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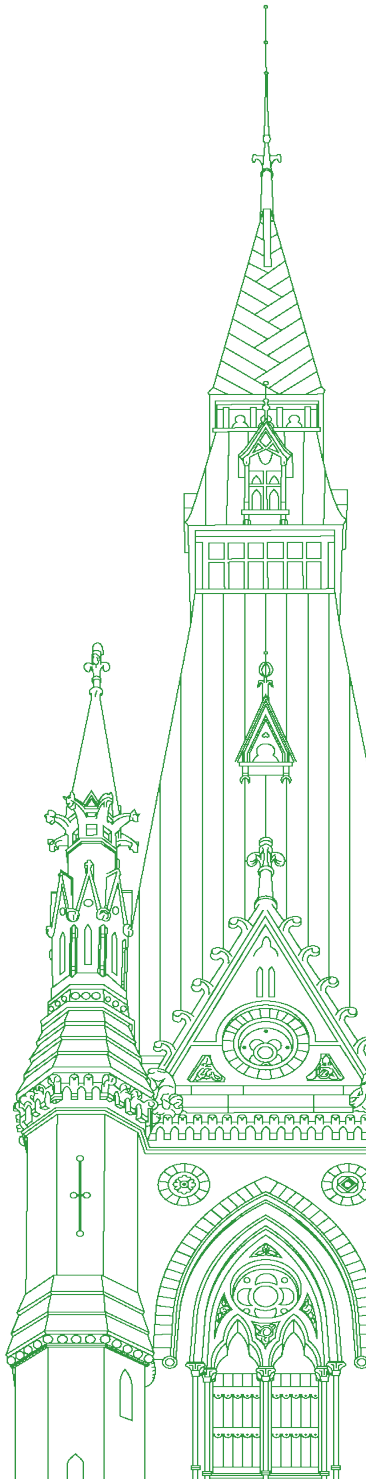

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Tuesday, October 31, 2023

● (1610)

[*English*]

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

Welcome to meeting number 81 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant the House order of June 21, 2023, the committee is meeting in public to study Bill C-40, an act to amend the Criminal Code and to make consequential amendments to other acts.

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

I would like to make a couple of comments for the benefit of the witnesses and members. Please wait until I recognize you by name before speaking. For those participating by video conference, click on the microphone icon to activate your 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 the floor, English or French. For those in the room, you can use the earpiece and select the desired channel.

All comments should be addressed through the Chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the "raise hand" function. The clerk and I will manage the speaking order as best we can, and we appreciate your patience.

I should also note that you will receive a notice that our meeting for the morning of Thursday from 11:00 to 12:30 with Minister Virani and the chair of the selection process for the new Supreme Court judge has been confirmed.

I understand that our witnesses do not have opening remarks, so we'll move right into our time of questions and answers. I will begin with Mr. Brock for six minutes.

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

Thank you to the witnesses for your attendance today.

This bill is about a miscarriage of justice. I would like to ask some questions of the officials about a specific miscarriage of justice.

To you, Mr. Livingstone, can you confirm that you were the Justice department's point of contact on the RCMP's request to waive cabinet confidences and solicitor-client privilege concerning Justin Trudeau's efforts to pressure Jody Wilson-Raybould into offering a sweetheart deal to a Liberal-connected firm of SNC-Lavalin?

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): I have a point of order, Mr. Chair.

The Vice-Chair (Hon. Rob Moore): Go ahead, Mr. Maloney.

Mr. James Maloney: I fail to see the connection between this and the topic we're here to discuss today.

The Vice-Chair (Hon. Rob Moore): Mr. Brock has the floor; it's his time. This is the time for the members of Parliament. We usually allow quite a bit of discretion when we have ministers, for example, or senior departmental officials.

Go ahead, Mr. Brock.

Mr. James Maloney: I'm sorry, Mr. Chair. With all due respect, there isn't a semblance of connection between his question and what we're talking about here today. I would ask that you review the question, if necessary, because it has absolutely zero connection. It wasn't leading to something that was remotely close to the topic at hand.

The Vice-Chair (Hon. Rob Moore): Mr. Brock has the floor.

Go ahead.

Mr. Larry Brock: Thank you, Chair.

Can you answer that question, Mr. Livingstone?

Mr. Edward Livingstone (Senior Advisor and Senior General Counsel, Public Law and Legislative Services Sector, Department of Justice): I was the Department of Justice contact, yes.

Mr. James Maloney: Mr. Chair, I apologize for interrupting, but there is a process for challenging the ruling of the Chair. I understand that you're sitting in the chair today because the chair couldn't be here.

I hate doing this. I really don't like doing this, because I don't like it when other people do it, but I am going to have to take issue with that and challenge the chair and put it to the committee.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, thank you for your intervention, but there has not been a ruling made. We have a six-minute period for questions and answers.

Mr. James Maloney: If you haven't made a ruling, then I would ask for one.

The Vice-Chair (Hon. Rob Moore): Mr. Brock has the floor. As a member of Parliament, he's entitled to ask his questions of the officials who are here. It's my opinion that we allow a degree of latitude for our members to ask the questions as they see fit. It's a parliamentary committee.

I don't want this to take away from your time, Mr. Brock. You have three and a half minutes left.

Mr. James Maloney: Mr. Chair, will all due respect, that is a ruling. You just made a ruling. You can't avoid the issue by refusing to make a ruling and then circumvent the process of challenging the chair, with all due respect.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, what ruling? We're kind of wasting time here.

Mr. James Maloney: I'm asking you to rule on the relevance of the question posed by Mr. Brock.

The Vice-Chair (Hon. Rob Moore): In my opinion I don't have to make a ruling on relevance.

Mr. James Maloney: I'm going to ask you to turn to the clerk and ask for the process then, because that's not my understanding on how this works.

Mr. Larry Brock: Mr. Chair, if I might be permitted....

The Vice-Chair (Hon. Rob Moore): Is this on a point of order?

Mr. Larry Brock: This is on the issue of relevancy. If the chair wishes that I justify the degree of relevancy, relevancy is a very subjective term. What is relevant to me is clearly not relevant to Mr. Maloney and the rest of the Liberal bench.

● (1615)

Mr. James Maloney: This isn't a debate, with all due respect. The chair has to make a ruling, not based on what's going in Mr. Brock's mind.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, you've made your point. Mr. Brock is on the same point.

Mr. Larry Brock: How much time do I have remaining, Chair?

The Vice-Chair (Hon. Rob Moore): I don't think this should take away from your time.

Mr. Larry Brock: I don't think it should. I had gone 48 seconds into my six-minute round before I was interrupted by Mr. Maloney.

The Vice-Chair (Hon. Rob Moore): Go ahead.

Mr. Larry Brock: Thank you.

Can I get a response, Mr. Livingstone?

Mr. James Maloney: Mr. Chair, I'm going to insist that you make a ruling. In eight years here on the Hill, I've never seen this before. Perhaps you can take a moment to reflect and speak with the clerk and get some direction on the process, because unless I am way off base on a point of order, you are required to make a ruling and if you make a ruling there's a process in place to challenge the chair's ruling.

The Vice-Chair (Hon. Rob Moore): Look, Mr. Maloney, it's Mr. Brock's time to ask a question. You're going to get your time if we ever move on beyond this point. Mr. Brock can continue to proceed with his question.

Mr. James Maloney: Is your ruling that you're not making a decision?

Let's just get this on the record. I want to be clear. I made a point of order. I've asked for a ruling.

Is your ruling that you're not going to make one?

The Vice-Chair (Hon. Rob Moore): There hasn't been a ruling. We're doing Q and A.

Mr. James Maloney: Okay.

I'm asking for one, Mr. Chair. I am asking you to rule on the relevance of the question posed by Mr. Brock.

The Vice-Chair (Hon. Rob Moore): That wouldn't be an appropriate ruling. We don't rule on relevance of these questions.

Mr. James Maloney: It's your role as chair, with all due respect, when there's a point of order to rule on relevance.

The Vice-Chair (Hon. Rob Moore): No, the role of chair is to conduct the meeting. We have an order for speaking. Mr. Brock is able to ask his question.

