BRIEF FROM THE
BARREAU DU QUÉBEC

Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

May 9, 2019
**Mission of the Barreau du Québec**

To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

**Acknowledgements**

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Overview of the Barreau du Québec’s position

No reform of minimum sentences

The Barreau du Québec is disappointed to see that the bill does not include any measures concerning mandatory minimum sentences of imprisonment. The Barreau reiterates its opposition to minimum sentences, particularly those involving imprisonment, except for the most serious cases, such as murder. Minimum sentences remove the flexibility front-line judicial stakeholders (prosecutors, defence counsel, trial judges) need to properly apply the principle of proportionality in sentencing.

Amendment to the mandatory imposition of the victim surcharge

The bill amends the victim surcharge provisions of the Criminal Code to allow the court to exempt an offender from the requirement to pay a victim surcharge if the offender satisfies the court that the payment would cause the offender undue hardship. The Barreau du Québec welcomes any legislative initiative that serves to strengthen the independence of the courts, fostering judicial discretion and, ultimately, giving full effect to the principle of proportionality in sentencing.

Repeal of Criminal Code provisions deemed unconstitutional

The bill would repeal or amend several provisions of the Criminal Code deemed inoperative by the Supreme Court of Canada given that they are contrary to the Canadian Charter of Rights and Freedoms. The Barreau welcomes these amendments. Maintaining offences in the Criminal Code that have been declared unconstitutional risks undermining both the rights of the accused and the public’s confidence in the justice system.

Repeal of section 159 of the Criminal Code

Numerous provincial courts of appeal have ruled that the ban on anal intercourse under the Criminal Code is unconstitutional. For the sake of legal predictability, particularly when it comes to criminal offences, but also to promote the rule of law and the right to equality, this provision must be removed from the Criminal Code.

New hybrid offences

The bill proposes to hybridize most indictable offences punishable by a maximum penalty of 10 years or less. The Barreau du Québec welcomes these amendments, which give flexibility to front-line judicial stakeholders to tailor the charges laid to the specific circumstances of a case.

Elimination of the preliminary inquiry

The bill proposes to restrict the availability of a preliminary inquiry to offences punishable by imprisonment for life. It strengthens a justice’s power to limit the issues explored and the witnesses to be heard at the inquiry. The Barreau du Québec is opposed to this amendment. First, preliminary inquiries were held in only 3% of eligible cases. Of the cases that caused delays beyond the thresholds established by R. v. Jordan and R. v. Cody, only 7% included a preliminary inquiry. There is no evidence, other than anecdotal, to conclude that preliminary inquiries create undue delays in the justice system or that there is a need to change the current rules surrounding them.
Abolition of peremptory challenges during jury selection

The bill abolishes peremptory challenges of jurors. This measure appears to be inspired by a highly publicized trial in Saskatchewan for which the selected jury did not reflect the diversity of the community where the trial was being held. The Barreau du Québec believes that the measure proposed in the bill misses the mark. Of course, we find it deplorable that some lawyers use peremptory challenges to systematically disqualify prospective jurors for discriminatory reasons, such as race or ethnicity. The composition of juries must reflect the diversity of Canadian society. We therefore propose that the Criminal Code be amended to provide that either party may ask the judge to direct the composition of the jury when one party appears to be using the peremptory challenges in bad faith, or when the jury, for other reasons, is not representative of the community.

Definition of “intimate partner”

The Barreau du Québec understands the value of extending the concept of spouse or partner to that of intimate partner in order to protect a greater number of people. That said, we are concerned about the increase in maximum penalties for recidivism of “an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner.” We can expect lengthy judicial proceedings and additional delays because of this provision. Stopping spousal or family violence also requires preventive measures. We believe that awareness and information campaigns must continue in order to inform victims of domestic violence of the resources available to help them. Community resources, meanwhile, should encourage victims to report their abuser to the police.

Increased use of videoconferencing

The Barreau du Québec welcomes the measures provided in the bill to facilitate the use of videoconferencing. However, we have some reservations about when the accused’s consent should be required before proceeding with the use of videoconferencing. The bill proposes that consent of the parties is necessary to conduct a trial by videoconference, but the accused’s consent is not required for a bail hearing. Yet, the bail hearing is a fundamental right of the accused.

