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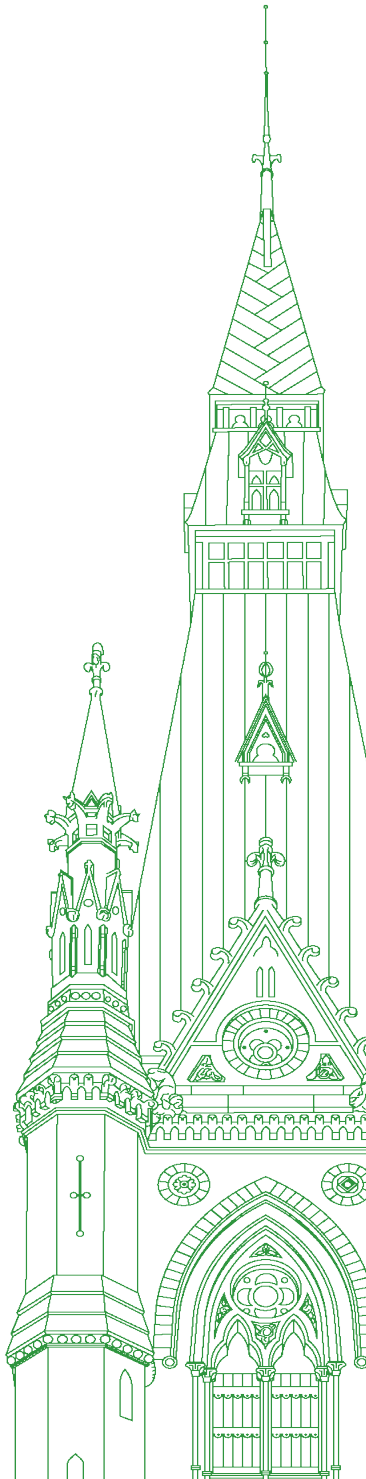

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Thursday, November 24, 2022

● (1535)

[*English*]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting 39 of the House of Commons Standing Committee on Justice and Human Rights. Pursuant to the order of reference of October 31, the committee is continuing its study of Bill C-9, an act to amend the Judges Act.

Today's meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and remotely using the Zoom application.

I would like to make a few comments for the benefit of the witnesses and members.

Please wait until I recognize you by name before speaking. For those participating by video conference, click on the microphone icon to activate your microphone, and please mute yourself when you are not speaking. For interpretation, those on Zoom have the choice, at the bottom of the screen, of floor, English or French. Those in the room can select the desired channel for their earpiece.

I'll 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. If you're on Zoom, please use the "raise hand" function. The clerk and I will do our best to place you on the speaking order.

For your information, all tests have been successfully performed with our witnesses.

Now I would now like to welcome our witness for the first hour.

Appearing today we will have Indra Maharaj from the Canadian Bar Association judicial issues subcommittee. She is appearing by video conference.

You have five minutes, Ms. Maharaj. I will let you know that I use little cue cards. Watch for the cue card for when you have 30 seconds left. When you're out of time, I use this one. Just wrap up, so I don't have to interrupt your train of thought.

We'll go over to you for five minutes, Ms. Maharaj.

Ms. Indra Maharaj (Chair, The Canadian Bar Association - Judicial Issues Subcommittee): Thank you.

Good afternoon, Mr. Chair and members of the Standing Committee on Justice and Human Rights. Thank you for the invitation to appear before you today. It is both an honour and a privilege to be able to present the Canadian Bar Association's position with respect to the issues raised by the proposed amendment to the Judges Act, Bill C-9.

My name is Indra Maharaj, and I am the chair of the judicial issues subcommittee.

I would like to begin by recognizing that I am attending this meeting from the traditional territories of the Blackfoot Confederacy—Siksika, Kainai and Piikani—the Tsuut'ina and Stoney Nakoda nations, Métis Nation Region 3, and all people who make their homes in the Treaty 7 region of southern Alberta.

The CBA represents lawyers, law students, academics and judges across our entire country, where different first nations have made their homes and stewarded the lands that form our unique and beautiful Canada. I will pause for a few seconds of silence, so that each of us can acknowledge the treaty or traditional territory in our own location.

Thank you.

The Canadian Bar Association is a national association of 37,000 members, including judges, lawyers, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. Specifically, with respect to Bill C-9—introduced on December 16, 2021—the Canadian Bar Association submitted commentary to this committee, on February 17, 2022, in support of the amendments proposed.

Among other things, the Judges Act establishes a discipline process for federally appointed judges in response to complaints filed about their conduct. Recent government consultations underscored concerns about the length of time required to investigate these complaints and the consequent costs of investigations, including the potential cost of a member of the bench being unable to fulfill their duties while defending a complaint for misconduct.

The CBA's recommendations are focused on ensuring that the objectives of protecting the independence of the judiciary and ensuring the public's confidence in the administration of justice are respected in the process.

Bill C-9 amends the process through which the conduct of federally appointed judges is reviewed by the CJC in three significant ways: It creates a process for reviewing allegations not serious enough to warrant removal from office; it improves the process by which recommendations for removal are made to the minister; and it ensures that the determination of pensionable service for judges ultimately removed from office reflects their time of service and does not include the time of review, all while ensuring that, if the judge is exonerated, they do not lose the time spent defending the claim made against them.

I have a little more detail.

First, the process for screening complaints that may not be serious enough to warrant removal from office is a positive development. It enhances the Canadian Judicial Council's capacity to respond quickly to allegations of misconduct and provides sanction options in these cases, such as counselling, continuing education and reprimands. This process saves the CJC time, ensures that judicial resources are well managed, and minimizes the amount of time a judge might potentially spend defending a frivolous complaint while not sitting on the bench.

Second, improving the discipline process ensures that meritorious claims are moved forward and department resources are used efficiently. It also promotes procedural fairness and is designed to minimize delays and control costs.

Third, it is critical that judges, like any other litigant, are able to defend their conduct in a fair, transparent process and be satisfied that, if they are ultimately exonerated, their pensionable service will be protected during the period of time dedicated to defending their case. However, it is equally important that time spent during that process does not contribute to pensionable service if the complaint results in removal of the judge from office.

● (1540)

Judicial independence and judicial accountability are both essential to ensuring the integrity of our judicial system, the primacy of the fair administration of justice and the support of the rule of law. If our judiciary is to be respected and trusted, the public must be confident that judges, through a fair and transparent process, are both independent of external influences and held accountable for their conduct on the bench.

Thank you. I'm happy to take any questions you may have.

The Chair: Thank you, Ms. Maharaj.

Now we will go to our first round of questions, beginning with Mr. Moore for six minutes.

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

Welcome to our committee. We appreciate your perspective and your input from the Canadian Bar Association.

From one of the previous panels we had, we understand.... All parties are supportive of this particular piece of legislation, recognizing that the Canadian Judicial Council has been calling for a more streamlined approach, and that other individuals within the process, including complainants, have recognized that the current approach is dated and cumbersome and there could be unnecessary delays.

When we look at the right of appeal of a decision, we see that there's a mechanism in the legislation to appeal to the Supreme Court of Canada, which seems like a pretty lofty first option of appeal. It was raised by two of our witnesses—and a third concurred on questioning—that it may be appropriate to have a right of appeal to the Federal Court of Appeal.

I'd like to get your thoughts on that in terms of the perception of justice and the rules of fundamental justice. I'm wondering about this idea that a governing body makes a decision and your recourse is an appeal to the Supreme Court of Canada. Are we accepting that because it's judges who are on that panel? If it were another group of peers—if it were doctors, accountants or some other group of peers who were passing judgment on one's conduct—would we accept that the recourse for that individual was just to appeal to the Supreme Court of Canada?

Could you make some comment on that? Also, did you have any thoughts on a right of appeal to the Federal Court of Appeal being injected into the process?

Ms. Indra Maharaj: Thank you very much for the question.

The particular option that was offered by The Advocates' Society, which was an appeal from the final review panel to the Federal Court of Appeal before an appeal might land with the Supreme Court of Canada, was not an option that we considered specifically, although I have heard some of the other presentations, and they do note that the final appeal panel, prior to the appeal potentially to the Supreme Court of Canada, is composed of senior members of the judiciary as well.

In terms of the fairness or the administrative fairness of that particular process, the concept of where the appeals lie and how they flow through from the complaints process, from the beginning through to the end, appears to be considered.

With respect to the CBA's position, we have confidence in the consultation that has been done by the government in this regard. It has been extensive. The result of that consultation is the bill that's before you, and we do support that bill.

Hon. Rob Moore: Thank you.

