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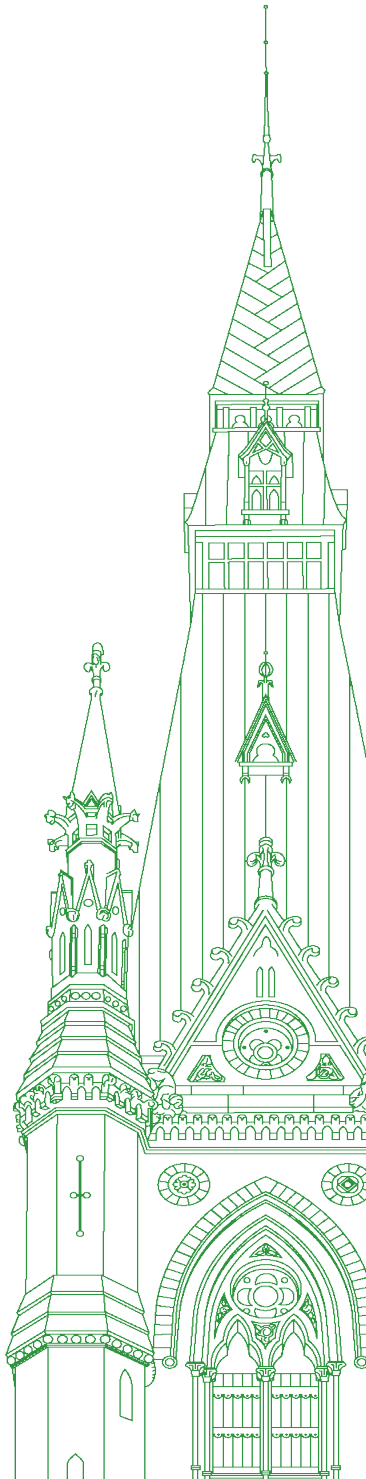

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

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

Welcome to meeting number 37 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to the order of reference of October 31, the committee is meeting to begin 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'd like to make a few comments for the benefit of witnesses and members.

Please wait until I recognize you by name before speaking. For those participating via video conference, click on the microphone icon to activate your mike and please mute yourself when you are not speaking.

For interpretation, for those on Zoom, you have the choice at the bottom of your screen of either 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 to the chair. For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the "raise hand" function. The clerk and I will manage the speaking order as best we can. We appreciate your patience.

I also use elementary cue cards to tell you when there are 30 seconds remaining and when you're out of time. I don't like interrupting. Hopefully, you'll keep your eye out for that. This committee is actually really good at keeping time.

I'd now like to welcome our first witness appearing today. We have the good pleasure—

Go ahead, Mr. Fortin.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): A point of order, Mr. Chair, before we start the meeting.

Would you please confirm that the sound checks have been done for each of the witnesses who are here in person? I don't think anyone is participating in the meeting virtually, but, if someone is, would you please confirm that the checks were done just before the meeting?

[*English*]

The Chair: They were done, Monsieur, and even the members online have been tested as well.

[*Translation*]

Mr. Rhéal Fortin: Thank you.

[*English*]

The Chair: Thank you.

Again, I'd like to welcome the Honourable David Lametti, Minister of Justice and Attorney General.

Thank you for returning to this committee. The floor is yours for five minutes.

[*Translation*]

Hon. David Lametti (Minister of Justice and Attorney General of Canada): Thank you, Mr. Chair.

It's always a pleasure to be with you. Most of you are participating in the meeting in person. Mr. Garrison and Mr. McDonald are participating virtually.

I am accompanied by Nancy Othmer, Patrick Xavier and Anna Dekker, my colleagues from the Department of Justice, who will be helping me answer any technical questions.

[*English*]

As I said, Mr. Chair, it's an honour for me to be here today to speak to you about Bill C-9, an act to amend the Judges Act.

I will take this opportunity to thank all of you for the unanimous support for this bill at second reading.

As you know, this bill reforms the process used to address complaints against federally appointed judges. The soundness and effectiveness of the judicial conduct review process can have a significant impact on the independence of the judiciary. This legislation will make the judicial conduct review process more efficient and more cost-effective.

This legislation is the fruit of years of careful study and analysis, including consultations between the legal community and the general public, and extensive dialogue with the Canadian Judicial Council and the Canadian Superior Courts Judges Association. In my view, Bill C-9 sets out what would become a world-leading judicial conduct review process and one that will serve Canadians exceptionally well for years to come.

● (1535)

[*Translation*]

We need a judiciary that is strongly independent, one that is able to render judgments without fear of reprisal. At the same time, Canadians rightly demand to hold judges accountable to a high standard of professionalism.

In 1971, Parliament, through the Judges Act, assigned responsibility for handling complaints against judges to the Canadian Judicial Council, or the "CJC". The Judges Act sets out the key elements of a process that served Canadians well for decades. However, shortcomings in the legislative framework have become more and more pronounced over the last few years, prompting growing calls for Parliament to act. This includes calls from the CJC itself.

[*English*]

In developing reforms, the government carefully considered feedback from the general public received through an online survey as well as from a number of key stakeholders, including the Canadian Bar Association, the Federation of Law Societies and provinces and territories.

We listened carefully. Our focus was to craft a process that the public would have confidence in, one that is rigorous and fair, yet timely and effective.

Constitutional principles dictate that a judge cannot be removed from office without having a judge-led hearing into their conduct. As I noted, Parliament has assigned this important task to the CJC. In light of this, my department's officials engaged in sustained discussions with the CJC to ensure that this legislative proposal could benefit from the council's 50-year experience running the judicial conduct review process. Departmental officials also engaged with the Canadian Superior Court Judges Association to understand its concerns regarding process reform.

I take this opportunity to thank both the CJC and the association for these discussions and their commitment to serving Canadians.

[*Translation*]

I wish here to highlight two main areas of particular concern. The first is efficiency. As it stands, the process takes too long and is too expensive. Of course, the Constitution demands rigour and sensitivity in the handling of complaints against judges. Yet, when the resolution of complaints at times stretches on for years on end, and at great expense to the taxpayer, Canadians rightly ask whether there is a better way.

This is perhaps best underscored by the multiplication of judicial reviews that we have witnessed over the last few years with respect to certain complaints, creating the perception that judges launch these proceedings to effect delay rather than to pursue legitimate legal interests. Bill C-9 responds directly to these concerns by making the process much more efficient.

[*English*]

A second shortcoming involves the all-or-nothing nature of the existing process, which is designed to answer a single question: Does the complaint warrant the judge's removal from office? No other sanction is available. This fact colours every step in the process. This risks unfairness to judges subject to complaints, who may be subject to a full-scale inquiry and its proceedings for conduct that would more appropriately be addressed through lesser sanctions. Further, this risks undermining the public's trust in the process. Members of the public may be perplexed and rightly dissatisfied when complaints are dismissed despite problematic conduct because the conduct in question did not reach the high threshold of justifying removal from office.

Bill C-9 addresses this concern by introducing, for the first time, the ability to impose sanctions for misconduct that do not warrant removal from office but that nonetheless demand some form of remedy and accountability. These could include, for example, mandating training sessions.

I do not have time in these remarks to discuss all of the improvements proposed by the bill. In the time I have left, let me highlight three key improvements.

[*Translation*]

First, greater transparency through greater participation of lay members. The current process has a limited role for lay members, which, in this context, refers to individuals who are not judges or lawyers. There is currently one lay member on the five-member review panels.

Bill C-9 changes this. There would continue to be one lay member on review panels, but these review panels would be more efficient—having only three members and being empowered to impose sanctions for any misconduct not serious enough to warrant removal from office. Second, hearing panels established to conduct public hearings on whether a judge should be removed from office would now include a lay member. These improvements directly address the system's current shortcomings, increase efficiency, and allow for more appropriate and targeted accountability.

● (1540)

[*English*]

The second point to highlight is how Bill C-9 streamlines the appeal process. The current process provides too many opportunities for judges subject to complaints to seek judicial review of decisions made by the council at different stages in the process. This is costly and results in excessive delay and undermines public confidence. Further, after the inquiry committee has issued its recommendation on whether a judge should be removed from office, the current process requires review of this decision by what is termed "council of the whole", where quorum requires participation by at least 17 CJC members. This body's powers are unclear, and legal decision-making by a body of this size has proven challenging.

To address both of these concerns, Bill C-9 would introduce an appeal mechanism internal to the judicial conduct process. An appeal panel made up of three CJC members and two puisne judges would have broad powers to remedy any shortcomings in the process. The only recourse available to the judge wishing to challenge the decision of an appeal panel would be to seek leave to appeal directly to the Supreme Court of Canada. Entrusting process oversight to the Supreme Court will reinforce public confidence and avoid lengthy judicial review proceedings through several levels of court. This will save time and costs while still providing robust fairness for judges subject to complaints.