Removal of the requirement that the accused, when not represented, be physically present for an appearance

The Barreau du Québec notes the repeal of section 848 of the Criminal Code, which requires the accused, when not represented, to be physically present for an appearance. This section has been removed from the Criminal Code without explanation. This amendment could have serious consequences for the rights of the accused. It could result in appearances being held by telephone or videoconference, without the accused. The Barreau du Québec would like section 848 of the Criminal Code to remain as is.

Impacts of amendments on the Superior Court of Appeal

With the significant increase in the number of hybrid offences and the imposition of a one-year limitation period on summary conviction offences, the Barreau du Québec is concerned about the potential impacts on appeals in superior court. We would hope to see more resources for the superior courts to enable them to deal with the increased volume of cases without expanding time frames, which we would like to see reduced.
Replacement of terms in the constitutive provisions of offences

We note that, for several offences, the adverb “wilfully” or the phrase “with intent to” have been replaced by “knowingly.” We wonder about the scope of these changes. The change in wording suggests the intention is to change the applicable criteria, since “Parliament does not speak in vain.” These amendments are therefore likely to lead to interpretive difficulties and legal disputes.

Proposal to allow only prosecutors to file charges

In addition to what is provided in the bill, the Barreau du Québec recommends that only prosecutors be allowed to file charges for Criminal Code offences. In many cases, charges are dropped for lack of evidence or because exculpatory evidence has been brought to the attention of the authorities.
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INTRODUCTION

On March 29, 2018, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, introduced in the House of Commons Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (the “bill”). This bill makes several significant amendments to offences under the Criminal Code and to the administration of criminal justice in Canada. It would do the following:

- Abolish peremptory challenges of jurors;
- Increase the maximum term of imprisonment for repeat offences involving intimate partner violence;
- Restrict the availability of a preliminary inquiry to offences punishable by imprisonment for life and strengthen a justice’s powers to limit the issues explored and witnesses to be heard at the inquiry;
- Hybridize most indictable offences punishable by a maximum penalty of 10 years or less, increase the default maximum penalty to two years less a day of imprisonment for summary conviction offences and extend the limitation period for summary conviction offences to 12 months;
- Allow the court to exempt an offender from the requirement to pay a victim surcharge if the offender satisfies the court that the payment would cause the offender undue hardship, provide the court with guidance as to what constitutes undue hardship, provide that a victim surcharge is to be paid for each offence, with an exception for certain administration of justice offences if the total amount of surcharges imposed on an offender for those types of offences would be disproportionate in the circumstances;
- Remove passages and repeal provisions that have been ruled unconstitutional by the Supreme Court of Canada; and
- Repeal section 159 of the Criminal Code and provide that no person shall be convicted of any historical offence of a sexual nature unless the act that constitutes the offence would constitute an offence under the Criminal Code if it were committed on the day on which the charge was laid.

The Barreau du Québec has reviewed this bill with interest and hereby submits its comments.

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1 RSC 1985, c. C-46.
1. NO REFORM OF MINIMUM SENTENCING

The Barreau du Québec is disappointed to see that the bill does not include any measures concerning mandatory minimum sentences of imprisonment. This reform was requested by the Prime Minister of Canada in his mandate letter to the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada. We note that this mandate letter asks the Minister of Justice and Attorney General of Canada to undertake modernization efforts, including the “exploration of sentencing alternatives.” It is now obvious that the interpretation given to this expression does not include abandoning minimum prison sentences.

The Barreau du Québec reiterates its opposition to minimum sentences, particularly those involving imprisonment, except for the most serious cases, such as murder. Minimum sentences remove the flexibility front-line judicial stakeholders (prosecutors, defence counsel, trial judges) need to properly apply the principle of proportionality in sentencing.

Imposing minimum sentences may, in the short term, provide some sense of security for citizens. In the long run, however, these measures are counterproductive to the justice system. Prosecutors lose an incentive to encourage an accused to plead guilty when the circumstances of the offence justify a sentence that would be less than the mandatory minimum. Conversely, when the prosecution asks for a sentence in a case where a sentence slightly higher than the minimum would be justified, the courts tend to stick to the minimum sentence.

