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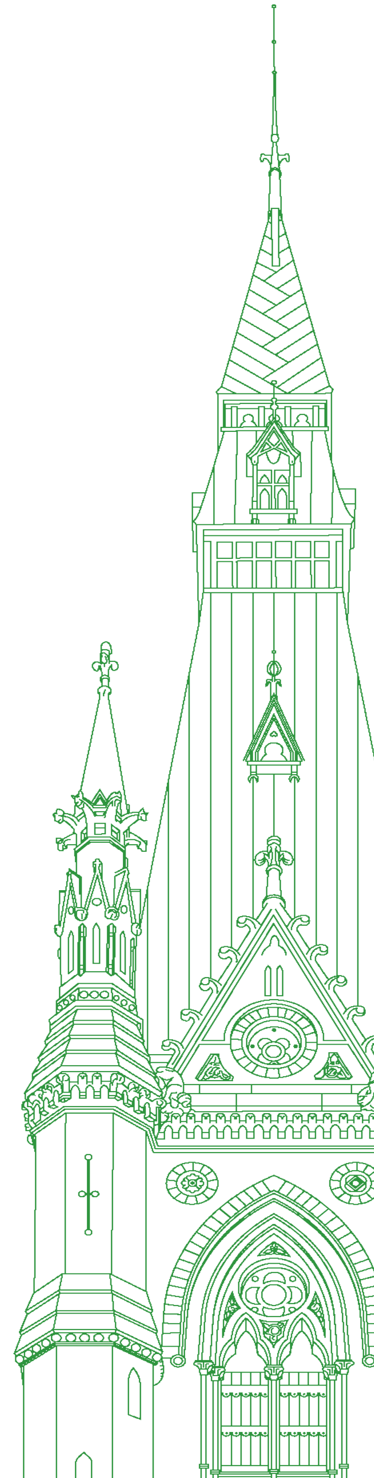

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Tuesday, December 12, 2023

● (1600)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): I call the meeting to order.

Welcome to meeting number 89 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to the order of reference adopted by the House on June 21, 2023, the committee's continuing its study of Bill C-40, an act to amend the Criminal Code, to make consequential amendments to other acts and to repeal a regulation regarding miscarriage of justice reviews.

Today's meeting is taking place in a hybrid format, pursuant to the Standing Orders.

We have with us two returning witnesses from the Department of Justice.

[*Translation*]

We welcome Ms. Julie Besner, senior counsel, Public Law and Legislative Services Sector, and Ms. Shannon Davis-Ermuth, acting general counsel and director.

[*English*]

I'm going to continue with the clause-by-clause consideration of Bill C-40. We were on clause 2.

Hon. Rob Moore (Fundy Royal, CPC): I have a quick point of order, Madam Chair.

I'm not going to belabour this point, because we did discuss it a little bit, but I want to draw the committee's attention to the notice of motion that we had inviting the minister here. We agreed to it on November 28.

It was that the Minister of Justice appear "no fewer than 2 hours regarding the Supplementary Estimates (B) 2023-24, and that this meeting take place as soon as possible, and no later than December 7".

At this committee, we very rarely have unanimity, and this was a time when we actually all agreed to this. I know we talked about it last Thursday. It's just that here we are again. The notice of meeting came out, and I saw once again that we were on Bill C-40, and the minister was not appearing. I still think there's a compelling reason why we would want to hear from the minister. I know his time was reduced from two hours to one, but maybe we could have a two-hour meeting with the minister. We had said "no later than December 7". It was scheduled for December 7, and now here we are sometime later and still no minister.

Perhaps you have something to say on that, Madam Chair. I think I know what you're going to say, but I would be remiss if I didn't mention it, because here we are again. The motion said at the earliest possible opportunity, and the minister's not here.

The Chair: I thank you, Mr. Moore, as the vice-chair of the committee, and all of your caucus. I will not entertain this again; I've already ruled on this point. I have absolutely nothing more to add. My decision stands, and that is it. I will not entertain any more points of order on that.

[*Translation*]

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): Madam Chair...

[*English*]

The Chair: Mr. Fortin, please go ahead.

If it's on this same point....

Mr. Rhéal Éloi Fortin: Absolutely not.

The Chair: That's perfect, because I wouldn't want you to waste your time.

[*Translation*]

M. Rhéal Éloi Fortin: As you know, Madam Chair, I very rarely intervene in this committee, but, when I do, it's always for the same reason.

The Chair: That's true.

Mr. Rhéal Éloi Fortin: We have two colleagues who are videoconferencing, and I'd like you to clarify whether the tests have been done and whether they are satisfactory.

Thank you, Madam Chair.

The Chair: Thank you very much, Mr. Fortin.

The duties of our two colleagues on the line today are limited to voting, if necessary. They will not take part in the discussions.

Mr. Rhéal Éloi Fortin: What happens if we have a roll-call vote?

The Chair: They can vote by raising their hand.

Mr. Rhéal Éloi Fortin: My only concern is not to harm our interpreters. We have so few of them. They are precious to us. I'm sure our colleagues online agree with me on that.

Thank you.

The Chair: Thank you very much, Mr. Fortin. I understand very well.

(Clause 2)

[*English*]

The Chair: We will now proceed with clause 2.

We have Mr. Kurek, please.

Mr. Damien Kurek (Battle River—Crowfoot, CPC): Thank you very much, Madam Chair. I'm pleased to have the opportunity to come back before this committee to discuss such an important bill.

Something I shared before was about how there are two sides to how we ensure that Canadians can trust our justice system. When we look specifically at clause 2 and, more generally, the fact that we have a system that requires a particular tension between the different branches of our government.... The justice system, in particular, demonstrates that very thing.

Madam Chair, I am, as all of us are, honoured to take my seat in the House of Commons. When I first got elected I, of course, was given a space for an office here. I take this very seriously and it's an important illustration that will get directly to the subject matter related to clause 2 here.

I think it bears mentioning that I can sit at my desk, and I can look out one window and see the Supreme Court. I can look out the other window and see the Centre Block of Parliament. It reminds me daily about the tension that exists in our system between the different branches of government.

There are many things that can and probably should be said about the role of the Minister of Justice and the Attorney General, which are two distinct positions within the executive structure of our government. I won't get into that, but Madam Chair, I will note, because it has a close relationship to what we are discussing here, that we have a certain level of disconnect that Canadians are feeling when it comes to their ability to be connected with and hold their government accountable.

It's disappointing that the Minister of Justice, who I'm sure would have lots to say about this particular bill, although he was requested to appear on the estimates....

We know there's a great deal of latitude given during the discussion of something that is as important as the estimates. It's disappointing that that respect would not be given to this committee, especially when it comes to the important work that needs to be accomplished, whether that's on instances of miscarriage of justice, rising crime rates across our country in a host of different categories, many other concerns within the justice system writ large or the various elements of the justice committee and its pretty wide-sweeping mandate.

There are a number of committees in Parliament that are more general in nature. I count it as an honour as a duly elected member to be able to join the discussion at different committees from time to time.

The justice committee has a particular impact. It's not specific to one segment of society and to one part of government, but it has that very wide scope. I think that's why it's so important. As I mentioned, in close connection to the topic at hand, it's why I am so disappointed by the fact that the Minister of Justice either couldn't find the time or refused to find the time to come and testify before this committee and be asked questions.

