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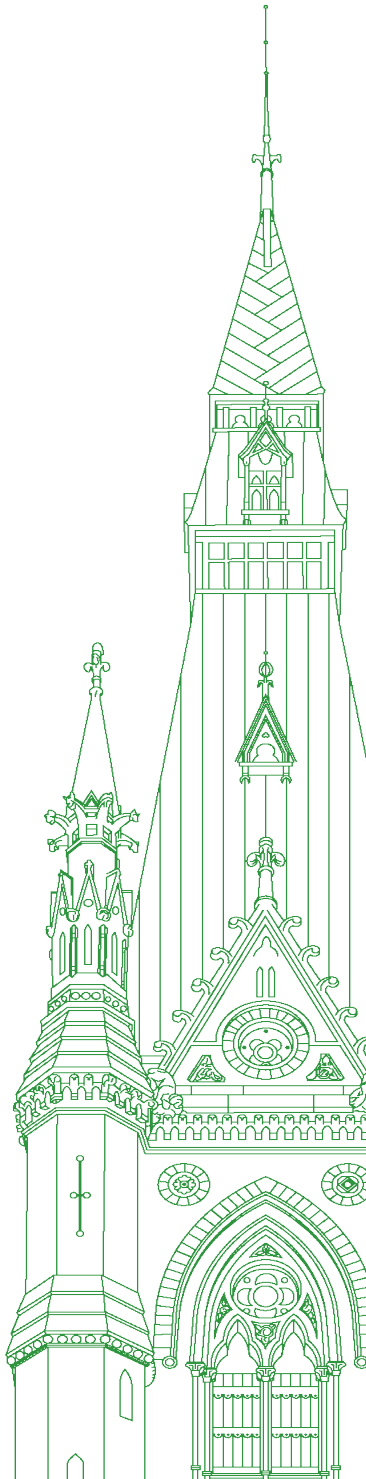

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Tuesday, November 28, 2023

● (1535)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): I call the meeting to order. Welcome to meeting number 85 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 House order of June 23. Members are attending in person in the room and remotely using the Zoom application.

I note that the witnesses we have for the first hour are all attending by Zoom, so I will make a few comments. Please wait until I recognize you by name before speaking. Click on the microphone icon to activate your mic, and please mute yourself when you are not speaking. With regard to interpretation, for those on Zoom, you have the choice at the bottom of your screen of the floor, English or French.

For those in the room, you can use the earpiece and select the desired channel. I will remind you that all comments should be addressed through the chair. For members in the room, if you wish to speak, please raise your hand.

I have these cue cards. I know it's difficult when somebody is on a roll and speaking, but I will raise the 30-seconds card when 30 seconds is left and the time-is-up card when the time has elapsed. If the speaker has a couple of seconds left, I will let them proceed; otherwise, I will need to interrupt them. Don't take it personally. Unfortunately, that's how things work around here.

[*Translation*]

I want to advise the committee members that all the witnesses who are with us this afternoon have successfully completed the necessary audio tests.

Thank you everyone.

Now, without further ado, I would like to welcome the witnesses participating in our study on Bill C-40.

With us are Neil Wiberg, lawyer, who is joining us by video conference and appearing as an individual; Nyki Kish, associate executive director of the Canadian Association of Elizabeth Fry Societies; and Tony Paisana, past chair of the Canadian Bar Association.

[*English*]

You have up to five minutes for opening remarks. After that, we will go to questions by members.

I will ask Mr. Wiberg to please commence.

The floor is yours.

Mr. Neil Wiberg (Lawyer, As an Individual): Thank you.

My name is Neil Wiberg. It's an honour to appear in front of you.

Just as a little tombstone information for you, I was called to the bar of Alberta in 1984, was appointed QC in 2006 and I transferred to the bar of British Columbia in 2018. I'd also like to say that when I was in the Kamloops office, I was the deputy regional Crown counsel. I was honoured to work with Frank Caputo as one of the prosecutors in our office. He was an excellent prosecutor.

Frank first asked me to talk about how often we receive these types of reports from the minister. In my career, I've only seen one since 1984, and that actually was in this past year. It was a case in British Columbia, in Kamloops, where an individual was convicted of first-degree murder.

It turned out that there was some change in the science of drowning and hypothermia and some recent evidence came from new forensic pathologists that put the first-degree murder conviction in doubt. There's no doubt that this accused committed a sexual assault and killed the victim, but it actually should have been a manslaughter charge rather than a murder charge. The minister made the report and the Court of Appeal reversed the decision and entered a stay on the murder charge.

I've only seen one in my career, both in Alberta and in British Columbia.

I'd also like to say that since I began my career, a number of steps have taken place that I think are very positive and have reduced the chances of wrongful convictions.

First of all is disclosure. When I started out in 1984, all that was provided to the defence was their client's criminal record, their client's statement and a synopsis of the facts. Nothing else was disclosed. Witness statements were not disclosed. Police reports were not disclosed. Police notes were not disclosed. If there was tunnel vision that was obvious from seeing those documents, the defence would have no idea and wouldn't have seen those.

In cases like Morin, Marshall and Milgaard, there wasn't disclosure provided in those days. The Stinchcombe case that came in 1991 and ordered disclosure on all relevant material is very, very helpful.

Number two, DNA has really changed the scope and, in my opinion, has reduced the number of possible wrongful convictions. DNA not only convicts individuals but eliminates individuals.

I had a case when I was in Lac La Biche, a very strong circumstantial case, where there was some hair evidence. I thought there might have been reasonable and probable grounds to lay a charge of murder, but the police came to me and said there could be DNA available, not the nuclear DNA we're associated with, but mitochondrial DNA. There were hair-shafts in the victim's hands. As well, from a general warrant, there was hair plucked from the potential accused. The mitochondrial DNA was not available to be analyzed in Canada, but it could be in North Carolina.

As the Crown responsible for the case, I said: “This matter has to be examined. Send the DNA to North Carolina.” The samples were sent to North Carolina and came back as not a match. Think of it. This individual was inconvenienced for 15 minutes while a DNA sample was taken, and it turned out that he was never charged because the DNA was not a match. The acceptance of DNA as a science, the DNA warrant regime and the DNA data bank have greatly helped, in my opinion, to reduce the chances of wrongful convictions.

Third, there are cameras everywhere now, so you don't always have to rely on eyewitness testimony. The fact that there are cameras everywhere is very helpful in prosecuting cases and getting to the truth. I had a sad case in Edmonton where an 80-year-old woman was run down by a city bus. We suspected the bus driver might have been speaking on a cellphone. The video showed clearly that the woman was walking within a crosswalk and that she had waited for the walk light to come on.

I'd also mention that photo lineups have been changed and also that in-custody informants are rarely used any more. Those were a big problem. Also, provinces have adopted tunnel vision rules.

● (1540)

I was the Crown in the Mayerthorpe case. I spent two years giving pre-charge advice to the police. Once charges were laid, I was no longer the Crown, because—

The Chair: Thank—

Mr. Neil Wiberg: —for tunnel-vision purposes, someone else came in.

My final point is this: We had James Lockyer and other people like that at our conferences, and they were—

The Chair: Why don't you save that point for questioning?

Let me go to Madam Kish.

Mr. Neil Wiberg: Thank you very much.

The Chair: Thank you very much.

Ms. Nyki Kish (Associate Executive Director, Canadian Association of Elizabeth Fry Societies): Thank you, honourable members, for inviting me to be here today.

Since 1978, CAEFS has been the leading national organization supporting women and gender-diverse people at all stages of legal system involvement. We conduct monthly visits into Canada's federal penitentiaries for women. Our 22 Elizabeth Fry Societies nationally provide a range of services in prison and the community, including operating halfway houses, providing court support and diversion programs, and beyond.

Through this work, we come to know closely the people whom this bill impacts. We welcome Bill C-40, but caution that amendments are needed to ensure the act can meaningfully respond to miscarriages of justice.

Most women and gender-diverse people who become incarcerated are critically disadvantaged. The system is in crisis, with half of the people in prisons designated for women being indigenous. Much attention has been called to the systemic and social factors that lead women and gender-diverse people to be wrongfully convicted. The justice system rests upon its ability to be just, yet we posit that, presently, miscarriages of justice for the populations we serve are systemic. This is in part because conditions in our provincial jails are deplorable, characterized by frequent lockdowns, isolation, poor food sources, dismal health care, very expensive, restrictive access to family, and beyond.

Many disclose to us that, up against losing their children, employment and housing, they plead guilty, regardless of whether or not they are, in order to get out faster. From our perspective, pleading out is a very common experience. Individuals make the best decisions they can within a forced choice, where no outcome is a good one. We receive almost constant requests to help people redress their convictions. Many share how their previous lawyers discouraged them from filing appeals and often encouraged them to plead guilty in the first place. We direct people toward innocence projects and watch the lengthy process unfold. Often, we see them give up.

The pressure to be guilty doesn't stop at a verdict for the wrongfully convicted. Once sentenced, women and gender-diverse people who maintain their innocence experience a number of punishments and exclusions, because they are not seen to be taking responsibility. This begins with being denied access to core correctional programming, which is a precursor for access to a host of additional programs and services, and a requirement to move to less restrictive security classifications.

Much of what it takes to survive incarceration—visiting family, accessing work and education, and accessing the legislated process of gradual release—is significantly restricted for people who maintain innocence, due to their being kept in higher-security classifications. Also, as most supportive processes are only conditionally approved, prison officials must complete assessments for each decision. Primary considerations are the level of responsibility and institutional adjustment a person demonstrates. It's very difficult to be assessed as “adjusting well” in an institution whose programs you cannot participate in. Doing well in prison and reintegrating into the community via parole becomes next to impossible. People become pressured to indicate guilt in order to successfully navigate the system, or they maintain their innocence and face a harsher version of incarceration, which elevates the risk of chronic adverse mental and physical health outcomes and institutionalization.

We submitted an associated brief that emphasizes amendments that ensure incarcerated applicants aren't punished as a result of pursuing redress. It endorses the UBC innocence project's key amendment to legislate the possibility of exceptional review where appeals have not been exhausted, and to legislate defined timelines associated with the commission. Perhaps nothing could be underscored more than the irreversible impacts on the life course of wrongfully convicted people.