The bill would have been a good opportunity to abandon those types of sentences, which do not promote an efficient and flexible administration of the criminal justice system. Unfortunately, it seems we will have to wait for next time.

The Barreau du Québec believes that it is urgent for the government to amend the Criminal Code to give the court residual discretionary power to not impose a mandatory minimum sentence.

We note that two bills have been introduced that seek to give this discretion to the courts: Bill S-251, An Act to amend the Criminal Code (independence of the judiciary) and to make related amendments, and Bill C-407, An Act to amend the Criminal Code (sentencing). The measures in these bills could be included in Bill C-75 to address the issue of mandatory minimum sentences.

Persons subject to trial have the right to this constitutional protection. In addition, individuals would not have to bear the burden of a constitutional challenge all the way to the Supreme Court. Mandatory minimum sentences can be profoundly unfair in certain cases because the only possible penalty is imprisonment, whereas other solutions may sometimes promote rehabilitation, thereby reducing the risk of reoffending. Judges must be trusted to apply the law in a fair and equitable manner, ensuring that sentences are proportionate to the gravity of the offence and the degree of responsibility of the offender.

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2 The Right Honourable Justin TRUDEAU, Minister of Justice and Attorney General of Canada Mandate Letter.
2. AMENDMENT TO THE MANDATORY IMPOSITION OF THE VICTIM SURCHARGE

The bill amends the victim surcharge provisions of the *Criminal Code* to allow the court to exempt an offender from the requirement to pay a victim surcharge if the offender satisfies the court that the payment would cause the offender undue hardship. It also provides the court with guidance as to what constitutes undue hardship.

In addition, the bill provides that a victim surcharge is to be paid for each offence, with an exception for certain administration of justice offences if the total amount of victim surcharges imposed on an offender for those types of offences would be disproportionate in the circumstances.

Finally, the bill obliges the court to provide reasons for granting any exception for certain administration of justice offences or any exemption from the requirement to pay a victim surcharge.

Furthermore, the bill clarifies that the amendments will apply to any offender who is sentenced after the day on which they come into force, regardless of whether or not the offence was committed before that day. Those amendments had previously been proposed in Bill C-28, An Act to amend the Criminal Code (victim surcharge), which was introduced on October 21, 2016.

The bill would therefore have the effect of reversing the amendments made by the *Increasing Offenders' Accountability for Victims Act*, providing on the one hand for an increase in victim surcharges, and on the other hand, the elimination of judicial discretion in the *Criminal Code*, allowing the court to exempt the defendant where undue hardship had been demonstrated. As a result, this legislation has made the victim surcharge automatic in all cases falling under subsection 737(1) of the *Criminal Code*.

In our view, the bill is more in line with the philosophy expressed by the Supreme Court of Canada in *R. v. Topp*. Although in that case, the Supreme Court ruled on the circumstances leading the court to impose a fine, we believe that the reasons can be extended to the surcharge. In particular, the Supreme Court of Canada emphasized the need for the court to be satisfied that the offender is able to pay, on a balance of probabilities, before imposing the fine, with the goal of reducing the number of offenders who are incarcerated in default of payment.

Bill C-37 also eliminated the rule whereby the court was required to state its reasons in the record, another change that is being reversed by Bill C-75. The Barreau du Québec welcomes any legislative initiative that has the effect of strengthening the independence of the courts, fostering judicial discretion and ultimately, giving full effect to the principle of proportionality in sentencing.

3. REPEAL OF CRIMINAL CODE PROVISIONS DEEMED UNCONSTITUTIONAL

The bill repeats the measures proposed in Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts, which was introduced on March 8, 2017.

