



The Advocates' Society La Société des plaideurs

July 30, 2021

VIA EMAIL: info.ccrcc@oktlaw.com

The Honourable Harry LaForme
The Honourable Juanita Westmoreland-Traoré
Criminal Cases Review Commission Consultations
Olthuis Kleer Townshend LLP
250 University Ave., 8th Floor
Toronto, Ontario M5H 3E5

Dear Justice LaForme and Justice Westmoreland-Traoré:

RE: Consultation on a Canadian Criminal Cases Review Commission

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association that represents approximately 5,500 members throughout Canada. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

On March 31, 2021, the Department of Justice announced your important role in leading public-facing consultations regarding the creation of an independent Canadian Criminal Cases Review Commission, which would review criminal convictions for miscarriages of justice or wrongful conviction. The Society formed a Task Force composed of members with expertise in criminal law and wrongful convictions to review the Consultation Paper dated June 18, 2021. The Society is grateful for the opportunity to provide input on this important issue from the perspective of advocates. The Society has confined its submission to matters that fall within its mandate as articulated above.

A. The Structure of the Commission

Although not directly addressed in the Consultation Paper, the Society believes that the Commission should be structured as an independent administrative body to ensure that the Commission's mandate is executed fairly and impartially, and to avoid undermining public confidence in its decision-making process. Particular attention should be paid to ensuring independence in the appointment process for Commissioners. Moreover, the Commission's enacting legislation ought to provide Commissioners with a measure of security of tenure consistent with similar independent administrative bodies. These protections for the Commission's independence, and other similar measures, will ensure the Commission operates outside of the political sphere as intended.¹

Question 1: Who Should the Commissioners Be?

The Society believes that it is important to ensure representation of equity-seeking groups among the appointed Commissioners; and furthermore, to provide all Commissioners with education and training

¹ See the Consultation Paper, p. 1.

regarding systemic racism, discrimination, and unconscious bias, in particular as they relate to wrongful convictions of individuals from equity-seeking groups.

Question 3: Funding and Advisory Boards²

The Society is of the view that in order to be a meaningful addition to the administration of justice, the Commission must be adequately and sustainably funded. The Commission will require sufficient staff and resources to carry out its mandate effectively. Wrongful conviction cases are complex, often involving dense forensic evidence, and will require intensive application of the Commission's staff resources. The Commission's staff will have to be able to conduct thorough and timely investigations; it will not serve anyone if a lack of adequate, secure funding leads to delays in the processing of applications. The Commission's funding should be reviewed at regular intervals to ensure it remains adequate for the Commission to fulfill its critical mandate and function.

The Society would point out, however, that a well-funded Commission is not a replacement for a criminal justice system that is adequately resourced. The provincial and federal governments must provide sufficient funding for legal aid for accused in criminal proceedings, and judicial and other resources for the criminal justice system, if it is to function effectively and avoid miscarriages of justice.

B. The Mandate of the Commission

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

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

The Society's recommendations in response to Questions 4 and 7 are interrelated, and we therefore address these questions together.

While we have urged adequate resourcing for the Commission, the Society is mindful that the Commission will not have unlimited resources and therefore recommends that the Commission limit its consideration of individual applications to serious cases.

While it is not realistic to think that the Commission will have the resources to address less serious matters on a case-by-case basis, wrongful convictions in less serious cases remain a matter of concern. Such injustices should not be overlooked, especially given the disproportionate engagement with the criminal justice system and incarceration of Indigenous and racialized people and other marginalized individuals. The Society believes that the Commission can and should address wrongful convictions in less serious cases, as well as serious cases, by playing a strong role identifying opportunities for systemic reforms to prevent miscarriages of justice before they occur.

The Commission's mandate should include making recommendations for improvements to the justice system to identify and eliminate the systemic causes of wrongful conviction. By way of example, the Commission could examine the ways in which systemic racism and discrimination impact wrongful convictions of individuals from equity-seeking groups. The Commission could also play a valuable role with respect to discredited experts or discredited areas of expertise that have influenced a number of criminal convictions. The Commission's mandate should also include making recommendations to appropriate

² The need for adequate funding for legal representation for applicants will be addressed in response to Question 9 below.

authorities to facilitate the review of alleged wrongful convictions. This could include, for example, recommendations regarding the preservation of court records and evidence for consistent and appropriate periods.

Collecting and maintaining accessible data – for example, related to the potential causes of wrongful conviction such as lack of disclosure, prosecutorial misconduct, precipitous guilty pleas, expert evidence, or wrongful confessions – will reinforce the Commission’s role in systemic reform. The Society recommends that the data collected by the Commission be anonymized and made publicly available, as a means of enhancing both the Commission’s accountability and research and systemic reform of the criminal justice system by other stakeholders.

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

The Society emphasized the need for the Commission to be adequately funded in response to Question 3 above. Similarly, the Society believes that adequate funding must be available for legal representation for applicants within the Commission’s process. A key goal of such funding should be to expand access to justice for applicants, including applicants from equity-seeking groups. Given the complex nature of most wrongful conviction cases, funding for legal representation will ensure that applicants are properly informed through each step of the process and have a greater chance of demonstrating the proper merit of their case.