At present, wrongful convictions take years or, more generally, decades to overturn, and life is simply not that long. We witness the cumulative loss experienced, especially for those with long or life sentences—loss of mental and physical health, and loss of family and social connections. Time is an irreturnable resource to take from people, and we don't often contemplate its associated costs: the loss of milestones and rites of passage—

● (1545)

[*Translation*]

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): There's a problem with the interpretation, Madam Chair.

[*English*]

The Chair: Let me stop you for a moment. Apparently, we have difficulty in the room with no translation. Wait one moment, please.

[*Translation*]

Mr. Rhéal Éloi Fortin: We're used to this. Let's just call it a parliamentary problem.

I can hear you clearly now.

The Chair: All right. Thank you.

[*English*]

Please continue.

Ms. Nyki Kish: Thank you.

Time is an non-returnable resource, and we don't often contemplate its associated costs such as the loss of milestones or rites of passage, but we see many women and gender-diverse people lose their reproductive years to miscarriages of justice. They lose love, marriages, divorces and careers and make career changes. This is the stuff taken, and this is the stuff that life is made of, and we only get one life.

There will be a material and significant benefit to the goals of justice and to safe, fair Canadian institutions through establishing the amendments offered in our brief and those offered by our colleagues.

I look forward to answering any questions you may have.

Thank you.

● (1550)

The Chair: Thank you very much.

I will now ask Mr. Paisana to please proceed with your remarks.

Mr. Tony Paisana (Past Chair, Criminal Justice Section, The Canadian Bar Association): Thank you for the invitation to present the CBA's views on Bill C-40. I'm the past chair of the national criminal section. I've worked with the UBC innocence project for the past 10 years, and I teach, at the University of British Columbia Law School, a course on preventing wrongful convictions.

As you know, the CBA is a national association of over 37,000 lawyers, students, notaries and academics. An important aspect of our mandate is seeking improvements in the law and the administration of justice. That is what brings us here today. Our submission was prepared by the national criminal justice section, which comprises both Crown and defence lawyers.

The CBA supports Bill C-40 and offers some suggestions for improvement, two of which I'll highlight in my remarks. Before doing so, however, I wish to express our clear support for some aspects of Bill C-40.

For decades, lawyers and others have laboured under a slow, difficult-to-navigate system for post-conviction review. Bill C-40 represents a sea change in how post-conviction review work will be done in this country. It is a welcome change, one that we hope means that miscarriages of justice will be rectified and, more importantly, rectified more quickly.

The creation of an independent commission we hope will improve the transparency and efficiency of post-conviction review. In particular, we support the new standard of review contained in Bill C-40. The existing standard that a reasonable basis to conclude a miscarriage of justice likely occurred is cumbersome, difficult to apply and leaves many potential wrongful convictions outside the ambit of review. The new “reasonable grounds to conclude” standard solves these issues and is a welcome development.

In addition, we applaud the federal government's explicit inclusion of posthumous cases in the commission's mandate. Wrongful convictions affect not only the accused but their family, friends and the wider community. Allowing for posthumous review provides an avenue for those affected by wrongful convictions to seek redress.

In terms of improvements, our brief lays out some of those areas. We support some suggestions made by other witnesses who have already testified, and I'll highlight two points, as I mentioned. First, as set out in our brief, we support the inclusion of a new unsafe ground of appeal in the Criminal Code. The most important and immediate step of rectifying a wrongful conviction exists in the Court of Appeal. Indeed, for the vast majority of accused persons, it is the forum of last resort; however, the Court of Appeal is a statutory court, meaning that it is specifically constrained by the Criminal Code. Where the court is faced with a case that does not meet the exceptionally high threshold of unreasonable verdict, it cannot intervene even if a lurking doubt exists as to the accused's guilt.

Unsurprisingly, given this landscape, many of Canada's most infamous wrongful convictions were unsuccessfully appealed, sometimes more than once. Indeed, there is a strange history of some of Canada's appellate cases being connected to wrongful convictions. The leading case on unreasonable verdict, in fact, was the Yebes case, a recent B.C. miscarriage of justice, a murder conviction that was overturned nearly 40 years after the fact.

One of the leading decisions on confronting hostile witnesses, Milgaard bears the name of the namesake of this legislation. In dismissing Mr. Milgaard's appeal in 1971, the Saskatchewan Court of Appeal said that the evidence could properly be found to support the verdict, that is, it “could have” as opposed to it “must have”. As you see, the “could” standard is a low one on appellate review, and there is a duty to prevent wrongful convictions at every stage of the process, including specifically on appeal, and changing the Criminal Code to add an unsafe verdict would address this issue.

Our second area of improvement relates to the eligibility criteria for the commission. We echo the concerns raised by others that the mandatory requirement of appellate final decision will potentially create a significant barrier to wrongful convictions becoming uncovered. Those who enter a false guilty plea, for example, will have to go through the complicated and awkward process of trying to overturn a guilty plea. Having falsely plead guilty, there is a strong likelihood that these individuals are unsophisticated, intimidated by court process and are otherwise at a disadvantage in navigating the appellate regime. Make no mistake, bringing an appeal is complex and requires expertise.

Ivan Henry's wrongful conviction is a poignant example of what this barrier might do. He was convicted in 1982 and designated a dangerous offender. Unrepresented, he filed numerous applications and failed at various courts and ministers reviewing his conviction. In 1984 his appeal was dismissed for want of prosecution, because he had not filed transcripts. He never had an appeal and never had a final judgment. He would therefore be ineligible for the current regime.

This, I say, is a problem and should be rectified by a simple amendment treating an accused who has not had an appeal the same as one who has had an appeal but has not appealed to the Supreme Court of Canada, that is, a factored analysis where it is just one factor to determine the eligibility, the fact that they have not filed an appeal.

The legislation currently contemplates that very process with someone who has not filed leave to the Supreme Court of Canada, and there is no reason this cannot be extended to accused persons who have not had an appeal.

Those are my comments.

● (1555)

Thank you.

The Chair: Thank you very much.

We will now begin with our questions. Members will have six minutes each.

We will start with Mr. Moore.

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

Thank you to all of our witnesses for appearing today and offering your perspectives on this legislation.

Mr. Wiberg, you seemed to be just wrapping up your remarks. I have only six minutes, but I'll give you 30 seconds or so to finish your thoughts.

Mr. Neil Wiberg: I was just going to say that it's the role of a prosecution service to make sure that all the Crowns are aware of wrongful convictions. When I was in Alberta, we had James Lockyer as a guest speaker. He told all of us about the history of wrongful convictions and the problems the Crown should look for. That's one of the obligations, I think, of a prosecution service.

Also, as a result of the Sophonow committee, our executive brought in new changes to photo lineups, based on scientific research; to the discouraged use of in-custody informants, who are almost never used because they're very dangerous and contribute to wrongful convictions; and also to rules for tunnel vision.

Thank you.

Hon. Rob Moore: Thank you for that, sir.
Frank Caputo is unable to be here today, but I will pass along your comments.

Mr. Neil Wiberg: Yes.

Hon. Rob Moore: He'll like everything you said, for sure.

I want to ask if you have any thoughts on the threshold that's being proposed in Bill C-40, moving from reasonable grounds to conclude that a miscarriage of justice “likely” occurred to reasonable grounds to conclude that a miscarriage of justice “may have” occurred.

One would think that many individuals who are convicted feel that they shouldn't be there and that it's unfair that they're there, but when we get to factual innocence, as you touched on in some of your commentary, there are some tools available now that were not available even 10 years ago, and certainly not 20 or 30 years ago.

Do you have any thoughts on that threshold? It is a threshold that's considerably lower than the current existing one as well as in the United Kingdom.

Mr. Neil Wiberg: For both prosecutors and defence lawyers, a wrongful conviction is the worst thing that can happen. I agree with my friend from the Canadian Bar Association on the standard that the CBA recommends. I would applaud that and recommend that as well.

Hon. Rob Moore: Okay.

Ms. Kish, you talked about a miscarriage of justice. How do you define that? We've heard very broad testimony from individuals at this committee. Some want to look at almost painting the entire system with a certain brush, suggesting that there can be no rightful convictions under our system. Others say that a wrongful conviction should focus on people who actually have not committed a crime, and that in fact we should be out looking for the real perpetrator of the crime once that process is finished.

In your view and in the view of the Fry Society, what is the importance of factual innocence in deciding whether a conviction should be overturned?

Ms. Nyki Kish: Thank you. That's an excellent question.

We spend a lot of time in our organization speaking about wrongful convictions, over-convictions, systemic discrimination, and of course all the broad societal factors that lead people into pathways of incarceration where we believe the viable alternative is a community response to whatever has happened.

Speaking to this bill, in Bill C-40 we see a tremendous number of women and gender-diverse people. I mean, we're talking about a population with an average education level, at the point of sentencing, of grade 8. People are very unaware of the legal processes they're becoming swept up in. In combination with the conditions that people experience in pretrial incarceration, we see this resulting in individuals just pleading guilty, or, at the base, not understanding the processes they're going through. We see a lot of people who we believe are factually innocent, and then we see many more who we believe are over-convicted and overincarcerated.

● (1600)

Hon. Rob Moore: On that issue of over-convicted or overincarcerated, what precisely do you mean by that? This is something that we've heard from other witnesses. Are you suggesting that if a group is overrepresented, for an individual who's a member of that group this should be grounds for finding that they've been wrongfully convicted even if in fact they have committed the crime they've been charged with and convicted of?

Ms. Nyki Kish: It's more so that we see individuals who, perhaps in the example that was used earlier, would more factually be convicted of a lesser crime, but because of low legal literacy or not enough access to adequate counsel because of systemic discrimination, they're receiving convictions that aren't proportionate to the experiences they were engaged in.

The Chair: Thank you very much.

Mr. Mendicino, go ahead, please.

Hon. Marco Mendicino (Eglinton—Lawrence, Lib.): I want to thank all three of our panellists for their presentations and their advocacy within the justice system.