[*Translation*]

The third and final point to highlight relates to the costs associated with the process. The day-to-day costs of handling complaints are fairly consistent and predictable, and would continue to be so under the new process. However, the costs associated with inquiry committees are highly variable and unpredictable, given the significant year-to-year variability in the number of public inquiries conducted. As a result, administrators must rely on complex mechanisms to seek necessary funding on an ad hoc basis. This is a longstanding problem that Bill C-9 would rectify by introducing a statutory appropriation to provide a stable funding mechanism for the highly variable portion of the process' costs associated with public hearings.

This is not only a sound practical solution, but is also justified by the fact that these public hearings are constitutionally required. To ensure sound stewardship of these funds, the bill would introduce several measures, including requiring that an independent review be completed every five years into all costs paid through the statutory appropriation. The findings and recommendations of this review would be made public.

[*English*]

I thank you for your time and attention today. I wholeheartedly recommend this bill, knowing that it will profoundly improve the judicial conduct review process to the benefit of Canadians.

I look forward to your questions after having had a glass of water.

Some hon. members: Oh, oh!

Hon. David Lametti: Thank you.

The Chair: Now we will go to the first round.

Mr. Brock, you have six minutes.

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

Welcome back, Minister. It's always a pleasure to have you here sharing your expertise with respect to our studies.

You are, indeed, correct. We will continue to support Bill C-9 going forward. That is a given.

Given my background, it's very important to me that we all hold ourselves responsible for our conduct and our actions, and judges are no different.

I would like to start by asking you this question. I think you would agree with me that Bill C-9 strikes the appropriate balance between maintaining the confidence of the public with respect to our judiciary and the interests of the complainants.

Do you agree with that?

Hon. David Lametti: I definitely do agree with that. First of all, there will be more transparency in the system for the complainant, for the person who files the initial complaint. There will be a greater amount of lay participation in the system, as well as a balanced amount of expert participation in the system—lawyers and judges. There will very much be a streamlined process, so that for the complainant, they won't see all of these side appeals to the Federal Court on judicial reviews—well, they're not technically appeals, but you know what I mean.

● (1545)

Mr. Larry Brock: Thank you, Minister.

I have a limited amount of time and a lot to get through.

You may or may not agree with me, but the public's confidence in our judiciary has been shaken significantly as a result of some pretty controversial Supreme Court of Canada decisions. With the time permitting, I want to touch upon two decisions: Bissonnette and Sharma. In my view, you need to know what the feeling is on the street and the community, and I want to have your thoughts in terms of the government's response.

As we know, in the Bissonnette decision, the Supreme Court of Canada unanimously struck down section 745.51 of the Criminal Code as violating section 12 of the charter—not saved by section 1—and made it retroactive to the day it was enacted, in this case 2011.

We all know the facts of the case. We need not belabour the point. It was a horrendous crime that shocked the conscience of not only the Muslim community but everyone across the country. In their ruling, the justices indicated that longer periods of parole eligibility, in this case upwards to 75 years, were "degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitely and irreversibly, that they lack the capacity to reform and re-enter society". They said that "Although Parliament has latitude to establish sentences whose severity expresses society's condemnation of the offence committed, it may not prescribe a sentence that deprives every offender on whom it is imposed of any realistic possibility of parole".

Minister, I want you to listen very carefully to the words we heard from various victims when we studied government's response to victims of crime. One such victim was Sharlene Bosma. She indicated that, on May 6, 2013, her husband, Tim, was taken from their home and shot in his own truck across the road from their house. His body was eventually taken to the Waterloo airport and then burned in an animal incinerator. She spent eight days searching the province for him, not knowing where he was. On the eighth day, her world fell apart when she learned one of the most horrifying phrases in the English language: His body was burned beyond recognition. She says:

> I cannot convey the overwhelming amount of joy and relief that we as a family shared when the court determined consecutive life sentences in each case—75 years and 50 years for cold-blooded, heartless killers. As the mother of a little girl who was not quite two and a half when her father was murdered, I was extremely thankful that she would never, ever have to face the monsters who killed her father for no reason other than they simply could.
>
> In May of this year, our government took away one of the very few things that we as victims had to hold on to, which was consecutive sentencing. It was one of the greatest blows that the Canadian government has ever dealt to victims of violent crime. It says to us that someone can kill as many people as they want here in Canada because sentencing will not change. It says that Canada only places value on the first victim, with the lives of any other victims not mattering—not here in Canada.

We also heard from another family who indicated the profound impact this decision has had.

I know that you showed compassion in the House of Commons, Minister, when the decision was released. I'm looking at a news release from one of the publications on the Internet. In a media statement, you indicated as follows: "Our position was clear, we supported a sentencing judge's discretion to impose a longer period of parole ineligibility where appropriate. However, we will respect the court's decision and carefully review its implications and the path forward."

Since hearing those words—and I remember you in the House using those or similar words—what has the government done? What is the government doing to address the pain that these victims are feeling and the overall sense that this is no longer a justice system but merely a legal system?

The Chair: Unfortunately, Minister Lametti, you have 10 seconds to answer this.

Also, I don't believe it was relevant to the bill, Mr. Brock, but I'll still give him the opportunity to answer.

Hon. David Lametti: It's unfortunate; I would like to answer the question.

I am open to ideas. We're studying that decision. We're trying to be compassionate to victims.

Note that the court did not change the total sentence. The consecutive sentences still exist; the court did not strike that down. What they did do, unequivocally, was to say that you needed to have a chance at parole at different stages in that process. They left the sentences intact, however.

It is, as you pointed out, a 9-0 decision. It's a clear decision by the Supreme Court, so it doesn't present an easy map forward, but we are studying the decision. We're studying ways to support victims, and we're also looking at the decision, and I'm open to good ideas.

● (1550)

The Chair: Thank you, Mr. Lametti and Mr. Brock.

It's over to you, Madame Brière.

[*Translation*]

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

Thank you very much, Minister. It's always a pleasure to have you here in committee.

We know the decision in the Girouard case was a judicial saga that received extensive media coverage.

Further to your remarks, would you please tell us how the new Bill C-9 would reduce delays and costs and make the complaints process for efficient.

Hon. David Lametti: Thank you for your question, Ms. Brière.

In the unfortunately well-known case of former Justice Girouard, we saw that every possible effort was made to conduct a judicial review and to appeal from the decision and that every tactic was used to prolong the process and increase costs and delays. Unfortunately, when the Supreme Court ultimately dismissed the application for leave to appeal, I informed Parliament that I was prepared to remove Justice Girouard from office, but he retired with full pension.

In one of the fall economic statements, about a year and a half ago, we resolved the pension plan issue, but now we need to review the process.

We currently have a process with clear guidelines and a transparent procedure for appealing from decisions to the courts. The review panels consist of judges, lawyers and lay members. So we can trust the system.

Judges will have the assurance that they will be treated fairly, and the general public will see that the process is more efficient, less costly, shorter, clearer and more transparent.

Mrs. Élisabeth Brière: Thank you very much.

You also said that sanctions would be imposed if the situation didn't necessarily warrant the judge's removal from office.

Please tell us a bit more about these new sanctions.

Hon. David Lametti: We've provided for the possible imposition of lesser and flexible sanctions, where appropriate.

Only one sanction was possible in the former system, and that was removal. However, there were instances in which judges had committed errors that were significant, severe and serious, but not to the point of warranting removal from office.

Now, as part of a parallel process, we would also be able to determine whether a judge is guilty and to impose a more appropriate penalty in the circumstances. I cited the example of training sessions for judges.

Consider the example of a judge accused of making an inappropriate remark during a judicial proceeding in a sexual assault case. The penalty mandated might be to attend training sessions on sexual assault, which would remedy the matter. The training sessions would help increase the judge's awareness of the social context and perhaps avoid removal if the judge can demonstrate competencies in other fields.

● (1555)

Mrs. Élisabeth Brière: He could also be asked to apologize.

Hon. David Lametti: He could also be asked to apologize, obviously.

Mrs. Élisabeth Brière: What's the benefit of allowing laypeople to sit on review panels?

I'd just like to say that I don't know if a member of the Chambre des notaires du Québec could be—

Voices: Oh oh!

Mrs. Élisabeth Brière: I won't hold that against you.

Hon. David Lametti: Ms. Brière, it's important for laypeople to be involved. Their point of view during the process is important because their opinions and experience may represent those of other laypeople, that is to say individuals who appear before the courts. Their experience, in itself, is very important, as is their involvement.

Their presence also adds an element of transparency to the system, since involvement isn't reserved solely for judges and lawyers.

Mrs. Élisabeth Brière: Is my time up?

[*English*]

The Chair: Thank you, Madame Brière.

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

[*Translation*]

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

Thank you for being with us today, Minister.

