THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Criminal Case Review Commission

CANADIAN BAR ASSOCIATION
CHILD AND YOUTH LAW, CRIMINAL JUSTICE, SEXUAL ORIENTATION AND GENDER IDENTITY COMMUNITY SECTIONS

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Child and Youth Law, Criminal Justice, and Sexual Orientation and Gender Identity Community Sections, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Child and Youth Law Criminal Justice and Sexual Orientation and Gender Identity Community Sections.

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I. INTRODUCTION

In response to the June 2021 launch of consultations on the creation of an independent Criminal Case Review Commission (CCRC), the Canadian Bar Association created a working group to answer the consultation questionnaire and to offer our experience and perspective in relevant areas. The Sexual Orientation and Gender Identity Community (SOGIC), Criminal Justice and Child and Youth Law Sections (CBA Sections) contributed to this submission.

The CBA is a national association of 36,000 lawyers, law students, notaries and academics, from every jurisdiction of Canada, with a mandate that includes seeking improvements in the law and administration of justice, and access to justice. SOGIC addresses the concerns of LGBTQI2S members in the CBA and provides a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. Criminal Justice Section members include prosecutors, defense counsel and legal academics specializing in criminal law. The Child and Youth Law Section consists of lawyers from across Canada who specialize in family law, and act for all parties in family law disputes.

This is an historic opportunity for Canada to create a new system to guard against the conviction of the innocent. Canada is fortunate to possess a justice system that generally functions well, with dedicated and ethical participants. But no justice system is beyond reproach, and sadly Canada has seen many wrongful convictions despite the system's safeguards and commitment to high standards. Appellate courts have limited capacities to correct injustices. For more than 20 years, the CBA has argued that it is essential to create a new, robust and independent CCRC as an additional tool in the fight against miscarriages of justice.[1]

II. STRUCTURE OF THE COMMISSION

Question 1: Who Should the Commissioners Be?

The CBA Sections agree that the CCRC must be completely independent of government in both function and appearance. We support the direction in the Minister of Justice's mandate

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1 Submission on Wrongful Conviction Review

letter[2] to the consultation lead, the Honourable Harry S. LaForme, that the ultimate power of decision be transferred from the Minister of Justice "to an independent body that is at arm's length from the Government and outside of the political sphere".

To promote a truly independent CCRC, we make recommendations on the structure of the organization.

A. General Comments on Structure of the CCRC

First, commissioners should have fixed but renewable tenures. If the CCRC is led by an individual commissioner, that person should be removable only upon joint address of Parliament for misconduct (or inability to perform the duties of office).[3] Removing a Minister's power to dismiss a commissioner assists in ensuring independence.

Second, commissioners should possess considerable experience at the bench or bar. It is not necessary that a commissioner be a criminal lawyer, as CCRC staff would include experts in criminal law. In his book *Good Judgment,*[4] Justice Robert Sharpe of the Court of Appeal for Ontario advocated for generalist appellate courts on the basis that such bodies must:

> oversee the legal process as a whole and to ensure that it is delivering fair, efficient and effective justice to the litigants. That requires a perspective that can get lost if one becomes too specialized and too preoccupied with the details of a certain area of law. Specialists have a tendency to become too familiar and too comfortable with the way things have always been done. An outside perspective can bring a breath of fresh air.

Justice Sharpe argues that coherence and integrity in the law requires both specialized knowledge and a broad perspective on the legal system.[5] Similarly, those who occupy leading roles in the CCRC must be aware of the overall justice system, including issues such as systemic discrimination, inadequate resource allocation, police investigative practices, Crown policies, the interaction between mental health and law, and civil remedies, to name

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2 Letter from the Hon. David Lametti to the Hon. Harry S. LaForme (December 16, 2020)

3 *Judges Act*, R.S.C., 1985, c. J-1 ss. 63 - 70.

4 Good Judgement, by Robert J. Sharpe, (Toronto: University of Toronto Press: 2018)

5 Ibid, at pages 39 - 40.

but a few areas. A generalist commissioner, with access to specialized staff, may provide a more robust review of wrongful convictions than could a narrowly focussed specialist.

Third, the CCRC should control all hiring and administrative matters to develop its own expertise to deal with wrongful convictions. Consistent with the generalist model noted above, an expert in criminal law may not have sufficient knowledge of cultural factors that contribute to a wrongful conviction. An independent commission that develops its own expertise provides greater flexibility in its administration and a better ability to respond to the many factors that may have led to an improper verdict.

B. Other Qualifications of Personnel

The CBA Sections generally support a combination of Options 1 and 2 in the consultation questionnaire, drawing on a pool of non-legal experts depending on the facts of each case. Specifically, we agree that cultural competency is vital to the CCRC's success.

