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, ON K1A 0A6

Dear Mr. Sarai,

We write to propose amendments to Bill C-40 to allow applications from individuals who pled guilty or were not able to appeal due to other justifiable circumstances.

Key Recommendation: to Amend Bill C-40 to allow applications to the proposed Miscarriages of Justice Commission (Commission) in exceptional circumstances in cases in which there was no appeal.

PROPOSED AMENDMENT

696.4

"(4) Despite paragraph **(3) (a) or (b)**, the Commission may decide that the application is admissible even if the finding or verdict was not appealed to a provincial appellate court or the Supreme Court of Canada. In making the decision, the Commission must take into account . . ."

ISSUE IN BRIEF

The UBC Innocence Project ("The Project") [1] submits that Bill C-40 (the "Bill")[2] be amended to allow applications to the Commission from those who falsely pled guilty or could not appeal their conviction for various other important reasons. This category of cases includes those in which new evidence is now available but legal aid to pursue an appeal was initially denied, or those which involved a false guilty plea. The Bill's current language contemplates receiving applications from those who pled guilty, but only in instances where the applicant has exhausted their provincial-level appeals. This approach is no different from the current legislative scheme. For guilty plea applicants or those who were unsuccessful in obtaining assistance from Legal Aid, having to

[1] The Project is a legal clinic at the Peter A. Allard School of Law at the University of British Columbia. The Project reviews and investigates claims of wrongful conviction with the help of law students and pro bono supervising lawyers. Its work has resulted in the exonerations of Tomas Yebes (in 2020) and Gerald Klassen (in 2022). Its pro bono lawyers and students helped to create new law relating to post-appeal disclosure in the case of *Roberts v. British Columbia (Attorney General)*, 2021 BCCA 346. The Project currently has five applications before the Minister of Justice, and another close to being filed. It has worked on all of these cases for over a decade and is familiar with the barriers facing those navigating the wrongful conviction review process. Tamara Levy, KC, co-founded the Project in 2007, and has served as its Director since its establishment. Ms. Levy has had 25 years of experience working in criminal law as both defence and crown counsel.

[2] Bill C-40, *An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)* 1st Sess, 44th Parl, 2023 (first reading 16 February 2023) [Bill C-40].

navigate the appellate process before applying to the Commission for conviction review is an unnecessary legal burden that will prevent miscarriages of justice from coming to light. If Bill C-40 is intended to effectively help identify miscarriages of justice in Canada, the Commission must be able to receive applications in these two case categories where the appeals process was not exhausted.

THE STATUTORY CONUNDRUM AND PROPOSED AMENDMENT

The proposed language in Bill C-40 currently sets out the following provisions:

Application for review

696.2 (1) An application for a review on the grounds of miscarriage of justice may be made to the Commission by or on behalf of

- **(a)** a person who has been found guilty of an offence under an Act of Parliament or a regulation made under an Act of Parliament, including a person found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, **a person whose plea of guilty has been accepted** and a person who has been discharged under section 730;

Exhaustion of appeal rights

(2) For the purposes of subsection 696.4(3) the application must include information indicating whether the person's rights to appeal the finding or verdict have been exhausted and, if they have not been exhausted, information relevant to the factors referred to in subsection 696.4(4).

Decision on admissibility

696.4 (1) On receipt of an application, the Commission must decide whether it is admissible.

…

Inadmissible application — appeal rights

(3) The Commission must dismiss the application as inadmissible if

- **(a) the court of appeal has not rendered a final judgment on appeal of the finding or verdict;** or

- **(b)** an appeal of the finding or verdict lies to the Supreme Court of Canada on a question of law.

Exception

(4) Despite paragraph (3)(b), the Commission may decide that the application is admissible even if the finding or verdict was not appealed to the Supreme Court of Canada. In making the decision, the Commission must take into account

- **(a)** the amount of time that has passed since the final judgment of the court of appeal;
- **(b)** the reasons why the finding or verdict was not appealed to the Supreme Court of Canada;
- **(c)** whether it would serve a useful purpose for an application to be made for an extension of the period within which a notice of appeal or a notice of application for leave to appeal, as the case may be, to the Supreme Court of Canada may be served and filed;
- **(d)** whether the application is supported by a new matter of significance that
    - **(i)** was not considered by the courts or previously considered by the Commission in an application in relation to the same finding or verdict,
    - **(ii)** requires investigation, and
    - **(iii)** does not raise only a question of law; and
- **(e)** any other factor that it considers relevant.

