

**WRONGFUL CONVICTIONS:  
A REVIEW AND ASSESSMENT OF MISCARRIAGE OF JUSTICE IN CANADA**

by

Lisa David

LL.M., The University of British Columbia  
LL.B, Simon Fraser University

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## ABSTRACT

Despite the checks and balances of our criminal justice system many cases of wrongful convictions have occurred. In Canada, the government has responded to wrongful convictions by creating a legislative process whereby someone claiming they have been wrongfully convicted can apply to the Federal Minister of Justice based on a miscarriage of justice. The postconviction review process allows the Minister of Justice to refer cases back to courts if, he or she is satisfied that a new trial or hearing should be directed.

The Department of Justice initiated internal changes to the postconviction review process in 1994 after serious criticism about the process. The changes created were not significant enough to curb more criticism and the need arose to rectify the problems again. Possible reform options included; the creation of a separate agency for reviewing criminal convictions, the elimination of s.690 altogether with a broadening of the scope of appellate review, or amending the s.690 process. In 2002 the Government decided to amend the existing process and ss.696.1 to 696.6 of the *Criminal Code* and the applicable regulations are Canada's current legislative postconviction review process. It has been eight years since these legislative changes were made and this thesis is going to assess whether the changes were an effective response to the criticisms that plagued the previous process.

A look at the legislative changes along with an in-depth statistical analysis is conducted to determine if the process addressed the criticisms of not being independent, open, effective, and accessible. The years have shown, that there has been little real improvement in the function of the system. The changes made were not substantial enough to check the existing problems.

The need to reassess the situation is still paramount. After canvassing the options for reform I conclude that the only viable option is to create an independent criminal convictions review body. I hope that the carefully considered and consolidated research for this thesis will allow the government to take notice of the genuine need of those struggling to gain access to a system that should run and effectively and efficiently.

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## DEDICATION

To my late father, Robert Dale Jung, (1949-1995), who taught me the value of right and wrong and the courage to stand up for justice.

*“It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope.”*

Robert Francis Kennedy (U.S. Attorney General and Adviser, 1925-1968)

## **CHAPTER 1 – INTRODUCTION**

The pains of imprisonment are indeed serious. Those who have suffered behind the walls of justice can attest to the deprivation with which they have lived. Prisoners are deprived of the support network of family and friends, and lose the option of personal choice and all the daily freedoms that that entails. The time in prison is considered the punishment for the crime that has been committed. The criminal record and the social ostracism that occurs after being found guilty of a criminal act are further types of punishment, although societal as opposed to legal. Such limitations and discomforts are considered “just desserts” for those who commit a crime. But, what about those imprisoned who have not committed a crime? What about those who are wrongfully convicted? The pains of imprisonment for those who are guilty may well be challenging; but for those who are innocent, they would be a living nightmare.

Canada, like many other countries, has had its share of wrongful convictions. Despite the checks and balances of our criminal justice system many cases of wrongful convictions have occurred. This paper is not going to address the special pains that wrongfully convicted offenders must bear. Most of us are capable of understanding the horror that an innocent person must face at being led through a justice system that not only pronounces his guilt and sends him to prison, but one that also turns a deaf ear to his claims of innocence. Many real life stories of unfortunate people who have had to suffer such injustices have been chronicled. Although such stories are worth telling what is also worth knowing is just how to rectify such injustices once they have occurred.

The reality is that wrongful convictions will continue to occur despite the systematic checks and balances that have developed over centuries of criminal proceedings because guilt or innocence is ultimately decided, as it must be, by fallible human beings. Realistically then, the challenge is to try and prevent as best as possible wrongful convictions from occurring and also to help identify and rectify as effectively and efficiently as possible such injustices when they do occur.

In Canada, the government has responded to wrongful convictions by creating a legislative process whereby someone claiming they have been wrongfully convicted can apply to the Federal Minister of Justice based on a miscarriage of justice. This paper, explores how those who have been found guilty of a criminal act can seek justice. Specifically, this paper will explore the legal processes available to those who claim to be wrongfully convicted.

Attention has been given relatively recently to Canada's legal framework for rectifying wrongful convictions. Canada's postconviction review process was amended in 2002 after some criticism that the process was not effective. It has been eight years since these legislative changes were made and an assessment will be undertaken to discern if the changes were effective.

Before assessing the postconviction review process I will first address what is meant by wrongful convictions. In Chapter 2, I will show that although wrongful convictions may be easy to understand, they are very difficult to decipher. It is commonly believed that a wrongful conviction pertains to someone who has been found guilty of a crime that he or she did not commit. However, finding who fits into this category and who does not cannot be measured with a yardstick and is, therefore, difficult to address. I will also examine how the criminal justice system, both historically



and more recently, has assessed wrongful convictions. Historically, wrongful convictions were not an issue. They were a non-issue not because they did not occur, but because it was believed that our system was infallible and such instances did not happen, or did so very rarely. More recently, with the advent of science and DNA technology, and the help of some very high profile cases, it is now understood that wrongful convictions do occur. This understanding, in turn, has created a shift in our criminal justice consciousness. This shift allows for the fallibility of our system and it attempts to create ways both to stop such errors from occurring and rectify them when they do occur.