I referenced where I sit in my office here in the parliamentary precinct and can see both the legislative branch and the judicial branch. I understand that in Canada, there's a close connection between the legislative branch and executive branch of our government, dating back to the Magna Carta when there was that distinction and the limitations placed upon the Crown. It's important that this is preserved in what we do in this place. I find it very unfortunate.

We see that when the executive power of—

● (1605)

Mr. Chris Bittle (St. Catharines, Lib.): I have a point of order, Madam Chair.

I may have come to the wrong committee meeting. I think this is a meeting on Bill C-40, which, I think, relates to miscarriages of justice, but we're talking about office placements.

This is a bill that the Conservative party supports, so I'm curious why they're filibustering it. When there are wrongfully convicted individuals who seek justice, and there are individuals here who are lawyers and who have sworn oaths with their various law societies to uphold justice and uphold their oaths as members—not only as lawyers, but when they come into the political sphere—to laugh as this is going to be filibustered, Madam Chair, is just disrespectful.

I'm wondering if I made it to the right committee room, because we're not discussing anything about Bill C-40. I was hoping the honourable member could get back to talking about clause 2 of Bill C-40.

● (1610)

The Chair: Thank you, Mr. Bittle. You definitely are in the right committee although I question myself sometimes whether I am chairing the right committee as well.

Mr. Kurek, for the record, just to be clear, the minister is definitely willing to appear. Bill C-40 needed to be dealt with first. It's something that the Conservatives are obviously taking their sweet time to get us to finish so that we can have the minister here.

Hon. Rob Moore: On the point of order, Madam Chair, that Mr. Bittle mentioned—and welcome to the committee—indeed, he's in the right committee, and this is a committee that has done a tremendous amount of good work.

As Mr. Bittle is not a regular at this committee, I want to let him know that under the leadership of our chair, we work relatively well together at this committee. We have very fulsome debates sometimes, back and forth, making our points. Sometimes there are compelling arguments one way or the other, but Mr. Bittle would also know, through you, Madam Chair, that we are on Bill C-40.

Not to revisit it, but you brought up the motion that we had to have the minister appear. That was deemed a priority because we set a deadline for that. We did not set a deadline for the completion of Bill C-40, for the awareness of Mr. Bittle.

Bill C-40 is a tremendously complicated piece of legislation—

An hon. member: How would we know?

Hon. Rob Moore: The wrongfully convicted in this country do have a process. The Minister of Justice is Mr. Arif Virani. A process has existed in Canada for decades whereby an individual who has been wrongfully convicted or feels they have been wrongfully convicted or suffered a miscarriage of justice can avail themselves of the Department of Justice and, through the minister, make application for release, so I don't want him to be under the illusion that—

The Chair: Mr. Moore, please get to your point of order because you're taking away Mr. Kurek's time, and I now have a list of other members.

Hon. Rob Moore: Madam Chair, I understand. It's just that Mr. Bittle's not a regular on the committee, so I wanted to give him a little flavour of how this is a committee that works well together—

The Chair: I would agree with you for the most part, yes.

Hon. Rob Moore: —and I want my comments on that to be on the record because he may never be back here again.

I'll bring my point of order to a close, Madam Chair. I just want to say that I don't want him to be under any illusion, because he may not be familiar with the issue at hand, that there's a vacuum currently in this country. There is a process for those who are wrongfully convicted or suffer a miscarriage of justice.

Thank you, Madam Chair.

The Chair: Thank you.

I'm going to ask Mr. Kurek to get back to clause 2, please, and not in relation to anything else in terms of ministers. I think we've settled that one last time.

Mr. Damien Kurek: I appreciate that, Madam Chair, and welcome to Mr. Bittle. I am also not a regular member of this committee. As a duly elected member, I certainly appreciate the opportunity to participate in discussions that are so important to the people we both represent.

The illustration about my office placement has a very direct correlation here. It's by happenstance or fate, but the fact is that when I sit in my chair, I have the opportunity to see the different branches of government in action. I bring that up because it has a very direct correlation on the work that we do here.

For Mr. Bittle's benefit, I would simply share that the tension is constitutionally required in order for things to be undertaken in a way that gets things right. Specifically when it comes to the administration of justice for Canadians, we have this tension that exists.

Again, the reason I bring up my office placement is not because it's necessarily that special, although it is an honour to be given the opportunity to represent the good people of Battle River—Crowfoot. I would hope that Mr. Bittle wouldn't suggest that I have any less place in Parliament than he does. However, I do think that it bears significance in that we are—

● (1615)

[*Translation*]

Mr. Rhéal Éloi Fortin: There is no interpretation at present.

[*English*]

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): The French is coming through the English channel.

Mr. Rhéal Éloi Fortin: I think the problem is that there is no French word for “filibustering”.

Voices: Oh, oh!

[*Translation*]

The Chair: Is there really a problem with interpretation?

Mr. Rhéal Éloi Fortin: That's what they tell me.

The sound is very weak.

The Chair: Is there anyone who can help you?

Mr. Rhéal Éloi Fortin: I hear a gentle voice in my earpiece, Madam Chair. I think it will be okay now.

Thank you.

The Chair: You're welcome.

Mr. Kurek, you have the floor.

[*English*]

Mr. Damien Kurek: Thank you very much, Madam Chair.

I won't get into the significance of a bilingual Parliament. I come from an area where I didn't have the opportunity to learn French as a young person, which I regret. I did take what they call “French 13” via textbook in grade 11, so I may be able to understand a few words. Regrettably, I not am fluent, but I have a great deal of respect for my French colleagues and francophone Canadians in their role in the fabric of our country.

I was just getting to the point about the that tension exists between the different branches of government. It is key on an issue such as this, when it comes to the miscarriage of..., misapplication of...and where there are wrongful convictions in Canada, because if that tension doesn't exist.... It goes back to the very premise of our judicial system, where we have the presumption of innocence and the ability to have a fair trial.

It is key in this discussion, because when that tension becomes misaligned, either when there's not enough tension and people who commit crimes, serious or otherwise.... It doesn't have to be the major crimes that often garner the headlines, but just when there's that lack of respect for the system in general or when it comes to wrongful convictions, which is the other side of that coin....

I'll get into a number of examples that I think are very important to get onto the record. We need to ensure that the tension that needs to exist is shepherded very carefully.

I hear from constituents often about how they are losing trust in our judicial system. In fact, there's a common sentiment I've referenced in the House, and I'll reference it again here. I hear from constituents often who say, “We don't have a justice system. We may have a legal system, but it's not a justice system.”

There are messages about being soft on crime, the revolving door of the justice system and that sort of thing, where people may commit serious crimes and get out without consequence or where a Crown prosecutor is so overwhelmed that they can only focus on a few of what are sometimes thousands of cases that sit on their desk. I know we have a former Crown here as a member of this committee who I'm sure could provide some insight into that. There are a couple, and I'm glad to hear that because, of course, I have a great deal of respect for those who fulfill that important role.

I think that's where the wrongful conviction conversation is just as important because if that tension does not exist, there will be erosion of trust at the very building blocks of a free and democratic society.

I fear some damage has been done. I think that we have to take seriously our job as legislators to make sure that we do everything we can to accomplish the tasks set out before us so that we have a justice system that can be trusted, that can be understood, that respects its role to ensure that we have a civil and just society, but also that we have the ability for consequences to be levied when they are needed.