I'd like to ask you some questions on various topics, but I'll try to stick to today's subject, Bill C-9.

First of all, I want to say that I think this is a good bill, and we of the Bloc Québécois intend to support it. However, shouldn't these complaints that the Canadian Judicial Council handles concerning judicial conduct, misconduct and alleged misconduct raise question marks in our minds? Shouldn't we question whether many of these situations can be avoided by paying more attention to the process and selection criteria?

As you know, the situation has improved over the years. We've discussed this on a number of occasions. We of the Bloc Québécois still condemn the partisan, political checks that are conducted before appointments are made. We should put an end to the practice. It should be given no consideration. Perhaps we should improve conditions and ensure that candidates have university training in the law, that they have a moral compass and that they know how to conduct themselves in any given situation in which litigants appear before them.

In short, shouldn't we improve the selection process so that fewer and fewer complaints are filed?

Hon. David Lametti: I'm firmly of that view. I think that's what we did when we made changes to the system. We do consider professional training and experience, and judgment as well. We look at these individuals' engagement in society, their careers and other necessary qualities, such as wisdom and maturity. These are qualities that we look for.

Furthermore, in the wake of former Bill C-3, we look at judges' training. That's now a prerequisite for candidates. We did it through contracts. It should also improve the quality of decisions.

Mr. Rhéal Fortin: Thank you, Minister.

What can we do, specifically?

I think the selection committee has already resolved the academic qualifications issue. Someone who hasn't completed the required studies clearly can't be a candidate.

How can we actually identify a candidate's moral values and potential conduct in a given situation?

Have you considered the possibility of validating candidates' moral values, in a manner consistent with charter privacy provisions?

● (1600)

Hon. David Lametti: As far as possible, that's what we do, in a manner consistent with privacy legislation in Canada. The advisory committees ask questions and conduct research. We also speak regularly with other judges and lawyers who have a certain amount of experience. There's no set list, but we look at candidates' experience to see if some of them can discuss their moral values.

Mr. Rhéal Fortin: Thank you, Minister.

I don't think I have much time left, and I'd like to address a completely different topic.

The provisions of Bill C-9 are interesting in the context of the current process.

Have you considered the possibility of introducing a mediation process prior to panel proceedings, for example, in the case of a complaint filed against a judge? Wouldn't it be appropriate to introduce a mediation process in which a representative of your department or of the Judicial Council could intervene?

An attempt could be made to determine whether an agreement can be reached with the judge concerned by the complaints on certain matters or on appropriate sanctions, which would preclude situations such as that in Justice Girouard's case.

Hon. David Lametti: Upon initial review, I think a slightly less official review panel could indeed conduct those kinds of discussions. It's the Judicial Council that initiated talks with our department to create Bill C-9.

I'm going to give the floor to one of the people who took part in those discussions.

Mr. Xavier, would you please provide some details on the subject?

Mr. Patrick Xavier (Acting Deputy Director and Senior Counsel, Judicial Affairs Section, Public Law and Legislative Services Sector, Department of Justice): Yes, of course.

Could I ask you to repeat your question, Mr. Fortin?

Mr. Rhéal Fortin: I'll do it quickly because I barely have 30 seconds left.

Would it be a good idea to introduce a mediation process?

For example, if we request a trial in Superior Court or the Court of Quebec, we'll be asked, even before the hearing date's set, if we've gone through mediation or at least tried it.

To avoid endless proceedings, as in Justice Girouard's case, I wonder if the mediation process would have made it possible to agree with Justice Girouard on various sanctions or ways of resolving the matter.

Mr. Patrick Xavier: It's hard to say in Justice Girouard's case. Justice Girouard was accused of certain offences, and I don't know whether the charges laid against him could have been settled through mediation.

[*English*]

The Chair: Thank you, Mr. Xavier—

[*Translation*]

Mr. Patrick Xavier: As the minister indicated, the review panel, which is the first step in the process, can definitely perform a mediation function.

[*English*]

The Chair: Thank you. The time is up.

Thank you, Monsieur Fortin.

We'll go to Mr. Garrison for six minutes.

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

Thank you to the minister for being available to the committee to talk about Bill C-9 today.

Obviously, there is a great deal of consensus that Bill C-9 will fix some of the major problems in the complaints process. I appreciate the minister stressing that it would fix the all-or-nothing problem and allow dealing effectively with lesser forms of judicial misconduct that might not involve removal from the bench. Of course, streamlining the timing is in the interest of everyone, as is reducing costs.

I have two further questions about Bill C-9 and the process in general. They revolve around transparency and the fairness of proceedings. I think right now there is a general feeling that there isn't a great deal of transparency about the outcomes of complaints against those who have committed misconduct on the bench. I wonder whether Bill C-9 will make any improvements or if there any other suggestions to improve the transparency of the outcomes of the process.

● (1605)

Hon. David Lametti: Thank you, Mr. Garrison, for that question.

The process will result in more published decisions, and certainly anything that the minister has to do at the end of it will also be public. I think that's a better process than exists right now. To my understanding, the proceedings themselves will remain confidential, but again, I think we're in a better place than we are currently.

Mr. Randall Garrison: There have been a lot of concerns expressed about a lack of transparency about the process for complainants. In other words, it's hard for them to know what's happened with a complaint, what's being done with a complaint and what stage a complaint is at. I think this contributes to a lack of confidence in the process as a whole.

Again, in your view, will Bill C-9 help make the procedures more transparent to the complainants?

Hon. David Lametti: I think the short answer to that is yes, particularly because there is a clear set of stages to the process. The complainant will know at every stage where the process is, and will receive more timely answers because of it.

There's a first vetting that takes place in order to make sure that frivolous or abusive complaints are not allowed into the system. There's an initial examination of the complaint, it moves to a committee if it gets past that, and then there's the formal process. At each stage, there will be a response available to the complainant. That, in and of itself, presents, I think, a much better set of transparent steps that allow for greater satisfaction on the part of complainants.

There's also the fact that, as you've pointed out, on more minor transgressions that I suppose are correctable in some sense, there isn't an all-or-nothing response anymore.

Mr. Randall Garrison: In terms of complainants, one of the concerns that people have had is that once the complaint is launched, there's no more role for the complainant. As the complaint makes its way through the system, there's no ability for the complainant to respond to any of the intermediate decisions or steps.

Will there be any provision for this as a part of Bill C-9?

Hon. David Lametti: My understanding is that the complainant lodges a written complaint, but then the complainant, I believe, would have the opportunity to restate that, at least in writing, if there is a formal hearing on the case. I can also get back to you with a better answer, Mr. Garrison.

I'm sorry. I believe Patrick can answer that.

Mr. Patrick Xavier: I'll help a bit with that.

It's important to appreciate that the Canadian Judicial Council has a duty of procedural fairness toward the complainant, and the heart of that duty is precisely to communicate the outcome of proceedings to the complainant.

The bill does not address that head on, because the duty of procedural fairness is variable. It will vary depending on the context, who the complainant is and what the circumstances of the complaint are, so it will be for the council to set out how it will deal with complaints in policies and procedures. It's best to leave that for policies and procedures, because it may need to be amended from time to time. There is no one-size-fits-all rule that could easily be put into that act.

How to deal with complainants will be very much for the council to set out in its policies and procedures. I'm sure the council will be pleased to speak to that when it appears before you.

Mr. Randall Garrison: What I'm trying to get at, again, is that some complainants have felt that they might have additional things to say or additional information to provide once they've seen the initial determination or consideration of the complaint, and they feel there's currently no ability to do that.

I wonder whether that is covered by what you're talking about as the procedural fairness aspects.

Mr. Patrick Xavier: It would be covered by that, and it would be addressed in the CJC's policies and procedures.

Currently, a member of the CJC has the ability to go back to the complainant and get further clarification and get further information if they feel they need it once they've seen the judge's comments, but that's what the policy currently states under the current process. What the policy will look like under Bill C-9 once it becomes law will be for the council to determine.

Presumably, the council will have some consultations on what that policy will look like, but I can't speak for the council. The council will be able to speak to that when they appear before you.

● (1610)

The Chair: Thank you, Mr. Xavier.

Thank you, Mr. Garrison.

We'll go to our next round, starting with Mr. Caputo for five minutes.

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

Thank you, Minister. It's always a pleasure to have you here before the committee.

I have to ask a bit of a selfish question, following up from the last time you were here. I asked about Bill C-299, which would raise maximum sentences to life imprisonment for sexual offenders.

I'm wondering if you've had time to contemplate that and whether it's something you might be prepared to support.

Hon. David Lametti: It's still under our contemplation.

Mr. Frank Caputo: I promise to keep asking you that every time you are here.

Hon. David Lametti: I suspect you will.

Mr. Frank Caputo: Minister, I'm going to take a little bit of a circuitous route, but I promise, if I could have the chair's indulgence, to bring this back to the bill. I'm going to give you a factual scenario that came up in case law in 2021. I want to get your comment on it. Then I will bring it back to this bill. It's a case that troubled me.