Cultural competency experts enhance the system's understanding of the unique individual and collective dynamics that play a role in any given case, particularly those that involve Indigenous communities. The United Nations Declaration on the Rights of Indigenous Peoples,[6] the Truth and Reconciliation Calls to Action,[7] and the recommendations of the Murdered and Missing Indigenous Women and Girls inquiry,[8] all highlight the need for better cultural understanding of those impacted by colonization and its related traumas. This includes wrongful convictions.

Other non-legal experts are also critical to the work of the CCRC. For example, forensic psychiatrists are an asset when dealing with cases involving an accused not criminally responsible on account of mental disorder (NCRMD), an accused affected by Fetal Alcohol Spectrum Disorder (FASD), and other matters that disproportionately affect young offenders due to their diminished capacity. Forensic psychiatrists better understand the complexities of these vulnerable individuals and why their disabilities or vulnerabilities lead to wrongful convictions. For similar reasons, the CBA Sections further recommend that the CCRC

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6 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295

7 Truth and Reconciliation Commission of Canada: Calls to Action, report.

8 Murdered and Missing Indigenous Women and Girls inquiry, report.

maintain a formal position for a youth justice specialist when dealing with cases under the *Youth Criminal Justice Act* (YCJA).

The CBA Sections urge caution with formal involvement of a "victims of crime advocate" in the CCRC's post-conviction review work. This work is dedicated to correcting miscarriages of justice. It is difficult work that requires a dispassionate and objective environment, focused on science, evidence at trial, and our best understanding of the issues that may lead to a wrongful conviction. Formally including a victims of crime advocate in this process risks transforming the system into a tripartite inquiry which injects considerations better left to the realm of sentencing and victim impact, than post-conviction review. Should the CCRC embrace a sentencing-review mandate, however, a victim's rights advocate has a more logical connection to the commission's work and should be seriously considered.

C. Statutory Considerations

To enhance the perception of independence of this body, we recommend that stand-alone legislation implement and govern the CCRC.

Should an individual be chosen to lead the CCRC, the requirements of the appointment and dismissal should be legislated, as should appropriate funding (a matter addressed in more detail below). Otherwise, the innerworkings of the CCRC should be administered without undue interference from Parliament.

Question 2: Commission Location

The CBA Sections believe that Option 3 (Central and Regional Offices), is appropriate. Canadian criminal law is administered differently in each province and territory. These differences manifest themselves in many ways, including charge approval procedures and standards, how appeals are handled, and the relationships between Crown counsel and local police and between the defence bar and other institutions. Each region also has its own relationship to local Indigenous communities. These variations create different challenges and obstacles to uncovering wrongful convictions.

Offices across the country help to determine how local conditions or attitudes affect a given case. “Northern” regional offices are particularly important to ensure access to justice and appropriate cultural competency. What is appropriate in Vancouver may not be appropriate in Iqaluit. The consultation document states, “at its core, this is about justice”. Bringing people to justice should enable access to justice and this can be better achieved by CCRC offices that are available and seen to be available to Canadians.

While we do not oppose the CCRC’s central office being housed in the National Capital Region, there may be benefits to choosing a different location. For example, there may be a symbolic opportunity in choosing the location of the central office of the CCRC. Consideration can be given to a community that has suffered the injustice of a wrongful conviction, or that continues to be the victim of overrepresentation in the criminal justice system.

Question 3: Funding and Advisory Boards

The CBA Sections support designating the CCRC as an independent agency, with dedicated funding untethered to the budgets of other government departments. A separate allocation of resources promotes independence and enhances transparency.

Funding should account for both the CCRC’s work and other institutions or groups that may assist it. Some form of assistance for Innocence Projects should be built into the funding model. These groups perform invaluable outreach, investigation and advocacy on behalf of those who are wrongfully convicted. The strength and longevity of these groups is critical to the success of the CCRC.

In this regard, it is also necessary to recognize that funding for applications before the CCRC may not be available through sources such as legal aid plans. Legal Aid Ontario’s policy, for example, is that a person who has completed the carceral portion of a sentence is not eligible for assistance. While there have been exceptions to this rule, it is applied in the great majority of cases.

The consultation document raises the prospect of an Advisory Board that may have different functions, including funding advocacy. An Advisory Board can prevent underfunding in the future, but not at the expense of the CCRC’s independence. Any Advisory Board, if constituted, must possess the same independent and arm’s length characteristics of the CCRC itself. There is a real risk that any Advisory Board not so constituted could undermine the

independence and efficacy of the CCRC, particularly if it plays a prominent role in funding. If the CCRC becomes a truly independent agency, the CBA Sections see no reason why it cannot have its own ability to seek or ensure funding directly with Parliament.

