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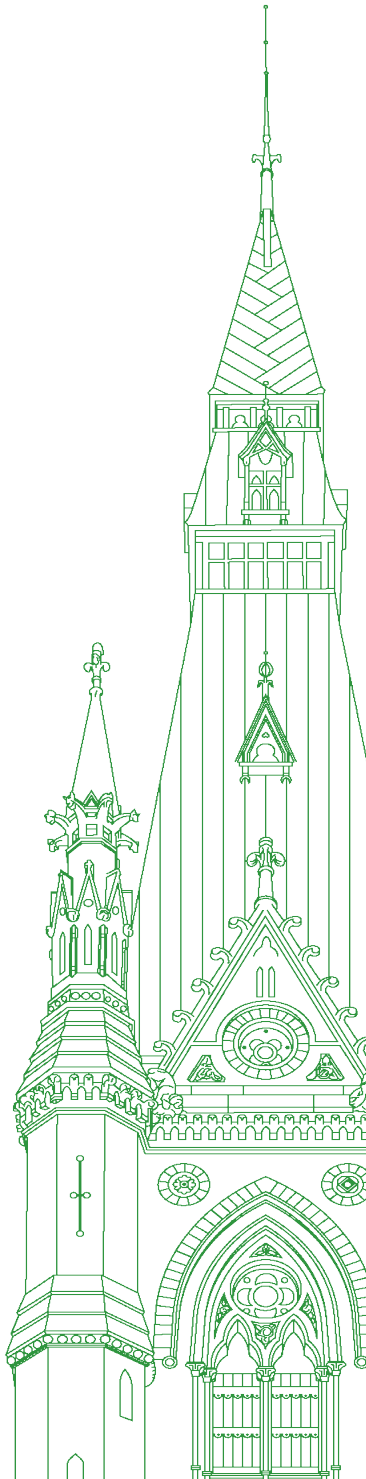

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Thursday, December 14, 2023

● (1540)

[*English*]

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

Welcome to meeting 90 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 is 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. I have two members attending remotely using the Zoom application. They are familiar with the processes of committees.

[*Translation*]

I would like to let members know that the tests were completed successfully.

[*English*]

Here with us today once again on our clause-by-clause study of Bill C-40, we have officials from the Department of Justice.

[*Translation*]

Joining us are Julie Besner, senior counsel, and Anna Dekker, senior counsel and deputy director, public law and legislative services sector.

Welcome.

[*English*]

Colleagues, pursuant to the order of reference of Wednesday, June 21, we are resuming debate on Bill C-40.

(On clause 3)

The Chair: We are on amendment NDP-1. This has already been moved.

If NDP-1 is adopted, LIB-1 cannot be moved due to a line conflict.

House of Commons Procedure and Practice, third edition, states on page 769:

> Amendments must be proposed following the order of the text to be amended. 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.

We will resume debate.

Mr. Housefather—

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

The Chair: —the floor is yours.

Hon. Rob Moore: On a point of order—

The Chair: Yes, Mr. Moore.

Hon. Rob Moore: Madam Chair, Mr. Fortin is not here. At the end of your opening statements, he always asks if the people who are remote have had their sound checked and if it was successful.

The Chair: I said it was, but I said it in French. My apologies if you didn't understand it.

Hon. Rob Moore: I know, but he always asks. Whether you say it or not, he tends to ask, so on his behalf I'll ask.

The Chair: Sometimes I forget, so—

[*Translation*]

Ms. Kristina Michaud (Avignon—La Mitis—Matane—Matapédia, BQ): I have a point of order, Madam Chair.

[*English*]

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): I'm glad the Conservatives have decided to take this seriously today.

[*Translation*]

The Chair: Please go ahead, Ms. Michaud.

Ms. Kristina Michaud: I'd like to thank the Conservative member for his point of order, but since you mentioned it at the beginning of the meeting, Madam Chair, I didn't feel the need to ask.

Thank you.

[*English*]

The Chair: Before I go to Mr. Housefather, I simply want to say, because this is public for people and for the members, thank you very much for being here today. We have extended hours—very, very long extended hours—and I know that everybody realizes the urgency of having this bill proceed to third reading. Again, it's a matter of justice for our country. We are here to deal with it this afternoon.

Mr. Housefather, the floor is yours.

Mr. Anthony Housefather (Mount Royal, Lib.): Thank you so much, Madam Chair.

As I mentioned at the last meeting, I want to thank my colleague Mr. Garrison, whom I very much admire for his views on justice issues. I think they're very similar to mine.

I think my amendment, LIB-1, is preferable to NDP-1 in terms of way amendment LIB-1 is structured. They both try to achieve the same thing, which is that somebody who hasn't appealed to the court of appeal may also benefit from the commission looking into their file should the commission choose to do so. What my amendment basically makes clear is that someone who has not appealed to the court of appeal is treated in exactly the same way as if they had not appealed from the court of appeal to the Supreme Court. The commission would look at exactly the same factors to determine whether or not there was a reason that they should look at that case.

The streamlined way that I have done it in LIB-1 basically treats a non-appeal to the court of appeal the same way a non-appeal from the court of appeal to the Supreme Court is treated. I actually think it's a more flexible way and would give more people the option to be heard by the commission than they would in the way NDP-1 is structured.

While I agree completely with the premise of NDP-1 and with the idea that people who have not had the ability to appeal to the court of appeal, especially the poorest and most vulnerable defendants, should have the right to have the commission consider whether there are factors that should allow the commission to look into their case, I think the way that mine accomplishes it is better. Because there's a conflict of lines and we can't pass both, I'll be voting against NDP-1 and for LIB-1. I just wanted to explain that.

Thank you, Madam Chair.

The Chair: Thank you, Mr. Housefather.

Go ahead, Mr. Garrison.

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

I guess I remain stupidly optimistic that we can finish consideration of these amendments and finish consideration of this bill today. As I have said many times, many people among those who are marginalized in our country are currently serving time for crimes they did not commit. They are waiting for this commission to get up and running so that they can seek justice. I'm hoping that today, in the next two hours, we can dispatch this bill and make it ready for the House to consider in the next sitting.

What I want to say is that I do agree with Mr. Housefather that we are trying to accomplish the same thing, but in defence of my amendment, I've tried to focus the commission's attention on those who did not appeal and on the reasons they did not appeal, and to focus on the reasons—through legal representation, through knowledge, through opportunity—that people were constrained. They didn't have the ability.

I am not intending to make a wide opening to the commission for people who didn't appeal who aren't in that situation. For that reason, I wrote it specifically into the amendment to make it clear that it was for the purpose of those who simply didn't have the opportunities or the abilities, and it was not simply anybody who failed to appeal.

I agree with Mr. Housefather that mine is in fact probably a bit narrower, but it's a bit more focused on providing the right to be heard to those who had limited opportunities and resources.

Thank you, Madam Chair.

The Chair: Thank you, Mr. Garrison.

Go ahead, Mr. Moore.

Hon. Rob Moore: Madam Chair, I thought Mr. Caputo was next.

The Chair: [*Inaudible—Editor*] unless you don't want to.

Hon. Rob Moore: No, I do, actually.

● (1545)

The Chair: Okay. Please proceed.

Hon. Rob Moore: It's on a point that was just raised by one of our colleagues here, Mr. Garrison. He said that there are individuals who suffered a miscarriage of justice or a wrongful conviction who are waiting for this legislation to pass, when in fact it was the testimony of the....

I just want to point out, so that Canadians are not under a wrongful illusion of what the situation is, that there's a robust process that currently exists and has existed over the last eight years of the current Liberal government, and existed prior to that as well under a Conservative government, that someone who has been wrongfully convicted or suffered a miscarriage of justice can avail themselves of. Ultimately the arbiter of the outcome is the Minister of Justice. Minister Virani appeared here and explained the current system.

Bill C-40 seeks to amend that system. It seeks to change it so that it is not the Minister of Justice. We've had a number of ministers of justice who have spoken to us about this. We've had a number who have dealt with cases of wrongful conviction. Minister Virani—possibly, not yet—said that there are some in the hopper, so to speak, with the department. There's a team of individuals at the Department of Justice who are experienced and specifically tasked with dealing with, under our current Criminal Code and laws, miscarriages of justice. They provide advice to the minister. That's the way it has been done.

There are those who feel that this process is inadequate. There's no doubt that laws can always be improved upon, but I wouldn't want anyone to think that unless this bill passes, the wrongfully convicted do not have a process to avail themselves of, because they absolutely do. That should be acknowledged. That's the testimony of the Minister of Justice, who appeared here on this legislation.

I wanted to make that point quickly at the outset, Madam Chair. If individuals are somehow waiting for this legislation to pass, individuals who are wrongfully convicted.... If, for example, DNA evidence subsequently shows that they in fact were not the individual at the scene of the crime, or new evidence comes forward that somehow exonerates this individual who was arrested, prosecuted and convicted with the full benefits of the Charter of Rights and a robust defence.... This individual was convicted of a crime, but subsequently we find out that the system got it wrong and that his individual is not guilty; this individual is innocent. Well, then, there is a process, so nobody in that situation should be waiting for Bill C-40 to pass.

To say that we're waiting for C-40 to pass would be to say that we're somehow opening up our system of justice in this country and opening the doors up to allow individuals who are not innocent to avail themselves of this process. If someone is factually innocent of a crime, there's a process whereby ultimately Minister Virani makes the call under the advice of an entire team within the Department of Justice. There is a process for that.

I wanted at the outset, before we get into this, to state that. I just thought, with the comments from Mr. Garrison, that someone could be led to believe that Canada doesn't have a process, when in fact we have a very robust process.

The Chair: Mr. Caputo, you have the floor.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you very much, Madam Chair.

I want to thank our witnesses, Ms. Dekker and Ms. Besner. I know that you've been very patient with us.

[*Translation*]

Welcome, Ms. Michaud.

[*English*]

I think she's our only visitor—oh, we have Mrs. Thomas as well. Thank you very much for joining us.

I think that the dichotomy between the two amendments is an interesting one. A lot of what we deal with really does come back to the clause generally that we're dealing with, clause 3, as it relates to the issue of a miscarriage of justice.

To our witnesses, we've heard what both Mr. Garrison and Mr. Housefather have said. I don't doubt they obviously come at this from a very sympathetic and compassionate point of view. They come at it probably from the same angle as everybody here, which is that none of us wants to see a wrongful conviction.

I have expressed this many times before. I won't get into significant details, but most people here know I was a defence lawyer for a time, and a prosecutor for a much longer time. One case haunts me to this day, an administrative case that would not have been considered a serious case by the public, but one in which I really think the person was not dealt with appropriately by the courts. I would classify it as a miscarriage of justice. There are all sorts of law society obligations now on my part, even with respect to that file. I think about it, because these things absolutely, positively never go away.