I think that by and large I would agree. This is legislation that was called for, but in light of this testimony that we've heard, it does raise the prospect: If your recourse is an appeal to the Supreme Court, is that real external judicial oversight? Is that realistic? I don't know if there's any analogous scenario in any other field. The consequences are severe: being removed from the bench and losing one's pension.

● (1545)

In your mind, should it matter that the people on that final panel are judges? Is that why we would be letting it slide in this case, in that we're dealing with judges passing judgment over a peer versus some other group that has a peer discipline model?

Ms. Indra Maharaj: Thank you for the question.

I would hesitate to say that an appeal to the Supreme Court of Canada is allowing it to slide by if there's no appeal that precedes it that's external to the process. However, I would refer back to the fact that the judges were consulted with respect to the process, and the result of that consultation did not generate an additional level of appeal. All I can conclude from that is that it was not an issue of concern to the bench.

Hon. Rob Moore: Okay. Thank you.

I only have 30 seconds left. Do you have any quick comment on the current system, in which there are undue delays?

What do you see as the key to Bill C-9? Is there on overarching feature that you feel, if there were to be amendments, we definitely want to stick with?

The Chair: Answer very briefly. You have 10 seconds.

Ms. Indra Maharaj: Thank you.

The fact that the process has been streamlined in order to ensure that the process moves upward and forward, rather than delayed laterally, is, I think, the primary goal in the amendment that's been produced.

The Chair: Thank you, Mr. Moore.

Now we'll go to Ms. Brière for six minutes.

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you very much, Mr. Chair.

Good afternoon, Ms. Maharaj. It is a pleasure to have you here this afternoon.

Bill C-9 introduces a process for reviewing allegations that are too insignificant to warrant the removal of a judge. In your letter to the committee chair, you wrote that the allegation screening process is a step in the right direction.

Is it a small or a big step?

In your view, is it right for a review panel to look at less serious complaints rather than having a member of the Canadian Judicial Council do the review?

[*English*]

Ms. Indra Maharaj: Thank you for the question.

I believe this is a significant step forward, because what it will allow the process to focus on is the most serious of allegations that deserve an in-depth and thorough process.

As one of the speakers in a previous panel indicated, there are often complaints that are made against members of the bench out of frustration with the result, rather than actual misconduct by a sitting judge. It's important that those types of complaints are reviewed and assessed to ensure that there is no misconduct, but that they don't bog down the workings of the Canadian Judicial Council.

[*Translation*]

Mrs. Élisabeth Brière: Do you think that the sanctions that are listed and those that can be thought of under Bill C-9 in response to complaints that are less serious are justified or worthwhile?

● (1550)

[*English*]

Ms. Indra Maharaj: Thank you.

The sanctions that are proposed for the less serious matters—such as counselling, continuing education or a reprimand—are sanctions that are designed to be proportionate to the severity of the claim. Giving those options or making those options available creates a certain flexibility in ensuring that the process responds fairly to the complaint and to the conduct of which a judge is accused.

[*Translation*]

Mrs. Élisabeth Brière: In 2014, you made a submission to the Canadian Judicial Council, in which you made 16 recommendations.

One of them was to ensure that the complaints process for judges meets the objectives of balancing judicial independence and public confidence in the administration of justice.

Do you believe that Bill C-9 achieves this objective?

[*English*]

Ms. Indra Maharaj: Thank you.

We do feel that Bill C-9 meets the objectives set out in our recommendations. It provides a process that is responsive to the various types of complaints that could be made. It's also responsive to the complainants' involvement as well as the judges' entitlement to defend themselves should they be accused of misconduct. What Bill C-9 does is create a better balance than what we had before.

[*Translation*]

Mrs. Élisabeth Brière: In your opening remarks, you spoke of the delays and costs involved, including those related to not allowing the judge who is the subject of the complaint to perform his duties.

How should this situation be addressed?

[*English*]

Ms. Indra Maharaj: Thank you.

Yes, we believe it does, because the bill creates a process that must move forward. In fairness, some of these delays and some of the mischief that the bill is trying to correct are in the gray zone that previously existed, whereby every decision of the CJC in a disciplinary matter could be subject to judicial review, which could be subject to an appeal, which could be subject to further appeal. By streamlining the process, it becomes more fair and it responds to the concerns about the cost of the process because it must move forward.

If a judge is not allowed to sit on the bench while there is a question about his conduct, then you can be assured as a member of the public that this will get addressed and that the judge is not utilizing the process in order to create a situation where they're not working but getting paid, and off they go and continue to proceed down the lateral route.

Mrs. Élisabeth Brière: Thank you very much.

The Chair: Thank you, Ms. Brière.

We'll next go to Mr. Fortin for six minutes.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Thank you, Mr. Chair.

Ms. Maharaj, thank you for joining us this afternoon.

I would like to raise with you the issue of sanctions. As my colleague Mr. Moore said, the parties will probably support this bill in the House, but there are still some interesting issues to look at, including the economics of this. That is what is being criticized the most.

When a judge is found guilty of some kind of misconduct and a penalty is imposed, people will often respond by saying that it cost hundreds of thousands of dollars in court costs, in addition to the judge's increased pension and salary. I understand that there are provisions in Bill C-9 that provide for some adjustments when the judge is convicted, but the issue of legal fees remains important to me.

In your view, would it not have been appropriate to adjust Bill C-9 so that a judge found guilty of a breach would be required to reimburse all or a significant portion of legal fees, in order to stem the tide of challenges, which can often appear unnecessary and merely dilatory?

● (1555)

[*English*]

Ms. Indra Maharaj: Thank you very much for that question.

The concept of having a party who is found to be unsuccessful in litigation compensate somebody for the legal costs of having engaged in the process is not one that's unknown in the litigation field. However, what is different about this particular scenario is that this is not litigation between two people; this is a disciplinary process. The question about the fees that are compensated for, or the fees that are paid on behalf of the judge who is defending their conduct, is something that we haven't considered in detail at the CBA. I believe it is a recommendation that one of the other panellists has made.

At this point, I can't really comment further on it.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

I understand the distinction you're making between what we're talking about here and a civil suit, where the judge has certain powers in the event of frivolous recourse, such as awarding costs. I understand that disciplinary measures are an entirely different matter. The fact remains, however, that it's an aspect of cases like this, which get the public talking, and which I believe are sufficiently important.

I asked the various witnesses we received, including the Minister of Justice, about this. That's why I would like to hear the Canadian Bar Association's opinion, because you play an important role in terms of discipline for lawyers who are members of the various bar associations in Canada. I'm also somewhat surprised to hear you say that you didn't really have an opinion about this. If that's the case, then I'll leave things there. On the other hand, my question may not have been as clear as I would have liked, and I will reword it. If you have an opinion to express after that, I'd like to hear it.

Would it not be interesting, useful, or even essential, for a judge found guilty of misconduct, to be required to suffer the consequences, and be personally responsible for at least part of the legal fees for the defence in a case like that?

[*English*]

Ms. Indra Maharaj: Thank you.

Let me see if I can be a bit more concise. The consultation that has occurred has not resulted in compensation of legal fees paid on behalf of a judge involved in a disciplinary process rising to the level of needing to be included in Bill C-9. That, to me, does not preclude an appeal panel's making of a decision that may be different. However, that being said, the CBA hasn't taken a position specifically with respect to this issue.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

I'm going to address a completely different subject. According to you, could mediation between the Canadian Judicial Council and a judge be a useful step prior to a hearing in the event of an alleged breach by that judge?

● (1600)

[*English*]

Ms. Indra Maharaj: Thank you.

I'm not sure I understand the question. Did you ask about the mediatization of the CBA and the judge?

[*Translation*]

Mr. Rhéal Fortin: No, I'm not talking about the Canadian Bar Association, but mediation between the Canadian Judicial Council and the judge in question.

[*English*]

Ms. Indra Maharaj: The particular case that seems to have triggered some of the amendments was the Girouard case. Is that correct?

The Chair: Unfortunately, we're out of time.

[*Translation*]

Mr. Rhéal Fortin: That's a good example, but we're out of time.

Thank you, Ms. Maharaj.

[*English*]

The Chair: Next we'll go to Mr. Garrison for six minutes.

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

Thank you, Ms. Maharaj, for being with us today representing the Canadian Bar Association. I think you captured very succinctly the challenge here that Bill C-9 is trying to meet, which is to balance the independence of judges with public confidence, but I would also add the rights of those judges who are being disciplined.

I want to return to the question of an effective appeal. We know the Supreme Court has set a very high bar for granting leave to hear cases and that these cases must in fact, in common language, be of national significance or national importance or constitutional importance before they'll actually be heard. I'm wondering, in that case, how often we could expect that the Supreme Court would actually hear appeals from this process, given that very high bar they've set.

