



The Advocates' Society La Société des plaideurs

April 29, 2022

VIA EMAIL: lcjc@sen.parl.gc.ca

The Honourable Mobina S.B. Jaffer, Senator
c/o Mark Palmer, Clerk of the Committee
Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, Ontario K1A 0A4

Dear Senator Jaffer:

RE: Bill S-4, *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)*

The Advocates' Society makes this submission to provide feedback about Bill S-4 to the Standing Senate Committee on Legal and Constitutional Affairs, for the Committee's consideration in its study of the bill pursuant to the Order of Reference dated March 31, 2022.

Established in 1963, The Advocates' Society is a not-for-profit association of more than 5,500 litigation counsel throughout Canada. The Advocates' Society's mandate includes making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. The Advocates' Society's membership includes many advocates who practise criminal law, including Crown prosecutors and members of the criminal defence bar. All of The Advocates' Society's members have a strong interest in the efficient use of court resources to conduct proceedings fairly and to achieve just outcomes.

The Advocates' Society's comments will focus on Bill S-4's proposed expansion of the availability of remote appearances in Part XXII.01 of the *Criminal Code* (Remote Attendance by Certain Persons).

I. The Advocates' Society's Report, *The Right to be Heard: The Future of Advocacy in Canada*

In 2020, The Advocates' Society struck a national Modern Advocacy Task Force to undertake extensive research, stakeholder consultation, and thoughtful analysis and deliberations regarding how court proceedings will be heard in Canada after the COVID-19 pandemic and what the continued role of in-person oral advocacy will be.

The Modern Advocacy Task Force's Report, *The Right to be Heard: The Future of Advocacy in Canada* (the "Report", available in [English](#) and in [French](#)), was published in June 2021 and contains the product of The Advocates' Society's extensive work on this important issue. The Advocates' Society commends the Report to the Committee in its study of Bill S-4. We invite the Committee to review the Report's thoughtful recommendations for the best way forward in our justice system, which balance a wide range of key

factors, including technological advancements in the justice system, access to justice, the open court principle, the integrity of the court process, proportionality, the achievement of just outcomes, and public confidence in the administration of justice.¹

The Report concludes that in-person oral hearings remain the preferable mode of hearing for significant steps in a proceeding.² The Report identifies several benefits of in-person oral hearings that are particularly applicable in criminal proceedings. For example,

- Self-represented litigants, whose numbers are increasing in criminal proceedings, have more opportunities to obtain assistance and informal guidance from counsel, court staff, and judges;³
- The court can better control its process and the conduct of parties and witnesses;⁴ and
- Security concerns associated with remote hearing technology, such as unauthorized recordings or photographs, inappropriate publication of court material, or intimidation of witnesses, are diminished.⁵

The Report also recommends that a court should order a video hearing for a step in a proceeding where the parties consent, unless there is a public interest in an in-person hearing that transcends the consent of the parties.⁶

II. Bill S-4's Amendments to Part XXII.01 of the Criminal Code (Remote Attendance by Certain Persons)

Overall, The Advocates' Society believes that Bill S-4's proposed amendments to the legislative regime for remote attendance at criminal proceedings strike the right balance and are consistent with the Report's recommendations: while the default mode of hearing for criminal matters remains in-person hearings, departure from that default is justified with the consent of the accused and, where appropriate, the consent of the prosecutor.

To that end, The Advocates' Society strongly supports the maintenance of the overarching presumption in s. 715.21 of the *Criminal Code* that criminal proceedings will occur in person in courtrooms with all parties present. From inception to conclusion, criminal proceedings have an immense impact on the

¹ See in particular Part IV of the Report ("The Way Forward: Key Observations and Task Force Recommendations"), pp. 89ff.

² Report, pp. 91, 95-96. "Significant steps" are described in the Report and include (but are not limited to) those:

- a. where the outcome of the hearing may be an order or judgment that is legally or practically dispositive of a material issue in the case (e.g., a trial, application or interlocutory motion that might have the practical effect of ending the litigation);
- b. where the order sought at the hearing may impact on the liberty or similar substantial interest of a litigant (e.g., a child protection matter or motion for contempt);
- c. where the decision will require the court to understand and resolve complex factual and/or legal issues or an important point of law; and
- d. where credibility is reasonably in issue and it is expected that *viva voce* evidence will play an important part in the determination of credibility.

³ Report, p. 93.

⁴ Report, p. 93.

⁵ Report, pp. 93-94.

