



# The Advocates' Society

## La Société des plaideurs

September 5, 2023

VIA EMAIL

Mr. Randeep Sarai, M.P., Chair  
Standing Committee on Justice and Human Rights  
c/o Jean-François Lafleur, Clerk of the Committee  
Sixth Floor, 131 Queen Street  
House of Commons  
Ottawa, Ontario K1A 0A6

Dear Mr. Sarai:

**RE: Bill C-40, *Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law)***

The Advocates' Society writes to provide our comments to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-40, the *Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law)*.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

### **I. Introduction**

The Advocates' Society applauds the Government's establishment of an independent Miscarriage of Justice Review Commission ("Commission") to replace the current regime of ministerial review set out in Part XXI.1 of the *Criminal Code*.<sup>1</sup> Bill C-40 represents a critical and laudable step towards identifying and rectifying the miscarriages of justice that can occur within the Canadian criminal justice system. In particular, The Advocates' Society appreciates that the Commission has been granted the powers of a commissioner appointed under the *Inquiries Act*;<sup>2</sup> this demonstrates the Government's commitment to empowering the Commission and providing it with the necessary tools to fulfill its important mandate.<sup>3</sup>

The Advocates' Society makes the following recommendations to ensure the Commission can fulfill its vital function in the justice system:

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<sup>1</sup> R.S.C. 1985, c. C-46.

<sup>2</sup> R.S.C. 1985, c. I-11.

<sup>3</sup> Bill C-40, Clause 3, in proposed s. 696.5(4) of the *Criminal Code*.

- 1) In order to maximize the Commission’s positive impact on the Canadian criminal justice system, the Commission should be granted jurisdiction to do systemic reform work related to the prevention of miscarriages of justice.
- 2) In order to ensure the Commission can effectively fulfill its mandate:
  - a. The Commission should develop a policy that sets out the priority it will accord to the individual applications it receives for review, and consult stakeholders in the development of that policy; and
  - b. The Commission should be provided with sufficient and stable funding.

We expand on these recommendations, and the reasons therefor, below.

## II. Remedying the Commission’s Lack of a Systemic Mandate

Bill C-40 provides that “[t]he Commission’s mandate is to review applications made under Part XXI.1 on the grounds of miscarriage of justice [...]”.<sup>4</sup> The Advocates’ Society notes that the Commission’s proposed mandate regrettably does *not* include making recommendations for systemic reform to prevent miscarriages of justice before they occur.

In the Honourable Harry LaForme and the Honourable Juanita Westmoreland-Traoré’s report regarding *A Miscarriages of Justice Commission* (the “Report”), a central and key policy recommendation was that the Commission should take a proactive and systemic approach to miscarriages of justice.<sup>5</sup> As Justices LaForme and Westmoreland-Traoré wrote in the Report, “[t]he new commission must be **systemic** in the sense that it should be concerned about both the correction of miscarriages of justice and their prevention.”<sup>6</sup> To that end, The Advocates’ Society strongly recommends that the government implement Recommendation #25 from the Report:

25. We recommend that the commission have jurisdiction to do systemic reform work related to the prevention of miscarriages of justice.<sup>7</sup>

The Commission’s lack of mandate to review the systemic causes of wrongful convictions and other miscarriages of justice is a missed opportunity. The Commission will be uniquely placed to identify the major causes and factors contributing to the occurrence of miscarriages of justice in the Canadian criminal justice system. No other organization will have access to the complete set of quantitative and qualitative information held by the Commission. While the Commission’s decisions will be published, they may be redacted to protect confidential information and to avoid interference with new trials or appeals that the Commission directs.<sup>8</sup>

If the Commission were to possess a systemic mandate, it could (for example) examine the ways in which systemic racism and discrimination impact wrongful convictions of individuals from equity-seeking groups. The Government has acknowledged the over-representation of certain groups in the criminal

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<sup>4</sup> Bill C-40, Clause 4, in proposed s. 696.72.

<sup>5</sup> The Honourable Harry LaForme & the Honourable Juanita Westmoreland-Traoré, *A Miscarriages of Justice Commission*, online: Department of Justice <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mic-cej/index.html>>.

<sup>6</sup> *Ibid.*, at p. 6 (emphasis in original).

<sup>7</sup> *Ibid.*, at p. 22.

