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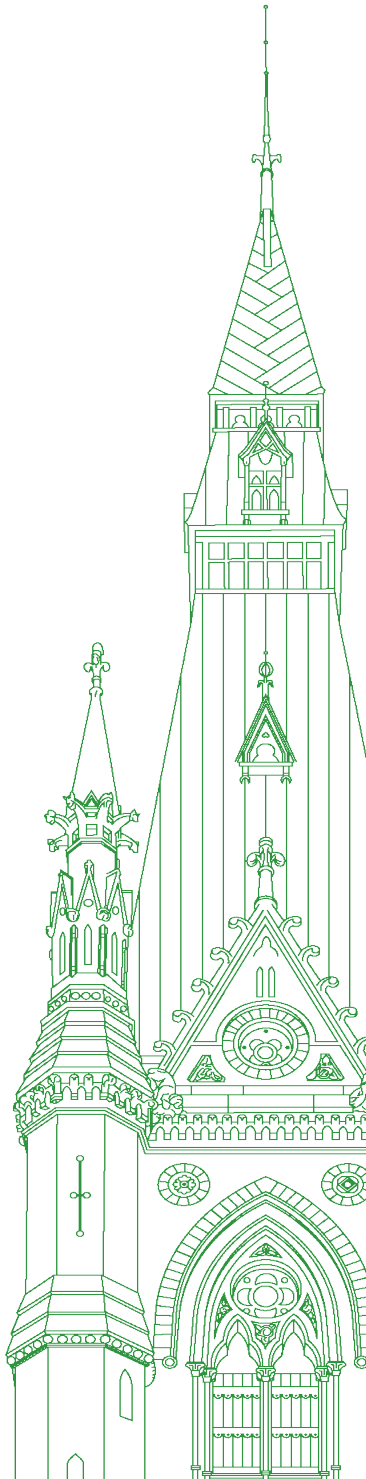

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Tuesday, November 7, 2023

● (1620)

[*Translation*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): Good afternoon everyone.

[*English*]

Welcome. Apologies to everyone, but this is kind of what happens in the House of Commons and Parliament. We are commencing late.

All the witnesses who will be speaking have been tested. They all know who they are.

Let me begin by calling the meeting to order. Welcome to meeting number 83 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 on miscarriage of justice reviews.

Today's meeting is taking place in a hybrid format, pursuant to the Standing Orders. Members are attending in person in the room and remotely using the Zoom application.

I want to make a few comments for the benefit of witnesses and members. Please wait until I recognize you by name before speaking. For those participating by video conference, click on the microphone icon to activate your mike. Please mute yourself when you are not speaking.

For interpretation, for those on Zoom, you have the choice at the bottom of your screen of floor, English or French. Please make sure that you have it now. For those in the room, you can use the earpiece and select the desired channel.

Just as a reminder, all comments should be addressed through the chair. For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the “raise hand” function. The clerk and I will manage the speaking order as well as we can. We appreciate your patience and understanding in this regard.

[*Translation*]

I'd now like to welcome the witnesses who will be with us for the first hour of the meeting. Actually, two one-hour periods were planned, but I think that all the witnesses from both groups are here right now.

[*English*]

We have a suggestion that perhaps we combine the witnesses. If it works, we can. If not, let me just proceed with the way it is.

[*Translation*]

We have, in person, two representatives from the Barreau du Québec, Mr. Nicolas Le Grand Alary, a lawyer for the Secretariat of the Order and Legal Affairs, and Mr. Nicholas St-Jacques.

We also have, in person, Mr. James Lockyer, counsel and board member at Innocence Canada.

[*English*]

On Zoom, we have the Honourable Harry S. LaForme and Professor Kent Roach, who is from the faculty of law at the University of Toronto. They are both appearing by video conference. Both of them will share the comments together, as will the groups that are in front of us.

Maybe we'll start with the witnesses we have, because not everyone is here.

It looks like we have a few hands up.

[*Translation*]

Mr. Fortin, the floor is yours.

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): Hello, Madam Chair. Thank you for introducing the witnesses.

Would it be possible for you to confirm that successful tests were done for those who are joining us through Zoom?

The Chair: We've had an hour to run these tests, so my answer is yes.

Mr. Rhéal Éloi Fortin: Okay, but were they successful? I only need confirmation from you. Otherwise, I'll ask for a suspension. If you tell me they were successful, however, then it's fine.

The Chair: Yes, they were successful.

We're going to try Mr. Roach again.

[*English*]

If it works, it works. If not, there's obviously nothing I can do about it as the chair. The rest were tested and were okay.

We have up to five minutes for the opening remarks. After that, we will begin with questions from the members.

Yes, Mr. Caputo.

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

I know that we spoke earlier about this, but I think we should address at the outset what our timelines are. My sense is that this is an issue.

Obviously, we were delayed by an hour due to votes. I understand that the committee normally ends at 5:30 p.m. Given that we're on record now, I would like to hear the chair's position on when our end time will be.

The Chair: We have resources for two hours. We started at 4:19 p.m., which puts us at 6:19 p.m.

However, if it is the wish of the committee and there's a motion otherwise, I have to entertain that motion.

● (1625)

Mr. Frank Caputo: Okay.

Just to be clear, from your position as chair, what time would we break for the next panel?

The Chair: I will do my best to do the timing.

How about we start and ensure that we give full time to the witnesses who are here? They're really anxious to start. Then we'll see how it goes.

Mr. Frank Caputo: Okay, I'm mindful of that. I want to get going as well.

The Chair: I know you do.

Mr. Frank Caputo: I don't want to jump in and then ask what we are doing about the rest of the witnesses or whatever. I'm not trying to be obstreperous. I just want to know what the plan is for the next 40 minutes and what's happening.

The Chair: Mr. Caputo, trust me for a little bit, and we'll see what we can do. How's that?

Mr. Frank Caputo: Okay.

The Chair: We'll begin the first five minutes with the Honourable Harry LaForme.

Mr. LaForme, you have up to five minutes, please.

Hon. Harry S. LaForme (As an Individual): Thank you.

Meegwetch for inviting me here to speak to you today and to each of you for your interest in this very important topic.

I am speaking to you virtually from my home in Ancaster, Ontario, located on the treaty territory of the Anishinabe, the Mississaugas of the Credit First Nation, my home.

As an indigenous man who happens to have been a judge for more than two decades, I am painfully familiar with the flaws in the justice system that can lead to miscarriages of justice. Yet the consultations we conducted, as requested by former minister of justice Lametti, revealed a different perspective.

I had the honour to speak with the late David Milgaard four times during this process, where we spoke to 16 other exonerees and 215 people in total. With the assistance of Justice Westmoreland-Traoré and Professor Kent Roach—who, as you indicated, is appearing with me today—we were guided by Mr. Milgaard's experience and wisdom when he told us, “The wrongfully convicted have been failed by the justice system once already. Failing a second time is not negotiable.” He was talking about this.

It was in that spirit that we prepared a detailed 200-page report, which Professor Leonetti of the University of Auckland has praised as a transformative blueprint, that, if implemented, learning from the lessons of other commissions in other countries, could produce the best commission that could proactively investigate miscarriages of justice, play a vital role in their correction and contribute to their prevention.

To say that I am disappointed with Bill C-40 is an understatement. I will summarize my concerns about Bill C-40 into three main themes, which are reflected in our brief.

First, it is critically important that the commission be as independent and as qualified as possible. Bill C-40 as presently written would allow a five-person commission with only a full-time chair, who also has chief executive responsibilities, and without statutorily required indigenous or Black representation. In my view, this is manifestly inadequate to the task. Indigenous and Black people are the population most at risk for wrongful convictions and they have little reason to trust the system. I am also concerned about the slow and non-transparent process of cabinet appointments to the new commission. We have proposed three amendments to expand and strengthen the commission.

Second, Bill C-40 severely restricts the jurisdiction of the commission. That is, the requirement of an adverse decision by a court of appeal would prevent most victims of a miscarriage of justice from even applying to the commission for help. I recommend the submission of UBC's innocence project in this regard. David Milgaard told us not to exclude sentencing from the commission's jurisdiction. We recommended that someone who is still serving a sentence based on wrong and inadequate facts should be able to apply to the commission. I commend the Native Women's Association of Canada brief in this regard. Our proposed amendments four and five also address these concerns.