Chapter 3 of this thesis outlines the legal avenues available to those who have been found guilty of a crime they have not committed. The first step in such a process is the appellate system. A person may be able to appeal his case all the way to the Supreme Court of Canada. Once a person has exhausted his appeals and justice still has been denied, he may make an application to the Minister of Justice claiming a miscarriage of justice. Sections 696.1 to 696.6 of the *Criminal Code* and the applicable regulations are Canada's postconviction review process. This is the process the thesis will focus on and assess; for this is generally considered to be the last option for those claiming wrongful conviction. The chapter will also briefly outline other forms of relief that have been thought to be viable alternatives. Finally, this chapter will address the confusion surrounding the legal result, termed a "miscarriage of justice", and the desired result, which is an exoneration for a wrongfully convicted person. Both avenues available for a wrongfully convicted person, appellate and postconviction review, seek to find a miscarriage of justice as opposed to a verdict of innocent. Although a miscarriage of justice may include an innocent person being found guilty, the definition is more

encompassing. This distinction between “miscarriage of justice” and “wrongful conviction” is important. A miscarriage of justice maintains only that an injustice has occurred and will not pronounce innocence. In the case of a wrongful conviction, a wrongfully convicted person is seeking exoneration for a crime they claim they have not committed.

The fourth chapter will review Canada’s postconviction review from its inception into Canada until the present day. A more in-depth analysis of the legislation prior to 2002 will be undertaken. A review of the legislation and the process will be conducted along with an overview of the criticisms of the now amended legislation. A study of the current legislation and an assessment of whether the changes have rectified the problems plaguing the previous system are also undertaken.

A further analysis of whether or not the postconviction review process has improved is determined with the use of statistics. Therefore, Chapter 5 will provide a collection of statistical information on the postconviction review process. This chapter begins by describing the importance of statistical information to the understanding of wrongful convictions in general, and goes on to specifically describe the remedying of wrongful convictions through the postconviction review process. Two tables will cover postconviction review applications from 1986 – 2001 and 2002 - 2010. The information provided by the tables includes the number of applications submitted each year to the Department of Justice, the number of interventions granted, the type of intervention granted, the result of each intervention, the length of time it took to grant an intervention and the yearly departmental disposal rate of applications. Information from each table will be assessed and appraised to determine if the legislative changes of 2002 have made an impact on the conviction review process for those seeking redemption.

Chapter 6 takes the information accumulated from Chapter 5 and analyses it. This chapter will review the number of applications received by the Department of Justice and what this information may reveal. Next, this chapter will look at the number of interventions granted in an attempt to demonstrate the effectiveness of the system. The type of interventions will also be reviewed. The next section will address the length of time it takes for an intervention to be granted and the rate at which the Department of Justice can review, investigate and dispose of cases. Each section will be assessed against the legislation existing both before and after the 2002 legislative changes to determine the overall efficiency and effectiveness of the postconviction review process.

Chapter 7 outlines options for dealing with wrongful convictions in Canada. An assessment of the options previously canvassed by the federal government prior to deciding to modify the existing system will be undertaken. These include eliminating the postconviction review process and broadening the powers of the court of appeal, modifying the existing system to address the problems or creating an independent review body. Each option is reviewed and assessed with particular reference to the criticisms leveled against the previous system.

## **CHAPTER 2 – WRONGFUL CONVICTION**

### **2.1 INTRODUCTION**

It is a tragedy when a person is found guilty of a crime he or she did not commit and it is this scenario that is commonly considered to be a “wrongful conviction”. Although the concept of wrongful conviction may seem straight forward, the conundrum exists of establishing who falls into the category of the wrongfully convicted. How do those studying wrongful convictions determine who qualifies as “wrongfully convicted” and who does not? And how does one who is found guilty of a crime prove to others that he or she is innocent? The first part of this chapter will review the meanings of wrongful convictions and the different ways researchers have attempted to identify cases of wrongful convictions. The second part of the chapter will look at the way the criminal justice system has reacted to wrongful convictions. Wrongful convictions seem to be a relatively new phenomenon. Has our criminal justice system somehow recently altered to allow people who are innocent to be found guilty? Or, are those persons found to be guilty but who are actually innocent only recently being acknowledged as such? Finally, the last part of this chapter looks at research in the area of wrongful convictions. It concludes that wrongful convictions do occur in the system; and it looks at how such convictions can occur and how much they occur.

### **2.2 MEANING OF WRONGFUL CONVICTION**

It is possible for a person to commit a criminal offence to be tried, and be acquitted -- even though that person is actually guilty. A finding of “not guilty” may mean only that the Crown has not proven its case “beyond a reasonable doubt”. On the other

hand, however, it is also possible that a person may be tried and found guilty of an offence he or she has not committed. The former is rather readily understood, while the latter is only very recently gaining recognition.

Wrongful convictions are a relatively new concept of the criminal justice system and they are generally understood to mean those who are innocent of a crime for which they have been convicted. As previously alluded to however, the term “not guilty” does not (necessarily) mean the accused did not commit the crime. There exist two types of “not guilty” factual innocence and legal innocence. Factual innocence is self explanatory, the person did not actually commit the acts upon which the conviction rests. Legal innocence means the person may have committed the act, but may not have met the legal standards to be found guilty of the crime. The courts will either acquit individuals who are found legally innocent or their convictions will be overturned.

Those advocating on behalf of those persons claiming wrongful conviction generally restrict their advocacy to those individuals who are factually innocent.<sup>1</sup> The reasons are obvious. Championing the cause of a person who may be guilty on the facts but is deemed legally innocent does not garner human sympathy or support. Whereas, the factually innocent person who becomes the victim of our criminal justice system evokes our sympathy and stimulates our sense of injustice. On the other side, it is also difficult to champion support for someone who committed a criminal act and has been found guilty, despite the fact that the case lacked the sufficient legal merit to warrant the conviction.

