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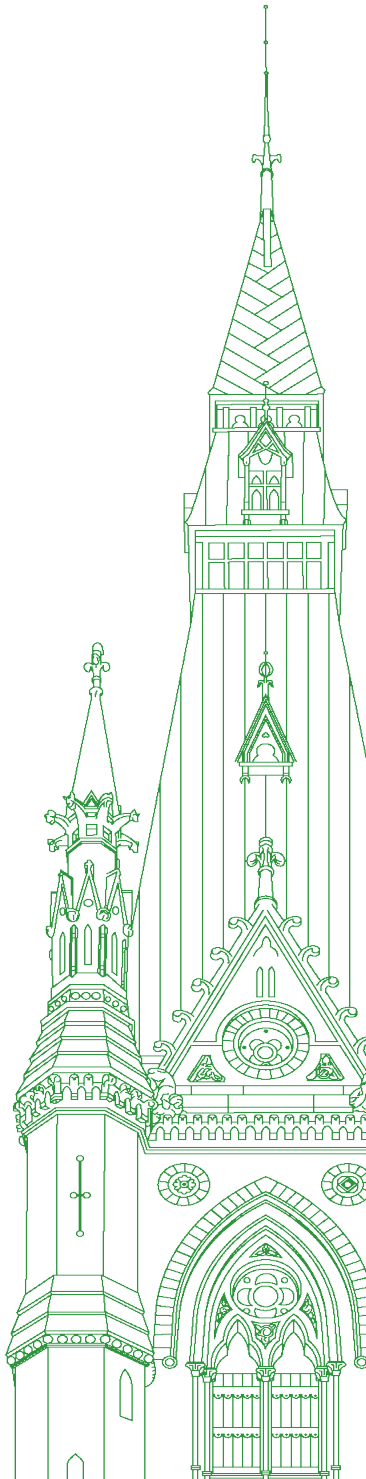

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Monday, December 12, 2022

● (1110)

[*English*]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting number 44 of the House of Commons Standing Committee on Justice and Human Rights. Pursuant to the order of reference of November 24, 2022, the committee is meeting to begin its study on Bill S-4, an act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other acts in relation to the COVID-19 response and other measures.

Today's meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and by using the Zoom application.

I would like to take a few moments for the benefit of the witnesses.

Please wait until I recognize you by name before speaking. For those participating via video conference, click on the microphone icon to activate your mike, and please mute yourself when you're not speaking.

There is interpretation. For those on Zoom, you have the choice at the bottom of your screen of “floor”, “English” or “French”. For those in the room, you can use the earpiece and select the desired channel.

I remind everyone that all comments should be addressed through the chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the “raise hand” function. The clerk and I will manage the speaking order as best we can, and we appreciate your patience and understanding in this regard.

On our agenda today, we will proceed with Bill S-4. First we'll hear from the Barreau du Québec. Then, right afterward, per the motion adopted last Thursday, we'll do the clause-by-clause study. We also need to reserve a few minutes to complete our review, in camera, of the draft report on the subject matter of Bill C-28. As you all know, we have to report it before December 16.

Before Mr. Fortin asks me, I believe all the witnesses' mikes have been tested.

Some hon. members: Oh, oh!

The Chair: Both witnesses have been tested for sound quality.

For our first item of business today, we have, by video conference, from the Barreau du Québec, Catherine Claveau, *bâtonnière*, and Nicolas Le Grand Alary, lawyer, secretariat of the order and legal affairs.

We welcome you to the committee. Thank you for accepting our invitation on short notice. You have the floor for five minutes.

[*Translation*]

Ms. Catherine Claveau (Bâtonnière du Québec, Barreau du Québec): Mr. Chair, committee members, I will introduce myself again. My name is Catherine Claveau, and I am the Bâtonnière du Québec. I am joined by Nicolas Le Grand Alary, who is a lawyer with the Secretariat of the Order and Legal Affairs of the Barreau du Québec.

Thank you for inviting the representatives of the Barreau to testify before you concerning Bill S-4.

For over two years, the COVID-19 pandemic has created issues and imposed constraints on the criminal justice system. The courts have managed to adapt to the challenges that faced them while complying with the Canadian Charter of Rights and Freedoms.

The objective of Bill S-4 is to modernize criminal procedure by giving the courts broader powers regarding the conduct of criminal proceedings and allowing them to make orders.

Like other legislative initiatives, Bill S-4 aims to make the solutions relating to the administration of justice that were implemented in order to respond to the problems experienced during the COVID-19 pandemic permanent. The impact of these amendments, and particularly the anticipated benefits, must therefore be evaluated well beyond the pandemic context. While the Barreau supports any measure that facilitates access to justice and the efficiency of criminal trials, the quality of the justice done must remain a priority.

One of the bill's provisions is the possibility of appearing by videoconference at various stages of the trial, whether the trial proceeds summarily or by indictment. That possibility is conditional on the consent of the prosecutor and the accused and the permission of the court, which must determine whether proceeding remotely is appropriate. Remote trials are therefore imposed as the rule rather than the exception.

While there are numerous advantages to using technological methods for holding a trial, we wonder about the impact of this new rule. More specifically, we are concerned by the effects of videoconferencing on assessing a witness's credibility. The assessment of testimonial evidence, particularly in emotionally charged cases, lies in the nuances and details. In our opinion, the virtual nature of testimony could affect the ability to do the assessment during an examination.

In an in-person trial, something as simple as a note passed to the lawyer, or a look aimed at a lawyer by the judge or a witness, can send cause the lawyer to veer off course and have a major impact on their strategy and the outcome of the trial. The fact that the parties and their representatives are in close proximity during the trial is not to be disregarded, from the perspective of lawyers who are carrying out their client's instructions. It can be hard to determine whether that proximity will be helpful or otherwise before the trial begins. We therefore recommend that the bill provide that all testimony be heard in person.

We are also concerned about lawyers' professional responsibility to their clients, for example when they are unable to communicate with the clients in real time in a way that preserves the confidentiality of their discussion.

Our last concern is that if the principle of trials by videoconference is incorporated into the bill it will be implemented at the expense of people who live in remote areas, for whom travel may be expensive and more complicated to undertake.

The measures introduced by the bill could therefore vary widely in their application in Quebec, where the availability of resources differs from one region to another. On that point, we would point to the issues associated with self-representation by accused persons who will be appearing virtually.