Finally, I am concerned that Bill C-40 will not produce the type of proactive, systemic and independent commission that the exonerees and many others told us we needed. Commissioners should not have renewable seven-year terms, because the hope of renewal and the spectre of non-renewal may interfere with their independence or reasonable perceptions of it. An independent advisory board should vet candidates for commissioners and assist the commission. The commission's budget, including compensation, should be tied to the judiciary's in order—

● (1630)

The Chair: You have 30 seconds.

I neglected to say that in the beginning. I won't take this out of your time. I will raise this card for 30 seconds, and this one when the time is up, so I can be as cautious as possible with people's time.

Thank you so much. You have 30 seconds left.

Hon. Harry S. LaForme: Great. I'll stop here, then, and I'll deal with the rest of it in questions.

Thank you.

The Chair: That's perfect.

[*Translation*]

Thank you very much.

[*English*]

We have up to five minutes for the Barreau du Québec.

[*Translation*]

Mr. Nicolas Le Grand Alary (Lawyer, Secretariat of the Order and Legal Affairs, Barreau du Québec): Hello, my name is Nicolas Le Grand Alary, I'm a lawyer with the Barreau du Québec's Secretariat of the Order and Legal Affairs. I'm joined by Nicholas St-Jacques, who represents the Barreau du Québec.

Thank you for inviting us to testify before the committee on Bill C-40.

First off, the Barreau du Québec wants to emphasize that it supports the bill's objective of replacing the current miscarriage of justice review process by establishing an independent body. However, based on its experience in the area of criminal justice administration, the Barreau du Québec has certain observations to make to improve it. Primarily, we want the new processes introduced by the bill to achieve their objective of correcting miscarriages of justice in an effective and efficient manner.

The Barreau du Québec therefore welcomes the creation of the independent miscarriage of justice review commission. We have always insisted on the creation of an independent body to analyze cases and gather information in order to increase the real and perceived independence of the post-conviction review.

I'd now like to move on to the particulars.

The bill provides that the commission must provide the applicant with an update concerning the status of their application on a regular basis. The commission may notify an applicant or their representative or provide them with information.

Applicants who apply for judicial review on the basis of miscarriage of justice are often in a vulnerable situation and may be incarcerated. Timely access to notices and information from the commission is important. In addition, applicants may require further context or an explanation of these documents. We are of the opinion that the commission's communications shouldn't be transmitted solely to the applicants, in order to avoid causing them additional harm. This approach would address an inconsistency between the English and French versions of the bill.

In addition, the bill states, “If the Commission has reasonable grounds to believe that a miscarriage of justice may have occurred or considers that it is in the interests of justice to do so, it may conduct an investigation in relation to an application.” The current wording says that the commission may do so, but it doesn't require it to do so. We're proposing an amendment to the section that the bill seeks to add to the criminal code specifying that the commission “must” conduct an investigation if it has reasonable grounds to believe that a miscarriage of justice may have occurred. This would allow the bill to meet its objective of facilitating and accelerating case reviews.

The bill also provides that when the commission provides notice that no investigation will be conducted, the notice must also specify the reasonable time within which the applicant and the attorney general may provide additional information. In the interest of procedural fairness, we recommend that the notices include the reasons why the commission decided not to investigate. Applicants should be aware of the deficiencies in their application for review and have the opportunity to rectify the situation.

I'll give the floor to Mr. St-Jacques for further comments.

Mr. Nicholas St-Jacques (Representative of Barreau du Québec, Barreau du Québec): On the interests of justice test, the bill provides that, at the end of the application review process, the commission grants a remedy when it “has reasonable grounds to conclude that a miscarriage of justice may have occurred and considers that it is in the interests of justice to do so”. The Barreau du Québec questions the relevance of including the interest of justice test to justify granting a remedy.

We are concerned that this test may disadvantage some applicants, including indigenous, Black, and other marginalized applicants. At the same time, applicants who have been convicted of serious crimes or who may appear dangerous to the public may not get justice even if a miscarriage of justice has occurred.

The Barreau du Québec considers that the interest of justice test should not be invoked when the commission concludes that a miscarriage of justice may have occurred. Rather, it should be an additional ground used to benefit applicants when the commission cannot conclude that a miscarriage of justice may have occurred.

You can find in our brief some of the other observations we made, such as how applications under the current regime can be forwarded to the commission and what criteria can be used for those applications. We also have recommendations concerning the knowledge of official languages that should be possessed by the commissioners who will be appointed to the commission.

Finally, the Barreau du Québec would like to reiterate the importance of implementing the new processes set out in the bill in an effective and efficient manner, so that they are successful. This will help maintain, if not enhance, public confidence in the miscarriage of justice review process and the justice system.

● (1635)

[*English*]

The Chair: Thank you.

Mr. Lockyer, you have up to five minutes, please.

Mr. James Lockyer (Board Member, Counsel, Innocence Canada): Thank you, Madam Chair and members of the committee.

I was last here on October 3, 2001, with the late Joyce Milgaard, when the committee was considering the enactment of the current sections of the Criminal Code that govern ministerial reviews of wrongful conviction claims. I looked up what we said on that occasion. Joyce Milgaard began her presentation by saying that her heart sank when she saw what the proposals were. Her heart sank because we so badly need an independent commission, a commission independent of the minister and the ministerial process.

Finally, today, we are here to talk about legislating such a commission. The late Joyce and David Milgaard would be proud that the legislation is named after them.

Addressing wrongful convictions has always seemed to Innocence Canada to be a non-partisan issue. Peter MacKay has attended many of our functions over the years. Daniel Turp went on a delegation with Innocence Canada, including Rubin "Hurricane" Carter, to try to save the life of a Canadian on death row in Texas many years ago. Elizabeth May has always been a supporter. Irwin Cotler and David Lametti, in particular, have always been supporters of Innocence Canada, and Jack Layton was always with us as well. We believe the present minister, Minister Virani, is too.

We've engaged in 30 years of advocacy, and for us, this legislation is welcome. It presents a sea change for our criminal justice system. It provides a new fail-safe mechanism for those who have been wrongly convicted.

It's hard to prioritize proposals we have for what we think would be improvements to the legislation, but I'll just list four.

First of all, regarding the composition of the commission, there aren't enough commissioners. The present criminal convictions review group, which does the minister's work on wrongful conviction claims, consists of six staff lawyers, one assisting lawyer and three outside, on-contract lawyers. You can see immediately that the proposed number of commissioners—one, the chief, plus four to eight more—is simply not going to be enough, because the applications under the new legislation are going to increase significantly beyond the present ministerial review applications.

Second, we believe that sentences should be brought into the legislation. We think that's particularly important for indigenous people. All commissions in other jurisdictions have always included sentences within the scope of the powers of the commission.

Third, we believe the commission should have the explicit power in the legislation to suggest systemic change arising out of the individual cases they review. The commissioners will be in a fabulous position, we believe, to recommend systemic changes that can avoid wrongful convictions in the future, because we want to do both: We want to find wrongful convictions that have already occurred, and we want to prevent wrongful convictions insofar as we can in the future.

Finally, we believe that appellate courts across the country have not served the role they should to find wrongful convictions at an early date when appeals are heard. We believe that appeal courts should have their jurisdiction extended to require them to consider whether or not convictions are unsafe when they're brought before them on appeal. Presently, appeal courts do not do that. They are courts of process, not courts that properly consider issues of guilt or innocence.

Thank you.

● (1640)

The Chair: That is much appreciated. Thank you very much.

We're going to be concise, and I am going to go to questions, allowing six minutes per party.

I'm going to start with Mr. Caputo, please.

Mr. Frank Caputo: Thank you, Madam Chair.

Thank you all for being here. There's a lot to chew on here, so I'm not sure how much I'm going to get through because you all have interesting things to say.

I will start by saying that nobody wants to see a wrongful conviction. I have sat on both sides of the aisle, as a prosecutor and as a defence lawyer. One thing that still haunts me to this day, as I think I mentioned in the last meeting, was what I thought was a wrongful conviction, even on a relatively minor matter. I think we're all *ad idem*. The question is how we get the legislation right, so please take my comments as coming from a place of inquiry.

One of the main things...and perhaps, Mr. Le Grand Alary, I'm going to direct my first question to you. You made the distinction between "may do an investigation" and "must do an investigation". When we're looking at this issue, it's about the likelihood of a miscarriage of justice. The word "may" in law, as we know, is quite permissive. Where I'm going with this is that something "may" have been a miscarriage of justice.

In your eyes, sir, where is that threshold? Sometimes we have "likely was a miscarriage of justice", "could have been", "may have been". Can you explore that with the committee a little bit?