This has garnered a massive amount of attention here in Canada and from our neighbours to the south, where there are examples of misapplication and people being convicted, sometimes of very serious crimes. In some cases those convictions span decades, or people lose their lives.

● (1620)

There is an interesting dynamic that has evolved with the onset of non-traditional forms of media. In some of the conversations we've had on a number of different issues before the House of Commons, we have talked about the democratization of information. It speaks with real relevance to this, specifically in clause 2, where it talks about subsection 696.71(1), and a few of the other aspects here where it talks about the processes when there is a miscarriage of justice. However, the democratization of information through non-traditional forms of media speaks to something that has—

Mr. Chris Bittle: Madam Chair, I rise on a point of order. Again, Mr. Kurek is not talking at all about this bill. This clause relates to subsection 679(7) of the Criminal Code, and we're nowhere in that ballpark.

I know Mr. Kurek doesn't want to see anything passed. He talks about wanting there to be justice for those who have been wrongfully convicted, but the filibuster continues. He is not relevant, and I think if he keeps going on, you should move on down the speakers list.

The Chair: I tend to agree with you, Mr. Bittle.

I too have my office in the Justice Building as well, and I do look at the branches of government, but I don't think that I'm here to talk about that today. If you're done for now, maybe I can move on to another speaker because I have a list.

● (1625)

Mr. Damien Kurek: Thanks, Madam Chair. With respect, it's been a little while since I talked about my office placement, and I'm actually in the Confederation Building. I'll leave that as it is because I can tell that the committee is just excited to hear more.

It's that democratization of information that I think speaks to, really, what has been an evolution of awareness on issues like this.

I found it very interesting here. It was a number of months ago. I had a staff member who had shared with me a podcast that they were listening to, and what is—

Mr. Chris Bittle: I have a point of order, Madam Chair.

The Chair: Yes, Mr. Bittle. I was waiting for that, actually, because I know Mr. Kurek keeps deviating a little bit too much, here.

Mr. Chris Bittle: Mr. Kurek isn't even pretending to talk about the legislation or clause 2. I think that perhaps we should move on.

Mr. Anthony Housefather (Mount Royal, Lib.): I think he's pretending. Come on.

Mr. Chris Bittle: He's not doing a great job of it.

If he's not going to talk about clause 2, I think we should move on in the speaking order, Madam Chair.

Mr. Damien Kurek: I find it interesting that Mr. Bittle seems to be intent on delaying the proceedings as I endeavour to get to the point that I think is so very relevant to the discussion, because I think what has led to this point is that we have an ability for Canadians to engage on these subjects and in some cases to learn a tremendous amount of information.

I had just mentioned before the interruption that a staff member of mine had been listening to a podcast about wrongful convictions. A podcast led to an outpouring of support and a society-wide, or at least audience-wide, pursuit of justice for somebody who had been wrongfully convicted, and to have the real criminal face the penalties of the crime that had been committed.

I think that bears an important relevance to the conversation, because as lawmakers, we are responsive, whether that be through the electoral process or the correspondence in our daily work. It's that responsiveness that speaks to where we are. There has been a process for the misapplication and miscarriage of justice in this country before. One of the concerns that we shared was that we want to make sure it applies in the right way, and that it doesn't open up or overburden our already-burdened justice system.

Madam Chair, I think that where it fits so carefully and significantly into the process here is that we have the ability for Canadians to be engaged in these subjects in a way that probably has not existed. I would just note, when it comes to the—

Mr. Chris Bittle: Madam Chair, I rise on a point of order.

Mr. Kurek is just putting together a series of words that are completely irrelevant to this. He's not speaking in any way with respect to clause 2, and I again request, since Mr. Kurek is not relevant on the subject, that we move on with the speakers list.

The Chair: I do understand that there's a lot of leeway. I came to this just a little over two years ago. There's a lot of leeway that we give members, but I think there's a time when that leeway just sort of takes its course and we do need to move on.

● (1630)

Hon. Rob Moore: Madam Chair, I rise on a point of order. So far at this committee, I've listened to Mr. Kurek speak about miscarriages of justice, which is exactly the topic of this legislation.

We're starting our study on Bill C-40.

The rules are that a member has a tremendous amount of latitude when speaking at committee. That is well established. There's no doubt about that.

Mr. Kurek is not using that latitude. In my view, he has been narrowly focused on the issue at hand, which is Bill C-40 and miscarriages of justice and wrongful convictions. He's not even using the latitude of which he could avail himself. I commend him for staying on topic—

The Chair: Would you like us to take a vote on that, Mr. Moore, and see what members on the committee think?

Hon. Rob Moore: Luckily, that's not the process we live in. In the world we live in, the rules we have are that a member has a tremendous amount of latitude and cannot be limited in their ability to speak to legislation. Mr. Kurek is not at this point even using any of that latitude.

I will note that Mr. Bittle is a first-time visitor to this committee and so far he's used every opportunity to interrupt and delay someone who is on topic, someone who's working his way to a point. The longer he is delayed and the more interruptions there are, the longer it's going to take Mr. Kurek, I would presume, to make his point.

I'm curious to know Mr. Bittle's opinion on this legislation, but to needlessly interrupt someone who is in the middle of doing their job, I think that takes away from the proceedings unnecessarily and wastes our time.

Mr. Chris Bittle: On the same point, saying “miscarriage of justice” every paragraph or so doesn't mean you're relevant to the topic, relevant to the clause and relevant to the legislation. Mr. Kurek is obviously filibustering, and if he's going to do it, he could at least pretend to be on topic, which he's not doing.

As a new member to the committee, I wouldn't presume to filibuster here without any knowledge, any review of witnesses or any review of transcripts. Mr. Kurek is just saying words that happen to include perhaps topics of the subject here, but he should be speaking to the point, which is clause 2, which is on subsection 679(7) of the Criminal Code, and I'd love to hear Mr. Kurek talk about subsection 679(7) of the Criminal Code and how it relates to this bill. If he wants to filibuster, he can filibuster it that way. Otherwise, the chair has the authority—because Mr. Kurek is abusing this matter of relevancy—to move on on the speaking list.

The Chair: By Mr. Kurek's own admission, he was not a member of the committee when we actually heard testimony on the bill.

Mr. Damien Kurek: That was Mr. Bittle.

The Chair: No, no, a fair point, not to strike, but I do appreciate the point that he's raising, because I believe it's a valid one. We will now move on to the speakers list.

I believe we've exhausted the different words that you've used many times, over and over again, and there is no amendment on clause 2 either.

You could put in an amendment if you wish, but there are no amendments on clause 2.

Mr. Damien Kurek: Madam Chair, I rise on a point of order. I appreciate the discussion that has been undertaken here. However, as a duly elected member and as somebody who subbed in at this committee to participate in an important discussion, I would suggest that removing my ability to intervene on the speaking list comes awfully close to a violation of a member's privilege.

I'll leave that for the moment.

On the point of order, I am a little bit concerned on this issue that is larger than that, because what I've been talking about has a direct connection to the historical precedent that has led us to the point we're at in the discussion surrounding Bill C-40.

With all due respect, Madam Chair, if you are making a ruling that would violate my privilege as a member to be able to intervene meaningfully on this subject, I would urge you to be very cautious in that, because I certainly wouldn't want you to inadvertently violate a member's privilege when there is a very close connection, and had it not been for the many interruptions....

