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:

We write to propose amendments to Bill C-40 and also to express concerns that we have not been invited to appear before the Committee.

In addition, we have some doubts that the committee has read our 211 page report *A Miscarriages of Justice Commission* (2021) at https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/docs/a-miscarriages-of-justice-commission-published-version.pdf that we prepared for the former Minister of Justice, the Hon. David Lametti. The report was prepared after consulting 215 people including exonerees, Innocence Projects and representatives of similar commissions in England, Scotland, Norway, North Carolina and New Zealand.

This brief will outline how Bill C-40 implicitly rejects some of the major recommendations in our report. If Bill C-40 is enacted without the major amendments we propose, we fear that the proposed Miscarriage of Justice Review Commission will have inadequate powers, budgets, independence and personnel to do its job. The creation of this commission has been recommended by commissions of inquiry since 1989. Canadians and most importantly victims of miscarriages of justice have waited much too long to be presented with such an unnecessarily inadequate bill.

A five person commission with only a full-time Chair who also has chief executive responsibilities and without statutorily required Indigenous or Black representation is manifestly inadequate to the task.

We recommended a commission of between 9 and 11 commissioners chosen by an independent committee. We recommended that a third of the commissioners be lawyers; a third have experience with the causes and consequences of miscarriages of justice; and a third, represent groups overrepresented in prison and disadvantaged in seeking relief including at least one Indigenous commissioner and one Black commissioner. [1]

Sections 696.71(2) of Bill C-40 could result in a commission with as few as 5 commissioners appointed by Cabinet with only a vague gesture to diversity in s.696.73. Under s.696.75, half of

[1] Hon. Harry LaForme and Hon. Juanita Westmoreland- Traoré, *A Miscarriage of Justice Commission* at p.65.

the commissioners would be non-lawyers. They would have to have relevant knowledge and experience "in the Governor in Council's opinion", something that strikes us as unenforceable if not meaningless.

New Zealand with a population less than one seventh of Canada has since 2019, a 7 person commission with a statutory provision for at least one Maori commissioner. As documented in our report, Indigenous and Black people are the populations most at risk for miscarriages of justice in Canada because of systemic discrimination and their overrepresentation in the prison population.

The Cabinet appointment process is notoriously slow and opaque. Although it is possible under Bill C-40 that a fully appointed Commission could have nine commissioners, many federally appointed commissions have less than their full complement. Without the participation of an independent committee representing the type of stakeholders, there is no guarantee that commissioners truly aware and committed to the redress of miscarriages of justice will be appointed.

Section 696.76 requires the Chief Commissioner to not only be a commissioner conducting investigations and deciding applications, but also a chief executive officer. Similar commissions in New Zealand, England and Scotland, by contrast, have chief executive officers who are not commissioners. We know this because we consulted them in the summer of 2021. We see the positions of Chief Executive Officer and Chief Commissioner as being separate and discrete. This is especially important if the commissioners, including the Chief Commissioner, are not to be sidetracked by Ottawa's onerous administrative requirements.

Proposed Amendments

1. Section 696.71 should be amended to require a minimum of 9 and a maximum of 11 commissioners.

2. Section 696.73 should be amended to require at least one of the Commissioners be Indigenous and one of the commissioners be Black. Commissioners should be interviewed and recommended by an independent committee representative of relevant stakeholders including Innocence Projects and those with lived experience of injustice before their appointment in order to ensure that all commissioners are aware of the causes and consequences of miscarriages of justice.

3. Section 696.76 should be amended to allow the Chief Commissioner to appoint a chief executive officer.

Most people who may suffer a miscarriage of justice may not even be able to apply to the proposed commission because of the exclusion of sentencing from its mandate and the rigid requirement of an adverse decision from a Court of Appeal.

We discussed at length in our report, the need for the commission to have jurisdiction over sentencing as do similar commissions in England, Scotland, New Zealand and Norway. We were influenced in this regard by the late David Milgaard, who we noted in our report urged us not to 'shut the door' on those who have been unjustly sentenced. Instead, Bill C-40 follows North Carolina's model of excluding sentencing from its jurisdiction.