Minister, I know you can't comment on specific cases, but what I'm asking you to do is comment on the legislative framework that permitted the decision, in a case called P.R.J., by the supreme court in my home province of British Columbia. It was a case in which a mother offended against her daughter sexually. The daughter was seven or eight years old. There were two charges—invitation to sexual touching and sexual interference. The case went to trial, meaning that the seven- or eight-year-old had to testify. The mother was ultimately convicted. The sentence was a 23-month conditional sentence order after trial, with 12 months of house arrest, for a sexual offence against one's child.

Minister, do you have any comment on the legislative framework that permitted this?

Hon. David Lametti: Look, this is a horrific set of facts as you have described them. There is absolutely no question about that. I think we all share the horror of this kind of crime.

There are a number of different procedures and provisions in place. For example, I now have visited a number of child advocacy centres and have funded a number of child advocacy centres across Canada so that the children and families who go through this will be better supported as they do.

As to the sentence, if that's what you are referring to, in the common law system we best leave that up to the judge, with the sentencing guidelines and rules of thumb and seeing the people before them, which I think is the great advantage of our criminal justice system based on common law traditions. I won't comment on the sentence itself, but we are trying to build supports into the system so that people who are victims of these horrific acts are better supported as they go through the process. We'll continue to look for ways to improve that.

Mr. Yasir Naqvi (Ottawa Centre, Lib.): I have a point of order, Chair.

● (1615)

The Chair: Yes, Mr. Naqvi.

Mr. Yasir Naqvi: Chair, I'm really concerned. This is the second time now I've noticed that members of the Conservative Party are not asking the minister a question directly on Bill C-9, which deals with judicial misconduct. They continue to bring up very specific cases and ask the minister to opine on them when they have no relation whatsoever to the matters covered under Bill C-9.

I let Mr. Brock go. I was trying to give him a little bit of latitude to see if he could bring it back to the bill. He failed to do so. Mr. Caputo promised that he would do so in this instance. He has not done so.

Through you, Chair, I really urge members opposite to focus on the bill. We have an opportunity here, with the minister present, to give us responses on this particular bill. I think it is highly unfair that we are asking questions that are outside the purview of the work we are doing right now.

Thank you.

Mr. Frank Caputo: Mr. Chair, may I respond, please?

The Chair: Yes.

Mr. Frank Caputo: Thank you.

I didn't ask the minister to comment on the specific case. I asked him to comment on the legislative framework. But we won't split hairs about that—

Mr. Yasir Naqvi: It was not related to Bill C-9.

Mr. Frank Caputo: I did not interrupt you, Mr. Naqvi. I would appreciate the same courtesy. Thank you.

Secondly, I said that my follow-up question, which I am happy to disclose right now, relates to Bill C-9, and it relates to that factual matrix.

If I'm given the opportunity to do so, with the full time that I have, I am happy to ask that question.

The Chair: Thank you, Mr. Caputo, and thank you, Mr. Naqvi.

I will remind all members to keep it in line with the study, which is Bill C-9.

I gave a lot of latitude on that. You had promised at the outset of your questioning that you were going to bring it back to Bill C-9, so I would ask that you bring it back to Bill C-9. This is an important and very timely meeting, so we should keep it focused on that.

I'll resume your time.

Mr. Frank Caputo: May I ask, Mr. Chair, how much time I have left, please?

The Chair: You have a minute and a half left.

Mr. Frank Caputo: Thank you.

This is a horrific set of facts and a highly repugnant outcome, in my view. I know you can't comment on that.

However, victims—particularly victims of sexual offences—are often placed in a psychological prison with a psychological life sentence. That's something I came to learn in my work. I was trained in that.

We talk about training, we talk about Bill C-9 and we talk about doing the right thing.

Minister, where should we be going when it comes to the training of judges—and we are talking about that here with Bill C-9—and when it comes to informing them of what victims go through in these circumstances?

Hon. David Lametti: Thank you. I was waiting for the very good follow-up that came, so thank you.

We've begun to take that into account with Bill C-3. It was the old private member's bill originally proposed by Rona Ambrose, which we took on and, I think, we improved. In this, we can now require newly appointed judges, as part of their application, to agree to go through precisely this kind of training, largely as a result of another case in the Bill C-9 file with former Justice Camp. We're increasing from the get-go the sensitivities and the abilities to understand what victims have gone through on the part of judges.

Chief justices have told me that Bill C-3 and the work that the National Judicial Institute has done now in developing these kinds of courses will give them leverage over existing judges; because of the principle of judicial independence, we can't force existing judges to go through training. Chief justices are now saying that because we've done this with the incoming group of judges as a matter of requirement, they can now exert more moral authority on the part of sitting judges to go through these kinds of courses.

Mr. Caputo, I share your concerns. I want to do anything we can to better train judges for precisely these kinds of cases and precisely the kinds of facts you have brought forward, and I continue to be open to good ideas.

The Chair: Thank you.

Thank you, Mr. Caputo.

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

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

Welcome, Attorney General. It's always good to see you back here.

Let's start with the existing process that's available to Canadians when it comes to judicial review in this context.

What are some of the challenges that exist in the current system? Can you, maybe in the second part, answer how this bill tries, in your view, to address those in a meaningful way so that Canadians feel they have a more effective recourse available if they face judicial misconduct?

Hon. David Lametti: Thank you, Mr. Naqvi, for the question. It's important.

I'll use the Girouard case as an example, because it's fresh in many people's minds.

There is a process, again, that involves a petition on the part of a letter or a complaint on the part of a citizen. It goes to the executive director of the Canadian Judicial Council. It is then screened by a member and it goes to a review panel. From a review panel, it can go to an inquiry committee and then to this nebulous council of the whole.

At every point in the Girouard case, after every decision, there was a lateral move to seek judicial review at the federal court. It would come back to the process and go to the next stage, and the person lost. It would go again, across the federal court and at the next stage, the person lost. It eventually went all the way up to a leave to appeal to the Supreme Court, which was rejected, thankfully. Only then did the process end.

All of these lateral proceedings were because it wasn't clear that the review mechanism didn't prohibit these kinds of processes seeking judicial review.

What we've done in the new process is establish a line, so you're effectively appealing the substance of the decision with appropriate safeguards and an appropriate chance to make your case on procedural and substantive grounds. However, it doesn't allow constant judicial review of the federal court and, eventually, to the Supreme Court by appeal, if it is merited.

There is an overarching guarantee of safety, if you will, for all participants by the presence of the Supreme Court at the end of the day.

● (1620)

Mr. Yasir Naqvi: Thank you for that.

My supplementary question to that would be whether you and the Department of Justice are comfortable from the perspective of natural justice and procedural fairness that this new mechanism still protects those important rights of participants versus the mechanism within the current system, where they could engage in those lateral steps.

Hon. David Lametti: Yes, you're absolutely right. It's not only our department but also the judges themselves who worked very hard on this bill.

One thing I have to point out, particularly in both the Girouard and Camp situations, is that some of the people who were the most outraged were judges, because they feel the reputational hit that these kinds of cases have, not only as individual judges but also as part of the judiciary as a whole, so they wanted reform. Believe me, the chief justice is watching what's happening and is constantly, in his formal way, telling me that he would like to see Bill C-9 pass. It's for precisely that reason: the reputation of the judiciary is very much at stake.

They participated in these decisions. They made sure that there was procedural fairness, but they wanted more efficiency. That's true both for chief justices across Canada, the CJC and the Superior Court Judges Association. They want a better process to police their ranks, if you will, because they realize that it's important for the reputation of the judiciary as a whole.

Mr. Yasir Naqvi: One of the concerns that I've heard from individuals, and I'm sure you have heard the same, is that the system seems too complex the way it exists right now, that cost is an issue and that it's inefficient, especially if you are a layperson, an ordinary citizen, trying to take on a judge. They feel that it's stacked against them to begin with.

How would you assure Canadians that this new process being proposed in Bill C-9 is a fairer system, less costly and more efficient?

Hon. David Lametti: It's definitely less costly and more efficient, because the lines are better delineated and it's vertical now. You're basically moving up the system with your appeals, and you can't keep going sideways all the time, which reduces costs and increases transparency.

It's also true that, because of the formal role of laypersons within the system, there is, I think, a better sense of legitimacy, from the perspective of a layperson who might be a complainant, to know that there are going to be other laypersons within the system who are also going to have a look at what's happening. It's not just judges judging themselves but also laypersons and lawyers. That will also ensure diversity within the system, which is also critically important for the legitimacy of the system.

Mr. Yasir Naqvi: Thank you.

The Chair: Thank you, Mr. Naqvi.

Next we'll go to Monsieur Fortin for two and a half minutes.