Mr. Bittle talks about filibuster. Well, his word count in this committee is certainly not small, just in the course of him taking the time to delay the proceedings on the discussion that we are having. I urge careful consideration because I think it bears both a very clear relevance to the discussion at hand, and I wouldn't want a member's privileges to be violated.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): I have a point of order, Madam Chair.

The Chair: Let me just rule on what he said.

Mr. James Maloney: That's coming awfully close to a threat to the chair—

The Chair: —and I don't take threats lightly.

Mr. James Maloney: The chair is very capable of making a decision. Threatening her with that is inappropriate.

The Chair: I usually am very cautious in whatever I do, particularly when I'm chairing committees, whether it's in the House of Commons or anything else I've done over the last number of decades in my career.

I said you can go back later, so I'm certainly not removing your right to speak whatsoever. I intend to enforce the rules, and I believe you are being irrelevant and repetitive. I am saying and I am warning that you are risking one more time, and if I direct you to discontinue with this speech, then I will move on to another member, and you can get back again on the order of speakers if you wish.

That is it, and I can give you the page number for that if you wish, and the chapter and the book.

● (1635)

Mr. Damien Kurek: Thank you very much, Madam Chair.

When it comes to the ability for Canadians to be engaged on the subject, I think that's part of the reason why we have this before us. It's because we have examples like the wrongful conviction of Donald Marshall Jr. and the role of racial bias that was such a significant part of what led to a 17-year-old indigenous boy being wrongfully accused of murder and subsequently convicted and incarcerated for more than a decade.

I think that in the case of Mr. Marshall—as I've done some research, contrary to what Mr. Bittle is suggesting—there is a passion of Canadians to engage on this subject and, in that democratization of information, specifically with things like podcasts and Internet sites, there is the ability for people to coalesce, build communities and find support. That, I think, speaks directly to the issue at hand.

Madam Chair, because I do want to ensure that my colleagues have a chance to engage on this subject as well, in the case of the wrongful conviction of Mr. Marshall, we have an example here. I know that in representing, as was referenced earlier, my constituency, Battle River—Crowfoot, the Battle River was known to be the location of a series of battles that took place between different indigenous tribes throughout history, and in Crowfoot, named after Chief Crowfoot, who was a legendary indigenous leader on the plains. Certainly, I have a lot to say about him and the legacy he left in the creation of the modern Canada that we have today, and especially in the role he played in some of the negotiations of treaties and what that looks like for the creation of the country we have here today.

I would just note that in the wrongful conviction of Mr. Marshall and the role that racial bias played in that, it was found that there were systemic failures that contributed to Mr. Marshall's wrongful conviction and that, as we see today, were not seen at the time. These led to this wrongful conviction and a miscarriage of justice and speak to a breakdown in that needed tension that I referenced earlier.

In the example of Mr. Marshall—I could get into a few more—the Government of Nova Scotia appointed a royal commission to investigate the errors that occurred. The Marshall inquiry asked for recommendations to ensure that similar mistakes could be avoided.

The Marshall inquiry identified errors at virtually every stage of the process.

The responding police officers failed to search the area and question witnesses. The investigating officer held a known racial bias against Mr. Marshall; I won't read into the record one of the quotes there, because it certainly has some very strong language and I wouldn't want to bring disorder here. The Crown prosecutor failed to interview witnesses who gave contradictory statements and to disclose these inconsistencies to the defence. Mr. Marshall's defence counsel did not interview Crown witnesses and failed to ask for disclosure of the Crown's case. Also, the officers who investigated the case in 1982 improperly pressured Mr. Marshall to falsely admit that he had attempted a robbery, and the Court of Appeal used this statement to suggest that Mr. Marshall was partly to blame for his wrongful conviction.

To summarize this as an example that relates clearly to the overall conversation, I would suggest, Madam Chair, that we take this very seriously, that we look at some of these issues and we make sure that in the process of the discussions we have before this committee we ensure that we find the right tension, because we cannot allow the system to be bogged down with nefarious complaints of people who were convicted for breaking the law, whether that be serious crime or simple and nominal things.

● (1640)

However, at the same time, we need to ensure that when there are miscarriages of justice, because to err is to be human, we find that tension.

With that, I would cede my time to the next speaker, but I would ask, Madam Chair, to be put on the list. I know that I look forward—and I hope that Mr. Bittle will pay very close attention to—the further meaningful interventions that we will have, whether they be on such important examples as I've just referenced or on the many other pieces of this that speak to the importance of our getting this right to maintain that tension that needs to exist within the administration of justice within our country.

Thank you, Madam Chair.

I would ask to be put back on the speaking list. Thank you.

The Chair: Thank you.

Mr. Garrison, go ahead.

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

I actually want to speak about clause 2 of the bill for a moment. There's nothing mysterious or controversial in clause 2. Clause 2 simply says that those with an application before the new commission are subject to the same rules about release or detention as those who have an appeal pending.

It's very straightforward, not difficult to understand and not controversial in any way, so why are we spending so much time on clause 2? I want to talk about it just for a moment, because I think it's important that we proceed.

We're spending so much time on clause 2 because one party has said that nothing will pass this Parliament until the carbon tax is removed. This has nothing to do with justice issues. It's the first time since I've been sitting on this committee or previously when I sat on the public safety committee that other political agendas have stopped the work of the committee.

It's quite legitimate, I think, for people to spend hours and hours talking about justice issues, but when they're doing it for a different political purpose, it makes it very difficult for this committee to remain collegial and for people in the public to accept that there's goodwill here to attack what is a very important issue.

Why do I think it's important that we move on quickly? Mr. Moore said that we have a process for miscarriages of justice. We do, and all parties agree that it's faulty. When you look at who has succeeded in getting a successful review of their case under the existing system, there have been something like 20 cases over the past 10 years. One of those people was indigenous. One of those people was Black. None of those were women. When you look at the overrepresentation of those groups in our justice system, there's clearly a need for us to make this reform that Bill C-40 proposes.

The way that's related to clause 2 is that there are people in prison right now who have been unjustly convicted, who are waiting for a release, which this bill and this clause would provide if their application were accepted.

Another political agenda, another statement by the leader of the Conservative Party that nothing will happen here is actually keeping, in particular, indigenous women in jail longer. The sooner we can pass this bill, the sooner we can start to address those systemic injustices in our system.

There's nothing controversial and nothing difficult to understand in clause 2. If people in the clause-by-clause process want to raise general questions, there will be a time for that. At the end, we will say, “Should the bill pass?” You can debate that—I'm from a rural area—until the cows come home. There's breadth in that, but under clause 2, there isn't that breadth.

I'd urge members to stick to the topic at hand, which is the clauses we're going through. When we get to “Should the bill pass?” fill your boots filibustering if that's what you think you need to do, but what you're actually doing is keeping people who have suffered miscarriages of justice in jail longer.

The Chair: Thank you, Mr. Garrison.

Go ahead, Mr. Van Popta.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you.

I will talk about clause 2 and subsection 679(7) of the Criminal Code.

At our meeting last week, Ms. Besner, you were very helpful in pointing us to the Vavilov case. I wasn't aware of it. I looked it up and read some summaries of it. It's a recent Supreme Court of Canada case. It's a judicial review case.