I think one of the themes that have emerged from your remarks is that there is a profound need to ensure that we reduce, if we cannot entirely eradicate, miscarriages of justice and wrongful convictions. That is an ongoing responsibility that any officer of the court has and retains, especially members of the Crown prosecution service.

As well, I think the presenters identified the rationale that supports this bill, which is to really zero-in on those cases where, for a variety of reasons, there may be circumstances that require a harder look into detail.

I was very alive to the concerns that were laid out by the panellists with regard to court delay, especially in the appellate system; to some of the developments around how we can unearth evidence that may have been previously available; to developments around technology, which help us better understand what is factual, provable evidence that can either support a conviction or an acquittal, for that matter. The conditions of incarceration, into which my colleague, Mr. Moore, probed a little bit, I do think are relevant in the sense that if a person has been wrongfully convicted, it demonstrates the life-altering and very negative consequences that can be visited upon someone unjustly.

Finally, the challenges that we've heard from our panellists today, as well as others, around systemic overrepresentation of racialized Canadians and indigenous peoples are all very good reasons why it's important to have this bill.

I do want to ask in my remaining moments whether, if we accept your amendments, there is a risk that we could be creating a parallel process that could be competing or at odds with the established routes of appeal. I'll ask any one of the three of you to chime in on this

In particular, I think it was either Mr. Paisana or Mr. Wiberg who talked about the different thresholds that merit an appellate review. It sounds to me that the gist of the amendment that you are proposing is meant to mitigate what you think is too high a bar in the appellate courts, by lowering the bar for consideration through this bill.

If I have misunderstood that, please feel free to clarify.

● (1605)

Mr. Tony Paisana: I'd be happy to address that.

Our proposal with respect to the unsafe verdict is to introduce a new ground of appeal—not to lower any thresholds. This ground of appeal exists in the United Kingdom already. It fills a gap in our current appellate process. There is no ground of appeal that one can advance to determine whether a conviction is unsafe, except apart from legal errors that might exist.

The only mechanism that exists is the “unreasonable verdict” ground of appeal, which is an exceptionally high threshold. So long as the verdict is one that could reasonably arise on the evidence, it is withstood on appeal. That means that there is a swath of cases where a judge at the court of appeal might feel the conviction is unsafe, that they would have acquitted, but they can't intervene, because a conviction is one of the reasonable—

Hon. Marco Mendicino: Can I probe more about that? I think we're getting to the nub of it.

Ultimately, if we introduce this amendment, we are expanding the grounds of statutory appeal. By doing so, in your own words, and having listened carefully to you, we are, in effect, creating a more flexible standard. It would encompass potentially a greater subset of cases that are not currently captured by the law. Is that a fair summary?

Mr. Tony Paisana: I don't want to “wordsmith” with you, Member, but I see it more as being more flexible.

We must recognize that for 99.9% of cases, the court of appeal is the forum of last resort. That's the forum that should be equipped with the most tools to rectify wrongful convictions. We say a more flexible approach with an unsafe verdict ground affords those tools.

Hon. Marco Mendicino: I think we're in agreement on that because that was the word I used: "flexible". However, if we were to introduce that, is it your opinion that, by doing that under the existing statutory rights of appeal, we would potentially be shrinking the subset of cases that may go to the special review process, which might lead to—

Mr. Tony Paisana: Yes.

Hon. Marco Mendicino: —a review of wrongful convictions? I'm just trying to understand the gist of it. Do I have it right?

Mr. Tony Paisana: Yes, you do.

In effect, you're front-loading catching the wrongful convictions, which would mean that it's a faster process, a more fair process and one that doesn't utilize this special process that is after the fact. What you're, in fact, doing is empowering the court of appeal to catch wrongful convictions before they languish for years in that post-conviction review state.

Hon. Marco Mendicino: Okay, I may pick it up on the second round if I have time. Thank you very much.

The Chair: Thank you.

[*Translation*]

We now go to Mr. Fortin for six minutes.

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

Thank you to the witnesses for being here. Their contribution to our study is important and will help us make better decisions.

I, too, am concerned by the threshold test, which has gone from a miscarriage of justice likely occurred to a miscarriage of justice may have occurred. Logically, then, we should have more recommendations around remedies, but I worry that would hinder the administration of justice. We can talk about that later.

Currently, the bill calls for between five and nine commissioners, whereas the commission's report recommended between nine and 11 commissioners.

Some witnesses raised concerns about whether five to nine commissioners was enough for the commission to run properly. I'd like to hear your thoughts.

Is it better to have a bigger commission, in other words, more commissioners? More commissioners could also mean more diversity.

The question is for all three witnesses. Ms. Kish can go first, followed by Mr. Wiberg and Mr. Paisana.

[*English*]

Ms. Nyki Kish: I was just reflecting that, while I don't have the expertise to understand how the dynamics of having a specific number of members would unfold, what we really want to get at is to see the commission's being able to reduce what is, right now, an egregious amount of time to process applications. Those people who can get to a section 696 application right now have no timeline for ministerial review. Also, it can take individuals years to get to an appeal. As I was saying in my comments, many people are discouraged, upon conviction, from appealing. They're told that they don't have the grounds, so they abandon their efforts to appeal. It might take five or 10 years until new evidence surfaces.

What we really want to see is timelines, just legislated systems of accountability, so that however that commission unfolds, it can be measured and augmented over time to be the most responsive it can be.

● (1610)

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Ms. Kish.

What do you think, Mr. Wiberg?

[*English*]

Mr. Neil Wiberg: I would agree. The important thing is that it be done as quickly as possible. The British Columbia case that was referred by the minister last year—and which I mentioned earlier—came about because of a change in science in terms of hypothermia and drowning. The individual had been ordered to serve life with no parole for 25 years. As soon as that report came out, the innocence project looked and thought that this probably was a manslaughter and not a first-degree murder.

The sooner that could be dealt with, the better, in my opinion.

[*Translation*]

Mr. Rhéal Éloi Fortin: I agree: the sooner, the better.

Should the new commission have five to nine commissioners, as Bill C-40 proposes, or should it have more, say nine to 11? Which would be better?

[*English*]

Mr. Neil Wiberg: I'm afraid that I'm not an expert at that. I go to court and run trials now as a defence lawyer all the time, as a Crown.... I have to confess that I'm not an expert on the number of commissioners, so I won't guess.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Mr. Wiberg.

What's your view, Mr. Paisana?

[*English*]

Mr. Tony Paisana: In my opinion, what's far more important is the designation in proposed section 696.74 of their being, potentially, part-time commissioners. I'm much more concerned about the fact that they are part-time commissioners than I am about the number. I would like to see full-time commissioners. I think that shows the dedication necessary for this project. I think that would much more easily withstand the caseload that would come into play, and I think that is the far more serious consideration as opposed to the difference between nine and 11. Whether they're full time or part time, I think, is the much more significant issue.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Mr. Paisana.

I have a question on the same topic. We know that, currently, it takes between 20 months and six years to process an application. That's a very long time. I'm not sure that what's proposed in Bill C-40 will shorten that. It could even take longer since all that has to be established is that a miscarriage of justice may have occurred, as opposed to likely occurred, before a recommendation is made.

What do you think of the time frames? Should there be a time limit for reviewing an application? The current wait time is 20 months to six years. Do you think that's reasonable?

[*English*]

Mr. Tony Paisana: The current status quo is not reasonable. It's the main impetus behind the push for this legislation.

In my view, a legislative timeline is something that could be considered. I think the difficulty with that is that no case fits any sort of particular criteria. Some may take longer than others. I think a much more significant push should be for resourcing and funding.

The bill has a very general structure with regard to how decision-making will take place. It does not actually set out how the process of the commission will work. That's being left for policy and funding. That's the key question that will determine the flexibility and speed with which this organization confronts the problem. If it is underfunded, you're certainly going to have worse problems. If it is properly funded, I have confidence that, whether it's nine commissioners or 11, the process will actually increase efficiency. It's just that the question of funding is not something that can be addressed at this stage. When it is addressed, it is vital that proper funding be dedicated to this process.

On November 23 you heard from a witness who talked about it.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you.

[*English*]

The Chair: Thank you very much.

Mr. Garrison, go ahead.

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

Thank you to all of the witnesses for appearing today.

I'd like to go back to you, Ms. Kish, on the question of over-conviction and over-sentencing. When you read through the text of this bill, I wonder whether or not you feel that it's clear that the question of sentencing is a question of miscarriage of justice?

Ms. Nyki Kish: That didn't strike me as a salient aspect of the legislation, no.

Mr. Randall Garrison: What you're telling us is that with the clients you work with quite often, it's not guilt or innocence, but the application and conviction of the proper statute and the assignment of a proper sentence. The failure to do that constitutes a miscarriage of justice.

● (1615)

Ms. Nyki Kish: I think we really see three dominant experiences. One is factual, wrong convictions at the serious-offence level. That's especially for life-sentenced women and gender-diverse people. Then for individuals it's especially related to “party to” convictions, in which we would consider the grounds for conviction to be very shaky. Then there are a host of individuals who plead guilty to lesser offences and who have very low legal literacy. They simply accept charges or convictions to get out as quickly as possible.

In the case of the first two that I just shared, I think we would constitute these as people being over- convicted. They are people receiving life sentences for being present, whereas if they had adequate counsel, they would have been exonerated or perhaps had an involuntary manslaughter conviction.

Mr. Randall Garrison: Do you think the creation of this new commission will address the problems that those who are serving sentences have in getting reviews of their convictions?

Ms. Nyki Kish: I'm sorry for the timing—that it just came through today—but we put forward a bill that really speaks to what happens post-conviction. We encourage consequential amendments to the CCRA, because the agencies regulated by it, the Correctional Service of Canada and the Parole Board of Canada, are right now so heavily reliant on considerations of level of responsibility that we see individuals having very strong, legitimate reasons for abandoning innocence claims and navigating the system to access parole and the reintegrative services in prisons. We think this is an amendment that could greatly strengthen the bill and help.

I'm sorry to go on, but institutionalization and community re-entry supports are a priority of this bill, and we worry that those priorities won't be meaningful if they're not in consideration of the system of incarceration.