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4 S.C. 2013, c. 11 (formerly Bill C-37).
5 By repealing subsection 737(5) of the *Criminal Code*.
7 By repealing section 737(6) of the *Criminal Code*.
Accordingly, the bill would repeal or amend several provisions of the *Criminal Code* that were deemed inoperative by the Supreme Court of Canada because they are contrary to the *Canadian Charter of Rights and Freedoms*, i.e., the following offences:\(^8\)

- Vagrancy,\(^9\) declared unconstitutional in *R. v. Heywood* in 1994;\(^10\)
- Spreading false news,\(^11\) found unconstitutional in *R. v. Zundel* in 1992;\(^12\)
- Murder for an unlawful object, part of which was declared unconstitutional in *R. v. Martineau* in 1990;\(^13\)
- Murder in commission of offences,\(^14\) declared unconstitutional in *R. v. Martineau* in 1990;\(^15\)
- Impaired driving,\(^16\) presumption of accuracy of breath or blood samples, some parts of which were declared unconstitutional in *R. v. St-Onge Lamoureux* in 2012;\(^17\)
- Abortion,\(^18\) declared unconstitutional in *R. v. Morgentaler* in 1988;\(^19\)
- Time allowed for detention in custody,\(^20\) part of which was declared unconstitutional in *R. v. Safarzadeh-Markhali* in 2016.\(^21\)

To better illustrate the need to repeal these unconstitutional provisions, we recall the case of *R. v. Vader.*\(^22\) In that case, the judge relied on section 230 of the *Criminal Code* to convict the accused, Travis Vader, of second degree murder, but that provision had been declared unconstitutional in 1990. This generated significant delays, with the accused finally being found guilty last October on two counts of manslaughter. Sentencing took place on January 25, 2017, six years after the criminal offence was committed.\(^23\) This type of situation is unacceptable given that maintaining offences in the *Criminal Code* that have been declared unconstitutional risks undermining both the rights of the accused and public confidence in the justice system.

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\(^8\) Part I of The *Constitution Act, 1982, Schedule B to the Canada Act 1982*, (UK), c. 11 (the “Charter”).
\(^9\) Paragraph 179(1)(b) of the *Criminal Code*.
\(^10\) [1994] 3 SCR 761.
\(^11\) Section 181 of the *Criminal Code*.
\(^12\) [1992] 2 SCR 731.
\(^13\) Paragraph 229(c) of the *Criminal Code*.
\(^14\) Section 230 of the *Criminal Code*.
\(^15\) [1990] 2 SCR 633.
\(^16\) Paragraphs 258(1)(c) and (d) of the *Criminal Code*.
\(^17\) [2012] 3 SCR 187.
\(^18\) Section 287 of the *Criminal Code*.
\(^20\) Subsection 719(3.1) of the Criminal Code.
\(^21\) [2016] 1 SCR 180.
\(^22\) 2016 ABQB 625.
4. REPEAL OF SECTION 159 OF THE CRIMINAL CODE

The bill also includes the provisions of Bill C-32, An Act related to the repeal of section 159 of the Criminal Code, which was introduced on November 15, 2016. That bill was intended to repeal the Criminal Code ban on anal sex.24 Although the Supreme Court of Canada never considered the constitutionality of section 159 of the Criminal Code, the Quebec Court of Appeal ruled it to be unconstitutional in 1998, in R. v. Roy,25 as did the courts of appeal for Ontario, Nova Scotia, Alberta, and British Columbia, as well as the Federal Court. Those courts all concluded that section 159 of the Criminal Code violates the right to equality protected by section 15 of the Charter since it authorizes unjustified discrimination based on sexual orientation, marital status and age.

In addition, since section 159 prohibits anal sex, with the exception of consensual acts that take place in private between spouses or between two adult persons, it creates a distinction with regard to the consensual sexual activities of homosexual men. Indeed, the courts ruled that the offence had a different effect on gay men, since anal intercourse is “a basic form of sexual expression for gay men.”31

For the sake of legal predictability, particularly when it comes to criminal offences, but also to promote the rule of law and the right to equality, this provision must be removed from the Criminal Code.

5. NEW HYBRID OFFENCES

The bill proposes to hybridize most indictable offences punishable by a maximum penalty of 10 years or less. The Barreau du Québec welcomes these amendments, which give front-line judicial stakeholders the flexibility to tailor the charges laid to the specific circumstances of a case.

This means more cases could be resolved without going to trial, by allowing for summary prosecution of offences, which could lead some accused to plead guilty in order to face reduced criminal consequences (but still appropriate to the particular context of the offence).