To summarize, we are afraid that the new status assigned to video appearance in the Code will institute a two-tier justice system, depending on the region, and compromise the lawyer-client relationship.

In addition, the new section of the Criminal Code states:

> — the court may allow or require an accused who is in custody and who has access to legal advice to appear by videoconference in any proceeding referred to in those sections, other than a part in which the evidence of a witness is taken.

The Barreau du Québec believes that this new section is problematic. We therefore recommend that this proposal be deleted. It is our opinion that the parties must always have the option of asking to proceed in person if they wish.

● (1115)

Denying accused persons who are in custody that option raises serious issues regarding the right to make full answer and defence and the right to a fair trial.

That is an overview of the main issues that the Barreau du Québec wanted to raise with the committee in its consultations on Bill S-4. We hope that our presentation has contributed to your study, and we are now prepared to answer questions from committee members.

[*English*]

The Chair: Thank you, Ms. Claveau.

We'll now go to our first round of questions.

Mr. Caputo, you have six minutes.

[*Translation*]

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Ms. Claveau.

[*English*]

I apologize that my French is not good enough to address you in French.

I have some questions for you. Please don't take them as adversarial. I approach these questions in a spirit of dialogue and a desire to learn a little bit more.

I'll start with an area that's a bit contentious, in my view, and that's testimony by video. I really want to get your opinion on something here. Are you familiar with section 486.2 of the Criminal Code? I don't expect you to know it just off of the top of your head.

● (1120)

[*Translation*]

Ms. Catherine Claveau: If I may, I am going to give the floor to my colleague Nicolas Le Grand Alary, since he is in a better position to answer substantive questions than I am.

[*English*]

Mr. Frank Caputo: Sure.

Section 486.2 says in a nutshell that when there's somebody with a disability, or you have a child, for instance, I believe it's what we call a “presumptive” application. I'm not sure what the French equivalent would be. The judge is presumed to grant the order that the person can appear outside the courtroom for testimony. In that case, this is often when we're dealing with sexual offences against children.

I'm just trying to reconcile how, in this instance, Parliament has said we're okay with a child testifying by video, and presumed to testify by video, or a person with a disability. Do these credibility issues apply equally when we as Parliament have already conferred this power, this authority, on a trial judge to allow a child to appear by video in any event?

[*Translation*]

Mr. Nicolas Le Grand Alary (Lawyer, Secretariat of the Order and Legal Affairs, Barreau du Québec): Good morning.

Thank you for your question, Mr. Caputo.

Although we don't want to start listing examples regarding the assessment of witnesses' credibility, we would nonetheless like to mention the issues that can also apply in the case of victims or other witnesses. We are talking about video appearance systems, that sometimes have flaws in terms of the bandwidth or the technology. There may be audio problems and questions may have to be repeated. So it is not just a question of assessing credibility by looking at the witness's face or body language. There really are issues relating to the actual introduction of testimony. With respect to the section of the Criminal Code you are referring to, the witness is normally in another room and testifies on a closed-circuit monitor or behind a screen. Other measures, in particular in sexual assault cases, also apply to adult witnesses, not just children.

Those are not the same issues as in the case of video appearances. When witnesses are in very remote areas, there may be technological issues. There may also be operational issues. Sometimes, accused persons and witnesses are in the same room when they appear, because there is only one room where the Zoom platform can be used. However, if the trial were held in person, they could be separated.

I think it is very easy to reconcile, because they are not exactly the same issues.

[*English*]

Mr. Frank Caputo: Okay. Thank you.

I'm just going to clarify your answer, sir. Do I have it right that your issue comes with the technology gap, then, and not in the evaluation of credibility? Do I have that right?

[*Translation*]

Mr. Nicolas Le Grand Alary: I would say it is a combination of the two. There is an issue when it comes to credibility. The technology gap can create problems in terms of credibility, but that is actually not the only issue.

[*English*]

Mr. Frank Caputo: Okay. To me, that seems like an issue that comes within the proper administration of justice. For example, when courts are conducting trials, the expectation is that the facilities will be up to par. I'm questioning whether as Parliament we should be considering the provision of technology, when really that should be a given in the circumstances, should it not?

[*Translation*]

Mr. Nicolas Le Grand Alary: You are entirely correct; that is one of the difficulties.

Often, what the Barreau du Québec says in parliamentary committees is that even if we agree on the purpose of the provision of a bill, it has to be implemented effectively and efficiently, it has to work, and the necessary tools have to exist. If we are not able to ensure that those tools are present, to ensure the proper conduct of a whole host of proceedings relating to the administration of justice, Parliament should perhaps specify, in the factors that must be assessed, that there must be sufficient guarantees in relation to the technology, for example.

[*English*]

Mr. Frank Caputo: Hypothetically, if a high-definition feed could be provided, would you be okay with that?

● (1125)

[*Translation*]

Mr. Nicolas Le Grand Alary: In terms of the administration of justice, I think so. However, we haven't talked here about the lawyer's presence with the accused. When the accused is participating remotely in a trial and is not in the same room as the other participants, as the judge and lawyers in particular, that can prevent effective communication between the accused and their lawyer. However, when witnesses are participating in a trial that is held completely remotely, in certain circumstances that have been fully explained here, then there is certainly a technological challenge.

[*English*]

The Chair: Thank you.

Mr. Frank Caputo: Thank you. I'm out of time.

The Chair: Thank you.

We'll go to Ms. Diab for six minutes.

[*Translation*]

Ms. Lena Metlege Diab (Halifax West, Lib.): Thank you, Mr. Chair.

I would like to welcome today's witnesses and thank them for being here.

[*English*]

The issue is one that I am a bit familiar with from my days in my own province of Nova Scotia, particularly, quite frankly, in the last couple years, given the fact that we've had COVID. I know quite a bit of investment has happened in the justice system with regard to technology, video conferencing and all of that in courts.

It may not be enough. I would say to you that it's probably never enough. There's always more work to be done. I know we've moved a lot in the last eight years to make it much friendlier by providing the opportunity for video conferencing and so on when witnesses—

It's not witnesses, really. I believe the bill says that parties have to agree to it, so this is an option; it is not a requirement in the bill.