The CBA Sections do not support scheduled reviews by Parliament. These reviews may interfere with the independence of the CCRC. We accept that the CCRC would be a public body, and in a democracy must be open to scrutiny. However, a review must not be an instrument allowing Parliament to interfere with its work. Instead, it is recommended that the CCRC be required to publish annual reports, like the Canadian Judicial Council. If there are problems in the CCRC's administration, there is no bar to having a properly constituted Parliamentary Committee, or an independent inquiry with an explicit mandate, investigate and report back to Parliament. This type of power must be exercised sparingly, in accordance with the independence of the CCRC itself.

III. MANDATE OF THE COMMISSION

Question 4: Should the Commission consider both serious and less serious cases?

The CBA Sections support Option 2 (Less Serious Cases Included). Criminal convictions can have long-lasting impacts, even though they may reflect the "less serious" end of the offending spectrum. Criminal convictions can make individuals ineligible for certain types of employment, volunteer work and educational opportunities. Convictions can affect access to housing and family law proceedings. They can result in significant travel restrictions and other forms of social stigma.[9]

In addition, recent post-conviction review work indicates that one of the emerging areas of wrongful convictions relate to false guilty pleas, particularly in the context of low-level crime. As recognized by the most recent Heads of Prosecution report on wrongful convictions, there is a real risk that individuals will plead guilty to low-level offences to obtain immediate release rather than risk being detained pending trial. These false guilty pleas are a disproportionate concern for marginalized communities that interact frequently with the justice system. It would be inappropriate for the CCRC to ignore this area.

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9 See, Collateral Consequences of Criminal Convictions (CBA: Ottawa, 2017)

Question 5: Should the Commission consider applications against sentence?

The CBA Sections support Option 1 (Commission can consider applications against sentence), with a focus on dangerous offenders, long-term offenders, and those held on findings of NCRMD.

Dangerous offender and long-term offender proceedings are susceptible to errors that have long-term, if not lifelong, impacts on offenders. For example, a person sentenced to an indeterminate period of incarceration could have undiagnosed conditions or other characteristics that, if known at the time of sentencing, may have resulted in a different outcome. The costs associated to properly diagnose offenders can be exorbitant and beyond the reach of marginalized individuals who come to the court with long records. The CCRC can play an important role in rectifying unjust sentences based on incomplete or inaccurate information about the offender.

The CCRC's mandate should include a role in redressing historical cultural biases and overrepresentation in the criminal justice system of Indigenous and other marginalized groups. Despite the passage of s. 718.2(e),[10] and the decisions in *R. v. Gladue*,[11] and *R. v. Ipeelee,*[12] the overrepresentation of Indigenous peoples remains a growing concern. Discrimination of Black Canadians in the criminal justice system is similarly recognized: *R. v. Jackson,*[13] *R. v. Le,*[14] *R. v. Theriault.*[15] The CCRC can rectify unduly harsh sentences that did not consider discrimination suffered by these groups and the need to reduce their overrepresentation in carceral settings.

The CCRC's mandate should also extend to NCRMD findings and continued detention based on them. Persons found NCRMD may have had legitimate defences that were not pursued or pursued less effectively because of the accused's condition at the time of trial. There is no reason to distinguish these individuals from other "factually innocent" applicants in post-conviction review. Additionally, persons who are properly subject to an NCRMD finding may

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10 *Criminal Code*, R.S.C. 1985, c.C-46

11 [1999] 1 S.C.R. 688

12 2012 SCC 13,

13 2018 ONSC 2527

14 2019 SCC 34

15 2021 ONCA 517

nonetheless remain incarcerated unjustly. The CCRC could be uniquely positioned to evaluate these cases if a sentencing mandate is included in its work.

Question 6: Should the Commission hear applications about historical cases involving convictions or sentences of deceased persons?

The CBA Sections support the CCRC reviewing convictions involving deceased persons. The stigma of criminal convictions is intergenerational. Children and family members of the wrongfully convicted suffer a different, but perhaps equally troubling injustice. They are commonly ostracized in their communities and are forced to disassociate themselves from the convicted individual to their own detriment. Seeking to clear the name of their family member can be an important step to returning to normalcy.

In addition, there is a prospective value to uncovering wrongful convictions, whether or not the conviction subject is still alive. this can prevent similar injustices in the future. The CCRC should play a role in systemic reform. That role is enhanced by cases that demonstrate the system's failure, whether or not the subject of the miscarriage of justice is deceased.

Question 7: Should the Commission have a role in systemic reform to prevent miscarriages of justice?