Ms. Indra Maharaj: I think everybody in the room would hope that the answer would be "never", because hopefully we don't have judicial misconduct that needs to be considered at a level of national importance. The reality is that the Supreme Court of Canada has limited time available to it, and it is selective about the cases it must allocate that time to. That's why the leave process is there. One of the other panellists provided some information earlier about some statistics around the number of cases where leave is sought, and where leave is actually granted.

Having a very high bar at the Supreme Court of Canada does support the fairness of the process, because it creates that ultimate authority. The Supreme Court of Canada is that ultimate judicial authority where a case could end up, should it be justified, should it be of such substantial importance that the Supreme Court of Canada ought to contribute its wisdom to the case.

Prior to that being granted, the levels of reviews contained in the process set out in Bill C-9 provide a robust and significant opportunity for all issues to be heard and adjudicated fairly, in the position of the CBA.

Mr. Randall Garrison: To be clear, I meant no criticism of the Supreme Court of Canada for having that high bar for hearing cases. That is, obviously, necessary in terms of managing the work of the Supreme Court of Canada, and the integrity of the system.

However, once you say that, you are actually saying that the individual judge has no appeal from this internal process that is being run by the Canadian Judicial Council, so there might, in fact, be a miscarriage of justice there that isn't of national significance or constitutional significance but might still be a real miscarriage of justice.

I think that is why The Advocates' Society was suggesting that an effective appeal would be to the court of appeal.

Ms. Indra Maharaj: I think there is a question in between the lines there. I believe the answer that you're seeking is whether the CBA aligns with The Advocates' Society on the recommendation.

I can tell you that the CBA has confidence in the consultation, which included members of the bench and the Canadian Judicial Council, and which did not result in the need for an additional level of appeal.

Mr. Randall Garrison: Maybe what is between the lines for all of us here is that when we talk about the review panel process, we say, well, it's judges, but, with respect, it is judges fulfilling a different role than an appeal judge would fulfill.

In other words, the Canadian Judicial Council is bringing disciplinary proceedings, investigating them, and deciding, so there is really no one outside that in-house process who will have an effective say over whether that is, in fact, fair, if there isn't an effective appeal to something like the appeal court.

● (1605)

Ms. Indra Maharaj: I'm not sure if you wanted me to respond to that specifically. Is there a question?

The Chair: Mr. Garrison, could you repeat the question?

Mr. Randall Garrison: It did have a question mark at the end.

Aren't we talking about two different roles of judges? Judges in their Canadian Judicial Council hat are playing a different role from what a judge on an appeal court is playing, even though we call them both "judges".

Ms. Indra Maharaj: Thank you for the clarification.

I appreciate that there is a difference. However, when the judges, and the members of that whole review panel, are sitting in that capacity—remember there are also lawyers and lay members there—there is a broad and diverse opportunity for there to be consideration of the merits of the case.

The CBA supports the process that has been set out in Bill C-9 because, in part, of the depth of consultation of the affected parties that it has undergone. While it's an interesting concept, the purpose of Bill C-9 is to remove levels of procedural duplication and to ensure that the core fundamentals of administrative fairness are met. We believe that that is the case with Bill C-9.

Mr. Randall Garrison: Thank you very much.

The Chair: Thank you, Mr. Garrison.

Next, we'll go to Mr. Caputo for five minutes.

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

Thank you, Ms. Maharaj, for being with us here today. It's not easy being the lone panellist here who's getting rapid-fire questions from a number of MPs, so I appreciate your being here.

I'm going to pick up where Monsieur Fortin left off. Perhaps I could frame what I perceive to be his question a little bit differently.

I think in most law societies, in British Columbia anyway, if a person is sanctioned by the law society and the complaint is meritorious—or founded, if you will—then there are often costs assigned against that lawyer. I'm not sure if that's what he was getting at, but from what I can see, that's not an option here.

Can you comment on whether that might appropriate in the circumstances?

Ms. Indra Maharaj: Thank you for the clarification.

I can comment on the bill that's been provided and the fact that not every administrative step needs to be included in legislation. There are practices and procedures within any administrative tribunal where the issue that you've addressed may become something that is more logically lodged—it may sit better in an administrative process.

The CBA has taken a position with respect to the bill presented. As it does not include that particular concept, I can't make any further comment about it. However, not every small step is included in legislation.

Mr. Frank Caputo: Thank you for that. I think I know where you're coming at it from.

Often we get into a pattern of comparison. For instance, a fine is frequently part of a lawyer sanction as well. That's not present here from what I can see, either, so I assume that if I was to ask you that question, we'd probably get the same answer as your previous answer.

Ms. Indra Maharaj: Yes, you would, sir.

Mr. Frank Caputo: Thank you.

Can I ask you a question about transparency generally? Transparency is a really big issue. It's obviously central to the rule of law. We have an open court principle generally, and in my view transparency must be sacrosanct.

Do you view Bill C-9 as being appropriately transparent, not transparent enough or too transparent? Do you have any thoughts on that?

● (1610)

Ms. Indra Maharaj: That's an interesting question. I think the change to include lay members on the hearing panels adds a significant amount of transparency to the process. The fact that we will have the point of view of the public is valuable in that regard. Certainly, public hearings are public hearings, so that creates an amount of transparency as well.

I do believe that Bill C-9 has tried to seek and establish that balance between those matters that are smaller and may not require being made public because they can be addressed through the screening process versus those matters of more significance where we start to see a more formalized administrative process and hearing process. I think the involvement of the public in particular—the lay members—is a valuable addition.

Mr. Frank Caputo: I have about 45 seconds here, so I will just ask you this very briefly.

You're on the ground. You're likely involved in all sorts of committees—that's what people in your position often do. Is it your sense that there was adequate consultation in respect of this bill?

You have 30 seconds.

Ms. Indra Maharaj: Thank you.

I think it is interesting to note that the bill was presented almost a couple of weeks short of a full year ago. During that time, all of the major legal agencies, if I can put it that way, were consulted. I'm sure that numerous members of the public had an opportunity to participate as well. I believe that the consultation has been very robust with respect to this bill.

Certainly, with the CBA, we had opportunity to make our views known and to contribute. We appreciate that very much.

When I look at the breadth of consultation, I think it is proportionate to the importance of this particular amendment.

Mr. Frank Caputo: Thank you.

The Chair: Thank you, Mr. Caputo.

Now we'll go to Mr. Naqvi for five minutes.

Mr. Yasir Naqvi (Ottawa Centre, Lib.): Thank you very much, Mr. Chair.

Welcome, Ms. Maharaj. Thank you for going through all these questions. I really appreciate your thoughtfulness.

I want to pick up on your last comment. You're right; the bill was tabled some time ago, and people have had the opportunity to look at it and reflect on what's contained in the bill.

In your personal opinion or on behalf of the Canadian Bar Association, do you feel, now that you have seen this bill in detail, that it really addresses the concern around having a fair, open and transparent system in dealing with issues relating to judicial conduct?

Ms. Indra Maharaj: Yes, the CBA does support this bill. We support it because we feel that it has gone through the mill and that it does create a balance between respecting the public's need to have confidence in the judiciary and the judge in question's ability and entitlement to defend himself in a fair and transparent process. Yes, we agree.

Mr. Yasir Naqvi: Thank you.

As we are deliberating on this particular bill, I'm of the view—and I've presented the position before in this committee—that a process around judicial conduct is a bit unique, unlike other administrative, tribunal dispute resolution processes, especially given that we're dealing with the judiciary.

There is a very important principle around maintaining and protecting the independence of our judiciary. Any system that is crafted must instill, enhance and foster the public's confidence in an independent judicial process.

Do you think, in CBA's assessment, that Bill C-9 as presented accomplishes that important goal?

● (1615)

Ms. Indra Maharaj: The goal of judicial independence and the value of judicial independence cannot be diminished if we are going to have a strong and functioning judiciary.

This bill does support the duality of the role of judge insofar as a judge must serve and a judge commits to serve. The exchange for that is that, if they make a mistake, because judges are human, there's a fair process whereby that mistake of conduct can be examined.

Given the screening process and the new review process, the balance of ensuring that the judge feels they have an opportunity to address complaints made against them in a fair and transparent way while still preserving the public's confidence that judges are being held accountable for misconduct in an appropriate manner is a very delicate balance. In fairness, it's a delicate balance.

The bill seeks to achieve that balance, and we believe it successfully achieves that balance.

Mr. Yasir Naqvi: Thank you.

We have the issue, of course, of maintaining and protecting the public's confidence in the integrity of a judicial system. You spoke to that. The balancing act around that is also to ensure procedural fairness and principles of natural justice as they relate to the respondent and the complainant or the applicant.