Again, I won't mention names due to privacy and confidentiality, but I've also dealt with somebody who, in the past, was subject to a wrongful conviction, and was—

● (1550)

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): I have a point of order, Madam Chair.

I apologize for interrupting the member, but we are probably going to be listening to this type of thing for hours, so would it be possible to ask Mr. Caputo to stop sniffing into the microphone? The interpreters must find it unpleasant—I know I do.

I can repeat what I said in English, if necessary.

The Chair: Yes, could you please say it again, in English, Mrs. Brière? Mr. Caputo said he didn't catch it.

[*English*]

Mr. Frank Caputo: Maybe my volume wasn't up. I'm sorry about that.

[*Translation*]

The Chair: Can you please repeat it?

[*English*]

Mr. Frank Caputo: I'm so sorry, but my volume wasn't up. That's my fault.

I'm not sure what the point of order was.

[*Translation*]

The Chair: Can you repeat what you said, Mrs. Brière? Mr. Caputo didn't hear.

[*English*]

Mrs. Élisabeth Brière: I said that it was already awful to have to listen to that filibustering for I don't know how many hours, and perhaps you could please stop sniffling into the mic, for us and for the translators.

The Chair: Okay. Thank you.

Mr. Frank Caputo: I turned my mic off there.

Hon. Rob Moore: On a point of order, Madam Chair, Madame Brière just mentioned the length of time that we're meeting. The normal meeting time for the Standing Committee on Justice and Human Rights is Tuesdays and Thursdays from 3:30 to 5:30. We're currently looking at Bill C-40, which, as I mentioned, creates an entirely new commission, an entirely new body to deal with wrongful conviction.

I don't want anyone to be under any illusion. We're going to take the time necessary to look at this bill. We're going to look at every sentence, every word, of this bill, because it all has meaning. It's going into the Criminal Code. It's part of our duty.

If Madame Brière has an issue with the timing of the meeting or the length of the meeting, I would urge her to raise it not with Mr. Caputo, who did not schedule the meeting and did not set the time, but through you, Madam Chair. She should raise the issue with you, because I received a notice—

The Chair: Mr. Moore, I'm afraid it's not a point of order.

● (1555)

Hon. Rob Moore: No, it is a point of order.

The Chair: No.

Hon. Rob Moore: What is it, then? If it's a point about this meeting, then it is a point of order. It's dealing with the timing of the meeting.

The meeting is scheduled from 3:30 to 11:30. It's you who scheduled that, so maybe you could explain that to Ms. Brière—

The Chair: That is correct—

Hon. Rob Moore: She's looking at us, but it came from you.

The Chair: Yes, absolutely, I did schedule the meeting, and —

Hon. Rob Moore: On the point of order, could you explain why you scheduled it from 3:30 to 11:30?

The Chair: It was to allow members the opportunity to look at each and every clause and be satisfied with the amendments that were brought up.

Now I'm going to move on to the next speaker.

Hon. Rob Moore: No, on that point of order, Madam Chair—

The Chair: This is the last time.

An hon. member: You can't do that.

Hon. Rob Moore: No, it's not. I can have as many points of order as I want.

The Chair: Yes, I can.

Hon. Rob Moore: On this point of order, this committee is a standing committee of this House of Commons. We can meet at our regularly scheduled meeting time until we finish any number of studies or bills. We had a study on wrongful conviction. We had a study on this bill. We had a study on the federal government's obligation to victims of crime. We've passed different pieces of legislation.

My point, Madam Chair, is that there is no obligation on this committee and there is no directive from the House that we would finish Bill C-40 today, so there's no reason to schedule a meeting for eight hours straight. Therefore, if someone has an issue with the meeting being eight hours, they should take it up with you, because this committee is scheduled to meet again in the new year, when we will pick up on Bill C-40, I'm sure.

The Chair: Thank you, Mr. Moore. I appreciate that.

I'm going to move to the next speaker.

Mrs. Rachael Thomas (Lethbridge, CPC): I have a point of order.

The Chair: Go ahead, Mrs. Thomas.

Mrs. Rachael Thomas: Madam Chair, you just said to my honourable colleague that this would be the last time that you would give him the opportunity to speak. I'm curious as to where in the green book or the Standing Orders you find permission or direction as chair—

The Chair: Absolutely, Mrs. Thomas—

Mrs. Rachael Thomas: I'm not done the point of order. Thank you for being respectful of my time.

I'm curious to know why you would rule that my colleague would be cut off and that he would only be able to raise a certain number of points of order or be able to speak a certain number of times. I haven't read that in the green book. I'm not aware of that being in the Standing Orders. I'm quite familiar with them myself, having been a chair previously.

I'm curious if you can point to the place in the green book where we would find that ruling.

The Chair: Thank you.

We've dealt with that last time and I will not entertain it again. I did point to the rule book and I want to move on now.

Mrs. Rachael Thomas: I have a point of order.

The Chair: You can challenge the chair. I've made my ruling. Please challenge the chair.

Mrs. Rachael Thomas: I have a point of order.

The Chair: No, you can challenge the chair and we will have a vote.

Mrs. Rachael Thomas: I have a point of order.

The Chair: I said you can challenge the chair.

Mrs. Rachael Thomas: You're referring to a decision that was made in the past, when I wasn't here.

The Chair: If you wish to challenge the chair, I will move aside and we will call this vote. Otherwise, I am moving to the next speaker.

Mrs. Rachael Thomas: I just wish to understand why you feel its your prerogative as chair to limit the number of times people at this table can speak. Are there only a certain number of points of order that we're allowed to raise?

Mr. James Maloney: If I can lend a hand, the chair did not say that. She was really trying to move on from Mr. Moore.

At no point did she ever say to anyone here today or previously that people were limited in the number of their interventions. She was ruling on a specific point of order and addressing a issue of relevance. It's as simple as that. Let's not waste time. Let's move forward.

The Chair: If you'd like to challenge, do so. Otherwise, the next speaker is Mr. Garrison.

Mrs. Rachael Thomas: I'm certainly—

An hon. member: It's Mr. Caputo.

The Chair: I thought he was finished.

Mr. Caputo, go ahead.

Your name was scratched, so I thought you were done. Go ahead, if you're not done.

Mr. Frank Caputo: That's fine.

I apologize. Frankly, I sniffle for about six months of the year. It's just something with my biology. I apologize to the translators. If I have to sniffle, I will try to mute myself because the last thing I want to do is harm the translators here. I'm getting a thumbs-up, so I apologize. Thank you for your work.

I'm going to start from where I left off.

I know both Mr. Garrison and Mr. Housefather to be conscientious members of this committee and of Parliament and both are persons of principle. Though we often will disagree, I think we all would say that we stand fast by our principles. I do not doubt where they're coming from.

One thing I was discussing was that as a defence lawyer, when I was dealing with a matter that wasn't really necessarily a serious matter in society's eyes, but a matter that nonetheless would attract significant liability before the court, it's my view that a miscarriage of justice occurred. That sticks with me each and every single day. It's not something I want to relive.

One thing we deal with in this committee—and perhaps this is even tunnel vision on our part as a committee, or maybe it's just where we get wrapped up—is that it's so easy to focus on the big cases. When I say "big cases", I'm talking about the people who've been convicted and incarcerated for a great deal of time. For everybody who has their day in court, that's a big day, whether they're there for the first time or whether they're there for the 100th time. It's their liberty on the line. That is important. That's their day. Perhaps for some people, if they've been through it a number of times, it's not going to be the same as for the person who walks into trial for the first time. That isn't to say, though, that it's not important. It certainly is.

We frequently hear about people who were incarcerated on life sentences, for instance, whose exoneration came after years on parole and after they had served a substantial amount of their sentence.

That's one thing I wanted to state for the record. When we do consider wrongful convictions, we have to think about this in the grand scheme of it all. Second, I don't think anybody here ever would want to see that.

Mr. Garrison and Mr. Housefather bring forward two competing amendments. In my view, they generally do accomplish similar things. We've heard from both of them what their interpretations are, and I'll be very candid: I'm terrible. In trying to piece together what exactly LIB-1 says, I'm not the best person to look at that and say this is exactly what it is.

Ms. Besner or Ms. Dekker, could either of you tell us independently what the upshot of each of these amendments is, in your eyes, and where the substantial similarities and differences are, please?

● (1600)

The Chair: Go ahead, Ms. Besner. Thank you.

Ms. Julie Besner (Senior Counsel, Public Law and Legislative Services Sector, Department of Justice): I'll only comment as to the effect of what the amendment appears to accomplish or its impact on other provisions within the bill. Obviously, it's for the committee to decide if one approach versus the other is the better approach.

I was listening a moment ago when Member Housefather was describing his amendment and I didn't see anything inaccurate in how he described it. I think that's all I can say.

The other day, I was asked at the end of the last meeting to describe NDP-1, and I did. I just identified one potential issue, which is that it only makes exception to (3)(a) and not (3)(b), so there's just a question there as to what would happen with (3)(b).

That's all I would want to say on that.

Mr. Frank Caputo: I'm sorry, but I'm not recalling that. Can you elaborate on that, please?

Ms. Julie Besner: When you look at page 3 of the bill, the proposed subsection 696.4(4), "Exception", currently says "Despite paragraph (3)(b)".

That means exceptions can be made when someone has not sought an appeal at the Supreme Court.

NDP-1 proposes to change that to say, "Despite paragraph (3)(a)", which applies to when someone has not sought an appeal at the court of appeal. It doesn't speak to what would happen if there was an appeal sought at the court of appeal and then, let's say, it was unsuccessful and there's perhaps still an issue that could be raised at the Supreme Court.

I'm not sure what would happen if it just says, "Despite paragraph 3(a)" and doesn't also include paragraph 3(b), because proposed subsection 696.4(4) canvasses all the considerations the commission would have to look at in determining whether it could admit an application despite appeals not having been completely exhausted.

● (1605)

Mr. Frank Caputo: I see. This isn't easy, obviously. This is a complex area, so I appreciate your distilling this. I think that if I had moved such an amendment, I'm not sure that this subtlety would have resonated with me, and if you'll allow me for a second, I just want to try to wrap my head around it.

What would be the impact if NDP-1 were to say, "Despite paragraph 3(a) or 3(b)"? What would that then do?

Ms. Julie Besner: The factors enumerated there would apply in both circumstances.

Mr. Frank Caputo: Would that make it more encompassing, then?

Ms. Julie Besner: Yes.

Mr. Frank Caputo: One of the things that I don't believe.... I was gone for some of the testimony, and I apologize. I wasn't here for that, including testimony from my former colleague Mr. Wiberg, who I know is well respected across the country for his work in criminal law.

In the notion of miscarriage, here we're talking about appeal and whether somebody should be foreclosed from making an application to the commission. Perhaps I missed this, but I believe that there was substantial testimony about the definition of what would qualify as a miscarriage, was there not? Obviously, that would have to be subject to interpretation.