In the spirit of dialogue, as my colleague Mr. Caputo said, I would say that some of the changes here seem to be taking us backwards from how we have tried in the last number of years to modernize the court system, which is a good thing. Can you comment on that?

How do you feel about that? I don't know if you're aware, but do you feel that other barrister societies across the country would share your view? I certainly haven't heard that, but I would like to get your feedback.

[*Translation*]

Mr. Nicolas Le Grand Alary: Thank you for your question.

We are not aware of the positions taken by other law societies in Canada, but we have the same objective as the committee when it comes to Bill S-4: to improve the justice system and adopt the positive lessons learned from the pandemic. As you said, there has been an ongoing effort to modernize the courts for several years now. It continued and accelerated during the pandemic because of public health requirements, for example, when hearings in person could not take place.

I would reiterate that we are not opposed to continuing that effort, but the bill provides for certain tools used during the pandemic to be implemented permanently for the future.

What the Barreau du Québec is proposing is that we step back a little and assess the effectiveness of these measures. Have they shown that they allowed for the procedural guarantees and rights guaranteed by the Canadian Charter of Rights and Freedoms to be respected? That is the reason we are here today.

We agree on the objective of the bill, in large part, but we still want to point out certain problems.

You said that it would remain an option. That's true: the judge must decide it, with the consent of the parties. However, the judge must justify the denial, if that is the case. There therefore seems to be an opening for video appearances to become the norm and not the exception. We wanted to draw your attention to that as well.

Ms. Lena Metlege Diab: Right.

Thank you for your answer.

I understand your qualms.

● (1130)

[*English*]

I believe maybe the good will outweigh the bad in the bill that is currently proposed.

My understanding is that the bill came forth as a result of Canada working with provincial and territorial ministers across the country. I believe it has also gone to the senators, who probably did their job as well, and it's come back before us.

Certainly the reality that I was aware of on the ground when I was looking at the criminal justice system in my own province was that many were—“crying” is a hard word, and I don't know what English word to use—advocating to have those types of opportunities if at all possible, because appearing was just so difficult for so many, depending particularly on whether people were in custody. There are very many situations. Again, it is an option that is available. That would be my comment there.

Were there any other concerns? You may have talked about that, Madame Claveau, but I'll ask Monsieur Le Grand Alary. Would you have any other big concerns that you haven't noted yet?

The Chair: Answer very quickly, please. You have 10 seconds,.

[*Translation*]

Mr. Nicolas Le Grand Alary: For one thing, there are Charter-related problems, since we are talking about fundamental rights, we must not forget. There are also challenges in connection with public trials. Normally, a person can attend a trial, that is, be present in the courtroom. However, trials held by videoconference are sometimes less accessible. We also have to think about that.

[*English*]

The Chair: Thank you.

We'll go to Monsieur Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Thank you, Mr. Chair.

Thank you for being here, Madam Bâtonnière and Mr. Le Grand Alary. I'm pleased that you are here this morning to testify.

As my colleague Ms. Diab pointed out, you appeared before the Senate previously, last spring, as part of the study of Bill S-4. I am satisfied that the Senate has done a thorough job. However, the committee also has a job to do, and we have to do it just as thoroughly. I don't think we can rely solely on the work done by others.

You have raised important issues in relation to Bill S-4. What I understand is that you have the same concern as Parliament and many justice system participants. We want to modernize the justice system to allow working by videoconference where it is useful. Videoconferencing is an excellent tool that should be used when the time is right, which is the key.

In your third recommendation, you raised the subject of section 715.241, which allows the court to require a videoconference hearing where the accused has not necessarily consented.

What would the consequences of a provision like that be if it were not amended?

Mr. Nicolas Le Grand Alary: Thank you for your question.

Yes, there are concerns regarding section 715.241.

We have to understand that videoconferencing has always been presented as one option among others in the kind of toolbox for holding hearings in criminal cases, if the parties consent and the judge determines that it is appropriate. A judge who denies it must even offer a justification.

With the bill, we are moving toward a situation in which videoconferencing can be imposed. For accused persons who are in custody, that may be a concern. I touched on that subject earlier in answer to a previous question.

Issues may arise, for example, relating to the ability of defence counsel to do an effective job, to advise their client and communicate with them, if they are not present.

If, for example, the lawyer is in the courtroom or their own office, the judge is in a room, and the accused is appearing by videoconference from their place of detention, there may be communication problems. There is also a concern relating to the lawyer's professional obligations to advise their client effectively.

That can ultimately have repercussions on the right to make full answer and defence. We are calling for caution. We are comfortable with the principle of videoconferencing, provided it is voluntary.

● (1135)

Mr. Rhéal Fortin: Where Crown counsel and counsel for the accused, where the accused is represented by counsel, and the judge presiding at the trial agree to proceed by videoconference, the Barreau believes it is an appropriate tool.

However, where one of the three participants I have just named had not agreed or had not been consulted, there would be a risk in terms of assessing evidence, the rights of accused persons.

Is that correct?

Mr. Nicolas Le Grand Alary: Yes. I would say there is certainly a degree of risk.

We also have to understand that the professionals who are around the table in a criminal trial can be trusted. We can trust both Crown counsel and defence counsel.

We must not think that the physical presence of the accused is going to be required, when they are in custody, just for setting a hearing date, for an adjournment, or for organizing and managing the trial.

We have to understand that it will be done when it is necessary for the accused to be present and there is some benefit to them being present, taking into account the other measures that already exist in the Criminal Code for ensuring the presence of the accused or the introduction of evidence...

Mr. Rhéal Fortin: Time is flying, Mr. Le Grand Alary. I would like you to tell us about another issue that is also closely connected with section 715.241.

We are talking about an accused who is in custody but "who has access to legal advice."

Could you tell us quickly about the distinction that must be made between having access to legal advice and being represented by counsel?

Mr. Nicolas Le Grand Alary: Yes, I think there may be a bit of confusion about the terms.

Normally, if the person is represented by counsel, they actually have a defence lawyer who is working on their case.

If we take the expression as it is written, having "access to legal advice" may mean being able to call the emergency lawyer line or get ad hoc advice without necessarily being represented.

The standard here may need to be reassessed, with the terms used. As we know, the words used in a statute are very important. So perhaps some attention should actually be paid to this wording.