[*Translation*]

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

Minister, I would like to hear your comments on a matter we haven't addressed until now.

Have monetary penalties been considered as one of the possible sentences or consequences of an offending judge's conduct?

Going back to the example of Justice Girouard, we could consider the matter of salary paid during the hearing and proceedings. There's also the matter of the pension that's subsequently paid. Is there any way to adjust pension payments in accordance with the decision rendered?

What particularly interests me is the issue of court costs. I understand that Bill C-9 would set a limit on the reimbursement of legal fees that a judge could pay.

However, has anyone considered the possibility, for example, of asking offending judges to pay court costs in the event they're found guilty of misconduct? The Judicial Council obviously decides whether a judge should be sanctioned.

However, if it's decided that a judge should be sanctioned for gross misconduct, do you think it would be appropriate to provide for the Judicial Council to have the option, without being compelled to exercise it, of requiring the offending judge to repay, in whole or in part, any fees that the government is required to pay for his or her defence?

● (1625)

Hon. David Lametti: Thank you for that question, Mr. Fortin.

That's certainly a possibility.

Before turning the floor over to Mr. Xavier, I would like to remind you that we have resolved the matter of pension plans. The rights of an offending judge will be suspended.

I think the salary of an offending judge should be frozen in this case. I'll let Mr. Xavier answer that question, but I believe the Canadian Judicial Council, the CJC, can impose monetary penalties.

Mr. Rhéal Fortin: I'd like to go back to the matter of fees.

Hon. David Lametti: Yes, I'll let Mr. Xavier answer that question.

[*English*]

The Chair: Be very quick, Mr. Xavier.

[*Translation*]

Mr. Patrick Xavier: The matter of fees is somewhat complicated. We could discuss the decision of the Federal Court of Appeal in *Bourbonnais v. Canada* later. According to that decision, a judge subject to disciplinary proceedings is entitled to have his fees paid by the government. However, it isn't entirely clear whether it's subsequently possible to compel the judge to repay those amounts.

That's the short answer.

Mr. Rhéal Fortin: Thank you.

[*English*]

The Chair: Thank you, Mr. Fortin.

Last, we have Mr. Garrison for two and a half minutes.

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

I'll resist the temptation that other members have indulged in, talking to the minister about a wide number of other things, because I want to stick to confidence in the judicial system and the contribution of Bill C-9, but I can't resist saying that I know that the minister shares my concern with systemic racism and the impact on indigenous and black Canadians in particular of systemic racism in our justice system.

With Bill C-5 apparently on the Order Paper at third reading in the Senate right now, I'd love to talk about that. But this is what I want to ask: Do you think Bill C-9 will make a significant contribution to the problem of systemic racism within the Canadian justice system as a whole?

Hon. David Lametti: Thanks, Mr. Garrison, for the question.

Indeed, we're hoping that today is a historic day. We're hoping that the Senate does get to a vote on Bill C-5 later this evening.

I think it will have a positive impact. The visible presence of laypersons within the system leads to potentially greater diversity as well as increasing the diversity within the judiciary and in particular the Canadian Judicial Council. We appointed recently the first indigenous chief justice in Canada in addition to the first indigenous member of the Supreme Court. The first indigenous member from the Northwest Territories, the first chief justice, will sit as part of the Canadian Judicial Council, part of the CJC, which is critically important.

We hope there will be others representing the face of Canada, if you will, the diversity of Canada. All of that helps, in its own way, in fighting overrepresentation, and it certainly helps increase the legitimacy of the Canadian judicial system.

Mr. Randall Garrison: Thank you, Mr. Minister. I do acknowledge that the appointment process has resulted in an increasingly diverse Canadian judiciary, but it's a slow process that takes time to make sure that the judiciary actually represents Canadians as a whole.

Once again, I thank you for being here today.

I have no further questions.

The Chair: Thank you, Mr. Garrison.

Thank you, Minister Lametti. We thank you for your presence here today on this very important piece of legislation.

We will now let you go while we suspend for a few minutes.

● (1630)

_____(Pause)_____

● (1635)

The Chair: I call the meeting back to order. For the sake of time, we're going to resume.

We will begin by allowing Mr. Xavier to say a few words for about five minutes to tell us about the steps on this bill, and then we'll resume the questions.

It's over to you, Mr. Xavier.

Ms. Nancy Othmer (Assistant Deputy Minister, Public Law and Legislative Services Sector, Department of Justice): Good afternoon, Chair and members.

I thought it might be helpful if Patrick, who is our expert on this particular file, provided you with the state of the legislation right now and how it works, and a little overview of what we're proposing, in case that's helpful. We don't have opening statements, but I thought we could start with that, if that's okay.

Mr. Patrick Xavier: Mr. Chair, I've become aware that you have a sign that indicates when someone runs out of time, so I should mention at the beginning that I'm mostly blind. I can't see that far, so my colleague will let me know if ever that becomes an issue.

The Chair: I apologize—

Mr. Patrick Xavier: No, no. I should have mentioned it.

I thought I would provide a very brief overview for the committee of some of the changes in Bill C-9 that are the most salient and that will help improve the effectiveness, the fairness and the transparency of the process.

It's important to appreciate that under the current process, most of the process takes place with a single member of the Canadian Judicial Council analyzing the complaint and then determining what to do about the misconduct in question. That member of the council doesn't have the ability to impose any kind of sanction. They can issue an expression of concern about the judge's conduct, but that's about all they can do for misconduct that is not serious enough to warrant removal, which is the majority of misconduct that comes to the attention of the council.

There is currently a body called a review panel, which performs a gatekeeping function. If the single member of the council who has the complaint thinks that it might be serious enough to warrant removal, they'll send it over to the review panel. That review panel is currently the only stage of the process where there is a layperson. In this context, that simply means someone who has never been a lawyer and, therefore, also never a judge. That panel has only one task, which is to decide whether a public hearing should be held by an inquiry committee on whether the judge should be removed.

If the review panel says yes, that's when we're in the public hearing phase that I'm sure most committee members will be more familiar with. When that public hearing phase takes place, the only members of the inquiry committee are judges and lawyers designated by the Minister of Justice. They hold public hearings, they issue a report to the council of the whole, made up of CJC members who are not conflicted and have not taken part in the prior stages of the process. They look at the report and they issue the final report to the Minister of Justice.

That, unfortunately, is when the opportunity for judicial review arises. The judge, at that point, can take the report to federal court if they disagree with it. From there, it can go to the Federal Court of Appeal and from there to the Supreme Court of Canada. That aspect of the process alone—the judicial review part—can take a good two years.

The new process makes several improvements to this current process.

The first improvement comes at the very start. Instead of a single member of the council reviewing the complaint, if the complaint raises concerns about a judge's conduct, it will automatically be reviewed by a review panel, which includes a lay representative. It will have three people on it: a member of the council, a judge who is not a member of the council and a lay representative. This review panel will have the ability to impose sanctions for misconduct short of removal, and those sanctions will not require the judge's consent. You'll find them, I believe, in proposed section 102 of clause 12.

They include things like having the judge pursue a course of continuing education. There was a question earlier about how this bill might help address systemic racism in the justice system. That's probably a key provision in that regard for Bill C-9. It's a way of having a judge, who has misstepped in a way that suggests they may be acting or harbouring certain stereotypes, pursue a course of continuing education to address that.

From the review panel stage, the process then becomes de facto public and it can go toward a hearing panel, which also includes a lay representative. That hearing panel issues a report, which will contain a decision on whether the judge should be removed or not. That is when the appeal stage begins.

Instead of waiting for the report to the minister and then having judicial review, the appeal stage immediately follows the full hearing panel. There is one appeal stage at the appeal panel and then the possibility of leave to appeal to the Supreme Court of Canada, and that's all. That's where a court review ends.

From there, once the appeal stage is complete, the report goes to the Minister of Justice and that's pretty much the end of the process.

I'll leave it at that and let the committee ask questions. I don't want to take up too much time.

Those are the principle improvements that Bill C-9 seeks to make to the process.

● (1640)

The Chair: Thank you, Mr. Xavier. That was one of the best Coles Notes version of a bill I've heard. I think every member understood how the process works. That was very helpful.

I'll begin with Mr. Moore for six minutes.

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

Thank you to our witnesses for being here today to discuss this bill. It's a bill that we support.

We've already discussed the limitations of the current process and how it's restrictive. The new process allows for sanctions short of removal.

I want to get your thoughts first on the analysis of what you contemplate those sanctions looking like.

Second, without revisiting this, are there judges under the current system who have been dismissed when a sanction would have been more appropriate? Are there going to be judges in the future that may be.... I think, if you're in the position of a judge, any kind of sanction is huge. It's huge to have that on your record, to have a sanction against you.

Is the sanction maybe an easy way out to deal with a case and say, "We're not going to remove this judge, but let's have them do some kind of training"? The sanction, obviously, is a severe issue in and of itself to a sitting judge.