Does either of you have any comment on that?

Ms. Julie Besner: Certainly. It's true that there is no definition in the code for a miscarriage of justice, though it is a term that is used in several different sections, and I would say key sections, not to mention that this entire part of the Criminal Code that's being amended—part XXI.1—deals with miscarriages of justice. It's also used in the appeal provision. Conviction appeals can be presented to the court of appeal either on the basis of an unreasonable verdict, error of law or any ground on which there may be a miscarriage of justice.

It's not defined. The courts have certainly articulated what it can include. I believe I recall the minister also saying that it's not proposed to be defined because it's malleable, and that this is intentional because things can evolve and circumstances can be quite varied as to whether or not something amounts to a miscarriage of justice. I could say that in some of the key cases, it's been things like misapprehension of evidence. It can be prosecutorial or judicial misconduct. It can be tunnel vision. It can be a number of things.

The other thing I wanted to mention about that third ground of appeal is that it's a stand-alone ground. It doesn't have to be in combination with an unreasonable verdict. That comes from the Supreme Court in a case called Lohrer, in which the court said that that any ground that constitutes a miscarriage of justice is a stand-alone ground of appeal.

Mr. Frank Caputo: I'm sorry. When you say "stand-alone ground of appeal", that's in respect of...?

Ms. Julie Besner: In a conviction appeal, an applicant would not have to both establish that the verdict is unreasonable and that it's a miscarriage of justice. A miscarriage of justice on its own can be a ground of appeal—

Mr. Frank Caputo: Oh, I see, so the—

Ms. Julie Besner: —or an error of law, for example. It's not that there has to be a combination of grounds. It can be a stand-alone basis to present....

Mr. Frank Caputo: Right, so if I understand your interpretation correctly, an applicant could go before the commission on the basis of a verdict that was reasonable on the evidence but nevertheless resulted in a miscarriage of justice. Is that what you're saying?

Ms. Julie Besner: It's possible.

Mr. Frank Caputo: Yes. I suppose that if evidence was fabricated, the verdict might be reasonable, based on fabricated evidence, but that itself was a miscarriage of justice. Am I making sense there?

Ms. Julie Besner: Yes.

Mr. Frank Caputo: You said something that struck me. We talk sometimes about categories. I don't want to misquote you, but my interpretation of what you said is that there are broad categories. We don't want to foreclose any category of miscarriage of justice.

My view is that generally when we're looking at these things, there are principles that underlie them. One principle is that somebody should not be convicted for a crime they didn't commit. That's one tenet of the rule of law. It's a very basic one: If you didn't do it, you obviously shouldn't be punished. We were all taught that. Even in high school we would talk about this in my law 12 class. We talked about whether it's appropriate for 100 people to go free to prevent one innocent person from going to jail—or 1,000. At what threshold do we reach that?

My concern is that we don't want to foreclose the categories that could result in a miscarriage of justice. Really, aren't there just a couple of principles that underlie this? The main one.... Well, I shouldn't say it's the main one, because we heard divergent testimony on this, but it's that the person didn't commit the offence. That is the most basic miscarriage of justice. We're looking at the Truscott case, the Milgaard case and others. They didn't do it. DNA says they did not commit the offence. I think we can all agree that this is a classic miscarriage of justice.

You've talked about other things, like the fabrication of evidence. If evidence was fabricated.... I'm sorry; I'm just trying to formulate my thought here. If we're looking at the fabrication of evidence as it relates to a miscarriage of justice, how would this bill look at somebody who may be factually guilty—by that, I mean they committed the offence—but should not have been convicted based on the evidence? In your view, is that a miscarriage of justice?

● (1610)

Ms. Julie Besner: I don't want to be extremely categorical in answering that question, because there could be a lot of factors at play.

In a general way, a miscarriage of justice is often seen when any new information or evidence that comes to light calls into question the reliability of the verdict or the process that led to it. Sometimes that second branch—the process that led to it—could be things like coercion, the extraction of a false confession or threats. You gave the example of fabrication of evidence. That's an example.

There are also other circumstances. In the early 1990s, for example, a broad review was conducted of self-defence after the Supreme Court came out with its decision on Lavallee, with the battered woman's syndrome and all of that. A lot of cases needed to be examined just to see whether a valid defence of self-defence could have been advanced and was overlooked. That's despite it having resulted in, for example, the death of a spouse.

There could be a variety of different circumstances. We can't be very categorical, but that is also the benefit. We try to describe it as not being defined, but the courts have not had any problems, as I've observed in my reading, with wrapping their minds around the concept of miscarriage of justice.

Mr. Frank Caputo: Thank you. I know these are hard questions, so I apologize. I find this very interesting, to be candid.

If I have your point correctly, it's “was justice done?” To the point I made earlier, I would call it factual innocence, if you will. Then you also have the process by which a person is found guilty. Was there obstruction of justice there? Were there any of these categories?

Those are the underlying principles. That's the point I was trying to get at before. When we look at these things and the categories, perhaps it's as simple as that. There are a couple of categories here that result in a miscarriage of justice. The defined one is that the person is factually innocent. Number two is that the process by which the person was convicted was flawed in some way.

Can we agree on that? Are those the two categories?

● (1615)

Ms. Julie Besner: Could I ask you to repeat them?

Okay, I have them now—

Mr. Frank Caputo: You do? Okay. I'm certainly open to whatever you have to say on this.

Ms. Julie Besner: I think you just kind of repeated what I had first articulated about anything that calls into question the reliability of the verdict or the process that led to it. Did you want additional examples of the process that led to it? Is that what you're asking?

Mr. Frank Caputo: No, what I'm asking is whether there are any other categories that you would see that would lead to a definition of miscarriage of justice. What I'm trying to drill down to here are the principles that amplify what a miscarriage of justice is.

Ms. Julie Besner: The description I provided is a bit of a catch-all, so underneath that, there could be a lot of things that fall into those two broad categories.

Mr. Frank Caputo: Okay. Suppose someone is reviewing their sentence from 40 years earlier, and sentencing has drastically changed on how an offence is viewed. Would that itself come to be something that could result in a miscarriage of justice or be construed as a miscarriage of justice? Let's say the sentence at the time was within the appropriate range, so the judge who imposed the sentence did not commit an error of law in imposing the sentence. Now, 40 years later, that sentence would be dramatically different. Would that be considered a miscarriage of justice, potentially?

Ms. Julie Besner: I don't want to speculate too broadly on that because I think it's something that the courts would certainly turn their mind to if it came up as an issue in a particular case. I can say that I recall having heard that in the U.K. they did re-examine some sentences for individuals when there was no longer an offence. I think it was, for example, same-sex relationships from decades ago. I think they did do some kind of review of the kind of conviction and sentence that had been imposed when afterwards the law had evolved.

Mr. Frank Caputo: Right. I can't recall under what prerogative the government can look at that. There must be a mechanism by which the Minister of Justice can say, “This was historically an offence. It is no longer an offence. It should never have been an offence, and for those people who were convicted of this offence, that is of no force and effect.” Is there a mechanism in the law to do so?

Ms. Julie Besner: I believe it falls under the Minister of Public Safety's portfolio for pardons.

Mr. Frank Caputo: Okay. For pardons, I thought it was something a little bit different from that. It's my understanding that the pardon is issued at the individual level. In the example I was describing, everybody who falls into this category is no longer considered to have committed an offence, whereas a pardon—or a record suspension, as I believe they call them now, just to confuse us a little bit more—is provided by the Parole Board of Canada, which is at arm's length from the minister and in—

The Chair: Go ahead, Mr. Garrison, on a point of order.

Mr. Randall Garrison: We had this concern raised before. We're dealing with clause-by-clause consideration of the bill, and much of what Mr. Caputo is talking about has absolutely nothing to do with either the clause under consideration today or the specific amendment we are dealing with.

I would ask the chair to remind Mr. Caputo that while there are other opportunities in the clause-by-clause consideration to talk about the bill as a whole, this is not that opportunity. This is to talk about the amendment before us and the clause that is under consideration.

● (1620)

The Chair: Obviously, that is absolutely correct. We are dealing with clause number 3.

Mr. Frank Caputo: We are dealing with clause number 3 and amendment NDP-1, which also, in my view, incorporates amendment LIB-1, but when we're talking about whether a person has exhausted their appeals and when we're talking about what a miscarriage of justice actually is, to me, that is germane to every single section in this bill. I'm not sure that we can say that what constitutes a miscarriage of justice is not relevant, when every single section in the bill deals with that.

With respect to my honourable colleague, I have to part company on that point. I think it is completely relevant.

The Chair: Do you want to continue with our clause 3, please, on NDP-1?

Mr. Frank Caputo: Yes.

The Chair: We can read it into the record if that helps everyone.

Mr. Frank Caputo: I'm in the chair's hands.

The Chair: Mr. Garrison, do you want to read your...?

Mr. Randall Garrison: No, Madam Chair. I believe it's the responsibility of the members, when it's already been presented to the committee, to do their homework and be here prepared and know what section we're on.

As I said earlier, and with all due respect to Mr. Caputo, there is a section during clause-by-clause consideration when we will be asked, “Should the bill pass,” which allows for general discussion of the bill as a whole. That is not the purpose of our discussion and debate of this clause or this specific amendment.

I will have some more to say later about this, obviously.

Thank you.

The Chair: That is absolutely correct.

When we're talking about generalities, you do have a chance at the end when we are talking about the bill. Right now, we are dealing with clause number 3, so please go ahead.

Mr. Frank Caputo: I agree.

My point is that the generality about what a wrongful conviction is isn't just an issue with the bill as a whole; it is an issue that strikes at the heart of every single clause. Again, I have to part company with my colleague on that point.

On the issue of pardons, I found that interesting, because I believe that somebody gave testimony about that. I can't recall who it was, but they gave evidence about somebody whose life had dramatically changed subsequent to their conviction. If we want to really tie it up with the amendment, in that case the person may or may not have appealed.

Let's say they didn't appeal, because in their view they were factually guilty and morally guilty, but 30 or 40 years later, they have changed their life, and they've not had a single offence since then. My understanding is that ordinarily a person in that case would seek a pardon. As to the legal effect of the pardon, the precise wording escapes me, but it essentially says that although you were convicted, you will no longer have a criminal record.

Did I say that properly, in your view?

Ms. Julie Besner: I'm not an expert on the record suspension statute, so I can't quote or lift from the language of it. I'm sorry.

Mr. Frank Caputo: Okay. I'll assume I'm kind of correct on that for now.

That was something that was a bit confusing to me. We had one witness—and, again, I apologize because I can't recall who it was—who said, on the one hand, yes, somebody has changed their life, even perhaps somebody who was doing a life sentence. I can remember meeting somebody well into their 70s, and you would have no idea that they had committed the offence of murder in their 20s. You would have no idea. It was a completely different person. They've been out of jail for 35 or 40 years. They could be your next-door neighbour.