[*Translation*]

Mr. Nicolas Le Grand Alary: I will begin, and then I'll let Mr. St-Jacques add to my response if he so wishes.

The idea is that the commission has to have reasonable grounds to believe that a miscarriage of justice may have occurred, so there need to be reasonable grounds to determine if it has indeed occurred.

Our proposal to replace the word "may" with the word "must" is more related to the discretionary power to investigate.

Would you like to add anything, Mr. St-Jacques?

Mr. Nicholas St-Jacques: In Bill C-40's current form, proposed subsection 696.5(1) states, “If the Commission has reasonable grounds to believe that a miscarriage of justice may have occurred or considers that it is in the interests of justice to do so, it may conduct an investigation in relation to an application.” We're not yet at the stage here where it has to be determined if remedies are appropriate or not. The point is rather to determine if, from the way it was processed, the file needs to get to the investigation stage and if the commission should look into it further.

What the Barreau du Québec is proposing is to make the investigation mandatory if the commission has already concluded that it “has reasonable grounds to believe that a miscarriage of justice may have occurred or considers that it is in the interests of justice to do so”. At this stage, the commission already has to do some kind of assessment and it still has the discretionary power to determine if an investigation is warranted. In our opinion, the commission shouldn't also have the discretionary power to determine if an investigation should be conducted or not.

Furthermore, having read several of the Criminal Conviction Review Group's investigation reports, I can tell you that some investigations are more detailed than others. So in our opinion, making investigations mandatory shouldn't be a significant burden on the commission. Some investigations will be more straightforward, and others will be more involved, but when there are reasonable grounds to believe that a miscarriage of justice may have occurred, we need to go forward.

[*English*]

Mr. Frank Caputo: I'm going to pause for one moment here. I do have a follow-up question.

Do we have bells?

The Chair: I have no idea, but I'm seeing the lights too.

Why don't we continue? I'm sure we will find out.

If there's consensus, we can continue until it's time. If there isn't, then we will suspend. Let me know. I'm the chair, and I'm here to listen to the members.

Mr. Frank Caputo: Okay.

I take your point about the compulsory nature of the investigation on reasonable grounds. My question is about the threshold. If there are reasonable grounds to believe that a miscarriage of justice likely occurred versus reasonable grounds to believe that a miscarriage of justice may have occurred, that's the distinction I'm trying to really ask for your opinion on and draw out from you. To me, “likely occurred” means 50% plus one, a balance of probability. Does that sound right? It's something like that. However, “may have occurred” can be quite remote in the eyes of some, or it could be a little bit more substantial. Do you get where I'm going with this question?

What I'm trying to get from you is your expertise on that very question.

● (1645)

[*Translation*]

Mr. Nicholas St-Jacques: That's an important distinction indeed. That's actually one of the important aspects of Bill C-40 compared to what we had before.

Currently, in order for a miscarriage of justice to be recognized and for a remedy to be ordered by the Minister of Justice, there must be a certain likelihood of miscarriage of justice. Earlier, we were talking about a threshold of 50% plus one, that is, a balance of probabilities.

In its current form, the bill actually seeks to lower the test to the level of a possibility. In the French version, proposed section 696.6 talks about cases where “*une erreur judiciaire a pu être commise*”, whereas in the English version, the word “may” is used. In a way, the French version talks of a reasonable possibility, which is a much lower test.

The reason the test was lowered is that it's not always easy to establish a miscarriage of justice occurred with a sufficient degree of probability. We often talk about cases that are so old that certain documents are difficult to trace, where witnesses can be hard to track down or have an imperfect recollection of events after all that time.

That explains the change somewhat.

The Chair: Thank you very much.

[*English*]

We have Mr. Maloney, please, for six minutes.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): Thank you, Chair.

First of all, for all the witnesses, let me just add my thanks, not only for being here today but for taking the time to prepare materials for us to review. In the case of Justice LaForme and Mr. Lockyer, I know you've done a lot of work on this leading up to the introduction of this legislation, and I thank you for that as well.

Justice LaForme, I'm going to start with you. I had some questions about what I think was going to be your last series of points. Since you didn't get a chance to make them, I will give you that opportunity first and then ask you some questions.

Hon. Harry S. LaForme: Thank you.

I mentioned that the commissioners should not have these renewable terms. I think that's important.

The commission's budget, including compensation, should be tied to the judiciary. I mentioned that. That should be independent. I'm not saying that they should be the same as the judiciary or anything, but they should have the same independent process whereby they determine the budgets for commissioners and salaries and whatnot

I think the five-year parliamentary review should be independent of the commission's work. The commission should have a separate employer status. One of the problems with the status quo is the role of the civil service in advising the Minister of Justice. We advised against "interests of justice". I don't think that should be a requirement, because as a judge I can tell you that "interests of justice" can mean many things or it can mean nothing. It's a term that I don't think assists us.

We recommend a proactive commission that could engage with systemic and disciplinary matters, as James Lockyer pointed out. We agree with that.

On Bill C-40, we recommend that, as in England, the commission should be able to have access to documents—and this is very important—even if the police, prosecutors and others claim privilege. We've been advised and our experience was that the police, etc. would claim privilege as often as they can. We say that the commission should be able to be the guardian of that privilege, and they should be the determining factor of what they get and what they don't get.

There are some features in the bill that we do like, as we said. We agree with that.

However, the most obvious is the status of the commissioners themselves and of the chief commissioner particularly. He's going to be a civil servant, first and foremost, and the independence of the commission is in doubt, I think, with that alone.

Those are my submissions.

● (1650)

Mr. James Maloney: Thank you, Justice LaForme.

I take it that when you bring into question the renewable seven-year term, you're not suggesting a longer term or a permanent position. You're suggesting a one-term appointment.

Hon. Harry S. LaForme: That's correct.

Mr. James Maloney: Okay.

Is your concern that there would be political interference and people would be making decisions based on the potential...something that people making the appointment would take into account because of their conduct?

Hon. Harry S. LaForme: Yes. I think people would be looking to their tenure and looking to renew their appointments, and I think that would be problematic.

Mr. James Maloney: Okay.

On the five-year parliamentary review, you said to include an independent audit. Is that a qualitative review of the performance of the commissioners or is that the process itself?

The Chair: Excuse me, Justice LaForme. Would you mind putting the mike between your nose and mouth?

Hon. Harry S. LaForme: Okay. How's that? Is that better?

The Chair: Yes.

Hon. Harry S. LaForme: I personally think it could be both. I don't see any reason why they wouldn't or couldn't do both, but mostly I think it's qualitative.

Kent, do you have anything to add to that?

Mr. James Maloney: Well, I don't share your concern about political interference with respect to the renewable term. I think there's benefit to having experience on this, as there is in somebody sitting on the bench, but—

Hon. Harry S. LaForme: I should say that with that interference I don't mean that it's going to be some kind of personal incentive or anything because of that. I just think that people who have this position would work and decide on the basis of wanting to get their renewals, and I don't think that's necessarily a good thing.

Mr. James Maloney: I'm just struggling to find a connection between finding that there's a miscarriage of justice and getting your term renewed, but perhaps we can agree to disagree.

The other point you made was on the requirement for an adverse decision by the court of appeal. I take it that what you mean is that they should not have to exhaust the appeal process before they apply.

Hon. Harry S. LaForme: That's right.

Mr. James Maloney: Okay. Does this not put the commissioners somewhat in the position of a court, because you're then reviewing a trial judge's or a lower court's decision?

Hon. Harry S. LaForme: Well, it's only to the extent that you would examine the situation and then turn it back over to the court for a decision.

Mr. James Maloney: Isn't that the purpose of the court of appeal?

Hon. Harry S. LaForme: Yes, but we know the court of appeal makes mistakes.

Mr. James Maloney: Exactly, but I think that you, having sat as a trial judge and a member of the court of appeal, would have faith in the system, recognizing that there are potential problems, which is why this bill is being discussed in the first place. I would think you would agree that it would be necessary to exhaust the appeal.

Hon. Harry S. LaForme: If I can, because this is important—

The Chair: The time is up, so perhaps another questioner can get to you.

If I don't do this, I won't be able to get to every party to ask a question.

[*Translation*]

Mr. Fortin, you have the floor for six minutes.

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

I thank all the witnesses for being with us today.

I'd like the representatives from the Barreau du Québec to elaborate on certain questions.