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<sup>1</sup> The Cardozo School of Law Innocence Project, The Osgoode Hall Innocence Project and the UBC Law Innocence Project.

So just how is it determined who is factually innocent after being found guilty by the criminal justice system? Those ultimately determined to be found “wrongfully convicted” go through a myriad of ways in order to be recognized as such. Since there is not an independent measure to assess the credibility of the person claiming a wrongful conviction, researchers often use different measures of analysis. Since wrongful conviction cases have such a subjective element about them, understanding who is “innocent” and who is not, is a challenge. A similarly great challenge is to objectively define wrongful convictions.

Some researchers attempt to confine their use of the term “wrongfully convicted”, to those who are factually innocent, looking only at cases in which the accused has been exonerated. Therefore, some researchers will wait until the government has officially exonerated an accused.<sup>2</sup> Other researchers will look at cases in which the courts have declared a miscarriage of justice or those in which the court of public opinion has concluded that the accused is innocent of the crime charged.<sup>3</sup> But others still feel that this scope is too narrow. These researchers take a broader view and conclude that all those charged with and found guilty of a crime they did not commit are wrongfully convicted. Therefore, those termed “wrongfully convicted” would include those who have been acquitted after trial,<sup>4</sup> those whose convictions are later overturned on appeal,<sup>5</sup> those who have had their convictions quashed,<sup>6</sup> and those who have been

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<sup>2</sup> Ruth Brandon and Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London, Eng.: George Allan & Unwin, 1973), at 19.

<sup>3</sup> Brandon and Davies, *ibid.*

<sup>4</sup> Tim Anderson, “Miscarriages - What is the Problem?” (July 1993) 5:1 CIJI 72 at 73.

<sup>5</sup> Anderson, *ibid.*

<sup>6</sup> Brandon and Davies, at 19.

convicted on evidence that is later called into question.<sup>7</sup> Then there are those researchers who believe that someone who goes through the appellate process which results in an acquittal is, perhaps, unfortunate but not a “wrongful conviction”. The range of understanding of the term varies considerably and significantly amongst researchers.

Finally, some researchers look to the trial process and the evidence and assess whether or not on the whole, the accused received a fair trial. If it is concluded that the accused did not receive a fair trial, or that credible evidence would have cast doubt on the conviction, a wrongful conviction has occurred.<sup>8</sup> Other researchers believe this approach may be too broad and researchers who define wrongful convictions very broadly have been sharply criticized and accused of artificially inflating the numbers of wrongful convictions.<sup>9</sup> Therefore, although wrongfully convicted individuals are generally considered those who are factually innocent, the practical method for determining who falls into this category and who does not is still an unsettled issue.

### **2.3 THE CRIMINAL JUSTICE SYSTEM’S RESPONSE TO WRONGFUL CONVICTIONS**

Historically, wrongful convictions were essentially considered a non-issue. This is not because wrongful convictions did not occur, but rather because it was assumed that those who were found guilty were, indeed, guilty of the crimes charged. According to

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<sup>7</sup> Clive Walker and Keir Starmer, *Justice in Error* (London, Eng.: Blackstone Press, 1993). at 4.

<sup>8</sup> Paul R. Wilson, “When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia” (February 1989) 1: 5 *AJ of Social Issues* 3.

<sup>9</sup> Morris B Hoffman, “The 50<sup>th</sup> Anniversary of 12 Angry Men: The Myth of Factual Innocence” (2007) 82 *Chi-Kent L. Rev.* 663 and Hugo A. Bedau and Michael L. Radelet, “Miscarriages of Justice in Potentially Capital Cases” (November 1987) 40:1 *Stan.L.Rev.* 21 and Stephen J. Markman and Paul G. Cassell, “Protecting the Innocent: A Response to the Bedau-Radelet Study” (November 1988) 41:1 *Stan.L.Rev.* 121.

Morris Hoffman, the issue of guilt in England was fairly much presumed and the main purpose of the criminal law was not determining guilt, but determining the type and severity of punishment it should impose.<sup>10</sup>

... the most important function of English jurors, as early as the 1300s, was not to assess factual guilt, which was still pretty much a given, but rather to act as a buffer between the guilty and what came to be viewed by ordinary citizens as grossly excessive levels of punishment. ... Even as late as the eighteenth century, English jury trials were in fact "sentencing proceedings," whose whole function was to persuade the jury to convict the factually guilty defendant of a lesser non-capital offense.<sup>11</sup>

According to Hoffman, it was not until fear of political repression through unjust criminal prosecution that the problem of factual innocence arose.

In England, the idea that the state might wrongfully accuse an individual of committing a crime ascended at roughly the same time as the divine perfection of kings descended, and nobles became not the enforcers of the King's law but its principal political targets.<sup>12</sup>

With the rise of concern over whether an accused was factually guilty, the issue of convicting the innocent starting taking precedence. The criminal justice system began to develop rules and procedures to ensure guilty persons were found guilty and innocent persons were acquitted. Our contemporary criminal law and our Constitution provides those charged with a criminal offence a host of legal rights to ensure that innocent people are not found guilty. The right to counsel, the rules on hearsay and character evidence, and the right to disclosure of the prosecution's case are meant to ensure that only the guilty are convicted, and not the innocent. As stated by Justice McLachlin in *R. v. Seaboyer*, "the precept that the innocent must not be convicted is basic to our concept

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<sup>10</sup> Hoffman, supra n. 9 at 682.

