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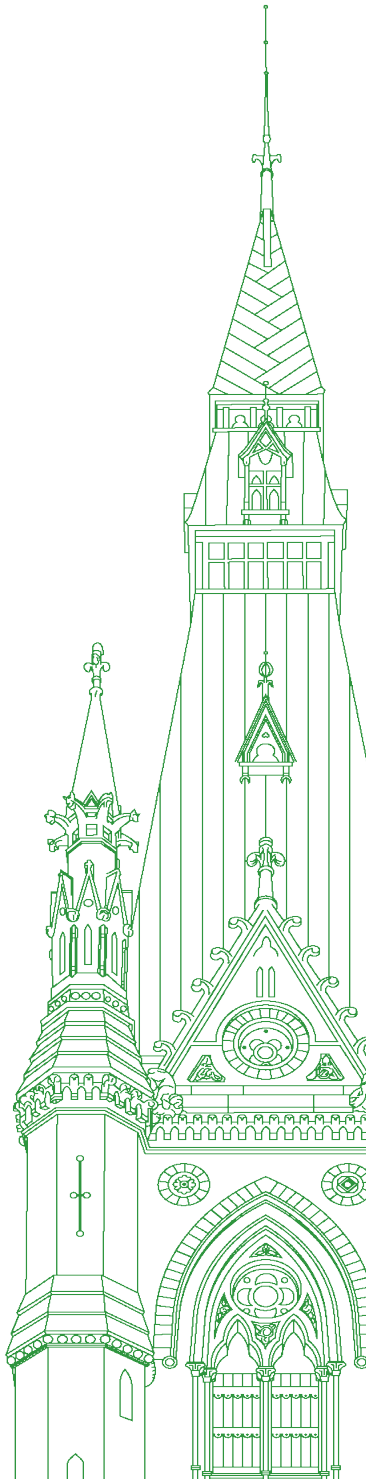

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Monday, November 21, 2022

● (1105)

[*English*]

The Vice-Chair (Hon. Rob Moore (Fundy Royal, CPC)): Good morning, everybody. I call this meeting to order. Welcome back.

Welcome to meeting number 38 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 some witnesses are appearing remotely.

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

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

There is interpretation for those on Zoom. You have the choice at the bottom of your screen of either floor, English or French audio. For those in the room, you can use the earpiece and select the desired channel.

I remind everyone that all comments should be addressed through the chair.

For members in the room, if you wish to speak, please your hand. For individuals on Zoom, please use the “raise hand” function. The clerk and I will manage the speaking order as well as we can, and we appreciate your patience and understanding in this regard.

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

I would like to welcome our witnesses for the first hour. Craig Scott, professor of law at Osgoode Hall Law School at York University, is here as an individual. From the Canadian Association for Legal Ethics, Professor Richard Devlin, professor of law, is appearing by way of video conference. From The Advocates' Society, Sheree Conlon, secretary, executive committee of the board of directors, is appearing by video conference.

We will move now to the opening comments. We will start here in the room, with Professor Scott.

Go ahead, please.

[*Translation*]

Mr. Craig Scott (Professor of Law, Osgoode Hall Law School, York University, As an Individual): Thank you, Mr. Chair.

Good morning, members of the committee.

Since I don't have a lot of time, I will goright to my findings, but I would be glad to elaborate on them or anything else during the question and answer portion.

[*English*]

Let me now begin by noting that my organizing theme is that Bill C-9 falls quite short when it comes to how transparency fits into the accountability of the judiciary in the face of reasonable concerns of misconduct.

The only decision made public under either the current or the new Bill C-9 system is the decision at the final stage: the report of what is now the panel of inquiry and will be one of the two kinds of hearing panels.

In this regard, my central concern for my remarks is how Bill C-9doesn't disturb the practice of the Canadian Judicial Council, the CJC, of hiding from view two other kinds of decisions and their accompanying reasons. Indeed, Bill C-9 actually increases the level of secrecy of these two kinds of decisions.

One kind of decision and set of reasons that are not made public in ordinary course are known as “reasons for referral of a complaint to a panel”. Under the current system, it's the vice-chair or the chair of the judicial conduct committee of the CJC who sends them on to the review panel.

Under Bill C-9, if that's going to continue, it would be the reviewing member who would be doing that. To give you a sense, in a recent CJC proceeding in which I was a complainant, this consisted of nine tightly reasoned single-spaced pages.

The second kind of decision that doesn't get published is known as the “report of the review panel”. In the above proceedings in which I was involved, that report was 13 double-spaced pages.

If they're not published, how is it that I know what's in them and how long they are? Forgive me: I might be going overboard, but this is where Kafka comes in.

Let me explain myself. When a review panel finds there's insufficient basis to send a complaint on to a full hearing panel—currently, to a panel of inquiry—the executive director of the CJC sends a letter to these complainants. It purports to give the gist of the review panel's reasonings. That letter can be well or poorly put together. It's not written by the review panel itself.

For the complainants, this is the point: The letter is the decision. That is all they have to go on. If they feel the reasoning in the letter does not stand up to some reasonableness standard, then they can seek judicial review in the Federal Court, only, of course, after having found a lawyer able to do it for the funds the complainants are able to scrape up for a judicial review.

Thus, it is only through citizen initiative in the form of a judicial review application to the Federal Court that the above sets of reasons can become public. This happens because the CJC is bound by the rules of judicial review procedure to disclose to the applicants all relevant documents, which then form part of something called "the certified tribunal record" of the court.

Even then, when the matter gets to the pleadings stages, the lawyers for the CJC effectively tell the applicants who were the complainants: "You know the reasons in the letter that you received and that were the basis for you to seek review? Forget those. That's not actually the decision. The review panel decision is the decision, and now that you've forced its disclosure, that is what you must now convince a judge is unreasonable."

So it is that complainants must go to court to challenge an unreasonable decision before they have access to what the CJC lawyers tell them is actually the decision. As I said, there's just a bit of Kafka there.

Nothing in Bill C-9 would change this situation. By analogy to the regular court system, it's as if Parliament and the CJC were keeping from prying public eyes the judgment of a motions judge—here, the reviewing member's reasons are the analogy—and the judgment of a trial judge—here, the review panel—with only the judgment of a court of appeal—here, the reduced or full hearing panel—being made public.

Open courts and published reasons are how we approach judges judging others. This of course includes cases where the impleaded person is partly or wholly successful. In the regular system, we don't fail to publish a decision because the defence prevailed, but somehow, when judges judge judges, it's only when we get to this third—in the new Bill C-9 system—appellate stage that we can see the reasons.

Consider what the situation means in the context of one of the big improvements made by Bill C-9, a really big improvement: the inclusion of a wider range of remedies that are available at the review panel stage in the new proposed section 102 of the Judges Act.

● (1110)

However, and along the line of my theme, because the review panel decision stays secret, the public will be little the wiser about exactly why no misconduct was found, if that turns out to be the case; why misconduct was found but characterized in a certain way; why it was of a certain gravity but that was not enough for it to go on to a full appeal hearing; or why a particular remedy was chosen over any of the others in the new section 102.

I'm getting towards the end.

With respect to review panel reasons, Bill C-9 goes on to make matters worse still. You may have heard testimony on why it's there. I find it hard to explain why it's there. Bill C-9 bars reduced hearing panels and full hearing panels from considering review panel decisions and reasons. It also bars the full hearing panel from considering the reasons of the reduced hearing panel. I don't see how that is justifiable.

Our judicial system—and, indeed, our entire approach to the rule of law—depends on the giving of reasons by the judiciary and the publication of those reasons, so the legal profession, public scholars and legislators can understand, apply critique and reform the law. As well, one key way in which judicial reasoning can be relied on to generally produce better results as you go up levels, is in each subsequent court having the benefit of the factual interpretations and legal analysis of preceding levels, which they can refer to, discuss and weave into their own judgments and reasoning in some integrated fashion.