The operation of s. 696.4 (3)(a) combined with the limitations set out in s. 696.4 (4) would prevent persons who had entered guilty pleas, and not applied to the appellate courts to withdraw the plea, from applying to the Commission, despite the language in s. 696.2 (1)(a) contemplating the review of guilty plea cases. It would also prevent applications from those who tried to appeal through legal aid but were denied funding. In our submission, the language of s. 696.4 (4) should be modified to read:

> "(4) Despite paragraph **(3) <u>(a) or</u> (b)**, the Commission may decide that the application is admissible even if the finding or verdict was not appealed to a provincial appellate court or the Supreme Court of Canada. In making the decision, the Commission must take into account . . ."

These changes would give the Commission the discretion to review the applications of individuals who entered false guilty pleas or those who were refused legal aid funding for an appeal if it found that their case sufficiently demonstrated the exceptions set out in s. 696.4(4)(d) or (e). In eligible and appropriate cases, the applicant could then request that the Commission use its legislated investigative powers to help identify the evidence necessary to establish that a miscarriage of justice may have occurred.

THE LENGTHY AND CUMBERSOME PROCESS OF ATTEMPTING TO WITHDRAW A GUILTY PLEA

Those who have entered false guilty pleas are often individuals who face systemic barriers and their negative experience with the justice system has been influenced by those barriers.[3] They often had little support through the investigation and trial, have limited support in prison as most claims of innocence once convicted are not believed, and it is difficult for them to know where and how to find assistance. These post-conviction barriers will similarly add to the delay in getting their case before the Commission. It is not in the interest of justice to require individuals from these disadvantaged groups to go through the cumbersome process of challenging the validity of their guilty pleas to provincial appellate courts, particularly when, in most of these cases, they must first apply to the court to extend the time period (30 days) in which they are allowed to bring an appeal. Both the application to extend time to appeal as well as the application to withdraw the guilty plea can take years to prepare, even when counsel are involved, and require significant legal and financial resources. Convicted individuals in this situation must collect hundreds of pages of documents including prison records, transcripts, and disclosure at trial in an attempt to meet the legal test for both the extension of time to appeal and the application to set aside the guilty plea.

Test for Granting an Extension of Time to Appeal:

The legal test to consider an application to extend time to appeal is set out in *R. v. Tallio,* (2017 BCCA 259 at para 8:

> A justice of this Court may extend the time to file a notice of appeal or application for leave to appeal: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 10(1). The criteria applicable to granting an extension of time are found in Davies v. C.I.B.C. (1987), 1987 CanLII 2608 (BC CA), 15 B.C.L.R. (2d) 256 at 260 (C.A.) and are summarized as follows:
>
> 1) Was there a bona fide intention to appeal?
> 2) When were the respondents informed of the intention?
> 3) Would the respondents be unduly prejudiced by an extension of time?
> 4) Is there merit in the appeal?
> 5) Is it in the interests of justice that an extension be granted?

The most labour-intensive aspects of meeting this test include: 1) demonstrating a bona fide intention to appeal; and 2) demonstrating the merits of the appeal. For the former, one must acquire the individual's entire prison record – which often spans decades – in an attempt to demonstrate that the person has always maintained innocence and intended to appeal on this basis. For the latter, the merits of the appeal test, one must have collected and reviewed the police investigative file, which (in British Columbia at least) the police will not disclose until one files an application with the Minister of Justice or files a Notice of Appeal. However, it would be a waste of resources for

[3] "Chapter 8: False Guilty Pleas" in Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, "Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada." Ottawa: Department of Justice, 2018, online: <ppsc.gc.ca/eng/pub/is-ip/index.html> [Innocence at Stake].

either of these steps to be taken without reviewing the police investigative file. It is a classic Catch-22 situation.

Under the proposed legislation, an applicant who has falsely pled guilty and who has not been able to appeal within the 30 day period, would currently have to take the following specific steps for their case to be eligible for the Commission's review:

(1) Apply for legal aid funding to hire a lawyer or contact an innocence organization to assist in funding or representing them in an extension of time to appeal application.
   a. Applications for legal aid funding are sometimes denied because the applicant has not been able to identify grounds of appeal or the evidence they need to prove that a miscarriage of justice occurred in their case. Sometimes this is because the relevant information has not been disclosed by the Crown or sometimes it is because the applicant doesn't have the skills to identify it in the case materials. Applicants are generally asked to explain how the verdict in their case was unreasonable, how the judge made an error of law, or how a miscarriage of justice occurred.[4] Legal aid lawyers will do their best to review the case and identify the issues but with high case volume, sometimes meritorious cases get overlooked and the person is left with no opportunity to appeal.
   b. Obtaining the help of innocence organizations often requires that the applicant wait months or years until their case can be reviewed and applications to courts can be initiated.