Mr. James Maloney: No. Mr. Chair, with all due respect, that is out of line. You're required to make a ruling. If your ruling is that you're not going to make a ruling, I'll challenge that. I have never come across this before. I understand what you're trying to do. In your capacity that you're in right now, with all due respect, I think it's fair to all members of this committee and anybody, particularly the witnesses, that you address the issue.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, Mr. Brock can proceed with his questions. There's nothing to rule on. Mr. Brock can proceed with the question and answer.

Mr. Housefather.

Mr. Anthony Housefather (Mount Royal, Lib.): I think there's always a time and a place for questions and it's reasonable to ask questions, Mr. Chair, but the agenda of the meeting was Bill C-40, an act to amend the Criminal Code and to make consequential amendments to other acts and to repeal a regulation regarding miscarriage of justice reviews.

In the normal course, when witnesses are invited here, they are invited to speak to the issue that is on the agenda of the meeting. Now, of course, there's always flexibility. If somebody were invited here on a sports study and questions were posed to them on medical assistance in dying, I think it would be relevant to ask the question of relevance.

Here, I fail to see the correlation or the relevance between that question and the subject in the meeting. That's what I want to understand, Mr. Chair, what the relevance is.

The Vice-Chair (Hon. Rob Moore): Look, I appreciate your comment, Mr. Housefather. I tend to agree with you, but in this case, when we have a minister, when we have a senior officials, I would err on the side of allowing you as members of Parliament the ability to ask the questions as you see fit. We're having this discussion on a piece of justice legislation and Mr. Brock has the floor.

I don't want any of this to take away from your time, Mr. Brock, because I think you were 40-some seconds in. Go ahead.

Mr. Larry Brock: Thank you, Mr. Chair.

Can you confirm the time I have remaining, please?

The Vice-Chair (Hon. Rob Moore): I would say five minutes and 10 seconds.

● (1620)

Mr. Larry Brock: For the third or fourth time, Mr. Livingstone, perhaps I can get a response without interruption.

Mr. Edward Livingstone: I'm sorry. Can you repeat the question, please?

Mr. Larry Brock: Absolutely.

This bill is about miscarriages of justice. I'd like to ask the officials some questions about a specific miscarriage of justice.

Mr. Livingstone, can you confirm that you were the justice department's point of contact on the RCMP's request to waive cabinet confidences and solicitor-client privileges concerning Justin Trudeau's efforts to pressure Jody Wilson-Raybould into offering a sweetheart deal to the Liberal-connected firm SNC-Lavalin?

Mr. Edward Livingstone: Mr. Chair, I'm assuming I'm not being asked to comment on the commentary, but in terms of being the point of contact, yes, I was.

Mr. Larry Brock: Were you the primary point of contact?

Mr. Edward Livingstone: I don't know the answer to that. I don't know if there were other contacts.

Mr. Larry Brock: Mr. Livingstone, why did the government refuse the RCMP's request for a full waiver of cabinet confidences?

Mr. James Maloney: I'm going to renew my point of order, Mr. Chair.

We've now heard this line of questioning pursued. If anything, it's become less relevant, if that's even possible. Now he's into asking the witness questions that the witness can't possibly even answer because they're beyond his knowledge. This is absurd, with all due respect.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, I'm going to allow discretion for our members to ask questions. If the witness is unable to answer a question, he can say that he's unable to answer it. If the witness wants to speak to something, that's the witness's time. The answer is the witness's time; the question is our time.

I would tend to agree with Mr. Housefather. If we were dealing with a witness that we brought in from somewhere to speak specifically on some narrow issue.... However, we have officials from the department, and we have the minister appearing. Everyone around the table knows that when a minister is here or when certain officials are here, sometimes we have very wide-ranging questions.

Go ahead, Mr. Brock.

Mr. James Maloney: Wide-ranging doesn't include an entirely different topic, with all due respect, Mr. Chair.

Mr. Larry Brock: Mr. Livingstone, would you like me to repeat the question?

Mr. Edward Livingstone: Yes, I'll need you to repeat the question, please.

Mr. Larry Brock: Thank you.

Mr. Livingstone, why did the government refuse the RCMP's request for a full waiver of cabinet confidences?

Mr. Edward Livingstone: I'm not in a position to answer that question.

Mr. Larry Brock: Do you have an answer that you just cannot respond with?

Mr. Edward Livingstone: No, I don't have an answer to that question.

Mr. Larry Brock: Did you counsel the outcome?

Mr. Edward Livingstone: I can't answer that question; that's privileged information.

Mr. Larry Brock: What position did you advise the government to take?

Mr. Edward Livingstone: I can't answer that question.

Mr. Larry Brock: Mr. Livingstone, if you can't answer the question, is there any other individual who was providing instructions with regard to the question that I just put to you?

Mr. Edward Livingstone: I don't know the answer to that question.

Mr. Larry Brock: Were you part of a team that gave advice to the government with respect to that request from the RCMP?

Mr. Edward Livingstone: I can't speak to any advice that I provided.

Mr. Larry Brock: That wasn't the question.

Were you part of a team of lawyers, of senior counsel, who were tasked with the responsibility of advising the government on that position to take with respect to that request? Were you part of a team?

Mr. Edward Livingstone: I believe that's still an area of privilege. I can't answer that question.

Mr. Larry Brock: Mr. Livingstone, on July 5, 2019, you emailed—

[*Translation*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): I have a point of order, Mr. Chair.

We were called here to talk about Bill C-40. I don't see the connection at all between the questions being asked and the notice of meeting I received.

[*English*]

The Vice-Chair (Hon. Rob Moore): Madame Brière, everyone here is going to have time to ask the questions they want. Mr. Brock is asking his question. He has 30 seconds left.

[*Translation*]

Mrs. Élisabeth Brière: That's not my objection. I'm saying that the questions being asked have nothing to do with the topic of today's meeting.

[*English*]

Mr. Larry Brock: Do I have 30 seconds left, Mr. Chair?

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

● (1625)

Mr. Larry Brock: Thank you.

Mr. Livingstone, was Justin Trudeau ever interviewed by the RCMP?

Mr. Edward Livingstone: I have no knowledge of that.

Mr. James Maloney: Mr. Chair, with all due respect, the only time that Bill C-40 has been mentioned is in a point of order, which just confirms how absurd this is.

The Vice-Chair (Hon. Rob Moore): Mr. Maloney, your turn is up in about six seconds, so you can—

Mr. James Maloney: Actually, it's not.

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

Mr. Larry Brock: What was your response to that question?

Mr. Edward Livingstone: I have no knowledge.

Mr. Larry Brock: You have no knowledge.

Was Justin Trudeau's chief of staff, Katie Telford, interviewed?

Mr. Edward Livingstone: I have no knowledge.

Mr. Larry Brock: Was his best friend, Gerald Butts, interviewed?

The Vice-Chair (Hon. Rob Moore): You're out of time, Mr. Brock.

Mr. Larry Brock: Thank you.

The Vice-Chair (Hon. Rob Moore): Next, for six minutes, is Madame Brière.

[*Translation*]

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

Good morning to all the witnesses. Thank you for giving us your valuable time today.

I would like to know whether the eligibility criteria will change under the new system set out in Bill C-40. I would also like to know how the process for determining the admissibility of a request for review will be improved.

Ms. Julie Besner (Senior Counsel, Public Law and Legislative Services Sector, Department of Justice): I can answer those questions.

The eligibility criteria are being amended in Bill C-40.

First of all, the terminology has changed in some respects. Under the current provisions of the Criminal Code, individuals who have been convicted of an offence under an act of Parliament may apply for a review. The bill changes that terminology to refer to people who have been convicted. This clarifies that it includes people who have pleaded guilty as well as people who have been granted a conditional or absolute discharge.

As another eligibility criterion, a provision is being added to allow for an application for review in the case of people who have been found not criminally responsible on account of mental disorder. If there was a misdiagnosis, for example, that could be reviewed.

