THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 6, 2023

Via email: just@parl.gc.ca

Lena Metlege Diab, M.P.
Chair, Justice and Human Rights Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A

Dear Lena Metlege Diab:

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

The Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-40, *Miscarriages of Justice Review Commission Act (David and Joyce Milgaard's Law).* The CBA Section offers its strong support for the Bill and the creation of the Miscarriage of Justice Review Commission. We also suggest a few improvements.

The Canadian Bar Association is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The CBA's Criminal Justice Section consists of criminal law experts, including a balance of prosecutors and defence lawyers, from every part of the country.

Bill C-40 fundamentally alters the post-conviction review process in Canada. The CBA Section applauds the federal government's efforts to create an arm's length process for post-conviction review, clarify the standard for remedies in this area of the criminal law, and confirm the availability of posthumous post-conviction review. These are long overdue and much needed reforms, in keeping with our recommendations to the federal government, most recently in the consultations by Justice LaForme and Justice Westmoreland-Traoré. We believe they make the Canadian justice system fairer, more just and more humane.

Below, we highlight some areas of improvements which do not detract from our overall support for the Bill and the creation of the Commission.

**The "Unsafe" Ground of Appeal**

Bill C-40 offers an opportunity to improve post-conviction review processes both before and after appeals have been exhausted. The Court of Appeal is the primary mechanism through which the wrongfully convicted seek redress. For most convicted persons, it is the forum of last resort. The grounds of appeal under the *Criminal Code* are circumscribed and, to some degree, antiquated. They fail to capture some of the nuanced ways in which wrongful convictions may slip through the cracks of our system.

Justice LaForme and Justice Westmoreland-Traoré recognized these issues and recommended in their report on the creation of the Commission that the grounds of appeal permitted under the *Criminal Code* should be expanded. Specifically, they recommended that an appeal should lie where "the court finds the verdict to be unsafe."[1] We agree. This ground would allow the Court of Appeal to intervene in cases that may not meet the high standard for "unreasonable verdict," but nonetheless leave the court with a lurking doubt as to the guilt of the accused. This standard exists in the United Kingdom, and therefore our system would have a wealth of jurisprudence to draw from in interpreting and applying such a section.

There is a long history in Canada of unsuccessful appeals of wrongful convictions due to the stringent and narrow bases for challenging verdicts. Indeed, the leading decision on unreasonable verdict, *R. v. Yebes*,[2] involves a murder conviction that was revealed to be a miscarriage of justice 35 years after the fact. At Mr. Yebes' appeal, he alleged unreasonable verdict. Both the Court of Appeal for British Columbia and the Supreme Court of Canada dismissed his appeals, finding that the evidence led at trial "could" reasonably lead to a conviction.

This equivocal standard for post-conviction review has persisted in our law for nearly four decades, allowing convictions for murder to be upheld in circumstances which may have been unsafe, like those in *Yebes*. As Justice LaForme and Justice Westmoreland-Traoré found, the current test for appellate intervention relies heavily on "judicial experience," leading to significant deference to trial judges and juries in their determinations of whether a witness is telling the truth, among other important issues. However, in a system such as ours, where juries do not explain their route to conviction, this deference may allow miscarriages of justice to go unrectified on appeal. Courts of appeal, which may legitimately have a lurking doubt as to how a lay jury reached a conviction, nonetheless must step aside in the name of deference. This is a recipe for wrongful convictions. The proposed amendment does not entirely alleviate this concern but affords an important further protection to those who are wrongfully convicted.

**Limiting of Posthumous Review**

The CBA Section reiterates its strong support for the government's clarification that post-conviction review is permitted in posthumous cases. Wrongful convictions have a significant impact on not only the accused, but also their families and extended communities. Family members of the wrongfully convicted report stigmatization, marginalization and shame, among a myriad of other impacts. Allowing these individuals to seek a post-conviction review on behalf of a relative contributes to the overall fairness of our system and recognizes the collateral effects of miscarriages of justice.

The CBA Section, however, recommends amending s. 696.6(4) of the proposed legislation. Under that section, the Commission is limited in the remedy it can offer in posthumous reviews: the only remedy available for a miscarriage of justice is to refer to the matter to the Court of Appeal. This situation contrasts with living applicants, who can have their matter referred to a trial court. The reason for this distinction is not clear in the Bill.

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1 LaForme and Westmoreland-Traoré, A Miscarriages of Justice Commission(2022): report

2 [1987] 2 S.C.R. 168

When an appellant dies in the normal course, the appeal generally abates. In *R. v. Smith*,[3] the Supreme Court of Canada determined when an appellate court can hear an appeal despite the appellant's death. The test is fact specific and offers no guarantee of a hearing. In other words, posthumous cases referred to courts of appeal may be abated, leaving those affected by the case without remedy or conclusion. If a referral to a trial court is permitted, the matter can result in a withdrawal of charges or a stay of proceedings, thus allowing the Crown and affected parties to have final closure.

**Judicial Review of Commission Decisions**

Bill C-40 is silent on what, if any, right of appeal an applicant has from a decision to dismiss an application made to the Commission. In the consultation phase of this project, the CBA Section recommended that there be a right of appeal to the provincial superior courts.[4] We recommend that a judicial review mechanism be incorporated into Bill C-40. Specifying a robust avenue of review of decisions demonstrates Canada's commitment to substantive justice for the wrongfully convicted.

**Workings of the Miscarriages of Justice Review Commission**

Bill C-40 focusses on the structure of the proposed Commission. The precise workings of the process will be addressed in regulations and policies. We offered extensive comments to Justice Harry LaForme and Justice Westmoreland-Traoré on these topics.[5] The CBA Section would welcome an opportunity to provide input on these areas as they are developed.

Yours truly,

*(original letter signed by Julie Terrien for Kyla M. Lee)*

Kyla M. Lee
Chair, Criminal Justice Section

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3 2004 SCC 14

4 Letter to Justice Minister (CBA: Ottawa, 2022)

5 *Ibid*