Mr. Randall Garrison: How do you see in that recommendation the relationship between the commission and other statutory boards like the Parole Board or under the Corrections Act? Do you see the commission as having power to direct or giving advice? What do you see that relationship as?

Ms. Nyki Kish: Thank you for the question.

We recommended an amendment that would give powers to employees and commission members to provide general direction and guidance to agencies regulated by the CCRA. As there is a mandate for employers to reach out to applicants and potential applicants and to provide education and awareness, we want to ensure that people in prison aren't afraid to do so, and that prison employees and administrators are educated and up to speed on the risks of wrongful convictions. We do dream of a consequential amendment to the CCRA that expressly prohibits punishment of people for seeking redress. Then we would say at a minimum that the powers to provide direction and education would be wonderful.

Mr. Randall Garrison: I know you apologized for going on, but I think you're raising a very important point here.

How often do you see this affecting the clients you work with in the system—their being denied access to programs because they maintain their innocence?

Ms. Nyki Kish: It's in most instances.

We work very hard. We work closely with Correctional Service Canada and the Parole Board to raise awareness. Certainly, at the senior level, there is knowledge of legislative and constitutional requirements. However, when you get to the decision-makers—the people writing the A4Ds and granting or denying incarcerated people access to programs—public education and direction are needed.

Mr. Randall Garrison: Do you feel those who are denying these feel as if they are following the letter of the legislation when they do so?

Ms. Nyki Kish: If you look at CSC policies and the Parole Board decision-making framework.... The PBC framework is less reliant on it. Just about all Correctional Service Canada decisions are very reliant on level accountability. That would be the agency we would prioritize.

Yes, I believe they are just following their policy direction.

Mr. Randall Garrison: Thank you.

Madam Chair, do I have any time remaining?

I think I heard all of you support removing or modifying the requirement that appeals be exhausted.

I'll go to Mr. Paisana here.

Would it be sufficient to create an exception so the commission could examine cases that haven't been appealed, rather than removing the requirement altogether?

The Chair: You have 30 seconds.

Mr. Tony Paisana: Our answer to that question already lies in the legislation.

Subclause 696.4(4) shows there's an exception built in for those who haven't appealed to the Supreme Court of Canada. All we're suggesting is that you just expand this to include those who haven't appealed to a court of appeal.

You are already contemplating doing this. It's just extending it to an analogous situation.

● (1620)

The Chair: Thank you very much.

We will now move to our second round. We're going to commence with two four-minute rounds each.

We'll start with Mr. Van Popta.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you to all the witnesses.

Mr. Paisana, you heard Mr. Wiberg, in his opening remarks, highlight some substantial changes to criminal law procedure, including changes to rules of disclosure. I think he referred to the Stinchcombe case and advanced scientific tools around DNA evidence.

In your opinion, will there be fewer wrongful convictions now, with these new rules and procedures? I note David Milgaard never would have been convicted if we had the DNA technology in 1970 that we did 30 years later.

Mr. Tony Paisana: I'm a proud Canadian lawyer. I'm very proud of our justice system.

However, the vigilance required to prevent wrongful conviction should never subside. It's institutional resistance to the acceptance of the idea of wrongful conviction that breeds wrongful convictions. For many years, we thought microscopy was a very valid science that could give us those same kinds of assurances. It turned out that we were wrong. Today, even DNA is being questioned in some circumstances, depending on the sensitivity of the technology and the kind of match being developed. That vigilance is extremely important.

Though I am proud to be a Canadian lawyer in our system, we have to be ever-vigilant that our processes don't suffer from—I don't want to call it "arrogance"—overconfidence.

Mr. Tako Van Popta: I'm going to jump in there.

I wasn't suggesting we lower our guard at all. My question was on whether, factually, there will be fewer wrongful convictions with new rules around the evidence.

Mr. Tony Paisana: I hope that's the case. It's impossible to tell, because there's also going to be an increase in wrongful convictions with increased use of those technologies, in the sense that we will be able to expose them more. In addition, the "false guilty plea" phenomenon is one we are very much new to. We expect there will be a great deal of wrongful convictions uncovered through that process.

Though I am optimistic that those technologies and advances will prevent more wrongful convictions, I am not in a position to say we are any better off without more vigilance.

Mr. Tako Van Popta: Thank you.

I'm going to pivot now.

You gave testimony in front of the LaForme-Westmoreland commission a couple years ago. You're quoted on page 103 as stating—and I'm paraphrasing—that you simply do not believe everyone in prison will claim they were wrongfully convicted.

We put a similar question to Mr. Curtis of the U.K. commission. I asked him what they do to ensure the application intake system doesn't get clogged with what I call "faint-hope" applications.

Mr. Tony Paisana: I think that's a valid concern—making sure the floodgates don't open and overwhelm the system, at the risk of obscuring those who truly need it.

In my experience working in the prison system, most individuals who have been there for a long time have come to terms with that reality. The people who seem to access these resources are the ones who are truly of the view that they're innocent. To that point—and this speaks to something Ms. Kish was saying earlier—we've had many people in innocence projects maintain their innocence even though they were eligible for parole years earlier. The main impediment to them getting parole is admitting their guilt. People spend 10 or 15 years longer in their sentence because of that.

Mr. Tako Van Popta: Yes, I understand that.

Mr. Curtis said that only 3% are actually successful—you said 97% are disappointed—and that's when I asked him about the intake process to make sure it doesn't get clogged up.

What do you think about that? Is 3% or 97% what you would expect to be the ratio?

Mr. Tony Paisana: It's impossible to tell because of the outreach challenge that we have at this stage. This is a new system.

How well it will be rolled out in prisons to people who will be aware of it and how they apply will be, I think, the driving force to how difficult of a problem it will be to weed out the poor applications.

I think an intake screening process is necessary, and the one thing in Bill C-40 that is fairly robust is there are a number of criteria here that you see that should serve the tool of screening out some of those applications.

The Chair: Thank you very much.

Madame Brière.

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Madam Chair.

Thank you to the witnesses for being with us this afternoon.

My question is for you, Mr. Paisana. Under the bill, after analyzing the information, the new commission makes a decision when it has reasonable grounds to believe that a miscarriage of justice may have occurred or that it is in the interests of justice to do so.

I'm wondering whether it is appropriate to add the part about being in the interests of justice. Do you think that could disadvantage marginalized populations?

● (1625)

[*English*]

Mr. Tony Paisana: I agree, if the viewpoint is looking at that requirement in a way that is restrictive, which I think is one possible interpretation of that.

The other way of looking at it—and this is somewhat hinted at in the bill—is the idea that you may have a case that's on the fence, but the interests of justice pushes it over the fence in consideration of things like the distinct challenges of the applicant, the personal circumstances of the applicant. I actually think it can work both ways.

To the extent that you have a case that might be a wrongful conviction, but for some reason the public interest suggests it shouldn't be reviewed, I agree with you. That seems inconsistent with the spirit of the bill. That may be something that's left to the interpretation of the bill down the road, but it seems to me that interests of justice in no way could override the fact that there may be reasonable grounds to conclude that a miscarriage of justice occurred.

[*Translation*]

Mrs. Élisabeth Brière: Under what circumstances might it not be in the interests of justice?

[*English*]

Mr. Tony Paisana: That's the part I'm struggling with, namely this idea that it could ever be contrary to the interests of justice to review a conviction that there was reasonable grounds to conclude there may be a miscarriage of justice. That's why I think, when we look at statutes and statutory interpretation, it's within the scheme of the whole bill.

I think the more likely interpretation that would be brought to bear to this requirement, if it remained in, is the one that I said earlier, which is that it actually should be a positive attribute to an application, as opposed to a negative attribute, if that makes sense.

[*Translation*]

Mrs. Élisabeth Brière: Thank you very much.

Proposed subsection 696.5(1) lists the same two conditions but presents them as alternatives using the conjunction “or”. It says that the new commission may investigate “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”.

Should the commission be required to conduct an investigation? Should the provision say instead that the new commission “shall” or “must” investigate?

Also, why are the two conditions presented as alternatives?

[*English*]

Mr. Tony Paisana: I'll break down your question into two.

I agree with you. It should be “must investigate”, not “may”. I'm not sure why there is a discretionary feature to this. The whole point of the standard is to reach a standard such that a power is triggered.

With respect to the disjunctive routes, I think it makes sense that there be a disjunctive route at this stage of the process because there can be cases where it's in the interests of justice to review it, where on the face of it, it may not appear to be a miscarriage of justice.

This comes back to what we call the catch-22 in post-conviction review. Post-conviction review often relies on new matters of significance, but persons in custody don't have the ability to investigate those matters of significance.

There may be an aspect of the case that cries out for a response, but you can't reach the threshold of reasonable grounds to believe because you don't have access to the investigative powers, but through the process of the interests of justice avenue to get to the investigation, you can access those resources such that you might eventually get to the point with new matters of significance that achieves the ultimate result.

It's a separate avenue that I perceive to be valuable for those who are in the catch-22, as we've called it, in post-conviction review.

The Chair: Thank you very much.

Mrs. Élisabeth Brière: Thank you very much.

[*Translation*]

The Chair: Now it's over to Mr. Fortin for two minutes.

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

I'd like to discuss the matter of having to exhaust appeal rights, Mr. Paisana. The bill says that the applicant must have exhausted their appeal rights before applying for a ministerial review, except as regards an appeal before the Supreme Court.

I'd like to hear your thoughts on that. You can have the rest of my time to answer.

[*English*]

Mr. Tony Paisana: We are very much of the view that this, as a mandatory requirement, should be removed. The reason for that is that the appellate process is very cumbersome, and it requires a great deal of sophistication and expertise.

To give you a sense of how it works, when a person appeals they have to file a notice of appeal, they have to order transcripts for the hearing that are relevant, and then they have to file a factum. The Crown needs to respond, and then there's a hearing before three judges of the court of appeal. That process, in the best-case scenario, usually happens within a year. That process often requires legal aid support if a person is unsophisticated and in custody. Legal aid has its own criteria for merit, and there may be many cases where legal aid is not prepared to fund something if there is no merit on the face of what the accused person can muster in terms of grounds of appeal.