In terms of improving the review process, during the consultations, we heard a lot about the fact that it is quite onerous for applicants to gather all the trial transcripts and provide the many documents required. Applicants are often still in prison, so it's a fairly onerous process for them. So they have difficulty meeting the admissibility criteria.

If the bill is passed, the first step for applying will be greatly simplified. The Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice will be repealed, and the new commission will instead develop policies to describe what people must submit. The form to fill out will likely be quite simple. This is what we have heard from other countries that have greatly simplified the form that applicants have to fill out. After that, we hope that the preliminary assessment to determine the admissibility of a request for review will be a little quicker and that, once a request has been declared admissible, we will be able to move fairly quickly to an investigation or a decision.

Mrs. Élisabeth Brière: Speaking of time frames, do you think the creation of this commission will speed up or slow down the process of reviewing miscarriages of justice, compared to the current time frames?

Ms. Julie Besner: Speeding up the review process is one of the main objectives of the bill. With the creation of a new commission whose sole mandate will be to examine miscarriages of justice, which will consist of a chief commissioner and four other commissioners, and which will have a lot of staff to support it, we are hopeful that the time required to review applications will be considerably reduced. These are still quite complex applications, but they can be reviewed more quickly by a number of commissioners with a fairly clear mandate, rather than by a single minister who has a lot of duties in their portfolio.

Mrs. Élisabeth Brière: According to some statistics we have seen, there have apparently been 77 applications over the past year, if I am not mistaken.

I understand that you don't have a crystal ball, but do you think this new way of doing things will lead to an increase in the number of applications?

Ms. Julie Besner: That is certainly what we are anticipating. Other countries saw an increase in the number of applications after the creation of a similar commission.

By changing the admissibility criteria and the referral criteria a little, we could see an increase in the number of applications submitted and applications deemed admissible, especially since people who have pleaded guilty will understand that they can submit an application and that it may be admissible.

I see the minister is here.

● (1630)

Mrs. Élisabeth Brière: Yes.

[*English*]

The Vice-Chair (Hon. Rob Moore): You have a minute and 40 seconds left.

[*Translation*]

Mrs. Élisabeth Brière: What measures are being put in place to ensure that the new commission will be transparent and accountable?

Ms. Julie Besner: There are a few aspects of the bill that will increase transparency. There is even a provision that explicitly provides for that.

The commission will also be able to publish its decisions, provided that confidential information is not disclosed. The very fact that it will be accessible across Canada should increase transparency.

There is also the requirement to give notice to interested parties, who will have an opportunity to make submissions, if they wish.

All of this is aimed at increasing transparency in decision-making.

Mrs. Élisabeth Brière: Thank you.

I'm done.

[*English*]

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

We still had a couple of questions due from Mr. Fortin, and our NDP member. Members, is it your will that we start now with the minister—I know the minister has to leave at 5:30—or would you like maybe two minutes each for the current witnesses? I know they're staying on.

Does it work to do two minutes each?

[*Translation*]

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): Mr. Chair, according to the routine motions we adopted, we each had six minutes. I don't see why that wouldn't be the case. We can continue with the minister afterwards. We have an hour until 5:30 p.m.

[*English*]

The Vice-Chair (Hon. Rob Moore): You want to keep with the six-minute round.

Okay. We'll continue with six and six, and then we'll start at the top.

[*Translation*]

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

Good morning, witnesses.

Ms. Besner, I believe it was you who said that, under the new rules, we would be talking about someone who has been found guilty rather than someone who has been convicted. You told us that this would make it possible to include, for example, people who pleaded guilty.

Do you have any examples of situations where someone who pleaded guilty to a charge could then claim a miscarriage of justice?

Ms. Julie Besner: There are certainly people who, unfortunately, despite all the good legal advice they may have received, plead guilty when they are innocent. Sometimes there are quite exceptional circumstances, without mentioning specific cases. You may hear witnesses talk to you about specific cases in which a person pleaded guilty when no offence had been committed. For example, in circumstances where a parent is criminally charged as a result of the death of their child and there are other children in the family, sometimes the parent feels trapped and agrees to plead guilty in the hope of having a lighter sentence to serve.

Mr. Rhéal Éloi Fortin: I understand, but what would be the judicial error that would be invoked at that time?

Ms. Julie Besner: This is a conviction that is still not warranted, if no offence has been committed.

Mr. Rhéal Éloi Fortin: It is justified because there has been a guilty plea.

I may be a little naive, but my understanding of a judicial error is that there was a major, fatal error in the case. Here, I understand that the mistake would come from the individual who pleaded guilty and should not have pleaded guilty. Did I understand correctly?

Ms. Julie Besner: That's right.

It is true that the Criminal Code contains no definition of what constitutes a miscarriage of justice, although that term is used a few times.

In the practice of criminal law, yes, miscarriages of justice include not only mistakes made by participants, such as lawyers, judges or police officers, but also mistakes made by the accused themselves, or choices made by them or a defence lawyer. So that includes a host of errors that can occur.

Mr. Rhéal Éloi Fortin: I must admit that I am astonished. A miscarriage of justice, in my view, is an error made by the court. Having said that, I don't want us to spend five minutes on this. We can come back to it if necessary. Thank you for enlightening me on that.

Earlier, in response to a question from Ms. Brière, you said that the time frames would be improved. Do you have an idea of what those time frames will be? Suppose a judicial error is invoked following a decision. In your opinion, does the process provide for a decision to be rendered within a month, six months or a year, for example?

● (1635)

Ms. Julie Besner: The bill does not mention fixed and specific time frames. However, there is a broader obligation to process applications quickly. I believe that, in English, we use the term expeditiously. This will still require the commission to take the time frames into account.

Given that the level of complexity of the cases varies enormously, a number of cases could be resolved more quickly, whereas it could take more than a year, for example, to resolve some others.

Mr. Rhéal Éloi Fortin: In terms of efficiency, you said that you expected there would be more applications for review on the grounds of miscarriage of justice. I understand that this is expected, since the system will probably be more efficient. My question is more about the execution of the decision.

Suppose someone files an application for review on the basis of a miscarriage of justice and the commission comes to the conclusion that there was indeed a miscarriage of justice. What is the process under Bill C-40 to implement that decision? I know of cases where it was not acted on. A miscarriage of justice was acknowledged, but nothing came of it.

So what about the execution of the decision if a miscarriage of justice is recognized?

Ms. Julie Besner: First of all, I must say that the commission's mandate is not necessarily to determine whether there was a miscarriage of justice. However, if it does have reasonable grounds to believe that there may have been a miscarriage of justice and that it is in the interest of justice that the matter be referred to the courts, that is what will be done.

So the execution of the decision is a referral, whether it's for a new trial, a new hearing, or a new appeal. The case then goes back to the courts, and they are the ones who are responsible for determining whether there has in fact been a miscarriage of justice.

Mr. Rhéal Éloi Fortin: Is it going to be a priority?

Ms. Julie Besner: Are you talking about the courts?

Mr. Rhéal Éloi Fortin: Yes. Is it going to be a priority in the courts?

I would also like to know what will happen to the individual who was convicted as a result of a miscarriage of justice in the meantime. Will they be released? Will the execution of the decision be suspended? Will the individual still serve their sentence?

Ms. Julie Besner: As soon as an application is deemed admissible, the applicant may make an application for release pending the commission's decision or, thereafter, pending the court's final decision. In this regard, the bill will amend section 679 of the Criminal Code.

Hon. Rob Moore: Thank you very much, Mr. Fortin.

[*English*]

Madam Gazan, you have six minutes.

Ms. Leah Gazan (Winnipeg Centre, NDP): Thank you so much, Chair.

Thanks to everybody for being here today.

My question is for you, Minister. As part of the report and findings of justices Harry LaForme and Juanita Westmoreland-Traoré, when tasked with reviewing the conviction review process in this country, they underscored that of the 20 individuals granted reviews and remediation by the Canadian government, all were men. Only one was indigenous, and one was Black.

Given the racist and misogynistic biases of the past conviction review processes administered by the Department of Justice, how will these issues be remedied in the proposed legislation?