Mr. Rhéal Fortin: An accused who has access to legal advice has not necessary met with a lawyer, if I understand correctly, and a lawyer who meets with their client might advise the client differently than if they have only spoken to them on the telephone.

With regard to appearances, when it comes to deciding whether to appear in person or by videoconference, that may become an important issue in some trials, in my opinion, particularly when we consider the matter of the Canadian Charter of Rights and Freedoms.

Mr. Le Grand Alary, do you have any comments to make about this more specific point?

Mr. Nicolas Le Grand Alary: I think you have summed it up.

In fact, we don't know what the meaning of the idea of "having access to legal advice" really is.

If it includes no more than having had a telephone conversation via the emergency lawyer line, where a lawyer has reiterated the accused's right to silence and some general advice, that is obviously not the same relationship as with a defence lawyer.

As well, using that term without using the same one throughout the bill raises questions in our mind.

Mr. Rhéal Fortin: Thank you.

[*English*]

The Chair: Thank you, Mr. Fortin.

Now we'll go to Mr. Garrison for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair.

I thank the witnesses for being with us today.

Madam Diab started a line of questioning that I want to follow up on. If I read the bill correctly, I think that in all but one section, using video conference or audio conference requires the consent of both the prosecutor and the accused.

I think you rightly identified that in clause 46 the new section 715.241 has one exception: If someone is in custody, they can be required to participate by video conference if no witness testimony has been taken and if they have private access to counsel.

Is that also your understanding of the bill?

[*Translation*]

Mr. Nicolas Le Grand Alary: Yes, there is the exception provided in new section 715.241 of the Criminal Code, which allows the accused to be required to appear by videoconference. In the other situations, it is by consent. Certain factors must also be assessed by the judge.

● (1140)

[*English*]

Mr. Randall Garrison: Your broader concern that appearance by video conference might become the rule would seem to me to be mitigated by the fact that everywhere else it requires consent of both the prosecutor and the accused. You're obviously saying that's not the case, but it seems to me that would militate against this becoming the common practice.

[*Translation*]

Mr. Nicolas Le Grand Alary: We acknowledge that this procedure is conditional on consent. However, we have to recall that section 715.221 that is created in Bill S-4 provides that the judge must give written reasons for denying video appearance and must include those reasons in the record. If the request is denied, there must be a justification. So this is the start of a move toward an application that is solely conditional on consent.

There is the case of parties who are not represented by counsel and who might sometimes agree to it without knowing the consequences.

Again, we are not opposed to video appearance. However, apart from that, the most important point we want to make is that we want to make sure the process is carried out in accordance with the rules and that all guarantees are provided, whether they be technological or under the Canadian Charter of Rights and Freedoms. We have to make sure that everything is respected.

What we are doing is codifying, making certain measures that we adopted temporarily during COVID-19 permanent. We may not have studied all the potential consequences and possibilities. It also calls for an effort to obtain data and statistics that might reassure the legal community.

[*English*]

Mr. Randall Garrison: Thank you very much.

With regard to your concern about the technical aspects of video or audio conferencing and the sometimes substandard connections and those types of things, also in clause 46 there's new section 715.23, called “Considerations—appearance by audioconference or videoconference”.

What that section says is that

> the court must be of the opinion that the appearance by those means would be appropriate having regard to all the circumstances

Do you not see this as a protection that the court can use if the technology is inadequate?

[*Translation*]

Mr. Nicolas Le Grand Alary: Yes. It is important that that criterion be present. If that criterion had not been adopted, we would undoubtedly have called for it to be.

We have talked a lot about the technical and technological issues, but in some circumstances there are even issues associated with the physical organization and the presence of people in the same room.

Another potential issue we have not yet addressed is that trials that take place in large cities are still being held in person, but when a person is in a somewhat more remote area, appearance by videoconference is becoming the norm. Even if people are asked to give their consent, they may do so solely for reasons of efficiency when it is not really suitable in their situation.

It is simply necessary to consider these issues and think about these measures to make sure the fundamental guarantees that must apply in these circumstances are respected.

[*English*]

Mr. Randall Garrison: Thank you very much.

I would say very clearly that I share those concerns. I think people around the table know that I'm no fan of virtual proceedings of any kind, but I feel that there are some protections here through the consent and the judge's ability to decide that the circumstances aren't appropriate.

Mr. Chair, I'll conclude my questions there.

The Chair: Thank you, Mr. Garrison.

We'll now go to our next round for five minutes, beginning with Mr. Brock.

Mr. Larry Brock (Brantford—Brant, CPC): Thank you, Chair.

Thank you, witnesses, for your attendance today.

I'm going to question you with respect to an article you prepared in April 2022. It's entitled “Comments and observations of the Barreau du Québec”. In particular, you have this paragraph:

> The Barreau du Québec would like Parliament to draw a more complete picture of the real impacts of the proposed videoconferencing provisions, particularly on the objective of searching for the truth in criminal trials. Given the time constraints, we were not able to undertake an in-depth analysis of the subject, but we invite Parliament to consider this in its study of Bill S-4 and be more careful with the proposed new videoconferencing system.

With the limited amount of time I have, I'd like to give either one of you an open floor to provide a little more colour with respect to that statement.

● (1145)

[*Translation*]

Mr. Nicolas Le Grand Alary: Thank you.

In fact, there are problems that the Barreau du Québec has raised in the past concerning justice system data, the effectiveness of the measures, and even the collection of statistics. That is an element we have addressed in several other forums. The idea behind the second recommendation in the Barreau's brief is that this study be undertaken in order to obtain the figures and data to be able to assess the repercussions. We have identified some areas and situations that would have to be assessed, particularly in connection with the lawyer-client relationship.

On the question of publicity surrounding trials and public access to trials, when a person participates in a hearing via Zoom or another platform, we have to protect the right to a fair trial and the quality and uniformity of justice in all regions of Canada and even within the provinces, in the more remote towns and areas. I think it would be worthwhile for Parliament to consider these questions in order to assess the possible consequences, unless a provision is to be included for reviewing the bill in five years or within some other time after the study and after that data has been collected and it has been analyzed by Parliament. That would provide assurance that the measures adopted and proposed during the COVID-19 pandemic and subsequently made permanent are effective and that the legislation is being implemented effectively.

[*English*]

Mr. Larry Brock: Thank you.