Has the CBA done any analysis around whether this bill ensures procedural fairness and the principles of natural justice? Are you comfortable that those key principles are also well protected in this bill?

Ms. Indra Maharaj: Through the various consultations with CBA members, sections, and different aspects of the CBA—it's a very complicated organization—we have had the opportunity to consider whether the principles of natural justice and fair process are being respected by the procedures that are set out in the bill.

We do believe this is a fair bill. It balances the rights of all concerned parties, including the judge, the complainant, and the public.

We do believe there has been fair consideration given, and we have had a fair opportunity to make our views known and to compile our position—together, there are 37,000 members—on behalf of the Canadian Bar Association that we do support the bill.

Mr. Yasir Naqvi: Thank you.

The Chair: Thank you, Mr. Naqvi.

Next we'll go to our third round.

Mr. Fortin, you have two and a half minutes.

[*Translation*]

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

Ms. Maharaj, I'd like to return to the question of mediation, which we didn't really have enough time to discuss in the first round of questions.

Although, of course, there can still be discussions about the rules, the disciplinary process does not provide a mediation mechanism. Would it have been a good idea to consider formal mediation meetings between the judge against whom there has been a complaint and the representatives of the Canadian Judicial Council to try and find a negotiated outcome?

I think that the new provisions in Bill C-9 might encourage judges to try and avoid a trial or a hearing before the Canadian Judicial Council.

Do you feel it would have been a good idea to provide for a mediation mechanism like that?

● (1620)

[*English*]

Ms. Indra Maharaj: I think I understand where I was confused before.

I believe, Mr. Chair, that Mr. Fortin is asking a question about a mediation or an alternative dispute resolution process that may precede a more formal process. I was hearing “mediatization” and thinking media and publication.

The Chair: I think you're correct. I think in interpretation it was just the pronunciation of the word.

Go ahead.

Ms. Indra Maharaj: Thank you.

Alternative dispute resolution is not included as an obligation in Bill C-9. As a preliminary step, there doesn't appear to be, in my mind, anything that would preclude a conversation towards an alternative dispute resolution or a mediation-style resolution, particularly with respect to the screening level of complaint.

With respect to serious misconduct that could result in removal, I don't know that mediation would be something that would be valued by all of the parties involved, so I can't comment on that.

I don't see in the bill that there is a requirement or an opportunity for mandatory mediation, but that doesn't preclude it from being a practice or a procedure at a more administrative level.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Ms. Maharaj.

[*English*]

The Chair: Thank you, Mr. Fortin.

Last is Mr. Garrison for two and a half minutes.

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

There was another issue raised in our first session on this bill, about the disclosure of the reasons for referral to a review committee and the legal reasoning that was used to reach a conclusion in the review panel.

In the current practice—and it seems it would be the same under Bill C-9—the complainants are only given a summary of reasons. They're not actually given the legal reasoning. The argument was made that you only get to see those once you file, as a complainant, an action for judicial review. That is costly, but it also results in the automatic release of those to the person.

The suggestion was made that we, perhaps, should amend Bill C-9 to ensure that those reasons are released at an earlier stage. That might, in fact, prevent people from deciding to ask for judicial review. In order to see the reasons now, they actually have to ask for a judicial review.

I wonder if the Canadian Bar Association has any comment on that kind of paradox—I don't know what I would call it—that gets created there: that if you want a review, you can't see the reasons until you ask for the review.

Ms. Indra Maharaj: Thank you.

That is the definition of a paradox.

In terms of the CBA's position, the complainant gets a summary of the reasons. That's the way it's set up in the bill right now.

Is there potential for there to be an earlier disclosure, or a more detailed disclosure? Perhaps. However, at this stage, it's not something that the CBA has identified as necessary, and it has not come out of the consultation and resulted in a place in this bill as being of significant importance such that it ought to be legislated.

Mr. Randall Garrison: In your opinion, could the Canadian Judicial Council require that earlier disclosure in their own internal standards for conducting the judicial reviews? In other words, might it be possible that it could happen without putting it in the legislation?

Ms. Indra Maharaj: That's a very interesting question. Unfortunately, I don't have an answer for you on that. I would have to be more familiar with the CJC's internal administrative processes to give you a fulsome answer.

Mr. Randall Garrison: Okay.

Thank you very much, Mr. Chair.

The Chair: Thank you, Mr. Garrison.

Thank you, Ms. Maharaj. I want to thank you for appearing as a witness. You have given wholesome testimony and had a lot of questions thrown at you, so it's a job well done.

We will now suspend for a few minutes while we set up for the next panel. We will ask the next set of witnesses to come forward, and we will ask those on Zoom to get their audio checked.

The meeting is suspended.

● (1620)

_____(Pause)_____

● (1635)

The Chair: We'll now resume the committee meeting for the second half.

We now have, as an individual, Mr. Christopher John Budgell. I just want to say that I'm pleased to also welcome Pamela Forward, who will assist him due to his hearing impairment. Ms. Forward, please accept our warm welcome as well. Let us know if, during the meeting, you need anything. Our clerk will be happy to help.

Members, when you're asking questions, be loud and clear, as the hearing mike will not be helpful to Mr. Budgell, as he has told me. We'll give some extra time, if we need to, to clarify anything in that regard.

We also have Ms. Karine Devost, senior legal counsel for the National Council of Canadian Muslims. Welcome. Via video conference, with us is Nneka MacGregor, executive director of the Women's Centre for Social Justice.

I'll begin with Mr. Budgell, for five minutes, and then we'll go to the other two witnesses. Then there will be rounds of questions.

It's over to you, Mr. Budgell, for five minutes.

Mr. Christopher Budgell (As an Individual): I'm just going to read my opening statement. I hope it is short enough to leave me with a little additional time.

From the record that I've been able to review so far, it appears that I'm the first witness, and maybe the only witness, the committee has heard from who is not a system insider. I note that you've heard from a couple of them, Professor Craig Scott and Professor Richard Devlin, who are telling you things you haven't heard from Justice Minister Lametti and his Department of Justice staff.

I am here solely because of my determination to be here. Where are the other voices speaking for the public?

I know that you haven't heard from any of the judges who are, or were before they retired, subject to the Judges Act.

My immediate purpose in speaking to Bill C-9 is to argue that it should not be enacted because it cannot be fixed.

I can go beyond that. You, the members of this committee, have a golden opportunity. The legal establishment's own dialogue, a good deal of which is accessible to the public, attests to the fact that Canada's justice system is in crisis. Perhaps that is “justice systems in crises” because there are many components and many issues.

If you proceed now to recommend to the House of Commons that it pass Bill C-9 and send it on to the Senate, you'll have missed a precious opportunity. The CJC perfectly illustrates the crisis or crises that the legal establishment is facing. The ship that is crewed by the legal establishment needs to be turned around to face the bow into the wind. This is an opportunity to start turning that ship around.

The publicly accessible record of the legal establishment's dialogue with itself shows that a principal concern, if not the principal concern, is the impact of these crises on lawyers, including judges themselves. Two sources I can note are The Lawyer's Daily, which is an excellent publication that has served the legal profession for years, and the blog slaw.ca. There have been many articles and posts about the stresses that lawyers and judges are facing—stresses that result in a good many of them suffering depression and even what they concede is mental illness.

There has been far less concern expressed about the impact of those systemic problems on litigants, especially those of us who are compelled to be self-represented.

On that note, I want to specifically mention two members of the legal establishment. They are Justice Yves-Marie Morissette of Quebec's Court of Appeal and Donald J. Netolitzky, who, as an employee of the Alberta superior courts, has the curious title of “complex litigant management counsel”. I would characterize what they have been doing as building a thesis about what they like to call “querulous litigants”—the most extreme kind of what are conventionally called vexatious litigants.

Justice Morissette did not coin the term “querulous litigants”. He attended an international conference held in Prato, Italy in 2006. Subsequently, he addressed a meeting of the Canadian Association of Counsel to Employers with a speech entitled “Querulous and Vexatious Litigants as a Disorder of a Modern Legal System”.

The CACE posted a copy of that speech on their website. After I found it there and began commenting publicly about it, they removed that copy. There's a copy currently on the website of an entity called ProQuest. I have had some success accessing it there, but not consistently, as it appears to be a subscription website. I have attached a copy that I saved.

Donald Netolitzky has built on Justice Morissette's original thesis and is continuing to do so. They don't, of course, claim that all self-represented litigants are querulous or even vexatious, but those are the ones on whom they have focused their attention.

One reason this interests me is that my own history of litigation matches their description of the classic querulous litigant, so I can see what they are doing.