How do you ensure that we get that balance right between those who should be removed and those who should be sanctioned? Do you think there is anything that needs to be tightened up to avoid misuse of the sanction?

Mr. Patrick Xavier: That's an excellent question, and it's a difficult balance to strike. The bill tries to strike that balance by focusing on sanctions that seem appropriate, that seem compatible with a judge's resuming their full duties with the confidence of the public. You'll notice that some sanctions that you might find in other workplaces, like suspension from duties for a time or suspension without pay, are not really included. There is some question whether some of them might be fully compatible with judicial independence—but also, if you include those kinds of sanctions, you might be implicitly raising the bar for removal.

If a judge has done something so serious that you need to dock their pay, we're probably in the realm of something serious enough that removal is warranted.

As to where to draw the line so that you don't either overshoot or undershoot the mark, the Supreme Court of Canada has set out in its two main decisions on judicial conduct, which are referenced in some of your material, Therrien and Moreau-Bérubé, that the bar for judicial conduct is very high. Judges are expected to be a cut above in how they conduct themselves.

With that in mind, the list of sanctions seems like a list that is appropriate so that a judge is allowed to resume their duties with the confidence of the public. It's in line with the sanctions that you will find in other regimes, including in the provinces, as well as in countries whose legal systems and judiciaries are very similar to ours, like the U.K., New Zealand, the U.S. federal courts and Australia.

Hon. Rob Moore: Thank you for that.

The minister mentioned the international experience. When looking at our process that has existed for some time, we're looking for a new way forward. What did you benchmark and what did you see as the international gold standard? Are there key differences that you would point out for the Canadian context?

Mr. Patrick Xavier: Yes. What's proposed in Bill C-9 actually compares very favourably with what's available abroad in countries very similar to ours. I can't say there's a country out there whose judiciary functions along the same lines as ours whose process is better. If you were to map out all of these processes, whether it be England, Wales, New Zealand or U.S. federal courts, they broadly have the shape of a capital letter “Y”. The complaints come in, they get investigated in the same way initially, and then they go one of two ways. One way is if they're not serious enough to warrant removal. If they're serious enough to warrant removal, you have a more serious set of investigations. That ultimately gets you to a public hearing and then removal by the executive and/or legislative branches.

This does follow that same pattern, but Bill C-9 involves laypersons in the process at the very outset in terms of the review of complaints. That is not something you find anywhere else. Laypersons are involved in England and Wales and New Zealand, but only at the hearings stage, when it comes time to determine whether the judge should be removed. The list of sanctions is very, very limited. It really is. It's removal or it's a reprimand or expression of concern in these other countries. The ability to, for example, require a judge to pursue continuing education or counselling is not really there.

In those two respects, Bill C-9 actually really improves on what's out there internationally.

Thank you.

● (1645)

Hon. Rob Moore: Thank you.

The Chair: Thank you, Mr. Moore.

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

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

Thank you to the officials for being here

I want to pick up on the conversation I was having with the minister in relation to the current system and his concern about these lateral steps that people can take throughout the system in terms of judicial reviews and how we account for procedural fairness and natural justice as it relates to the new process.

Can you walk us through the analysis you may have done in ensuring that, if this bill is passed, we will not run into an issue around breach of procedural fairness and natural justice?

Mr. Patrick Xavier: Do you mean toward the judge, the complainant or both?

Mr. Yasir Naqvi: Both. Thank you.

Mr. Patrick Xavier: As I said earlier in response to a question when the minister was here, the duty of procedural fairness that the council has toward the complainant is something that this bill leaves for the council to do via policies and procedures, because the universe of possible complainants is extremely large. When the Camp matter broke, there were hundreds of complaints. All of those people who had read about it in the newspaper were complainants. In a case like that, where the victim of the judge's misconduct also complains, that victim is in a very different position. The council might, or should, really, treat that victim of the misconduct differently from the average person who has read about it in the newspaper.

It's difficult to come up with a one-size-fits-all rule that can fit in an act. Policies amendable from time to time are probably the better way to go. That's why this act leaves that up to the council.

In terms of the procedural safeguards available for judges, the judge has paid counsel. We covered that earlier. That's a very important procedural safeguard. The judge has the right to a hearing at which they can test and adduce evidence before they can be removed. That's the basic minimum that the Supreme Court has said is necessary in order to satisfy judicial independence requirements.

The judge has a full right of appeal. We've created a right of appeal that is not restricted. It's not an appeal on a question of law alone. It's a plenary right of appeal to an appeal panel that has all the powers of a provincial court of appeal. Then there's the right of appeal with leave to the Supreme Court of Canada, as you might have from any provincial court of appeal. Again, that right of appeal is plenary. There are no limits on it.

Those are probably the most important procedural safeguards that help ensure that the process is procedurally fair.

The only other one I could mention is the reduced hearing panel. Review panels will operate by written submissions only. That will be fair for judges in the vast majority of cases, but there may be the odd case where the circumstances might give the judge a right to a hearing, in which case they can basically ask for a reduced hearing panel. The reduced hearing panel will hear the complaint *de novo*. Whatever the review panel did is not going to have an influence on the reduced hearing panel. The reduced hearing panel can come to its own conclusion on that complaint. Again, the decision of that reduced hearing panel will be appealable to an appeal panel as a plenary right of appeal.

I think those are probably the most salient procedural fairness safeguards.

● (1650)

Mr. Yasir Naqvi: Thank you. I sincerely appreciate that thorough response.

I'm assuming that the rules of procedure as they relate to this entire new mechanism will be developed by CJC. In this bill, are there some clear markers that have been outlined that CJC shall follow as they're developing their rules of procedure?

Mr. Patrick Xavier: Obviously, the rules of procedures will have to be consistent with anything that's in the bill, but there's no empowering provision that specifically targets the rules. Administrative bodies always have the ability to set rules that govern their own procedures, and it's pursuant to that implied power that the CJC will develop rules of procedure for the various stages of the process.

Mr. Yasir Naqvi: Will the process to appoint the layperson in this process be developed by the Canadian Judicial Council as well?

Mr. Patrick Xavier: Yes, the criteria will be set by the council, and the council will determine how the laypersons are selected and so on, yes.

Mr. Yasir Naqvi: In terms of term limit or the duration of that layperson to serve...?

Mr. Patrick Xavier: The term limit is four years, and I believe that's in the bill somewhere in proposed sections 81 to 85. It's in the 80s. Proposed sections 81 to 85, I believe, relate to rosters, so somewhere in there, there is the limit of four years for both laypersons on the lay roster and for judges who are not council members on the judges roster.

Mr. Yasir Naqvi: Thank you.

Do you want to add any point?

Mr. Patrick Xavier: Ms. Othmer has just reminded me that there is also the exhortation that the roster will have to reflect the diversity of Canadians, so that's, I believe, proposed section 84. The council will be required to keep that in mind whenever it develops the roster.

Mr. Yasir Naqvi: Thank you very much.

Thanks, Chair.

The Chair: Thank you, Mr. Naqvi.

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

[*Translation*]

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

Thanks for being with us, Mr. Xavier, Ms. Dekker and Ms. Othmer.

Earlier I discussed the possibility of mediation with the minister. I agree it might be appropriate in some cases but not in others.

Many steps must be taken after a complaint is filed against a judge and before a potential sanction is imposed. Wouldn't it be appropriate to provide for a frank discussion with the judge in question at some point? A representative of the Department of Justice and another from the Canadian Judicial Council could take part in that discussion to seek a solution to the situation concerned by the complaint.

I can see that it would probably be hard to convince a judge to agree to a potential sanction. However, we can set aside sanctions for the moment and focus solely on consequences, taking the repayment of fees as an example. As we know, fees are a heavy cost. The judicial system loses considerable credibility in the public's view when it learns from the newspapers that hundreds of thousands of dollars are being spent to defend an individual who is rightly accused of certain conduct and may potentially be removed. It's a situation that shocks many people.

Could we legislate certain steps that would enable us to sit down and discuss consequences and potential sanctions? The idea would be to try to determine an outcome so that the judge in question will agree to put an end to the discussion and perhaps waive certain privileges that are granted under the act and that judges may exercise for the purpose of challenging or opposing complaints filed against them.

Isn't there a process that could be applied?

Mr. Patrick Xavier: As far as I know, that's currently included in the first part of the process. The council member who takes charge of the complaint at the start of the process first attempts mediation as a remedy. That's probably also what the review panel will do. This is a question that I encourage you to put to the council. It's in a very good position to address what the review panel will put into practice. That, for example, could be included in the rules we discussed a little earlier, the procedural rules that the council might put into practice at the review panel stage.