<sup>11</sup> H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources" (1983) 50:1 U. Chi. L. Rev. 41.

<sup>12</sup> Hoffman, supra n.9 at p.680.



of justice.”<sup>13</sup> Two paramount safeguards against convicting the innocent are the burden of proof beyond a reasonable doubt and the presumption of innocence.

### **2.3.1 Burdens and Presumptions**

According to s.11(d) of our *Charter of Rights and Freedoms* “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”<sup>14</sup> The right to be presumed innocent has been interpreted to mean that an accused must be proven guilty beyond a reasonable doubt. This means that the accused does not need to prove his or her own innocence, rather, the Crown must prove guilt and it must be proven beyond a reasonable doubt. According to Justice Cory in *R. v. Lifchus*, the onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence.<sup>15</sup>

Chief Justice Dickson for the Supreme Court of Canada in *R. v. Oakes*<sup>16</sup> stated that the presumption of innocence is essential for a fair and just society.

An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the state proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.<sup>17</sup>

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<sup>13</sup> *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577.

<sup>14</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11.

<sup>15</sup> *R. v. Lifchus*, [1997] 3 S.C.R. 320.

<sup>16</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>17</sup> *R. v. Oakes*, at para. 29.

In essence, our criminal justice system created a legal definition of guilt that would include guilty people but would not include those who were innocent.

On the other hand, those who were found not guilty included those who were innocent and those who could not legally be proved guilty of the crime committed. Therefore, the criminal justice systems safeguards also ensured that some people who were guilty would be acquitted. In other words, the high standard of proof meant that some guilty persons would be acquitted, while ensuring that all those who were innocent would be found not guilty.

The criminal law had found the answer to the question of possibly convicting the innocent. It was decided that it would be far better to allow some guilty people free to ensure that an innocent person would not be wrongfully convicted. This understanding is found in the oft-quoted saying, "it is far better to let ten guilty people go free than to convict one innocent person".<sup>18</sup> This led to the understanding that if one was found guilty, then one was truly guilty of the crime charged.

It was believed that the safeguards of the criminal justice system worked. It was also believed that the safeguards worked so well that only guilty people were found guilty while both guilty and innocent people were found not guilty. In other words, there was an understanding that wrongful convictions rarely, if ever, occurred. Judge Learned Hand wrote in an oft-quoted decision, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."<sup>19</sup> It was believed that fair

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<sup>18</sup> This phrase is frequently attributed to either William Blackstone or Matthew Hale. See, e.g., Harold J. Berman & Charles J. Reid, Jr., "The Transformation of English Legal Science: From Hale to Blackstone" (1996) 45 Emory L.J. 437 at 482.

<sup>19</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

criminal law procedure and constitutional protection rendered the possibility of wrongful convictions virtually nonexistent.

Not only was there a general understanding that wrongful convictions were rare, but public sentiment of the criminal justice system held that the checks and balances put in place to protect innocent defendants were causing too many guilty people to be found not guilty. The criminal justice system had a problem; but it was not convicting the innocent it was acquitting the guilty.<sup>20</sup>

For courts today, the "ghost of the innocent man convicted" remains an "unreal dream." The real concern remains "the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime."<sup>21</sup>

### **2.3.2 The Birth of Wrongful Convictions**

More recently the discourse of wrongful convictions has arisen. High profile cases such as the cases of Donald Marshall Jr., David Milgaard and Guy Paul Morin have brought to light the fallibility of our criminal justice system and that although safeguards were in place, innocent people could be found guilty of crimes they did not commit. At approximately the same time, research began to delve into the area of wrongful convictions. Up until that time "how and why courts convict(ed), sentence(d) and imprison(ed) the wholly innocent remained sketchy, anecdotal and contestable."<sup>22</sup> Research has also now shed light on the issue of how wrongful convictions happen, eyewitness misidentification, police mishandling of the investigation, inadequate

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<sup>20</sup> Rodney Uphoff, "Convicting the Innocent: Aberration or Systemic Problem?" (2006) Wis. L. Rev. 739 at 820.

<sup>21</sup> Daniel Givelber, "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" (1997) 49 Rutgers L. Rev. 1317.

<sup>22</sup> Alan W. Clarke and Laurelyn Whitt, "Problem Without Borders: A Comment on Garrett's Judging Innocence" (2008) 33 Queen's L.J. 619.

disclosure by the prosecution, unreliable scientific evidence, criminals as witnesses, inadequate defence work, false confessions, and misleading circumstantial evidence.<sup>23</sup>

Researchers also tried to estimate the extent of wrongful convictions. Innocence projects, particularly in the United States where capital punishment still exists, began to develop. From this grew more media attention, more research, and of course, more public awareness. These factors helped bring the idea of wrongful conviction into the collective consciousness.

However, there is one factor above all that seems to have spearheaded the wrongful conviction movement; DNA evidence. Scientific testing through the use of DNA tests to determine cases of wrongful conviction has created a shift in the understanding of wrongful convictions. DNA evidence has the ability to objectively determine whether a person is wrongfully convicted. This ability was not possible previously and was, arguably, one of the reasons why wrongful conviction cases could be disputed. Prior to this objective proof the decision to believe in a wrongful conviction was based ultimately on belief. One had to believe in not only the totality of the evidence but also in the person who had gone through the justice system and been found guilty. DNA evidence, on the other hand, does not require subjective belief, merely an acceptance of the objective facts.