In the Vavilov case, the Supreme Court of Canada held that decisions about judicial review—when we're talking about reviewing a decision of either the Minister of Justice, under the current legislation, or the commission that will be established by this legislation—should be presumptively reviewed on a reasonableness basis except in five separate and discrete exceptions. This is the important part of the Vavilov case: one, cases “where the correctness standard is required by law”, the correctness standard being the higher standard; two, cases “where statutory appeal mechanisms are in place”, so, in other words, you can still appeal to the Court of Appeal; three, “Constitutional questions”; four, “General legal questions of central importance to the entire legal system”; and five, “Questions regarding the jurisdictional boundaries between administrative bodies”. For one of those categories, the reasonableness standard applies.

I did a little further digging and found a couple of really interesting cases: one called Walchuk and the other called Bouchard, both predating Vavilov. One was a Federal Court trial decision, and the other was a Federal Court of Appeal decision. They both upheld the reasonableness standard for the criminal conviction review group as it is currently existing under present legislation under the relevant sections of the Criminal Code.

I thought I would take a look at those cases, because clearly they're going to be very important to the way the new commission is going to operate. In each of these cases, the applicant is asking the commission to review their case, their fact situation. They're arguing that there's been a wrongful conviction and a miscarriage of justice, and the remedy that they would be seeking from the commission is that this would be ordered back to a trial or back to the Court of Appeal, whichever is the relevant one.

My question from the other day and that I'm looking at here today is, what happens when the commission makes a decision that the applicant is unhappy with and is turned down?

I looked up a couple of cases. The first one is a Federal Court trial decision of 2018. Jean-Claude Bouchard applied for a review by the Minister of Justice, who at the time was Jody Wilson-Raybould, so it's fairly recent. One of the beautiful things about studying common law is that we get to read stories about people's lives, and that's the way we learn the law.

Mr. Bouchard served 26 years for the murder of Robert O'Brien, the murder having taken place in 1979 in Montreal, but Mr. Bouchard always maintained his innocence. He was convicted by a jury on June 23, 1983. On June 19, 2015, some 22 years later, now on parole, Mr. Bouchard applied for a review of his case pursuant to the existing subsection 696.1(1) of the Criminal Code, on the basis that a miscarriage of justice had occurred in his case. Bouchard submitted two affidavits in support of his application.

The first affidavit was one sworn by Gilles Bénard, who quote-unquote confessed that he was indeed the murderer and that Mr. Bouchard was not. The second affidavit in support of Mr. Bouchard's application before the then minister of justice was one sworn by Gilles' son, Alexandre, who confirmed some of the facts in his father's affidavit. It would seem like a slam dunk case. Somebody else is confessing to the murder: “He didn't do it. I did it”.

● (1645)

However, here's the rest of the story.

Bouchard and Bénard met in a halfway house in 2011, both having served their time, inside and out, transitioning to life on the outside. They discussed their personal lives, their fact situations and the reasons for their imprisonment.

Now—and this is a very important fact—Bénard died of cancer on May 11, 2012. Two days later, Innocence McGill—a group of volunteers working out of McGill's law school—received a package containing the affidavit he had sworn four months earlier. You can immediately see why the minister of justice starts to become a bit suspicious. “Okay, here's an affidavit from somebody who knew he was dying. Clearly, he had given instructions to somebody to 'pop this in the mail the day I die'.” Two days later, the Innocence McGill people received it.

They did their job. They interviewed Bénard Junior, the son of the deceased person. On February 4, 2014, 18 months later, he signed affidavit number two confirming a number of things in his father's affidavit. The Montreal police conducted a new investigation, but this was many years later. The trail had gone cold and not a lot of new evidence was available. The minister of justice rejected the application on the basis that the affidavits didn't meet any exceptions to the hearsay rule. Without new evidence, there was no reasonable basis to conclude that a miscarriage of justice had likely occurred.

Now, the Department of Justice considered whether new evidence was admissible, and the Federal Court trial decision on their judicial review application hearing reviewed the work the minister of justice had done.

I want to read a couple of paragraphs. This is the Federal Court trial division speaking on the judicial review application: “The representative”—that would be the representative of the criminal conviction review group within the Department of Justice—“also considered Palmer v. The Queen“, a 1980 case from the Supreme Court of Canada “which held that new evidence is admissible on appeal when”, and there are four things, “(1) even by due diligence, it could not reasonably had been adduced at trial”—well, obviously the affidavit was sworn many years later—“(2) it is relevant, (3) it is credible in the sense that is reasonably capable of belief, and (4) if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.”

Clearly, the court found that the Department of Justice had given due consideration and had found against Bouchard for review. Bouchard applied, of course, for judicial review, and that's the case we're talking about here today.

This is the way the Federal Court posed the question, or how it was posed for them. “Did the Minister err in finding that Gilles Bénard's statement”—they're not even calling it an affidavit—“constituted unreliable and inadmissible hearsay evidence that offered no reasonable basis to conclude that a miscarriage of justice likely occurred when the applicant was convicted of murdering Mr. O'Brien?” That's the question that is set to be answered.

What is the standard of review? Well, paragraph 34 states, “The standard of reasonableness applies to the issue raised in this application” citing Walchuk—which I'm going to talk about in a minute—which was a 2015 Federal Court of Appeal decision.

Thank you, Madame Besner, for putting us onto the Vavilov case. That is good law, of course. I don't think it overturns the Bouchard case. It only confirms it as being good law. The reasonableness standard is what's going to apply.

The Federal Court looked at the legislative framework within which they were to work, in order to review how they were going to answer that question.

● (1650)

Paragraph 35 states, “It is helpful to recall the legislative framework within which the Minister is to assess an application for review based on an alleged miscarriage of justice."

First, “any remedy available on such an application is an extraordinary remedy.” That is the law today. It may change when Bill C-40 passes, but that is the law today.

In making a decision under the relevant subsection, the minister is to take into account “the relevance and reliability of information that is presented in [connection with] the application”. When the preliminary assessment has been completed, the minister dismisses the application without an investigation if he/she “is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”. That's how the Federal Court is analyzing the legislative framework within which they are to do their judicial review.

Their finding is this, and it should come as no surprise: “The Minister is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred, since the new evidence adduced by the applicant is not reliable, and does not meet the admissibility criteria for hearsay evidence set out in Khelawon.” I have to admit, I did not read the Khelawon case.

The trial court notes, “I am of the view that the Minister could reasonably reach that conclusion, and that her assessment of the record is among the possible and acceptable outcomes that could be justified on the basis of the facts and law.”

That's the way the reasonable test works. The judicial review judge looks at the work that has been done by the administrative body and asks whether it is reasonable. I might have come to a different conclusion, but I can see that it is not unreasonable that she came to that conclusion.

I have just a couple of other citations.

The minister did exactly what the applicant argues was required of her: consider whether it was more probable than improbable that Gilles Bénard told the truth in his affidavit. The minister's answer to that question was in the negative, and that is a reasonable answer if all facts of the case are taken into account.

I find it interesting. That is really the "balance of probability" test that Mr. Curtis told us about at committee. Mr. Curtis, you'll recall, was the representative from the U.K. Criminal Conviction Review Commission. We asked him what likely or reasonable probability looked like. He said that it had to be more than fanciful but that it was not proof beyond a reasonable doubt either, that it was around the balance of probability, probably a little below the civil standard.