Now, in this instance, when it comes to the bill, could it be that such a person who has changed their life and would ordinarily be under the record suspension or pardon stream, was subjected to a miscarriage of justice in the sense that this person has that offence on their criminal record or is still doing time for that offence by virtue of the fact that they're under the jurisdiction of the Corrections and Conditional Release Act?

● (1625)

Ms. Julie Besner: I think that all I can add to that is that currently, and I would imagine in the future, as part of the screening process, it would have to be determined whether what's being sought here in an application for a miscarriage of justice review is the proper avenue for the individual to pursue, whereas under the public safety umbrella, as I described, the Corrections and Conditional Release Act, I think, includes the record suspension regime.

Currently, sometimes people are diverted to the other stream if that's really the avenue they should be pursuing, depending on the circumstances, and that's at the initial screening at intake. I think that will continue to happen with the commission.

Mr. Frank Caputo: Perhaps I'll try to be more direct.

We heard evidence at committee from a witness who said that somebody in that situation should be able to apply to the commission for a review of their conviction or their sentence based on subsequent behaviour.

Could that be encompassed by the wording we have here?

Ms. Julie Besner: I don't believe it could be, on that short description you provided. There are admissibility criteria. They are actually in the provision being discussed right now. They have to do with the type of finding or verdict the court entered and then whether the individual exhausted their rights of appeal. There would be other information that the commission would request in the application form in order to do an initial screening of the application.

I think it's a separate stream when it appears obvious on its face that the conviction is reliable, that it's just a rehabilitative situation and that they're looking for some kind of reprieve from the effects of their sentence and conviction. I don't think that would be this stream, if I understood your question clearly.

Mr. Frank Caputo: Thank you. I think you've answered it.

An error of law is obviously a miscarriage of justice. If an error of law is committed and there is an appeal, presumably it would have been found by the appellate court. Is that correct? Is there a situation in which an error of law occurred, an appeal occurred, the appeal court got it wrong, and then 30 years later they had a chance to revisit it?

Ms. Julie Besner: It depends. In the statute we have, in the considerations, is there a new matter of significance that was not previously considered by the court? A new matter of significance can be new information or new evidence. That is sometimes one of the first indicators. If there's something new and it wasn't previously considered, it may call into question the reliability of the verdict.

To distinguish between evidence and an error of law, which you launched your question by saying, there are circumstances in which the law evolves and the legal society becomes more informed of how the law should be applied in the present day. Evolution in the law is something that could be looked at.

Mr. Frank Caputo: I'm glad you said that, because—this is going to sound totally nerdy—I remember my first-year criminology class in, I believe, 1997 or 1998 at Douglas College. Mr. Garrison may have taught criminology, actually, so it's a shout-out to Douglas.

I still remember my first-year instructor. [*Inaudible*], Paquette, Logan, Vaillancourt and Rodney are the five cases that talk about intent to kill and whether you need subjective foresight, objective foresight and all that other stuff. It used to be, pre-charter, that a person did not, I believe, need to have any foresight to kill in order to be convicted of murder. The big case that changed that was Vaillancourt. I'm going back, so please nobody quote me on this, but there had to be some sort of objective foresight.

I'll give a classic example. Two people have the common intention to rob a bank, and they go in there. Person A and person B both have firearms. Person A commits the offence of murder, but Person B is liable for constructive murder, which I believe is the term that was used. A person convicted of that in, say, 1980 at 21 years old is now in their sixties or seventies and out of jail or not out of jail. That person would not be convicted today on that.

Is there a mechanism by which that person could go to a court of appeal right now to have the conviction quashed based on the change in the law?

● (1630)

Ms. Julie Besner: I'm aware that there are fresh evidence applications that are made routinely to the court of appeal, even if it's beyond the time within which to normally file an appeal with leave—

Mr. Frank Caputo: Yes, of course.

Ms. Julie Besner: —so it would depend on the evidence. I really can't get into big hypotheticals and put that kind of information on the parliamentary record as to if that particular scenario you describe would fit the bill, you know—not this bill, but fit the description. I'm sorry if I—

Mr. Frank Caputo: No, that's fine.

Ms. Julie Besner: I can't engage too deeply into....

Mr. Frank Caputo: No, that's fine. I've actually wondered about this for quite some time.

This wouldn't be a fresh evidence application. It's “the record says” that this person had no intention to kill. They were convicted of murder based on the law in 1981, say, and the law in 2023 would never have convicted them of murder. They potentially would have been convicted for manslaughter.

If that's the case, is there a mechanism by which the person who would have been convicted for manslaughter now, but was convicted for murder then, can go to the court of appeal, or would they need to avail themselves of this type of—

Mr. James Maloney: On a point of order, Madam Chair—

The Chair: Go ahead, Mr. Maloney.

Mr. James Maloney: —I respect Mr. Caputo's experience in criminal law and I'm grateful for the fact that he's probably the first Conservative since we started reviewing this bill who's remotely close to the subject matter—

Some hon. members: Oh, oh!

Mr. James Maloney: —but he has strayed far afield and he's now talking about things that don't have even a tenuous connection to this draft piece of legislation. I would ask that you request that he move on or get back to focusing on the actual language of the bill itself.

Thank you.

Mr. Frank Caputo: Can I reply, please, Chair?

The Chair: No. Mr. Maloney is quite correct.

Mr. Frank Caputo: With all due respect—

The Chair: Maybe there's other legislation or there are other committees on public safety to talk about parole boards and so on that you probably, you know.... But please—

Mr. Frank Caputo: With all due respect, is it not relevant if somebody who committed a crime in 1980 should have that crime revisited today by a commission for a wrongful conviction, based on the fact that they wouldn't have been convicted today? Do I have that correct?

Mr. James Maloney: That's not what you asked.

Mr. Frank Caputo: That's exactly where I was going. That's exactly what I asked, with all due respect. That's what I was saying.

Is that it? Is that not relevant?

The Chair: I think I'm going to allow a bit of leniency, but I'm also going to be cognizant of Ms. Besner's time and also her expertise and what she is actually here to give.

Ms. Besner, if you're receiving a question that you feel is not within the confines of this legislation, please feel free to let us know that, because there are questions being raised that I believe are not in the confines of the legislation. We certainly don't expect all our witnesses to be experts in everything to do with the law, because I don't think that's fair or reasonable or appropriate.

Ms. Julie Besner: The term that is used in this bill—“new matter of significance”—can include new information, new evidence, new law. New law can be a new matter of significance that could call into question the reliability of a verdict.

● (1635)

Mr. Frank Caputo: Okay. Thank you. That's exactly where I was going.

If we want to expand on the relevance here right now, I'll actually bring it full circle, and that's to say this. Somebody was convicted of an offence in 1980 that would no longer be an offence today or would be a different offence that attracts substantially less liability. Perhaps, on the advice of counsel, that person didn't appeal in 1980 because they were told, “You know what? Look, the judge got it right and you have no hope”, or the person said, “Yup, I did it and I'm not going to appeal.” I think that that's highly relevant and highly germane to what we are dealing with here today.

I've seen conviction situations like this. I think we could probably go through the court of appeal decisions from the 1970s and see people who went into a gas station with the intent to rob, and somebody died. There were a number of cases that were decided on this, and I don't think it's actually wrong for us as parliamentarians to explore whether or not that person appealed, or whether that person, period, will have recourse through this commission, and whether the legislation as it is currently written would apply to give that person recourse.

I see that I've been going for a little while here. I'm not sure if Mr. Van Popta was up next or who was up next.

The Chair: Thank you, Mr. Caputo.

Mr. Garrison, you're up next.

Mr. Randall Garrison: Thank you, Madam Chair.

I would like to start by thanking Ms. Besner for her comments on my amendment.

All I would say is that it was drafted as a parallel exemption, as was advised by the Canadian Bar Association when they were here. There is no intention for that exception to affect the existing exemption in the bill.

What I'm going to say now has to do with something I believe is in order. I'm anticipating objections. I'm going to talk about why we should deal with this amendment before us today, and the other amendments, expeditiously.

The chair has provided us with an additional amount of time, which should be sufficient for us to deal with this small number of amendments. I'd like to remind people that we're dealing with a bill that all parties supported in principle at second reading and a bill that all parties had the opportunity to introduce amendments to if they had concerns about those sections.

I want to address two things here. One is that Mr. Moore continually says there is a robust process.

I'm at risk of being a little repetitious, but the process we have in place now is not robust. Since 2002, the minister has recommended only 20 cases for reconsideration by the courts as a result of the existing process. None of those were cases affecting women. Only one of those cases was an indigenous person, and one was a Black person.

I laid out those three categories because those are precisely the groups that are most overrepresented in our corrections system. They are also the groups, because of their marginalization, that have been the most likely to suffer miscarriages of justice. The existing system is not in fact robust, and it appears to be excluding from consideration applications from those who are most likely to need that consideration.

My second point is that we're in a minority Parliament. The Conservative Party tonight has said clearly that it's their intention to force this bill's consideration into the spring. What that means is that we'll be back in this committee in February dealing with this same bill, with the same limited number of amendments. It means that this is unlikely to get back into the House before March at the very earliest.

We're in a minority Parliament, which could end at any time. We have had years of work done on this bill. Certainly I have personally been working on it, as a member of Parliament, for the last five years. I know that the former minister of justice, Mr. Lametti, worked very closely on this issue. We've had a broad consideration of these issues by very respected experts.

What I want to do right now is read into the record four letters I have from people who have been observing this clause-by-clause consideration process. I won't read them all in their entirety, but I think they're very important. They have a common theme, and that is the concern that the years of work that has been done on the creation of a new commission will be lost in this minority Parliament if this filibuster continues.

The first is from Innocence Canada's co-president, Ron Dalton, and James Lockyer, a member of the board of directors of Innocence Canada. This letter has gone to the committee, but I'm reading it into the record tonight with their permission. The way that the House of Commons grinds, it would be another day before this would be officially distributed to members and there's obviously some urgency here.

The first letter is from Innocence Canada. It reads::

> All of us at Innocence Canada are extremely troubled by the events at the meetings of the House of Commons Standing Committee on Justice and Human Rights last week and this week at which certain members of the committee have been filibustering clause by clause...consideration of Bill C-40.
>
> It is essential that Bill C-40 be allowed to go to third reading in this Session. Tomorrow's meeting of the Justice Committee—

This was dated yesterday.

> —is the last chance for this to happen.
>
> Bill C-40, creating an independent Miscarriage of Justice Review Commission to review wrongful convictions, constitutes an immense improvement to our justice system which is why we at Innocence Canada have been urging its passage for 31 years. There are women and men in our prisons for crimes they did not commit,—

● (1640)

Mrs. Rachael Thomas: I have a point of order.