Virtual hearings, if open to the public, can ensure the continued respect of the open court principle, but it can also affect the privacy interests of participants. While individuals can watch in-person court proceedings, few do. Virtual access may increase public viewing substantially. Remote appearances also include the possibility of livestreaming, screen grabs or recordings, which can then be distributed or posted online.

I have two questions. How should the open court principle and privacy interests be balanced in virtual hearings? Secondly, what impact could public broadcasting have on witnesses, particularly in cases of sexual assault and other more sensitive matters?

[*Translation*]

Mr. Nicolas Le Grand Alary: Thank you for the question.

This is one of the very important problems we have raised, in particular in the second recommendation. The public nature of hearings and trials is a fundamental principle, certainly. To go back to the earlier questions, I would say it is a problem that is going to have to be solved by technology. If trials are held by video appearance, for example, and the public could have attended, seated in a courtroom, the public has to have a way of attending if they want. It is not necessary for it to be broadcast online, as the meeting we are currently taking part in is. It is not necessary for it to be televised. The rules of access have to be the same, however. In other words, if people want to attend, they must be able to attend. An internet link could be offered, for example, but there have to be guarantees relating to screen captures and recording, among other things, that are not permitted in a courtroom.

On the second part of your question, which relates to sexual assault victims, there are provisions in the Criminal Code that allow the public or witnesses to be excluded during certain testimony. The judge will have to maintain tight control over the trial to make sure there are no problems in that regard.

[*English*]

Mr. Larry Brock: Thank you.

The Chair: Thank you, Mr. Brock.

Next we'll go to Madame Brière for five minutes.

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Mr. Chair.

Hello, Ms. Claveau and Mr. Le Grand Alary. Thank you for being with us this morning.

At the start, you said the pandemic had created issues and it was necessary to modernize criminal procedure. We know that the legal community is sometimes reluctant to improve or change procedures they are familiar with.

I would like you to address certain subjects again. We have talked about what was put in place during the pandemic and the positive aspect of these new ways of doing things. What is being done here is to make these new methods permanent.

One thing I am thinking of is a study that talked about someone who had driven to the location, rented a hotel room, and attended at the courthouse in the morning, only to ultimately find that everything had been postponed. If video appearance had been a possibility, the victim and their family would not have had to travel and incur that expense, and so on.

Personally, I take a very favourable view of the changes being proposed. I would like to hear your comments on that subject.

● (1150)

Ms. Catherine Claveau: If I may, I am going to start, and my colleague will be able to add to my answer.

We agree that for any interim hearing, any hearing where it is not necessary to determine the credibility of a witness, an accused or another person, videoconferencing is entirely appropriate. It avoids pointless travel, for one thing. It genuinely is an access to justice measure. We agree on that.

However, what has to be understood is that it is our role, at the Barreau du Québec, to issue warnings. That applies to everything we do. Our concerns always relate to respect for fundamental rights. When a party is testifying, that is when things can go wrong.

I'm going to let my colleague add to my answer if he wants.

Mr. Nicolas Le Grand Alary: I think Ms. Claveau has identified the issue very well.

The example you gave was a very good one. Of course, we will never object to witnesses being spared having to travel when it is just a pro forma date and everyone knows the trial will be postponed. In that kind of situation, the lawyers will certainly work together and arrange with the court for those hearings to be held by videoconference.

However, where there are fundamental matters in issue, where there is testimony, where the presence of the accused is necessary, and where it is known that the trial will be held on a specific date, as Ms. Claveau said, then the parties can be alerted and it can be ensured that the proper procedure is followed.

Mrs. Élisabeth Brière: Thank you.

Last week, in fact, the chief justice made a strong statement in *La Presse*. She pointed out that some trials had been delayed or even cancelled.

Do you think that Bill S-4 might improve things, to achieve its primary objective of reducing delays, and helping out in this labour shortage?

Ms. Catherine Claveau: That will certainly be the case for hearings with no witnesses, when travel can be avoided and it is manageable. There still has to be a minimum of management in courtrooms. So there has to be a clerk on site to coordinate it all.

The bill will help things, but will obviously not be enough to eliminate all the problems associated with the labour shortage and delays.

Mrs. Élisabeth Brière: Mr. Le Grand Alary, did you want to add something?

Mr. Nicolas Le Grand Alary: No. I think it has all been said.

The bill does have to be seen as one tool among others. Obviously, it is not a panacea.

Mrs. Élisabeth Brière: Very good. Thank you.

You talked about witness credibility. I would now like to know your opinion of interpretation, which is a widely used service, as we know.

Do you believe that proceeding by videoconference may create problems for interpreters or that the issue is primarily the proper understanding of all parties to the trial?

Mr. Nicolas Le Grand Alary: We don't have any data about interpreters, translation and video appearances.

However, I will tell you that in general, there are problems relating to note taking by stenographers, recording of the proceedings, and transcription. On platforms like Zoom, Teams, or other software, the connection is often lost and problems with the sound happen, for example. Sometimes mics are not turned on and are then turned back on. The problems this causes are different from the ones encountered in a courtroom.

● (1155)

Mrs. Élisabeth Brière: Tell our interpreters here about it. They are very familiar with that.

Thank you.

[*English*]

The Chair: Thank you, Ms. Brière.

We'll go to our last round of questions. Mr. Fortin, you have two and a half minutes.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Don't I have the floor for three minutes, rather than two and a half?

In any event, I won't waste 30 seconds on arguing pointlessly.

Madam Bâtonnière and Mr. Le Grand Alary, you are both welcome to answer my questions.

I want to come back to section 715.241, which provides that the court may require virtual appearance by an accused without necessarily obtaining their consent. I am wondering about the impact that may have on wait times, as Ms. Brière raised. I wonder whether a decision like that could be appealed. Based on that alone, a person might claim they did not get a fair trial since they were unable to appear in person or present argument before the court.

First, in your opinion, might that result in more frequent and more numerous appeals?

Second, what impact might it have on the public's confidence in the administration of justice?

Mr. Nicolas Le Grand Alary: Of course, the accused's absence could become a determining factor in relation to the effectiveness of counsel and of counsel's advice, the right to counsel, or another of the rights guaranteed by the Canadian Charter of Rights and Freedoms. In a case like that, there could be an appeal on that basis.