(2) If successful in their legal aid funding application, the applicant will likely wait many months for their counsel to review their case materials and put the documentation together to make the extension of time application. If the applicant has been in prison for a lengthy period of time (the Project has had guilty plea cases where the applicant has been in prison for over 25 years) all of their prison files (thousands of pages after so many years in prison) will have to be reviewed to assess the part of the legal test requiring "a bone fide intention to appeal". Waiting for a scheduled court date to make the application can also take several months and sometimes over a year.

(3) Once the application is heard, the applicant will need to wait for the presiding justice to decide the case and provide reasons. If granted leave to extend time to appeal, the applicant must then gather documents and prepare for the appeal hearing involving the application to withdraw the guilty plea. This process can also take months or over a year, in addition to then waiting for court time for the hearing and for the court's decision.

(4) If an extension of time is granted, applicants would proceed with an application to withdraw the guilty plea on the basis that a miscarriage of justice occurred.

(5) If the application is denied, it would now be open to the applicant to apply to the Commission for conviction review because the appeal process has been exhausted.

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[4] *How to Appeal Your Conviction*, online: Legal Services Society, BC <http://pubsdb.lss.bc.ca/pdfs/pubs/How-to-Appeal-Your-Conviction-eng.pdf> at 10.

Test for Applying to Withdraw a Guilty Plea:

Once an applicant has litigated the issue of extending time to appeal (which will be necessary in almost all cases where a guilty plea has been entered), one then has to litigate whether the plea was valid to determine whether a miscarriage of justice may have occurred. A valid guilty plea is one that is voluntary, informed, and unequivocal. To withdraw a guilty plea, one must demonstrate that one of these circumstances was not met.[5] There have been numerous cases in Canada and other countries where what appeared to be valid guilty pleas have led to miscarriages of justice.[6] Justice Rondinelli in *R. v. Ceballo* noted that in some Canadian false guilty plea cases, "the appellants had falsely pleaded guilty due to powerful inducements of reduced charges and significantly reduced sentences."[7]

In applications to withdraw guilty pleas, to properly litigate the issues, one must have the entire police investigative file which, as noted above, the RCMP will not release until an applicant has already filed a Notice of Appeal. And, even if the files were to be released, the process of reviewing them and conducting further necessary investigation, can take years for under-resourced organizations or self-represented applicants.

This lengthy process and the logical legal outcomes will make it extremely difficult for those who have falsely pled guilty to access the proposed Commission. Endowing the Commission with the ability to investigate cases where applicants have pled guilty but have not yet appealed would:

1) take years off the process of remedying a miscarriage of justice;
2) ensure that the Commission fulfills its mandate to improve access to justice and;
3) "mitigate the devastating impact [miscarriages of justice] have on the convicted person, their family, victims and the justice system as a whole."[8]

SCOPE OF THE PROBLEM OF FALSE GUILTY PLEAS

People plead guilty when innocent for myriad reasons, including, but not limited to:

- because they are trying to cover for the real perpetrator;
- because they did not want to risk a harsher sentence if convicted;
- because their cognitive deficits combined with coercive interrogation tactics led them to believe they might be guilty;
- because they were unrepresented and scared to face a trial alone;
- because they have an attention-seeking personality disorder; and/or
- because their cultural context and lived experience (primarily, but not limited to Indigenous circumstances) leads them to acquiesce to the overwhelming authority and complexities of the legal system. [9]

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[5] *R. v. T.(R.)*, 1992 CanLII 2834 (ON CA), [1992] O.J. No. 1914 (Ont. C.A.) at para. 14;
[6] See e.g., *R. v. Hanemaayer*, 2008 ONCA 580, *R. v. Kumar*, 2011 ONCA 120, and *R. v. Shepherd*, 2016 ONCA 188.
[7] *R. v. Ceballo*, 2019 ONCJ 612.
[8] Department of Justice Canada, *Bill C-40: An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)*, (Ottawa: Department of Justice Canada, 22 Mar 2023).
[9] Innocence at Stake, *supra*, note 3.

Additionally, individuals who have entered a false guilty plea may not appeal their conviction for multiple reasons, including, but not limited to:

- on the advice of counsel (which may have been sound at the time but circumstances may have changed); and/or
- a lack of legal aid funding; and/or
- because they have allowed their 30 day period to appeal to lapse unknowingly or without appreciating the consequences; and/or
- because their experience with the justice system leads them to believe an appeal would be futile.