● (1640)

I've just found a program of a meeting held last May in which Mr. Netolizky contributed another version of his thesis: “The Responsibility of the Tribunal to Accommodate Users with Mental Health Issues”. To access it, you can go to a link to Donald Netolizky's....

Am I done? Okay. That's it.

The Chair: Thank you, Mr. Budgell. Hopefully, you'll be able to get the rest out in the questions.

Next we have Ms. Karine Devost, from the National Council of Canadian Muslims.

[*Translation*]

Ms. Karine Devost (Senior Legal Counsel, National Council of Canadian Muslims): Thank you, Mr. Chair.

[*English*]

Good afternoon to the committee members.

[*Translation*]

My name is Karine Devost.

[*English*]

I am the senior legal counsel for the National Council of Canadian Muslims. We want to thank you for giving us an opportunity to be here today to provide our recommendations regarding Bill C-9, an act to amend the Judges Act.

We want to be clear at the outset that we are supportive of the goals of this legislation and of the legislation broadly. The proposed reforms to the Judges Act aim to enhance the Canadian Judicial Council's capacity to effectively respond to all allegations of judicial misconduct against federally appointed judges, not just highly serious instances potentially warranting removal from office.

We are supportive of the passage of Bill C-9 but have two targeted amendments we want to raise that we submit will improve this legislation.

We are here to make two specific recommendations. The first one pertains to lobbying. The second amendment broadens the wording that is found at proposed subsection 90(3). I will explain that later.

First, we're recommending to amend proposed section 80 to add a proposed paragraph 80(c) to include “lobbying, directly or indirectly;” and for the current proposed paragraphs (c) and (d) to become (d) and (e).

We're recommending this amendment so that the motives or intentions of a judge in their lobbying efforts are not left to interpretation, which very often leads to different results. I can give you two examples.

For example, in a recent decision from the Federal Court involving Justice David Spiro from the Tax Court, the complaints alleged that Justice Spiro was actively engaged with a lobby group attempting to interfere with the appointment of a professor at the University of Toronto whose views were at odds with those of the lobby group. The Honourable Madam Justice Kane of the Federal Court agreed with the review panel of the CJC, which determined that Justice Spiro engaged in improper conduct but his conduct was not serious enough to impose the ultimate penalty for judicial misconduct. This matter did not go to a full hearing.

Conversely, we have the case of Justice McLeod, here in Ottawa, in which he was involved with a non-profit organization and was advocating for social and legal reform for a certain group. In this case, the review panel determined that Justice McLeod engaged in “impermissible advocacy and lobbying” and his matter proceeded to a full hearing on the complaints.

Our amendment attempts to provide uniformity in the law and gives no room to interpretation, so whether you are actively lobbying or subtlety sharing emails that contain a position on a political issue like the one in Justice Spiro's case, the complaint will automatically go to a hearing. This will avoid different readings of the same law, which, as we have seen from the cases I've illustrated, resulted in different outcomes.

As I mentioned earlier, we also seek to amend proposed subsection 90(3) by broadening the scope of impermissible misconduct that would restrict the screening officer from dismissing a complaint. As the provision stands, serious misconduct that may warrant a hearing but does not meet the threshold of discrimination or sexual harassment may be dismissed.

We appreciate and, like most lawyers, applaud the CJC decision in the past to remove former Justice Robin Camp; however, our concern is that misconduct like his will be dismissed because it does not necessarily equate to sexual harassment or discrimination. Justice Spiro's case is a good example that further outlines our concern: A screening officer may dismiss a legitimate complaint because it does not appear to be discriminatory on its face.

● (1645)

That is why it's necessary, at least in the initial screening stage, to apply a broader language that captures misconduct that is not directly discriminatory but can still erode the public confidence in the judiciary and bring into question a judge's impartiality.

Thank you.

The Chair: Thank you, Ms. Devost.

Next we'll have Ms. MacGregor, from the Women's Centre for Social Justice, for five minutes.

Ms. Nneka MacGregor (Executive Director, Women's Centre for Social Justice): Thank you, Mr. Chair, vice-chairs and committee members.

I want to first acknowledge that I'm Zooming in from my home on indigenous land, the traditional territory of many first people of this land, including the Mississaugas of the Credit, the Anishinabe, the Chippewa, Haudenosaunee and the Wendat peoples. It's home to many diverse first nations, Inuit and Métis. My work is done in solidarity with them, especially indigenous women, girls and two-spirit people, who are the targets of ongoing systemic racism.

My submission today centres on our collective responsibility to ensure that they have equitable access to justice in this new process.

My name is Nneka MacGregor, and I want to also acknowledge my colleague, Maya Roy, who co-authored this submission. I am the co-founder and executive director of this organization. We're an NGO with pan-Canadian operations that works to eradicate violence against women, women-identified, two-spirit, and trans-identified people through personal and social advocacy. As an organization created by and for survivors, we use our shared experiences to help change public perceptions.

Thank you for the opportunity to comment today. The focus of my submission will be on proposed section 84, on diversity, and on identifying ways and opportunities for the bill to address systemic and individual biases, especially those based on race and gender, as a way of preventing further harm or impacting the integrity of the processes that are being proposed under this bill.

I want to emphasize the critical importance of ongoing training on understanding and addressing gender-based violence as well as training on uprooting anti-Back and anti-indigenous racism and biases for all members of the judiciary, and ensuring that such training is a mandatory requirement for anyone who will be serving in any capacity under this act.

In our work with survivors of gender-based violence, my organization frequently receives reports on how court systems retraumatize survivors of violence who are seeking justice. For example, in our 2019 research with survivors of gendered sexual violence across communities, we documented reports of bias based on gender and racial stereotypes and the impact on survivors' experiences of the criminal court process, including egregious statements made by judges in some of the cases.

I want to share one example of a woman in Renfrew Country who noted that the court process was almost more traumatizing than the actual incident of violence. She said, “I ended up in hospital because of court.”

It is also imperative that the judiciary and other parties selected to serve in any capacity under these proposed provisions have an evidence-based demographic understanding of how systemic oppression and human rights violations impact sentencing practices.

The current demographic reality in Canada is that Black-identified and indigenous people are disproportionately overincarcerated. For example, Statistics Canada has documented that one in six adult admissions into custody is from population groups designated as visible minorities. We know that these populations do not have a greater propensity for criminal behaviour than their white counterparts, but the reason for their overrepresentation—

The Chair: Ms. MacGregor, could you just slow down a little bit? The interpreters are having a bit of a hard time keeping up with your speech, so just slow down slightly.

● (1650)

Ms. Nneka MacGregor: My apologies.

We know that these populations do not have a greater propensity for criminal behaviour than their white counterparts, but the overrepresentation is, again, due to systemic racism and pathologizing.

I think it's important to note that I am not advocating for the ideological indoctrination of judges; rather, our research has demonstrated the importance of identifying systemic bias in the legal system and the differential impact on rights holders to access justice in accordance with their charter rights.

It is important that the committee incorporates the intersectional framework developed by the Black legal scholar Dr. Kimberlé Crenshaw, who has written extensively on how court processes must be informed by the nuanced, evidence-based understanding of how historical, legal and social inequities harm rights holders who experience both racism and sexism.

Intersectionality has been judicially recognized across multiple Anglo common-law jurisdictions. Moreover, scholars have documented that Canadian legal frameworks have been embedded with preconceived biases and myths throughout, especially during trials and sentences.

As noted by the legal scholar and historian Dr. Constance Backhouse, there is a “professional culture of whiteness” in the Canadian legal profession, resulting in judges who are “not well-equipped to address racism claims.” Inaccurate and demeaning myths result in the systemic criminalization of Black, indigenous and/or racialized Canadians and compromise our charter rights.

I would invite the committee to consider the following recommendations. I think it's important that the proposed anonymous complaints mechanism remain, because it is essential due to the power imbalances between the judiciary and laypeople.

I think the members of the judiciary, review panel members and screening officers must undergo mandatory training to ensure sound technical knowledge and competencies in areas such as gender-based and racial bias, intersectionality, indigenous cultural sensitivity and humility and training that's developed by elders and knowledge keepers and delivered by indigenous trainers. It's important that they have trauma-informed training and a complaint process that is based on transformative accountability and justice principles.

It's also important to ensure an independent, impartial and representative review panel, and have review panel members disclose any perceived or actual conflict of interest in relation to the complainant. Then, to ensure—

The Chair: Thank you.

I'm sorry; if you want to finish your sentence, go ahead.

Ms. Nneka MacGregor: Yes, it's just to ensure diversity of representation of the review panel.

The Chair: Thank you, Ms. MacGregor.