With that, Mr. Chair, I will end, as I know I'm coming up to time. There are a number of interconnected arguments. I have arguments about how we should understand the administrative law of judging judges, and why this has undue secrecy built in for judges, but perhaps I can bring those out in the question period.

I also have a set of specific recommendations for amendments to new sections 97, 103, 111 and 118, and I would suggest adding two more new sections—161 and 162. They're in my written brief, which is not yet available and can't be circulated until it's fully translated. That will take place within a couple of days, hopefully.

Thank you.

The Vice-Chair (Hon. Rob Moore): Thank you, Professor Scott.

I should have said, "Welcome back." I remember when you were here on this side of the table, so welcome back. It's great to see you here again as a witness.

Next we will move to the Canadian Association for Legal Ethics and Professor Devlin, professor of law.

Professor Richard Devlin (Professor of Law, Dalhousie University, Canadian Association for Legal Ethics): Good morning, Mr. Chair. Thank you for inviting me to appear as a witness on Bill C-9.

My name is Richard Devlin and I'm a professor at Dalhousie law school in Halifax, Nova Scotia. I'm here as a member of the board of the Canadian Association for Legal Ethics. I served as its founding president and as chair of the board for several years. More particularly, I'm here because in the last couple of years I've edited two books, with scholars from around the world, on what might be appropriate for a complaints and discipline process for judges. Those two books are called *Regulating Judges* and *Disciplining Judges*.

There are three key insights that emerge from those two books.

The first is that the design of a complaints and discipline regime for judges is not just a technical project. It is an important act of statecraft that's about allocating power within our community. It requires us to think about the delicate relationship between the executive, the legislature, the judiciary and the general public. This is often phrased as the “who guards the guardians?” question.

The second key theme that comes out of those materials is another question, which is how we should guard the guardians.

This requires us to articulate key values or principles that should guide us in the design and implementation of a complaints and discipline system for judges. Traditionally, two key values have been identified, the first being independence and the second being accountability. However, our research indicates that there are at least seven other core values that need to be considered. The values in addition to independence and accountability are impartiality, fairness, transparency, representativeness, proportionality, reasoned justification and efficiency. Those are the core values against which we must measure Bill C-9.

The third key insight from our research is that the core purpose of a complaints and discipline process for judges is to promote public confidence in the administration of justice. Over the last two decades in Canada, there have been a number of high-profile cases that have amply demonstrated that the current regime has failed to enhance public confidence in the administration of justice. The purpose of Bill C-9 is to rebuild that confidence.

When you review Bill C-9 generally, there are a number of innovations that are very positive and that do a very good job of trying to balance these particular values or principles, but today I want to identify five core concerns that suggest that we haven't got the right balance of these principles. These are very significant problems that I hope you can be persuaded to address as you work through this legislation.

Our first concern is that not enough attention is paid to the rights of complainants, therefore we compromise the principles of fairness and transparency.

Our second concern is that there's insufficient lay representation in the process, therefore the values of impartiality, independence and representation are compromised.

Our third concern relates to reduced hearing panels. We suggest that the composition of the reduced hearing panels and the processes involved may in fact favour the impugned judge and therefore compromise the principles of impartiality, independence and representativeness.

Our fourth concern is that the remedies for misconduct are not sufficiently comprehensive. In particular, they do not include a power to suspend a judge. Therefore, the principles of transparency and proportionality are compromised.

Fifth and finally, our concern is with the annual reports. These reports are not adequately tailored to the needs of a modern democratic society. Therefore, we compromise the principles of transparency and accountability.

In the question and answer period, I'd be delighted to answer and elaborate on any of these points, but I want to conclude by emphasizing that not since 1971, more than five decades ago, has there been a statutory revision of the complaints and discipline process. The role of Canadian judges has changed profoundly in that time. Canadian democracy has changed significantly in that time. The expectations of the public have changed enormously in that time. It might well be another 50 years before there's another review of the process.

● (1115)

Therefore, Bill C-9 is a unique moment. The Canadian Association for Legal Ethics is delighted to try to help you make Canada develop one of the most comprehensive and persuasive complaints and discipline systems in the world.

I look forward to your questions. Thank you.

The Vice-Chair (Hon. Rob Moore): Thank you, Professor.

Finally, from The Advocates' Society, we have Sheree Conlon, executive committee of the board of directors.

Go ahead, for five minutes.

● (1120)

Ms. Sheree Conlon (Secretary, Executive Committee of the Board of Directors, The Advocates' Society): Thank you, Mr. Chair, for the opportunity to make submissions to the standing committee today regarding Bill C-9, an act to amend the Judges Act.

My name is Sheree Conlon, and I'm a partner at the law firm of Stewart McKelvey in Halifax, Nova Scotia. I am here representing The Advocates' Society.

The Advocates' Society is a national, not-for-profit association of litigation counsel, with approximately 5,500 members located across Canada. Part of The Advocates' Society's mission is to promote a fair and accessible justice system in Canada.

My submissions to you today will focus on one central point: The Advocates' Society is concerned that Bill C-9 does not allow for an adequate amount of court oversight of the CJC's decisions in its judicial conduct process. I will present to you a simple remedy to this concern that we believe will still achieve the government's laudable goals for this reform.

The Advocates' Society's written submission to the standing committee dated July 18, 2022, expands on the points I will make in my presentation today.

Overall, The Advocates' Society supports amending the Judges Act to reform the CJC's process for reviewing and addressing complaints made against federally appointed judges. We have seen that the current process is susceptible to delay and high costs. These inefficiencies diminish public confidence in the accountability of members of the federal judiciary for their conduct, and we agree they need to be corrected.

The Advocates' Society also agrees that one principal source of the delay and costs in the current process is that the parties can apply to the federal courts for judicial review at multiple points in the process. Parties can then avail themselves of several levels of appeals.

However, we submit that Bill C-9 overcorrects this problem by replacing the court review process with review mechanisms that are almost entirely internal to the Canadian Judicial Council. Under Bill C-9, parties can seek leave to appeal the decisions of the appeal panel only to the Supreme Court of Canada.

This is a concern, because there is no right of appeal; rather, an appeal is available only if the Supreme Court grants leave. The Supreme Court is not an error-correction court, and leave is granted only in cases of public importance. Historically it has granted leave in only about 8% of cases per year. This means there is no guarantee the Supreme Court will grant leave, even in a case in which the CJC's decision is wrong. In our respectful submission, all decision-makers can get it wrong sometimes. That is the purpose of appeal courts.

The Advocates' Society is concerned that Bill C-9 would create a legislative scheme in which the Canadian Judicial Council is the investigator, the decision-maker and the appellate authority with respect to allegations of judicial misconduct. External judicial oversight of the CJC's actions and decisions is all but eliminated.

The proposed process is concerning, because court oversight of administrative actions is fundamental to ensuring their legality and their fairness. This undermines security of tenure, which is a critical component of judicial independence.

The Advocates' Society suggests that there is a simple remedy to our concerns. We propose instead that the parties be provided with a right to appeal the CJC appeal panel's decision to the Federal Court of Appeal instead of the Supreme Court of Canada. Draft language is contained in our submission.

I must stress that we believe our proposed amendment would not reintroduce the delays and costs we see with the current process and which the government is rightly trying to fix. The Advocates' Society's proposal ensures that the CJC's final decision would be subject to appeal only directly to the Federal Court of Appeal. This would eliminate one layer of judicial review, the Federal Court, and eliminate judicial review of interlocutory decisions—which historically have been the primary cause of the delay and expense—while preserving a right of judicial review on the final decision of the CJC's internal process.

The Advocates' Society believes that the small change we propose to Bill C-9 strikes the balance between efficiency, public confidence in judicial accountability and fairness to the parties, all the while maintaining judicial independence.

Mr. Chair, I would be pleased to answer any questions from the standing committee arising from my submissions. Thank you.