The Canadian Registry of Wrongful Conviction's first report indicates that 18% of all remedied wrongful convictions in Canada were the result of false guilty pleas, with the majority involving hard-to-disprove "imagined crimes" that never occurred.[10] False guilty pleas are most commonly entered by individuals who are marginalized - women, Indigenous people, other racialized individuals,[11] and those diagnosed with mental health and/or cognitive challenges.[12] The true number of false guilty pleas entered by persons with cognitive challenges is likely significantly undercounted. In a 2010 study of 1,200 accused persons living with mental health issues, over one-third of respondents claimed they had pled guilty at some point in their lifetime to an offense they did not commit. This finding is unsurprising considering that Canadian courts allow guilty pleas to be entered with a low mental competency threshold; people only need a basic awareness or an operating mind.[13]

The Canadian Registry's data show that 26.67% of these false guilty pleas were made by Indigenous individuals. This number is hugely disproportionate to the country's population in which Indigenous peoples account for only 5%.[14] Indigenous peoples are most at risk of wrongful convictions and face many barriers in their pursuit of remedies when wrongful convictions occur. Despite making up 40% of Canada's female prisoner population, none of the recognized false guilty plea exonerations identified in Canada to date involve Indigenous women. Indigenous women already face significant access to justice issues, which are further exacerbated by the difficulties associated with withdrawing guilty pleas.[15]

The most recent *Federal/Provincial/Territorial Heads of Prosecution Report: Innocence At Stake* makes the following statements about false guilty pleas in Canada:

> "In short, Canada's criminal justice system is not preventing false guilty pleas in all cases. It is clear they occur; we simply do not know the scope of the phenomenon."

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[10] Kent Roach, *Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report from The Canadian Registry of Wrongful Convictions* (February 2023), online: Canadian Registry of Wrongful Convictions <http://www.datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf> at 3 [*First Report*].
[11] *Ibid*.
[12] *Ibid* at 3.
[13] *Ibid* at 9.
[14] *Ibid* at 5.
[15] *Ibid*.

> "Some experts suggest that the known documented cases of false guilty pleas are increasing, and that the sheer number of guilty pleas entered annually in Canada suggests false guilty pleas are likely more prevalent than we realize, but remain undetected, and are more difficult to identify and much less studied than false confessions."
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> "More than 450,000 accused persons are dealt with in Canada's criminal justice system annually, and the vast majority plead guilty, which could mean that hundreds or even thousands of people every year plead guilty to offences they did not commit (even if only one percent of guilty pleas are false), some Canadian academics contend."[16]

DIFFICULTIES IN IDENTIFYING & REMEDYING FALSE GUILTY PLEAS

The Canadian Registry of Wrongful Conviction found that in thirteen of the fifteen remedied false guilty plea cases, the convicted individual needed assistance from prosecutors, prison officials, or RCMP forensic labs to overturn their convictions.[17] New evidence, which is necessary to advance a current conviction review application (including new witness information, new expert reports, and new forensic analysis) requires cooperation from several sources within the justice system.[18] These exonerations would have never occurred without this cooperation.[19]

The Commission's investigative powers ideally position it to unearth evidence necessary to assist false guilty plea applicants in overturning their convictions. Preventing false guilty plea applicants from being able to efficiently access the Commission's investigative powers because they have yet to appeal their conviction will result in a subsection of wrongfully convicted individuals being unable to prove that they were the victims of a miscarriage of justice.[20]

Case example: *R. v. Tallio* and the lengthy process of undoing a guilty plea

One recent case embodies Kent Roach's statement that "[a] guilty plea wrongful conviction can happen in a matter of minutes. Once a guilty plea is entered, however, it can take decades for the convicted person to correct the miscarriage of justice."[21]

At 17 years old, Phillip Tallio pled guilty to second-degree murder relating to the death of his 22-month-old cousin.[22] Despite being a minor with cognitive difficulties, the British Columbia Court of Appeal refused to reverse the plea, citing: 1) Mr. Tallio's failure to prove on a balance of probabilities that he lacked the requisite capacity to plead guilty; and 2) that he could not clearly identify the true perpetrator 30 years later.[23] Exhibits that would likely have identified the

[16] Innocence at Stake, *supra* note 3.
[17] *First Report*, *supra* note 4 at 18.
[18] *Ibid* at 11.
[19] *Ibid*.
[20] *Ibid* at 11.
[21] *Ibid* at 18.
[22] *R v Tallio*, 2017 BCCA 259 at para 1.
[23] *R v Tallio*, 2021 BCCA 314 at paras 359, 370.

perpetrator were lost by the RCMP shortly after Mr. Tallio was convicted. Mr. Tallio received a life sentence in 1984, and was denied parole until March 2023. The parole delay was largely due to his continued assertion of innocence over the years.