I find it very interesting and I'm going to read it again because I think it—

● (1655)

Mr. Randall Garrison: Madam Chair, I rise on a point of order. I commend Mr. Van Popta for actually talking about the bill and things relevant to the bill; however, he is actually talking about a different section.

We're doing clause-by-clause, and he is talking about the clause that the Conservatives have sought to amend, which deals with the bar to measure whether a miscarriage of justice is found to have occurred. That occurs in clause 3 on page 4 of the bill. Unfortunately for him, we are talking about clause 2, on an earlier page of the bill.

I would ask the chair to consider that. In fact, when we come to clause 3, I wonder whether Mr. Van Popta would be in danger of not being able to make that argument under the proper clause because he's already done so under this clause.

Mr. Tako Van Popta: I find that what I am talking about is highly relevant to what we're talking about.

I asked our witnesses the other day what would happen if an applicant were unhappy with the decision, and I was pointed to the Vavilov case. I've done my research and I just want to confirm that I think that is exactly the right answer.

I'll see what happens when we're talking about clause 3. I'll have other things to say about that as well.

I want to move on now to the Walchuk case, which is actually a Federal Court of Appeal decision, which was three years before the Bouchard case I was just referencing.

Here is a summary of the Walchuk case. Again, this predates the Vavilov case. On June 14, 2000, Walchuk was convicted of second-degree murder of his estranged wife, Corinne. It's a very sad story. Walchuk applied for ministerial review on the grounds of miscarriage of justice. The minister of justice at that time was Rob Nicholson. His application was rejected. He applied to the Federal Court, and that application was rejected, so then he appealed to the court of appeal. That's what was happening here. Here are the facts. I'll try to be brief. It's a very sad story.

● (1700)

Mr. Randall Garrison: I have a point of order, Madam Chair. Mr. Van Popta has the same problem as before. It's not about this section. It's not about clause 2; it's actually about clause 3.

I know I'm being a bit picky here. But since it's going to take us seemingly forever to get through this bill, we could at least try to have the arguments made under the clause that we're actually considering, or saved for the clause that's coming up that they are relevant to.

The question is on whether or not it should be accepted as a miscarriage of justice. That is in clause 3 on page 4 of the bill, and not in clause 2.

The Chair: As the chair, I want to ask staff for a little bit of guidance.

I know I have full authority as the chair to rule on relevance and duplicity and so many other items. Based on the laws and the arguments that are made and the clause, do you have any legal opinion on what he's been going on with...whether it's directly related to clause 2 or not?

Hon. Rob Moore: I have a point of order, Madam Chair.

The Chair: Do you have a point of order on my asking staff the question?

Hon. Rob Moore: I do. When you said "staff", I thought you were talking about your table—

The Chair: I meant Department of Justice staff.

Hon. Rob Moore: The ruling on relevancy would be up to you. I don't know that putting them on the spot is....

I know that Mr. Van Popta anchored clause 2 with what I thought were very interesting comments. He spoke directly from clause 2 and then brought in some relevant case law that had come from our previous meeting.

It's probably fair to ask departmental officials to comment on the question, but isn't it up to Mr. Van Popta to put the question to them based on what he's been saying?

The Chair: That's a fair point, Mr. Moore.

I would have hoped that Mr. Van Popta did put some questions to the officials, but I guess that's not going to happen.

Mr. Garrison, I'm going to listen again to your point of order, so that I am fully able to make a ruling on this and move on.

Mr. Randall Garrison: I am not disputing whether Mr. Van Popta's comments are about Bill C-40—they are.

However, clause 2 is about whether someone should be detained or released while their application is being considered by the commission.

Mr. Van Popta's arguments are about, and quite rightfully, what's in clause 3 of the bill. That is about the standard by which we decide that a miscarriage of justice either may have occurred or may not have occurred.

I'm simply pointing out that the cases he's citing and the things he's talking about have nothing to do with detention or release while awaiting a decision of the commission. They have to do with something further on in the bill.

I'm not arguing that they're irrelevant to the bill. I'm just saying that since what we're facing here is a filibuster, we could at least filibuster under the right clauses.

Mr. Tako Van Popta: Madam Chair, I will concede the point, but I reserve the right to talk about the Walchuk case when we do get to clause 3.

However, I do have another question for Julie Besner or Shannon Davis-Ermuth.

In preparing for this study, I read up quite a bit about the David and Joyce Milgaard case. I'm not going to belabour it, because I'm assuming that everybody is at least somewhat familiar with this case.

Mr. Milgaard served 23 years for a crime that he didn't commit. This is one of the reasons that we've introduced Bill C-40. It's because the process for seeking justice when one feels that they've been wrongfully convicted is very awkward under the criminal conviction review group process currently in the Criminal Code. Rightly, we are trying to amend that.

This is the way that it finally got to the attention of the minister of justice, who by the way was Kim Campbell at that time.

Credit goes to Joyce Milgaard's persistence, Joyce was the mother. One day in September 1991, she held a vigil in front of the hotel in Manitoba where Prime Minister Mulroney was scheduled to speak. She did not actually expect to speak to the Prime Minister, but he walked over to her to hear what she had to say. Years later, in an interview with the Winnipeg Free Press, the Prime Minister had this to say. I think it is a great quote:

> There was something so forlorn...about a woman standing alone on a very cold evening on behalf of her son. But in that brief meeting I got a sense of Mrs. Milgaard and her genuineness and her courage. We all have mothers, but even the most devoted and loving mothers could not continue to crusade for 22 years if there was any doubt in her mind. So I went back to Ottawa I had a much closer look at it.

● (1705)

Mr. Chris Bittle: Madam Chair, I rise on a point of order. I don't know if there's a question coming, but it's the height of irony to be quoting members of the Milgaard family while filibustering this bill that is going to prevent people who are wrongfully detained from seeking access to justice.

I'm sure there's a question coming, but I hope the honourable member knows how ridiculous and hypocritical it is to be invoking that name, invoking that comment and using it to filibuster this committee. It's appalling.

Hon. Rob Moore: Madam Chair, on that point, to be 100% clear—and I don't want Mr. Van Popta to lose his train of thought or his spot; he might even want to back up a few steps—my understanding is that Mr. Van Popta was quoting a former prime minister, the Right Honourable Brian Mulroney. In my mind, this ties back directly to clause 2, which says, "this section applies to the release or detention of that person — as though that person were an appellant in an appeal described in paragraph (1)(a) — pending the completion of the review, pending a new trial".

We're talking about the wrongfully convicted or a situation where there's a miscarriage of justice. Mr. Van Popta is speaking very clearly and solely on those issues. The issues that he's raising relate directly to clause 2 of Bill C-40, which involves the custody of an individual who has made an application under these provisions.

Bill C-40 has not come into effect. We don't know the outcome of these deliberations that we're having. There are several amendments that we're going to get to on Bill C-40, some by the NDP, some by the government and one by us. The Conservatives have moved one amendment.

However, this goes to the core of what we're talking about here. I want to be very—

The Chair: Is that a point of order?

Mr. James Maloney: I have a point of order, Madam Chair.

Hon. Rob Moore: It is a point of order, Madam Chair, because Mr. Van Popta—

The Chair: I didn't know if you were trying to skip the line—

Hon. Rob Moore: No, I am not.

The Chair: —because you are on the list.

