



November 22, 2022

Via email: mcu@justice.gc.ca

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister Lametti:

Re: Miscarriage of Justice Commission

We are writing on behalf of the Canadian Bar Association's Criminal Justice, Child and Youth Law and Sexual Orientation and Gender Identity Community (SOGIC) Sections (CBA Sections) in response to your letter of September 21, 2022. We appreciate your request for CBA comments on certain recommendations of the LaForme/Westmoreland-Traoré report¹ on the proposed creation of a Miscarriage of Justice Commission. The CBA Section is very supportive of a strong and independent Commission to rectify wrongful convictions. Our comments should be read with our earlier complete submission² on the report which commented all recommendations.

The CBA is a national association of over 37,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The Criminal Justice Section consists of a balance of Crown and defence counsel from every part of the country. The Child and Youth Law Section addresses law, policy and legal research developments on matters affecting children in all legal disciplines. SOGIC represents 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.

We deal with the recommendations in the order they were mentioned in your letter.

Commission Recommendation 5

We recommend that a third of the commissioners have expertise in the causes and consequences of miscarriages of justice; a third of the commissioners be qualified as lawyers; and a third represent groups that are overrepresented in prison and disadvantaged in seeking relief. There should be at least one Indigenous and one Black commissioner.

¹ LaForme and Westmoreland-Traoré Report: [online](#).

² [Criminal Case Review Commission](#), (CBA 2021).

The CBA Sections agree with Recommendation 5 and recommend that one third of the commissioners be criminal law lawyers, that non-lawyers commissioners have expertise in wrongful convictions, and that diversity in appointments be a priority without mandating a quota.

The CBA Sections believe that the Commission must be adaptable to changing demographics in Canadian society, but also possess the expertise to effectively tackle the problem of wrongful convictions. We agree that diversity of opinions and backgrounds is important to meet the Commission's mandate and to offer agency to those groups who have been historically marginalized and discriminated against in the criminal justice system. For these reasons, we generally support Recommendation 5, but offer some comments for consideration.

First, we agree that at least one third of the commissioners should be qualified as lawyers. The legal members should be chosen from candidates who have expertise in the causes and consequences of wrongful convictions. Most commissioners should have expertise in criminal law and procedure, evidence, police investigation techniques, prison conditions, legal ethics, forensic sciences and mental health law. While the Commission will be able to draw on staff with expertise, it is essential that the commissioners themselves have this font of knowledge.

We accept that non-criminal law lawyers can have a meaningful role in the organization and management of the Commission, as noted in our earlier submission. However, it is important that the Commission is equipped with the legal and practical knowledge of criminal law lawyers, particularly if "lay" or non-criminal law experts also serve as commissioners. The reasons for requiring criminal law lawyers include:

- They have procedural and substantive knowledge of criminal law that is important to assess the strengths and weaknesses of wrongful conviction claims, particularly those involving defences at law (e.g. self-defence, not criminally responsible on account of mental disorder (NCRMD), reduced intent etc.);
- They are generally familiar with court practices and markers of competence to evaluate claims of ineffective assistance of counsel, which is not an infrequent issue that arises in the post-conviction review context;
- They have experience in dealing with juries, who are often the triers of fact in cases of wrongful convictions;
- They are familiar with accused persons and issues that can disproportionately affect them, including mental health, race and discrimination, systemic bias, and police tactics.

Second, we agree that at least one third of the commissioners should have expertise in the causes and consequences of miscarriages of justice. We take this recommendation to mean non-lawyers with expertise in areas that frequently arise in wrongful conviction cases. These experts may include forensic psychiatrists, pathologists, DNA experts and others who are traditionally involved in criminal cases as "professional" witnesses. As noted in our earlier submission, the CBA Sections would also support a formal position for a youth justice specialist, given the unique challenges youth matters raise in our system. We also recognize the value of cultural competency in this area and the need for commissioners to be familiar with these issues when deciding cases.

Third, the CBA Sections encourage cultural diversity in the appointment process for commissioners. However, we have concerns with the recommendation mandating a particular quota. While this goal is well intended and designed to obtain representation on the Commission from two traditionally disadvantaged groups, a quota system based on race may be seen as counter productive. Rather than a strict number, it would be better that the Commission reflect the diversity of Canadian society. In making appointments, traditionally disadvantaged groups that have suffered historically from miscarriages of justice, as well as socially disadvantaged groups, should be

represented. The CBA Sections are confident that if diversity is made a priority in the composition and structure of the Commission, the appointment process will properly reflect these concerns without a specific quota.

From the CBA Sections' perspective, greater flexibility is needed, particularly in the Commission's nascent stages. Flexibility would allow groups who have traditionally been disadvantaged based on race to have a direct voice amongst the Commissioners, but it would also allow other disadvantaged groups who suffer discrimination on bases other than race, such as gender identity or sexual orientation, to have a direct voice as well.

Greater flexibility can also unlock the Commission's potential for a broader base of expertise. For example, poverty and social alienation are major factors in miscarriages of justice. People on the marginalized end of society (poor, drug addicted, mentally ill, etc.) commonly feel the system is overwhelming. These disadvantaged people may not have the resources to fight. In this context, a poverty advocate or expert can bring a special perspective. A person versed in the legal aid process and its failure to deliver equal justice due to lack of funding could also bring an important perspective to the Commission. Appointments such as these are especially important if the Commission is to be proactive. These appointments would be based on knowledge and relevant experience but could also be representative in terms of race and background. One need not be sacrificed for the other.

