Canada's Proposed Miscarriage of Justice Review Commission in Bill C-40: "A Good Start"

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The Proposed Canadian Miscarriage of Justice Commission: "A Good Start"[1]

Bill C-40, appropriately named after the late David Milgaard and Joyce Milgaard, will create a long-awaited independent commission to replace the role of the federal Minister of Justice in correcting miscarriages of justice.

It has a number of positive features and should be welcomed. At the same time, there is room for improvement as the bill is debated in Parliament.

A Long Wait

Starting in 1989, seven public inquiries, and most recently the 2021 report prepared by Justices LaForme and Westmoreland-Traoré have all called for the creation of an independent commission.

A New Name

In England, Scotland, and New Zealand, similar commissions are called "criminal cases review commissions". The 2021 report heard that the wrongly convicted did not like that name given that they are people who want their claims of injustice investigated and not "criminal cases" who want a desk-top review by a bureaucrat. Bill C-40 will create a new "Miscarriage of Justice Review Commission."

For the longest time, the Minister of Justice only received about five completed applications each year, but this has increased to around 20 applications in recent years. If the experience in other jurisdictions holds true, the number of applications that a new commission will receive will be substantially higher than the current number the Minister receives. Hopefully the new commission will have sufficient budget, commissioners, and staff to meet its new statutory requirements to deal with applications "as expeditiously as possible" and provide regular updates to applicants.

A Five to Nine Person Commission

The new commission will have four to eight commissioners plus the chief commissioner who is the only commissioner required to serve full time. The chief commissioner will also be the chief executive officer who supervises the staff.

The commissioners will each be appointed by the Cabinet on the recommendation of the Minister of Justice and serve renewable seven-year terms. In making recommendations to the

[1] Justice Harry LaForme in Sean Fine, "Ottawa introduces bill to overhaul how wrongful convictions are reviewed" Globe and Mail (17 Feb. 2023).

Cabinet, the Minister must take into account gender equality and the overrepresentation of groups, including Indigenous and Black persons in the criminal justice system.

The 2021 report recommended a 9-11-person commission appointed by an independent committee at arms-length from government and outside the political sphere. Justices LaForme and Westmoreland-Traoré thought such a committee should resemble the type of people who would be selected as commissioners. They also recommended that at least one commissioner be Indigenous and one be Black to reflect the overrepresentation of those groups in the prison population at risk of suffering miscarriages of justice.

A Better, More Realistic Standard for Ordering New Trials and New Appeals

At present, federal Ministers of Justice will only order a new trial or appeal if they conclude that a miscarriage of justice "likely occurred". The new commission will have a slightly lower standard based on whether a miscarriage of justice "may" have occurred and it is in "the interests of justice" for there to be a new trial or new appeal.

The focus on whether a miscarriage of justice "may" have occurred as opposed to the existing standard that the miscarriage "likely" occurred is a good change. It reflects the standard used by foreign commissions. It also reflects criminal justice values designed to give the accused the benefit of a reasonable doubt and the practical reality that many applicants will require the commission's investigative powers to undercover miscarriages of justice.

The focus on broadly defined "miscarriages of justice" is underlined by a provision that it is not necessary to establish the applicant's innocence. This is appropriate because factual innocence is often impossible to establish especially in the many cases do not involve DNA evidence.

The 2021 report advised against adding the additional requirement of "interests of justice". Its concern was that this would give the commission too much discretion and might not hold the confidence of groups who are distrustful of the justice system. The Scottish commission, however, has a similar double requirement.

Unlike the English and Scottish commissions, the Canadian commission will be required to publish its decisions with redactions of confidential information and information that will interfere with a new trial or appeal. Published decisions are required from the New Zealand commission which has been in operation since 2020 but is already struggling with a limited budget, higher than expected applications and the labour required for outreach, investigation and creating decisions for public release.

Exhaustion of Appeals and the Problem of False Guilty Pleas

As with the present Ministerial review system, the new commission will only hear cases after an accused has tried and failed at least one level of appeal.

A potential problem is that the bill requires at least an appeal to a provincial Court of Appeal. This may work to the disadvantage of those who made false guilty pleas and need access to the commission's investigative powers to establish a miscarriage of justice. As the Canadian Registry of Wrongful Conviction's first report indicates, 18% of all Canada's remedied wrongful convictions are the result of guilty pleas, with the majority involving hard to disprove "imagined crimes". The vast majority of those who made false guilty pleas are female, Indigenous, racialized, or suffer other historically acknowledged disadvantages. It may be too much to expect them to always go through the difficult process of trying to appeal their guilty plea to a provincial Court of Appeal without help and investigations from the new commission.

The English legislation allows its commissions to order remedies in all exceptional cases even if there has been no appeal, whereas the Canadian bill contemplates only an exception - already recognized in existing caselaw - for the need to appeal all the way to the Supreme Court.