The process becomes slightly more contradictory once a complaint is laid before the review panel and a public hearing is held. The situation, which slightly more resembles that of a court, then becomes more difficult, not just because the process is contradictory, but also because the misconduct is serious. In the circumstances, the misconduct could be serious enough to warrant removal, in which case a mediation process might perhaps be less helpful. However, mediation could be part of the review panel process.

● (1655)

Mr. Rhéal Fortin: Correct me if I'm wrong, but a judge currently can't be compelled to repay lawyer's fees in whole or in part.

Mr. Patrick Xavier: That's true. It's not possible. On that subject, see the Federal Court of Appeal's decision in *Bourbonnais v. Canada* in your documents. The reference is “Bourbonnais v. Canada (A.G.), 2006 FCA 62”. Writing for the court, Judge Nadon held that judicial independence provided the judge with a right to a lawyer paid by the government for the purposes of the disciplinary process.

It isn't at all clear from that decision that legal cost indemnification would ultimately be compatible with judicial independence. There's no clear answer to that question.

Mr. Rhéal Fortin: I quite agree with you. That's also my understanding, but I wonder if Bill C-9 could have been an opportunity to clarify those issues.

Isn't it possible to include that? I don't mean an automatic measure but at least the possibility for the Canadian Judicial Council to require full or partial reimbursement when the judge is found guilty. The idea is to ensure that the judge doesn't get the impression in a mediation process that this is an all-you-can-eat buffet. It's pretty hard to convince someone to accept a settlement when he knows from the outset that he can drag the process out and won't have to pay fees because they'll be reimbursed by the government.

It seems to me we may be passing up an opportunity to acquire an instrument for encouraging parties to settle situations of this kind. Haven't you considered it?

As you said earlier, I know this isn't clear.

Mr. Patrick Xavier: We think that the bill, as drafted, reflects the requirements stemming from the Federal Court of Appeal's decision in *Bourbonnais v. Canada*.

As we said a bit earlier, the process includes much shorter appeal proceedings. Lawyers’ fees will therefore be much lower than they are right now.

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

[*English*]

The Chair: Thank you, Monsieur Fortin.

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

Mr. Randall Garrison: Thank you very much, Mr. Chair. I do want to assure you and the translators that it's my hope to always be present in person for the rest of the session.

I want to thank the officials for sticking with us for the second round.

I thought the opening statement, if I can call it that, was very useful. I want to follow up on that by asking some very specific questions.

At what stages will the complainants be notified, and what's the extent of notification through this process? Secondly, is there any opportunity for them to provide additional evidence or arguments, having seen an initial determination, say, at the review process?

Mr. Patrick Xavier: Thank you, Mr. Garrison.

As I said earlier, unfortunately those are difficult questions to answer based on Bill C-9 alone, because that will be part of what the CJC will have to provide for in its policies outlining how it will deal with complainants under Bill C-9.

Currently, when the CJC has carriage of a complaint and asks the judge for submissions on the complaint and receives submissions that indicate that maybe some clarification of the complaint is required, my understanding is that the CJC does absolutely go back to the complainant and ask for clarification and ask for more information. If the CJC has a sense that more information should be available, for whatever reason, it will go back to the complainant and ask for more information.

All of that is very much going to be regulated by that policy and procedure on how the CJC will discharge its duty of procedural fairness toward the complainant.

● (1700)

Ms. Nancy Othmer: I would only add that I wasn't involved the way Patrick was in all of the consultations with the CJC, but in a couple of them I can tell you that the complainant's right to procedural fairness and being involved in the process was top of mind.

We'll see in their guidelines what they do come up with, but I know that they're certainly alive to this issue.

Mr. Patrick Xavier: Definitely they are.

Mr. Randall Garrison: Apart from the legal obligation of procedural fairness, is there anything in Bill C-9 that specifies that information will be provided to the complainants at each stage of the process? I know you keep saying that this can be in the policies, but I'd like to know if Bill C-9 creates an obligation to have policies that deliver adequate information on the process to the complainants.

Mr. Patrick Xavier: The obligation flows from procedural fairness. The Federal Court has found that there is a procedural fairness obligation to notify the complainant adequately of the outcome of the process. That's a legal obligation that the CJC has, that the Federal Court has found that the CJC has.

It's not expressly stated in Bill C-9, but it's not really necessary to say that it is. It is a legal obligation that the CJC has and that they're very keenly aware of. That's why the bill doesn't need to go into it in any detail. It's there, and the CJC is well aware of it.

Mr. Randall Garrison: Just to be clear, the phrasing you used is to notify them of the "outcome" of the process, but what I'm asking—

Mr. Patrick Xavier: In a meaningful way.

Mr. Randal Garrison: Sorry?

Mr. Patrick Xavier: It's to notify them in a meaningful way of the outcome of the process. It's not a matter of.... Exactly how extensive the reasons have to be will depend on the complaint, but they do have to be notified in a clear way how their complaint was dealt with.

Mr. Randall Garrison: But that's only at the end.

Mr. Patrick Xavier: The CJC will be in a better position to speak to whether that's only at the end or whether there are intermediate stages. Currently, I can say that for complaints that are entirely public, because some complaints are entirely public from the beginning, the CJC issues press releases at every stage of the process saying that the complaint is now at this stage or at that stage.

Whether they follow the same practice with complainants, I can't say, because we don't manage the process. The CJC manages the process at arm's length from the department. It may well be at every stage of the process. They would be in a better position to let you know how it works behind the scenes.

Mr. Randall Garrison: Thank you.

You may not have an answer to this question, but I'd like to ask about the level of what we call frivolous or vexatious complaints. Have we seen a change in the number of complaints that would be more about not liking the outcome of cases rather than the actual behaviour of judges? Has there been a trend toward additional, or perhaps fewer, frivolous and vexatious complaints?

Mr. Patrick Xavier: Again, that is a question that the council would be better placed to answer. I can say that what we see are the judicial review applications. A complainant can always judicially review a council decision that they're not happy with in Federal Court. That is not going to change following Bill C-9. Bill C-9 is only doing away with judicial review by judges; complainants can still judicially review the council.

In these judicial review applications, in the ones that go to court, there is still a fair number where the question is whether this is judicial decision-making or whether this is really judicial conduct. That's the line it seems every judicial council has to walk. It's a difficult line to walk. A lot of the ones that go to court still turn on that question.

Where it's a trend or not, I'm afraid I can't say.

Mr. Randall Garrison: Thank you very much. I'll follow up later with those.

That will conclude my questions. Thank you, Mr. Chair.

The Chair: Thank you, Mr. Garrison.

Next we'll go to a five-minute round, beginning with Mr. Caputo.

Mr. Frank Caputo: Thank you, Mr. Chair. I will be splitting my time with Mr. Van Popta, so I'll endeavour to be a couple of minutes here.

Thank you to the panel.

One question I have is this. When lawyers are subject to a citation that has been founded to be appropriate, the process is that somebody makes a report to the governing law society or organization. If it's frivolous or vexatious, it's dismissed, just like in the legislation. There is that gatekeeper function. But then it becomes public for everybody.

I'm trying to recall whether Bill C-9 makes that same complaint public.

● (1705)

Mr. Patrick Xavier: I'm sorry. The complaint is made public at what stage?

Mr. Frank Caputo: Is it public at the point of investigation?

Mr. Patrick Xavier: The complaint becomes public as soon as you get to a hearing panel. Once you get to hearings, section 2(b) of the charter requires openness. At that point, it becomes public by default.

Whether it's public from the beginning depends on the nature of the complaint, the complainant and so on. Some complaints are kept confidential because the complainant wants them kept confidential. Other complaints are public from the get-go because the complainant wants them to be public or because the misconduct in question has been public from the beginning. It really depends on the complaint.

That's something, again, that the bill leaves to CJC policies. How to navigate confidentiality in those early stages of the process is really tricky. It really depends on context.

Mr. Frank Caputo: Thank you.

I may have misheard the minister. I thought that it would remain confidential.

Mr. Patrick Xavier: No, it's not automatic. Confidentiality is not automatic. It really depends on the complaint.

Mr. Frank Caputo: Okay, thank you.

I have a general comment. I think it's moving towards a system where, like lawyers, judges can be subject to all sorts of sanctions. I think that anybody who has practised law, like most of the people here, have seen that it's one per cent of judges who have occasionally caused issues and may be disrespectful, or things like that. I do look forward to the fact that we will be addressing this as a profession.

I'll give my time now to Mr. Van Popta.

Thank you.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Chair.

Thank you to the witnesses.

You were talking about reform to the judicial conduct complaints process, which is pretty dry stuff. On the other hand, we're talking about the administration of criminal justice, which, of course, is very important to the way Canada operates. It's very important to the public.

My question is about the perception of the public about how the judicial system works. Is there mandatory reporting that the Canadian Judicial Council has to give annually about how many complaints there are, how many are frivolous and how many went into that direction or another direction?