Indeed, many offences may be the subject of either indictable or summary prosecution. In the past, the accused could often only be prosecuted by indictment, as the summary option was not provided for in the Criminal Code.

From now on, a person may negotiate with the prosecutor to waive the limitation period and agree to plead guilty to a summary offence rather than face a trial for an indictable offence. The Barreau du Québec believes that such agreements are beneficial to all parties and will provide for increasing the number of cases where a settlement is reached.

24 Section 159 of the Criminal Code.
25 [1998] RJQ. 1043 (C.A.)
26 R. v. C.M., 82 OAC 68.
27 R. v. T.C.F., 2006 NSCA 42.
30 Holm v. Canada (Minister of Employment and Immigration), [1996] 1 FC 547.
6. ELIMINATION OF THE PRELIMINARY INQUIRY

The bill proposes to restrict the availability of a preliminary inquiry to offences punishable by imprisonment for life. It strengthens a justice’s powers to limit the issues explored and witnesses to be heard at the inquiry.

The Barreau du Québec is opposed to this amendment. By limiting the use of the preliminary inquiry, some have argued that we can speed up the judicial process and reduce delays. The traditional purpose of the preliminary inquiry is discovery of the evidence. That objective is less important today, they argue, given the requirements for disclosing evidence. There are nevertheless two elements that lead us to believe that restricting the preliminary inquiry will be ineffective or even counter-productive.

First, preliminary inquiries were held in only 3% of eligible cases. Of the cases that caused delays beyond the thresholds established by R. v. Jordan\(^{32}\) and R. v. Cody,\(^ {33}\) only 7% included a preliminary inquiry.\(^{34}\) There is no evidence, other than anecdotal, to conclude that preliminary inquiries create undue delays in the justice system or that there is a need to change the current rules surrounding them.

There are also cases where the preliminary inquiry can test the strength of the parties’ positions. This promotes case resolution, thereby avoiding a trial on the merits and contributing to reduced delays.

For example, evidence of an offence may be based on witness testimony. The preliminary inquiry may be of benefit to both the accused and the prosecution, as they can assess the credibility of the witnesses. This may encourage one party or the other to seek to settle the matter through a guilty plea or the withdrawal of charges.

We realize that some may abuse this step and thus unduly lengthen procedures. The Barreau du Québec wishes to point out, however, that judges already have numerous powers at their disposal for managing cases.

These powers should be used to define the scope of the inquiry and prevent abuse. Otherwise, we risk abandoning a stage of the criminal proceeding that is still useful in the search for more efficient justice.

Additionally, the Barreau du Québec proposes adding to the *Criminal Code* the possibility of replacing, with the consent of the accused, the preliminary inquiry with out-of-court questioning. Pilot projects on this front have been established in several judicial districts of Quebec and have proven very effective.

Codifying these practices would allow them to be applied across Canada, help reduce delays in criminal cases and improve the efficiency of the justice system.

7. ABOLITION OF PEREMPTORY CHALLENGES DURING JURY SELECTION

The bill abolishes the peremptory challenge of jurors. This measure appears to be inspired by a highly publicized trial in Saskatchewan for which the jury selected did not reflect the diversity of the community where the trial was being held.

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\(^{32}\) [2016] 1 SCR 631.

\(^{33}\) [2017] 1 SCR 659.

The Barreau du Québec believes that the measure proposed in the bill misses the mark. Of course, we deplore the fact that some lawyers use peremptory challenges to systematically disqualify prospective jurors for discriminatory reasons, such as race or ethnicity.

We do not believe, however, that simply abolishing peremptory challenges is the answer. Peremptory challenges are always useful for litigants who are familiar with jury trials. In fact, based on the appearance, words and non-verbal language of prospective jurors, lawyers can discern whether they will have the capacity to listen objectively to the evidence to be presented and to make an impartial judgment as to that evidence. Peremptory challenges also ensure that the accused accepts the legitimacy of the jury and by extension, the verdict and sentence that will be pronounced.

