



THE CANADIAN
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May 10, 2022

Via email: lcjc@sen.parl.gc.ca

The Honourable Mobina S.B. Jaffer
Chair,
Standing Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Jaffer:

Re: Bill S-4 – *Criminal Code and Identification of Criminals Act* amendments (COVID-19 response and other measures)

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section (CBA Section) about Bill S-4, *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts* which was introduced on February 8, 2022.

The CBA is a national association of over 36,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of a balance of Crown and defence counsel from every part of the country. We appear in criminal courts daily and have been at the forefront of our courts' adaptation to increased virtual proceedings during the COVID-19 pandemic.

The main objectives of Bill S-4 are to clarify and harmonize language in the *Criminal Code*, update provisions surrounding remote appearances in response to COVID-19, streamline the police warrant process, and amend the *Identification of Criminals Act*. The CBA Section is generally supportive of the proposed amendments but raises the following issues.

Remote Appearances

The CBA Section generally supports the expanded use of remote appearances in criminal cases. We endorse making the parties' consent the guiding principle in determining whether accused may appear remotely. We encourage extending the consent requirement to all remote appearances where evidence is heard, including the requirement to obtain the Crown's consent for in-custody guilty pleas.

Consent of the accused is paramount because many of them do not have ready access to audioconference or videoconference technology. The homeless, drug-addicted and those afflicted with mental illness cannot easily obtain or navigate remote technologies. While videoconferencing is an important tool for access to justice, it cannot be the norm for many persons involved in the criminal justice system.

Provisions dealing with remote appearances

First, proposed section 715.23¹ lists factors for the court to consider in deciding whether to allow an accused or witness to appear remotely. The CBA Section recommends adding three factors:

1. Whether the parties have the necessary technology to maintain a stable connection, present exhibits, and hear the proceedings;
2. Any special considerations needed to maintain the open courts principle (especially for high profile cases);
3. Any special security circumstances that may exist in the matter.

The CBA Section also recommends adding language so a judge may grant a remote appearance “on any conditions that are appropriate in the circumstances.” This enables judges to address issues such as a suitable location for testimony at the outset, rather than waiting until it arises on the day of a hearing or trial.

Second, the proposal in section 715.23⁴ on pleas and in section 715.23⁵ on sentencing – that accused persons appear by way of audioconference or videoconference – have limitations, including consideration of whether videoconferencing is available. While the CBA Section recognizes the access to justice considerations surrounding widespread availability of videoconferencing, we raise the following concerns.

It is often impossible to verify the identity of a person appearing by audioconference. We suggest that it be used only when the identity of the person can be ascertained with certainty, for example, if they are present with counsel.

We are concerned that this may be a “slippery slope” for justice sector stakeholders not to invest in necessary technology. CBA Section members report that custodial institutions often have accused appear by phone for certain proceedings because all video suites are occupied. The accused is then faced with a choice to consent to proceeding by phone or to seek an adjournment to another day to facilitate videoconferencing. Audioconferencing cannot be viewed as a substitute for failing to make videoconferencing technology widely available.

Third, whether a trial proceeds remotely is in the purview of the trial judge. Different jurisdictions take different approaches, and some jurisdictions strictly require applications be heard in person by the trial judge even when both parties consent to be heard remotely. This creates scheduling challenges, particularly in a time of court backlogs, to find time in advance of a trial before the trial judge and also challenges around witness planning and travel arrangements.

The CBA Section would support an additional amendment permitting any judge of competent jurisdiction to hear the application and/or a “shall” requirement (i.e. “The court shall allow an accused or witness to appear by videoconference if both the accused and the prosecutor consent”) to the two

¹ Articles from Bill S-4 referenced in this letter are reproduced in the Appendix for ease of reference.

sections if all parties consent to the matter proceeding remotely. This would streamline applications of this nature and free up court resources to deal with more pressing matters.

Telewarrant and Other Warrant Provisions

The CBA Section supports the modernization of the telewarrant provisions. The proposed amendments simplify the warrant process and save police resources. We also support the additional requirement to give the warrant documents to persons whose property is being searched.

Jury Selection

The CBA Section partly supports the proposals to incorporate videoconferencing into the jury selection process. It is a valid option for introductory matters to be handled by videoconference, for example the trial judge's opening comments or preliminary vetting for citizenship, language, and non-challenge for cause selections.

However, the CBA Section does not recommend that the challenge for cause process be adjudicated, or the oath or solemn affirmation be administered, via videoconference. There is an important, qualitative value to having the potential juror look upon the accused and vice versa. It is the first time that both see one another, and counsel may have to make submissions on subtle aspects of juror's reaction vis-à-vis bias or other metrics of juror suitability.