Hon. Rob Moore: The point was made in error. There are two errors.

One is that what Mr. Van Popta was saying wasn't relevant when it is 100% relevant.

The second is that he was quoting the Milgaard family, when, in fact, he was quoting, if we had listened carefully, which I was endeavouring to do.... I believe he was quoting former prime minister Mulroney. I stand to be corrected—and I would ask Mr. Van Popta to clarify—but I understand that he was quoting Mr. Mulroney, the impression that he had upon meeting the mother of someone who was wrongfully convicted, a mother who had been advocating for her son for 22 years.

It's on that point of order, Madam Chair.

The Chair: Mr. Maloney.

Mr. James Maloney: A number of times today we've heard from opposition members that this is a good piece of legislation. It's ironic and hypocritical at the same time.

In February, I will celebrate 28 years as a member of the Law Society of Ontario. When I became a lawyer in 1996, I took a number of oaths. One of them was to act in the best interests of my clients. One of them was to do everything while preserving the integrity of the justice system.

We have an opportunity, with this piece of legislation, to fix something that many people, as Mr. Garrison referred to earlier, are anxiously and desperately awaiting to fix.

To invoke the family name Milgaard while sitting here—this is now the third meeting—filibustering this piece of legislation—because their leader, Mr. Poilievre, has stated publicly that he has no intention of passing any legislation before the end of this session—is outrageous.

These people are waiting in prison. Their families are waiting patiently.

They should be ashamed of themselves. There are members on the other side who are lawyers themselves. There is no excuse for this, Madam Chair.

I'm prepared to sit here today, tomorrow and the next day, as long as it takes, to get this bill passed because it is important, and these people deserve it.

Thank you, Madam Chair.

● (1710)

The Chair: I have celebrated over 32 years as a member of the bar of Nova Scotia. I too took oaths to uphold the law. Mr. Kurek spoke about Donald Marshall Jr. I was still a law student at that point. I recall vividly the royal commission and various things.

I take this very seriously. I'm sure all members here do. In light of what we are all hearing, I believe we all do take this very seriously. We're not here to harm people who have already been harmed enough. I would suggest that we stick to relevant points and avoid duplication. Let's just get on with it as much as we can.

Clause 2—there's not much in there. We've already gone over clause 2, over and over again. Were there any other points anybody wanted to make—

Mr. Tako Van Popta: I was just about to ask my question.

The Chair: No, I have Mr. Fortin first.

Mr. Tako Van Popta: Oh, I'm sorry.

[*Translation*]

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

I won't tell you how many years I've been a member of the Bar, as that would betray my age, but let's just say we're from about the same graduating class.

I'm concerned about that too. I don't always agree with Mr. Maloney, but this time I admit he raises an important point and I agree with him. I don't think the problem is that our Conservative colleagues on the committee don't want the bill passed; the problem is their leader. We can sit until next week, day and night, but we won't make it, because they have strict instructions not to let this bill pass.

I see two possibilities: either our Conservative colleagues talk some sense into their leader, or our Liberal colleagues ask their leader to talk to the Conservative leader. However, this is happening over our heads.

We can persist like this for days and days, but we won't get anywhere. Is it possible that the leader of the Conservative Party, Mr. Poilievre, will listen to reason, whether because the Prime Minister has spoken to him or because members of his party have spoken to him? That's the problem. It doesn't come from the members of this committee, for whom I have enormous respect. It's a top-down decision, as I understand it. We're wasting our time, and wasting the witnesses' time.

The most odious thing—I agree with Mr. Maloney and Mr. Garrison on this—is that there are families who, in the meantime, are waiting for people who are in prison, and there are prisoners who are waiting to get out. All they get is this kind of pointless obstruction from an individual who has decided to block the work of the House. It's very sad, but we are being held prisoner by this individual, as I understand it.

● (1715)

The Chair: Thank you, Mr. Fortin.

My concern is that we continue this meeting and continue the clause-by-clause study to arrive at a resolution and continue the study of this bill.

[*English*]

Does anyone else want to speak on this clause?

Mr. Van Popta, you do.

Mr. Tako Van Popta: I said that I had a question for Ms. Besner.

I will get to it shortly. I'm not trying to prolong things at all.

I indeed was quoting Prime Minister Mulroney and not the Milgaard family. He was speaking with a great deal of deference for Mrs. Milgaard, so I don't know how any of this can be offensive. This is what he said: “But in that brief meeting I got a sense of Mrs. Milgaard and her genuineness and her courage.” I don't know what's offensive about that.

Prime Minister Mulroney put the file back to the Minister of Justice, who I believe was Kim Campbell at the time. She reviewed it and found that he had a case, that Milgaard's application was valid, and ordered a new trial. But the Saskatchewan Attorney General decided to simply enter a stay of proceedings. Later on there was DNA evidence and he was exonerated. He actually got a reward of I think $10 million.

Here's my question. Under proposed subsection 697(7) of clause 2 of Bill C-40, how would Mr. Milgaard have been dealt with at that time, when he was in this sort of state of suspension, where the Saskatchewan Attorney General just decided to enter a stay of proceedings—not found guilty, not found innocent, not exonerated, or just no more proceedings against Mr. Milgaard?

Ms. Julie Besner (Senior Counsel, Public Law and Legislative Services Sector, Department of Justice): In the Milgaard case, the Minister of Justice initially dismissed his application and then his mother approached the Prime Minister. After that a reference was sent to the Supreme Court of Canada. The Supreme Court looked at the evidence and heard from a lot of witnesses. In its decision, it recommended to the minister that it could be referred back to Saskatchewan for a new trial.

When it's referred back for a new trial, under the common law, I think the superior court in Saskatchewan would have had the authority to determine whether Mr. Milgaard could be released or detained pending that new trial. It didn't get to that, because a stay was entered, as you pointed out.

Section 679 deals with release pending a review, or release after the commission in the future makes a reference for a new appeal or a new trial that the court of appeal is the court that should hear that application for a release. I think I articulated the test. It's the same thing as if it were a conviction appeal.

The Chair: Thank you very much.

Go ahead, Mr. Caputo.

Mr. Frank Caputo: I'm prepared to cede my time to Mr. Moore.

The Chair: Mr. Moore, you're next.

Hon. Rob Moore: The question that I have can wait. It covers a couple of clauses, so I'm good.

The Chair: Mr. Kurek, you were on the list.

Mr. Damien Kurek: Thanks, Chair.

I do have a number of questions, but just in light of some of the ongoing conversations here, I will have some statements about the case of Wilson Nepoose that I think bear relevance to a number of sections, including clause 2. Those questions can also be raised in some of the subsections in clause 3, so I will cede my time.

The Chair: I have no one else on the list.

(Clause 2 agreed to)

(On clause 3)

The Chair: Does a member wish to put forth an amendment to the clause?

Go ahead, Mr. Garrison.

● (1720)

Mr. Randall Garrison: Thank you, Madam Chair.

I believe that NDP-1 is the first amendment to be considered in this clause.

The Chair: That's correct.

Mr. Randall Garrison: As Bill C-40 stands, it requires applicants to the commission to have exhausted all of their appeals before their applications can be accepted. As we've heard almost universally from witnesses before this committee, this potentially excludes applicants who are the least likely to have been able to have either the resources or the ability to mount such an appeal.