First, I understand that you agree on expanding the cases where there can be a request for a miscarriage of justice review. Instead of only cases where there probably was a miscarriage of justice, the bill expands the possibility of requesting a review to those cases where a miscarriage of justice may have occurred.

You would also like the wording to say that the commission "must", rather than "may", conduct an investigation at that point.

Essentially, I agree with that, but I do wonder: Would that not weigh down the process? It seems to me that there would be a lot more files than there currently are.

I'd like to hear your opinion on that.

Mr. Nicolas Le Grand Alary: Indeed, there very well may be an increase in the number of files. I'll let Mr. St-Jacques add to my answer.

The underlying message in our remarks and in our brief is that this commission needs to have the necessary resources to do its job. It will definitely need to have an adequate budget and the necessary resources to see its investigations through. As Mr. St-Jacques has said, some investigations can be more straightforward than others, depending on the case.

I'll let Mr. St-Jacques give a supplemental response.

● (1655)

Mr. Nicholas St-Jacques: As I mentioned earlier, the goal is not for investigations to be mandatory in all cases. Still, the commission must have reasonable grounds to believe that a miscarriage of justice may have occurred, so it must have received a minimum amount of information to enable it to conduct an investigation.

As soon as there are reasonable grounds to believe that a miscarriage of justice may have occurred, I think the logic of the current reform should lead to a mandatory investigation. We want to prevent certain cases of miscarriage of justice from going unreported and uncorrected. As long as there are reasonable grounds, I think compulsory investigation goes without saying.

As far as making the process more cumbersome by using this commission, I don't think it will be very significant. As I mentioned earlier, there are cases where investigations are very straightforward. Having read investigation reports published under the current process, I can say that there are cases where investigations are more complex.

I think this answers your question.

Mr. Rhéal Éloi Fortin: Mr. Le Grand Alary, you mentioned that the necessary resources and budgets need to be in place. Currently, the bill provides for the appointment of between five and nine commissioners. Does this seem sufficient to you?

Shouldn't provision be made for appointing more commissioners and having two chief commissioners who can study files simultaneously?

Mr. Nicolas Le Grand Alary: As you saw in our brief, we haven't taken a direct position on the number of commissioners. I know we repeat this a lot, but, what we want is for the proposed commission to be effective and efficient.

There could certainly be more commissioners. We've also raised the idea of having regional offices, for example, so that there's proximity to applicants. So various measures could be put in place, including the appointment of more commissioners, indeed.

Mr. Rhéal Éloi Fortin: With regard to time frames, we're told that the current review process can take anywhere from 20 months to six years, which seems enormous to me. Yet the bill does not set a time limit for rendering a decision.

Do you think it would be appropriate to make amendments to the bill so that it provides for certain deadlines that will necessarily have to be met?

Mr. Nicolas Le Grand Alary: Yes. In fact, we highlight this issue in our brief, particularly in our comments on the notices indicating that no investigation will be carried out. Several provisions that the bill proposes to add to the Criminal Code, notably clause 696.5, indicate that the commission must provide a response within a reasonable time or that the parties must be given a reasonable time to respond. These kinds of time limits should indeed be quantified or more clearly defined.

That said, we don't have any specific deadlines to suggest. Mr. St-Jacques will certainly be able to add details about the possible length of these deadlines.

In fact, it's a good line of thought.

Mr. Rhéal Éloi Fortin: I'll turn instead to Mr. Lockyer, to whom I'd like to ask similar questions.

Since we would be moving from a threshold of probability to a threshold of possibility of a miscarriage of justice, more cases could be submitted to the eventual commission. In addition, the Barreau du Québec is asking that the commission be obliged to investigate. All this could, in my opinion, create a backlog of requests.

Do you think this will actually be the case or not? If so, how can we guard against such a situation?

[*English*]

Mr. James Lockyer: There will undoubtedly be a substantial number of applications when this legislation comes into force. If you look at the experience of other jurisdictions, the number of applications has soared at the outset, and that's not surprising.

In terms of the new test, the lesser test, the "may" instead of the higher tests that we have to deal with now, the probability test—

The Chair: Mr. Lockyer, to be fair to everybody, I'm going to have to stop you.

I will ask Mr. Garrison to start his six minutes, and it's up to him whether he would like to have you respond to that question or ask a different question.

● (1700)

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

Please continue.

Mr. James Lockyer: I don't think the lower standard will increase the number of applications. What it will do is increase the number of successful applications. That can only be a good thing, in my view. If someone may have been the victim of a wrongful conviction, they deserve a remedy.

I think it's important to remember that the remedy they're going to get is not a final remedy. It's only a remedy of a new trial ordered by the commission or a new appeal ordered by the commission to be heard in the provincial appeal court.

The "may" standard is something that we strongly endorse at Innocence Canada. In our experience—and we have considerable experience of many individual applications, more than 40—we believe that the high standard has impeded some wrongful conviction cases from getting back before the courts.

Mr. Randall Garrison: Thank you, Mr. Lockyer.

I would have started by thanking all the witnesses for being here today. All of you have done important work on this topic, and some have done decades of work. We appreciate the expertise.

Our processes are always a bit arcane here at the House of Commons, and today they are particularly disrupted.

I want to go back to Justice LaForme for one second. You were talking about the requirement that there be an adverse decision by the court of appeal being lifted or changed. We haven't received your brief in translation yet, so can you tell me more about what you were suggesting there?

Hon. Harry S. LaForme: What I'm suggesting is.... If you recall, one doesn't have to think too hard about the expert witnesses who gave rise to people pleading guilty to offences they never committed. There were a lot of them. That happens very often. A court of appeal would never touch those cases. They would simply go to prison without appeal. Those are the cases that we think about. I think there would be a lot of those cases.

In fact, I think the vast majority of cases would be that way. Consequently, if you're relying on a court of appeal to give a decision on it, you're going to miss out on the vast majority of cases that are entitled to it.

Prof. Kent Roach (Professor, Faculty of Law, University of Toronto, As an Individual): If I could add just briefly to that, Mr. Garrison, only 23 of the 87 cases that are on the Canadian registry of wrongful convictions have gone through the minister. As Justice LaForme said, the eight victims of Charles Smith—largely indigenous, largely young women, largely racialized—couldn't even apply to the commission.

The English commission is able to hear cases without a decision from the court of appeal in exceptional circumstances, and we see no reason why we should have a more restrictive jurisdiction for our commission.

Thank you.

Mr. Randall Garrison: Thank you, Professor Roach.

Mr. Lockyer, in bringing sentences within the scope of the commission, can you talk a bit more about the importance of doing so and how that would be done in the legislation?

Mr. James Lockyer: First of all, we would be the only commission that doesn't allow sentence applications.

If you look at the stats of the various commissions—the English and Scottish commissions in particular, because they've been around for more than 25 years now—you will see that approximately a sixth of their references are in sentence cases. For example, the English commission, in the 25 years of its existence, has referred 834 cases, of which about 85 were sentences.

As I pointed out in the Innocence Canada brief, appeal courts are very reluctant to interfere with sentences on sentence appeals. They defer again and again to the trial judge. This means that the appeal process for sentences is pretty well broken. There really is very little chance of winning an appeal when your only appeal is one from sentence.

That leaves an opening for the commission, because someone sentenced to a lengthy period of imprisonment, shall we say, may well have improved his or her life, their status in the world or their status in life during the time of their incarceration, and it's only right that they should have an opportunity to go somewhere to ask that their sentence be reconsidered. That's how the process is used in the other jurisdictions, and I think it would be a very helpful process here, particularly for those who tend to get the longer sentences: indigenous and Black people. As we know, their numbers are grossly disproportionate in our jails.

● (1705)

Mr. Randall Garrison: If we added sentences, I guess through amending the application process, would we also, then, be amending the remedies available to the commission? Would it require us to say that the commission actually can make a recommendation on sentencing? I don't believe that's in the scope of the bill.

Mr. James Lockyer: Well, at the moment, the commission has the ability to quash convictions or refer to an appeal court. If sentences were introduced, you could give the commission the power to vary sentences and/or refer the sentence to an appeal court. You'd still have those same options available to you.

Mr. Randall Garrison: It's not currently in this legislation.

Mr. James Lockyer: No, it's not, because sentences are not included within the jurisdiction of the commission. They can't look at sentence applications.

Mr. Randall Garrison: Thank you very much.

The Chair: Thank you very much.

I'm going to give three minutes to Mr. Van Popta and Ms. Dhillon, and then two minutes to Mr. Fortin and Mr. Garrison. That will end the panel.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Do I have three minutes?