● (1125)

The Vice-Chair (Hon. Rob Moore): Thank you. We will now move into our question and comment period.

We will begin with Larry Brock. These are six-minute question and answer time slots.

Mr. Larry Brock (Brantford—Brant, CPC): Thank you, Mr. Chair, and good morning, witnesses. I sincerely thank you for your participation in this important study.

I have a limited amount of time, so I will try to balance my questions among all three of you. I have three unique areas I want to discuss.

I want to start off with this proposition.

I'm reviewing a printed summary of Professor Devlin's statement to this committee, and I couldn't agree more with paragraph 3 of that statement: “The core purpose of a complaints/discipline process for judges is to promote public confidence in the administration of justice.”

Professor, you cited a number of cases over the last several decades that have shaken that public confidence to the core.

That is an area I pursued last week, when the Minister of Justice, David Lametti, appeared before this committee. I asked him a specific question: In his view, does he believe the objective of maintaining public confidence in the justice system is in line with the complainant's interest? Is there a balance? He emphatically stated that he did believe there is a unique balance that Bill C-9 puts forth.

I would like to hear from all three witnesses.

I'll start with you, Professor Devlin. What are your thoughts on Justice Lametti's commentary and how you would improve specifically the public confidence aspect of Bill C-9?

Prof. Richard Devlin: Thank you very much.

I will go directly to proposed new section 87 of the act. This is the only new section that explicitly addresses the rights of complainants. It says: “The Council shall establish policies respecting the notifying of complainants of any decisions made.” That's all that is given to complainants in the process. This is very weak. It's just notice of the decisions made. This means that once a complaint is filed, the complainant is shut out of the process. This raises fundamental questions around the fairness and transparency of the process and the requirement for reasoning justification.

We would suggest there are actually four improvements that could be made to the legislation that would give greater rights to the complainants and therefore promote public confidence.

First, the complainant should have a right to be informed about the progress of the complaint.

Second, they should be given reasons if their complaint is dismissed.

Third, if there are hearings or an appeal, they should have a right to participate.

Fourth, and finally, they should have a right to request reconsideration of a decision at any stage in the proceedings. This is particularly important if it's dismissed by the screening officer, the reviewing member of the CJC, or the reduced hearing panel.

With respect, I disagree with the minister that we are promoting public confidence, because we're failing to adequately consider the rights of complainants.

Mr. Larry Brock: Thank you. I will move on to Professor Scott.

Do you agree with the Minister of Justice's commentary with respect to that right balance? Whether you do or don't, please explain why.

In under three minutes, I also want to give you the opportunity to expand on the recommendations you feel could enhance Bill C-9.

Mr. Craig Scott: Thank you very much.

Ultimately, I don't feel the balance is there. I think the points that have been made by both of the other witnesses are good examples of that.

What I would add to the picture is this: There's another feature of the current practice of the CJC that feeds into this imbalance. Complainants are allowed only to send in their complaint. They are told, in a letter, that they can keep sending further information if they have it, but into a void. They have no idea what stage the process is at, etc.

At the end of the process I was involved in.... Something that follows from the current rules of the CJC, I think, is that complainants are not allowed to make submissions. That is, they are not allowed to connect facts to arguments in terms of what they see to be the standards in play. I tried it, just to see, and was told there was no duty to consider the submissions. The vice-chair who had carriage of the case at that stage, read them, but emphasized he had no duty to do so.

I sent them after the review panel had decided internally. I didn't know that, because I had no idea what stage the review panel was at. I'm guessing that the vice-chair, whose hands it was back in, realized there was a bit of an imbalance, because something else happened: A third party non-complainant submitted an argumentative brief to the Council, which was passed on to the review panel. Complainants are not allowed to do it. A third party who had nothing to do with the case was allowed to do so. I think he probably realized that, at minimum, he had to read it to say that it didn't make any difference to what he was going to do.

● (1130)

Mr. Larry Brock: Professor Scott, I have just under 30 seconds. Of the recommendations that you wanted to talk about at some point to this committee, can you highlight one that's most important—in 20 seconds or less?

Mr. Craig Scott: In 20 seconds, I would say this. For both the reasons for referral and the review panel report, there should be a duty to publish. The standards should be that the council “shall make public the reviewing member’s written reasons for referral”, and, in a separate clause, make public the review panel report “to the same extent as the council would be obligated to disclose them in order for them to form part of the certified tribunal record in the event of judicial review proceedings”.

The point is that we can get these things. We just have to go to court. Why hold them back and force citizens to pay money to see things they can get through a judicial process? Whatever the standards are that you can maybe hold back some of the stuff—for reasons of anonymity, privacy or whatever—would still apply, but whatever you'd have to give up, were there JR, you'd have to give up proactively.

Mr. Larry Brock: Thank you, Professor Scott, and thank you to all the witnesses. I'm out of time.

Thank you, Chair.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Brock.

Ms. Dhillon, you have six minutes....

Oh, okay. It's Mr. Naqvi.

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

I'll pick up on Mr. Brock's line of questioning, and I'll start with Professor Devlin.

These are unique proceedings when it comes to looking at the conduct of our judiciary. All witnesses acknowledge that fact. They obviously go to the core of ensuring and maintaining, if not in fact enhancing, I would argue, confidence in our independent judiciary, so a fair bit of care and balance needs to be accomplished.

Professor Devlin, you feel that Bill C-9 does not accomplish that balance. Let me give you an opportunity to explain to us how that balance can be accomplished in such a way that we do not undermine the independent nature of our judicial system and the independent nature of our judges in particular, as individuals.

Prof. Richard Devlin: You're absolutely right that these are unique proceedings. You're absolutely right that judicial independence is vital. However, judicial independence is part of a larger picture of promoting public confidence in the administration of justice, not just public confidence in the independence of the judiciary.

Judicial independence is vitally important, but as I said, there are several other key values, which I've tried to identify for you, beyond independence. Again, they are accountability, they are the impartiality of this process and they are the fairness of this process. You can't have public confidence if there's no real transparency. You can't have real public confidence if there's not [*Technical difficulty—Editor*]

The Vice-Chair (Hon. Rob Moore): I'm sorry, Mr. Devlin. We can't hear you.

Mr. Naqvi, do you want to move on to another—

Mr. Yasir Naqvi: Can you pause my time for a second?

The Vice-Chair (Hon. Rob Moore): Sure.

Mr. Yasir Naqvi: I think there are some serious issues around the quality of the sound and the volume as well. I don't know if there's a way we can rectify that before I continue with my line of questioning.

The Vice-Chair (Hon. Rob Moore): I know the clerk was working on that before we started. I guess it was a little sketchy.

Do you want to try to work with Mr. Devlin?

The Clerk of the Committee (Mr. Jean-François Lafleur): Yes, I will. This is the best we can do so far, Mr. Chair.

The Vice-Chair (Hon. Rob Moore): Okay.

Mr. Naqvi, do you want to continue your questioning?

Mr. Yasir Naqvi: Mr. Devlin, perhaps you can try talking a bit to see if we can hear you.

We can't hear him. I will have to continue.

Mr. Scott, let me pose the same question to you around balance. You also felt that balance was not reached. Very quickly, do you have a suggestion or two as to how one can accomplish that balance while ensuring that we are not only maintaining but also enhancing the independence of our judiciary and judges?

● (1135)

Mr. Craig Scott: Exactly.

I think my main point would be that I don't see anything about any of the proposals so far that compromises the independence of the judiciary. That would be my first point.

What they do is enhance the other kinds of values that are crucial. They include reminding the judiciary that confidence does not come from overly stacked processes and from an undue degree of non-transparency. That actually feeds the lack of confidence that undermines the very basis of the independence of the judiciary. Embracing more secrecy than is healthy, cutting off the relevance of lower decisions by referrals of reasons or review panel decisions, allowing the judge a second kick at the can to have a *de novo* review panel and calling it a reduced hearing panel.... Clearly, all these things are safeguards of a certain sort for judges, but on their own without some of what we're suggesting, that produces serious unbalance.