<sup>8</sup> See proposed s. 696.82(2) regarding publication of decisions (Bill C-40, Clause 4).

justice system, including Indigenous peoples and Black persons, in the composition of the Commission (in proposed section 696.73 regarding Commissioner appointments).<sup>9</sup> The Advocates' Society suggests that the Government can and should bring that same recognition to bear in the formulation of the Commission's mandate by including systemic reform work related to the prevention of miscarriages of justice. Identifying and making recommendations to eliminate the causes of miscarriages of justice will increase efficiencies in the justice system over the long term. If the Commission is granted the authority to address systemic reforms, it will ultimately allow the Commission to lower the number of applications it receives and investigations it conducts.

The Commission may wish to implement appropriate internal processes and safeguards to separate its systemic reform work from its review of individual applications.

### **III. Ensuring the Commission Can Fulfill Its Mandate**

Proposed s. 696.2(1) of the *Criminal Code* sets out the types of applications that may be made to the Commission for review on the grounds of miscarriage of justice:

#### **Application for review**

**696.2 (1)** An application for a review on the grounds of miscarriage of justice may be made to the Commission by or on behalf of

(a) a person who has been found guilty of an offence under an Act of Parliament or a regulation made under an Act of Parliament, including a person found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, a person whose plea of guilty has been accepted and a person who has been discharged under section 730;

(b) a person who has been found to be a dangerous offender or long-term offender under Part XXIV; or

(c) a person who has been the subject of a verdict of not criminally responsible on account of mental disorder under section 672.34.<sup>10</sup>

The scope of matters that the Commission is empowered to review is ambitious, including any criminal or regulatory conviction or discharge, any dangerous or long-term offender designation, and any finding that a person is not criminally responsible. This broad scope poses a risk that the Commission may not have the capacity to respond to the high volume of applications it receives. The Advocates' Society offers two recommendations to avoid that potential outcome.

First, The Advocates' Society recommends that the Commission develop a policy that sets out the priority accorded to the applications it receives, and that the Commission consult stakeholders in

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<sup>9</sup> Proposed s. 696.73 (Bill C-40, Clause 4) reads as follows:

**696.73** In making recommendations for commissioner appointments, the Minister must seek to reflect the diversity of Canadian society and must take into account considerations such as gender equality and the overrepresentation of certain groups in the criminal justice system, including Indigenous peoples and Black persons.

<sup>10</sup> Bill C-40, Clause 3.

developing that policy.<sup>11</sup> The Commission must have the power to prioritize the most serious cases for review and allocate its resources accordingly.

Second, we recommend that the Commission be provided with sufficient and stable funding to fulfill its mandate with respect to individual applications and systemic reform (as proposed above). Wrongful conviction cases are complex, often involving dense forensic evidence, and will require significant staff resources. The Commission's staff must be able to conduct thorough and timely investigations. It will not serve anyone if a lack of adequate, secure funding leads to delays in the processing of applications, or an inability to make recommendations for system-wide reform that will improve the functioning of the criminal justice system long-term.

We appreciate that the 2023 federal budget allocated \$83.9 million over five years for the Commission, and \$18.7 million ongoing. The Commission's funding should be reviewed regularly by the Government, however, to ensure that the Commission continues to have the means to fulfill its critical mandate and function. In order to assist in the Government's review of the adequacy of the Commission's resources, The Advocates' Society recommends that the Commission be required to include in its annual report a statement on whether the Commission had sufficient resources to carry out its mandate in the past fiscal year, and whether it expects to have sufficient resources for the following fiscal year.<sup>12</sup>

Thank you for the opportunity to make these submissions to the Standing Committee on Justice and Human Rights. We would be pleased to answer any questions the Standing Committee may have.

Yours sincerely,



Dominique T. Hussey  
President

CC: The Honourable Arif Virani, P.C., M.P., Minister of Justice and Attorney General of Canada  
Vicki White, Chief Executive Officer, The Advocates' Society

#### **The Advocates Society's Task Force on Bill C-40**

James G. Foy, *Savard Foy LLP*  
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<sup>11</sup> See proposed s. 696.83 regarding Commission policies (Bill C-40, Clause 4).

<sup>12</sup> The Commission is required to produce an annual report with specific content by proposed s. 696.87 (Bill C-40, Clause 4). In this regard, see, e.g., the [Specific Claims Tribunal Act](#), R.S.C. 1985, c. H-6, s. 40(2): "The annual report may include a statement on whether the Tribunal had sufficient resources, including a sufficient number of members, to address its case load in the past fiscal year and whether it will have sufficient resources for the following fiscal year."