The Chair: Yes.

Mr. Tako Van Popta: I'll speak quickly.

The Chair: Please do.

Mr. Tako Van Popta: Thank you to all our witnesses for being here.

Justice LaForme, under the new regime, will it still be an extraordinary remedy for a convict to receive a remedy from this commission for a new trial, for example? I'm reading from the report, where you're quoting the David Milgaard inquiry:

> The conviction review system in Canada is premised on the belief that wrongful convictions are rare and that any remedy granted by the federal Minister is extraordinary. Change is needed to reflect the...understanding of the inevitability of wrongful convictions....

These aren't your words, Justice LaForme, but you did quote them. What are your thoughts on that?

Hon. Harry S. LaForme: Kent, can I ask you to touch on that one?

Prof. Kent Roach: Yes.

The bill would still require the commission to take into account new matters of significance not previously considered by the courts. This would happen whether...there wasn't even a court of appeal decision. I don't think any of the commissions are going to second-guess the trial judge. What this is about is getting new evidence that the accused, when they've been convicted and often imprisoned, is powerless to get. That was one of the reasons we recommended—and the English commission has this—that they should have information even if the police, prosecutors or anyone else claims legal privilege over it.

This is about helping people find new evidence. One of the reasons that Mr. Lockyer and all of the innocence projects will support the commission is that they do not have public powers to compel the police and prosecutors and forensic experts to give them the evidence they want and need.

This is why it's very important—

Mr. Tako Van Popta: Sir, I only have three minutes, so I'm going to jump in with another quick question.

Will it still be a requirement, in your opinion, that there should be new evidence brought forward that was not available at trial? That is my understanding of the current regime. I'm reading from the 2022 annual report, which says exactly that. What are your thoughts?

The Chair: You have 30 seconds.

If there's not enough time and there's more evidence from any of the parties—I won't take this out of your time, Mr. Van Popta, don't worry—please forward to the committee anything else you would like to add or anything that may have come up today. We would love to have any supplementary information.

You have 30 seconds, Mr. Roach or Justice LaForme.

Prof. Kent Roach: According to the bill and according to the existing language in the Criminal Code, there must be “new matters of significance”. In most cases, that will be evidence, but in some cases it may be a change in law. If sentencing was introduced and if there wasn't a proper Gladue report or other pre-sentencing report, it may include those factual matters.

● (1710)

The Chair: Perfect, thank you very much.

Ms. Dhillon, go ahead.

[*Translation*]

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): Thank you, Madam Chair.

Good evening, and welcome to you all.

I'll start by addressing the representatives of the Barreau du Québec.

There's no doubt that wrongful convictions have really serious consequences for those who are wrongfully convicted, but these convictions also harm the victims of crime.

Can you share with the committee any cases you have seen, in your practice, where such convictions have had consequences for victims of crime?

Mr. Nicholas St-Jacques: Having represented people who have been wrongfully convicted, I can say that the consequences they suffer are very significant. We're talking about psychological and financial consequences, for example. These are isolated people, cast aside, who are often shamed by society.

As far as the victims are concerned, I couldn't testify to any specific factors. However, I can tell you that, under the current system, victims' families are notified of the situation when a remedy is granted by the Minister of Justice. This is something the commission could do as well.

When there has been a miscarriage of justice, it must be corrected. I think it's important for everyone, including the victims and their families.

Ms. Anju Dhillon: Mr. Le Grand Alary, do you have anything to add?

Mr. Nicolas Le Grand Alary: I'd say it's also a question of trust in the justice system. If the person was convicted unfairly, the victims won't have gotten justice either.

Ms. Anju Dhillon: In your opinion, how can we guarantee that this new commission will be transparent to the public?

Mr. Nicolas Le Grand Alary: I think we need to publicize the decisions that are made in some way, and where appropriate, the remedial measures that are ordered. Mr. Jacques will be able to elaborate as to whether or not the files are confidential.

Generally speaking, the bill also provides for a review mechanism. For our part, we propose to give the commission the power to make recommendations to improve the system and better manage systemic problems.

Ms. Anju Dhillon: I have a few seconds left to ask one last question.

What lessons can be learned from countries that have established similar independent review commissions?

Mr. Nicholas St-Jacques: I think Mr. Lockyer mentioned this earlier. Indeed, we saw that there were significant shortcomings in other countries' systems for reviewing miscarriages of justice. When independent commissions were set up, many eligible people did not make claims, or their claims were not dealt with in sufficient detail for miscarriages of justice to be recognized.

The United Kingdom is a striking example where we have seen an increase in the number of cases recognizing miscarriages of justice, whereas the situation was quite different previously.

Ms. Anju Dhillon: Thank you.

The Chair: Thank you very much.

Mr. Fortin, you have the floor.

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

I once again thank all the witnesses for being with us.

In the two minutes I have, I'd like to hear comments from representatives of the Barreau du Québec.

In the current situation and according to what the bill also provides, we must exhaust all possible remedies before invoking a miscarriage of justice. This means, among other things, appealing whenever possible. Often, however, victims of a miscarriage of justice do not have the financial resources to use these recourses. We know that an appeal hearing can be very expensive, especially when it comes to cases before the Supreme Court.

What do you have to say about this? Doesn't this requirement to exhaust remedies before invoking a miscarriage of justice deprive many citizens of their right to judicial review when there is a mistake?

Mr. Nicolas Le Grand Alary: I'll answer quickly first and then let Mr. St-Jacques complete my answer.

You've read our brief. As you can see, we don't have a position on this specifically. I would simply say that, from my point of view, we should avoid duplicating the types of hearings or appeals as much as possible. Indeed, you raised a very important point with regard to unrepresented parties and the complexity of certain procedures.

Mr. St-Jacques could add comments on this.

Mr. Nicholas St-Jacques: Indeed, in our brief, we did not take a position on this point specifically.

That said, as Mr. Lockyer mentioned earlier, as well as other speakers, I believe, there could be an openness to the idea that the commission could conduct a review in certain cases. Should this be done automatically? Perhaps not, precisely so as not to duplicate appeal procedures. However, granting this power to the commission would indeed help avoid injustices.

● (1715)

Mr. Rhéal Éloi Fortin: I have barely a few seconds left.

If we eliminated this requirement, so that people who think a miscarriage of justice has occurred could request a review, and those who had to appeal instead used that remedy, would that be an interesting and appropriate solution?

Mr. Nicholas St-Jacques: This could be a solution, but there would need to be more discussion about how it would be worded.

Mr. Rhéal Éloi Fortin: It would take more than two minutes.

Mr. Nicholas St-Jacques: Yes.

The Chair: Thank you very much.

[*English*]

For the final round, we have Mr. Garrison.

Mr. Randall Garrison: Thank you very much, Madam Chair.

Mr. Lockyer, I will come back to you. I was very interested in your suggestion of changing the appeal court's jurisdiction as a preventative measure so that fewer cases end up going through this whole process and end up at the commission. I have some concerns about whether that's within the scope of the bill in front of us, but can you say a bit more about how extensive a change that would be?

Mr. James Lockyer: Well, in some jurisdictions, appeal courts have the power to set aside convictions when they have, as they put it, “a sense of unease” about the conviction. Our courts of appeal do not give themselves that power, and only legislative change would do that. It's something that we advocated for to Minister Lametti when he was considering this legislation. It's something that Justice LaForme recommended in his recommendations to the minister.

It may be something for another day. I want to get this commission going, and obviously you're going to have to consult appeal courts if you're going to change their jurisdiction, and that hasn't been done.

Could I just add one thing about the victims of the crimes for which someone has been wrongly convicted? There are two important things there. One is that if a person has been wrongly convicted of the crime, that means the right person hasn't, so the victim of the crime has not gotten justice.

Second, in many of our cases, the victims of the crimes have actually showed up at the proceedings. Just in July of this year, in appearing before the chief justice in the Court of King's Bench of Manitoba, we had two indigenous men, Brian Anderson and Allan Woodhouse, acquitted of a 50-year-old murder that neither of them had committed. That happened just three months ago. The family of the deceased, of the man who was murdered, was in court, and it was marvellous to see them in the same place and with the two men who, for 50 years, have been wrongly convicted of their father's crime or their uncle's crime, depending upon which relative we're talking about.

Wrongful convictions have a scope that goes beyond the individuals themselves who have been wrongly convicted. It's important as well for the victims of the original crime.