The CCRC should be a proactive commission and play a role in systemic reform. The CCRC will be in a unique position to comment on aspects of the criminal justice system that have caused and may continue to cause miscarriages of justice.

Miscarriages of justice represent a significant system failure. Lessons learned from them are invaluable to improving the administration of justice. Wrongful convictions caused the system to evolve in many important ways. These changes include better tailored jury instructions on dangerous evidence (e.g., eyewitness testimony and unsavory witnesses) and more stringent scrutiny of expert evidence. These changes resulted from recommendations of commissions of inquiry into wrongful convictions. With the information available to it, the CCRC can continue this important law reform work.

In addition, the CCRC may have a role in reviewing information about who is more likely to be affected by miscarriages of justice because of certain characteristics such as disability, language barriers, Indigenous status, and other factors.

Question 8: What should the Commission's mandate be with respect to outreach to potential applicants and ensuring accessibility?

The CCRC should be a proactive commission that seeks to reach potential applicants. Marginalized and vulnerable groups will benefit most from proactive efforts. Individuals belonging to these groups are more likely to misunderstand the CCRC and its role, and as a result, are less likely to take advantage of its remedy of last resort, even though they are disproportionately more likely to be the victim of a miscarriage of justice.

Information about the CCRC should be accessible and in plain language. The CCRC should look to existing resources for assistance in making itself known and trusted. For example, Indigenous and mental health court workers often act as advocates and support those most in need of outreach. Consideration should also be given to delivering information to community organizations that serve marginalized communities.

Particular attention should be made to reach young offenders given their limited understanding and capabilities. Youth appeals are notoriously rare as youth often want the process over and behind them if they are convicted.

In special circumstances, the CCRC should initiate investigations on behalf of individuals who have not applied. Through its work, it may receive information exonerating not only the applicant, but others (co-accused, accused in other cases involving a pattern of misconduct, etc.). It is important for the CCRC to proactively initiate investigations to reach those who may be innocent, but for whatever reason, have not availed themselves of its process.

Question 9: What funding for legal representation should be provided to the applicant?

The CBA Sections supports both a discretionary and dedicated funding model. Dedicated funding for staff lawyers ensures that the beneficial aspects of the adversarial system translate into the CCRC's work. Discretionary funding should also be allocated to Innocent Projects and lawyers with special expertise in areas that might arise in wrongful conviction cases (e.g., forensic science, youth)

This kind of funding will significantly impact the CCRC. Funding for legal representation will bring focus to historical files by ensuring that resources are dedicated to the issues that have a reasonable prospect of success, cutting down on unnecessary review of transcripts and disclosure. In modern criminal proceedings, disclosure has become so voluminous that

disclosure itself ironically becomes a barrier to post-conviction review. Better funding for wrongful conviction advocates will assist in overcoming this modern barrier to review.

Discretionary funding can also be considered for counsel of choice. It is not uncommon for wrongfully convicted individuals to build a rapport with a particular lawyer that has played an important role in continuing to investigate their case. These dedicated lawyers often have a specialized understanding of the case and can use their rapport with the accused to further advance the truth-seeking function of the CCRC.

A. Youth

It is important for youth applicants to have access to legal representation throughout the process and to timely decisions. The CCRC should comply with Canada's obligations under the *United Nations Convention on the Rights of the Child.*[16] The following articles of the Convention are relevant:

> Article 3
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> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
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> Article 37
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Automatic funding for legal representation for youth applicants would also be consistent with the underlying principles and philosophy of the YCJA

B. Caseworkers

The CBA Sections agree that caseworkers and CCRC staff should help vulnerable, disadvantaged or unrepresented applicants.

16 United Nations Convention on the Rights of the Child

Question 10: What statutory requirements should there be for language interpretation and communication assistance for applicants?

Communication is critical to the CCRC's proper operation. Written material should be available in plain language and in several languages, particularly for demographics likely to be the victim of a miscarriage of justice.

The CBA Sections also support face-to-face interviews, particularly given advances in video technology that make this communication more accessible.

Question 11: What provision should there be for crime victim notification and participation?

The CBA Sections believe that Option 2 (Notification but No Participation) is appropriate for post-conviction review. Option 3 (Notification and Participation) is appropriate for post-sentence review. The reasons for this distinction are explained under Question 1 above.

IV. DECISION-MAKING BY THE COMMISSION

Question 12: Should there be statutory criteria for initial acceptance of an application?

The CBA Sections do not take a position on whether statutory criteria should govern the initial acceptance of a CCRC application. Criteria developed through statute or otherwise should encompass the limitations faced by convicted persons in their ability to apply for post-conviction review. Convicted persons may not have basic information about their own case, or the skills necessary to convey their position appropriately. These realities can transform even the most rudimentary acceptance criteria into barriers for review. In our experience, these problems are often more pronounced for convicted persons in groups who face discrimination or who are otherwise vulnerable.