DNA testing has made a tremendous contribution to the ability to determine culpability and to exonerate the wrongly accused. It has saved lives and set prisoners free. It has been crucial in demonstrating, even to the most recalcitrant observers, how often suspects are wrongly accused, wrongly convicted, and wrongly sentenced. It is difficult to overstate the importance of DNA.<sup>24</sup>

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<sup>23</sup> Bruce MacFarlane, Q.C., “Convicting the Innocent – A Triple Failure of the Justice System” (December 18<sup>th</sup> 2005).

<sup>24</sup> Susan A. Bandes, “Beyond Biology: Wrongful Convictions in a Post DNA World” (2008) Utah L. Rev 5, at 10.

The high level of exonerations through the use of DNA evidence in the United States has made wrongful convictions truly a phenomenon. Since 1989, post-conviction DNA testing has exonerated 249 criminal defendants and at least another 300 inmates have been released on grounds consistent with innocence during that period.<sup>25</sup> Some researchers have created a name for the massive attention that the issue of wrongful convictions is now receiving, referring to it as either the innocence movement or “innocentrism”.<sup>26</sup>

Although Canada does not have the high number of wrongful convictions or exonerations through DNA evidence as does the United States, the attention to wrongful convictions here is no less. It is now understood that wrongful convictions do occur and are not as rare as once believed.

The discourse on wrongful convictions has now become a part of the discourse of the criminal justice system. The understanding that the criminal justice system was able to prevent innocents from being found guilty has now given way to the idea that it is possible for this system to find guilty those same innocents. This has led to courts, government and scholars, working in the criminal justice arena to research and implement strategies to prevent wrongful convictions. For example, the Federal/Provincial/Territorial (FPT) Heads of Prosecutions Committee Working Group created a Report on the *Prevention of Miscarriages of Justice*. The Report outlined recommendations that should be implemented into the police agencies and Crown

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<sup>25</sup> For an up-to-date listing of DNA exonerations in the United States, see The Innocence Project, online: <<http://www.innocenceproject.org>>.

<sup>26</sup> Daniel Givelber, “Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?” (1997) 49 Rutgers L. Rev. 1317.

policies to help prevent wrongful convictions.<sup>27</sup> For example, the Report stressed the importance of training to instill a workplace culture that encourages Crown counsel to be open to alternative theories of the case in order to avoid the development of “tunnel vision”.<sup>28</sup> It also urged prosecution services to educate Crown counsel on the causes of wrongful convictions and their prevention and, thus, to promote a stronger, fairer justice system.<sup>29</sup>

A further example of the discourse shift is the discussion of the Supreme Court of Canada in *United States of America v. Burns and Rafay*.<sup>30</sup> The court held that largely because of the possibility of wrongful convictions, it is generally a violation of the *Charter* to extradite a fugitive to another country without obtaining assurances from that country that the death penalty will not be applied.

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, added by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all the careful safeguards put in place for the protection of the innocent.<sup>31</sup>

...

The avoidance of conviction and punishment of the innocent has long been in the forefront of “the basic tenets of our legal system.” It is reflected in the presumption of innocence under s.11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals. The possibility of miscarriages of justice in murder cases has long been recognized as a legitimate objection to the death penalty, but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in the

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<sup>27</sup> Report on the *Prevention of Miscarriages of Justice*, 2004, FPT Heads of Prosecutions Committee, Working Group, online: <[www.justice.gc.ca/en/dept/pub/hop/](http://www.justice.gc.ca/en/dept/pub/hop/)>.

<sup>28</sup> Report on the *Prevention of Miscarriages of Justice*, chapter 4.

<sup>29</sup> Report on the *Prevention of Miscarriages of Justice*, chapter 10.

<sup>30</sup> *United States of America v. Burns and Rafay*, [2001] 1 S.C.R. 283.

<sup>31</sup> *Burns and Rafay*, at para. 1.

years since *Kindler* [[1991] 2 S.C.R. 779] and *Ng* [[1991] 2 S.C. R. 858] were decided. [These cases decided that it did not violate the Charter to extradite a fugitive to face the death penalty.] This expanding awareness compels increased recognition of the fact that the extradition decision of a Canadian Minister could pave the way, however unintentionally to sending an innocent individual to his or her death in a foreign jurisdiction.<sup>32</sup>

Although it is now generally agreed that wrongful convictions happen, the extent to which they happen is not agreed upon. Those who argue that the criminal justice system is working but acknowledge that wrongful convictions occur, point to the human construction of the system. They agree that factually innocent people are wrongly arrested and wrongly convicted, as innocence projects have demonstrated but they argue the cause “is an unavoidable consequence of underlying, and irreducible, human error.”<sup>33</sup>

Those who support the workings of the criminal justice system dispute the number of wrongful convictions that researchers allege. Generally, it is argued that the numbers of factually innocent people are inflated and include those who may be legally innocent but not necessarily factually innocent.<sup>34</sup> “In their view, isolated cases of rogue cops or prosecutors are the explanation for these tragic mistakes, but there are no widespread problems or structural deficiencies.”<sup>35</sup>

Others, however, argue that wrongful convictions are a result of the breakdown of our criminal justice system. The support for this position comes from the large number of cases in which DNA has proved the innocence of those convicted. It is argued that

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<sup>32</sup> *Burns and Rafay*, at para. 95.