The New Zealand commission's very first referral back to the courts was based on an alleged factual error made in sentencing based on the accused's age. Many Indigenous and Black offenders are sentenced without adequate consideration of all relevant facts. Sometimes they are sentenced based on facts that are inaccurate and sometimes new facts are discovered. Professor Julian Roberts of Oxford wrote a research report for us advocating the inclusion of sentencing that has recently been published.[2] In order to conserve the new commission's resources, we recommended that only those currently serving a sentence could apply raising a new matter of significance about their sentence.

Our Recommendation 31 was that "the commission have the flexibility to define its own acceptance and screening policies without rigid statutory requirements including those requiring exhausting appeals." Section s.696.4(3) is the complete opposite of this recommendation. It is one of the most objectionable parts of Bill C-40, it prohibits the proposed commission from even considering an application unless the applicant has an adverse decision from a Court of Appeal. This is a significant incursion on the independence of the commission which we stressed must make its own decisions about what cases to prioritize.

The English commission is able to consider applications in exceptional circumstances where there has been no appeal. Some of the most disadvantaged victims of miscarriages of justice, including the many Charles Smith victims[3] who pled guilty, would not be able to apply to the Commission for assistance.

Almost 20% of the 87 people on the Canadian Registry of Wrongful Convictions[4] pled guilty. Without an adverse decision from a Court of Appeal (requiring two appeals in summary conviction cases) could not under Bill C-40 look to the proposed commission for assistance. We also heard about how legal aid cuts decrease access to appeals. Section 696.4(3) would make the commission inaccessible for many, indeed most, victims of miscarriages of justice.

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[2] Julian Roberts and Umar Azmeh "Correcting Miscarriages of Justice at Sentencing: The Role of a Criminal Cases Review Commission" (2023) 71(4) Crim. L.Q. 501.

[3] On the problems of guilty plea wrongful convictions in Canada see Kent Roach *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do To Safeguard Justice* (Toronto: Simon and Schuster, 2023) at pp.3-56.

[4] www.wrongfulconvictions.ca

Proposed amendments

4. **Section 696.2 should be amended to allow applications from persons who are currently serving a sentence of imprisonment.**

5. **Section 696.4(3) which prohibits the Commission from accepting applications from those who do not have an adverse decision from a Court of Appeal should be deleted.**

The Commission is Not Independent Enough from Government

In our report, we stressed that the commission, which will have powers to refer cases back to the independent courts, should be independent from government. To ensure that, we recommended that the new commission be treated more like courts than just another small agency in Ottawa.

We recommended non-renewable terms for Commissioners. Bill C-40 takes the direct opposite post and allows renewable 7-year terms. For employment purposes, commissioners would be treated as civil service employers. This raises concerns about whether the prospect of being re-appointed or not for another 7 year term could compromise the independence of commissioners and/or perceptions of their independence. Canadians would rightly never accept such arrangements for judges. We should not accept it for a commission with the power effectively to overturn judicial decisions and require new trials and appeals to be held before the courts.

Our report stressed that the Commission should be both proactive and systemic. It should reach out to potential applicants and refer systemic and disciplinary matters to relevant bodies. Section 696.72 of Bill C-40 takes the opposite approach by restricting the Commission's mandate to reviewing applications. Section 696.72 is also internally inconsistent with the limited accessibility, outreach and transparency requirements in s.696.8-696.82 and with respect to annual reports in 696.87. These latter provisions, as well as the Commission's ability to provide supports to applicants under s.696.84 are positive features of Bill C-40. Nevertheless, they will place demands on the commission that require an adequate budget. Unfortunately, the Bill does nothing to assure the adequacy of the commission's budget or that it is treated in budgetary matters as are the independent courts.

In our report, we traced the struggles of the English commission which has suffered from severe budget cuts and delays on appointments and now has only one full-time commissioner- the Chief Commissioner- who is primarily concerned with administrative matters. We interviewed many in England who have lost confidence in the English commission. We also documented tension and even conflict between English Innocence Projects and their commission. Our recommendations sought to try to avoid these issues for a Canadian commission.