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

With those concluding remarks, we really want to thank all witnesses for being patient with us this afternoon. Thank you for appearing by video conference or in person.

As I said, if there is anything else you think we should have, please send it in.

Let me suspend for one minute so we can organize our next panel.

Thank you very much.

● (1715)

_____(Pause)_____

● (1725)

The Chair: I am going to call the meeting to order.

We have Myles Frederick McLellan in the room. Welcome.

We were unable to have Ms. Canoe tested appropriately for the sound, so apologies for that.

We do have Dunia Nur, president and chief executive officer of the African Canadian Civic Engagement Council, by video conference.

I am going to start, for up to five minutes, with Mr. McLellan from the Canadian Criminal Justice Association.

Welcome.

Dr. Myles Frederick McLellan (Chair, Policy Review Committee, Canadian Criminal Justice Association): Thank you, Madam Chair and members of the committee. It's truly an honour and a privilege to be here with you.

Our position deals with compensation for wrongful convictions.

Before we get into that, our first position is quite clear. We absolutely endorse the recommendations in the report by Justice LaForme and Justice Westmoreland-Traoré, with the exception of recommendation 51. We'll talk about that shortly.

Having said that, basically we're going to deal with compensation. The first thing I'm going to do is give you a quote from the late David Milgaard: “Fighting the Canadian government for compensation long after being released from prison after exoneration feels like being in prison all over again”.

Our position is clear. As important and fundamental as it is to get those who are wrongly convicted or victims of the scourges of justice out of prison, it is also incredibly important to make arrangements for compensation for those persons so that they can in fact rebuild a life.

The centrepiece of compensation in most nations around the world is a function of the United Nations international obligation in that regard. Following the Universal Declaration of Human Rights in 1948, two multilateral treaties were entered into in 1966 by all nations, including Canada and its provinces and territories in 1976, called the International Covenant on Civil and Political Rights. What article 14.6 said, for all those nations that acceded to it, including Canada, was that they had an obligation to put a compensation scheme into place for miscarriages of justice.

Most countries in the world have in fact done that. Canada really has not. We tried to do that, and we still have in place federal, provincial and territorial guidelines, the part that the jurisdictions can enter into, which is ostensibly following the tenet of article 14.6, but it really doesn't. It doesn't follow what in fact article article 14.6 asks for.

These guidelines have provided large amounts of compensation over the years: $10 million to David Milgaard and $6 million to Steven Truscott, etc. Apart from those very large awards, there has only been, on average, one award per year since 1988. It really doesn't provide access for those who, for the most part, are in that field of wrongful convictions and miscarriages of justice.

In fact, in 2006, Michel Dumont, who is widely recognized as one of Canada's wrongly convicted, went to the United Nations, using the optional protocol to get the United Nations Human Rights Committee to force Canada to abide by its international rights obligation. The committee agreed with him. The committee, in fact, did find that Canada did not subscribe and did not live up to the terms of the covenant. It issued a directive to Canada to make arrangements for compensation for Mr. Dumont. Canada quite simply ignored it and refused to do so.

Having said that, the other things that are available for compensation are items that deal with litigation, for the most part, such as malicious prosecution, negligent investigation, charter damages and what have you. The prospect for those who are released from prison of having the funds available to pursue litigation is negligible and, for the most part, most of those remedies are highly ineffectual.

The relatively broad accepted method of approaching this issue is by way of statute. What we're asking the committee to do with respect to Bill C-40 is to add a provision in this statute allowing for compensation based upon model statutes that have been prepared in that regard.

We have two commonwealth jurisdictions that have statutes. We have the United Kingdom. In 1988, it enacted the Criminal Justice Act, which very much aligned with article 14.6 of the international covenant. In fact, it was a very strong proponent of compensation until it was amended in 2014. The other jurisdiction is the United States. There are 38 jurisdictions that have statutory provisions for compensation. They vary widely from state to state, but in fact they do provide those seeking compensation with an accessible and transparent opportunity to rebuild a life.

● (1730)

The Chair: Thank you very much.

Ms. Dunia Nur, you have five minutes.

Please proceed.

Ms. Dunia Nur (President and Chief Executive Officer, African Canadian Civic Engagement Council): Thank you so much for having me here. My name is Dunia Nur, and I serve as the president of the African Canadian Civic Engagement Council, ACCEC.

I would like to begin by acknowledging that I am joining you virtually from Treaty 6 territory. I recognize and hold deep respect for the histories, languages, ceremonies and cultures of the first nations, Métis and Inuit people who have called this territory home since time immemorial.

As a person of African descent, I think treaty acknowledgement is of utmost importance, as it serves as a reminder of the shared painful histories of oppression that have left both of our communities with enduring scars. It is important to acknowledge that the system of apartheid established through the process of colonization on the continent of Africa drew its model from the oppression and colonization of the indigenous people of Turtle Island. This was tragically replicated in the enslavement and colonization of African indigenous populations in Africa.

Our mandate is to protect and promote the dignity and human rights of people of African descent, and we fulfill this mandate through five primary areas—youth development, gender-centred access to justice—

The Chair: Ms. Nur, hold on a minute, please.

[*Translation*]

Do you have something to say to me, Mr. Fortin?

Mr. Rhéal Éloi Fortin: Madam Chair, the interpretation can't be done because the sound quality isn't good enough. That's what we just heard on the French interpretation channel.

Moreover, I notice that the witness speaks so quickly that, even if the sound quality were good, I imagine this would be a problem.

Be that as it may, the sound quality is not good enough for adequate interpretation. I think you should consult the interpreters about this, Madam Chair.

[*English*]

The Chair: I'm going to wait a second.

If the interpreters are saying they are unable to interpret, there's really not much I can do as the chair.

I'm going to ask the clerk to find out.

Ms. Dunia Nur: I apologize. Is it because I'm speaking too fast? I'm just trying to keep up the time.

The Chair: We are told the audio quality is not good for the interpreters. There's very little I can do. My apologies for that.

If you wouldn't mind sending us what you have written down, we would love to have it at the committee.

There's not much I can do about it. What I can do is start with questioning.

Yes, Mr. Garrison.

Mr. Randall Garrison: Thank you, Madam Chair.

I do think we need to make it clear to the witness today that we have had this problem repeatedly. It is not a problem with the witness. They quite often feel responsible when, clearly, the problem is with the technical provisions on the House of Commons end. I hope she was there long enough to hear this, and also Ms. Big Canoe.

We try to make arrangements so that they can appear again when we solve this problem, rather than just dismissing them by saying they should submit things in writing. I think it's very important that the witnesses be able to appear.

My last point in the point of order is that this has been going on for a year and a half, and it is becoming increasingly frequent. It is not acceptable. The technical problem must be solved. It not only affects the privileges of members, but it affects the ability of witnesses to give us much-needed testimony. We can't just keep ignoring this and keep suggesting that witnesses or members are doing something wrong, when it happens to a wide variety of people in many different circumstances.

As I've said to you, Madam Chair, it happened when I was using Wi-Fi, and it happened when I was using a connected House of Commons computer. It is not something the witnesses or members are doing. It is a fault either in the software or in the connectivity between the Zoom software and the interpretation booth, and it must be solved. We can't just keep proceeding like this.

I really appeal to the chair that perhaps we schedule no more meetings until this problem is solved.

● (1735)

The Chair: Mr. Moore, I see you have your hand up.

Hon. Rob Moore (Fundy Royal, CPC): Thank you, Madam Chair.

I won't belabour the point, because Mr. Garrison just said it so well, but it's extremely embarrassing to have.... I think there have been more witnesses unable to take part, and we've invited them to take part in this meeting. We've provided them with the equipment to do so, and then, when it comes time for the meeting, they're unable to take part. There has to be a better way than doing this in real time, potentially embarrassing the witnesses and, in my opinion, embarrassing ourselves.

I don't want to miss the opportunity to say that I agree100% with what Mr. Garrison has said. Rather than waiting until the next meeting, I think we need to put our heads together in a subcommittee meeting and find out why this is happening and how we make it better. Do we have to have an appeal to the House leadership? Is it a resource issue? We can't continue on like this.

Thank you, Madam Chair.

The Chair: I agree with you all, and I think every member here agrees.

Why don't we go to questioning? We still have Mr. McLellan with us.

I'm going to start with Mr. Caputo for six minutes.

Mr. Frank Caputo: Thank you, Madam Chair.

I don't intend to grill Mr. McLellan for six minutes.