Further, videoconferencing does not permit counsel to assess the representativeness of the jury array and potentially challenge it for lack thereof. There must, therefore, be a mechanism for counsel to know the representative make-up of the array, whether by a questionnaire or by permitting defence counsel to look into the jury selection room.

Identification of Criminals Act amendments

The CBA Section understands the need to modify the *Identification of Criminals Act* and related provisions of the *Criminal Code*. However, modifications must balance the societal interest in collecting fingerprints to investigate crime and the privacy interests of persons only accused of a criminal act.

First, the name of the *Act* is a misnomer. When fingerprints are taken at the time of a new criminal charge, that person is an accused person, not a "criminal" in accordance with the presumption of innocence. Renaming the Act itself would ensure better harmonization with the *Charter of Rights and Freedoms*.

Second, greater clarity is needed in the scenario where the accused has a valid summons to attend for fingerprinting, yet the underlying charges are never laid in court. This arises in two situations:

1. When an appearance notice is issued to an accused charged on the scene along with a summons for fingerprints but where the criminal information is never filed in court. In the post-*Jordan*² era, this scenario is becoming more common as "charge approval" jurisdictions like British Columbia frequently delay laying charges to allow for the completion of investigations before the clock starts to run on delay.
2. When charges are withdrawn or stayed in court before the return date on a fingerprint summons.

² *R. v. Jordan*, [2016]1 S.C.R. 631.

In both circumstances, the absence of a criminal charge before the court should remove a person's obligation to comply with the fingerprint summons. The privacy interests of those for whom criminal matters do not proceed should be considered, particularly the impact of attending the police station for young, vulnerable and racialized persons.

This could be accomplished, for example, by requesting that the summons be rescinded like a bench warrant. Alternatively, a provision can be added to specify that the summons is of no force if no charge is laid by the date listed in the summons. Additionally, a presumptive mechanism ought to be introduced for a person's fingerprint records to be destroyed on proof of their matter being withdrawn or the information not being laid before the return date on their fingerprint summons. These types of non-conviction records can have a profound effect on persons. They may be used later to connect the individual to unproven allegations of misconduct for the purposes of "criminal record checks" thereby imperilling future job prospects, volunteer and educational opportunities.

We hope these observations will be helpful.

Yours truly,

(original letter signed by Julie Terrien for Tony Paisana)

Tony Paisana
Chair, Criminal Justice Section

Appendix

The following definitions in Bill S-4 are referred to in the CBA Section letter.

45 Section 715.21 of the English version of the Act is replaced by the following:

Attendance

715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so in person.

2019, c. 25, s. 292

46 The heading before section 715.23 and sections 715.23 and 715.24 of the Act are replaced by the following:

General

Reasons

715.221 If the court denies a request respecting a person's appearance or participation by audioconference or videoconference under this Part, it shall include in the record a statement of the reasons for the denial.

Cessation

715.222 If the court allows or requires a person's appearance or participation by audioconference or videoconference under this Part, it may, at any time, cease the use of those technological means and take any measure that it considers appropriate in the circumstances to have the person appear at or participate in the proceedings.

Accused and Offenders

Considerations — appearance by audioconference or videoconference

715.23 Before making a determination to allow or require an accused or offender to appear by audioconference or videoconference under any of sections 715.231 to 715.241, the court must be of the opinion that the appearance by those means would be appropriate having regard to all the circumstances, including

- (a) the location and personal circumstances of the accused or offender;
- (b) the costs that would be incurred if the accused or offender were to appear in person;
- (c) the suitability of the location from where the accused or offender will appear;
- (d) the accused's or offender's right to a fair and public hearing; and
- (e) the nature and seriousness of the offence.

Trial — indictable offence

715.233 The court may, with the consent of the prosecutor and the accused, allow an accused to appear by videoconference at a trial for an indictable offence. However, an accused must not appear by videoconference during a jury trial when evidence is being presented to the jury.

Plea

715.234 (1) The court may, with the consent of the prosecutor and the accused, allow an accused to appear by audioconference or videoconference for the purpose of making a plea.

Limitation

(2) The court may allow the accused to appear by audioconference only if it is satisfied that

- (a) videoconferencing is not readily available; and
- (b) the appearance by audioconference would permit the court to inquire into the conditions for accepting a plea of guilty under subsection 606(1.1) despite the fact that the court would not be able to see the accused.

Sentencing

715.235 (1) The court may, with the consent of the prosecutor and the offender, allow an offender to appear by audioconference or videoconference for sentencing purposes.

Limitation

(2) The court may allow the offender to appear by audioconference only if videoconferencing is not readily available.