<sup>33</sup> Hoffman, supra n.9 at 680.

<sup>34</sup> Hoffman, supra n.9 at 680.

<sup>35</sup> Uphoff, “Convicting the Innocent: Aberration or Systemic Problem?” supra n.20 at 820.

“DNA exonerations are the tip of the innocence iceberg, and that wrongful convictions lacking biological evidence suitable for DNA testing are far more pervasive.”<sup>36</sup>

...biological evidence may become lost, degraded, or destroyed before post-conviction DNA testing can be conducted; and matters lacking scientific evidence, so-called non-DNA cases, are notoriously difficult to overturn considering the presence of procedural roadblocks and judicial skepticism toward nonscientific, newly discovered evidence in general. It is fair to say that the proven cases of actual innocence are just the tip of the innocence iceberg, so to speak.<sup>37</sup>

It is virtually impossible to resolve the dispute as the rates of wrongful convictions can never be truly known. As Samuel Gross has observed, “the true number of wrongful convictions is unknown and frustratingly unknowable.”<sup>38</sup> This is so because not every case of actual innocence is brought up for postconviction review and not every case leads to exoneration. Those cases that have DNA may lead to a finding of wrongful conviction, while those lacking in DNA evidence are very difficult to overturn.

## **2.4 CONCLUSION**

Although the rates of wrongful convictions are in dispute and can never truly be known, what is apparent is the interest in wrongful convictions. Much research has been conducted on wrongful convictions and our knowledge of why wrongful convictions occur has grown. The advent of DNA evidence has brought the focus of wrongful convictions to the forefront of society. The attention and study of wrongful convictions has created a shift in which the criminal justice process is now seen as, at the very least, a fallible process. This fallibility of the criminal justice system has created an acknowledgment that wrongful convictions do occur. Much research has gone into how

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<sup>36</sup> Daniel S. Medwed, “Innocentrism” (2008) U. Ill. L. Rev. 1549.

<sup>37</sup> Medwed, “Innocentrism” at 1559.

<sup>38</sup> Samuel R. Gross, Souter Passant, Scalia Rampant: Combat in the Marsh (2006) 105 Mich. L. Rev. First Impressions 67 at 69, online:

<<http://students.law.umich.edu/mlr/firstimpressions/vol105/gross.pdf>>.



many wrongful convictions occur, how they happen and what can be done in the future to prevent them. This paper, however, will address what happens to those who are found wrongfully convicted. What are their options for redemption?

# **CHAPTER 3 - HOW DOES CANADA ADDRESS WRONGFUL CONVICTIONS?**

## ***3.1 INTRODUCTION***

Once a person has gone through the criminal justice system, has been found guilty and is incarcerated, what are his or her options? For a person claiming a wrongful conviction the first step of the journey is to appeal. The appeal process can be complex and there exists many rules of both law and procedure. The first part of this chapter will provide an in-depth overview of what is necessary for an appeal process.

An innocent person found guilty of a crime will need to appeal to the Supreme Court of Canada if possible. If the appellant is still unable to seek justice, he or she may apply to the Minister of Justice for an application for a “miscarriage of justice”. The second part of this chapter will review the process involved for such applications. Finally, this chapter will address the meaning of “miscarriage of justice” and “wrongful conviction”. Innocent parties found guilty of crimes are seeking not only to have their guilt set aside; they are also seeking the declaration of innocence. The judiciary however, is seeking a consideration of something broader; in such cases this body is focused on the concept of “miscarriage of justice”. This chapter will assess how the discrepancy between these two terms may impact the journey for the wrongfully convicted.

## ***3.2 APPEAL***

If a person has been found guilty of a criminal offence at trial it is possible for him or her to appeal against the verdict. The defendant may appeal on the conviction or

sentence and the Crown has rights of appeal as well. Since we are addressing issues of wrongful conviction, the appellate process will be confined to the defendant process and only in relation to convictions. The appeals available to the defendant depend on whether he or she has been convicted of a summary conviction offence or an indictable offence.

### **3.2.1 Summary Conviction Offences**

Summary conviction offences are considered “lesser” offences compared to the more serious indictable offences. There exist few, if any, applications for postconviction review based on summary conviction offences. However, since the process has now been made available to those who have committed summary conviction offences I will outline the appellate procedure for such offences briefly.

There are two forms of appeal processes with respect to summary conviction offences. One is an appeal to a s.812 Appeal Court and the other is a summary appeal on transcript or agreed statement of facts.<sup>39</sup>

In an appeal to a s.812 Appeal Court the accused may appeal a summary conviction offence from a Provincial Court to a s.812 Appeal Court, meaning an appeal to the Superior Court of Criminal Jurisdiction. A defendant may appeal on a broad range of issues including questions of law and questions of fact. The Appeal Court may either dismiss the appeal; or it may allow the appeal, set aside the verdict, and either direct that a judgment or verdict of acquittal be entered; or it may order a new trial.<sup>40</sup> The Summary Conviction Appeal Court has no jurisdiction to retry the case, its

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<sup>39</sup> *Criminal Code*, R.S.C. 1985, c. C-46, Part XXVII.