Commission Recommendation 18

We recommend that a concern about substantive equality and combatting discrimination and colonialism be built into the new commission's statutory DNA. The commission should be required by statute to report on Indigenous identification, gender, gender identification, age, membership in a racialized grouping, linguistic, disability and other relevant personal characteristics of applicants and those who receive remedies from the commission. This data should be benchmarked to available information about the incidence of those characteristics in both the general and prison populations. The commission should be required by statute reasonably to accommodate linguistic diversity including Canada's various Indigenous languages.

The CBA Sections agree with the Commission's commitment to substantive equality. The Commission must have adequate resources to accommodate linguistic diversity and all constitutional rights. We suggest that data collection be approached with sensitivity.

The CBA Sections agree that the Commission's mandate must include a strong commitment to substantive equality. It must recognize the role of discrimination in all forms that result in miscarriages of justice. Parliament has recognized the special status of Indigenous communities in the criminal justice system. Obtained information must be from Indigenous and all racialized groups as well as those from all traditionally disadvantaged backgrounds.

It is not sufficient that the Commission "be required by statute reasonably to accommodate linguistic diversity...". It must have adequate resources to accommodate language diversity and ensure that no person suffers a miscarriage of justice based on an inability to communicate. A reasonable attempt is not an acceptable standard when dealing with a miscarriage of justice.

Just as persons in a proceeding have the right to an interpreter under s. 14 of the *Charter*, their inability to communicate must not negate the ability to challenge a wrongful conviction. These two concepts are intimately connected since wrongful convictions can only arise from court proceedings.

Constitutional rights must drive the allocation of resources. Other legal rights must also direct how resources are spent. It is unacceptable for Canadian society to allow wrongful convictions to stand because the government is not prepared to commit sufficient resources to ensure justice is done.

Finally, on a related note, the CBA Sections caution that data collection in this area be approached with sensitivity. Self-identification is a complex issue that engages personal autonomy, privacy and other dignity concerns.

Commission Recommendation 25

We recommend that the commission have jurisdiction to do systemic reform work related to the prevention of miscarriages of justices.

The CBA Sections fully support the Commission having jurisdiction to do systemic work in the prevention of miscarriages of justice.

The CBA Sections fully support Recommendation 25. We advocated for this in our earlier submission, which we incorporate by reference.

Systemic problems in the criminal justice system are, by their very nature, difficult to identify and rectify in individual cases. They often involve a complicated mixture of causes that may or may not be relevant to the narrow issue at play in an individual post-conviction review. However, the Commission will be uniquely positioned to evaluate causes of wrongful convictions across cases, allowing it to form an expertise and knowledge base that could be critical to law reform work in this area.

Perhaps an obvious point is that prevention of miscarriages of justice is equally, not more important than the discovery of miscarriages of justice. Undoubtedly, the Commission's direct aim is to identify and rectify miscarriages of justice, but another important objective must be to prevent such travesties from occurring in the future. The only way to meaningfully address this issue is to ensure the Commission has the capability to deal with the concerns it identifies so they are not perpetuated in the future.

Commission Recommendation 26

We recommend that the commission be proactive and provide outreach and support to potential applicants and applicants.

The CBA Sections fully support that the Commission be proactive and provide outreach and support to potential applicants and applicants.

The CBA Sections fully support Recommendation 26. We refer to our earlier submissions on this point.

The Commission's work will not be immediately apparent to those in custody given inmates' circumstances and their access to information, as well as their disadvantaged backgrounds in many cases. Outreach will allow the Commission to reach those truly in need. It will also offer a mechanism to discover miscarriages of justice that would not otherwise come to the Commission's attention.

Commission Recommendation 50

We recommend that the commission be enabled by statute and funding to provide support for the reintegration of applicants during the application process and after they have been released or had their conviction overturned.

The CBA Sections fully support that the Commission be enabled to support the reintegration of applicants during the application process and after their release or overturning of conviction.

Serious criminal convictions typically have a stigmatizing and isolating effect. That is, in part, their intended purpose. Wrongful convictions create additional traumas that make integration a challenge to exonerees and their families. Individuals suffering from institutionalization generally face challenges in day-to-day activities, particularly those who have been incarcerated for many years. This may include mental and physical health limitations, financial and housing difficulties, and other common problems associated with reintegration (e.g. technological know-how; job searching and training).

The CBA Sections believe the Commission should play a proactive role in reintegrating applicants and exonerees so they can begin to reassemble their lives. This support should also recognize the broader impact of wrongful convictions on not only the applicants, but their family and community. Some examples of assistance can include: counselling and psychiatric services; medical and dental benefits; housing; legal aid to determine eligibility for civil compensation; and job training.

We hope these observations will be helpful. We would welcome an opportunity to meet with your staff to discuss these matters at greater length.

Yours truly,

(original letter signed by Julie Terrien for Kevin Westell, Sarah Dennene and Hossein Moghtaderi)

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