The Vice-Chair (Hon. Rob Moore): Madam Gazan, we were wrapping up with the other witnesses. We were going to give the minister time for his opening statement and then begin a new round. However, if the minister wants to take the question, he can.

Hon. Arif Virani (Minister of Justice): Sure. We can do this in reverse order.

Thank you, Ms. Gazan. What I'd say to you is that those are very troubling statistics. I remarked on them myself. I was given a slightly different version: All of them were men, and out of 26 cases, 20 involved people who were white, with only six racialized people.

I think the importance of what you're underscoring is that we need a system that reflects better the statistical likelihood that you're going to have wrongful convictions across the prison population. When you look at the overrepresentation of indigenous and Black individuals in this country in the prison population, and you look at the number of women in the prison population, it is statistically improbable—probably impossible—that there's never been a wrongful conviction of a woman in this country, for example.

I think the way we address it is that we do some of the things that are targeted in the legislation, such as outreach activities where you're actually in prisons, explaining to people that there is this process that's available. You're looking at providing access to legal assistance. Sometimes we know that people are only as good as the lawyers they can afford to hire. By providing actual legal assistance, you're empowering those indigenous and Black people who are in prison populations. There's also providing translation and interpretation. That might beg the question of whether that would be provided in indigenous languages. I hope so, but I don't know the answer to that.

Lastly, there's even reintegration support. Sometimes it's daunting to raise the spectre of a wrongful conviction and then be given bail. As Ms. Besner just mentioned, when you have that bail provided to you, all of a sudden you're outside a prison system that you've been in for 18 years, hypothetically. You don't have the ability to house yourself, feed yourself or get employed.

● (1640)

Ms. Leah Gazan: Just as a matter of time, and with all due respect, I think we all know that with legal aid in this country, the hours are so limited that you really don't get fair representation, particularly in more serious cases. I say that to put it on the record. I don't think it's unknown.

In terms of that, I appreciate what you said, but what kind of—and I can ask this of Ms. Besner, too, if you like—evaluation accountability measures and performance indicators are you anticipating will be included in this legislative regulatory policy and practice process you're advocating? How are you going to measure this?

This question is for anybody.

Ms. Julie Besner: The legislation includes a very exhaustive list of information that has to be provided in the annual reports to Parliament. That will help to evaluate the commission's performance in terms of volumes, timelines and programs.

Ms. Leah Gazan: Can you give me some examples, please?

Ms. Julie Besner: There's the number of applications made, the number of investigations conducted and the number of matters referred to the courts. There's also an obligation for the commission to track the outcomes of those cases after they're referred back to the courts, the number of applications dismissed, the average length of time between the receipt of an application and the commission's final decision, the number of applicants in need who receive supports and the amounts paid to the service providers of those supports, and GBA+ type of data—

Ms. Leah Gazan: That all sounds well, but the measures proposed in this bill that you've shared do not allow for group reviews, which are particularly crucial to identifying systemic factors that have led, for example, to indigenous women being overrepresented among these people. They have been criminalized for actions taken to protect themselves or others from violence and for which they often should have had valid legal defences—and we know this.

If you look at—and I know, Minister, you know this—the statistics in Saskatchewan of the number of women currently incarcerated, the majority are indigenous women, and it's a growing population. This is becoming a matter of great injustice.

Why was the possibility for group reviews not included in this legislation, particularly in light of the glaring systemic factors and systemic racism that still persist?

Hon. Arif Virani: What I would say to that, Ms. Gazan, is that demographic data is also meant to be tracked in the parliamentary reviews. I think that demographic data can help demonstrate whether patterns are emerging in who's applying and who's not applying, so that there can hopefully be curative aspects taken at the time of the parliamentary review to target exactly what you're speaking of.

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

Minister, welcome. You're already here, so it's a belated welcome. Thank you for joining the committee today on Bill C-40.

I'll turn it over to you for your opening comments.

Hon. Arif Virani: Thank you.

It's good to see you in the chair, Mr. Moore.

Hello, colleagues. I hope you're all well. At the outset, I want to say thank you for the quick work on Bill S-12 and making sure that we met a court deadline and maintain the sex offender registry going forward.

● (1645)

[*Translation*]

Thank you very much for inviting me to speak to you about Bill C-40, Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law).

[*English*]

Bill C-40 proposes necessary and long overdue change to our criminal justice system, and it will indeed change lives. I'm grateful for the important work of my predecessor David Lametti in developing Bill C-40. I have every intention of fulfilling the promise that David Lametti made to David Milgaard and his mother Joyce to pass this important legislation.

I think we all, as parliamentarians, owe it to those people who have been wrongfully convicted, like David Milgaard and others. These errors cost them their freedom, their livelihood, their reputation and their time with loved ones. The errors are devastating to victims of crime and to their families.

This bill responds to long-standing calls from wrongfully convicted Canadians and their advocates. This issue has been studied extensively. Over decades, numerous commissions of inquiry have delivered one consistent recommendation to government: the creation of an independent commission dedicated to the review and investigation of cases when a miscarriage of justice that may have occurred is warranted.

Other countries have done this already, so we're not charting new territory here. Independent criminal case review commissions have been established in the jurisdictions of England, Wales and Northern Ireland; in the jurisdiction of Scotland; and in the jurisdiction of New Zealand.

Bill C-40 is shaped by a broad public consultation process that took place during summer 2021, involving more than 200 individuals and groups with experience and expertise in the area of criminal justice. That process was followed by further consultations with the provinces and territories, judicial organizations, national indigenous organizations, organizations from Black and other equity-seeking communities, and various bar associations.

One of the key findings of the consultations is that commissions in other countries are able to process applications far faster than in Canada's current system. This means that countries with an independent commission have fewer people spending time behind bars for crimes they didn't commit. That in and of itself is incredibly significant.

In Canada, our wrongful conviction regime was last amended in 2002.

I'll just note parenthetically that this power has existed in one shape or form in the hands of people, who were my predecessors going back to 1892. We're talking about a change to the executive prerogative in this area that dates back to the time when the first Stanley Cup was awarded over 100 years ago.

Since 2002—I was just referencing the last time this was amended—just over 200 applications for review have been submitted. You've heard Ms. Gazan mention that there have only been 26 successful referrals back to the courts through the ministerial review process.

Let's compare that for a moment with a country that has an independent commission. The United Kingdom is a great comparator. They have referred 822 cases in the same time period, with 559 appeals successfully overturned. With a population that is just about half of the U.K.'s, I think that contrast is very powerful. Further, I would note that in all but five of the 26 successful Canadian applications that Ms. Gazan mentioned, the individuals were white and not racialized. In every single one of the 26 successful applications the individuals were male.

That bears no resemblance whatsoever to our prison populations. Black and indigenous persons, who we all know are overrepresented in our criminal justice system, need equal access to this process, as do women.

[*Translation*]

An independent commission devoted exclusively to reviewing potential miscarriages of justice will both increase trust in the review process and improve access to justice by facilitating and accelerating the review of applications from persons who may have been wrongfully convicted.

A commission with five to nine full-time or part-time commissioners, in addition to staff, will be able to review applications more quickly. Recommendations for the appointment of commissioners will have to reflect the diversity of Canadian society and also consider gender equality and the overrepresentation of certain groups in the criminal justice system, specifically indigenous and Black individuals.

[*English*]

The bill requires the commission to deal with applications as expeditiously as possible—this was mentioned by Ms. Besner—to provide regular status updates, and to provide notice to the parties, as well as to provide them with a reasonable period of time in which to respond. The bill also requires the commission be accessible and transparent.

It will adopt and publish on its website procedural policies to guide its work. It will have a dedicated victim services coordinator to support victims and assist with the development of procedural policies, especially as they relate to victim notification and participation.

These are essential measures to facilitate the proper support for victims, which I know is a keen concern of yours, Mr. Chair, in terms of the work you and I did on this committee previously.

I think it's important to understand that, obviously, victims can be doubly traumatized by the notion of a miscarriage of justice having occurred and the fact that the actual perpetrator of the crime against their families remains at large.