The Chair: Go ahead, Mrs. Thomas.

Mrs. Rachael Thomas: Thank you, Chair.

Chair, as the honourable member previously pointed out with regard to my colleague, his comments are currently not pertinent to the amendment that's being discussed.

I would ask, through you, Chair, that you insist that comments be restricted to the amendment that is currently a part of our conversation.

The Chair: Thank you, Mrs. Thomas.

Of course, we do need to go back to the clause.

I'm going to allow a bit of leniency with Mr. Garrison. He hasn't had a lot of chances to speak in the last *x* number of hours that we've been sitting, and I think it's fair to speak to his amendment that he has put forth.

Mr. Randall Garrison: Madam Chair, that's why I said at the beginning that what I'm speaking to is relevant. I'm talking about why we need to deal with this amendment and deal with this clause in order to get this bill through Parliament, so I believe it is directly relevant.

Let me just skip to the last sentence here of the Innocence Project letter. It says:

> To all those on the Committee, please deal with the Bill's provisions and vote on them tomorrow and thereby fulfil your important duties as members of Parliament and members of the Justice Committee.

I'll read an excerpt from a second letter. This is from the Innocence Project at the Peter Allard School of Law at the University of British Columbia, again dated yesterday:

> After listening to the House of Commons Standing Committee on Justice and Human Rights...hearings on Bill C-40, I write to express my deep concern that members of the Committee are about to unravel the hard work of so many people over the past few years. Politicians, advocates, lawyers, law students, and more importantly, the wrongly convicted and their families, have all participated in consultations, attended meetings, and drafted detailed submissions in an effort to see miscarriages of justice remedied in a more efficient, more informed, and impartial manner. In the interests of justice, I urge the Committee members to pass at least Bill C-40 before the House rises for the winter.

I won't read the entire letter.

My third letter is from a group that appeared as witnesses before the committee, and that's the Canadian Association of Elizabeth Fry Societies. They wrote:

> We write today to urge you to pass Bill C-40 before the House rises. Through this letter we want to share the real and saddening consequences of witnessing intentional delays to the clause by clause reading of this committee's study of Bill C-40, and to thank members of the committee who are voicing support for the meaningful and immediate consideration of this legislation.

I'll skip a bit of this letter.

> For everyone who has been watching every minute of these hearings, from organizations such as ours who support wrongfully convicted people, to impacted people themselves and their families, and to the many others who care about Canada's approach to this issue, it has been deeply troubling to watch three full committee meetings proceed without movement. With the start of each meeting, we have watched, hopeful that members will act in good faith and put forward genuine consideration of the Bill.

The last letter comes from someone who was a witness at one of our recent meetings. Professor Kathryn Campbell is from the Department of Criminology at the University of Ottawa and is also associated with the Innocence Project Ottawa. She says, and again I'll read just a portion of it:

> I wanted to express my opinion to you as I was deeply disturbed to hear that the Leader of the Conservative Party plans to shut down Parliament and not let legislation pass before you rise for winter break. I understand this could ultimately derail the passing of Bill C-40, which would establish an independent commission to address wrongful convictions in this country. I object strongly to this tactic, as it could in due course, have an impact on whether this very important bill passes to law.

I'm going to just skip to the last part:

> Given the enormous amount of time and effort that has gone into developing this Bill, the many consultations both before and after it was introduced in Parliament and the fact that the Conservative Party has supported the Bill in second reading, delaying at this point represents a very significant lost opportunity.

Madam Chair, I believe we've had a full and extensive discussion of the amendment before us. I would urge members of this committee to take advantage of the extra time you've granted to raise their concerns as we move through this bill this evening. Really, as these four letters are just a sample of the reaction from those in the legal community and particularly from the miscarriage of justice community about what they've seen in this committee, I think we risk bringing our committee and our Parliament into disrespect if we do not deal with this expeditiously.

Thank you, Madam Chair.

● (1645)

The Chair: Mr. Van Popta, you're on the list.

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

I have a question for Mr. Housefather about his LIB-1. I know we're talking about NDP-1, but the two are so interrelated that I think they need to be discussed together. I'm asking for some leeway there.

I don't know if Mr. Housefather.... Oh, he's still on the screen.

When I saw LIB-1, I was not surprised, because this is what we heard Mr. Housefather say. I think it was at the November 23 meeting, when Mr. John Curtis was with us.

This is the question Mr. Housefather put to him:

> The thing that I'm the most worried about in the legislation is the fact that you need to exhaust the appeals process. I'm very concerned that the defendants we're looking at—indigenous, Black, and marginalized people—are the least likely to have the financial resources and the least likely to have the ability to pay high-value lawyers to give them advice to continue appealing.
>
> Can I get an understanding of what, in the U.K., is allowed in terms of the commission's discretion to circumvent the exhaustion of appeals?

I thought that was a fair question, and Mr. Curtis gave the answer. I won't bother reading it into the record. Do you remember when we heard Mr. Housefather put that question? I thought to myself, “Isn't the problem that there isn't enough legal aid at the trial level? Is Mr. Housefather advocating an alternative system, one in which the person who has been convicted doesn't have to pay because there are financial resources being made available?”

In my reading and in preparing for this study, I came across a U.K. case. I think it's the one that Mr. Curtis was referring to, although he did not give the citation. I want to read a paragraph from that case. The case is called.... It's a criminal conviction review regarding the Pearson case. It was a judicial review application of an unfavourable decision by the commission. I'm reading from paragraph 8, about halfway through.

This is what Lord Chief Justice Bingham said:

> The main protection of the citizen accused of serious crime is, however, to be found in our system of trial by judge and jury. This system is so familiar as to require no description. But we draw attention to two characteristic features of jury trial germane to this application. First, the procedure is adversarial. There is no duty on the trial judge, as in an inquisitorial proceeding, to investigate what defences might, if pursued, be open to a defendant, nor to interrogate or call witnesses. It is the function of the judge to direct the jury on the relevant law and to summarise (perhaps very briefly) the evidence, and to define the issues raised by the prosecution and the defence, including any possible defence disclosed by the evidence even if not relied on by the defendant. The judge need not, and should not, go further. Secondly, the decision on the defendant's guilt is made following a trial, continuous from day to day, by a jury assembled only for that trial, with no responsibility for the proceedings before the trial begins or after it ends. Thus the decision-making tribunal must reach its decision on the argument and evidence deployed before it at a final, once-for-all, trial.

I read that into the record because we're all lawyers in this room. At least, I think most of us are. We recognize that the common law tradition of trial is an adversarial system. It's not an inquisitorial system. It sounds as though Mr. Housefather's concern—I understand it's genuine—is that some people are not getting a fair trial in that adversarial system, because they can't afford a good lawyer. The problem is that....

There should be more legal aid so that people can get a fair trial; it's not to have a commission fix all the mistakes that the trial judge made because the person couldn't afford a proper trial. I think the answer is to make sure the trial is a better trial.

● (1650)

I want to add this: The commission, according to this new legislation, is going to have investigative powers. Maybe Mr. Housefather is more comfortable with that, rather than an adversarial system—that is, having an inquisitorial system, like in continental Europe, where the judge gets involved in introducing evidence and is part of the investigation team. That sounds like where the commission is going, and I wonder if that's what Mr. Housefather is imagining the commission is going to be.

I would add one other thing. We're talking about whether or not the whole appeal process should be exhausted. We had Mr. Virani here. I don't know if it was the same day or.... Anyway, it was last month. I asked him a question about whether the floodgates would open with this new commission and the new mechanisms.

He said:

> I think there are built-in factors to avoid them getting all the way through the floodgates. You still need to meet the threshold criteria. You need to have exhausted your appeals, at least to a court of appeal or, in some instances, all the way to the Supreme Court of Canada.

I have two questions for Mr. Housefather, if he wouldn't mind answering them.

Number one—

The Chair: I'll let you ask them, but I don't believe I'm going to let him respond until such time—if and when—we get to his amendment. We're not dealing with his amendment yet.

Mr. Tako Van Popta: The problem I have with that, Madam Chair....

The Chair: That's a fair point.

Yes, you can ask, because it's a line conflict and we need to make a choice between the two.

Mr. Tako Van Popta: It's one or the other, or neither. It can't be both.

My question, then, to Mr. Housefather is twofold.

Does he disagree with the Attorney General, who says that all appeals must be exhausted? It sounds like his amendment would go contrary to that. Number two, how expansive does he think this commission will be, and will it replace the adversarial system we're so accustomed to?

Thank you.

The Chair: Were those all of your questions?

Mr. Tako Van Popta: Those are my questions, yes.

The Chair: Okay.

Go ahead, Mr. Housefather. Again, this is seeking clarification. I'm told that's quite okay, but it depends on timing. It's simply to answer the questions, if you're able to.

Mr. Anthony Housefather: Madam Chair, I'm not going to join the Conservative filibuster. I'm not going to be used to add to the time they take up to avoid the question coming to a vote.

In terms of my comments, I'll repeat that I believe the exact same criteria should apply to a case that was not appealed to the court of appeal, as is already in the legislation for a case that was not appealed to the Supreme Court because the poorest and most vulnerable are the ones who wouldn't have the means or the legal help to appeal. My amendment simply creates exactly the same criteria for a non-appeal to a court of appeal as what exists in the legislation for a non-appeal to the Supreme Court.

Thank you, Madam Chair.

● (1655)

The Chair: Thank you, Mr. Housefather.

[*Translation*]

Go ahead, Ms. Michaud.

Ms. Kristina Michaud: Thank you, Madam Chair.

I just wanted to jump into the debate briefly to say that the Bloc Québécois is in favour of Bill C-40, as well as the important amendment proposed by the NDP.

I think our witnesses were able to answer most of the outstanding questions about the meaning of the amendment. If no one else has any questions, I propose we vote, so that we can continue clause-by-clause consideration of this very important bill.

Mr. Garrison read letters to the committee from a number of stakeholders who were eager to see Bill C-40, an extremely important piece of legislation, passed. Out of respect for those people, we should do the work we have been entrusted to do.

Thank you.

[*English*]

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

[*Translation*]

The Chair: Thank you, Ms. Michaud.

[*English*]

Mr. Moore, you're next in line, so go ahead.

Were you not able to...? Was there no translation?

Hon. Rob Moore: What I'm saying is different from the point of order. I'm not able to get translation. It cut out while Ms. Michaud was speaking, so I didn't catch what she said.

The Chair: Apparently they weren't able to listen to it. He said it's on the wrong channel. Do you mind checking that?

Mr. Garrison was able to hear it and Mr. Van Popta was able to hear it.

Oh, you were not able to hear either? Okay.

[*Translation*]

Did you have something to add, Ms. Michaud?

It doesn't look like it. All right. Thank you.

[*English*]

Mr. Moore, did you want to speak? You don't have to.