Therefore, you're setting up a situation where people, particularly those who have falsely pled guilty, will see significant barriers to interceding at the appellate level, such that they will be completely discouraged from doing that, or not know how to do that; and you won't be able to access the commission after the fact, because you haven't done that step.

● (1630)

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Mr. Paisana.

I have just a few seconds left. If the requirement is removed, don't you worry that the new commission would be swamped by applications, with people applying for ministerial review instead of appealing their case?

[*English*]

Mr. Tony Paisana: What I'll direct you to is that this seems to be contemplated in the legislation. If you look at one of the factors that's relevant to acceptance and the ultimate decision, you see under proposed paragraph 696.6(5)(c) that the “application is not intended to serve as a further appeal”. I would suggest that this would include an appeal in first instance. It should be a relevant factor that the person has not appealed. It should be weighed in the analysis. All we're saying is it shouldn't be determinative. There will be cases where it will be appropriate to not force the person to go through the appellate process.

The Chair: Thank you.

For our final round of questions, we have Mr. Garrison, please.

Mr. Randall Garrison: Given that I only have two minutes, I'm going to focus on a couple of things that I think are not in the bill.

We've talked about a miscarriage of justice sometimes being a result of systemic factors, and there doesn't seem to be anything in the bill that would allow the commission to recommend to the Law Reform Commission, to Parliament, or anyone a way of addressing those factors.

The second one is that if in the process of investigating a miscarriage of justice, the commission finds dereliction of duty, malice, or other professional misconduct, they don't have the power to refer that to anyone.

I'm going to ask the Canadian Bar Association's Mr. Paisana to quickly answer those two points.

Mr. Tony Paisana: With respect to law reform, we do support the idea that the commission should refer and participate in law reform projects. They are uniquely positioned to see the wide spectrum of wrongful conviction issues that come before them, and they're uniquely positioned to study and provide data and input with respect to those issues.

With respect to the referral of misconduct, this is something that came up in the consultation phase. We are of the view that there are plenty of ways in which misconduct can be reported. The commission doesn't need to be the avenue through which that occurs. It can be something that they raise within their decision-making process—that this is something that a particular group, or body, or regulator should consider. However, they don't have to be the actual source of the referral. There are plenty of other "watchdogs", if I could put it that way.

Mr. Randall Garrison: Thank you.

In the 30 seconds remaining, Ms. Kish, maybe you can comment on these two points.

Ms. Nyki Kish: Yes. We think that with all of the amazing evidence and insights from impacted stakeholders and wrongfully convicted people that went into the beautiful report from the commission, there should be every opportunity to address systemic cultures of miscarriages of justice, because certainly they exist. You see it in the outcomes. That half of the people in prisons for women are indigenous doesn't demonstrate that indigenous people are more deviant; it demonstrates that there are flaws in our justice system. We want our system to be as responsive as it can be, as Tony indicated, to provide just and fair outcomes for everyone. With every opportunity we can clearly legislate, we should do so.

The Chair: Thank you.

Thank you very much to all of our witnesses for appearing this afternoon, and thank you to colleagues.

Let's suspend for two minutes to allow our next panellists to be tested if they're virtual. I think we have one who is in person.

● (1630)

(Pause)

● (1635)

The Chair: I call the meeting back to order, please.

For the second hour, we're going to continue our study of Bill C-40.

With us today we have two witnesses, one in person.

Good afternoon to Madam Kathryn Campbell, who is appearing as an individual. She is a professor in criminology, Faculty of Social Sciences, University of Ottawa.

As well, on the screen we have Madam Lindsey Guice Smith, executive director, The North Carolina Innocence Inquiry Commission.

I have Mr. Moore.

Hon. Rob Moore: Did you want me to move my motion?

The Chair: Go for it.

Hon. Rob Moore: I don't want to take any time from the witnesses.

Quickly, a notice of motion has been circulated that the minister appear before the committee to discuss the supplementary estimates at some time, as soon as possible, up to and including but no later than December 7.

There seems to be consent for this. That's great.

(Motion agreed to [*See Minutes of Proceedings*])

The Chair: Thank you, Mr. Moore.

Hon. Rob Moore: Thank you, Madam Chair.

The Chair: That's how I like things to be done: very efficiently. Thank you very much. That's fabulous.

The witness on the screen has been tested, and the equipment is working well.

I will ask each of you to commence with your remarks for up to five minutes each.

We will start with Madam Smith.

The floor is yours for five minutes.

Ms. Lindsey Guice Smith (Executive Director, North Carolina Innocence Inquiry Commission): Thank you, Madam Chair.

The North Carolina Innocence Inquiry Commission is the United States' first and only independent state agency charged with the neutral investigation of post-conviction claims of factual innocence.

The preamble to the legislation that created the Innocence Inquiry Commission in 2006 states:

> Whereas, postconviction review of credible claims of factual innocence supported by verifiable evidence not previously presented at trial or at a hearing granted through postconviction relief should be addressed expeditiously to ensure the innocent as well as the guilty receive justice; and
>
> Whereas, public confidence in the justice system is strengthened by thorough and timely inquiry into claims of factual innocence; and

> Whereas, factual claims of innocence, which are determined to be credible, can most effectively and efficiently be evaluated through complete and independent investigation and review of the same…

This preamble encompasses the commission's mission.

Although wrongful convictions erode public confidence in the criminal justice system, addressing them enables criminal justice stakeholders to learn how to better ensure that justice is served. For every wrongful conviction, there's a true perpetrator at large, a victim under the false impression of having received justice and an innocent person who may spend years in prison for a crime they did not commit.

Accordingly, the commission is designed to uncover the truth from a neutral perspective outside of the adversarial criminal justice system. By design, the North Carolina General Assembly limited the scope of the commission's work, while also granting the commission very broad statutory authority to achieve its mission.

There are three hallmarks of the commission process that make it successful.

The first is this broad statutory authority. The commission was given all of the authority of both the rules of criminal procedure and the rules of civil procedure in North Carolina to ensure that we can achieve our goal of uncovering the truth in claims of factual innocence. This has resulted in the commission being able to review, interview and depose individuals who had not previously participated in a case; having access to files and evidence that others may not have been able to access; and the commission locating physical evidence that agencies had claimed did not exist or could not be located, among other things. In fact, the commission has located physical evidence in 28 cases, where others said it no longer existed, including in 12 of our 15 cases where individuals were ultimately exonerated.

The second is our neutrality. Because we do not enter into any kind of attorney-client relationship with the claimants and are not working on the claimant's behalf, or even on the behalf of the prosecution, we can be curious in our endeavour to find the truth. This allows commission staff to ask necessary but difficult questions as part of our investigations.

Because claimants have to waive all of their constitutional rights to participate in the commission process, and can do so because our process is narrowly limited to claims of factual innocence, many of the concerns that attorneys face in an adversarial system are simply not factors in investigations of these claims.

Our neutrality also shapes how we measure success. A good day at the commission isn't based on whether a claim results in an exoneration, but rather in whether we are able to fully investigate a claim and provide answers that the criminal justice system didn't previously have.

The third hallmark is confidentiality. By statute, the claims we investigate and the investigations themselves are confidential during the investigation, and only in certain circumstances is information released to the public about cases. This allows the commission to develop a rapport with witnesses and to have full and frank conversations with witnesses, law enforcement agencies and others involved in cases, and it often leads to positive change within the criminal justice system. We have especially seen this with respect to changes in evidence storage and handling at law enforcement agencies throughout North Carolina.

Since its creation in 2006, the commission has received 3,571 claims. We have received 194 claims thus far in 2023, putting us on track to receive 233 claims in 2023, which is up from our average of 211 claims per year. We have held 19 hearings since our creation, and will hold our 20th hearing next week.

● (1640)

Fifteen individuals have been exonerated by a post-commission three-judge panel or had their convictions vacated through a motion for appropriate relief and been granted a pardon of innocence by the governor of North Carolina based on the commission’s investigation of their claim. Additionally, we have definitively confirmed guilt through DNA testing in 13 cases—

The Chair: Ms. Smith, why don't I have you continue with the questioning? You'll have lots of time when you're asked questions. We only have two witnesses for the second hour, so there should be plenty of time.

We have Ms. Campbell for five minutes, please.

Ms. Kathryn M. Campbell (Professor, Criminology, Faculty of Social Sciences, University of Ottawa, As an Individual): Thank you.

First of all, I want to thank you very much for the invitation to be here today. It's a real honour.

As an academic, I've published extensively in the area of miscarriages of justice in Canada and other common law countries for the last 20 years. My research has focused on a number of areas, including examining the factors that contribute to miscarriages of justice and prison and post-release experiences of the wrongly convicted, amongst many other things.

I also took part in the consultations held by Justices LaForme and Westmoreland-Traoré around the proposed reform in 2021. I've met, spoken to and interviewed many wrongly convicted people over the years, and I'm well aware of the devastation that a wrongful conviction can wreak on individuals and their families.

In 2012, I started Innocence Ottawa, which is, through the Department of Criminology, an innocence project that's run by criminology and law students. Our aim is to help the wrongly convicted who are seeking exoneration.

We've come a long way. When we started in 2012, we had bake sales and sold T-shirts to fund our work, whereas in 2023 we've just received an access to justice grant from the Ontario law foundation for an outreach to indigenous prisoners program, so we've really moved quite far.

It's clear—as I've heard through these hearings these past few weeks and as I think we all accept—that indigenous and Black prisoners are overrepresented in federal and provincial and territorial institutions, but they're strangely absent in the numbers of exonerees or even amongst those seeking conviction review.

Thus far, Innocence Ottawa has filed one application for conviction review through the CCRG on behalf of one of our applicants, so I'm well aware of the difficulties in the current system. In fact, we submitted his application in 2019. Four years later, it's still at the preliminary investigation stage. Just as an aside, he also happens to be a person of colour.

My frustration over the last 20 years of the difficulties and challenges of innocence work is that it just shouldn't be this hard to overturn a conviction, to correct an error, because the stakes are just too high. Thus, I greatly anticipated the new legislation, and I feel it's a very important first step.

In the next half of my short talk, I'll briefly comment first on what I see as the strengths of the bill and then on the areas that I believe are in need of improvement.