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

In order that individuals before the Commission have a meaningful right to be heard, it is essential that the Commission be accessible to those who do not speak English or French as a first language, or who have disabilities or other communication difficulties. The Society recommends that the Commission ensure that its process is accessible through, for example, the allocation of resources and funding to translation services or other language services in order to accommodate diverse manners of communication. The Society also recommends that the Commission consider conducting proceedings in Indigenous languages to further facilitate access to the Commission by Indigenous individuals. An accessible process will promote equity and inclusion in the case proceedings.

C. Decision-Making by the Commission

Generally, the Society believes that the Commission should have some capacity to regulate the number and nature of cases it undertakes to review. There is no value to the Commission being obliged to work on cases where the chances of a finding in favour of the applicant are obviously small, or where the relative seriousness of the conviction in issue is disproportional to the resources that would be needed to conduct a review.

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

The Society supports establishing appropriate threshold criteria to determine whether the Commission can accept an application. These threshold criteria ought to ensure that the applicant has exhausted all avenues of appeal and to aim to screen out obviously unmeritorious applications. The threshold criteria also ought to aim to control the volume of applications, so that the Commission is not immediately overwhelmed and the Commission does not become a “parallel” justice system, which would

unnecessarily undermine the principle of finality. However, the threshold must not be so high that it becomes impossible for applicants to meet the Commission's criteria for initiating a review after exhausting all of their avenues of appeal.

Question 15: Investigative powers

The Society recommends that the Commission's investigative powers be at least equal to those given to a Commission under Ontario's *Public Inquiries Act*, so that the Commission is equipped to conduct thorough investigations.³

With respect to whether any provisions should address various legal privileges, the Society believes that the provisions in the *Public Inquiries Act* pertaining to privilege and immunities ought to guide the Commission's powers.⁴ The Society suggests that consideration also be given to whether the Commission should have the powers of a Superior Court with respect to state-held privileges, such as, for example, in the context of informant privilege. If a wrongful conviction case relies on the evidence provided by a confidential informant, the Commission may need access to such evidence, incorporating suitable safeguards, so as to advance the Commission's purpose of uncovering wrongful convictions. Similarly, if a witness in a wrongful conviction case needs protection against self-incrimination, the Commission ought to be able to provide that protection to have access to the witness's evidence, which may assist them in making a well-grounded recommendation.

Question 18: Challenging Commission decisions

The Society recommends that there be some recourse to a court for review of the Commission's decision. The scope of review ought to be robust, so as to assist the Commission in refining its rules, policies, and procedures. The Society recognizes that implementing a judicial review process will require the use of additional court resources, but believes that it is worthwhile to ensure procedural fairness at the Commission level for those bringing forward wrongful conviction cases.

D. Remedy

Question 20: Should the reasons given by the Commission be public or confidential?

The Society believes that the Commission should have the ultimate authority to decide what information to make public from its reasons for decision in any particular case.

In exercising its discretion and developing norms for the publication of its reasons, the Commission should be guided by the principles of openness and transparency and the overarching purpose and goals of the Commission: for example, to explain to the applicant why their application was denied, to explain to the public why there is no finality when there is a referral, and to explain to participants in the justice system why a conviction may be flawed so that those errors are avoided in the future. The Commission should also be mindful that robust judicial review of its decisions will require reasons for decision.

The Society recognizes there will be sound rationales for the Commission to deviate from the principle of openness and not to publish reasons (or a full set of reasons) in some cases. These may include privacy

³ *Public Inquiries Act*, SO 2009, c 33, Sch 6.

⁴ *Ibid*, s 8(3) [privilege preserved], s 16 [immunities].

concerns and not impacting the conduct or outcome of a new trial or appeal. To partially address privacy concerns, the Society recommends that the Commission have the express power to order a permanent or temporary publication ban.

The Society recognizes that this will be a case-by-case approach, but submits that the Commission will develop a body of applicable principles over time.

Question 23: Non-discrimination and positive safeguards

The Society believes that the legislation creating the Commission need not contain free-standing non-discrimination provisions, as this would be duplicative of other federal statutes that would govern the Commission's activities. Instead, the Society recommends that the Commission use existing legislation, both federal and provincial, as guidance when developing its internal non-discrimination policies. The Commission's non-discrimination policies should respond to systemic issues, such as the ways in which it will address the overrepresentation of marginalized individuals in the criminal justice system.⁵ The Commission's non-discrimination policies ought to be published on its website.

Thank you for undertaking this important public consultation with stakeholders and for providing the Society with the opportunity to make these submissions. We would be pleased to discuss our comments with you further.

Yours sincerely,



Deborah E. Palter
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Members of The Advocates' Society Task Force:

Hilary Book, *Book Law*
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⁵ See, in this regard, the Society's recommendation that the Commission play a role in systemic reform in response to Question 7, above.