Hon. Rob Moore: No, I want to.

The Chair: I mean, you've spoken. That's why I'm asking.

Hon. Rob Moore: I have a number of questions and comments on NDP-1 as well as LIB-1, since we're dealing with them both at the same time.

The first thing I want to point out.... There may be someone on the government side who can speak to this if they want to, but the government, in its wisdom—Mr. Virani was here not long ago on Bill C-40—elected to have a requirement that a person had to have appealed their decision. NDP-1 and LIB-1 both do away with that that requirement. It's no longer a requirement to have appealed your decision.

That's a fundamental change in the bill as it was received by this committee a short time ago and as it was presented to this committee by the Minister of Justice. It's a fundamental change because, in one instance, an individual would have been convicted at trial and then would have appealed their decision and then, presumably having had their conviction upheld, would then avail themselves of of the commission. That would be the bill as proposed. The bill as amended, should NDP-1 or LIB-1 be successful, would eliminate the requirement for an individual to have appealed the decision.

I guess my question, Ms. Besner, is if the department has done an analysis of the international situation.... We had testimony here from the U.K. and from North Carolina. It was interesting. North Carolina is the only state in the U.S. that has a commission like this. Of all the many states, there's only one that has this commission.

It was interesting to hear from an individual from that commission, who gave testimony that “factual innocence” was the bar by which somebody could avail themselves of the commission. There has to be a finding of factual innocence. There's quite a high bar of entry to the commission. One of the bars of entry in our system, as proposed by Bill C-40, is that an individual has to have appealed their decision. That's showing some degree of faith in our system.

I have to agree with what Mr. Van Popta said. We're trying to address, certainly from my perspective, issues around someone who is innocent, someone who was convicted of a crime they did not commit. That shouldn't happen in any country. It shouldn't happen in Canada that someone can be convicted of a crime they didn't commit. However, being human, we fail. Everyone can get it wrong within the system. The police could get it wrong, the prosecutor could get it wrong or the judge could get it wrong, because we're all human. Therefore, when new evidence arises that an individual did not commit the offence, that they were wrongfully convicted, as has happened in many high-profile cases in Canada, there's a process in our country whereby individuals avail themselves of relief.

My question is on the international experience. When the department drafted this legislation and provided advice to the minister, and the minister presented the legislation to us, the minister chose—the government chose—to maintain a requirement that an individual would have appealed the decision. These two amendments fundamentally alter that.

● (1700)

If you don't know, that's fine, but I want to ask this: Has there been a comparison with any international peers on this requirement that an individual has to have appealed?

The Chair: Thank you, Mr. Moore.

Ms. Besner, do you have an answer to that?

Ms. Julie Besner: We're aware that in the U.K., they have a provision in their statute whereby the commission can make exceptions. It's a very short provision. I don't have it with me, so I can't read from it, but it's that exceptions can be made.

I wanted to point out that currently the Criminal Code does require that appeals be exhausted. When I was here with the minister on October 31, I think I might have explained that the way Bill C-40 sets out the exceptions and the considerations is a codification of the relevant law that explains how it's to be considered and applied. In the past, there was some confusion as to what it could include and could not include, so the approach was to just clarify. That is there in Bill C-40 as a list of considerations for whether exceptions can be made for the Supreme Court level.

I would add one more piece of information for the committee. In subsection 3(a) of the provision we're looking at here, it says:

> the court of appeal has not rendered a final judgment on appeal of the finding or verdict;

Those terms are lifted from other parts of the code, and it's for drafting reasons that they were used, but I wanted to share with the committee that in the case law, in a decision called "Alvin", the courts have clarified that if an applicant on an appeal has requested an extension to a file, has requested an appeal and been denied or has filed for leave to appeal and has been denied, that constitutes a final decision of the court of appeal.

It doesn't mean final judgment, when there was actually an appeal heard and a decision rendered on the merits of the appeal itself. It's just that the person attempted to seek an appeal and was unsuccessful.

● (1705)

The Chair: Thank you.

Hon. Rob Moore: Thank you for your answer.

This ties into these amendments, because we have to look at other countries and how they handle their commissions. That's why we had witnesses from the U.K. as well as from North Carolina.

The U.K. Criminal Cases Review Commission website, under "Our powers and practices", says:

> Our legal powers mean that we can often identify important evidence that would be impossible for others to find.
>
> We can also interview new witnesses and re-interview the original ones. If necessary, we can arrange for new expert evidence such as psychological reports and DNA testing.
>
> We look into all cases thoroughly, independently, and objectively but the legal rules that govern the work of the Commission means that we can only refer a case if we find that there is a "real possibility"

—and this gets to the crux of my point—

> that an appeal court would quash the conviction or, in the case of an appeal against sentence, change the sentence in question.

That real possibility already puts our system.... The test that's being proposed in Bill C-40 is that a miscarriage or justice may have occurred. "May have occurred" is an incredibly low bar.

Of course a miscarriage of justice may have occurred in a case, but we have to aspire to something more than the absolute floor. To suggest that someone can avail themselves of a commission, a new commission.... I'm hoping nobody in this room would want to create a parallel justice system or clog up our courts with cases that shouldn't be before them, cases that have already been dealt with. If you've been convicted of a crime and you've appealed your sentence, or not, and you have a chance to have that sentence overturned, why wouldn't you take it?

I should mention that even with this higher threshold in the United Kingdom, when this commission was opened up, they saw a rush of individuals who sought to have their convictions overturned. They have set a standard. We brought them forward as witnesses, but our standard is far lower. The effect of amendments NDP-1 and LIB-1 would be to further lower the threshold whereby someone could avail themselves of this commission.

They say the following:

> We can only refer a case if we find that there is a "real possibility" that an appeal court would quash the conviction or, in the case of an appeal against sentence, change the sentence in question.
>
> The CCRC is a prescribed body under the legislation dealing with the making of public interest disclosures (whistleblowing). This means that, quite apart from our statutory responsibility to deal with the applications we receive, we are the body to which individuals can report concerns of actual or potential miscarriages of justice.

What it takes to refer a case for appeal is new information plus a real possibility. Neither of those things is a requirement under the existing Bill C-40, let alone if we were to adopt amendment NDP-1 or LIB-1. Neither new information nor a real possibility is a requirement that would bar someone from availing themselves of this commission, using up the commission's time and perhaps clogging up the justice system when the commission doesn't even have to believe that there is a real possibility that a miscarriage of justice has occurred or that there's a real possibility of an appeal court overturning a conviction.

● (1710)

It's a two-part test, as we've heard. It introduces what I think is a very reasonable test: One, is there a real possibility that a miscarriage of justice occurred? If you accept that, two, is there a real possibility that an appeal court would change the sentence? What they're trying to do there is ensure they're dealing with cases that, based on the evidence before them, number one, they believe involved a miscarriage of justice, and number two, based on the evidence they have, that there's a real possibility of an appeal court overturning a conviction or not offering a conviction when there has already been one.

They go on to say, "We must be able to show the appeal court" some "new" information—again, that's not a requirement of BillC-40—"that was not used at the time of the conviction, or first appeal, and that might have changed the outcome of the case if the jury had known about it." They say that it will not be of any use to simply apply "to the CCRC...saying the jury" got it "wrong" when they chose "to believe the prosecution case instead of the defence, unless there is "convincing new information to support that idea."

I want to narrow in on that: It will not be of any use to simply apply to the CCRC saying that the jury got it wrong when they chose to believe the prosecution case instead of the defence. That's how our system works. Unlike what was in place for some of the wrongful convictions that are most famous in this country, we now have the Charter of Rights. We now have an improved legal aid system. We have a justice system that affords incredible rights to those who have been charged.

We've heard testimony on other pieces of legislation, like Bill C-5 and others. The fallout on Bill C-75 said that there are individuals who are being let out who should be in jail, or there are people who are not getting convictions who should get convictions. We've heard from victims saying that we don't have a justice system—we have a legal system. The cards are often stacked against victims in this country, and that's what's lost in some of this debate.

I have to refer back to the U.K. system. Their commission is one that we've chosen to take a strong look at. Simply saying, "I didn't get a fair shake" or "I don't agree", or "The jury got it wrong", or "The judge got it wrong and I'm actually innocent", is not good enough to avail yourself of the commission.

What they go on to say is that for them:

> To refer a case for appeal, we must think the new information is convincing enough that it raises a 'real possibility' that the appeal court will overturn the conviction. If we refer a sentence for appeal [we must be convinced that there's] a 'real possibility' that the court will reduce the sentence.

This goes to something that Mr. Caputo raised about changes in sentencing guidelines for individuals who were convicted of an offence in the past that would not be the same level of offence now. They can, in the U.K., avail themselves of a reduction in their sentence, but the commission has to be convinced that there's a real possibility the court will reduce the sentence.

Madam Chair, they go on to say, "Most people apply to the [commission] because of convictions or sentences they have received in a Crown Court." They go on to reiterate that standard of, first, "new information", and, second, "a 'real possibility'".

I go back to the bill, Bill C-40, that was presented to us by Minister Virani.

Number one, does Bill C-40 say there has to be a real possibility that a wrongful conviction occurred, or a miscarriage? No. Bill C-40 says that it "may have occurred". Even under our current legislation, which the minister currently exercises control over, there's a higher standard than "may have occurred". Of course, it would be impossible to have a lower standard than "may have occurred", so one thing I took some comfort in with Bill C-40 when it was originally presented is that there was this requirement that an individual would have at least availed themselves of an appeal.

● (1715)

Madam Chair, there's a tremendous amount of noise on the other side there.

Mr. James Maloney: I'm listening.

Hon. Rob Moore: I know you're listening, but it's not fair to you when your colleagues are talking. I know you want to hear everything I'm saying.

An hon. member: Put on your earphones.

An hon. member: Sorry, but I didn't hear that.

An hon. member: If you just [*Inaudible—Editor*]

The Chair: Excuse me, everybody. I think Mr. Moore has the floor.

As much as we can, we'll....

I have the earphones, because for whatever reason I am finding it difficult to hear anybody. Maybe it's because there's so much repetitiveness.

Although I'm doing my utmost best, I do have the earphones and I have them on pretty high.

Mr. Moore, please continue.

Mr. Stéphane Lauzon: I have a point of order, Madam Chair.

The Chair: Go ahead, Mr. Lauzon.

[*Translation*]

Mr. Stéphane Lauzon: Madam Chair, I was speaking with a fellow member, and we were wondering whether we needed to keep the witnesses here while this filibuster was going on. We know full well it's going to go on and on and on. I don't think this is an appropriate way to treat the witnesses who are with us today. This is appalling.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): I want to add that the witnesses may want to stretch their legs or go to the washroom. They are signalling that they do.

The members should think about them as well. This is the third time this has happened.

The Chair: All right. Thank you.