<sup>40</sup> *Criminal Code*, s.822 and s.686.

jurisdiction is limited to determining whether the evidence is so weak that a verdict of guilty was unreasonable.<sup>41</sup>

A summary appeal on transcript or agreed statement of facts appeal is a more restrictive appeal as it can address only questions of law. These appeals are argued on the trial transcripts unless an agreed statement of facts is filed. The Appeal Court has the power to affirm, reverse or modify the decision under appeal.<sup>42</sup> Additionally, the Court can remit the matter back to the trial judge with the opinion of the Appeal Court and make any other order that it considers proper.<sup>43</sup>

It is possible for a defendant to make a further appeal to the Provincial Court of Appeal. Such appeals can be made, with leave, on questions of law only.<sup>44</sup> Leave to appeal to the Supreme Court of Canada must be obtained under s.40 of the *Supreme Court Act*.

### **3.2.2 Indictable Offences**

A defendant convicted of an indictable offence will need to appeal to the Provincial Court of Appeal.<sup>45</sup> A defendant may appeal the conviction on:

- i. grounds of law alone;
- ii. ground of fact or mixed law and fact, with leave of the court of appeal or a judge thereof or with a certificate of the trial judge; or
- iii. any other ground, with leave of the court of appeal.<sup>46</sup>

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<sup>41</sup> *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 (Ont. C.A.); *R. v. Arthur* (1981), 63 C.C.C. (2d) 117, [1982] 1 W.W.R. 122 (B.C.C.A.), leave to appeal to S.C.C. refused December 21, 1981.

<sup>42</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.834(1)(a).

<sup>43</sup> *Criminal Code*, s.834(1)(b).

<sup>44</sup> *Criminal Code*, s.839.

<sup>45</sup> *Criminal Code*, s.673.

<sup>46</sup> *Criminal Code*, s.675(1)(a).

With respect to an accused appealing a conviction, according to s.686(1)(a) of the *Criminal Code*, the Court of Appeal may allow the appeal where in its opinion:

- i. the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence;
- ii. the judgment should be set aside on the ground that there was a wrong decision on a question of law; or
- iii. on any ground there was a miscarriage of justice.<sup>47</sup>

If an accused appeals his conviction, he carries the burden of demonstrating that the appeal is necessary. The Court of Appeal presumes that, on the evidence produced at trial, the appellant was properly convicted.

Most appellants claiming a wrongful conviction rely on fresh evidence to support their appeal. Section 683(1) of the *Criminal Code* is the provision that empowers an appellate court to admit fresh evidence on appeal. The powers of the Court of Appeal under this section are limited to admitting fresh evidence, but only evidence that otherwise would be admissible. Therefore, any evidence inadmissible due for example, to the rules of hearsay would not be admissible.<sup>48</sup>

The Supreme Court of Canada in *R. v. Palmer and Palmer*<sup>49</sup> reviewed the rules of fresh evidence and stated the principles on which fresh evidence should be admitted:

1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this principle is not applied with the same strictness in a criminal trial as in a civil trial;
2. the evidence must be relevant in that it bears upon a decisive or potentially decisive issue;
3. the evidence must be credible; and
4. it must be such that, if believed, it could have affected the result.<sup>50</sup>

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<sup>47</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.686(1)(a).

<sup>48</sup> *R. v. O'Brien*, [1978] 1 S.C.R. 591.

<sup>49</sup> *R. v. Palmer and Palmer*, [1979] 1 S.C.R. 759.

<sup>50</sup> *R. v. Palmer and Palmer*, [1979] 1 S.C.R. 759 at 775.

Due diligence is not essential to admit fresh evidence. According to the Supreme Court of Canada, the reason the evidence was not available at trial must be determined to assess whether due diligence has been met.<sup>51</sup> Due diligence is considered only one factor in determining the admission of fresh evidence. If the interests of justice require the admission of fresh evidence, particularly in criminal cases, then the lack of due diligence should not be an impediment to its admission.<sup>52</sup>

The language of s.686 does not fit easily with wrongful conviction appeals based on fresh evidence. Section 686(a)(iii) is the only provision that is relevant as it allows an appeal court to grant an appeal “on any ground there was a miscarriage of justice”. “This power can reach virtually any kind of error that renders the trial unfair in a procedural or substantive way.”<sup>53</sup> In the end, the appellant will have the burden of proving that his wrongful conviction was based on a “miscarriage of justice”.

Where the Court of Appeal allows the appeal, the conviction will be quashed and either:

- a. direct a judgment or verdict of acquittal to be entered; or
- b. order a new trial.<sup>54</sup>

The Court of Appeal may also dismiss the appeal where:

- i. the accused was properly convicted on part of the indictment;
- ii. the grounds raised have not been made out;
- iii. any error of law did not occasion a substantial wrong or miscarriage of justice;
- iv. the error at trial was a procedural irregularity that did not prejudice the accused.<sup>55</sup>

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<sup>51</sup> *R. v. B. (G.D.)*, [2000] 1 S.C.R. 520.

<sup>52</sup> *R. v. C. (R.)* (1989), 47 C.C.C. (3d) 84 (C.A.).

<sup>53</sup> *R. v. Truscott*, [2007] ONCA 575 at 621.

<sup>54</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.686(2).

<sup>55</sup> *Criminal Code*, s.686(1)(b).