One of the final points I would make is that two things are going on here. Both the bill and the CJC are underplaying something called the open court principle, which applies to tribunals as well, and overplaying the independence of the judiciary principle. They're also doing another move, which is to say that the CJC is just an administrative body and is no different from any other professional regulator. Therefore, with regard to anything that's involved in keeping decisions quiet before there's a tribunal decision, what's the harm? That happens in other tribunal contexts.

The CJC is not just any regulator. It's responsible for the third and most important branch of government when it comes to how individuals are affected by judgments of the state.

Mr. Yasir Naqvi: Thank you. It's just that I'm very limited in my time.

The Vice-Chair (Hon. Rob Moore): Mr. Naqvi, we'll pause your time for one second.

I guess, Mr. Devlin, your microphone was deactivated. Do you want to try it again?

No, we're still not hearing you. I'm told your microphone was deactivated.

Go ahead, Mr. Naqvi.

Mr. Yasir Naqvi: I want to pick on one feature that is proposed that I find unique and interesting, which is including lay persons on review committees. I'll start with Ms. Conlon, to get her views on this. I found that very interesting, because we rely on lay persons when we're appointing judges as part of the JAAC process, the judicial appointments advisory committee process, and to now to see lay persons involved in the review of judicial conduct or misconduct is interesting.

Ms. Conlon, what are your thoughts on that? Do you see benefits to adding lay individuals in this review process?

Ms. Sheree Conlon: Yes, we do see a benefit to adding lay witnesses who are involved in the entire process. It is an improvement from the perspective of the public confidence in the process. As we've indicated, The Advocates' Society supports all of the amendments, including the addition of lay-witness participation, with the sole exception of the external judicial review process.

Mr. Yasir Naqvi: Great. Thank you. I think my time is up.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Naqvi.

Now, for six minutes, we have Mr. Fortin.

[*Translation*]

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

Thank you to the witnesses for being here and for contributing to our study on this important bill.

I want to discuss the sanctions that are available. As we all know, cases of misconduct by members of the legislature make headlines, as do the council's decisions, and that significantly affects the public's trust in the administration of the justice system.

A certain number of benefits are granted. Take, for example, Judge Girouard's case, which has captured media attention in recent years. A number of legal proceedings were initiated in order to buy time. Judge Girouard ended up stepping down, but he walked away with a number of financial benefits, including his salary, his pension and coverage of his legal costs.

Mr. Scott, do you think changes could be made so that a judge who is found guilty faces financial sanctions or penalties? For example, perhaps the judge could be made to pay the legal costs, at least some of them.

● (1140)

Mr. Craig Scott: Mr. Fortin, I think new section 102 could be amended to allow the review panel to impose salary-related penalties, such as suspending a judge's pay.

Three or four years ago, in Ontario, Judge Zabel wore a MAGA hat after Trump was elected, and his penalty was a two-month reduction in pay.

Mr. Rhéal Fortin: What type of hat was it?

Mr. Craig Scott: It was a hat emblazoned with “MAGA”, which is the slogan “Make America Great Again” abbreviated.

Mr. Rhéal Fortin: I see.

Mr. Craig Scott: That's a possibility in Ontario, but I can't say with certainty that it is in this case. It may be possible under paragraphs 102(f) and 102(g), but I'm not sure.

As for legal fees, the government has to pay them up to a certain point, but perhaps not all of them. I'm not exactly sure where that line is.

● (1145)

Mr. Rhéal Fortin: Where is the line? That is indeed the question. Perhaps it should be measured using percentages.

I gather from your remarks that financial penalties would be something worth considering.

Mr. Craig Scott: Yes, that would be a good idea.

There aren't any now, so I imagine there's been some pushback to the idea from judges.

Mr. Rhéal Fortin: What impact would such provisions have on judicial independence, in your view?

Isn't there an argument to be made that financial penalties could undermine judicial independence or the credibility of a judge returning to the bench after having faced a financial penalty?

Mr. Craig Scott: Yes, there is an impact. That may be why there was pushback. One of the elements underlying judicial independence is security of tenure.

Imposing a reduction in pay is perhaps an option, but it may be easier not to change the provision. The fact that a jurisdiction in Canada—Ontario—has done it shows that it is possible.

Mr. Rhéal Fortin: You said it's been done in Ontario. How long has Ontario had the measure in place?

Also, has the measure been challenged?

Mr. Craig Scott: That, I don't know. I'm sorry.

Mr. Rhéal Fortin: Could you answer the same question, Ms. Conlon, in 30 seconds?

Should we consider including financial penalties in Bill C-9?

[*English*]

Ms. Sheree Conlon: I'm not sure if Mr. Devlin's microphone is working.

[*Translation*]

Mr. Rhéal Fortin: Where do you stand on the matter, Ms. Conlon?

You have just a few seconds.

[*English*]

The Vice-Chair (Hon. Rob Moore): You have only about five seconds left, so maybe we could have a very quick answer, Ms. Conlon.

Ms. Sheree Conlon: The Advocates' Society would not recommend any changes to include financial sanctions in the legislation.

The Vice-Chair (Hon. Rob Moore): Thank you.

Thank you, Mr. Fortin.

Mr. Garrison, go ahead for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair, and I'm going to make the appeal once again that we try to figure out what's wrong with this room, because we have periodic problems. All kinds of different people who can be heard quite well on Zoom can't be heard in the room, so there's a recurring technical problem, not with people's equipment but with this room. I just would ask that we look into that.

On the topic today, I'd like to ask both Professor Scott and Professor Devlin, if we can get him back, about the proposal from Ms. Conlon that we change the appeal process so it's an appeal to the appeals court rather than to the Supreme Court of Canada. It seems to me that the reasoning is correct, that one effective appeal would not add greatly to the process, and that the likelihood of the Supreme Court's hearing one of these cases is very small.

Professor Scott.

Mr. Craig Scott: Very quickly, I think it's a very sound recommendation. As I understand it, it would replace the Supreme Court. It stops at the Federal Court of Appeal. It's possible that could be challenged for not having a further level, but the point is that the Supreme Court doesn't give leave except in a minor number of cases. Her reasoning is absolutely spot on.

I would add one thing. Judicial review is ousted for the judge, but I hope I haven't missed something in the amended act that would oust judicial review for complainants, because at the moment the only way complainants can really understand what's going on, as I described to you, is by getting hold of what the decisions were when a case was dismissed or dealt with and not completely dismissed.

We're talking only about the judge here—the judge going up that stream—not about the complainants, I hope.

Mr. Randall Garrison: You've raised a bit of doubt for me on that point.

Maybe we can go back to Ms. Conlon to get some clarification on that point.

Ms. Sheree Conlon: First of all, my understanding is that if the legislation were redrafted as we are proposing, which would be to have a right of appeal to the Federal Court of Appeal, there would still be an opportunity for leave to appeal to the Supreme Court of Canada, at least based on our proposed amendment.

On the second question, regarding who it applies to, my reading of proposed new section 137 of the act is that all rights of appeal, including judicial review, would be excluded by the act, and the final right of appeal from the appeal decision would be to seek leave to the Supreme Court of Canada.

I wouldn't see anything in the bill that would provide any other right of judicial review to anyone involved in the process, but that's nothing we examined specifically. That's my read of the proposed legislation.

The Vice-Chair (Hon. Rob Moore): Mr. Garrison, maybe we'll check in with Mr. Devlin.

Do you want to see if we can hear you, Mr. Devlin? We don't want to miss the benefit of your participation. No, we still can't hear you.

Mr. Garrison, I know they're working on it, but, for whatever reason, we're not getting any audio from Mr. Devlin. I'll check in once in a while in between questions, but in the meantime I would just focus your questions on the two witnesses we can hear.