The independence of the conviction review process now I think is an excellent step forward, but I feel there are some constraints on this as well. The commissioners should not be considered as government employees. The commission itself I believe should be viewed more as a court rather than a small government agency, and it should be located outside of Ottawa, with possible regional offices. Otherwise, that may detract from the perception of it as being independent.

On accessibility, the bill proposes to enhance access to previously marginalized groups, those who are overrepresented in the criminal justice system—particularly indigenous and Black prisoners—and I think that being an altogether new entity may help address this matter with a new conviction.

On the change in the threshold test, as was discussed in the previous hour, I think this change from a “miscarriage of justice likely occurred” to a “miscarriage of justice may have occurred”, or to if the commission “considers that it is in the interests of justice to do so” they can conduct an investigation, I think is an important step. It sounds far more expansive, but at the same time, I wonder to what extent this is going to change things, because it is also somewhat vague. My experience thus far with the CCRG itself, the criminal conviction review group, is that it's unclear as to what it actually takes to recommend reviewing a conviction.

Three other important additions are the examination of the personal circumstances of an application, enhancement of investigative powers and greater victim involvement.

On areas that need improvement, I believe the number of commissioners is far too low. The LaForme and Westmoreland-Traoré report advocated for nine to 11 commissioners. That seems reasonable and necessary, in my view. The number suggested by Bill C-40 is clearly not adequate, because if the commission isn't properly staffed with both commissioners and investigators, it's going to incur huge delays, and that's an ongoing issue with the CCRG.

I have a couple of other things. I believe the mandate should include sentences, as a sentence can also represent a miscarriage of justice, and also those whose cases have not yet been before a court of appeal. Otherwise, it may severely limit the number of applicants.

● (1645)

Finally, I think as an academic that we have a really great opportunity here with this new commission to get it right, to have a proactive and systemic approach to miscarriages of justice, to collect data from cases, derive policy lessons and discern patterns. I think it would be a shame to miss that opportunity with this new commission.

Thank you very much.

The Chair: Thank you very much to both of you.

We will now commence with the first round of six minutes each, and we will start with Mr. Van Popta.

Mr. Tako Van Popta: Thank you, Madam Chair.

Thank you to the witnesses.

Thank you, Ms. Smith, for coming here all the way from North Carolina and sharing your experience over many years. We're just starting this process.

My first question is about the intake process. In your opening remarks you quoted some sections of the legislation: “Whereas, post-conviction review of credible claims of factual innocence”—that would be number one—“supported by verifiable evidence”—number two, and—“not previously available at trial”—number three.

How does a person get over that first hurdle of having their application heard by your commission?

● (1650)

Ms. Lindsey Guice Smith: I want to make clear that it's not previously presented at trial, so it could have been available, but it can't have been presented at trial. That is one factor.

When they apply to the commission, they can tell us what is new, but it is not necessary for them to always know what is new. We don't put that burden on the convicted person—the claimant—to necessarily know, for instance, that there is definitively evidence that hasn't been DNA tested in their case. We will do the work to figure that out.

We ask them to fill out a 22-page questionnaire and to give us as much information as they can about their case. What is the innocence claim?

We then begin the process of figuring out if there is something here that can be done and if is there something new. We may go back and look at the trial transcript to figure out what was presented at trial. We'll assess whether there is forensic testing that hasn't been done or that could be done, or they may come to us and say, “Hey, there's a new witness who has come forward who is saying something that was never presented at trial,” or “There's a witness who has come forward and changed their story".

It's then a question for us to assess the credibility of that witness. Are there other factors that make that person credible? Is there other evidence out there that would make that person credible?

Mr. Tako Van Popta: Thank you.

Your commission has broad investigative powers. What do you do with that evidence that you gather? Is it then presented to court if you deem this to be a successful review?

Ms. Lindsey Guice Smith: We have a three-step process.

We are a state agency. Our staff are state employees. They do the day-to-day operations.

Once there is some credible, verifiable evidence of innocence, it's the director's discretion as to whether that case moves forward to a hearing.

If it is moved forward to a hearing, that is heard by our commissioners.

The commissioners are appointed by our Supreme Court chief justice and our court of appeals chief judge, and there are members from different areas of the criminal justice system: a judge, prosecutor, criminal defence attorney, sheriff, victim advocate and some others. They hear the cases and, if they determine that there is sufficient evidence of factual innocence to merit judicial review, then they'll move the case forward to a three-judge panel.

That three-judge panel then hears the case and makes a final determination as to whether the convicted person has proven by clear and convincing evidence that they are, in fact, innocent.

Mr. Tako Van Popta: Is all the evidence that you gather presented to this three-person tribunal, including perhaps self-incriminatory evidence?

Ms. Lindsey Guice Smith: When we are presenting the case to the commissioners, all relevant evidence is presented—all parts of it, the good, the bad and the ugly. It's non-adversarial.

When it goes to the three-judge panel, it becomes adversarial, and the parties get to present what works for them. They may present it in the light most favourable to their client, and it will look a little bit different from what it does before our commissioners.

The state, of course, is represented by the prosecution, who may present things that are unfavourable to the convicted person—and, of course, the convicted person can present all of the things that are favourable to them.

Mr. Tako Van Popta: Thank you.

You or somebody from your commission gave evidence at our LaForme and Westmoreland commission looking on miscarriages of justice. I'm quoting here from page 14, I think. This is what they concluded about some of your evidence:

> We considered a test that would allow the commission to refer cases back to the courts on “factual innocence” grounds as used in North Carolina. We ultimately rejected such a test on the basis that it was too restrictive.

Here in Canada, we're taking a different direction with this draft legislation. What are your comments about it? Why was this important to North Carolina?

● (1655)

Ms. Lindsey Guice Smith: I think in North Carolina it was a balance of a policy decision that they wanted to limit the scope to factual innocence claims, and in order for this process to work in North Carolina, it needed to be limited in that manner. I can't really provide an opinion as to what Canada should do or what standard you all should put into place. I can really only speak to what we've chosen here in North Carolina and how we've seen success in the model we have chosen here.

Mr. Tako Van Popta: Thank you.

The Chair: Mr. Housefather, please.

Mr. Anthony Housefather (Mount Royal, Lib.): Thank you, and thank you very much to both witnesses.

I want to start with a question of something that's preoccupying me with respect to the legislation, which is the prerequisite that people need to have exhausted their appeals process before they can make use of this legislation.

I'd like to ask both witnesses. I understand, first in the North Carolina context, that this is not a requirement. People need not have exhausted their appeals processes if they can provide a preponderance of evidence, show you that they are actually innocent and provide factual evidence of innocence. Is that correct?

Ms. Lindsey Guice Smith: That's correct.

Mr. Anthony Housefather: Perfect.

Can I ask your opinion, Professor, about that and whether or not that should be changed in the draft bill.

Ms. Kathryn M. Campbell: We get about 30 to 50 applications a year, and we have our criteria that they have to meet. One of those is that they have to have exhausted all of their appeals. That eliminates probably half of them right there.

I think the process is so lengthy anyway. I understand that's still there in the bill, whereas there may be special consideration for certain cases. Perhaps what the witness, Paisana, said earlier may be a way to go about it, having it as an exceptional case that would be allowed to go ahead, despite not having done that yet.

Mr. Anthony Housefather: My concern is essentially that the poorest defendants, the defendants who are the most likely to wind up in the system, are the least likely to have the means to exhaust their appeals. Therefore, if this is really meant to deal with the disproportionate number of indigenous, Black or poorer incarcerated people in our systems, we're in a situation where they would be the least likely to have exhausted their appeals.

Ms. Kathryn M. Campbell: Absolutely.

If I can just make a comment on this point as well, which is related to it, I don't think a lot of people know about the conviction review process at all. I met with an elder this week on our indigenous outreach program, and that is what he said to me. He said they don't even know about it. They know what an appeal is. They get that, because they have a conviction, but that's it. I think we really need to be better at reaching people, and one way would be what you've suggested, and also just providing information.

Mr. Anthony Housefather: Professor, the U.K. legislation, for example, has that exceptional circumstance where they can decide to not require all the appeals to be exhausted. Have you looked at what it says in the U.K. legislation? Would you recommend something like that?

Ms. Kathryn M. Campbell: I would. I've written a couple of things with Professor Clive Walker about the CCRC as a model for us here. However, I think one of the biggest issues was not that, but the whole idea of funding and having it to be adequately funded, because there are huge problems there now with their commission, given that they just don't have enough money.

Mr. Anthony Housefather: Thank you.

Coming back to North Carolina again, I'm very interested in this model as well. The eight commissioners who are named by the two different judges of the court represent different criteria. One of them represents sheriffs, and one of them represents the public at large. There have been requests that the commission here include members of minority communities, that they be represented on the panel of people. Is that a requirement in North Carolina at all?

Ms. Lindsey Guice Smith: As part of the statute, it requires that the chief justice and chief judge consider diversity in gender, racial makeup and the geographic diversity of the state. Therefore, when we send the appointment information to the chief justice and the chief judge, something I always let them know is what the current makeup of the commissioners is and who's leaving, so that they have an idea of where they might need to go.

Mr. Anthony Housefather: It's three justices who will hear, because.... As I understand it, the commission will refer cases when it has determined, by a preponderance of evidence, that the person is innocent to a three-judge panel.

Is that a special three-judge panel? Is it of the North Carolina supreme court? Who are the judges on it?

● (1700)

Ms. Lindsey Guice Smith: The judges are superior court judges. In North Carolina, those are our felony trial court judges. They can come from anywhere in the state; they just can't have had anything to do with the original case. They can't have been involved in the original trial, plea or any post-conviction work on the case.

Mr. Anthony Housefather: Are there any instances of when the case will stop at the commission's decision? For example, the North Carolina prosecutor at that point will say, “I agree with what the commission has found. I'm either going to drop it or I'm going to have them take an Alford plea and allow them to end the case at that point.”

Ms. Lindsey Guice Smith: We've had a couple of instances when the prosecution has agreed that the person is innocent and joined with the defence in asking the three-judge panel for the relief. That allows the convicted person to go ahead and receive the compensation from the state, if they go down that route.