The Chair: Take however long you need.

Mr. Frank Caputo: I echo those comments.

When the NDP and the Conservative Party are *ad idem*, you know that there's—

Mr. Randall Garrison: Coalition.

Some hon. members: Oh, oh!

Mr. Frank Caputo: In any event, this does have to change. This is unacceptable. I echo my colleagues' comments.

Mr. McLellan, am I correct in saying that the purview of the evidence you're prepared to give really only relates to compensation? Is that right?

Dr. Myles Frederick McLellan: That's correct.

Mr. Frank Caputo: To be candid, a lot of my questions relate to the technical aspects of the bill, so I want to, perhaps, clarify one or two things with you.

When we're talking about miscarriage of justice and whether there's a remedy ordered, miscarriage of justice can take multiple different forms. What you view as a miscarriage and what someone else may view as a miscarriage are completely different. I'm thinking about.... For instance, DNA exonerates somebody. Clearly, that person was factually and, therefore, legally innocent. Then there might be another case where, perhaps, there was something else at play, but the case is not as clear-cut. Do you get where I'm going with this?

Dr. Myles Frederick McLellan: Absolutely, and the issue of factual innocence or actual innocence is a real problem in this area of the law. Article 14 of the International Covenant on Civil and Political Rights does not require factual innocence for compensation to be pursued. The FPT guidelines that Canada adopted in 1988 do, in fact, require factual innocence, so there's a dichotomy between what Canada has put in place and what the United Nations has asked it to put in place.

The recommendation you'll see in Justice LaForme and Justice Westmoreland-Traoré's report is that a statute be put in place with respect to compensation and that it not require factual innocence. In a liberal democratic society, that's probably the appropriate way to go. Factual innocence is not something that a trial court determines. There is no finding of innocence in court. You're guilty or not guilty, so there's no finding of innocence. To impose upon somebody, in order to qualify for the compensation, that they have to somehow prove something that has never been proven before in their case is a burden that is troublesome.

Steven Truscott could never have proven factual innocence and, as a function of that, never received the compensation that the public inquiry awarded him.

Mr. Frank Caputo: I see.

In your mind's eye, would your position be that anybody who has a remedy ordered under this prospective legislation would be entitled to compensation?

Dr. Myles Frederick McLellan: Yes, that would be the trigger.

Mr. Frank Caputo: Okay. Thank you.

I'll see if my colleague, Mr. Van Popta, has anything he wishes to add, because that's all I was going to ask you about.

● (1740)

Dr. Myles Frederick McLellan: Thank you very much.

Mr. Tako Van Popta: Thank you for that.

In the absence of legislation around this, what would be the test or the determinative to calculate a quantum of a financial award? Is this civil law? What is it?

Dr. Myles Frederick McLellan: As I said before, all we really have are the federal, provincial and territorial guidelines of 1988. They have a cap of $100,000 in any award, and the guidelines also indicate that nobody other than the wrongly convicted person is entitled to recover that. For the most part, those guidelines are just that: guidelines. Courts and public inquiries have ignored them. They've awarded much larger awards than $100,000. In the case of David Milgaard, they awarded Joyce Milgaard compensation. It was the same thing with Steven Truscott: His wife was awarded money because, during the time he was on bail, she had to change her name and move away from her home and what have you.

The current system is unworkable. The only thing we have, apart from the FPT guidelines, is litigation. It's malicious prosecution, against the Crown, and proving malice is a very high threshold to get over. We have negligent investigation. Canada is the only common-law jurisdiction in the world where you can sue the police for negligence. This has been in place since 2007 and the Supreme Court of Canada decision in Hill v. Hamilton-Wentworth. What happens there, of course, is that you have to be able to bring the action to begin with, have the funds to hire and retain counsel to do so, and sue the police. That's a relatively promising way to pursue it because, in the 200 cases that have been heard and adjudicated since 2007, 28% of them have been successful for the plaintiffs. In fact, there has been a great deal of liability placed at the feet of the police, which is often where the errors leading to a wrongful conviction start.

You also have the opportunity for charter damages if, in fact, there's been a charter breach leading to a wrongful conviction. There are very few systemic causes of wrongful convictions that don't have a charter breach at the base of them. Again, it requires retaining counsel and issuing action. You're now suing the state. The state has unlimited resources to defend its position, while plaintiffs, particularly those who were wrongfully convicted and recently released from prison, have next to nil in resources, so it's not a very appropriate remedy.

Mr. Tako Van Popta: Madam Chair, how much time do I have left?

The Chair: You have 30 seconds.

Mr. Tako Van Popta: I'd like to follow up on the question from my colleague Mr. Caputo. You said that if a remedy is granted under this legislation, there should be financial payment, but the remedy might be to order a new trial. I'm assuming that the trial has to be successful.

Dr. Myles Frederick McLellan: Absolutely. At the end of the day, somebody's going to have to be exonerated.

Mr. Tako Van Popta: Okay. That's good.

Thank you.

The Chair: Thank you very much.

Madame Lattanzio, it's over to you.

Ms. Patricia Lattanzio (Saint-Léonard—Saint-Michel, Lib.): Thank you, Madam Chair.

Thank you for being with us, Dr. McLellan.

I have a few questions with regard to justice. According to you, what impacts do wrongful convictions have on the public trust in the Canadian justice system, and why is it so crucial to be able to rebuild that trust?

Dr. Myles Frederick McLellan: It's elementary. Everybody can appreciate that if something happens to you and you're unable, for a relatively modest period of time—three months or six months—to go to work, you perhaps can't make a mortgage payment, can't pay rent and can't make payments on your truck. In a relatively modest period of time, you're going to lose everything. If you're losing it and you're wrongly losing it because you shouldn't have been charged in the first place, then Canadian society recognizes that as something that needs to be corrected.

Angus Reid did a poll in 1995 that basically found—and Justice LaForme recited this in his report—that 90% of Canadians basically support compensation for the victims of wrongful convictions. That was a poll duly taken and recorded. That's not a surprise to me. Human beings feel for each other. We know that when people are harmed, there should be some remedy to take care of that harm.

After a wrongful conviction, the harm that needs to be taken care of first is to get immediate relief to get into housing, to get some food on the table and to get established, but over the long term those years that have been lost as a function of wrongful imprisonment should be compensated for so somebody can truly rebuild the life they have lost.

Ms. Patricia Lattanzio: The bill proposes that the committee be composed of commissioners made up of both lawyers and non-lawyers. According to you, is adding this diversity of personal and professional background an enhancement for the commission? Do you see it as a positive idea or suggestion?

● (1745)

Dr. Myles Frederick McLellan: Sure. As I said earlier, we endorse every recommendation as made, including ensuring that among members of the commission there are representations from indigenous persons and Black persons, so we totally understand that. It's an excellent recommendation, and we endorse it.

The only recommendation we don't endorse is 51. Recommendation 51 is at the very end of the report. It basically says—and I was part of the consultation with Justice LaForme so we had words about this—that there shouldn't be compensation in the bill. That being said, the federal government should, in fact, put legislation in place for compensation along the model that was proposed to him during the hearings.

What we're saying, and what I'm saying, is that it takes just one more provision in the bill to create a statutory solution for those who are wrongly convicted or subject to miscarriages of justice. Add one more section. Put a statute in place that allows for it. As Professor Leonetti referenced in an article on the inspirational view that Justice LaForme's committee has regarding wrongful convictions and miscarriages of justice, aim high, but aim higher. Be the first commission of this nature in the world to include compensation as part of the relief granted. It will be applauded internationally.

Ms. Patricia Lattanzio: The question, Dr. McLellan, was more about the composition of this committee including lawyers and non-lawyers. According to you, having non-lawyers would be beneficial. In what way?

Dr. Myles Frederick McLellan: Having lay people involved in the process brings humanity into the process. Obviously, legal minds are important, but having lay people there.... The committee also recommends that a criminal conviction not be a bar to sitting on the commission.

I think it's absolutely fine to have somebody with a conviction sitting on the commission—somebody who knows the ins and outs of what prison is all about, who knows what a sentence can do to somebody's life. It's a sentence you carry from the day it's imposed to the day you die, so people who have that kind of personal experience provide a very worthwhile contribution to the commission—in addition, of course, to that of people who are lawyers.

Ms. Patricia Lattanzio: Unlike under the current process, the commission would be able to do more proactive outreach to help applicants submit their cases. How would this change the number of applications in the application pool?