Investigative Powers and the Potential Problem of Legal Privileges

The new commission, like the Minister, will have wide investigative powers under the *Inquiries Act.* This is a good start that can require public officials and private individuals to produce relevant material and answer questions to assist the commission in its investigations. One potential problem is that people and institutions may claim that the commission should not have access to relevant information on the basis of legal privileges such those that protect the identity of informants or the confidentiality of legal advice.

The 2021 report recommended that the commission should be able to have access to all relevant information regardless of claims of legal privilege. It suggested borrowing from legislation that allows law societies to have access to privileged information held by lawyers while also taking steps to protect the legal privilege with respect to third parties.

The English legislation establishing their commission provides in s.17(4) of the *Criminal Appeal Act*, 1995 that the duty to provide information to the commission "is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission." Something similar should be added to Bill C-40.

The Mandate and Budget of the Commission

A legitimate debate is whether a new commission will try to do too much or too little.

The 2021 report recommended that in addition to deciding applications, the commission would be able to engage in systemic reform work to prevent miscarriages of justice. In contrast, Bill C-40 appears to limit the mandate of the commission to deciding individual applications and engaging in some outreach and education.

The commission can conduct outreach, provide support for applicants, provide them with translation, and appoint lawyers to assist them when necessary. These are all necessary services, recommended in the 2021 report. The rub, however, is that there is nothing in the bill to ensure that the commission will be adequately funded.

Powers to appoint lawyers or contract with support workers will be useless if there is no budget to pay for it. The existing process has been criticized for its perceived lack of independence from government and its delays, but budget constraints have not been a problem because it can simply draw as needed from the federal Department of Justice's substantial budget.

The new commission may be vulnerable to under-funding. The 2021 report emphasized this danger. It made recommendations that the commission be funded more like the courts than a small administrative agency. It also recommended that the adequacy of the commission's funding be the focus of both Parliamentary and outside expert reviews.

A similar English commission has been operating since 1997 but has suffered from budget cuts even greater than those of other criminal justice actors. Commissions may not be popular if they are doing their jobs. Sometimes, courts do not appreciate their referrals. Applicants and innocence projects may be disappointed if their applications are not successful. The public may not always understand or support their work. Until they are exonerated, the wrongfully convicted are often erroneously viewed as dangerous criminals.

No Mandate Over Sentences

Another omission from the commission's mandate is the ability to hear applications about new matters of significance with regard to sentences. Similar commissions in England, Scotland, and New Zealand all allow applications in relation to sentences that can be affected by new evidence that emerges after an appeal. Sometimes, this evidence can relate to the mental health or changed circumstances of the accused or factual errors made at sentencing. Bill C-40 quite appropriately allows reviews of dangerous offender designations and not criminally responsible verdicts, but not sentences.

A sentence application to a commission could allow applicants, especially those serving life or long-term sentences, a second chance at freedom from incarceration. The independent courts, which would receive a sentencing referral from the commission, may be more receptive to hearing new evidence than parole boards which often evaluate applicants through a risk focused and often a risk-adverse lens.

Indigenous people, who constitute about a third of Canada's prison population, as well Black offenders and offenders living with mental health challenges, would benefit from the commission having jurisdiction to consider new matters of significance to sentences as well as convictions. New Zealand created a similar commission in 2019 and its first referral to the courts at the end of 2022 was on a sentencing matter where apparently the courts did not realize when sentencing an offender that he was only 15 years of age.

Work Still to be Done

There are other omissions in the bill. It does not take on the difficult issue of compensating the wrongfully convicted which still operates under 1988 guidelines that are often avoided in part because of an insistence on declarations of innocence that Canadian courts refuse to make. Fighting for compensation can be a long and often re-victimizing experience for the wrongfully convicted.

The bill also does not address the existing grounds under which courts decide whether to overturn convictions. The Supreme Court of Canada has rejected a call by the inquiry into Guy Paul Morin's wrongful conviction to require courts to overturn convictions if they have a lurking doubt.

The accused, including when a new appeal is ordered by the new commission, still will have to establish to the court that they have suffered a miscarriage of justice or that their guilty verdict was unreasonable. It is possible that the commission could refer a case on the basis of new evidence but that new evidence could be held to be inadmissible in the new trial or new appeal ordered by the commission. The English law commission is presently examining its standards for overturning convictions, recognizing that the topic is closely tied to the success of its independent commission.

Additionally, there are no explicit provisions to allow the new commission to refer matters of discipline to proper authorities or to make references on systemic policy matters.

Lastly, the bill rightly recognizes that the new commission should accept applications that require investigation. But it does not follow the English legislation in allowing appeal courts, in appropriate cases, to ask the commission to conduct investigations. In any event, adequate investigations will require adequate budgets.

Conclusion

A new commission is long overdue. It has been recommended for over 30 years and the government deserves credit for acting. Moreover, the new commission is to be welcomed as a new criminal justice institution that recognizes that mistakes are inevitable in any justice system run by humans.

That said, improvements can and should be made as Bill C-40 is debated in Parliament. Moreover, Canadians will need to be vigilant that when the commission is created that it is adequately staffed and funded and continues to remain that way.