We have seen an increasing trend since 2021 of prosecutors offering the Alford plea as opposed to going through the three-judge panel, and then defence counsel consulting with their clients as to whether to take the risk of going through the three-judge panel process or—

Mr. Anthony Housefather: She's put up the card, which means my time is over.

Thank you very much.

The Chair: Thank you.

[*Translation*]

Go ahead, Mr. Fortin.

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

Thank you, Ms. Campbell and Ms. Smith, for being here today to discuss this important issue. Your insights are very important.

Ms. Smith, my fellow member Mr. Housefather just took one of the questions I wanted to ask you, about the makeup of your commission in North Carolina.

How many commissioners are on your commission, and where are they from? What diversity requirements do you have?

[*English*]

Ms. Lindsey Guice Smith: I don't have it in front of me, but I could look it up. It's on our website, so I could quickly look it up and tell you. If you give me half a second, I can tell you.

[*Translation*]

Mr. Rhéal Éloi Fortin: I'll let you look that up. Meanwhile, I'll turn to Ms. Campbell.

Good afternoon, Ms. Campbell. Let's say the commission finds that the court ruled appropriately, but that the sentence was too harsh. Should the commission consider that to be a miscarriage of justice and refer the case back to the courts?

[*English*]

Ms. Kathryn M. Campbell: I actually do, and that's one thing I think the commission should consider—the sentence—because at times, a sentence can be a miscarriage of justice as well. We've had people come to us with cases of, let's say, second degree when, in their opinion, it should have been manslaughter. We're a small, student-run innocence project; we can't touch those cases.

Is that a miscarriage of justice? In that person's view and, in a broader sense of justice, it might be.

I believe there is a place for sentencing to be reviewed in the new commission.

[*Translation*]

Mr. Rhéal Éloi Fortin: Ideally, how long should it take for the commission to make a decision on an application?

Currently, it can take between 20 months and six years. That time frame could be longer or shorter as a result of these reforms.

What are your thoughts on that?

[*English*]

Ms. Kathryn M. Campbell: In an ideal world, it would be a couple of years.

The case that we have in front of the CCRG right now, we investigated for five years. They've had it now for four years. This man had a second-degree murder sentence and was released at 13 years. He's going in front of the parole board right now. There's a dilemma attached to that as well.

The thing I think will help with the new commission is that it will have access to all kinds of information that we never could get very easily, such as police records and Crown records. That would allow for a more expeditious review of a conviction...two or three years at the most.

The British commission is very quick. If we could start to meet that standard, that would be really good.

● (1705)

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you.

That brings me back to you, Ms. Smith. Did you find out how many commissioners there are and where they are from?

[*English*]

Ms. Lindsey Guice Smith: Yes, I have—roughly.

We have eight commissioners and eight alternate commissioners for each position. The reason is that, sometimes, a commissioner is unavailable due to illness, or they need to be recused from a case because they had some involvement in it or it's from the county where they were the judge—something like that.

Overall, we have five female commissioners and 11 male commissioners. We have 13 white commissioners and three Black commissioners. We have five commissioners from the western part of the state and about six or seven from the central part of the state. That leaves three or four from the eastern part of the state.

[*Translation*]

Mr. Rhéal Éloi Fortin: Are you satisfied with the makeup? Does it meet the community's needs?

[*English*]

Ms. Lindsey Guice Smith: I always think we can do better with diversity. I would love to see more diversity on the commission. We are always mindful of that. When I am given the opportunity to make recommendations for commissioners to the chief justice and chief judge, I always include more diversity in that. It's up to them as to whether or not they take those recommendations.

[*Translation*]

Mr. Rhéal Éloi Fortin: Are they all full-time or part-time positions?

[*English*]

Ms. Lindsey Guice Smith: Our staff are full-time employees. Our commissioners' role is to hear cases. They hear cases only when we have hearings. We've had two hearings in 2023. This involves them coming to hear those cases for three or four days at a time, and also participating in our commission meetings a couple of times a year.

[*Translation*]

Mr. Rhéal Éloi Fortin: How long does it take the commission, on average, to make a decision?

[*English*]

Ms. Lindsey Guice Smith: Our cases can vary. For an initial review, it takes a couple of weeks, from the time we receive the questionnaire, before we can review the case and decide whether there is any merit to it. After that, it can take a couple of years to fully investigate a case.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you.

[*English*]

The Chair: Thank you very much.

Mr. Garrison, go ahead, please.

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

Thank you to both witnesses for being with us today.

Professor Campbell, I want to return to the question Mr. Fortin raised about whether sentences are subject to review by this commission.

I don't see anything in the legislation that says they are not. Is it due to an abundance of caution that you're suggesting we explicitly add sentencing? If I'm not mistaken, the current conviction review group has looked at sentences.

Ms. Kathryn M. Campbell: They can look at dangerous offender designations and long-term offender sentencing designations. Perhaps, as you're saying, it's an overabundance of caution. I suspect that, once the commission is up and running, the floodgates will open. There will be a lot of people asking for review. I feel there may be a need to sort through more pressing cases. I don't know how that would happen. It certainly happened with the British commission when it was first introduced.

I feel that perhaps stating it explicitly would make it happen.

Mr. Randall Garrison: Okay.

I had that question myself while reading the legislation. I was trying to determine whether or not sentences were considered a miscarriage of justice.

Ms. Kathryn M. Campbell: Yes.

Mr. Randall Garrison: I think, in the way it's currently listed, it is left to the discretion of the commission. I understand your point that could lead to different prioritizations than if it were listed.

Ms. Kathryn M. Campbell: That's right.

Mr. Randall Garrison: I was very interested in—and I think it's very apt—your comment about the strange absence of those who are most likely to need a review from the current process.

In terms of the new commission, do you feel there are adequate measures there to improve that record of review?

● (1710)

Ms. Kathryn M. Campbell: There are statements to that effect, but I don't think there is legislative pressure behind it. I've been listening to all of these hearings, and I know that Justice LaForme was very disappointed in terms of wanting to have mandated positions for an Indigenous person and a Black person on the commission. I don't really know how that would work legislatively. However, I think it's one thing to say it, and it's another thing to do it. That could help in terms of access. It is hard because people who are wrongly convicted don't have a lot of faith in the system as being legitimate. It made a big mistake in their case, they believe, and then to have to go back to that same system, which they do now, for a review.... I can understand why somebody would be reticent to do that.

I believe that there is going to have to be a lot of hard outreach work done. There have been briefs that I've read for these hearings that are asking for just that. It's going to be.... It will take some time, but there are steps. The fact that it is independent from government is really important. That will help.

Mr. Randall Garrison: It's a frustration that we often have on the justice committee in that we deal with the black-letter law and not the budgets, so if the commission is not adequately funded, then it won't be able to do that kind of outreach you are talking about.

In terms of legal representation for applicants, when we had the British commission appear before us, they were saying that most of their applicants do not have assistance in filing applications. How do you feel about that in terms of the new commission and creating a process that wouldn't necessarily require legal representation to access the process?

Ms. Kathryn M. Campbell: A process that wouldn't necessarily.... I don't think that somebody sitting in a jail cell is going to know what to do in terms of their application. They won't. I know that the CCRG, in my dealings with it over the years, has told me its most fulsome applications come from innocence projects and people who have representation, which is very rare. I mean, there is a three-year wait list at Innocence Canada for it to even look at your case, so it's tough.

Within the bill, I understand there is.... It will allow for legal representation in some instances, I believe. However, I still think there will be a role for innocence projects when this commission becomes a reality, as well, because people will need support. It won't be easy.

Mr. Randall Garrison: Have you looked at the bill in terms of leaving the space for advocacy groups to continue to work with applicants?

Ms. Kathryn M. Campbell: I certainly saw that in LaForme and Westmoreland-Traoré's recommendations. It was right in there. I don't know if it's so explicit in the bill, though. I didn't really see that.

Mr. Randall Garrison: I know you were able to hear the last session. I was asking about the systemic factors, and I guess I'll ask you two questions there.

First, in terms of your own experience, what have you seen as the main systemic factors resulting in the miscarriage of justice?

Ms. Kathryn M. Campbell: Poverty is a big one, for sure. Others are racism, lack of opportunity, lack of education, and not really understanding how the criminal justice system works. I don't think people really understand the notion of what their rights are—the right to silence, the right to counsel, all of those things that we understand as being something every Canadian is entitled to. People don't necessarily understand that. They think, when the police question them, let's say, that they have to answer their questions. They don't, and people don't understand that.

Mr. Randall Garrison: Thank you.

The Chair: Thank you very much.

We will now move to our second round with Mr. Moore for five minutes.

Hon. Rob Moore: Thank you, Madam Chair.

Thank you to both of our witnesses for informing our discussion on this bill.

Ms. Smith, you're in a very interesting or unique position, your organization in North Carolina being the only such body in the U.S., as I think you were saying. I found your testimony to be very helpful.

One thing that I think we need to do when we're looking at this legislation is to sort what Canadians' expectations are when we talk about wrongful conviction and justice.

Under your system, I think wrongful conviction is what most Canadians would expect when we talk about wrongful conviction, and that is a verifiable evidence of innocence. It means that, as stated in your submission to us, there is a perpetrator at large and that the accused didn't commit the crime. There's a perpetrator at large, there's a victim with a false sense of justice, and then, of course, you have someone who is innocent and wrongfully convicted.

That is not the case, however, with this legislation, in that it introduces brand new factors, such as the personal circumstances of the applicant and the distinct challenges that applicants who belong to certain populations face in obtaining a remedy for miscarriage of justice. I think that we need to live up to Canadians' expectations when we discuss this legislation.

You mentioned that you had to work within the parameters of what North Carolina would accept. In light of the fact that you're the only body like this in the U.S., why was it important that factual innocence be a part of your program?

● (1715)

Ms. Lindsey Guice Smith: That predates my being at the commission, but looking back at the notes from the study commission, that was really where the compromise was.

Chief Justice Lake was one of the former chief justices of the North Carolina Supreme Court. He brought together a group of folks from all across the different areas of the criminal justice system to talk about the causes of wrongful convictions and how we should address wrongful convictions in North Carolina.