The Barreau du Québec, does agree, however, that the composition of juries must reflect the diversity of Canadian society. We therefore propose that the Criminal Code be amended to provide that either party may ask the judge to direct the composition of the jury when one party appears to be using the peremptory challenges in bad faith, or when the jury, for other reasons, is not representative of the community. By holding a hearing to this effect, the judge could appoint juries to ensure that some members are from different cultures and backgrounds.

8. DEFINITION OF “INTIMATE PARTNER”

Clause 294 of the bill amending section 718.3 of the Criminal Code

294 Section 718.3 of the Act is amended by adding the following after subsection (7):

Maximum penalty — intimate partner

(8) If an accused is convicted of an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against an intimate partner, the court may impose a term of imprisonment that is more than the maximum term of imprisonment provided for that offence but not more than 20

(a) five years, if the maximum term of imprisonment for the offence is two years or more but less than five years; (b) 10 years, if the maximum term of imprisonment for the offence is five years or more but less than 10 years; (c) 14 years, if the maximum term of imprisonment for the offence is 10 years or more but less than 14 years; or

(d) life, if the maximum term of imprisonment for the 30 offence is 14 years or more and up to imprisonment for life.

The Barreau du Québec understands the value of extending the concept of spouse or partner to that of intimate partner in order to protect a greater number of people. That said, we are concerned about the
increase in the maximum penalties for recidivism of “an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner.”

Given the large increase in sentences, we can expect lengthy judicial proceedings and additional delays if the prosecution were to ask the judge to impose a prison sentence in excess of the maximum term of imprisonment. The debate is likely to focus on the notion of “intimate partner,” in particular the notion of the “current or former...dating partner of a person.”

Furthermore, amending the aggravating factors would have the effect of removing the discretionary power of judges, who will have to deal with sentences that may double in length where the aggravating factors apply.

The emphasis when sentencing must be on the societal stigma against intimate partner violence. It would be simpler to stick to replacing the term spouse or common-law partner with the broader term of “intimate partner” in the aggravating factors that the judge must consider when imposing a sentence.

Moreover, stopping spousal or family violence also requires preventive measures that align with provincial, territorial and municipal strategies. We believe that awareness and information campaigns must continue in order to inform victims of domestic violence of the resources available to help them. Community resources, meanwhile, should encourage victims to report their abuser to the police. Finally, to prevent such acts, or at least recidivism, we must also look at developing resources for people who have difficulty managing their aggressiveness. Domestic violence is a societal problem, and should be everyone’s business.

35 Bill C-75, clause 297, adding subsection 718.3(8) to the Criminal Code.
36 Bill C-75, subclause 1(3), amending the definitions in section 2 of the Criminal Code.
37 Bill C-75, clause 296, amending subparagraph 718.2(a)(ii) of the Criminal Code.
9. INCREASED USE OF VIDEOCONFERENCING

Clauses 216 and 274, adding and amending sections 502.1 and 650 of the Criminal Code

216 The Act is amended by adding the following before section 503:

Appearance of the accused

502.1 (1) Except as otherwise provided in this Part, an accused who is required to appear in a proceeding under this Part shall appear personally but may appear by audioconference or videoconference, if arrangements are made with the court in advance and those arrangements are satisfactory to the justice.

274 Subsections 650(1.1) and (1.2) of the Act are replaced by the following:

Video links

(1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.

Video links

(1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.

The Barreau du Québec welcomes the measures provided for in the bill to facilitate the use of videoconferencing. However, we have some reservations about when the accused’s consent should be required before proceeding with the use of videoconferencing.

The bill provides that consent of the parties is necessary to conduct a trial by videoconference, but the accused’s consent is not required for a bail hearing. The bail hearing, however, is a fundamental right of the accused.38

The Barreau du Québec proposes that the bill reaffirm the principle that consent of the accused is always necessary for the use of videoconferencing, except under exceptional circumstances that do not undermine the administration of justice.