Go ahead, Mr. Garrison.

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

I'll go back to Ms. Conlon. Do you have any comment on the two proposals that Professor Scott put forward on requiring the publishing of reasons for the referral and the report of the review panel?

● (1150)

Ms. Sheree Conlon: No, we don't have any comment beyond what's already contained in our submissions. As I indicated, The Advocates' Society supports the entirety of Bill C-9, including the restrictions on reasonings.

The public aspect and the involvement of lay participants at the hearing panel, we think addresses some of the concern in terms of public confidence. Beyond that, we don't have any recommended changes to the proposed legislation.

Mr. Randall Garrison: [*Technical difficulty—Editor*] Professor Scott.

I'm not sure how much time I have left.

The Vice-Chair (Hon. Rob Moore): You have about two minutes.

Mr. Randall Garrison: Professor Scott, go ahead.

Mr. Craig Scott: I double-checked the structure. It's definitely.... What we're talking about are a judge and possibly the pleading officer in terms of going up out of the system.

The right of judicial review is not taken away from complainants. It already exists as part of the broader system. It certainly is not ousted by Bill C-9. If anybody thought it was, then you put in a clause saying that it's not ousted. Otherwise, complainants are made even worse off than ever.

Judicial review is a separate thing from an appeal. When it usually happens is when a matter is dismissed. The reasons do not appear adequate in the letters that complainants receive, and they want to challenge that. That currently happens rarely, but it's possible. That isn't touched by this legislation. I hope, again. I'm looking at Mr. Anandasangaree.

The other thing is that the lay point is extremely important. It also goes to the second kick at the can. The judge gets to say that if the review panel doesn't like it, then within 30 days they want a reduced full hearing. Part of that is they get to swap out a lay person for a lawyer. The lay person's role is there, but then can be stripped out at the instance of the judge.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Garrison.

Now we're moving to five-minute rounds, and we'll start with Mr. Caputo.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Mr. Chair. I appreciate everybody's being here. This is a really interesting topic.

I open this up to all of our witnesses.

Through you, Mr. Chair, I was speaking to Professor Scott earlier, and we were talking about transparency. Throughout this process I've been thinking about it, as in, what happens on the provincial level with law societies when a lawyer is getting sanctioned? I'm mindful of the fact that we are federal and these are provincial, but certainly an analogy can be drawn.

I believe that in British Columbia—and likely in most jurisdictions—when a complaint is made and that complaint is deemed not to be frivolous or spurious, then that complaint is automatically made public.

Professor Scott, and any of the other witnesses, can you comment on Bill C-9 and the analogy, or lack there of, in this legislation, to that transparency?

Mr. Craig Scott: On the specific example of the complaint being made public, it is not made public by the CJC. However, the CJC current rules, the current act, and this new revised act, don't prohibit complainants from making it public. It's not part of the system to make it public. I'll leave it at that.

The other aspect I'm particularly concerned about is what is then done with the complaint, which is also not made public. That's my concern.

Mr. Frank Caputo: Right. Before I hear from the other witnesses on this point, may I ask you a follow-up?

Is that a concern to you when it comes to transparency? I'm mindful of the fact that you said a complainant can make it public. Anybody can make anything public, theoretically, right? However, coming through the official channel and whether a decision is being released, does that concern you when it comes to transparency?

Mr. Craig Scott: Yes, it does.

However, it's less about the complaint not being made public than how it's handled. The fact that the only way you can make public the reasons for referral or the review panel report is by going to court with a judicial review application has things backwards. It says that the public has a right to this, but you have to go through these extra steps and pay money to do it. Why not do it proactively?

Mr. Frank Caputo: Yes, and that's part of the transparency.

If I understand your point, then, this is a small part of a bigger problem when it comes to transparency.

● (1155)

Mr. Craig Scott: Yes.

Mr. Frank Caputo: Thank you.

I'm not sure whether Ms. Conlon wants to weigh in on this, and do we have our other witness back, Professor Devlin?

Ms. Sheree Conlon: I can weigh in simply from the perspective of the law society.

I can speak to the Nova Scotia law society, and Bill C-9 is actually quite consistent in that complaints that are filed are not made public. It's only when the matter is referred for a hearing and charges are laid that it becomes public. Everything up to that level, from a lawyer's perspective and the complainant's perspective, is kept private. I would see Bill C-9 as being consistent with that process.

Mr. Frank Caputo: That's interesting.

In British Columbia, I believe, once the complaint is found to be non-frivolous, then it is made public, but my understanding is that Bill C-9 wouldn't make it public at that point. I may be mistaken.

Ms. Sheree Conlon: Just to clarify, it obviously varies by jurisdiction, but in Nova Scotia it depends on whether it gives rise to professional misconduct or professional incompetence and charges are laid. At that point, it becomes public.

There can be breaches that from an ethical perspective do not give rise to professional misconduct or professional incompetence. Those are not made public, including the disposition.

That is why I said that I feel that Bill C-9 is consistent with that approach, because a similar approach is being taken.

Mr. Frank Caputo: Thank you.

Professor Devlin, do you have any thoughts on that?

Prof. Richard Devlin: Yes, perhaps. Can people hear me?

An hon. member: Yes.

Prof. Richard Devlin: Thank you for that. I apologize for the technology problems. I'm not sure it's my fault.

Some hon. members: Oh, oh!

Prof. Richard Devlin: I agree with Ms. Conlon on her description of Nova Scotia.

I'm not sure the analogy to the regulation of judges is the appropriate analogy. The function of law societies is to promote the public interest in the practice of law. Just because they don't necessarily make their processes transparent is not necessarily the reason the CJC should make its processes transparent.

Again, if we're trying to think about the larger values we're trying to promote, there is also significant public dissatisfaction and a lack of public confidence in how law societies regulate, so I'm not sure an awful lot of light is captured by looking to what law societies do in this regard.

Could I take a quick second to respond to the previous question? It was around the judicial review question.

Mr. Frank Caputo: You have 30 seconds. I'm fine with your taking that time.

Thank you.

Prof. Richard Devlin: I would simply say that we agree with The Advocates' Society that appeal to the Federal Court of Appeal would be a good move.

The only clarification I would make, though, is that there's a nuance in this. If you look carefully at proposed subsection 146(2), which deals with the fees that are paid, it says:

> no payments to lawyers representing judges are to be made in respect of any judicial review of any decision made under this Division

This seems to acknowledge that perhaps there in fact could still be a judicial review process. The legislation tries to exclude the possibility of judicial review. I think it is also implicitly acknowledging that it could still happen through this process. Maybe, given the Federal Court of Appeal's decisions in recent years, it's saying that the Canadian Judicial Council cannot exclude judicial review.

That is a nuance. However, basically we are in support of the position advanced by The Advocates' Society. I'll stop there.

The Vice-Chair (Hon. Rob Moore): Okay.

Finally, we have Madam Diab.

Ms. Lena Metlege Diab (Halifax West, Lib.): Thank you very much, Mr. Chair.

It's nice to see you, Ms. Conlon and Professor Devlin.

Two out of three witnesses on this panel are from my home province—

Mr. Craig Scott: Also, I was born in Windsor, Nova Scotia, in the same hospital as Scott Brison and Geoff Regan.

Ms. Lena Metlege Diab: You were born in Windsor? Well, a hundred per cent: This could not be a better morning for me.

Welcome.

Professor Devlin, I'm glad the audio is working for you. You seem to be a bit of a celebrity here. A number of the panellists and people in the room here have said that you taught them. I know you started at Dalhousie the year before I left. It's nice to see you.

I want to go back to a really simple question. Maybe I'll start with you, Ms. Conlon.

What is it that the government is trying to address by bringing in Bill C-9?

I hear that you pretty much support the recommendations, with the exception of the one issue of having it go to Federal Court. Can you take me back to what it is, in your opinion, that we are trying to address? Is there anything else? I suppose you're limited in your testimony because you've only looked at it so far, but is there anything else you would like to share with us for our benefit in our review?