What this amendment proposes to do is what was suggested by the Canadian Bar Association, which is to create an exception. It's not to say that anyone can appeal to the commission, whether or not they've appealed. What it says is that, if the commission takes into account factors that have constrained the ability or the opportunity of the applicant to file an appeal, they may accept the application.

This has not opened the doors wide, but it allows people to make an application when they may not have had adequate legal advice, may not have known the process or may not have known the deadlines for filing appeals and therefore missed their chance to appeal. There are all kinds of factors, and someone who is marginalized, racialized, indigenous or poor is very unlikely to have the skills and abilities to understand how to make that appeal, and legal aid is quite often not available to people in that situation in many provinces.

This says that the purpose of establishing the new commission is to make sure that we catch all of those people who may have suffered a miscarriage of justice, and among those are people who may not have been able to file an appeal. This creates a narrow exception under the authority of the commission to accept an application when they believe that those people who are most marginalized in general may not have had the opportunity to file an appeal.

I know that there have been some references to concerns about opening the door to everyone applying to the commission. This amendment does not do that. It creates a limited exception, and it gives the commission the authority to decide if it feels that the case meets the criteria that they set for this exception.

I believe, as we heard from almost all the witnesses on this bill, that this is an important improvement that we could make to the bill without affecting the ability of the new commission to consider cases and without throwing the doors wide open to those who may not have had a good case at all, those sometimes referred to as the “faint hope people”. It focuses on what we're trying to do here, which is make sure we correct systemic miscarriages of justice where people lacked resources and the ability to defend themselves against the miscarriage of justice.

Thank you, Madam Chair.

[*Translation*]

Mr. Rhéal Éloi Fortin: Madam Chair, I would like to ask a question regarding procedure.

As I understand it, if the NDP-1 amendment passes, the LIB-1 amendment cannot.

Is this the case?

The Chair: That's right. I was just about to mention that.

[*English*]

Go ahead, Mr. Housefather.

Mr. Anthony Housefather: Thank you.

Let me just say first of all how glad I am that we're getting to talking about amendments.

I want to thank my colleague Randall for this amendment, because I agree with him. LIB-1 is drafted to essentially do a similar type of thing, but I prefer the way LIB-1 is drafted. LIB-1 makes it clear that the same criteria will apply to cases that weren't appealed to the court of appeal in the same way as if they weren't appealed originally to the Supreme Court.

The Chair: Can I get a clarification? Are you talking on the clause?

Mr. Anthony Housefather: I'm explaining why I don't support NDP-1. I support LIB-1. There is a conflict of lines, and it is a similar type of amendment.

● (1725)

Hon. Rob Moore: I have a point of order.

The Chair: Okay, I was going to read that, “Once moved”—so you've moved it—“if NDP-1 is adopted, LIB-1 cannot be moved due to a line conflict.”

Mr. Anthony Housefather: Madam Chair, I'm speaking to NDP-1 and explaining why I believe LIB-1 is preferable to NDP-1, which is why I would not be voting for NDP-1. It's perfectly in order.

Hon. Rob Moore: No one is suggesting it isn't, but I think there's a speakers list.

Mr. Anthony Housefather: Right, but I thought I was on the speakers list and that's why I was recognized.

Hon. Rob Moore: You're on it, but you're not at the top of it.

Mr. Anthony Housefather: Oh, well, it's a totally different question if I'm not on the speakers list now.

The Chair: I think you've already made your point. Have you?

Mr. Anthony Housefather: No. I would like to speak to it eventually. Of course, if I'm not the first one on the speakers list and was erroneously recognized, no problem.

I'm sorry, Madam Chair. If I'm not the first one on the speakers list, please come back to me.

The Chair: You were making your point on the amendment, I guess.

Mr. Anthony Housefather: There's no amendment. I was speaking to Randall's amendment. If I'm not the first one on the speakers list for Randall's amendment, then I....

Am I or am I not?

The Chair: I wasn't sure if you were making an amendment. That's what I was asking you.

Mr. Anthony Housefather: With the speakers list it wouldn't depend on whether I was making an amendment or just speaking to it. There's no advantage if someone is making an amendment.

Am I the next person on the list or not? I think my question is really simple.

The Chair: We do have a list and you are on the list—

Mr. Anthony Housefather: But if I'm not the first one on the list, then I shouldn't be recognized. That's fine. No problem.

The Chair: According to what I have written here, Mr. Moore is the first one on the list.

Mr. Anthony Housefather: No problem.

The Chair: If he wishes to cede and change with you, that's fine.

Hon. Rob Moore: Thank you.

No, Mr. Housefather's points are well taken, Madam Chair, because as was just mentioned, and it's important for us to know this....

I have a number of questions about NDP-1, but since you have ruled that if NDP-1 passes LIB-1 drops, it's impossible not to look at them together. Obviously, we would only want to go with one or the other—or neither, depending on our views of the legislation.

Turning now to our departmental officials and focusing on NDP-1, because that's the one we're on, a lot has been said about exhausting appeal. We heard witness testimony on that. There are, I think, significant public policy reasons and interests to not gum up our justice system and to not create a parallel justice system where someone could say, “Oh, I was convicted. Do I go the appeal route? Do I go the 'I was wrongfully convicted' route or 'I had a miscarriage of justice' route?” Lawyers would be advising their clients on which would be the most advantageous route to take.

Could the departmental officials maybe walk us through how NDP-1 would change Bill C-40 and maybe how it compares to LIB-1, if you're prepared to do that? I wouldn't want to think that LIB-1 was better or worse while we're considering NDP-1.

Could you just walk us through first the effect of NDP-1, as you understand it?

The Chair: Thank you, Mr. Moore.

Madam Besner, please go ahead.

Hon. Rob Moore: Are you prepared to speak to the effect of NDP-1?

The Chair: Are you prepared to speak to that today?

Ms. Julie Besner: Yes. In terms of the description, to the extent that I can, I will.

The Chair: Go ahead, Madam Besner.

Ms. Julie Besner: As I see it, NDP-1 proposes to replace proposed subsection 696.4(4) entirely to allow the commission to decide that an application is admissible even if a court of appeal has not rendered a final judgment based on any factor that may have constrained the applicant’s ability or opportunity to appeal the finding or verdict.

In addition, the motion would amend proposed subsection 696.4(2) of that same provision, which is the exhaustion of appeals admissibility criterion to allow applicants to include information they believe should be taken into account by the commission in deciding whether to admit the application despite their not having exhausted their rights of appeal.

One thing I did observe, though, in the manner in which the motion is worded, is that the amendment to proposed subsection 696.4(4), the exception provision, says that it's “despite” proposed paragraph 696.4(3)(b), I believe. I'm trying to find the motion itself. It doesn't speak to what would happen with (3)(b), which is when someone had an issue that they could have appealed to the Supreme Court.

In terms of operationalizing that, I'm not quite sure what effect that would have.

● (1730)

Hon. Rob Moore: Madam Chair, on that, I think there's a lot to digest here with NDP-1. It's a substantive amendment, reconciling it with LIB-1.

At this juncture in the meeting, I know we were scheduled to go from 3:30 to 5:30, and I know some of our members have adjusted their schedules based on that, so at this point, I would make a motion to adjourn the meeting for today.

The Chair: We have a motion to adjourn. Do we have agreement?

Some hon. members: Agreed.

The Chair: The meeting is adjourned.

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