We recommend that the CCRC adopt a flexible approach to accept applications for conviction review. Where an individual lacks necessary skills to convey their position or does not have the assistance of a legal representative, greater care should be taken to ensure meritorious applications are not summarily dismissed due to lack of detail or failure to clearly articulate concerns traditionally associated with wrongful convictions. This is what appears to have occurred in the Ivan Henry case.

Between 1984 and 2006, Mr. Henry filed over 50 applications to various government agencies to review his sexual offences convictions. Perhaps due to his own limitations, he was unable to convince authorities to review his case in any meaningful way, though information existed in police files that had the potential to exonerate him: *Henry v. British Columbia.*[17] This case offers a powerful lesson about the possible drawbacks of a too stringent or technical approach at the beginning of the process.

Question 13: Who in the Commission should decide applications?

The CBA Sections believe that Option 1 (Subset of the Commission can reject an application, but with the applicant being able to respond to provisional decisions) is the most practical approach to decision-making. It affords an appropriate balance between resource allocation and procedural fairness. Allowing an applicant to consider and respond to provisional decisions offers transparency and efficiency. It allows the applicant to respond to potential concerns before more onerous standards of review and procedural roadblocks are engaged.

The statute creating the commission ought to set out a clear roadmap for the decision-making process. This has at least two benefits. First, it ensures ongoing legislative oversight of the decision-making process, offering greater transparency in the process. Second, it ensures a level of consistency and predictability to the process for applicants and those who assist them.

Question 14: Should there be a statutory threshold for investigation/review?

There should be no statutory threshold for sending a case for investigation or review. If commission criteria or policy is developed, it should recognize that convicted persons, particularly those who remain incarcerated, are at a distinct disadvantage in their ability to collect new information about their case. The biggest flaw in the current "preliminary assessment" model is the so-called Catch-22 faced by applicants who seek post-conviction review. This phenomenon is explained in detail in Andrew Guaglio's article, *Proving Innocence After Appeals – A Call for Uniform Post-Appeal Disclosure Policies*.[18]

To pass the current preliminary assessment stage, applicants must point to "new" matters of significance not previously considered at trial or by the Minister. To identify "new" matters

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17 2015 SCC 24 at para. 15.

18 (2015) 62 C.L.Q. 88.

of significance, the applicant must often resort to requesting new materials or testing from the state, who may (and often do) refuse the request because no "new" matter has been raised for their consideration or to their satisfaction.

To avoid this Catch-22, any criteria that may be developed must recognize that the "new matters of significance" test acts as a significant barrier to post-conviction review. It fails to adequately account for changes in forensic evidence, changes in the law governing evidence that may have been crucial to conviction, and limitations faced by the applicant.

Nearly all Canadian wrongful convictions were uncovered through information that already existed in the police or Crown files. A robust and accessible investigatory regime is necessary for the CCRC to fulfill its mandate.

This regime ought also to include a statutory and enforceable threshold for applicant disclosure to ensure they are able to meaningfully participate in the process. In *Roberts v. British Columbia (Attorney General)*[19] (currently on appeal before the Court of Appeal for British Columbia), the appellant suggested a disclosure test tailored to the post-conviction review context, namely, that disclosure ought to be given to an applicant where there is a "reasonable possibility" that the material may assist in making an application for post-conviction review, bearing in mind the threshold for overturning a conviction in that context. This suggestion built on the post-conviction (but pre-appeal) threshold for disclosure identified in *R. v. Trotta.*[20]

A. Bail

The CBA Sections agree that a statutory framework for bail pending post-conviction review would be a helpful development in the law. Several common law decisions allowing bail pending post-conviction review and the thresholds that have emerged from this body of caselaw are the basis for a statutory framework. To obtain bail, a convicted person must (1)

19 2018 BCSC 1027

20 23 C.R. (6th) 261 (Ont. C.A.).

make an application for post-conviction review, and (2) otherwise justify bail in accordance with s. 679(3) of the *Criminal Code*: *R. v. Unger;*[21] *R. v. Assoun*,[22] and *R. v. Skiffington.*[23]

Bail pending post-conviction review is typically granted only after the "preliminary assessment" threshold has been overcome. This necessarily means that the Minister has determined there "*may* be a reasonable basis to conclude that a miscarriage of justice likely occurred": *R. v. Purdy.*[24] If the preliminary assessment phase is abolished in the new CCRC, it will be more difficult for applicants to obtain bail pending appeal without a meaningful replacement for this threshold being met. One option would be to explicitly adapt s. 679(3) of the *Criminal Code* to the post-conviction review context. That is, to require applicants to show that their application for post-conviction review is not frivolous and that detention is not necessary in the public interest.