To help address systemic issues and prevent miscarriages of justice from occurring, the bill directs the commission to carry out outreach activities, such as the ones I mentioned to Ms. Gazan; provide information about its mandate on the miscarriage of justice to the public and potential applicants; and publish its decisions. Commission staff will be empowered to provide applicants with information guidance. The commission will be able to provide reintegration supports to applicants in need. The commission will be able to provide applicants with translation and interpretation services, and to help applicants obtain legal assistance and the necessities of life, such as housing and medical care.

All of these elements are essential. A commission that conducts outreach and assists with applications recognizes the systemic barriers faced by applicants in the current system. It is in everyone's best interest that wrongful convictions be remedied. Indeed, I would posit that there isn't a single one of us, among the 338 occupying the House of Commons, who would advocate for a wrong conviction in any context. Therefore, the proactive nature of Bill C-40's commission will ensure that no applicant is excluded from accessing this process because of a lack of resources or the inability to apply.

My officials have been briefing you on the technical changes this law reform proposes, but there are a couple that I would like to highlight in particular.

One is with respect to investigative powers. The commission will have the same powers of investigation as I do as Minister of Justice under the existing regime. These powers are found in part I of the Inquiries Act and can be used to compel the production of information or evidence relevant to an application, and to examine witnesses under oath. These authorities will ensure the commission can gather the information it needs to complete a thorough case review.

The second change I want to highlight is this: Bill C-40 will modify the threshold to proceed with carrying out an investigation. Similar to the existing regime, the commission will be able to conduct an investigation if there are reasonable grounds to believe a miscarriage of justice may have occurred. The commission will also be able to conduct an investigation if it considers that it is in the interest of justice to do so. This is the precise approach used in Scotland and New Zealand.

With respect to the final decision—not the investigation entry point, but the final decision—Bill C-40 introduces a new test. The commission will be able to refer matter to the relevant court of appeal, either for a new appeal or to direct a new trial or hearing when there are reasonable grounds to conclude a miscarriage of justice may have occurred, when the test is conjunctive, and when it is in the interest of justice to do so. It is a test with two criteria, not one. This test replaces the current standard, which is that a miscarriage of justice likely occurred.

If the proposed new legal test is not met, the commission must dismiss the application. The remedies in the bill are the same as those currently available in the existing process: a referral for a new appeal or a direction for a new trial or hearing. The commission will not have the power to quash a conviction or determine the issue of guilt. Those are decisions that will always remain with the courts.

● (1650)

[*Translation*]

Bill C-40 sets out the factors the commission will have to consider in making its decisions. The factors currently stipulated in the Criminal Code that relate to the administration of justice are reproduced in Bill C-40, and two new factors are added relating to the particular circumstances of applicants.

[*English*]

That is, it's specifically looking at the personal circumstances of the applicant and distinct challenges they may have faced, with particular attention to the circumstances of Black and indigenous accused.

I believe firmly in our justice system. Its quality is the best in the world. However, we also know that miscarriages of justice occur. Often they are only discovered long after the criminal court process has concluded. These experiences erode the public's trust in a justice system that is meant to protect them. This bill is a significant step forward in restoring that trust and confidence in the system. It is named after David Milgaard, who spent 23 years of his life serving time for a crime he did not commit, and for his mother, Joyce, who never gave up the fight for his freedom.

Bill C-40 honours David and Joyce's legacy by creating a system that will lead to more exonerations of the innocent.

Thank you.

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

We will begin our six-minute rounds starting with Mr. Caputo.

● (1655)

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Minister, for being here.

Thank you to our guests for being here.

Minister, I'm going to rewind back to October 3, because we had a correction on the record from that visit. I had asked you about sexual offences against children and whether you were prepared to add house arrest.

I have the transcript here. You were advised by an official that house arrest for people who commit sex offences against children was not a legal sentence.

Do you recall that?

Hon. Arif Virani: I recall the question you asked me, yes.

Mr. Frank Caputo: I asked you two or three times in various different forms.

Now, you're aware that the record has been clarified and that in most jurisdictions—and I believe one newspaper story I have here references Bill C-5—sex offences against children can lead to a conditional sentence order, in other words, house arrest.

Do you agree with that?

Hon. Arif Virani: I believe that the interaction we had specifically, once the formal committee session stopped, is that you were making an inquiry as to whether that provision you identified in the code had been struck down by one of the courts.

Mr. Frank Caputo: Yes, and I believe that your official came on the record—I wasn't here—and stated that house arrest was available and that various courts had struck it down. My recollection is that probably 90% of the population has that available.

Are we good on that? Do you understand where I'm going with this?

Hon. Arif Virani: I understand where you're going, yes.

Mr. Frank Caputo: Given that sexual offences against children can result in house arrest, are you prepared to plug that legislative gap?

Hon. Arif Virani: What I would say to you is similar to what I said at the time of that hearing. I appreciate that it was on a different bill, so I don't have all of my notes before me, but, with respect to Bill S-12, what we're trying to do is take a strong step in the direction of maintaining a sex offender registry to keep people safe from sexual predators.

Mr. Frank Caputo: I'm not talking about keeping people safe, from the Bill S-12 point of view. I'm talking about keeping people safe generally.

This is a very clear question, with all due respect, Minister. Are you prepared to eliminate house arrest for people who commit sexual offences against children or have images of it in the form of child sexual abuse and exploitation material?

Yes or no? Will you plug that hole?

Hon. Arif Virani: Mr. Caputo, what I would say to you is that conditional sentencing orders are available in certain prescribed circumstances, and we have case law, including from the Ontario court, that talks about when such a sentence would be appropriate or inappropriate.

In the case of violent sexual offences, the Ontario Court of Appeal has been pretty clear that they are not available and should not be available in this context.

Mr. Frank Caputo: With all due respect, Minister, I have a number of newspaper articles noting that there have been conditional sentence orders, and, in fairness, some of them have been on joint submissions. I won't get into the nuances of that, but here we go.... I can go through them if you like. I don't intend to waste—I shouldn't say “waste”, but spend—my time dealing with this, but, well, here's one. Where is the date here...?

Mr. James Maloney: Mr. Chair, I have a copy of the meeting notice if any members from the Conservative Party would like to see it, because so far none of them seem interested in the least bit about the issue at hand, which is miscarriage of justice, because their questions are completely unrelated.

I'm not going to ask you for a ruling, because I know that it's not something you want to do today.

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

Go ahead, Mr. Caputo.

Mr. Frank Caputo: I believe I have three minutes and 58 seconds left.

If we want to get back to this, this was something that came up at the last committee, and I was stymied in asking this very question because of the advice that you received. I'm not throwing anybody under the bus, but we could not flesh this out because of that. With all due respect, I think I should have time with the minister. This is an important issue, and some people would argue that miscarriage of justice occurs when a victim who is subject to a psychological life sentence sees their abuser have house arrest.

In any event, I have an article right here entitled “House arrest for 78-year-old Niagara Falls man convicted of child pornography offences.” I don't like using that term. It should be “child sexual abuse and exploitation” material, but that's the headline.

The Ontario Court of Appeal has said this—and I don't know which decision that is, and I will take your word for it, Minister. But it is available regardless. Sometimes there are exceptional circumstances—I get that—but it can happen. People who are victims of sexual crimes are serving a life sentence.

Will you legislate so that people who commit sexual offences against children or who have depictions of such cannot receive house arrest? Yes or no?

Hon. Arif Virani: I would say a few things, Mr. Caputo.

Is the issue of sexual offences important? Yes, absolutely, it is. Is it critically important to protect children from sexual predators? Absolutely, there is one hundred per cent in agreement on that.

What I would say to you is that, in this context, we're dealing with wrongful convictions. What you're talking about is a sentencing disposition in the context of using a CSO, or conditional sentence order, for a particular case.

What I would say to you is that the criminal justice system is structured—you would know this better than I do as a former Crown—such that one has the ability to appeal a conviction but also to appeal the terms of a sentence.

So there's—

● (1700)

Mr. Frank Caputo: But we're not talking about an appeal, Minister.

With all due respect, we have limited time.