We'll begin our first round of questions with Mr. Brock for six minutes.

Mr. Larry Brock (Brantford—Brant, CPC): Thank you, Chair.

Thank you to all the witnesses who are here in person and online. Your participation is noted and very valuable to us, so I thank you for that.

I'd like to inform all our panellists that this bill is going to pass. It is receiving consent and approval from everybody on this committee. I bring that to your attention because I want to start off by questioning you, Mr. Budgell, and I listened very carefully to your commentary.

You indicated that the justice system is in crisis, and that Bill C-9 can't be fixed and shouldn't be enacted. I did a little bit of research on your background, sir, and I understand that the National Post has proclaimed you “a self-appointed citizen watchdog” of the CJC.

I understand that, in one of your blog posts, you've opined that Parliament has a unique opportunity “to create an entity fully independent from both the judiciary and the executive branch to receive complaints and decide how to respond to them”. In your opinion, “this is the right solution. It always has been.” In your view, the fundamental problem with the CJC is that “[j]udges judging judges doesn't work.”

I take it, sir, that you still stand by that position.

● (1655)

Mr. Christopher Budgell: Do I stand by that?

Mr. Larry Brock: Yes.

Mr. Christopher Budgell: Absolutely, and I could go further.

Mr. Larry Brock: Well, I'm going to give you an opportunity, because I know you ran out of time, but ultimately, from my perspective, I'd like to hear from you knowing full well that this bill is going to pass and receive royal assent shortly. Can you offer any opinion, any suggestions, that we can consider moving forward by way of possible amendments to make the bill a little stronger, in your view, or more appropriate?

Mr. Christopher Budgell: Do I have possible amendments?

Mr. Larry Brock: Yes.

Mr. Christopher Budgell: My concern, like anybody in my position, is what happens at the very beginning of the process.

You have what you call a “screening process” in the hands of the executive director and general counsel. I don't know how many complaints are dismissed at that point. I know mine was. Actually, it was the second one. I sent one in before that one. It's over for the majority of people right there.

There are two screening stages right now. I expect there will be, if Bill C-9 goes through. Those are—

Mr. Larry Brock: I'm sorry. I have limited time. I hate to interrupt you.

Can you think of any possible recommendations or amendments to strengthen this bill?

Mr. Christopher Budgell: Are you asking me if I can recommend amendments?

Mr. Larry Brock: Are you recommending ways that we can improve this bill?

Mr. Christopher Budgell: Yes and no. I'm saying it can't be improved.

If you want to improve it, get rid of that.... The solution I really want to see is that the screening is not done by the Canadian Judicial Council.

Mr. Larry Brock: Okay. Thank you, sir.

I'm going to move on to Ms. Devost. I did a little research on your background, as well.

I followed along the case of Justice David Spiro in the media when this was first brought to our attention. Notwithstanding the CJC clearing the judge of not one but several complaints with respect to that decision, the Tax Court Chief Justice Rossiter has promised that this particular justice would not be assigned to anyone appearing with an Islamic background. That would be litigants and lawyers.

Is that still the case?

Ms. Karine Devost: I think that decision was made temporarily. I believe right now that he's back to his full duties. He can sit on those cases.

I'd like to verify that fact. Perhaps I can get back to your office with that answer.

My understanding was that it was temporary, but then the judge was—

Mr. Larry Brock: I understand that, largely, you are supportive of the legislation. You've recommended a couple of amendments.

I didn't know if you ran out of time in the narrative that you were describing during your opening statement. With the last 25 seconds, I'll allow you to complete that.

Ms. Karine Devost: I wanted to read out what the amendment would look like.

Proposed subsection 90(3) would read as follows: "A screening officer shall not dismiss a complaint that alleges sexual misconduct or that alleges improper conduct relating to a prohibited ground within the meaning of the Canadian Human Rights Act."

We're removing "discrimination" and including "improper conduct". We're broadening the wording of this provision.

Mr. Larry Brock: Thank you.

I think, Chair, I have 10 seconds left.

It's over to you, Ms. MacGregor. I got the impression that you ran out of time as well. In 10 seconds or less, can you complete your thoughts?

Ms. Nneka MacGregor: It was really to suggest that Bill C-9 incorporate something more substantive around cultural training for everybody who's going to be part of the process, not just on race, but also on gender.

I note that proposed section 84 talks about diversity, but the thrust of our argument is that just mentioning doing everything we can to ensure there is diversity doesn't do enough to uproot the systemic racism that is embedded in the judicial system.

● (1700)

Mr. Larry Brock: Thank you very much.

The Chair: Thank you, Mr. Brock.

Now we'll go to Mr. Naqvi for six minutes.

Mr. Yasir Naqvi: Thank you very much, Mr. Chair.

I'm going to pick up where Mr. Brock was leading. Thank you, Mr. Brock.

I'll start with Ms. Devost. You were talking about the suggested language in proposed section 90. Can you explain your rationale? Why are you suggesting that the scope be broadened in the language that you're proposing on behalf of NCCM?

Ms. Karine Devost: It's because if a complaint comes in and it's not direct discrimination, the screening officer may interpret this provision literally. Therefore, if it's not a direct conduct of sexual harassment or discrimination, the complaint may get dismissed even though it could be a legitimate complaint because the conduct may appear to be discriminatory. The Justice Spiro case is actually a perfect example.

On the face of it, when the complaint comes in, it may not appear to be discriminatory, but the conduct of the judge may lead one to believe that it is discriminatory as you go along within the complaint process. This is why we want to make sure that, if we broaden the wording, these complaints that could potentially be dismissed are not.

Mr. Yasir Naqvi: I'm looking at the wording of the provision, and your position is that the way it's drafted right now is not sufficiently broad to give that discretion to the screening officer.

Ms. Karine Devost: No, not at all. We believe that if a screening officer looks at this.... For example, if the complaint comes in—if I take the matter of Justice Spiro—you know, sharing emails, interfering with the hiring process at a university, that may not in itself seem to be discriminatory, but the conduct of the judge is discriminatory.

Mr. Yasir Naqvi: It's the conduct, the act, that you're concerned with.

Ms. Karine Devost: Exactly. It's the conduct, so we feel that if we leave the provision the way it is now, a screening officer will look at this and say, "Oh, well, he was not discriminating against a certain individual, so we're going to dismiss the complaint."

Mr. Yasir Naqvi: Then, in relation to proposed section 80, you're just suggesting that the word "lobbying" be added.

Ms. Karine Devost: We're suggesting "lobbying, directly or indirectly".

Mr. Yasir Naqvi: We do, then, run into the issue of the definition of "lobbying", and I'm assuming that your suggestion would be....

Ms. Karine Devost: However minimalistic lobbying can be, it falls under that category, and it goes to a hearing process.

This is because now we're in a situation where the panel review qualifies what lobbying is. They look at what the judge does, and they do the exercise of qualifying it. For example, in the case of Justice Spiro, they determined that Justice Spiro was voicing a concern, that he was not really actively lobbying, even though it was lobbying.

That's why we say that we want to add "lobbying, directly or indirectly" so that however minimalistic—I don't like to use that word—it seems, it's considered lobbying and it goes to a hearing. Now we have the review panel looking at two cases differently. They're looking at the same law, but they're reading it differently. By adding "lobbying, directly or indirectly", we're bringing uniformity; it's not left to interpretation.

Mr. Yasir Naqvi: With the exception of these two suggestions, these two amendments that you are proposing, am I correct in assuming that, otherwise, NCCM supports Bill C-9 and feels that it enhances the process of reviewing matters of judicial conduct?

● (1705)

Ms. Karine Devost: It's a work in progress. That's why we're here. We like its goal. I think you had other witnesses who provided testimony on transparency and the disclosure of documents. We do support that as well, but our focus today and for this bill is these two amendments that we propose.

Mr. Yasir Naqvi: Thank you.

Ms. MacGregor, I will go to you now, and I'll come to your proposal on proposed section 84, which is the section you were speaking to. However, with the exception of that particular concern or that enhancement of the language that you want to see, I take it that you and your organization are supportive of Bill C-9 and the way it lays out the mechanism for judicial conduct.

Ms. Nneka MacGregor: In principle we are, yes.

Mr. Yasir Naqvi: Okay, great. Thank you.

In terms of proposed section 84, which deals with diversity, your position is that the language is a good start and it needs more to it. As I understand it, you were speaking more on the training of members of the review panels, to make sure they have training around unconscious bias and systemic racism, those types of important matters.

The Chair: You'll need to be very brief, Ms. MacGregor.