● (1200)

Ms. Sheree Conlon: We see two fundamental objectives. One is increasing public confidence in the judiciary, and the other—and there can be tension between the first and second—is maintaining the independence of the judiciary, particularly security of tenure. That is why The Advocates' Society thinks this legislation strikes the right balance between the two. It does a number of things. It streamlines the process. It reduces time and cost, as well as abuses like those that occurred in the past. It increases lay participation.

Our only concern—this goes to security of tenure for judges, as well as public confidence in the process—is the external judicial oversight process. Otherwise, in practical reality, what we have is a piece of legislation that allows the entire process to be conducted internally by the CJC, without external judicial oversight.

I understand the argument about the appeal panel within the CJC being composed of judges sitting as an appeal court. However, they are performing an administrative function pursuant to the act, which is different from the judicial function in an appeal. We would propose that this function should be exercised by the Federal Court of Appeal.

As I indicated, the concern regarding both public confidence and security of tenure is over adequate external judicial oversight. We are concerned that this is not accomplished by the current piece of legislation, because in the vast majority of cases it is likely the Supreme Court of Canada will deny leave, as it does not meet the public importance test set out by the Supreme Court of Canada. There will be little to no testing by way of an appeal.

Those are my comments.

Ms. Lena Metlege Diab: Thank you, Ms. Conlon.

Mr. Scott, I like how you described it as “judging judges”. Again, we're talking about federally appointed judges here.

I'm not sure which of you has practised law in terms of going to court. My question is this: What are the complaints that come against federally appointed judges? Is it the fact that complainants...perhaps they don't like the decision, or does it go more to societal issues and so on?

I can remember, when I started—when I articled, back in the late eighties and early nineties—my goodness, most of them were male judges. I tell you, I heard courtroom horror stories from females.

I don't know whether any of you can comment on that. I would be interested to hear that. I don't know who to ask.

Mr. Craig Scott: I can say something very briefly. I think Ms. Conlon probably has more direct experience.

It runs the gamut. The CJC sees an awful lot of complaints that get screened out, because people don't like what a judge decided, and they throw into it a bit of the judge's manner, tone or whatever—that kind of stuff. There is a distinct need for a screening mechanism, because things that are not in this purview come up a lot in the judicial councils.

Beyond that, it can be the individual conduct of judges—sexual misconduct or whatever, where there's a victim in a general public interest sense, not just a complainant. There can be interference in lobbying, which occurred recently with one judge, I believe, but the review panel did not agree this was the correct characterization. There's a whole range of things that can throw the integrity of the judiciary into doubt.

Hon. Rob Moore: Thank you, Madame Diab, and thank you to all our witnesses. It's unfortunate that we had some technical difficulties, but I think everyone would agree we heard some important and thoughtful testimony.

We are going to suspend for two minutes. We have another panel of witnesses to set up. We will get started as quickly as possible.

Thank you to all our witnesses.

● (1200)

_____(Pause)_____

● (1210)

The Vice-Chair (Hon. Rob Moore): We'll get started for our second panel.

I should mention, although you're probably all aware, that we are going to have a vote. I'm told that the bells will start at 12:38 p.m., so we could probably meet until 12:45 p.m. or so. We'll wrap up in time for people to get to the vote.

We have here today, from the Office of the Commissioner for Federal Judicial Affairs, Marc Giroux, commissioner; and from the Canadian Judicial Council, Jacqueline Corado, senior counsel.

We will begin with you, Commissioner Giroux, for your five-minute opening statement.

[*Translation*]

Mr. Marc Giroux (Commissioner, Office of the Commissioner for Federal Judicial Affairs): Thank you, Mr. Chair.

[*English*]

I'm very pleased and honoured to be here today. I'm joined by Jacqueline Corado, senior counsel in the secretariat of the Canadian Judicial Council.

From the outset, allow me to say that the Office of the Commissioner for Federal Judicial Affairs, the Canadian Judicial Council and the Canadian Superior Courts Judges Association are pleased that this judicial conduct reform bill is making its way through Parliament and is being studied by your committee. We all look forward to its receiving royal assent.

You will already know that the council and the association have worked with Justice in order to bring this bill to fruition. In our opinion, Bill C-9 will provide for much-needed efficiency in the judicial conduct process and will reinforce public confidence in the regime.

[*Translation*]

With respect to the Office of the Commissioner for Federal Judicial Affairs, it was created under the Judges Act and is independent of the Department of Justice, and its mission is to safeguard the independence of the judiciary.

Among other things, we administer the Judges Act on behalf of the Minister of Justice, administer the appointments process for the Supreme Court of Canada as well as for superior courts across the country, publish information relevant to the judiciary such as statistics on judicial expenses and diversity on the bench, and provide other services. We provide services to approximately 1,200 federally appointed judges.

The Judges Act also provides for the office of the commissioner to provide corporate services to the Canadian Judicial Council. Such services include obtaining necessary funding from the Department of Finance and the Treasury Board for the council's operations, for its needs with respect to investigations into judicial conduct, as well as for the legal costs of judges who are the subject of a complaint.

[*English*]

In accordance with the Judges Act, the commissioner must also provide council with the necessary personnel for its operations and its secretariat. The secretariat includes a small team of about 10 employees, ordinarily led by an executive director. At the current time, in the absence of an executive director, I as commissioner am performing those duties myself.

Ms. Corado's role as senior counsel in the secretariat is focused on the judicial conduct process. She or I will be pleased to provide answers to your questions later.

Mr. Chair, before I turn it over to Ms. Corado, allow me to make a few observations about the Canadian Judicial Council.

[*Translation*]

The council is chaired by the Chief Justice of Canada and is composed of all chief justices and associate chief justices in the country, that is, those of the courts of appeal and superior trial courts. At present, there are 44 such positions of federally appointed chief justices and associate chief justices.

Under section 60 of the Judges Act, the council's mandate is to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts. As you know, the main functions of the council are focused on judicial conduct and judicial education. That being said, the council has several committees working on various topics.

● (1215)

[*English*]

Over the past two years, the council has been active on a variety of fronts, including, for example, ensuring court services during the COVID pandemic through, amongst other things, the action committee on court operations in response to COVID-19, co-chaired by the chief justice and the Minister of Justice. The council has signed MOUs with the government on judicial education and the council's governance, has [*Technical difficulty—Editor*] self-represented litigants, and has ensured more communications and publications in order to increase the transparency of its work.

One last example of the council's recent work is the new and revised ethical principles for judges that the council adopted and has published on its website. These revised principles are founded in the concepts of integrity, independence, equality, diligence and impartiality. They recognize that ethical considerations evolve and need to keep pace with society's expectations.

Mr. Chair, I feel this may be a good segue to pass it over to Ms. Corado, if you agree.

Ms. Jacqueline Corado (Senior Counsel, Canadian Judicial Council): Thank you, Commissioner, and thank you again, honourable members of Parliament, for your invitation to speak on Bill C-9.

This is something the Canadian Judicial Council has indeed been looking forward to. You will know that the Chief Justice of Canada, as chair of the council, has spoken publicly on a few occasions on the need to bring this reform in order to bring more efficiency and transparency to the judicial conduct process for the benefit of all Canadians.

As already indicated, the council has also worked on the proposed reform with the Department of Justice and the Canadian Superior Courts Judges Association. We look forward to the adoption of Bill C-9.

As you know, section 99 of the Constitution Act, 1867, provides for the security of tenure of judges, which is a key element of judicial independence. A judge of a superior court can be removed from office only by the Governor General on address of the Senate and House of Commons.

Judicial independence means that judges must be free to decide independently from any form of direct or indirect coercion. However, judicial independence does not require that the conduct of judges be immune from inquiry. On the contrary, as stated by section 99 of the Constitution Act, 1867, a superior court judge shall remain in office “during good behaviour”. Therefore, an appropriate system for the review of judicial conduct is crucial to maintain public confidence in the judiciary.