[*English*]

We will suspend for a few minutes to allow people to use the washrooms and grab something to eat.

Thank you very much.

● (1715)

_____(Pause)_____

● (1725)

The Chair: All right. Thank you very much, Mr. Moore.

We'll continue with your questions. Do you have questions still, or do you have more to say?

The Clerk of the Committee (Mr. Jean-François Lafleur): Do the witnesses want time, Madam Chair, to finish their meal?

The Chair: I'm not sure if Mr. Moore has any....

Hon. Rob Moore: Thank you, Madam Chair.

I was talking about the U.K. system and their standard as it relates to NDP-1 and LIB-1—that “real possibility” standard. This is seen as a lower bar than Canada's current threshold.

If I were to ask everyone around whether they know what Canada's current threshold is, I don't know if they would know. However, the current threshold requires this: “a conclusion that a miscarriage of justice 'likely occurred.'”

Within our system—and this ties into NDP-1 and LIB-1—we have “beyond a reasonable doubt”. That's the highest standard that we use. That is the standard by which someone needs to be convicted; it has to be “beyond a reasonable doubt” that they committed the offence. It can't be that the person might have done it, that there's a good possibility that the person did it, or that on the balance of probability, fifty-fifty, we think he did it. That's not the standard that we use in Canada. The standard that we use for conviction is “beyond a reasonable doubt”.

A lower standard, applied in civil cases and some other cases, is on a balance of probabilities. That means you weigh the scales and you say that it's more likely scenario A than scenario B. That is a balance of probabilities.

The Canadian standard right now under wrongful conviction—the current law—“requires a conclusion that a miscarriage of justice 'likely occurred.'”

When you consider these different standards, Madam Chair, that's a fairly high bar, to say that it “likely occurred”. The minister has to feel that there was a miscarriage of justice. It's not that there “may have been” and it's not that there's a “real possibility”; this is a somewhat higher standard. It's not as high as the Criminal Code standard of “beyond a reasonable doubt”, but it's that it “likely occurred”.

The U.K. standard is that there's a “'real possibility' that a conviction would not be upheld”. “Real possibility” is a far lower standard than our current standard of “likely occurred”. This different standard helps to explain a much higher volume of cases that are successful in the CCRC—that's the Criminal Cases Review Commission of the United Kingdom—versus those in Canada's criminal conviction review process.

We're talking about—depending on how many we're counting—a minimum of three standards here. One is our current standard that “a miscarriage of justice 'likely occurred.'” The other is the U.K. standard that there's a “real possibility” that a miscarriage of justice occurred, and then there's the new standard in Bill C-40. The new standard in Bill C-40 is “that a miscarriage of justice may have occurred”.

That's why, Madam Chair, I have real concerns about reconciling NDP-1 and LIB-1 and explaining how this wouldn't open up an absolute tsunami of applications. This is a very subjective test, and depending on how the commission chooses to operate, we could have a ridiculous volume of frivolous cases with that standard.

● (1730)

I'm not suggesting, necessarily, that the current standard is the appropriate one. The current standard is that it “likely occurred”, which I take to mean that the minister feels there's at least a 51% chance that there was a miscarriage of justice. To me, the U.K. standard is more reasonable. That's why later on, once we've dealt with NDP-1 and LIB-1—I'm not speaking to it now, but later on—you'll hear us move a Conservative amendment that would change that standard from “may have” occurred to the U.K. standard of “likely” occurred. I think that's completely reasonable. I think that will protect this commission and protect Canadians' perception of our justice system.

I was looking at some polling. I'd encourage all members to look at the polling on how Canadians feel about our justice system. It's pretty dismal. Canadians are really concerned about our system of justice in Canada. A top concern is that the rights of victims are protected and that the individuals who should be behind bars are in fact behind bars. We have to be very careful. In Bill C-40 we have to get it right. At the outset, when I speak to NDP-1, it ties in directly to this standard that a miscarriage of justice “may” have occurred.

Following on the idea of the CCRC, the U.K. commission, the idea of a Canadian CCRC obviously has significant support among experts and stakeholders. Some people argue that it's potentially too costly. Canada has a low number of identified wrongful convictions. You could take that to mean a couple of different things. You could say that we're not finding enough wrongful convictions; you could also say that our system of justice is effective at preventing wrongful convictions. I mentioned some of the safeguards we have in place.

I think it was the individual whom Mr. Caputo had recommended as a witness—a former associate of his who spoke very highly of Mr. Caputo—who brought to the attention of the committee some very interesting testimony.

What was his name?

An hon. member: Was it Mr. Wiberg?

Hon. Rob Moore: Yes. He had some very interesting testimony.

He was reminding committee members that the landscape around our system of justice has changed remarkably since some of the more high-profile cases around wrongful convictions in this country. There's been the coming into effect of the charter, of legal aid and of DNA evidence. DNA evidence didn't exist at the time of some of these wrongful convictions. DNA evidence can be used to convict and DNA evidence can be used to exonerate.

I need to speak about the North Carolina experience. I wouldn't want anyone to be under any illusion that what's being proposed here is in any way in sync with what North Carolina has done once we've heard that testimony.

North Carolina requires evidence of factual innocence. I asked the witness from North Carolina why they came up with that standard. She said it was the standard that they found would be acceptable to the people in North Carolina. From talking with my constituents about the justice system, which I do, and hearing from other members of Parliament from all parties on what they hear from their constituents, I have to believe that Canadians' expectations around wrongful conviction more closely mirror what North Carolina has proposed versus what is being proposed in Bill C-40, should it be broadened—that is, if there is new evidence to suggest that it is likely that someone who was convicted of an offence was innocent, every single one of us should want that person to be completely exonerated if that person is found, through DNA evidence or other evidence, to have been wrongfully convicted of a crime they didn't commit.

● (1735)

You will remember the case of O.J. Simpson. He immediately said that he would go out and look for the person who actually committed the crime. Well, most people thought they had the person who had committed the crime the first time. That's the kind of response there should be when there is a wrongful conviction found within our system. It should be that strong; Canadians should say, “We need to find the person who really did this.” That is not the standard in Bill C-40.

Why do I mention that? Bill C-40 is tenuous enough, with the.... I would say we need to have a robust system, obviously, for individuals who have been wrongfully convicted. We have a system now. The Minister of Justice is ultimately responsible for that system. We have a threshold now that says, “a miscarriage of justice likely occurred”. We could debate around this table whether that is too high a threshold, but I can tell members that if we were to poll our constituents and ask what the standard should be, they would be much more likely to say the bar should be “when there's a real possibility there was a miscarriage of justice” rather than a convicted individual who doesn't appeal their sentence being able to avail themselves of the commission. What standard does the commission apply? Well, there “may” have been a miscarriage of justice. Is it based on new evidence? Not necessarily; it's based on the whims of the commission at that time. This is where we're heading should Bill C-40 be amended and broadened in its scope.

I'm not going to put anyone on the spot. I'll answer my own question. When the minister and the cabinet considered Bill C-40 before it was tabled, and on the advice they would have received from departmental officials.... There is a reason an individual, except under exceptional circumstances, has to appeal the decision. There's a reason inherent in that. There's a reason that this standard is meshed with that requirement. The ultralow standard that a miscarriage of justice “may” have occurred requires the step of having to appeal. To introduce the possibility of not appealing at all calls the low threshold into question even further,.

It's for those reasons I have concerns about NDP-1.

We did a study recently, as a committee, on the federal government's obligations to victims of crime. I think of that study often when I look at other pieces of legislation. That's a lens—I hope we all agree—we should somewhat look through. That's a lens that should always be on our mind when we look at any piece of legislation. Right now, I'm looking at Bill C-40, and specifically NDP-1. I want to look at Bill C-40 and amendment NDP-1 through the lens, at least, of victims of crime. When someone feels they were wrongfully convicted—even though, under this provision, they may have committed the offence—what does a victim of crime say about a process that's going to involve dredging up their concerns and revictimizing them? I don't throw that out lightly. The process revictimizes victims. That's why we need to get this right.

● (1740)

We heard that testimony at this committee. We heard that from victims who have lost loved ones. They have said that having to go to parole hearings, having to know that their daughter has to go to a parole hearing, that when they pass on, their daughter will go to a parole hearing of the individual who murdered their husband.... We heard the testimony that it revictimizes victims. Victims have been through enough, so when we create a system that could amount to a reopening of these very hurtful cases for victims, we'd better be sure that we're dealing with cases that we ought to be dealing with.

That is why.... We have a system of justice. I think it was Mr. Van Popta who rightly mentioned that some of the fixes that people are trying to incorporate into this catch-all may be better placed in other areas—for example, access to justice, legal aid. The question was put to Minister Virani about making sure that vacancies in the system of judges are filled, making sure that people can get a hearing, making sure that there's timely access to justice—there's the old expression of “justice delayed is justice denied”—and all those things.

This commission cannot be a fix-all for everything that's wrong in the justice system; this commission should be about the wrongfully convicted. With NDP-1, I fear that we are steering away from that principle and into an area that I don't think Canadians would be supportive of: the possibility of opening up a parallel justice system, another avenue to avail yourself of when you've been convicted of a crime. You may choose, “Well, I'm not going to appeal my sentence as I'm supposed to do. I'm convicted. I'm not going to appeal. I'm going to try out this new commission.” What's the standard for that commission? I know that within the criminal system, the standard is “beyond a reasonable doubt”. Within this system, the standard is that “a miscarriage...may have occurred”.

I was speaking a bit about victims. I look at the U.K. treatment of victims, and what “The Wrongful Convictions in Canada” paper says—and I think this is instructive for us—is that:

> the CCRC has been criticized for not having objective standards to determine the scope of investigations, with neither a minimum amount of investigation required, nor a logical end point to the open-ended task or proving the absence of error.

The U.K. has its challenges, too, even with its higher standard, but it was clear from the testimony that the U.K. takes that investigative responsibility serious. When it comes to victims, the CCRC says:

> The CCRC will not contact a victim just because we are a looking at a case.

Now listen to what they say next:

> This is because most of the cases we look at are not sent for an appeal.

Why? It's because the standard is that “there is 'a real possibility' that the conviction would not be upheld.” Their standard is not that the conviction may not be upheld; it's that “there is 'a real possibility'”.

The CCRC goes on:

> We know that victims and their families have already had stressful experiences. Finding out their case is under review can make them feel they are having to relive it all again [and] are not believed. We do our best to avoid causing unnecessary distress where we can.

That's the U.K. It's saying that it's not going to put victims through a frivolous.... It's acknowledging that it's not going to hear a lot of the cases, the applications, that come to it because it has a standard. It's saying that it's not going to put victims of crime through this just because someone says, “I didn't get a fair shake. I was wrongfully convicted. I'm going to take a shot at the CCRC.” It's saying that it doesn't even notify the victim right away because it doesn't want to stress out the victim and the victim's family. It knows what this will put them through—to hear that the person who was convicted of maybe murdering a friend or a family member is now going to suggest that they were wrongfully convicted.