We also heard how the present work of the Criminal Cases Review Group within the Department of Justice could be thwarted by claims of privilege by police and prosecutors. References to the court could also be dependent on the willingness of courts to consider novel forms of evidence. In light of these pressing concerns, our Recommendation 35 provided that the new commission should be able to access legally privileged material while also being the guardian of the legal privilege. We noted that both the English commission and many Canadian law societies had similar powers.

In England, we heard concerns that its commission is not independent enough from the courts. To address this we proposed in Recommendation 46 that courts should be required to admit any new evidence that was a basis for the Commission's referral. As independent bodies, the courts themselves remain free to decide what, if any, weight to assign it.

In Recommendation 42 we advised against including a vague reference to "the interests of justice" in the Commission's referral test after hearing that the Scottish commission uses this test to dismiss applications from some applicants with long criminal records without always inquiring whether there may have been a miscarriage of justice. Such an approach can fail those who are overrepresented in the justice system.

After consulting widely, including with former Clerks of the Privy Council, we tried to make proposals that would ensure, as much as possible, that the Commission would always have an adequate budget and be as independent as possible. Professor Carrie Leonetti subsequently wrote that our report was a detailed and "transformational" "blueprint" that, if implemented, could remedy more wrongful convictions than any of the existing commissions in the UK, US, Norway or New Zealand and respond to challenges faced by those commissions.[5]

We are aware that the budget below $20 million has been secured for a number of years. Nevertheless, we note that the New Zealand commission had a similar long-term budgetary commitment which soon became inadequate given an unexpectedly large number of applications. We fear that the same could happen to the Canadian commission.

Proposed Amendments

6. **Bill C-40 should be amended to follow Recommendations 9 and 29 of our report and provide an independent advisory board to help the Commission work with Innocence Projects and those with lived experience of injustice in a collaborative manner**

7. **Recommendation 10 of our report should be implemented by giving the commission separate employer status to hire its own staff.**

[5] Carrie Leonetti "Conviction Integrity: The Canadian Miscarriage of Justice Commission" (2022) 3(2) Wrongful Conviction L.Rev. 97 at 100.

8. **Section 696.72 should be amended to include proactive and systemic reform work within the Commission's mandate.**

9. **Section 696.77 should be amended to require non-renewable seven year terms and s.696.78(1) should be amended to require the remuneration of commissioners should be tied (though not necessarily as high) as those of superior court judges in order to ensure that the commission is independent. Section 696.78(3) treating commissioners as government employees should be deleted.**

10. **The Commission's independence should be demonstrated by requiring, following Recommendation 12, that the commission be headquartered outside Ottawa. As such, s.696.71(3) should be amended to remove the Cabinet's discretion about where the Commission will be headquartered.**

11. **The Parliamentary review in s.696.62 should require an examination of the adequacy of the commission's budget by an independent body.**

12. **Our Recommendations 35, 36 and 38 should be included in Bill C-40 to allow the Commission to have access when necessary to material despite claims by police, prosecutors or third parties that access should be denied because of legal privileges or Privacy Act provisions. Recommendation 33 giving the commission the power to order the retention of relevant information should also be included in Bill C-40. Without such powers, the commission will be underpowered compared to the English commission as well as potentially underfunded.**

13. **Following our recommendation 46, the limited independence of the commission in relation to the courts should be ensured by requiring the courts to consider the new evidence that the Commission believes justifies a referral back to the courts because it may be a miscarriage of justice. At the same time, the independent courts should be free to decide what, if any weight, to accord the new evidence that the Commission believed justifies reopening the case.**

14. **Section 696.6(2) should be amended to delete the phrase "and considers that it is in the interests of justice to do so". The phrase is vague. Moreover, it allows the commission to exercise its discretion not to refer a case back to the courts even if a "miscarriage of justice may have occurred".**

In our respectful view, these amendments are the absolute minimum required before the Bill is worthy of enactment and of the name the David and Joyce Milgaard Act.

Sincerely

Hon. Harry LaForme, O.C., I.P.C

Kent Roach, F.R.S.C., C.M.
Professor of Law and Co-Founder Canadian Registry of Wrongful Convictions

Hon. Juanita Westmoreland- Traoré