Ms. Nneka MacGregor: That's correct. I think part of the challenge is who has access and opportunity to actually begin the process of a complaint or bring in a complaint. It's understanding that Black and indigenous women, who are systematically discriminated against, are some of the last people to feel they have a voice and an opportunity to complain about a judge because of the inherent biases and racism and discrimination they face at that intersection of gender and race.

For us, it's beyond training; it's more about a culture shift.

The Chair: Thank you.

Thank you, Mr. Naqvi.

Next we'll to go Monsieur Fortin for six minutes.

[*Translation*]

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

Ms. Devost, you spoke about lobbying earlier. I'm not sure I understood what you were saying. I understand that we should stop making a distinction between direct lobbying and indirect lobbying, but what kind of lobbying are we talking about exactly? What kind of harmful lobbying are you afraid that a judge might engage in? Can you explain this for us?

Ms. Karine Devost: Okay.

I'm talking about cases in which judges use their position to lobby.

Let's look at the example of Justice David E. Spiro, who was formerly affiliated with the University of Toronto and the former chair of a lobby group. This judge, at someone's request, called the University of Toronto to influence the appointment of a professor.

Are you aware of this incident?

Mr. Rhéal Fortin: No I'm not.

Ms. Karine Devost: Okay.

I'll go over it quickly then—

Mr. Rhéal Fortin: Oh, I understand the one you mean. He intervened in an appointment process at the University of Toronto.

Ms. Karine Devost: Exactly.

The applicant who had been hired for the position had all the qualifications required to fill it. After the judge called the University of Toronto, everything fell apart for her. What the judge had done was exercise a form of lobbying.

When the complaint was made, the vice president determined that there might be suspected partiality and for that reason, the appointment process was to resume.

The lobbying by Justice Spiro was indirect, unlike the lobbying by Justice Donald McLeod, who met with ministers and members of Parliament on behalf of a non-profit organization. That's why we say that, however subtle, lobbying is still lobbying.

● (1710)

We want Bill C-9 to take into account all forms of lobbying to avoid any differences in interpretation.

Does that answer your question?

Mr. Rhéal Fortin: Yes. Thank you.

At any rate, it sheds some light for me on the Justice Spiro matter.

When we talk about lobbying, do any other examples come to mind? I understand that the justice's approach was probably in violation of his duty of confidentiality and a number of other things. In the context of the amendment you are proposing, however, can you think of any other approaches that might amount to lobbying?

Ms. Karine Devost: If judges use their office to influence anyone, like the arresting police officer, that's a form of lobbying.

Mr. Rhéal Fortin: Thank you, Ms. Devost.

Now I'm going to step away from Bill C-9 a little to ask you if it would be useful to review the judicial appointment process based on the various criteria we're talking about today or other criteria.

Do you see any value in changing the way we appoint judges in Canada?

Ms. Karine Devost: Thank you for the question.

It's a good question, and one that I haven't looked into. If you want, I can send some comments on that to your office.

In the meantime, my colleague may have an answer for you.

Mr. Rhéal Fortin: Thank you, Ms. Devost.

Ms. MacGregor, can you shed some light on this for me?

Also, you are of the opinion that it should be possible to file complaints anonymously. However, are you not concerned that this will create situations where it will be difficult for a judge or the Canadian Judicial Council to determine whether or not the complaint is serious?

In your view, how might we go about such a process?

[*English*]

Ms. Nneka MacGregor: Thank you for that question.

Can I answer the first one you asked my colleague on the panel, around the process for appointing judges?

[*Translation*]

Mr. Rhéal Fortin: Yes, go ahead.

[*English*]

Ms. Nneka MacGregor: I think the process that's currently in place for appointing judges is flawed. If you actually examine the number of judges and break it down by racial demography, you'll find that the system is heavily whitewashed. In a country like Canada, which has diversity, having this overrepresentation of typically white and typically male judges should tell you something. There is something wrong in the system. Other identities, other individuals, are not being represented.

Do I think something could be changed? Absolutely. A lot could be changed. I'd be happy to send you some recommendations on ways to do that.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Ms. MacGregor.

[*English*]

The Chair: Thank you, Monsieur Fortin.

Next we have Mr. Garrison for six minutes.

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

Thank you to all the witnesses for being with us today. It has certainly expanded the range of the topics before us. I think that's important.

I want to go first to you, Ms. Devost. We've talked a lot about the lobbying recommendation, but the other recommendation is for proposed subsection 90(3). What brought that to your attention? What experience here are you responding to? Is it the high-profile cases that were dismissed, is it the volume of cases that were dismissed at screening, or is it both?

Ms. Karine Devost: Thank you for your question.

No, it's just that we want to make sure that there's uniformity. The way this provision reads, it's not limited, but it deals with two specific things—sexual harassment and discrimination. We feel that if a screening officer receives a complaint that does not fall within those two parameters—again, I sound like I'm repeating myself—it will be dismissed. By broadening the provision or the definition, a complaint that is legitimate but that may not, on its face or at the beginning of the process, seem to be legitimate, will not get thrown out or dismissed and will go through the process.

That's why we're looking at this provision. We feel that it would be a proper amendment to make to this bill.

● (1715)

Mr. Randall Garrison: I think I see what you're getting at. I'm trying to do a little parallel here. As a gay man, I have quite often been told that I haven't been discriminated against, by someone who didn't have an understanding of what had actually happened. I'm using that as a parallel. I think that's what you're getting at. Sometimes the person hasn't had lived experience, or they don't have a detailed understanding of how discrimination functions. Something, on its face, might not appear as discriminatory.

Is that what we're talking about here?

Ms. Karine Devost: Yes, that's one explanation given to it. Yes, definitely.

Mr. Randall Garrison: Are there others, or is that pretty close to the heart of it?

Ms. Karine Devost: Yes, it's pretty close to the heart of it.

As I said, we don't want somebody to read the provision literally and, as you say, not have an understanding of what discriminatory conduct may be, and then say that this was not discrimination and go ahead and dismiss the complaint.

Mr. Randall Garrison: My understanding is that we don't actually have good figures on dismissals of complaints and reasons for dismissals. Would you agree that we don't actually have good data on that?

Ms. Karine Devost: We just heard from the witness here that his complaints were dismissed in the beginning.

Yesterday I was reading, and I saw that a lot of complaints are getting dismissed. That was my understanding, that a lot of complaints are getting dismissed at the screening stage.

Mr. Randall Garrison: Right.

I want to turn to you, Ms. MacGregor, on the same topic, the proposal by the National Council of Canadian Muslims on proposed subsection 90(3), and get your reaction to the proposal to broaden the context of things that must be looked at.

Ms. Nneka MacGregor: I completely agree.

Mr. Randall Garrison: Could you give us a little more in terms of why you might agree with that?

Ms. Nneka MacGregor: I think her answers were quite explicit, and I completely agree. I really have nothing more to add. She said it very eloquently.

Mr. Randall Garrison: Do you think your proposal for mandatory training on systemic racism and gender-based bias would actually help in terms of this problem with screening officers perhaps not understanding and therefore dismissing cases?

Ms. Nneka MacGregor: I think that's a really foundational part of the work.

The challenge is to have the types of training that are actually going to result in attitudinal shifts, as opposed to training that is delivered to check a box. The challenge for us is really how to ensure that everybody who is part of this process has abandoned their biases, has abandoned their prejudices and is looking at every complainant and every judge from the perspective of "We're here to protect individuals' rights. We're here to support access to justice, and we're doing it from a place of nuance and understanding."

You cannot do that unless you have grounding in human rights and you have an understanding of anti-Black racism, anti-indigenous racism and gender-based violence.

Mr. Randall Garrison: We have certainly seen a reluctance by sitting members of the judiciary to accept the idea of mandatory training. For instance, the bill that we did pass, which requires training, does so only for new appointees to the bench.

What's your reaction to that objection to mandatory training on the grounds that it is interfering with the independence of judges?

● (1720)

Ms. Nneka MacGregor: If I'm to be very honest, I think it's ridiculous.

We actually did a lot of work with the National Judicial Institute to develop training for candidate judges around this issue of gender-based violence and racism. There were a lot of negotiations back and forth between us and Justice Adèle Kent, who is a former executive director there, before we finally managed to land on, I think it was, a two-hour training that was recorded. That same complaint around interference was raised numerous times.

There is a difference between interference and getting yourself educated about the reality of the society in which you live. There is a difference between interference and having you understand that people have biases and blinkers that are influencing the way they are meting out justice in the courtroom. Trying to get people to that level of understanding is not about interference. It's about uplifting and educating.

The Chair: Thank you, Ms. MacGregor.

Mr. Randall Garrison: Thank you very much for that response.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Garrison.

We'll now go to Mr. Caputo for five minutes.