Hon. Arif Virani: If I could just finish, there's a mechanism in place to address the infirmity or lack of appropriateness of a sentence.

Lastly, what I would say is that if it's coming in on a joint submission, I think you have to look at why a Crown and a defence attorney would take the position that it may be appropriate in a given context.

Mr. Frank Caputo: But, Minister, some of these aren't coming in on joint submissions. You're talking about the inappropriateness or appropriateness of it. The fact is that the buck stops with Parliament on whether something is appropriate or inappropriate, based on the maximum sentence, the minimum sentence and on whether Parliament says that a conditional sentence order in the form of house arrest is appropriate. With all due respect, you and I part company at that point.

I'm going to ask again, based on the seriousness—and you have acknowledged it—why are we not putting forward a bill right here right now that says sex offences against children will not result in house arrest, given the foregoing?

Hon. Arif Virani: Mr. Caputo, we have a bill that's before us right now. That's not the bill you're choosing to speak about. That's the first point.

Secondly, we will definitely part company if you think that people in your former profession, Crown attorneys, should have their discretion fettered such that they're not permitted to put in a joint submission on sentencing.

Mr. Frank Caputo: We fetter discretion every time we prosecute an offence with a minimum sentence.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Caputo, and Minister.

Next, for six minutes, is Mr. Mendicino.

Hon. Marco Mendicino (Eglinton—Lawrence, Lib.): Thank you, Chair.

Welcome, Minister. Thank you to your officials.

I am going to try to focus my questions on Bill C-40.

I will begin by asking you, Minister, to expand a little on the interplay between your statutory responsibilities when it comes to potential miscarriages of justice and what this bill would do—if and when it is passed—in the creation of a new commission that would take on that responsibility. You mentioned in your remarks that you would retain some of the existing statutory responsibilities in this regard, but you also alluded to the commission.

In cases where, for example, in the territories where there are no provincial attorneys general and you still are the presiding attorney general with responsibilities can you clarify what the role of the commission is in initiating a process or a preliminary review step by step, and what your responsibilities are? Help us understand the sequence of how that process will play out between your office and the new commission when it's set up?

Hon. Arif Virani: Thank you, Mr. Mendicino.

I'll take a stab at that. Julie will correct me if I get any aspects of the steps wrong.

Effectively, the role of the commission is to replace many, if not most, of the functions that I currently perform as Minister of Justice. What I would say to that is where I, the Attorney General of Canada, am the prosecuting attorney in a given piece of litigation, what happens is pursuant to the statute if a John Doe is making an application and a determination about admissibility is being made, I'm alerted to that fact.

It comes across my desk that John Doe has made an application. If they clear the admissibility criteria and get to an investigation stage, as the AG of jurisdiction I'm able to provide submissions about how the prosecution was handled to inform the commission's investigative function. After that point, I believe I have no further role, because the commission makes a determination based on that investigation on whether the test has been met...if there may have been a miscarriage of justice, and it's in the public interest to pursue either a new appeal or trial *de novo*. They make that decision independently of me entirely.

Hon. Marco Mendicino: The new commission will do the initial screening. It's not your office, which is where the current entity resides, or within the Department of Justice. That function will then reside with the commission. You will provide submissions in your capacity as the Attorney General on the appropriateness and merits of the conviction. Then the commission will come to a determination about whether or not there should be any remedy for a potential miscarriage of justice. Have I summarized it accurately?

I'm looking at your officials. They are nodding affirmatively. That's encouraging.

Hon. Arif Virani: I would just add one qualification, though, Mr. Mendicino. This is only in a subset of cases. In the vast universe of cases when you have provinces.... You're in my province of Ontario, and it's the AG of Ontario who plays that role. It would only be in small cases where the AG of Canada has the jurisdiction.

● (1705)

Hon. Marco Mendicino: Yes, that's with the initial qualification that I provided.

I see Ms. Besner may want to add something.

Ms. Julie Besner: When it's the Attorney General of Canada who would have prosecuted the offence for which someone is applying for a review, it would be the Public Prosecution Service of Canada that would be interacting with the commission, not the minister personally. The function of reviewing applications that the Minister of Justice is currently empowered to do is completely being replaced with the commission. The minister will make recommendations for appointments that the Governor in Council will make to the commission.

Hon. Marco Mendicino: Right. That part I get.

Does the bill, in your view, Minister—or to any of your officials—expressly stipulate the distinction between what we have just been discussing around what your residual functions are in a case where you are the Attorney General of Canada and one of your delegated authorities had carriage of the prosecution that led to conviction, and all of the other provinces, where the respective provincial attorney general is responsible for making that submission to the commission? Is that spelled out expressly?

Ms. Julie Besner: Well, the way it's written in Bill C-40 is that it's the attorney general who was responsible for the prosecution or the jurisdiction in which the prosecution occurred. Something along those lines is how it's spelled out in Bill C-40 for the amendments to the code.

Hon. Marco Mendicino: Is there language that expressly extinguishes your current role in the delegation to your department for the purposes of making out the preliminary screening? What I'm getting at is just to be sure that our intent around the function of the commission to effectively substitute your current statutory responsibility is deconflicted and that there is no ambiguity about what the current mandate of the commission is and about any residual responsibility that may still be in the statute. I'm trying to be ironclad clear about this.

The Vice-Chair (Hon. Rob Moore): I'm sorry. You have just 10 seconds for a response.

Hon. Arif Virani: I'm pretty confident that there is, but there's a slight grey zone in terms of applications that are currently pending. In that case, that John Doe would have a choice to keep it in the ministerial track or to go to the new track. The choice would be made available.

Hon. Marco Mendicino: Thank you.

The Vice-Chair (Hon. Rob Moore): Monsieur Fortin, you have six minutes.

[*Translation*]

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

Hello, Minister.

Before you arrived, we had a few questions for your employees, so to speak. I think it was Ms. Besner who answered my question by saying that there isn't really a strict definition of the miscarriage of justice. I would like to hear your thoughts on that.

Should the bill not have included a definition of the miscarriage of justice? If there is one, could you please tell me where it is and what it says?

Hon. Arif Virani: I heard part of Ms. Besner's answer. The concept of miscarriage of justice is indeed recognized in jurisprudence. It is something seen in cases of wrongful conviction in the past. For example, a person may have given false testimony, or it is determined that the person the police relied upon was not credible. A miscarriage of justice can also involve a witness or a change in scientific knowledge.

So the term “miscarriage of justice” is not unknown to the justice system. It is a familiar concept that is present in case law. That is where we find clues or answers to determine whether there was a miscarriage of justice in a specific case.

Mr. Rhéal Éloi Fortin: Do you not think it would have been helpful to include a definition in the bill?

Hon. Arif Virani: We always face the same issue, Mr. Fortin: if we try to come up with a definition, it might not be inclusive enough or might be limited in scope.

In the 1980s, for instance, I don't think anyone thought about evidence involving DNA or each person's unique genome. Thanks to advances in science, we can now rely upon genetic evidence.

If we rely on a definition based on case law, that allows greater flexibility.

● (1710)

Mr. Rhéal Éloi Fortin: In broader terms, could that include an error made by the accused when he pleaded guilty, as we were discussing earlier, or a whole range or other errors that are not necessarily committed by the judge?

Hon. Arif Virani: That's right, exactly.

Mr. Rhéal Éloi Fortin: Could that also include an error by police in the course of their investigation?

Hon. Arif Virani: Definitely, that can happen.

Mr. Rhéal Éloi Fortin: I believe you said earlier, Minister, in response to my colleague's question, that there are a lot of racialized individuals in our prisons, particularly indigenous and Black individuals. It was as though there might have been some miscarriage of justice. I would like to hear your thoughts on that.

In your opinion, are the racialized individuals in our prisons there in many cases because of a miscarriage of justice?

Hon. Arif Virani: That is hard to say. I cannot speculate, Mr. Fortin. From a purely mathematical point of view, it is a bit strange to see that, among the 26 individuals whose review request was granted, just five were racialized persons. Those figures are surprising considering that indigenous persons account for 32% of the prison population and Black inmates account for 9% of the prison population. That means that roughly 40% of prisoners are either indigenous or Black, and are therefore racialized, and yet they account for just five of the 26 cases I mentioned. My last math class might have been in high school, but I would say that these figures do not accurately reflect reality, statistically speaking.