The CCRC says:

> If the CCRC decides to send a case for an appeal, we will always try our best to tell the victim or their family.

It also says:

● (1745)

> If a victim or their family feels we have not acted in accordance with our policy they can complain, using our complaints procedure. Our Customer Service Manager will take an independent look at the issue raised.

I haven't heard from the NDP or the Liberals on how they reconcile. If I had seen a two-part amendment, if I had seen an amendment that said we don't want to require appeals but we do agree with having a higher standard, I might want to take a closer look at the amendment, although there's a reason that the justice minister had the requirement of an appeal.

For those reasons, I would urge extreme caution around both NDP-1 and LIB-1. They do not mesh with the full context of the bill, which has an extremely low access point of “a miscarriage of justice may have occurred”.

I think I'll wrap up my remarks for now on NDP-1. I have some questions that I am going to put to our witnesses who are here. I might save that for a bit.

I just wanted to make some comments early on to everyone and to our committee members about the U.K. experience as we deliberate on NDP-1, because what I mentioned was not part of the testimony that we heard; it is through some deeper digging that I had done on the U.K. experience. I find their concern around victims, their rationale behind their higher threshold, and the fact that even with their higher threshold, they were met with an enormous volume of applicants to be incredibly compelling and instructive.

We have to be prepared for that too. We are going to have an enormous volume of applicants. Unless we want to completely ignore the entire U.K. experience—and they have years of experience on this—and unless we want to completely ignore their rationale and their lived experience in having a commission, we are not only going to face an enormous volume of applicants, but we are also going to cause enormous disruption to victims and their families if we don't get Bill C-40 right. If the threshold is too low, this is going to cause enormous hurt to families of individuals who were killed or injured by those who have been through our justice system and have been convicted, having not even appealed that conviction.

I will conclude my remarks on that note on NDP-1 for now.

● (1750)

The Chair: Go ahead, Mr. Caputo.

Mr. Frank Caputo: Thank you, Madam Chair.

I'm going to go through NDP-1 here a bit now. What I see here is that at the outset, it speaks about replacing line 35 on page 2 with the following.... I do this because I sometimes have difficulty placing it unless I read the whole thing together.

It would read:

> For the purposes of subsection 696.4(3), the application must include information indicating whether the person’s rights to appeal the finding or verdict have been exhausted and, if they have not been exhausted, information relevant to any factors that the applicant believes should be taken into account for the purposes of subsection—

As it currently reads, it's:

> ....relevant to the factors referred to in subsection 696.4(4).

Those subsections are under proposed subsection 696.4(4), and I'm looking at page 3 right now. It reads:

> the amount of time that has passed since the final judgment of the court of appeal;

If I understand the NDP amendment, it would remove the requirement to consider these things, but the amount of time that has passed since the judgment until the time of appeal is quite relevant.

Next, it reads:

> the reasons why the finding or verdict was not appealed to the Supreme Court of Canada;

Now, we have heard a fair amount of evidence. We've also heard a number of submissions from members of this committee as to why or why not something may have been appealed to the Supreme Court of Canada, and why or why not something may have been appealed to a provincial court of appeal. Again, I think that it's probably a relevant factor as to why we should be considering whether or not the commission should review the application.

Next, it reads:

> whether it would serve a useful purpose for an application to be made for an extension of the period within which a notice of appeal or a notice of application for leave to appeal, as the case may be, to the Supreme Court of Canada may be served and filed;

This is an interesting point here in proposed paragraph 4(c). The reason I say that is we have talked about legal aid and its lack of funding. Ultimately, the final say on whether a decision is appealed rests with the accused, who is obviously going to be the client. A lawyer can't put forward an appeal if their client does not wish to put forward the appeal.

It's obviously quite relevant. This is interesting to me, because what this is asking is whether it would serve a useful purpose for an application to be made for an extension of a period of time for an appeal when this person is claiming that a miscarriage of justice has occurred. I wonder whether provincial legal aid bodies would look at this provision, take heed of it and say that when they're dealing with something that is a potential miscarriage of justice or an allegation of a miscarriage of justice, they will appoint counsel in order to seek an extension of time to appeal. The mischief that NDP-1 and LIB-1 are addressing, as I understand it, is that some people wouldn't have appealed because they didn't have the means. If I understand it correctly, that's one of the issues.

What if proposed paragraph 4(c) is really an exhortation to say to legal aid in the provinces, "Look, you should be funding these appeals. In that case, seek leave to extend the time to appeal and then seek to appeal"? In that case, we are actually looking at a court of appeal maybe saying that on the basis of the appeal, there is no need to go before the commission.

● (1755)

We have to remember that the court of appeal is the mainstream process. Everybody who's in the room knows that when somebody is unhappy with their decision, they have the right of appeal. That is the main way that things are done.

This is actually quite a revolutionary piece of legislation, when we think about it, because we're establishing a commission. We'll have commissioners appointed by government who don't necessarily, as I recall, need to have a legal background. This is a parallel set of proceedings.

The question of whether a person should have to have exhausted their appeals and whether that should be material, I think, is quite a live issue, especially if the provinces—reflecting on what we've had to say and listening to what Mr. Housefather and Mr. Garrison have had to say about people maybe not having had the ability—ask if the recourse shouldn't first be to the court of appeal. That is the whole point of our system. When you have been aggrieved, when the court below gets it wrong, you go upstairs. That's what we would say, right? You would say that it's time to go upstairs to the court of appeal.

I find that interesting and I wonder whether we should be circumventing the necessity for an appeal. I wonder—I'm just thinking out loud here—whether an amendment could actually be made, and whether there might be.... I'm just trying to think about the cases that relate to the funding of appeals, especially if there's a bona fide potential for a miscarriage. If somebody shows that they have a bona fide case that there "may" have been a miscarriage of justice—not even at a high threshold, because we're not talking about overturning the appeal but only about the appointment of counsel to simply help somebody to appeal—then in that case, I don't think anybody around this table would say, "You suffered what could have been a miscarriage of justice 30 years ago. You did not have the means to appeal it. Therefore, this legislation will not only establish the commission to do it, but it will also establish a mechanism by which you could pursue that in a more streamlined manner."

I'm not sure. I'm not going to ask the experts to comment on it because I know that's not an easy thing to do, given that my thoughts on this are still coming together, but—

● (1800)

Mr. Randall Garrison: I have a point of order, Madam Chair.

In light of some of the comments that Mr. Caputo has made, I believe there may be an error in drafting my amendment. I would like to withdraw my amendment in favour of LIB-1.

The Chair: Okay. Thank you.

An hon. member: That's amazing.

The Chair: Okay. I take it that everybody agrees to the withdrawal of the amendment. I guess that's what I'm hearing.

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

The Chair: Go ahead.

Hon. Rob Moore: Just for clarification, if Mr. Garrison, once the amendment is moved, it becomes the committee's, I think. We would have to agree to then withdraw it.

The Chair: Yes. That's what I asked.

Mr. Frank Caputo: Can we have a chat for a couple of minutes? Is that possible?

The Chair: Well, I can give you a couple of minutes. I'm thinking you're very happy with that.

Mr. Frank Caputo: It's not happiness—

The Chair: Certainly. Take a couple of minutes. I'll suspend for two minutes. Go ahead.

● (1800)

_____(Pause)_____

● (1805)

The Chair: All right. We're back. I'm calling the meeting back to order, please.

I'm calling a vote on the withdrawal of the....

Hon. Rob Moore: Madam Chair, I have a point of order. Normally we meet from 3:30 to 5:30. In light of the time, in light of the fact that it's taking a long time to get through these amendments, and I suspect it will continue, I make a motion that we adjourn the meeting at this point.

The Chair: Do you want a recorded vote?

Hon. Rob Moore: Yes.

The Chair: Mr. Clerk, please go ahead—

A voice: [*Inaudible—Editor*] first. Mr. Garrison asked—

The Chair: Oh, I can't do that. I'm sorry. I have to deal with the withdrawal first.

Is there any objection to the withdrawal?

There is no objection. We have unanimous consent to withdraw that.

(Amendment withdrawn)

The Chair: Thank you very much.

Hon. Rob Moore: Madam Chair, there was much made about how long the meeting was scheduled for and that our witnesses are here—

The Chair: Now I'll deal with a different point—

Hon. Rob Moore: That's why I'm moving a motion.

Normally we meet from 3:30 to 5:30. We're heading into Christmas season. At the rate we're going, we're not going to pass Bill C-40 tonight, no matter what. There are just too many clauses to go through.

We're scheduled to meet in the new year on January 29 or 30. I would suggest that we adjourn now and everyone have a merry Christmas. Then we'll get back to work when the House reconvenes.

I move that we adjourn.

The Chair: We have a motion on the floor to adjourn.

We'll have a recorded vote—I hear you, Mr. Maloney—and I will ask the clerk to please take over.

Mrs. Rachael Thomas: Clerk, I know if you seek it you will see that he is actually officially subbed in and I am no longer.

The Clerk: I'm on the mailbox here. I didn't receive anything.

The Chair: Ms. Thomas, you are here. Do you mind getting this over with?

We'll go back to Mr. Mendicino.

● (1810)

Hon. Marco Mendicino (Eglinton—Lawrence, Lib.): Yes.

The Chair: I know you're acknowledging that I'm speaking with you.

Mr. Garnett Genuis (Sherwood Park—Fort Saskatchewan, CPC): No, this is B.S. You can't do this. This is an attack on the rights of members of Parliament. He cast his vote. You're not going to get away with this.

Mr. James Maloney: Madam Chair, follow the procedure.

Mr. Garnett Genuis: He cast his vote and you called the vote. We're not going to play these games.

Mr. James Maloney: You're the one playing the games.

Mr. Garnett Genuis: No. He voted. You can't just sit here in the middle of a vote because you don't like the result.

Mr. James Maloney: Ask him the question. Ask him if he voted.

Mr. Garnett Genuis: Call the vote, clerk. It's the clerk who calls the results of the vote.

Ms. Anju Dhillon: Does he have...?

He doesn't have his thing either.

Hon. Marco Mendicino: To clarify, I was acknowledging, and I vote no.

Mr. Garnett Genuis: Oh, what is this? This is not allowed. You can't just sit here and change the vote until you get what you want.

This is not going to fly. This is not going to fly at all. You need to respect the rules of the committee and adjourn.

The Chair: Let's take a second, please.

● (1810)

_____(Pause)_____

● (1815)

The Chair: The vote stays as it is. It was a no, unless there is unanimous consent to change his vote.

An hon. member: The vote was a yea.

The Chair: I mean....

A hon. member: No, there's not unanimous consent.

The Chair: Yes, okay.

We will adjourn.