The public interest component of the test may be best left to the common law to develop. This concept has been interpreted in the s. 696.1 context as requiring the applicant to show "a serious concern about the validity of the applicant's conviction": *Skiffington* at para. 28. Other courts have simply relied on the Minister's threshold/determination that there "*may* be a reasonable basis to conclude a miscarriage of justice likely occurred": *R. v. Phillion.*[25]

Question 15: Investigative Powers

Option 4 is appropriate (Statutory powers to compel production from public and private entities and to compel a witness to answer questions). The CCRC must be empowered to effectively investigate wrongful convictions. To limit these powers only to "public" entities would be superficial and would unnecessarily narrow the CCRC's ability to investigate. The powers should be flexible to allow for other steps to be taken by CCRC staff or those in their employ, including forensic testing of exhibits, search warrants and production orders, and the compulsion of testimony.

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21 2005 MBQB 238

22 2014 NSSC 419;

23 2019 BCSC 178

24 2019 BCSC 2285 at para. 9.

25 2009 MBQB 327 at para. 32.

For material that might be privileged, the CCRC should be governed by existing rules of procedure and evidence with one exception. As a government institution, the CCRC should be empowered with appropriate safeguards (e.g., undertakings) to access information covered by police/Crown held privileges. As such, it can be made privy to this kind of information while maintaining the privacy and safety of those affected or protected by these privileges. This should be permitted so that the CCRC can access relevant information that may speak to the validity of a conviction without meaningfully interfering with the privilege except in exceptional circumstances. Indeed, the CCRC's work dovetails with the "innocence at stake" common law threshold that already exists for many of Crown/police held privileges.

As noted under Question 14, the applicant should be afforded disclosure of investigatory materials where a reasonable threshold has been met. The "reasonable possibility" test advocated for in *Roberts v. British Columbia* is one option.

The applicant should also be permitted to request production through the CCRC, who applies a screening function. This screening threshold ought to mirror the disclosure threshold for first party disclosure under the new regime. Third party disclosure to the applicant (e.g., disclosure in the hands of private entities) should be treated in a manner consistent with the *O'Connor/Mills*[26] regimes that currently govern this area, again tailored to the post-conviction review context.

For questioning under oath, the CCRC should adopt a model that allows the applicant's position to be effectively advanced. The CBA Sections do not necessarily suggest applicants be given direct standing to question witnesses, but should advance their position to its fullest extent in proceedings. This could take different forms. Counsel for the applicant could be appointed or provided for in the framework. Alternatively, an *amicus curiae* system could be developed for these circumstances.

Question 16: What should the test for referral to the Courts be?

The CBA Sections submit that a combination of Options 2 and 4 is appropriate. A predictive test based on the possibility that a conviction or sentence will be overturned, with a residual

26 *R. v. Mills,* 1999 CanLII 637 (SCC) and *R. v. O'Connor*, 1995 CanLII 51 (SCC).

"interests of justice" discretion for cases implicating the fairness of the trial. The interests of justice discretion ought to be guided by relevant factors.

The CBA Sections support a predictive test that requires the CCRC to be satisfied that a "miscarriage of justice may have occurred" (i.e., the Scottish standard). A higher standard would only be justified by a "floodgates" concern that has not materialized in other jurisdictions where lower standards apply, or in Canada for that matter.

The Scottish standard, once met, raises a real concern that a miscarriage of justice has occurred. In these circumstances, it is appropriate to allow a trial or appellate court to evaluate that concern without the CCRC expressing an opinion on the likelihood of a wrongful conviction. This allows for greater harmony between the CCRC and court processes. Indeed, it would be unusual and potentially undermining of the administration of justice for the CCRC to conclude a miscarriage of justice "likely" occurred, only to have the courts disagree. However, this outcome would be more understandable if the threshold for referral was simply that a miscarriage of justice "may" have occurred.

Some cases do not lend themselves to predictive standards. For example, a particular area of forensic science may have been discredited since conviction, or a piece of evidence may be subject to a different admissibility standard. In these cases, it may not be possible to determine whether a conviction "may" or will "likely" be overturned, particularly where other evidence implicates the accused, but it may still be in the interests of justice to refer the matter back to court.

Alternatively, there may be cases that call for a response as a matter of fairness and decency. An applicant may have been the victim of ineffective counsel assistance or have been convicted based on or seriously influenced by improper jury instructions which were not subject to appeal. The applicant may have entered an uninformed guilty plea. It may be that it is determined post-appeal a juror acted improperly during deliberations that resulted in the applicant's conviction.