Mr. Tallio applied to the UBC Innocence Project in 2009. It took until 2016 to gather enough information to file an application to extend time to appeal. It then took until 2021 to litigate the narrow issue of the validity of the plea and get a decision from the court. Twelve years after applying to the Project, he is now able to apply to the Minister of Justice but must find new evidence. As noted above, it may be that the only new evidence that would help Mr. Tallio was the evidence lost by the RCMP shortly after his conviction. These are lengthy and difficult cases to litigate.

Case example: *R. v. Catcheway* and the difficulty in identifying false guilty pleas

A second case worthy of note is *R. v. Catcheway* – a compelling example of how false guilty pleas happen and why they sometimes take a stroke of luck to remedy. Richard Catcheway is an Indigenous man who had a difficult and tragic childhood. He was also diagnosed with FASD (Fetal Alcohol Spectrum Disorder) and was addicted to crystal methamphetamine. In 2017, he was charged with and arrested for break and enter for an offence that had occurred on March 17th of that year. While in drug withdrawal in custody, he was led to believe that there was evidence proving he was at the crime scene at the time of the offence. Given his limited cognitive abilities and the seemingly strong evidence against him, he entered a guilty plea. He was represented by counsel at the time.

While he was in jail for the offence, a prison administrator happened across information that demonstrated Catcheway could not possibly have committed the crime because he was in jail 200km away when the offence was committed. This critical detail was missed by everyone involved with his case. He spent over 6 months in jail before the court quashed his conviction and ordered an acquittal.[24] But for the prison administrator finding, as well as acting upon, the exonerating information, this injustice would likely never have been corrected.

It should not go unnoticed that both of the guilty plea cases discussed above involve young Indigenous men.

NON-GUILTY PLEA CASES IN WHICH THERE WAS NO APPEAL

The amendment proposed above would not only allow false guilty plea cases the opportunity to apply to the Commission but also those cases in which there was no appeal for other valid reasons. Many stories from the wrongly convicted include circumstances in which they wanted to appeal but either did not know how to go about it, thought their lawyers were appealing when they were not, couldn't find a lawyer to help them, or were refused funding to appeal by legal aid and didn't know how to proceed. The Project has a case in which funding was denied by legal aid even though they agreed there were grounds of appeal. Funding was denied on the basis that

[24] "Richard Catcheway", Canadian Registry of Wrongful Convictions, online: < www.wrongfulconvictions.ca/cases/richard-catcheway>.

they didn't think the accused could meet the legal test for the court to grant an extension of time to appeal.

The proposed amendment would allow applications in these exceptional circumstances where applicants can demonstrate that they wanted to or tried to appeal but were not able to do so for various justifiable reasons. The Commission should have the discretion to accept these cases in certain circumstances.

HOW OTHER CONVICTION REVIEW BODIES DEAL WITH GUILTY PLEA CASES

The Criminal Cases Review Commission in England, Wales, and Northern Ireland has the ability to investigate and order remedies in exceptional cases where the applicant has yet to appeal.[25]

The Scottish Criminal Cases Review Commission will similarly review exceptional cases where an applicant has yet to appeal, such as in cases where the Commission's special investigative powers are needed to help uncover evidence to support the applicant's appeal.[26]

Canada should follow the exemplary lead of England, Wales, Northern Ireland, and Scotland and clearly set out an exemption for applicants in exceptional cases who have yet to appeal their convictions. This would include applicants who entered false guilty pleas and those who were unable to obtain funding to appeal but nevertheless may have suffered a miscarriage of justice.

CONCLUSION

One simple change to the proposed legislation would address this very important issue in wrongful conviction advocacy. If subsection (a) is added to 696.4 (4), as proposed above, those who have not yet appealed to their provincial appellate court would have the opportunity to apply to the Commission in these unique circumstances in which they entered a false guilty plea or were otherwise unable to appeal. The decision as to which of these cases would be accepted by the Commission should be left to the Commission itself to determine through the development of its own policies and procedures. Whether a wrongful conviction did occur will ultimately be determined by the courts on successful applications to the Commission, but giving applicants the support of the Commission to help access the information to support their innocence claims will go a long way to achieving access to justice for applicants and to remedying miscarriages of justice when they have occurred.

Sincerely,

Tamara Levy, KC, Director
with the assistance of the students of the UBC Innocence Project

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[25] *Frequently asked questions*, online: Criminal Cases Review Commission in England, Wales, and Northern Ireland <http://ccrc.gov.uk/submitted-applications-if-you-havent-appealed-and-the-referrals-process>.
[26] *Making an application*, online: Scottish Criminal Cases Review Commission < http://www.sccrc.co.uk/making-an-application-old>.