38 Paragraph 11(e) of the Canadian Charter of Rights and Freedoms.
10. REMOVAL OF THE REQUIREMENT THAT THE ACCUSED, WHEN NOT REPRESENTED, BE PHYSICALLY PRESENT FOR AN APPEARANCE

Clause 329 of Bill C-75, repealing section 848 of the *Criminal Code*

**Condition for remote appearance**

848 Despite anything in this Act, if an accused who is in prison does not have access to legal advice during the proceedings, the court shall, before permitting the accused to appear by a means of communication that allows the court and the accused to engage in simultaneous visual and oral communication, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.

The Barreau du Québec notes the repeal of section 848 of the *Criminal Code*, which requires the accused, when not represented, to be physically present for the appearance. This section has been removed from the *Criminal Code* without explanation. This amendment could have serious consequences for the rights of the accused.

It could result in appearances being held by telephone or videoconference, without the accused. The Barreau du Québec would like section 848 of the *Criminal Code* to remain as is.

11. IMPACTS OF AMENDMENTS ON THE SUPERIOR COURT OF APPEAL

With the significant increase in the number of hybrid offences and the extension of the limitation period for summary conviction offences to one year, the Barreau du Québec is concerned about the potential impacts on appeals in superior court.39

We would hope to see more resources for the superior courts to enable them to deal with the increased volume of cases without expanding time frames, which we would like to see reduced.

12. REPLACEMENT OF TERMS IN THE CONSTITUTIVE PROVISIONS OF OFFENCES

We note that for several offences,40 the adverb “wilfully” or the expression “with intent to” have been replaced by “knowingly.” We wonder about the scope of these changes.

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39 *Criminal Code*, section 812 and following.
40 For the following offences in particular: Interception of communications (s. 184 CCC); Disclosure of information (s. 193 CCC); Disclosure of information received from interception of radio-based telephone communications (s. 193.1 CCC); Misleading receipt (s. 388 CCC); Fraudulent receipts under *Bank Act* (s. 390 CCC); Removing natural bar without permission (s. 440 CCC).
Is this simply an exercise in semantics, as suggested in the decision in *R. v. Sault Ste. Marie*, which uses the terms “voluntarily” and “knowingly” as synonyms? Or is it rather a desire to change these offences from specific intent offences to general offences?

The change in wording suggests that there is an intention to change the applicable criteria, since “Parliament does not speak in vain.” These amendments are therefore likely to lead to interpretive difficulties and legal disputes.

Indeed, we wonder about the “mischief rule.” “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.” What is the object of this amendment? Have any court decisions led to incongruities as a result of the current wording?

13. **PROPOSAL TO ALLOW ONLY PROSECUTORS TO FILE CHARGES**

In addition to what is provided in the bill, the Barreau du Québec recommends that only prosecutors be allowed to file charges for Criminal Code offences.

Charges are often dropped for lack of evidence or because exculpatory evidence has been brought to the attention of the authorities. In addition, charges may be laid despite their technical or marginal nature, contrary to the principle of *de minimis non curat lex*, or when it is not in the interests of justice to do so. To reduce this risk, British Columbia, New Brunswick and Quebec have chosen to give only prosecutors the power to lay charges.

In Quebec, this measure is all the more effective because prosecutors have discretionary power, when the circumstances are appropriate, to apply an alternative to judicialization, including the non-judicial handling of the case or an alternative measures program when the person has admitted responsibility.

For example, pre-charge screening by prosecutors reduces delays by relieving the system of some cases that can be handled alternatively without harming the public interest, or that would likely not have been successful at trial. Indeed, as stated by the Supreme Court of Canada in *R. v. Sciascia*, this practice is helpful to the overburdened justice system.

With the agreement of the provinces and territories, which is necessary since we are dealing with the administration of justice, this rule should be enshrined in legislation to standardize this practice across Canada. At the very least, it should “encourage” the use of pre-charge screening, as does section 23(1) of the *Youth Criminal Justice Act*.

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41 [1978] 2 SCR 1299.
42 This principle of statutory interpretation was recognized for the first time by the Supreme Court of Canada in *P.G. (Qué.) v. Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831, and repeated recently in criminal law in *R. v. D.L.W.*, [2016] 1 SCR 402.
43 *Heydon’s Case* (1584), 76 ER 637.
45 [2017] 2 SCR 539, para. 32.
46 Section 92(14) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK).
47 SC 2002, c. 1.