In bringing together those various stakeholders, that was where they landed. What were we going to do about wrongful convictions in North Carolina and where should the focus be? Ultimately, they decided that the focus should be on claims of factual innocence.

They looked at what areas our post-conviction appellate processes and post-conviction motions for appropriate relief were not able to address in North Carolina. They felt that claims of factual innocence were the ones that were falling through the cracks, that those could not be handled very well in these other court processes and that those were the ones that needed this extra attention and an extraordinary process with this extra broad statutory authority, this investigative power, that we really don't see in any other process.

I don't know any other lawyer, at least in North Carolina and probably in the U.S., who has the authority of both criminal and civil procedure that can go out and get all of this information to try to get to the truth. It is very different from the adversarial system we're normally working in in criminal law. Therefore, when they were thinking about giving this much authority and power to an agency, they felt like that needed to be narrowly tailored to actual innocence.

Hon. Rob Moore: Thank you.

That makes perfect sense.

I don't expect you to comment on our Canadian context right now. This bill further broadens the application of our wrongful conviction regime to a test that, rather than saying a wrongful conviction "likely occurred" to saying one "may have occurred", a miscarriage of justice, so we have to be very careful as we draft this legislation.

You mentioned victims in your remarks.

What is the role of the victim in this, and is there a concern about this process revictimizing individuals? Is that a reason to have a narrower focus?

The Chair: Hold that thought. Maybe you'll get a chance with another questioner. If we've missed anything and if anybody would like to submit anything in writing to the committee, we would be happy to receive it.

I will now move to Mr. Maloney for five minutes.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): Thanks, Chair. Thanks to both witnesses.

I might get back to Mr. Moore's question in a moment.

Ms. Smith, I'm going to start with you. I want to get some clarification on your process. You mentioned in your opening remarks and later as well that you're given all the powers from the rules of criminal and civil procedure. I'm not entirely sure what that means in this context.

Maybe you can answer that and incorporate it into explaining to me whether, when your body goes through its process and reaches a conclusion, it then goes to a three-judge panel. Is that right?

● (1720)

Ms. Lindsey Guice Smith: Yes, sir.

Mr. James Maloney: Okay.

When it goes to that three-judge panel, what actually takes place there? Are they reviewing the work that you have done or are they conducting another trial?

What's the process? What standard of review do they apply?

Are the rules of evidence, for example, the same as they would be in a criminal trial of first instance or on appeal?

Ms. Lindsey Guice Smith: Okay, great. There's lots to unpack.

All right.

When I say we have all of the tools of criminal and civil procedure, I mean all of the tools. We have the ability to get search warrants, just as law enforcement does, because that falls under criminal procedure in North Carolina. We have the ability to depose witnesses under civil procedure. If someone doesn't want to comply with the deposition, we can certainly go and do a motion for contempt under civil procedure, or we could use a material witness order under criminal procedure. We are able to jump between those pieces. We can subpoena witnesses. Those are some of the tools in the tool box.

When the commission presents a case to our commissioners, that is me as director presenting that to the commissioners. It's a non-adversarial hearing. The rules of evidence do not apply. We're presenting all relevant evidence. We're not taking a side on that. It's just not adversarial. We are just really trying to give the commissioners all of the evidence.

At the three-judge panel, that is kind of a *de novo* hearing. It's a new hearing. The parties are presenting the evidence. They can agree to have some of the materials from the commission's hearing presented. Until this summer, it was unclear whether the rules of evidence applied, and most three-judge panels applied them loosely.

This summer a statute was passed that the rules of evidence do apply. That's a new law that just went into effect this summer. That's an adversarial proceeding. The burden is on the claimant, the convicted person, to prove by clear and convincing evidence that he or she is innocent. It's a reverse burden from a normal criminal proceeding. It's lower than the burden of proof in a criminal trial. Normally you have the beyond a reasonable doubt. This is just below that. This is the clear and convincing, which is somewhat above the civil standard, the preponderance of the evidence standard.

Mr. James Maloney: Okay.

They are put in a position of prosecuting their own innocence.

Is there somebody on the other side?

You describe the process as adversarial.

Is there a prosecutor or somebody on the other side who is defending the other position or taking the opposite position?

Ms. Lindsey Guice Smith: Yes, sir.

It is typically the prosecution from the original jurisdiction. There are some exemptions if they are recused. Then the attorney general's office or a special prosecutor can be appointed.

Mr. James Maloney: It's a retrial of sorts, but from an opposite perspective, I guess I can put it that way.

Ms. Lindsey Guice Smith: It's like a retrial. The decision is binding. There is no right to appeal the decision, however it goes. The finding of innocence has to be unanimous. The three judges have to be unanimous. If it's two to one for innocence, then it's not a finding of innocence. It has to be a unanimous decision.

Mr. James Maloney: Normally I take it it's the governor's decision as to whether or not to overturn the conviction. Or did I get that wrong?

I thought I heard you say earlier it then goes to the governor of the state.

Ms. Lindsey Guice Smith: It doesn't have to go to the governor. If the case doesn't go to that three-judge panel, there's another process, a motion for appropriate relief process. The prosecution and the defence could file a motion for appropriate relief, as opposed to the three-judge panel process. If they go through that process based on innocence, in order to be declared innocent in North Carolina, then you would have to get a pardon from the governor.

You can either go through this three-judge panel and be declared innocent or you can file a motion for appropriate relief. But if you go that route, then you have to have a pardon of innocence in order to be declared innocent and get compensation from the state.

Mr. James Maloney: Thank you.

The Chair: Thank you very much.

● (1725)

[*Translation*]

You may go ahead, Mr. Fortin, for two and a half minutes.

Mr. Rhéal Éloi Fortin: Thank you for the extra 30 seconds, Madam Chair.

Ms. Campbell, we were talking about time frames when we left off. You were saying that it could take a number of years. I know it works that way, but it still surprises me. We are talking about miscarriages of justice. To my mind, it should be simple.

My fellow member Mr. Maloney asked Ms. Smith whether, at the end of the day, the process amounted to a retrial.

Do you think that's the right way to go? Shouldn't the process be simplified? Again, the commission shouldn't be retrying the case. It should just be checking whether or not a miscarriage of justice occurred. From that standpoint, it's a bit surprising that it takes years to come to a decision about whether a miscarriage of justice occurred.

First, isn't the approach too extensive?

Second, isn't it appropriate to conduct a full-time investigation in order to arrive at a decision and ensure justice is done in a reasonable time frame, so a few months or even weeks?

[*English*]

Ms. Kathryn M. Campbell: Ah, I wish I had an exact answer to that question. I think in the work we're doing, we're looking for new and significant information that, if it had been used at trial, could have changed the outcome of the actual trial. We start with the applicant: What do you think? Could there be something there?

Contrary to what people think, DNA is rarely evident in these cases. I think 10% of cases have DNA evidence. So it's really like detective work. In an innocence project, we try to get hold of police files and Crown files. We phone and we phone and we show up and we don't get them. They delay, delay, delay, delay, delay. I think a commission will have better powers for having access to that kind of information, which would significantly reduce the delay in finding the new matters.

[*Translation*]

Mr. Rhéal Éloi Fortin: What should that time frame be? You do have some expertise, after all.

How long is a reasonable amount of time to probe the matter and refer it back to the courts if need be?

[*English*]

Ms. Kathryn M. Campbell: I think Lindsey talked about two years for her commission, or a couple of years. I think the CCRC in England has a similar timeline of I think 24 months. Once a case has been accepted to move forward, it would not be unreasonable, in my view.

The Chair: Thank you.

For the final two and a half minutes, I will turn to Mr. Garrison.

Mr. Randall Garrison: Thank you, Madam Chair. It's my usual position of having way too many questions and being the last questioner.

Mr. Moore raised the question of factual innocence versus what's in this bill.

I want to ask you, Professor Campbell, how you would square some kind of requirement for factual innocence with the charter right to a presumption of innocence.

Ms. Kathryn M. Campbell: Oh, my God....

Voices: Oh, oh!

Ms. Kathryn M. Campbell: That's a hard question to answer.

Mr. Randall Garrison: In two minutes.

Ms. Kathryn M. Campbell: Yeah, right. That's a doctoral dissertation.

You have to sort of draw the line somewhere, I guess. It's funny, because there's a presumption of innocence at trial and in the adversarial system, but then once you've been convicted, that's gone. I think then it begins almost sort of an inquisitorial type of practice. With the presumption of innocence, you're trying to find the factors that will indicate maybe what really went on. Hopefully, if you have a client who's claiming innocence, it is that—but I think that's a very difficult thing to ascertain.

There are many other cases as well. I was just thinking, when Mr. Moore was talking, about all of the Dr. Charles Smith cases. He was the pediatric forensic pathologist who was disgraced. A lot of those were wrongful guilty plea cases. They couldn't have been examined unless we had an open door for that type of re-examination. I think it's better to err on the side of caution with these cases, because they're so devastating. The result is so devastating.

Mr. Randall Garrison: I'm sure we're at the conclusion, so thank you very much.

The Chair: You have a few more minutes, if you like.

Mr. Randall Garrison: Minutes...? You mean seconds.

The Chair: Sorry. Yes.

Mr. Randall Garrison: The last place I left off, Professor Campbell, was on the ability of the commission to make systemic recommendations, which is not in the bill. I'm presuming that you'd be in favour of our adding that to the bill.

Ms. Kathryn M. Campbell: Yes, 100%. It's such a great opportunity at this moment to be able to say, okay, let's collect all of this data and find out where our courts are getting it wrong, where our police are getting it wrong and where lawyers are getting it wrong, and to do research, make policy recommendations and share information with organizations. I think it's imperative, in my view.

● (1730)

Mr. Randall Garrison: Great. Thank you.

The Chair: Thank you very much to both of our witnesses.

Thank you for appearing from North Carolina, and thank you to our witness appearing in person from Ottawa.

Colleagues, thank you very much. Have a lovely evening.

I will remind you that our next meeting is on Thursday, November 30, which is the last day of the month. We will be doing clause-by-clause on Bill C-321.

Thank you very much. Have a nice afternoon.