It is from this standpoint that the Canadian Judicial Council was created.

The council is the only body mandated to determine when the obligation of good behaviour under section 99 of the Constitution has been violated, as well as which type of misconduct is serious enough to merit the removal of a judge.

[*Translation*]

Of course, not all complaints warrant a recommendation fo removal from the bench. In fact, the vast majority of complaints received by the council either do not fall under its authority or have no basis—often because they are related not to judicial conduct, but to the judge's decision or because they are frivolous.

That brings me to the current process and how Bill C-9 would improve it.

[*English*]

Currently, a full judicial conduct review process is composed of five stages within council. The first two stages have been qualified by the courts as a screening stage. The third stage of the process is a review panel that will decide whether an inquiry panel needs to be created, if the complaint is serious enough to merit the removal of a judge.

Under Bill C-9, the review panel will also have other tools. It will be able to impose other types of remedy for misconduct, such as private or public apologies, counselling or continuing education for the complaints that fall short of removal.

The fourth level of the process is an inquiry panel that makes findings of fact and may recommend the removal of the judge. If the inquiry panel recommends removal, then we move to the last stage of process, where a minimum of 17 members of council must consider the inquiry report and recommendation for removal.

Under Bill C-9, if a review panel refers the complaint to a hearing panel, and if the hearing panel recommends removal, the judge will be able to appeal that decision within the council. Bill C-9 provides for this appeal mechanism so that the council will deal with any appeal application in a more expeditious manner and as the appropriate authority and guardian of judicial conduct.

One obvious improvement that Bill C-9 brings is efficiency of the whole process. Over the past years, we have witnessed how the current process may allow for lengthy delays due to multiple judicial reviews.

Overall, we agree that Bill C-9 aims to strike the right balance of fairness for both judges and complainants in order to maintain public confidence in the conduct review process. We also agree that it aims to strike the right balance between accountability and judicial independence.

[*Translation*]

The council hopes that Bill C-9 will be passed without delay. We believe these changes will have a significant and positive impact on the judicial conduct process, which will benefit all Canadians.

[*English*]

We thank you for the opportunity to express the council's views and for your excellent work.

● (1220)

The Vice-Chair (Hon. Rob Moore): Thank you, both, for your testimony.

Now we'll move into the question and answer period. These are six-minute rounds, beginning with Mr. Van Popta.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Chair, and thank you, witnesses, for being here. This is a very important study. We're studying judges judging judges.

At this committee we've heard testimony on previous studies, one on the victims of crime and another on the defence of extreme intoxication. We are hearing from witnesses who feel the justice system isn't very just to them.

We heard one executive director of an abused women's centre say that if this defence of extreme intoxication becomes permanent, as women, they receive the message loud and clear that they are not safe in Canada. Now, whether or not that position is justified, it is a commonly held understanding or perception of the justice system.

I'm moving on to the functionality of Bill C-9 and the functionality of the Canadian judicial system.

There is the case of Quebec Superior Court Justice Michel Girouard, who is fighting the Canadian Judicial Council's recommendation that he be removed. It went through appeal and appeal and appeal. It's dragged on for years. Again, this puts the Canadian judicial system in a bad light in the eyes of the public.

This is for you, Ms. Corado.

How does Bill C-9 improve the public perception of how justice is administered in Canada?

Ms. Jacqueline Corado: With the case of Girouard, now it's done. He has resigned. He lost the application for appeal to the Supreme Court, but it was indeed a case that dragged on. There were multiple judicial reviews. This created costs and delays. This is what Bill C-9 aims to correct, that no more judicial reviews of this kind will drag on forever.

Right now the process, and what was done in Girouard, is that every decision of council is brought to the Federal Court for judicial review. That creates a very long delay.

With Bill C-9, there's going to be an appeal mechanism. There's a part of a clause that doesn't allow for those judicial reviews anymore. In that context, it provides the balance of procedural fairness for the judge to contest a decision of council. It also provides for council to streamline.... I think Minister Lametti gave a good example: that the process keeps going up instead of going sideways, with multiple judicial reviews that create undue delays.

Mr. Tako Van Popta: Thank you.

An earlier witness today, Ms. Conlon from The Advocates' Society, on the one hand is applauding Bill C-9, saying it is definitely an improvement, but on the other hand says that building in these efficiencies of no appeals or only internal appeals was an overreaction. Their organization is recommending an amendment to Bill C-9 to include the ability over the right to appeal to the Federal Court of Appeal, not to the trial court but to the Court of Appeal.

What are your comments on that? Would that be an improvement that we should consider?

That's for either one of you.

Mr. Marc Giroux: Perhaps I can start, if you'll allow me. I'd be quite happy to bring any further information.

The Canadian Judicial Council is made up of chief justices, associate chief justices. When a matter comes before a full hearing panel, it will have two of those members on the panel. It will have a member of the association...or nominated, or at least recommended by the association as well. It will have a lay member, and it will have a lawyer who has been nominated by the Minister of Justice.

In light of the makeup of that panel, we are of the view that the appropriate body to review such a decision—a decision of the Canadian Judicial Council and that particular hearing panel—would be the Supreme Court of Canada.

● (1225)

Mr. Tako Van Popta: I just want to interact with that.

That question was put to Ms. Conlon. She said that their proposal does not exclude the ability to appeal from the Federal Court of Appeal to the Supreme Court of Canada, but that's always the leave application, and most leave applications are denied by the Supreme Court. Therefore, she thought it would be fair that there be a right to appeal to the Federal Court.

Can I get your comments on that?

Mr. Marc Giroux: I don't know that I have further comment to add, other than that I respect the view of The Advocates' Society in making that recommendation to you, but we are still of the view that the appropriate body to review a decision of a full hearing panel and of council would be the Supreme Court of Canada.

Ms. Jacqueline Corado: I'd also add that the proposal would add another layer, and this is what Bill C-9 is trying to cut—all the delays that are, basically, relitigating and rebringing forward those comments from the judge or those procedures from the judge.

Again, I respect the proposal, but it would add another layer, which is counterproductive to what Bill C-9 is trying to do.

Mr. Tako Van Popta: Thank you.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Van Popta.

Madam Diab.

Ms. Lena Metlege Diab: Thank you very much, and thank you to both of you for appearing today.

In your opening statement, you said there are 44 positions—so we're talking about federally appointed judges. I would like to go back to the question I asked earlier. What are the types of complaints that we are receiving today? With regard to the people who are complaining, I'd like to know what it's about, and how difficult it is for them in terms of cost. I guess one aspect would be that we're trying to streamline the process to reduce time and make it more efficient, while also safeguarding the impartiality and independence of judges, which is so important.

On the other hand, I guess, if we look at the last number of decades, what kinds of complaints do we receive?

Mr. Marc Giroux: Again, if you'll allow me, Ms. Diab, I'll start and then ask Ms. Corado to follow up as required.

There are more complaints made nowadays than in past years, and that is not surprising in light of people's being more informed about their rights and having access to various information. There are more judges, as well. Last year, there were over 600 complaints; the majority of those were maybe excluded or dismissed by the executive director. The reason is that many of those are often related to matters that should be appealed and are not related to the conduct of the judge. Those are a lot of these cases, and a lot of these cases, as well—or complaints, I should say—are in the area of family law, where passions are high. The issue of access to children is, obviously, a very sensitive area, and people may well be very upset with any decision that may be rendered that does not please them.

Some other complaints are simply frivolous or illegible; we receive some anonymous complaints as well. Those that make their way up to a member of the conduct committee, then to a panel and, ultimately, to what exists now as an inquiry panel are, obviously, some very concerning issues for the council. Council takes great pride in ensuring that the judiciary across Canada can be respected—that public confidence in the judiciary is maintained—so it takes very seriously any complaint that may raise issues about that public confidence.