However, virtual appearances can be beneficial in first appearances, when the accused is still in custody and the purpose is simply to set dates for the release hearing, also called the “bail hearing”. It might mean that wait times could be reduced.

It can be beneficial for the accused in some regards, but yes, it can pose problems. It is therefore important to retain the consent requirement.

Mr. Rhéal Fortin: I would ask you to comment in the few seconds that remain. As you said earlier, your second recommendation raises the problem of uniformity in the administration of justice. The situation in cities is completely different from the situation outside urban areas. You are right to suggest that this could become the norm outside urban areas.

Does the Barreau have more specific statistics or information about legal proceedings outside urban areas?

Ms. Catherine Claveau: Thank you for the question.

Unfortunately, we don't have, and we find that unacceptable. That is one of the requests we have made to the authorities in both departments of justice. We do not have the neutral, centralized data that would enable all justice system participants to take stock of what is missing and in what regions, and determine where the needs are. That is unfortunate and we find it unacceptable.

We are therefore not in a position to give you that information. We would like to assemble it, together, to find an authority that would let us have that data so we could implement permanent solutions to improve access to justice and cut wait times.

Mr. Rhéal Fortin: Thank you, Madam Bâtonnière and Mr. Le Grand Alary.

[*English*]

The Chair: In the spirit of Christmas, you got the 30 seconds you requested, Monsieur Fortin.

Voices: Oh, oh!

The Chair: I want to thank all the witnesses for their testimony. It has been very informative.

We are now going to switch to our clause-by-clause consideration. We'll just take a few seconds to transition to some of the other video conference guests we have, and we will have our in-room guests come forward as well.

Thank you.

● (1155)

_____(Pause)_____

● (1200)

The Chair: We'll resume.

We'll be doing clause-by-clause consideration.

From the Department of Justice, we have Matthew Taylor, director and general counsel, criminal law policy section.

Do we have anyone online, Mr. Clerk?

We also have Normand Wong, senior counsel, criminal law policy section, by video conference.

I have some considerations. I'd like to provide members of the committee with some instructions and a few comments on how the committee will proceed with clause-by-clause consideration of Bill S-4.

As the name indicates, this is an examination of all the clauses in the order in which they appear in the bill. I will call each clause successively, and each clause is subject to debate and a vote.

If there are amendments to the clause in question, I will recognize the member proposing it, who may explain it. The amendment will then be open for debate. When no further members wish to intervene, the amendment will be voted on. Amendments will be considered in the order in which they appear in the bill and in the package each member received from the clerk.

Members should note that amendments must be submitted in writing to the clerk of the committee. The clerk has advised me that if you want an amendment resulting from the testimony we just heard, you can still send it to the clerk in writing and we shall consider it.

The chair will go slowly to allow members to follow the proceedings properly. Amendments have been given an alphanumeric number in the top right corner to indicate which party submitted them. There is no need for a seconder to move an amendment. Once moved, you will need unanimous consent to withdraw it.

During debate on amendments, members are permitted to move subamendments. These subamendments must be submitted in writing. They do not require the approval of the mover of the amendment.

Only one subamendment may be considered at a time, and that subamendment cannot be amended. When a subamendment to the amendment is moved, it is voted on first. Another subamendment may then be moved, or the committee may consider the main amendment and vote on it.

Once every clause has been voted on, the committee will vote on the short title, the title and the bill itself. If amendments are adopted, an order to reprint the bill may be required so that the House has a proper copy for use at report stage. That report contains only the text of any adopted amendments, as well as indications of any deleted clauses.

We'll begin the clause-by-clause study. Before I call clause 1, in the interest of time, and given that there are no amendments to most clauses, I seek the unanimous consent of the committee to regroup clauses for the purpose of voting, starting with clauses 1 to 38. We'd then debate the amendment on clause 39 and group subsequent clauses as we go along.

Is there unanimous consent?

Some hon. members: Agreed.

The Chair: Thank you.

(Clauses 1 to 38 inclusive agreed to)

(On clause 39)

The Chair: We have amendment BQ-1.

Do you want to speak to it, Mr. Fortin?

● (1205)

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Amendments BQ-1 and BQ-2 go together.

In amendment BQ-2, we are proposing to delete lines 7 to 11 on page 22, to reflect the recommendations made by the Barreau du Québec relating to the problem associated with section 715.241, which deals with mandatory appearance by videoconference. That section seems to us to be a bit counterproductive. That is the idea behind recommendations BQ-1, BQ-2 and BQ-3.

I am not going to add to what was said earlier. The bâtonnière and the lawyer who accompanied her clearly described the problem associated with requiring someone in custody to appear by videoconference. It opens the door to possible appeals and undermines public confidence in the sound administration of justice. It also appears to me to be a major breach of the protections granted by the Canadian Charter of Rights and Freedoms.

If an individual who is in custody agrees to appear virtually, there is no problem. However, provisions as worded in section 715.241 open the door to anything at all if, for some reason, the judge then imposes it on an accused who is not represented by counsel. A lawyer can say, a month or a year later, that their client consented without being aware of the effects of their consent and without having an opportunity to meet with counsel because they were in custody. The lawyer can say that the court compelled an appearance by videoconference.

Bill S-4 is a fine bill that proposes a modern way of proceeding and, overall, respects the parties' rights. I am going to agree to Bill S-4, but there is this one hitch that seems to me to pose a serious problem. I think we must protect ourselves from it.

In amendment BQ-1, we want to make an amendment by replacing, for consistency, line 19 on page 18, where it refers to sections 715.231 to 715.241. Because I am going to propose that section 715.241 be eliminated, an amendment has to be made there.

Thank you, Mr. Chair.

[*English*]

The Chair: Thank you, Monsieur Fortin.

We'll go now to Mr. Anandasangaree.

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): Mr. Chair, I would like to get a sense from Mr. Taylor as to what the impact of....

I'm going to say that we work with clause 39 first, and then when we have a discussion on 46, we get his comments on clause 46.

● (1210)

Mr. Matthew Taylor (General Counsel and Director, Criminal Law Policy Section, Department of Justice): Thank you.

Good morning.

I'm hoping that someone could provide me a copy of that motion, because I don't have the BQ motions. I gather it relates to section 650 of the code, but if I could have a copy, that would help.