I think this would go to the confidence that the public has in our judicial system, to know that there is this level of transparency.

Mr. Patrick Xavier: Currently, there isn't. The council does issue an annual report where it provides that kind of information, but there is no current requirement. Bill C-9 is going to change that.

I believe it's proposed section 160 at the end of clause 12. It imposes a requirement for an annual report where certain numbers are provided in terms of numbers of complaints and the breakdown of the complaints that the council deals with every year.

Mr. Tako Van Popta: So there's been no reporting up to this stage, but there will be reporting once Bill C-9 is...?

Mr. Patrick Xavier: No, there has been reporting every year. The council does it. It's just not required. Now it will be required. I believe that proposed section 160 stipulates some things that have to be in the report.

Those things are largely in the reports already. It reflects established practice. It's just going to be a requirement.

Mr. Tako Van Popta: Could you give us a sense of the scale? How many complaints are there in any given year? How many result in sanctions or are removed?

We all know about the Camp case, of course. It was high profile. How many low profile cases do we see every year?

Mr. Patrick Xavier: My understanding is that there are around 600 or so complaints a year. It depends on the year. It varies quite a bit there. Some years it's closer to 700; some years it's a little bit lower. I would say that over time it's probably trending a little bit upwards, and that's because the federally appointed judiciary continues to grow.

Mr. Tako Van Popta: Does it?

Mr. Patrick Xavier: It does, yes. I think we have around 1,200 federally appointed judges.

● (1710)

Mr. Tako Van Popta: Is that 1,200 complaints or 112,000...?

Mr. Patrick Xavier: No, there aren't 1,200 complaints; there are 1,200 federally appointed judges.

Having more judges probably means that the number of complaints grows a little bit every year. It's around the 600 mark or so every year. How many are frivolous, vexatious or go forward, that information, unfortunately, we don't have. You'll have to inquire with the council.

Mr. Tako Van Popta: Will it be required in the new reporting?

Mr. Patrick Xavier: Yes. It will be part of what will come out in the reports every year going forward.

The Chair: Thank you, Mr. Van Popta.

Next we'll go over to Madame Brière for five minutes.

Mrs. Élisabeth Brière: Thank you, Mr. Chair.

[*Translation*]

Greetings, everyone.

Thank you for being with us this afternoon.

Earlier we heard that Bill C-9 would improve efficiency and reduce delays. However, the process nevertheless involves review panels, hearings, plenary hearings, appeals and, ultimately, the Supreme Court of Canada.

Can you confirm that the objective will be achieved?

Mr. Patrick Xavier: Yes, absolutely. The objective will be achieved.

It's true that there are a lot of committees.

I have to say that this process does two things simultaneously. It's designed, first, to determine whether a judge is guilty of misconduct or should be sanctioned for slightly less series misconduct, and, second, to determine whether it should be recommended that the judge be removed under subsection 99(1) of the Constitution Act, 1867. That's why I said a little earlier that, if you mapped out the process, it would have the shape of a letter “Y”. After the appeals, the paths then come back together and continue on to the Supreme Court.

The complexity stems from the fact that, in a way, there are two processes in one, but we're certain the objective will be achieved.

Mrs. Élisabeth Brière: Thank you very much.

We also know that the first essential condition of judicial independence is that judges may not be removed on arbitrary grounds. That's the principle of immovability provided under paragraph 11(d) of the Canadian Charter of Rights and Freedoms. It's essential to maintaining public trust. It's also the antithesis of discretionary or arbitrary appointment.

How are the changes proposed in Bill C-9 consistent with the rights protected under paragraph 11(d) of the charter?

Mr. Patrick Xavier: Bill C-9 is absolutely consistent with that paragraph of the charter.

Paragraph 11(d) requires that judges have a right to a hearing where they may be heard or be represented by counsel, if they so wish, and where they may adduce evidence and have it considered. Review panels are specifically designed for that purpose. A judge has a plenary right of appeal. Once again, the appeal is not restricted in any way. It isn't an appeal solely on points of law; it's a plenary appeal. The same is true in the Supreme Court.

As I mentioned a little earlier, according to the Federal Court of Appeal's Bourbonnais decision, judges have a right to have their fees paid by the government solely for the purposes of the process.

Bill C-9 would ensure that is the case. That's provided in paragraph 146(1)(d), if I'm not mistaken. We are really ensuring that all rights under paragraph 11(d) of the charter respecting judicial independence are reflected in Bill C-9.

Mrs. Élisabeth Brière: I see.

Could you tell us a little about the consultations that were conducted on Bill C-9?

Mr. Patrick Xavier: Yes.

The consultation was done in several stages.

The department prepared a consultation document that was posted to the departmental website, and the general public had a chance to comment on it.

We officials also examined all the correspondence that the Minister of Justice had received from the public over the years regarding the judicial conduct process.

We consulted the Canadian Judicial Council, which will manage the process; the Superior Court Judges Association, which is the main representative of superior court judges; the Federation of Law Societies of Canada; the Council of Canadian Law Deans; and the Canadian Bar Association.

We consulted lawyers who have represented judges in previous disciplinary processes, lawyers who have adduced evidence against judges and lawyers appointed to inquiry committees.

We received submissions from the Barreau du Québec and the Canadian Association for Legal Ethics, which is an association of legal ethics professors.

Lastly, we consulted the provinces and territories.

So this consultation was quite exhaustive.

Bill C-9 truly reflects the concerns that we heard from all those groups. They focus mainly on the fact that there were no sanctions for minor misconduct, that the process for removing a judge for gross misconduct was too long and too costly and that it was impossible for the general public to take part in the process for determining whether a judge was guilty of misconduct.

Bill C-9 will therefore remedy all that.

● (1715)

Mrs. Élisabeth Brière: Thank you, Mr. Xavier.

You even answered my next question.

[*English*]

The Chair: Thank you, Madame Brière.

Now we'll go to Monsieur Fortin for two and a half minutes.

[*Translation*]

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

Mr. Xavier, you mentioned a large number of legal associations and experts among the organizations you consulted. You said you received a brief from the Barreau du Québec.

Am I to understand that you didn't consult the Barreau du Québec at the outset?

Mr. Patrick Xavier: We asked the Federation of Law Societies of Canada to forward our consultation document to all bar associations across the country. We expected the submissions from the federation would reflect those of all bar associations in Canada. However, we received a separate submission from the Barreau du Québec.

Mr. Rhéal Fortin: I see. So you didn't contact the Barreau du Québec, or you didn't send them a request.

Mr. Patrick Xavier: No. We went through the federation. We expected the federation to consult the various bar associations, including the Barreau du Québec.

Mr. Rhéal Fortin: I have another question for you.

Bill C-9 is a new version. We've been discussing the possibility of amending the process for a long time. Actually, Bill S-5 and Bill S-3 were previously introduced, but died on the Order Paper.

Would you please explain the main differences between Bill S-5, Bill S-3 and Bill C-9?

Mr. Patrick Xavier: There's not really any difference. They're exactly the same bill.

Mr. Rhéal Fortin: I see.

If my understanding is correct, no provision was made in any of those bills to compel a judge subject to a complaint to repay legal fees.

Mr. Patrick Xavier: No, those bills were identical to Bill C-9.

Mr. Rhéal Fortin: I understand that there's the matter of the Bourbonnais decision. I don't want to go back over that, but, apart from that decision, don't you think it would have been appropriate to ask certain justice department lawyers to examine all the cases and information from the Supreme Court and other courts? This seems to be an important issue in the public's mind.

Wouldn't it have been appropriate to consider the possibility of examining the case law?

Mr. Patrick Xavier: All the applicable case law was studied, and we feel that Bill C-9 reflects it. That's unfortunately all I can say on the subject.

Mr. Rhéal Fortin: You don't think it's possible to come to… I see my time is up.

Thank you, Mr. Xavier.

[*English*]

The Chair: Thank you, Monsieur Fortin.

Thank you to the witnesses.

I think Mr. Garrison has already ceded his time, so we'll conclude here.

I want to thank Ms. Dekker, Mr. Xavier and Ms. Othmer for coming today.

We will end this portion.

I have a couple of things for committee business. I want to let you know that the deadline for submitting amendments to Bill C-9 is scheduled on Thursday, December 1, so we have to establish a deadline to submit amendments. As per routine motions, there is about a 48-hour notice period required to submit amendments, if there are any. If we have that deadline as 6 p.m. on Monday, November 28, that should be fair.

Also, the supplementary estimates were tabled in the House today. As per our calendar, we would be able to have the minister appear on the matter on December 1. I will have the clerk coordinate with the minister and see if he's available. I'll let you guys know about that.

Barring any questions....

Yes, Mr. Anandasangaree.

● (1720)

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): We need to check the availability, so if you can give flexibility on the date....

The Chair: Sure.

We will adjourn. I'll see you next week.