Mr. Rhéal Éloi Fortin: I see.

Has your department conducted an inquiry to determine why there is such a high proportion of racialized persons in our prisons?

Hon. Arif Virani: We have looked at the reports of inquiries conducted in the past. There have been numerous royal commissions, for instance. We are also in the process of dealing with...

Mr. Rhéal Éloi Fortin: I'm sorry to interrupt, Minister. I do not want to be rude, but time is running out.

You said you have looked at reports of inquiries conducted in the past. I would like to know what conclusions they reached as to why those persons were in prison.

Hon. Arif Virani: I will let my officials answer that question, but what I would like...

Mr. Rhéal Éloi Fortin: Can we do that right away? I have only about a minute left, I think.

Hon. Arif Virani: I would just like to point out that we are in the process of creating Canada's Black Justice Strategy and the Indigenous Justice Strategy to address the overrepresentation...

Mr. Rhéal Éloi Fortin: Thank you, Minister. I like you a lot, but I would like an answer to my question. Who can answer it?

Ms. Julie Besner: I would like to hear the question again, please.

Mr. Rhéal Éloi Fortin: We know there are a lot of racialized persons behind bars. Do we know why they are there? Has there been an inquiry into this? The minister said he consulted the reports of previous inquiries on the subject and that you could give me an answer. What did those inquiries conclude? Why are those people behind bars?

Ms. Julie Besner: First of all, I think that kind of study would be the responsibility of Public Safety Canada, which is also responsible for Corrections Canada. During the consultations...

Mr. Rhéal Éloi Fortin: Did you read the report?

[*English*]

The Vice-Chair (Hon. Rob Moore): Thank you very much. We're out of time for that round.

[*Translation*]

Mr. Rhéal Éloi Fortin: From what I am hearing, we do not know why those people are there, but we are amending the legislation. Is there a rationale for that?

[*English*]

The Vice-Chair (Hon. Rob Moore): Monsieur Fortin, your time is up.

Do you want to very quickly respond?

Hon. Arif Virani: If I could just highlight this specifically, there was a commission in Ontario in 1995 on systemic racism in the justice system. It dates as far back as that, if not further, identifying factors that result in the overrepresentation of racialized people in our justice system.

It is a pretty established fact, but we could undertake to provide you with more information as to where those conclusions were drawn.

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

Ms. Gazan, it's over to you for six minutes.

Ms. Leah Gazan: Thank you, Chair.

Minister, I appreciated that response you just provided on systemic racism. That is one of the reasons I asked a question about the evaluation and accountability measures and performance indicators. It's because I have concerns that they don't address the kind of systemic racism we're currently seeing in the system, which is glaring, certainly in the Prairies with the overincarceration of indigenous women.

I want to go back, because I ran out of time. Why was the possibility for group reviews not included in the legislation?

● (1715)

Hon. Arif Virani: What I can say, Ms. Gazan, is it's an important question, but this is meant to be an incremental approach. We looked very closely at some of those other jurisdictions that I identified—New Zealand and Scotland, and then England, Wales and Northern Ireland combined—and the notion of having a broad and far-reaching mandate for the commission was made moot by some individuals who were helping us develop this.

What we tried to do was a have more targeted and focused initiative that looked at replacing my discretion with a commission of people who would be able to look at this using a slightly different test and outreach, which would allow for more applications to come in such that they would then be able to address the convictions we're seeing.

As for what we do with the patterns we see, that is part of the parliamentary review that's built into the statute, so five years from now, this committee or another one will be looking at whether the legislation needs to be amended to perhaps examine exactly what you're speaking to.

Ms. Leah Gazan: I have questions about the commission.

I'm wondering what portion of applications, through the process provided in Bill C-40, are expected to be from indigenous women.

Hon. Arif Virani: I'm sorry. Could you repeat the question?

Ms. Leah Gazan: What percentage or portion of applications, through the process provided in Bill C-40, are expected to be from indigenous women?

Hon. Arif Virani: It's very hard to predict how many applications will come in from any sector. I hope it will be more than what comes in now. That would be my goal.

Ms. Leah Gazan: That is concerning to me, because, if you look at miscarriages of justice, knowing about programs and access to proper legal help.... These are some of the things that need to be looked at while the bill is being implemented—should it pass—in order to make sure some of these areas are looked after.

This past year, the Department of Justice indicated.... In terms of miscarriages of justice, there's a very prominent case. You began a review of the convictions of two indigenous women, Odelia and Nerissa Quewezance. They are two of at least 12 indigenous women whose stories have been publicized by the MMIWG national inquiry. It underscored how the systemic injustices they faced have been experienced by far too many indigenous women within the criminal legal system, but also when they are seeking remedies for miscarriages of justice.

Can you provide an update on when the department will reach a decision on these convictions, for which the Quewezance sisters have served decades in prison? What is the timeline for reviewing the cases of the other 10 identified indigenous women?

Hon. Arif Virani: Ms. Gazan, I appreciate the question and your very significant concern in this area.

What I would say to you is this: In the normal course, I don't discuss any application that is pending in the system, because it's ultimately going to come on my desk for a decision. I know that, in the case of the two Quewezance individuals you mentioned, they have themselves disclosed the fact that they put in an application. I would refer you back to what Ms. Besner said earlier, in her testimony: The length of time spent on a file varies depending on the complexity of the file. It's very difficult to ascertain.

As a further elaboration on your last question, the point, Ms. Gazan, is that we can't guarantee how many, quantifiably, will come in from Black, indigenous or female accused. What you will have prior to the five-year parliamentary review is this: On an annual basis, you'll have parliamentary reports that show the demographic data on applicants coming into the system. When a report like that is tabled, it's incumbent on all of us, as parliamentarians, to try to identify patterns and say, “Well, maybe there needs to be more done on outreach with indigenous women or Black men”—whatever the case may be.

Ms. Leah Gazan: I would agree there is absolutely more that needs to be done in outreach. I think we know that already, just by seeing what the system currently looks like. I appreciate that acknowledgement.

The report by Justice Westmoreland-Traoré and Justice LaForme recommended three defining features for the new Miscarriages of Justice Commission. First, they recommend “a proactive and systematic commission as opposed to a reactive commission.” Such a commission could proactively research and identify recommendations to avoid future cases of wrongful convictions and miscarriages of justice.

Why is this proactive approach not addressed in the commission's mandate?

● (1720)

Hon. Arif Virani: First of all, we appreciate what Justice LaForme and Justice Traoré offered a great deal, in terms of their hard work on this issue.

Secondly, I would politely and respectfully push back a bit on that. There are many proactive elements built into this bill and in what's conceived for the commission—very specifically, the outreach efforts of going into prisons; raising awareness about the existence of the commission and how people can apply; providing assistance to people who apply; and providing translation and linguistic interpretation. That is all, by far, much more proactive than the work the tremendously hard-working officials at the Department of Justice do right now. That's exactly the same type of proactive activity that was contemplated by Justice Traoré and Justice LaForme.

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

Next, for the second round of five-minute questions, we have Mr. Van Popta.

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

Thank you, Minister, for being here, and to the other witnesses.

Today we're talking about Bill C-40, the proposed miscarriage of justice review commission act, also called the David and Joyce Milgaard law. I want to talk a little about the facts in the Milgaard case. You referred to them already, Minister.

He served 23 years in prison for a crime he did not commit. That was definitely a miscarriage of justice. It was a tragic story, but he and his mother Joyce stuck to their guns. It wasn't until new evidence became available that there was a review. Without that new evidence, there likely never would have been a review.

Under this new regime of having a commission instead of applications managed through your ministry, Minister, how would the Milgaard case have been treated differently? Today, is there still a requirement that there be new evidence presented that wasn't available at trial?

Hon. Arif Virani: It's a very good question, Mr. Van Popta. Thank you.

There are a couple of things I would say.