I think I understand. To me, this looks like a consequential amendment to another substantive amendment that will come later, and specifically to remove reference to certain proposed sections in the bill.

If I understand correctly, the concern relates to the remote appearance provision, meaning this clause and clause 46 of the bill, and maybe I can start with some general information.

The first thing I would point out to the committee is that clause 45 of the bill re-enacts a provision that already exists in the Criminal Code—or would re-enact a provision that already exists in the Criminal Code—which states the principle that as a general matter, proceedings would be done in person. That's the starting point. Then, what clause 46 proposes to do is to consolidate and clarify a bunch of different rules that already exist in the Criminal Code with respect to remote appearances.

In effect, when I say “consolidate”, there are provisions, for example, as in clause 39, in section 650 of the Criminal Code. There are provisions in other clauses of the bill that are being opened, such as section 537 of the Criminal Code and section 800 of the Criminal Code, that all deal with the rules around remote appearances. Bill S-4 doesn't propose to change those rules, so to the extent that an individual can appear by video conference, Bill S-4 doesn't propose to change that.

If I understand as well the concern around proposed section 715.241 with the requirement of an accused to appear in in a situation where there isn't consent provided, that is simply a re-enactment of existing rules. It doesn't change the law in that respect.

The goal here is really to ensure that if an individual in custody is going to appear in a proceeding, the court ensures they have access to legal advice before they do so.

I know that's a lot of different pieces of information, but I think the main point to convey is that Bill S-4 really seeks to consolidate and clarify existing laws around remote appearances.

The Chair: Do you have anything else to add, Mr. Anandasangaree?

Mr. Gary Anandasangaree: Yes. For the purpose of this discussion, should we have the discussion on clause 46 before clause 39?

The Chair: You can have the discussion, but we have to go to that at that time.

We would have to get unanimous consent to discuss that before.... Do we have it?

We have consent to discuss clause 46.

Mr. Gary Anandasangaree: Thank you, Mr. Taylor, for that clarification.

I think, based on what you have said and on what the witnesses have said, that it's very clear that the scope of Bill S-4 is very important. It makes remote proceedings available in some circumstances when all parties agree to these proceedings.

Some of us have practised for some years in courtrooms, and we know that at some point, access to witnesses can be difficult. There were a number of examples cited. I think Ms. Brière brought one up as well.

I also think it's important to note that Criminal Code section 715.24 is not a new provision. It would merely re-enact a new part of the Criminal Code to clarify and consolidate the provisions on criminal proceedings.

It would also be preferable to have these existing powers located in the part on remote proceedings, because that will ensure that the court is required to take into consideration the factors set out in section 715.23. This recommendation would also undo long-standing court powers that I understand go back to 1999. In some cases, some are from the mid-2000s.

For this reason, we will not be supporting clause 46 and subsequently clause 39.

● (1215)

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

I would like to address the witnesses.

I have a problem. I do agree entirely with what my colleague Mr. Anandasangaree just said, and I agree entirely with what the witness tells us.

In fact, section 715.24 is entirely acceptable, since the court can allow the accused to appear by videoconference.

However, in section 715.241, it says “le tribunal peut permettre” and, in the English version, “the court may allow”, which does not present a problem, but it then adds “or require.” In French, it says “ou exiger la comparution”. Therein lies the rub. Section 715.241 incorporates this new way of proceeding, where the court may require the witness to appear by videoconference. It does not say “with their consent.”

First, it talks about allowing the witness to appear by videoconference if the witness requests or consents. In English, it says “the court may allow”, but it adds “or require”. I did not hear Mr. Anandasangaree or Mr. Taylor address that aspect of section 715.241.

Is it wise of us to allow the court to require an appearance?

I don't think so. That is also the opinion voiced by the representatives of the Barreau du Québec.

I would like to hear the witness's opinion about this subject, which presents a problem, in my opinion.

[*English*]

The Chair: Go ahead, Mr. Moore.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair.

Not to answer Mr. Fortin's question, but discussion on these two provisions, clause 46 and then, by extension, clause 39.... We had a very abbreviated opportunity to study this bill, of course, but it has been in the Senate, so I looked at some interesting Senate testimony.

We did have the benefit of hearing from the Quebec bar this morning. For some of this, there was a long-standing need pre-COVID. Some of what we see in Bill S-4 is certainly a reflection of being in a pandemic time when there were major limitations on in-person meetings and a desire to be able to do things differently in every aspect of our lives, including the judicial.

I looked at the amendments being put forward by Mr. Fortin and at the CPC amendments. I know there's probably some conflict between the two. However, I look at that as maybe reflective of the fact that we are past the COVID pandemic lockdowns right now, and while there are many aspects that are very important in Bill S-4, there are aspects—certain presumptions that are included—that I think we may want to put the brakes on a little bit.

Today I have the unique opportunity, just because of an Air Canada flight cancelled for no apparent reason, to participate in this meeting virtually. Normally I'm there in person, so I can tell you that there are major limitations on the ability to understand what's happening in the room and get a perspective on how people are receiving what is or isn't being said, and all the non-verbal cues one might get.

That's lacking in any kind of virtual meeting. The most important proceeding, at the highest level, is going to be a judicial proceeding in which someone's life, and possibly his or her future, hangs in the balance, or one in which victims are being asked to participate in a system that all too often revictimizes them.

Without belabouring the point, I think there are some reasons that I'm very receptive to the comments made by the Barreau du Québec as well as the amendments that have been put forward, and I think I'm inclined to support them, for sure.

● (1220)

The Chair: Thank you, Mr. Moore.

Go ahead, Mr. Garrison.

Mr. Randall Garrison: Thank you, Mr. Chair.

I thank Mr. Taylor for the reminder for all of us that the presumption in the Criminal Code is that appearances will be in person and that what we're dealing with are exceptions. I don't share the optimism that others have about either this or future pandemics.

I also have a great deal of pessimism about the impacts of climate change as it affects all of our systems. I think having the exceptional provisions in place in advance will serve us well as we head into the future. I'm convinced that the requirement of consent by both prosecutors and the accused provides sufficient protection.

Admittedly, there's one circumstance when that doesn't apply. However, I'm also reassured by the section on “appearance by audioconference or videoconference”, where it says, “the court must be of the opinion that the appearance by those means would be appropriate having regard to all the circumstances”.