Dr. Myles Frederick McLellan: As James Lockyer said earlier, there's no doubt that once this commission is put into place—whether it's in its current form, Bill C-40, or amended as requested—there are going to be a lot of applications. There will be a lot of people who are going to go through the process of trying to see what this commission can do that a section 696.1 application to the Minister of Justice couldn't do, and I think that's great.

Again, the opportunity to have these applications is going to give this commission, going forward, the opportunity to remedy wrongs that never should have taken place at all.

Ms. Patricia Lattanzio: Do you feel that we have enough resources to be able to deal with the increase of applications?

Dr. Myles Frederick McLellan: There are five other commissions that are referenced in Justice LaForme's report, and all of them are funded, and funded well, to a great degree.

If they're not funded well enough, then they need to be. You have to go back to Parliament and make sure they are properly funded.

Ms. Patricia Lattanzio: Thank you.

The Chair: Thank you very much.

[*Translation*]

Mr. Fortin, you have the floor for six minutes.

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

Thank you, Mr. McLellan.

I'm going to continue in the same vein as my colleague Ms. Lattanzio and ask you about the constitution of the commission, specifically the fact that it will be made up of lawyers and non-lawyers. It could therefore happen, in certain cases, that non-lawyers would determine that there had been a miscarriage of justice. This strikes me as a little surprising.

Don't you worry that this undermines the commission's credibility?

[*English*]

Dr. Myles Frederick McLellan: It depends—and we don't have this—upon how those members of the commission make decisions. There's no indication that, for instance, the entire panel has to make the decision. Most of these commissions around the world break it into smaller panels of two or three people, and they decide. It may be a majority decision. It may require a unanimous decision of those two or three people as to whether a case goes forward.

These people are imbued with the ability to correct miscarriages of justice, and that's a very noble cause, so I'm not particularly worried that those people on the commission, whether they're lawyers or non-lawyers, wouldn't be doing absolutely everything in their power to do what's best for the people who come before them.

[*Translation*]

Mr. Rhéal Éloi Fortin: Indeed, they'd surely do their best, I'm convinced of that too. However, if it were a matter of determining whether a doctor had made a medical error or an electrician had erred in his work, I would want to hear the opinion of experts in the field in question.

I haven't made up my mind about this yet, but it does surprise me a little that non-lawyers could determine that there has been a miscarriage of justice. I'm a lawyer myself and I find this somewhat surprising. I wonder to what extent the fact that an ordinary citizen sees decisions being changed by non-lawyers can undermine the credibility of the commission.

I understand you have no concerns in this regard

● (1750)

[*English*]

Dr. Myles Frederick McLellan: I don't mean to be glib, but it's not brain surgery. Everybody knows.... I mean, we had seven public inquiries in Canada that determined what the causes of wrongful convictions are. We all know what they are. Everybody in the field knows what they are: mistaken identification, false confessions, jealous informants, etc. There are six or seven absolutely well-established systemic causes of wrongful conviction, so it's not an unworldly request of those who are lay people on the commission to learn about them and to understand them.

All they have to do is read the seven public inquiries into wrongful convictions—and Canada is renowned for this—and I guarantee that these lay people will be absolutely well qualified to understand why the people coming before them are there and what caused the misstep in the criminal justice system that led to the miscarriage of justice. I have no doubt that it's a task that these people can assume.

[*Translation*]

Mr. Rhéal Éloi Fortin: I'll now move on to another topic, Mr. McLellan.

In your opening remarks, you mentioned the case of Michel Dumont, who was acquitted by the Quebec Court of Appeal in 2001. In 2010, the United Nations Commission on Human Rights determined that his rights had been violated by Canada. I won't go into all the details of this case, but it seems to me that Mr. Dumont should have received compensation from the federal government, but didn't. He's still waiting for it. He and his wife, whom I've met, have gone to great lengths for years to resolve the situation.

Mr. McLellan, shouldn't the bill provide for a process of mandatory enforcement of decisions even in cases where the decisions were rendered not in Canada, but by international tribunals whose powers are recognized in Canada, such as the United Nations Commission on Human Rights, in Mr. Dumont's case?

[*English*]

Dr. Myles Frederick McLellan: I wouldn't necessarily go there. I actually haven't thought about this, but I wouldn't go there. The UN has this optional protocol system, which is what Monsieur Dumont used in order to get to where he was. Unfortunately, the Government of Canada ignored what the United Nations Human Rights Committee directed it to do. The thing to remember about Monsieur Dumont is that he had his judgment in Canada that he could rely upon to seek compensation. The fact of the matter is that there was no effective remedy in Canada he could use, which prompted his unique and extraordinary application to the United Nations.

I would hope that in all of those cases where people think the United Nations is a remedy.... They already have something that would trigger compensation in this bill. They would have already been exonerated to the point that, in fact, they would be entitled to compensation domestically. They don't have to worry about going to the United Nations. That's an extraordinary remedy.

[*Translation*]

Mr. Rhéal Éloi Fortin: In this case, an international tribunal, the Commission on Human Rights, declared that this person's rights had been violated and that Canada should compensate him. Yet, as I understand it, this is not sufficient reason, in your opinion, to include provisions in our miscarriages of justice bill that would make compensation for victims of miscarriages of justice mandatory.

[*English*]

Dr. Myles Frederick McLellan: I have absolutely no qualms including anything in the bill that will trigger somebody's entitlement to compensation for whatever miscarriage of justice has taken place, wherever it's taken place. I just think that working domestically, at this stage in the game, is probably the most appropriate approach.

The Chair: Thank you very much.

We'll now move to our final questioner for the afternoon, for six minutes.

Go ahead, Mr. Garrison.

Mr. Randall Garrison: Thank you very much, Madam Chair.

Thank you very much for being here today.

I think your emphasis on compensation is quite important. Locally, we've had miscarriages of justice that resulted in things like the loss of custody of children for a long period of time. It really disrupted families for a long period of time. Some of those things you can't repair with money, but money is the currency we use, if I can put it that way.

I'm interested in places where there is compensation. Is that determined by the commission, or is it a separate body that ends up determining the compensation?

● (1755)

Dr. Myles Frederick McLellan: On a worldwide basis, the European Union and a great many nations—including China, for that matter, and African nations—include compensation as a function of their international rights legislation. As I mentioned earlier, the U.K. does it, although in 2014 it imposed a factual innocence component, which destroyed its effectiveness.

I would turn to the United States because, obviously, it's our closest neighbour and it's been doing this for a very long time. It started compensation statutes before the enactment of the international covenant. Edwin Borchard, who was a Yale professor, wrote an article in 1913 basically pleading for governments to pay attention to this. It's important.

There are 38 states and the District of Columbia that have compensation. They vary tremendously. There's one state that gives only $5,000 a year and caps it at $25,000. Texas, on the other hand, is quite generous. It gives you $80,000 a year for every year of wrongful imprisonment, and $100,000 if you're on death row, but it's also a capital punishment state—it puts people to death—so if Texas doesn't kill you, it'll pay you.

We have lots of examples we can look at to frame our legislation, and we have model statutes that have been created for that purpose, for enactment in this bill. It's not something that's beyond the reach of being enacted and really aiming high to become as inspirational as I think this committee can be.

Mr. Randall Garrison: If I understand how it works in the United States, then, it's like a schedule of "if this happens, this is the compensation". Is that correct?

Dr. Myles Frederick McLellan: It varies from state to state. There are different qualifying thresholds to get over. There are things that disentitle you to compensation. For instance, in some states, if you have a felony that's totally unrelated to the wrongful conviction, that disentitles you to any compensation at all.

There are statutes of limitations that are in place, which are incredibly difficult, so once you're exonerated, you have a period of time to bring your action for compensation. Again, for most people who are released from imprisonment, their first priority is to get food on the table and get a roof over their head, so the passage of time often takes place and they lose the right to seek compensation. That's important to keep in mind.

Of course, the amounts are all different. Again, as I said, there are some that are very miserly, and some that aren't so bad.

Mr. Randall Garrison: I think I'm probably out of time, Madam Chair.

The Chair: That's great. Thank you very much.

Thank you very much for appearing and being our witness this afternoon. I think you probably got your fair share of questions this afternoon.

Dr. Myles Frederick McLellan: It's been a privilege. Thank you very much.

The Chair: Thank you very much.

Committee, thank you. I'm going to adjourn for today. If there's anything to communicate, we can figure things out for next time.

[*Translation*]

I wish everyone a lovely evening.

Thank you very much.