In these circumstances, and others like them, the "interests of justice" may justify referring a matter back to court even though it is not possible to determine how likely it is that the conviction will be maintained. The referral is a recognition that the convicted person has been the subject of an unfair process, a recognized category of "miscarriages of justice".

For these reasons, the CBA Sections support a residual "interests of justice" category for referrals governed by relevant factors which may, *inter alia*, include the following:

1. Whether the fairness of the trial was negatively affected by a matter not raised at trial or on appeal;
2. Any changes in the law since the time of conviction which would affect the admissibility of evidence heard at trial;
3. Any changes to forensic science since the time of conviction that may call into question the validity of evidence presented at trial.

The "new matters of significance" consideration should be abolished or curtailed considerably. It is an artificial construct that, at times, serves to obscure the purpose of post-conviction review. If a miscarriage of justice occurred, it should not matter whether the subject of that controversy was "new." Put another way, it should not be a barrier to review if a matter that undermined the validity of a verdict was raised at trial or appeal, but for whatever reason was not determinative at that time. Simply because the matter is not "new", does not change the fact that it was significant and possibly contributed to a miscarriage of justice.

Question 17: The Court's Grounds for allowing an Appeal in cases referred to them by the Commission

The current powers in the *Criminal Code* offer a sufficiently flexible framework to address CCRC cases with perhaps one exception (i.e., Option 2).

For conviction referrals, more explicit guidance should be offered to appellate courts to exercise their discretion to order an acquittal or judicial stay of proceedings following a CCRC referral. The *Criminal Code* ought to be amended to allow appellate courts to enter an acquittal or judicial stay of proceedings where it would be in the interests of justice having regard to:

1. length of delay between conviction and appeal;
2. amount of time served by the appellant;
3. existence and quality of exonerative evidence;
4. availability of witnesses and evidence;
5. any other factor affecting the likelihood that the case will be retried.

The CBA Sections do not believe appellate courts must comment on factual innocence, though it should be encouraged as a matter of policy and fairness given the reputational, civil and *Charter* interests implicated in wrongful convictions.

Appellate courts should not be afforded the discretion to decline a CCRC referral. This would add an unnecessary and time-consuming procedural step to each case that would potentially raise other procedural concerns and delays (e.g., further appeals of such decisions, etc.).

Question 18: Challenging Commission decisions

The CBA Sections support a hybrid model of review. The CCRC should give an applicant provisional reasons for rejection to allow a response to concerns raised during the process. This will add greater efficiency and fairness and will avoid the cumbersome trappings of a full appellate process.

Some method of judicial review is necessary to ensure the fairness and transparency of the CCRC's decision-making process. The CBA Sections support giving the CCRC deference in these reviews absent legal error, but no statutory limitation of the grounds for review is necessary.

V. REMEDY

Question 19: Should the Commission be able to refer a case for a new appeal or new trial or both?

The CBA Sections believe that Option 3 is appropriate (Option of a New Appeal or New Trial but with Recommendations to the Prosecutor or the Executive).

The CCRC will be in a unique position to determine whether potential wrongful conviction issues are best dealt with by a new trial or fresh appeal. For example, where new matters question the factual record, a new trial may be the obvious course of action. However, where a miscarriage of justice occurs for a predominant issue of law (e.g., admissibility of evidence, a change in the law), the Court of Appeal may be the better forum. Other considerations may dictate the appropriate forum (e.g., concerns for further delay, likelihood of matter being retried, etc.).

The CBA Sections support continued prosecutorial discretion to determine whether to proceed with a new trial following a successful CCRC application. However, CCRC recommendations may be an invaluable resource in exercising this discretion. Where CCRC's

independent investigators determine there is no longer a reasonable prospect of conviction based on the current record, prosecutors should consider this advice to assess whether the case must proceed to retrial. This advice may result in significant savings as prosecutors attempt to evaluate a case's strength many years after the fact.

Question 20: Should the reasons given by the Commission be Public or Confidential?

The CBA Sections support Option 2 (Statutory requirement that decisions be made public, subject to anonymity and privacy safeguards appropriate to individual cases).

Transparency is vital to any independent agency tasked with investigating matters of public importance. Publicly accessible reasons allow the public to understand the CCRC's work and why a case has been overturned. Publicity about overturning serious convictions will also have an important remedial effect for the wrongfully convicted, as it begins the process of reversing the stigma of a wrongful conviction.

The CBA Sections also agree that privacy interests must be protected, particularly where the decision is to uphold the conviction. In those cases, publicity surrounding a further attempt to overturn a conviction may revictimize individuals who already endured a trial and appellate process.