Therefore generally, with regard to amendments to Bill S-4, I will be voting against them. I think the existing protections are simply being reinforced here, and we are creating some exceptional circumstances to deal with the world we live in today. I will be voting against the amendments.

The Chair: Mr. Anandasangaree is next.

Mr. Gary Anandasangaree: I'm just wondering if Mr. Taylor could give us a little bit of clarification on the language difference that Mr. Fortin identified.

Mr. Matthew Taylor: Sure.

If it's okay with you, Mr. Chair, I propose quickly walking through clause 46 and drawing your attention to where the proposals in the bill correspond with equivalent provisions in the Criminal Code. It is a large clause.

Proposed section 715.23 is drawn from the equivalent provision already in the code. I think this was already spoken to earlier today. It provides a set of circumstances or criteria that a court must take into consideration when determining whether to allow remote testimony.

Proposed section 715.231 requires the consent of the prosecutor and accused for participation in preliminary inquiries. That is drawn from existing subsection 537(1) of the Criminal Code.

The next provision, 715.232, deals with some reconviction proceedings. That is drawn from subsection 651(1) and requires, again, the consent of the accused and the prosecutor when the accused is not in custody or the consent of the accused where they are in custody. There are always those checks and balances that exist. There's also a corresponding subsection 802(1) in the current Criminal Code, which this provision is drawn from.

Provision 715.233 is also drawn from subsection 650(1.1). This is the provision that governs remote appearances in prosecutions for indictable offences. Again, it requires the consent of both the accused and the prosecutor.

Proposed section 715.234 deals with police and guilty pleas. Again, it requires the consent of the prosecutor and the accused. It is drawn from existing section 606 of the Criminal Code.

For sentencing, 715.235, again it requires consent of prosecutor and offender, and it is drawn from section 650 of the Criminal Code.

Proposed section 715.24 is a residual catch-all provision that addresses circumstances in which a specific rule hasn't been provided in the Criminal Code for remote appearances. It requires the consent of the accused or the offender, because it may apply to circumstances post-conviction. It is drawn from existing section 715.23.

I think the provision that has come up, proposed section 715.241, is drawn from paragraph 537(1)(k) and section 650.

Finally, proposed sections 715.242 and 715.243 are drawn from existing provisions 715.24 and section 537 and so on.

To summarize, the proposals seek to consolidate a number of different provisions that already exist. They do not propose to change the requirements, and they build in checks and balances for when remote proceedings would be possible.

Thank you.

● (1225)

The Chair: Thank you

Go ahead, Mr. Moore.

Hon. Rob Moore: Thanks, Mr. Chair.

I have a couple of things.

I certainly appreciate the testimony we're now hearing on this. We understand. However, we also heard, during our victim study, how consent of the defence and prosecution.... Oftentimes, victims are the ones on the sideline and don't have as much say in the process as some may wish to believe. It's only after going through the process that they realize how much is out of their hands.

We know there hasn't been extensive consultation with victims groups on this. My concern is.... I'm dealing with a particular case in my riding now, on a parole hearing. The victim's family has to participate virtually. That creates a hardship for them. It's not something they wish to happen, but it's happening nonetheless.

With all that said, I heard Mr. Garrison say the magic words that he's not inclined to support any of the amendments. Mr. Chair, I think we all know where we stand on it. Perhaps, in the interest of time, we'll just get to the voting part, unless Gary indicates that he'd be open to the amendments.

My quick math tells me we could just get to the voting.

The Chair: Thank you, Mr. Moore.

I see no more speakers.

Shall amendment BQ-1 carry?

Using my quick math, I believe the amendment is defeated.

(Amendment negatived [*See Minutes of Proceedings*])

The Chair: Shall clause 39 carry?

An hon. member: On division.

(Clause 39 agreed to on division)

The Chair: Colleagues, can we regroup clauses 40 to 45 into one vote and then go to clause 46? Do I have unanimous consent?

Some hon. members: Agreed.

The Chair: Shall they carry?

(Clauses 40 to 45 inclusive agreed to)

(On clause 46)

The Chair: We have amendment BQ-2. I want to note that if this is adopted, we cannot move to Conservative amendment CPC-1 because of a line conflict.

House of Commons Procedure and Practice, third edition, states the following on page 769: “Once a line of a clause has been amended by the committee, it cannot be further amended by a subsequent amendment as a given line may be amended only once.”

Even though we kind of know the outcome of this, we'll still put it to a vote: Shall amendment BQ-2 carry?

(Amendment negatived [*See Minutes of Proceedings*])

The Chair: Now we can go forward to amendment CPC-1.

Does anyone want to speak to that, or should we just go to the vote?

● (1230)

Hon. Rob Moore: Mr. Chair, when I spoke earlier, I explained the reasons for Conservative amendment CPC-1. I would move the amendment.

The Chair: Thank you.

Shall CPC-1 carry?

(Amendment negatived [*See Minutes of Proceedings*])

The Chair: Shall CPC-2 carry?

(Amendment negatived [*See Minutes of Proceedings*])

The Chair: Shall BQ-3 carry?

[*Translation*]

Mr. Rhéal Fortin: Mr. Chair, if I may, I would like to speak to amendment BQ-3.

That amendment refers to another aspect of the problem. It says: “If they are not represented by counsel, the accused ... must be given the opportunity to communicate privately with counsel.”

That seems to me to be important and it is different from the discussion we are now having about section 715.241. This addition should therefore be taken into consideration. In proposed section 715.243, it would add that the accused “must be given the opportunity to communicate privately with counsel.” That seems to me to be necessary if we want to protect the right of accused persons.

[*English*]

The Chair: I don't see any hands up, so I will put the question: Shall BQ-3 carry?

(Amendment negatived [*See Minutes of Proceedings*])

The Chair: Shall clause 46 carry?

An hon. member: On division.

(Clause 46 agreed to on division)

The Chair: Colleagues, can we regroup clauses 47 to 79 into one vote?

Some hon. members: Agreed.

The Chair: Shall they all carry?

(Clauses 47 to 79 inclusive agreed to)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill to the House?

Some hon. members: Agreed.

The Chair: Perfect.

We will suspend for a few quick minutes—hopefully, we'll do this in the next one or two minutes—for our second review of the draft report of the subject matter of Bill C-28.

Thank you.

[*Proceedings continue in camera*]