There are not a lot of them, but they certainly make more headlines than others, and that is certainly fair. I guess the point I'm trying to make is that these are stand-alones at the end of the day. The majority of the complaints that we receive, as I said, may often be dismissed at an earlier stage, and you hear more about those stand-alone issues.

● (1230)

Ms. Lena Metlege Diab: I appreciate your comments, and I know you were both in the room when the first panel were giving their evidence. I appreciate your comments on The Advocates' Society and its recommendation.

Can you, briefly, with the time that we have, tell me...? You also heard from Mr. Scott and his recommendations, as well as from Professor Devlin from the Canadian Association for Legal Ethics. Can you tell us your view on those recommendations?

Mr. Marc Giroux: Is there a specific one that you would like us to comment on?

Ms. Lena Metlege Diab: There were some we couldn't even get to because of the timing and the audio and so on. I guess there were a couple that you heard. Professor Devlin was saying that there are so many more values that so need to be protected, but that he feels are not in the bill. Generally, he's okay with it, but there were a couple of other things he was concerned about.

Ms. Jacqueline Corado: As per the values, the ethical principles were reviewed very recently to adapt to the evolution of times and the landscape of the law. All those values are included in our ethical principles. Bill C-9 is more about remedies and tools when there is a case that deserves the attention of council.

I will bring you back to my initial comments that security of tenure is protected by the Constitution. For something that is so protected and important in our society for the democracy of this country, the reasons for removal have to be very serious.

The process now needs to be streamlined, and this is what Bill C-9 is intended to do. As for other comments that were brought—

Ms. Lena Metlege Diab: How about the specific one that there's not enough attention to the rights of the complainants?

Ms. Jacqueline Corado: Thank you.

I'm glad you asked that question, because currently our procedures provide that a complainant will be advised when the disposition of the complaint is done. We have to remember here that this is a very unique process. I think there is confusion about how that process works.

This is not a statement of claim that's filed before the court while the person who files the statement of claim is a party to the proceedings. This is a disciplinary proceeding. There's a body that's mandated to look at it, and that is council. Council has that expertise and that purview to decide what is a violation of section 99 of the Constitution.

When a complainant files a complaint, they are not a party to a proceeding. Council will take that on. Council's mandate is the search for the truth, and council will do inquiries. There's extensive case law with regard to the rights of the complainants and the duty of procedural fairness for them.

Just to name a few, there's Slansky, from the Federal Court of Appeal, which provides for the transparency and the rights of the complainant, because they don't have standing. Subsection 63(2) of the Judges Act does not give standing to complainants. There is also Cosgrove, from the Federal Court of Appeal, which talks about the publicization and confidentiality of complaints. There are many more. Unfortunately, I didn't hear any case law being mentioned this morning, but there is extensive case law to that effect.

The rights of the complainants are protected. The duty of fairness is protected and the rights they have are very minimal, because we are not in an adversarial mode.

The Vice-Chair (Hon. Rob Moore): Thank you.

Now, for six minutes, we will move on to Mr. Fortin.

[*Translation*]

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

Thank you to the both of you for being here today. This is indeed an important bill, so the Canadian Judicial Council's view is obviously of the utmost importance. I'm glad that you're both here.

The case involving Judge Girouard came up earlier. It's one that can't be ignored. It would be nice if we didn't have to talk about it, but it has captured the attention of the media and the entire judiciary in recent years.

Far be it from me to say that judges should not be allowed to appeal or challenge the council's decisions. That's probably true for everyone. Nevertheless, the process has to have some limits, and I think that's what Bill C-9 seeks to do. However, it does not set any limits on something that keeps coming up in the public space, legal costs.

I don't want to get into the specifics of the case I just mentioned, but abuse of process not only delays the proceeding, which has costly salary and other implications, but also results in considerable legal fees. One question keeps coming up. If the judge is found guilty and the decision is warranted, why wouldn't the lawyers' fees have to be repaid, at least for the judicial process? It might be possible. It might not. Could the judge be made to repay all or some of the legal fees if proceedings were found to be unnecessary or frivolous? I don't know.

Have you explored that possibility?

I'd like to hear from Mr. Giroux and, then, Ms. Corado.

● (1235)

Mr. Marc Giroux: You raise a specific issue that I think clearly illustrates why Bill C-9 is needed. The multiple requests for judicial review meant that the process dragged on for nearly seven years, resulting in significant legal costs. There were also costs associated with the council's having to address those requests for judicial review.

I would point out that the bill does set some limits, for instance, when it comes to calculating the judge's annuity. The period used to calculate the annuity ends when the council recommends that the judge be removed from office in a report submitted to the Minister of Justice. That's one thing.

Obviously, Bill C-9 does not provide for judicial review. It is stipulated, however, that the judge's legal fees will not be paid in cases in which a judicial review is requested. The Office of the Commissioner for Federal Judicial Affairs has a budget to cover the legal fees of judges, and the money is used only for that. Every year, we have to request that funding from the government, if necessary.

Bill C-9 takes that into account so we don't have to go through that exercise every time. We are bound by the rates set by the Department of Justice for the retaining of legal services. Bill C-9 also mentions the commissioner for federal judicial affairs, legal fees and the fact that we basically have to take into account what the government provides for in terms of legal fees. If we have to deviate from that, we are required to indicate why.

Mr. Rhéal Fortin: When a case involving sanctions against a judge is heard by another judge, couldn't that judge choose to order that costs be paid? After all, that would be similar to what judges do in civil cases when they find proceedings to be frivolous or to constitute an attempt to delay the process.

Mr. Marc Giroux: If I understand your question, you're asking about taking away access to legal fee coverage so that a judge subject to sanctions would not have their fees covered in those circumstances.

Mr. Rhéal Fortin: I'm even talking about ordering the judge to reimburse the government for fees.

Mr. Marc Giroux: I know there was a discussion about how that's handled in provincial regimes. I also know that the Department of Justice cited the Federal Court of Appeal's decision in Bourbonnais v. Canada, whereby a judge is entitled to payment of their legal fees when they are the subject of a complaint. Again, I would add that payment of those fees is subject to the rates that must be adhered to.

Mr. Rhéal Fortin: Thank you.

Mr. Scott was in the previous panel, and he talked about a fairly recent decision in Ontario, I believe, whereby a financial penalty had been imposed on a judge. I can't say for sure, but I think it was two months' salary or two months in the pension calculation. The reason the judge was penalized was that he had a “Make America Great Again” hat sitting on his desk during a hearing.

Are you familiar with that decision? What is your view?

Mr. Marc Giroux: I'm not really familiar with that decision. I heard about it, but only anecdotally.

Basically, judicial independence has three attributes: institutional independence, job security—I know that's not the right term because it's also about appointments—and financial security.

Although I haven't examined the issue carefully, it seems to me that holding back a judge's salary would go against one of the core principles of judicial independence.

● (1240)

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

The Vice-Chair (Hon. Rob Moore): Thank you.

[*English*]

You'll note, colleagues, that the bells are ringing, but we have a bit of time before the vote. If it's okay with everybody, we'll turn it over to Mr. Garrison for six minutes.

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

I'm the one who's never okay with proceeding when the bells are ringing, so I think perhaps we should enforce that, even when it's my own ox that's being gored today.

I would prefer that we adjourn.

The Vice-Chair (Hon. Rob Moore): Well, we need unanimous consent to continue, so if we don't have that—

Mr. Randall Garrison: I'm not giving unanimous consent for me to continue.

The Vice-Chair (Hon. Rob Moore): It was good of you to do that before your question and not after.

Voices: Oh, oh!

The Vice-Chair (Hon. Rob Moore): Thank you to our witnesses for appearing today. It was a very helpful submission.

We will adjourn the meeting and go and vote. Thank you.

The meeting is adjourned.