Is new evidence the threshold or gateway consideration that allows you to get into this regime? No, it is not.

Does it happen frequently, particularly in the case of DNA evidence? Yes, of course it does.

However, it's not simply about new evidence. It can be about other errors that might have been committed, and I outlined some of those in my response to Monsieur Fortin.

What I would say to you is that I have confidence in the system in the way it's articulated in this bill insofar as when I look at the statistical reality of the vast number of cases—in the hundreds—that we see going through the system and being overturned as wrongful convictions in places like New Zealand, Scotland, England and Wales, it's such that we have nowhere to go but up in improving our numbers. The thing that distinguishes Canada from those other three jurisdictions is the lack of an independent commission that is separated out.

Those commissions sometimes work on the basis of months, to go back to Ms. Gazan's point, whereas in our case, because of the complexities of the case, these processes sometimes take years.

If we can work more quickly and make it more accessible, I think that at least makes options available to a future David Milgaard such that in a prison in a given part of the country, they know there's something available to them that can assist them through the process, including things like legal assistance.

Mr. Tako Van Popta: Fair enough.

I'm reading from the 2022 annual report of the review of miscarriages of justice, which says:

> The Minister must take into account all relevant matters in assessing an application, including whether the application is supported by "new matters of significance"—usually important new information...that was not previously considered by the courts.

Is this new regime going to be a substantial change to that? Is a review by the commission and the remedy of a new trial still going to be an extraordinary remedy, or will it be seen as just another appeal process?

Hon. Arif Virani: It's not another appeal process. It doesn't usurp the role of the courts. That's important. That's critical to understand.

Is it a fundamental change? It's a change in the test. As opposed to the test that I currently operate under, which is whether a miscarriage of justice "likely occurred", we have a test that is "may have occurred". We have factors that I outlined in my opening comments whereby you're supposed to look directly at the personal circumstances of the individuals, including their life characteristics and lived experiences, with particular attention to Black and indigenous individuals and their overrepresentation in the justice system.

I think with that kind of focus, what you're going to have is an attentive body that is well-staffed, well-resourced and out there, doing the outreach that has the ability to engage different demographics, including those two demographics that we know are sorely overrepresented in our justice system.

It's going to make a very substantive difference.

Mr. Tako Van Popta: Are you at all concerned that this new process may open up a floodgate of new applications, many of which would be completely unwarranted?

● (1725)

Hon. Arif Virani: I think there are built-in factors to avoid them getting all the way through the floodgates. You still need to meet the threshold criteria. You need to have exhausted your appeals, at least to a court of appeal or, in some instances, all the way to the Supreme Court of Canada. You need to have been convicted of a particular offence.

There is threshold vetting that the commission must do, and I'm confident that the commission will have the resources and will have the buy-in from provincial and territorial partners. When we were consulting on this, it wasn't as if a random provincial attorney general put up their hand and said, "Actually, we're okay with wrongfully convicted persons festering in prison."

Mr. Tako Van Popta: Nobody's okay with wrongful convictions.

Hon. Arif Virani: No one is, and that's why they've committed to working with us hand in hand and to working with this new commission once it's been created.

Mr. Tako Van Popta: Of course. I recognize full well....

I'm sorry. Am I out of time?

The Vice-Chair (Hon. Rob Moore): You have 15 seconds.

Mr. Tako Van Popta: I have a very quick question then.

On DNA evidence, will wrongful convictions be less likely to happen now that we have DNA evidence? Keep in mind that David Milgaard never would have been convicted if he had had DNA testing available in the 1980s, or whenever it was that he was convicted.

Hon. Arif Virani: I would like to say yes, Mr. Van Popta, but I think the statistics I was shown for the United States still show a wrongful conviction rate hovering between 3% and 6%, notwithstanding the fact that we have DNA evidence.

While I believe in our justice system, I also believe it's not infallible. It's important to make sure that we have a commission in place to address wrongful convictions when they occur, because they will continue to occur.

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

Thank you, Mr. Van Popta.

Our final questioner for five minutes will be Ms. Dhillon.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): It will be Mr. Housefather.

Mr. Anthony Housefather: I'll be taking it, Mr. Chair.

Minister, it's nice to have you here. Based on what I've seen before, I could probably ask you about the federal child support guidelines under the Divorce Act, but I will try to stick to Bill C-40.

I want to follow on from what Ms. Gazan was saying. This bill is supposedly aimed at giving the poorest, most vulnerable defendants a better chance of reaching out to a commission and having an opportunity to have their grievances heard about the verdict in court. My concern is the exhaustion of appeal provision. If I'm the poorest of defendants, how often am I going to be appealing to the court of appeal if I don't have the money to pay a good lawyer to be able to do that?

If this happened years later, after I'm time-barred from appealing to the court of appeals, wouldn't I then be locked out of this process? Wouldn't it be better to reconsider that exhaustion of remedies approach to allow the opportunity for the new commission to consider all factors as to whether or not it could consider a case?

Hon. Arif Virani: I think that's a very insightful question, Mr. Housefather. What I would say to you is that we've had to put some demarcations around the structure of the commission. Also, I, as well as the drafters in the department, was very conscious of not usurping the proper role of the courts in terms of making determinations. This is not meant to replace determinations of convictions, etc. It's not meant to usurp the proper judicial role.

I hear you on the access to justice point about who's able to pursue an appeal in the first instance within the time frames that are allowed. One way I think we can work to address that is by ensuring we have robust legal aid. This was mentioned, I think, by Ms. Gazan. What I would say to you there is that there's always room for improvement, but I'm particularly content with the fact that I think this year, if my memory serves correctly, over $200 million was provided by the federal government on an annual basis to support legal aid around the country.

Mr. Anthony Housefather: I very much appreciate that, Mr. Minister. I do understand that, but I'm looking at the question, again, of whether the Department of Justice has any figures for what percentage of convictions are appealed to the court of appeal, especially in the cases of Black and indigenous defendants.

Ms. Julie Besner: There is nothing that I can convey off the top of my head. We'd have to look at what the Canadian Centre for Justice Statistics has on that in terms of the percentage that are appealed.

As the minister was explaining, the commission can't usurp the rule of the courts or become like an alternative to the courts so that people can pick and choose where they want to advance their claim. What the bill does do, however, is to clarify what it means to have exhausted your rights of appeal, which wasn't there beforehand. That did create a lot of confusion, so now it's being explicitly clarified that people have to appeal to the court of appeal—that's for sure. Whether or not they subsequently appeal to the Supreme Court of Canada, there are factors that are enumerated in the bill to help explain whether exceptions to that can be made, so if an appeal is like futile or—

● (1730)

Mr. Anthony Housefather: I've read the criteria; I understand and I very much appreciate the effort to clarify this.

Again, I'm sort of struggling with the concept. I do appreciate that it's not meant to usurp the role of the courts. However, if you're time-barred from appealing to the court of appeal and you didn't appeal because you had no competent legal advice to do so and years later you're well past the time that you could go and apply to the court of appeal for some type of remedy related to insufficient counsellor or whatever else, would it not be a good idea to include some provision in the bill that's irrespective of the above in the event the commission believes, based on certain criteria, that the defendant has no other option and that there are reasonable grounds on which to believe that they were wrongfully convicted—I'm using the wrong words now but I'll take the same language of the bill—and that they should have that opportunity?

Ms. Julie Besner: There are, actually, quite a few cases in which fresh evidence comes to light after a person has been convicted and they can apply to the court of appeal to have an extension of the time within which to file an appeal. When there is such compelling fresh evidence, the courts of appeal do grant that extension and an appeal. A lot of wrongful conviction cases do make their way through the courts without coming through the ministerial review process and, in the future, the commission process. That will remain available but it's just to clarify the avenues with respect to when someone can come to the commission or whether they still have to go to the courts.

Mr. Anthony Housefather: I understand that.

The Vice-Chair (Hon. Rob Moore): Thank you, Mr. Housefather. Your time is up.

Thank you, Minister, for being here today. Thank you to our other officials who are here. I appreciate your being here.

The meeting is adjourned.