⁶ Report, p. 95.

accused and often entail serious consequences for liberty and life prospects. Moreover, criminal proceedings are a matter of public interest; the conduct and outcomes of criminal proceedings impact the public's confidence in the administration of justice. As such, The Advocates' Society agrees that the default mode of hearing criminal proceedings ought to be in person.

The Advocates' Society moreover agrees with the addition of proposed s. 715.222 to the *Criminal Code*, which will allow the court to cease the use of technological means of appearance for any person at any time and take appropriate measures. A judge must be able to revisit a prior order regarding the mode of a person's appearance if the use of technology is not working well or there is a change in the circumstances that led to the order, to maintain the integrity and fairness of the proceeding.

The Advocates' Society agrees with the proposal in Bill S-4 that the consent of the prosecutor and the accused (or offender) should be required for the court to allow the accused (or offender) to attend the following steps in a proceeding remotely:

- By videoconference at the preliminary inquiry (proposed s. 715.231);
- By videoconference at a trial for a summary conviction offence where the accused is not in custody (proposed s. 715.232(a));
- By videoconference (or audioconference where the specified conditions are fulfilled) for the purposes of making a plea (proposed s. 715.234(1) and (2));
- By videoconference (or audioconference where the specified conditions are fulfilled) for sentencing purposes (proposed s. 715.235(1) and (2)).

The Advocates' Society further agrees that, as proposed by s. 715.232(b), only the consent of the accused is required for the accused to appear by videoconference at their trial for a summary conviction offence when the accused is in custody. The accused's consent is rightly required because there may be legitimate reasons they do not wish to appear at their trial from jail. Moreover, it makes good sense not to require the prosecutor's consent, as there is no concern that the accused will abscond. Furthermore, if an accused is in custody, there is no concern associated with the accused's ability or willingness to stay connected to the proceedings or the security or appropriateness of the location from which the accused may appear for the proceeding.

The Advocates' Society submits that the amendments should maintain the distinction between an in-custody and out-of-custody accused in proposed s. 715.233. The prosecutor's consent should not be required for an in-custody accused to appear remotely at their trial for an indictable offence, as there is no risk of the accused failing to appear or of the other potential concerns discussed above. As such, The Advocates' Society suggests that proposed s. 715.233 be amended to mirror proposed s. 715.232 as follows:

- 715.233 **(a)** 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:
- (i) if the accused is not in custody, with the consent of the accused and the prosecutor;**
 - and**
 - (ii) if the accused is in custody, with the consent of the accused.**
- (b)** However, an accused must not appear by videoconference during a jury trial when evidence is being presented to the jury.

This amendment would mirror the principles for consent for summary offence or indictable offence matters.

The Advocates' Society submits that it is critical that the requirement for the accused or offender to consent to their own remote appearance not be rendered nugatory by orders allowing for the remote appearance of all other parties, including witnesses pursuant to ss. 714.1 to 714.3 of the *Criminal Code*, counsel or other participants pursuant to s. 715.25, or the judge presiding remotely pursuant to s. 715.26. Members of The Advocates' Society are aware of instances during the COVID-19 pandemic when the accused was the only person in the courtroom for their proceeding, and all others attended remotely.

III. Ensuring Access to Remote Technology

As noted in The Advocates' Society's Report, significant portions of the Canadian population do not have access to the requisite technology (such as computers, cell phones, adequate Internet and data plans) or technical knowledge to attend court proceedings virtually.⁷ The Advocates' Society recommends two further measures to counteract this disparity in resources.

First, The Advocates' Society recommends that Bill S-4 be amended to include a provision that permits the presiding judge to make orders to facilitate access to the required technology, including funding if appropriate, for impecunious individuals to attend proceedings remotely, where it is in the interests of justice to do so.

Second, The Advocates' Society recommends that the federal government work with provincial and territorial governments and allocate funds to ensure the availability of technological resources to support virtual proceedings in the criminal justice system, including in federal penitentiaries.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,



Deborah E. Palter
President

Attachments:

1. Final Report of the Modern Advocacy Task Force, *The Right to be Heard: The Future of Advocacy in Canada*
2. Rapport final du Groupe de travail sur le litige moderne, *Le droit d'être entendu : L'avenir de la plaidoirie orale au Canada*

CC: The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada
Vicki White, Chief Executive Officer, The Advocates' Society

⁷ Report, pp. 90, 93.

The Advocates' Society's Task Force on Bill S-4:

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