A. Data Collection and Publication

The CCRC will be in a unique position to report on causes of wrongful convictions and those who are most affected by them. The CBA Sections support annual reporting requirements for the CCRC, of both its work and data collection. This data will be important to policy and legislative reform. The criminal justice system, by its nature, highlights discriminatory practices and outcomes. This has become apparent amongst the most vulnerable communities. Indigenous populations are overrepresented in the carceral system and Indigenous individuals and people of color are treated differently by law enforcement. Data that tend to reveal these practices and outcomes is critical to improving the system.

Question 21: Should the Commission be involved in pardons?

The CBA Sections support Option 1 (Commission should have a role with respect to pardons) in special circumstances.

We do not support pardons applied *in lieu* of a new trial or appeal, except if this is the accused's wish and otherwise appropriate. An accused may have served their sentence and not wish to endure a retrial. In these circumstances, if in the public interest, it may be advisable to empower the CCRC to issue a pardon for finality.

In other circumstances, a pardon is more appropriate for a historical conviction. For example, behaviours may have been technically illegal at the time of their commission but are inconsistent with modern values or the *Charter*. These matters may not lend themselves to retrial, given the passage of time or the potential for revictimizing the accused. For instance, many individuals in the LGBTQWS+ community were targeted by unfair or unconstitutional offences.

Prior to 1969, gay men were routinely convicted and imprisoned for consensual sexual relationships with other men. The story of Albertan Everett Klippert is an example of the subsequent wrongful conviction of a gay man. He was convicted of multiple counts of gross indecency for having sexual relations with men. In 1960, Mr. Klippert, who was 34 at the time, plead guilty to the charges and was sent to prison. After his release, he was arrested for the same charges in 1965. During his second trial, the Crown successfully argued Mr. Klippert should be labeled a dangerous offender and jailed indefinitely. The Court held that if Mr. Klippert were released, he would reoffend. The Supreme Court of Canada upheld his dangerous offender designation in 1967.[27]

Homosexuality was decriminalized in 1969.[28] Mr. Klippert remained in prison two additional years before his release. The new legislation did not expunge his criminal record. He lived the rest of his life with a criminal conviction and a dangerous sexual offender determination. This is the kind of fact pattern that would lend itself to a pardon by the CCRC.

Question 22: Should the Commission be involved in compensation and reintegration for those who have suffered miscarriages of justice?

The CBA Sections take no position on whether the CCRC should be involved in compensating those who have suffered miscarriages of justice. However, we support funding to assist the wrongfully convicted through the reintegration process. Funding should be available for

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27 [1967] SCR 822

28 *Criminal Law Amendment Act,* S.C. 1968–69, c. 38

services such as counselling, legal representation for civil proceedings, housing and other necessities of life for individuals released following a CCRC decision.

The process of compensation can take months, if not years. In the intervening time, the wrongfully convicted are particularly vulnerable, especially if they have been incarcerated for many years. They do not possess the skills to quickly reintegrate into the workforce, they may suffer from mental and physical illnesses that were not addressed in prison and are otherwise dealing with the repercussions of returning to normal life. In these circumstances, it would be just to assist these individuals in getting back on their feet.

Question 23: Non-Discrimination and Positive Safeguards

The CBA Sections support Option 2 (free-standing non-discrimination provisions).

Positive safeguards and provisions accomplish two goals. First, they ensure better access to justice by removing unnecessary barriers to post-conviction review. Second, they recognize historical discrimination against particular groups who have been overrepresented in the Canadian justice system.

Safeguards should be developed in consultation with groups who have historically suffered from discrimination. However, our suggestions about including legal representation, translation and communication services, and flexible standards that consider cultural competencies and certain limitations that may be more common to certain vulnerable groups should be considered.

VI. CONCLUSION

It is often remarked that a wrongful conviction is a "miscarriage of justice". It represents a complete failure of the adversarial system, often with tragic consequences. An individual has suffered the injustice of false imprisonment, unjustified stigma and other repercussions.

Ironically, the discovery and rectification of wrongful convictions, however, embodies the best of our system. When a wrongful conviction is overturned, it is usually because of the perseverance and dedication of those who believe in the system, and those who can admit when they are wrong and finally do the right thing, despite the embarrassment and cost that might incur.

The CCRC will have an important opportunity to display the best of the Canadian justice system in the midst of its worst cases. It will be best equipped to do so by adhering to important first principles: transparency, independence and fairness. Should these guiding principles animate the creation of the CCRC, we believe it can achieve great success in the face of past failures of our system.

Thank you again for the opportunity to comment on the creation of an independent Criminal Case Review Commission. We respectfully request an opportunity to discuss our submission should hearings be held.