Mr. Frank Caputo: Thank you, Mr. Chair.

I'm going to pick up where Mr. Garrison left off, on mandatory training. I think it's interesting.

One thing I'm quite passionate about is the issue of secondary victimization. I believe you outlined that in your opening statement. I can't tell you how many victims I have seen who have described the court process itself as worse than the initial offence. It's not always the case, but it's never easy and it's often unduly burdensome. Often, that comes down to things like adjournments, applications under section 276 of the Criminal Code maybe being brought late and things like that.

I find it very interesting. I think this really applies more to federal appointments than to provincial appointments. Provincial court judges typically deal with small claims, family court and criminal court. They are typically going to come from criminal law or family law. For a federal appointment, someone could be a construction litigator, for instance. That could be where they made their mark in their legal career. Then, two months later, they're doing a jury trial for a complicated sexual assault.

I'm very interested in the issue of secondary victimization and I want to pick up on the issue of education and ongoing education.

Would you agree that we are just now starting to really understand how victims react and that this is a fluid research area that we are making strides in as we speak?

Ms. Nneka MacGregor: I completely agree.

We are doing work on the impact of traumatic brain injuries sustained as a result of intimate partner violence and how those brain injuries impact and impede the witnesses' ability to testify. When they are testifying, because of their brain injury, their attitudes and their demeanour are misunderstood as being belligerent, whereas in fact it is the result of the brain injury that they sustained.

We're also doing work around the neurobiology of trauma, which is explaining how trauma also impacts the witness of the crime.

The idea of developing a very robust, comprehensive analysis that helps everybody in the process better understand the experiences of the victims of violence in order to better provide services and better provide justice for them is essential.

The biggest challenge is having those types of training as check boxes and having one hour to undo a lifetime of discrimination that has been ingrained in you. It's not going to work.

For us, it's about how we instill a culture shift by providing comprehensive, ongoing training around these issues.

Mr. Frank Caputo: I certainly understand that, especially when the literature is changing and developing.

It seems to me that it would be incumbent not only on the public to want it, but on the judges themselves. I don't know any judges who say they're going to set out to not make the best decision they can. Part of the best decision you can make, in any context, is understanding the witness who is before you. Understanding the witnesses before you, as you have mentioned, is that trauma-informed practice.

I thank you for that contribution.

You didn't get to finish your comment on anonymous complaints. I was going to ask a question about it. I find this interesting because I believe that two members of the reviewing panel would have to approve anonymous complaints.

You didn't get to answer the question about that. The floor is yours for whatever time I have left if you'd like to answer that question.

● (1725)

Ms. Nneka MacGregor: Absolutely. Thank you so much for the opportunity.

The issue goes back to my point around Black women, indigenous women and trans women who have traditionally been silenced and have traditionally not been believed by the judiciary or the criminal legal system.

With the fear that is ingrained in us, to then actually step up and file a complaint against a judge who has tremendous power, whether anybody believes it or.... The judge has tremendous power in relation to a complainant, who, when you look at the intersection of the race and the gender....

Having an opportunity for this anonymous complaint to be filed is, I think, a really compassionate and progressive way to engage individuals who are traditionally marginalized. These are people whom my colleague, Dr. Tope Adefarakan, calls people on the margins of the margins. They are people who don't have opportunities, access, money or resources. This is an opportunity for them to come forward.

The Chair: Thank you, Ms. MacGregor.

Thank you, Mr. Caputo.

We'll now go to Ms. Dhillon for five minutes.

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

Thanks to our witnesses for being here today.

I'm going to start with Ms. MacGregor.

You spoke about a 2019 study in your opening statement. Could you please tell us a bit more about the kinds of discrimination seen? Can you give us some examples, please?

Thank you.

Ms. Nneka MacGregor: Thank you very much for the question.

What we did was actually.... There were two parts of ethics approved. One was a series of interviews with women in rural and urban communities who had been raped and who reported, and therefore went through the system. The other was a series of focus groups with women who had been raped and didn't report. We tried to understand why. What barriers were women facing?

One thing that became quickly evident in the focus group with women who were raped and didn't report was this: It was the only site where we found Black women in the community, because Black women who were raped were reluctant and feared reporting to the police, because they see police as an unsafe place. Women who were raped and reported, whether in rural or urban communities, were generally white women.

The point I was making about Dr. Crenshaw's intersectionality framework is that it will help people better understand what systemic racism is doing and how it ensures that Black women, as an example, or indigenous or trans women, are not getting access to justice, which then makes a mockery of the whole system. If not everybody has access to justice, then nobody has access to justice.

Ms. Anju Dhillon: Thank you for that.

You also spoke about the overincarceration of indigenous and Black people. Do you believe this is because of the racial biases you spoke of in your opening statement and just mentioned, from the starting process until the very end—from when a complaint is first filed until it is judged? Could you please tell us whether this is another reason you believe there's overincarceration of Black and indigenous people? Is it because of these biases—the decision rendered by the judge in their case, or on their file, when they are in front of a judge?

Ms. Nneka MacGregor: I believe it unequivocally.

In my opening statement, I talked about the fact that it isn't because Black and indigenous women and girls, or 2-spirit people, have more propensity for criminality or criminal behaviour. It is because of racism.

I had a conversation, recently, with the CEO of the National Association of Friendship Centres, who said that, in federal prisons, anything as high as ninetysomething per cent of federally incarcerated women are indigenous. That is a ludicrous figure when you consider the percentage of the population indigenous women have in Canada—about 2.3% to 2.5%. Nobody can tell me that is anything other than systemic racism, which has resulted in such a small population being so grossly overrepresented. The same goes for Black and trans women. For me, it is a clear indication that the system is set up to disadvantage and discriminate against certain populations and do it with such impunity.

We're hoping that, with this bill and our proposal, more attention will be paid to the process of hiring and to ensuring that the individuals administering the process are individuals who are educated, understanding, empathetic and really grounded in intersectional understanding of race and gender.

● (1730)

Ms. Anju Dhillon: Thank you for that.

I guess it would be on the other end, as well, where victims come forward and, as you said, don't feel as if they're being listened to. Again, this comes down to those biases.

You also spoke about not being able to understand the different cultural or racial nuances. Can you speak to us a bit about that, please? As well, because I'm running out of time, what about tacit discrimination? How do we address tacit discrimination? Sometimes there's eye-rolling or words like “you people”.

Thank you.

Ms. Nneka MacGregor: Thank you so much.

That's not tacit. That's explicit, in my opinion. The issue of implicit and explicit biases that.... Everybody has them, but when you're in a position of power and using that as the basis on which to judge and discriminate against certain members of the population, that is something we're trying to uproot.

There are many people doing this work. I want to spend a few minutes talking about my brilliant colleague, Dr. Rachel Zellars, who has done a lot of training around that—

The Chair: Unfortunately, Ms. MacGregor, you don't have a few minutes. You're over time.

Ms. Nneka MacGregor: Thank you.

The Chair: I want to thank all the witnesses in this study for the time they've given us. It's very valuable testimony.

That concludes the testimony part of this meeting.

I have a few matters that I want to mention. Witnesses are free to leave if they want to, or they can sit around with us if they would like to see this.

Members, we will be proceeding to the study of the draft report on the government's obligation to the victims of crime. You should receive a confidential first draft tomorrow in order to prepare for Monday's meeting. Hopefully, that will give us enough time. That's what the analysts have told me.

We'll have to adopt a budget to reimburse our witnesses who appeared on Bill C-9 and adopt the revised budget for the trip in March 2023.

I also want to remind you that you have a deadline to submit amendments to Bill C-9: Monday, November 28 at 6 p.m.

Finally, yesterday we received Bill C-291, an act to amend the Criminal Code and to make consequential amendments to other acts regarding child sexual abuse material. We will have to find time to proceed to this study. It is Mr. Mel Arnold of North Okanagan—Shuswap who has presented this bill in the past. At the latest, we have to report the bill 60 sitting days after the date of the order of reference. That is April 26, 2023, so we have some time for that.

Go ahead, Mr. Garrison.

Mr. Randall Garrison: Mr. Chair, can I ask that for the committee business section we have a proposed revised schedule to accommodate the various things that have been dropped on us and also to confirm if we're having the minister for estimates and when?

I'm not asking for it today, but if we can have the revised schedule to look at on Monday, that would be helpful.

The Chair: The clerk can probably answer that right now.

Go ahead.

The Clerk of the Committee (Mr. Jean-François Lafleur): Mr. Garrison, as the meeting was going on, I updated the calendar, so I can circulate it pretty soon, maybe even after the meeting.

Mr. Randall Garrison: Thank you.

The Chair: Are we good? Okay.

We'll adjourn.