Where the Court of Appeal decides to dismiss the appeal, it may substitute the verdict that, in its opinion, should have been found and:

- a. affirm the sentence; or
- b. impose a sentence itself or remit the matter back to the trial court with a direction to impose the appropriate sentence.<sup>56</sup>

It should be noted that s.684 of the *Criminal Code* provides that the Court of Appeal, or judge of that court, can appoint counsel for an unrepresented accused who does not have the ability to afford counsel and has been denied legal aid. However, this power is discretionary and there is no *Charter* right for an indigent appellant to be entitled to legal counsel.<sup>57</sup>

### **3.3 SUPREME COURT OF CANADA**

The *Criminal Code* also makes provisions for an appeal from a decision of the Court of Appeal to the Supreme Court of Canada.<sup>58</sup> An accused may only appeal to the Supreme Court on a question of law. If there has been a dissent in the Court of Appeal the accused can appeal “as of right”. Also, if the Court of Appeal allows a Crown appeal from an acquittal at trial and enters a verdict of guilty, the accused may appeal “as of right”. However, if the Court of Appeal has dismissed the appeal and there is no dissent, the accused must obtain the leave of the Supreme Court. The powers of the Supreme Court of Canada are the same as those available to the courts of appeal.

### **3.4 POSTCONVICTION REVIEW**

In Chapter 4, I will be providing an historical review and in depth assessment of the postconviction review process. At this point I will therefore provide a summary of the

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<sup>56</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.686(3).

<sup>57</sup> *R. v. Robinson* (1989), 51 C.C.C. (3d) 452 (Alta. C.A.).

<sup>58</sup> *Criminal Code*, ss. 691-695.

process to complete this overview of remedies for wrongful convictions. If an accused has been found guilty and has exhausted the appeal process there is one further option available, ss. 696.1 to 696.6 of the *Criminal Code*. Under these provisions an accused may apply to the Minister of Justice for a review of his case on the basis of a miscarriage of justice. Section 696.1(1) states:

An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

In determining whether to allow an application the Minister is to take all the circumstances that she or he considers relevant into account, including, but not limited to, those listed:

- a. new matters of significance
- b. the relevance and reliability of the information
- c. the fact that the process is not meant as a further appeal and the remedy is an extraordinary one.<sup>59</sup>

If the Minister of Justice determines a miscarriage of justice likely has occurred they may do one of two things:

1. return the case to trial court for retrial, or
2. refer the matter to a court of appeal for hearing and determination as if it were an appeal against conviction<sup>60</sup>

In addition, the Minister may refer the matter to the Court of Appeal for its opinion on any question which the Minister desires the Courts assistance.<sup>61</sup> The Minister may combine two options together. For example, the Minister can refer the matter to the Court of

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<sup>59</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.696.4.

<sup>60</sup> *Criminal Code*, s.696.3(3).

<sup>61</sup> *Criminal Code*, s.696.3(2).



Appeal for an opinion and also request either an appeal or a new trial if necessary. If the Minister of Justice requests an opinion of the Court of Appeal he or she usually also will ask the Court for a disposition on the matter if the question is answered in the affirmative. For example, the Minister may ask if certain evidence would be admissible and if so refer the matter for appeal.

Under s.696.3(4) the decision of the Minister to direct a new trial or hearing, refer the matter to the Court of Appeal, or to dismiss the application for review is final. According to the Department of Justice the power of the Minister is “not to second-guess the decision rendered by the courts, to substitute his or her opinion of the evidence or the arguments already considered by the courts, or to decide if a convicted person is guilty or innocent.”<sup>62</sup> Therefore, if the Minister does determine that a miscarriage of justice has occurred it is made clear that such power does not grant them the ability to overturn the conviction.<sup>63</sup>

Although rarely used, the Minister of Justice has one other option available. The Minister may make a recommendation to the Governor General of Canada to refer a case directly to the to the Supreme Court of Canada under s.53(2) of the *Supreme Court Act*.<sup>64</sup> The Supreme Court will make a determination if a miscarriage of justice has occurred. This power was used in the case of David Milgaard.<sup>65</sup> In 1991, the then Minister of Justice, Kim Campbell, asked the Supreme Court to consider whether the

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<sup>62</sup> Canada, Department of Justice, “Applying for a Conviction Review” online: Department of Justice Canada <[www.justice.gc.ca/en/ps/ccr/review.pdf](http://www.justice.gc.ca/en/ps/ccr/review.pdf)>.

<sup>63</sup> However it was open to the Minister to join with the Solicitor General and recommend to the Governor-General in Council that a free pardon be granted under s.748 of the *Criminal Code*. Braiden and Brockman, “Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code” (1999) Windsor Y.B. Access Just. 3 at 5.

<sup>64</sup> *The Supreme Court Act*, R.S. 1985, c. S-26.

<sup>65</sup> *Reference re Milgaard* (1992), 71 C.C.C. (3d) 260 (S.C.C.).

continued conviction of Mr. Milgaard constituted a miscarriage of justice and, if so, what remedial action should be taken. Based on new evidence and witness testimony, the Supreme Court found the conviction of Mr. Milgaard constituted a miscarriage of justice and recommended there be a new trial. The charges were stayed and Mr. Milgaard was released and eventually exonerated.<sup>66</sup>

Depending upon whether the Minister chooses to direct either a new trial or an appeal means different procedural, evidentiary, and redress implications for the applicant. If the Minister orders a new trial, the applicant would return to the trial court in the same position as anyone accused of a crime. Therefore, the applicant would have the full benefit of the presumption of innocence the Crown would have the burden of proving the elements of the offence beyond a reasonable doubt and full appeal rights would be available. If the Minister grants the application and returns the case to trial for retrial, more often than not there will not be a retrial on the merits. Retrying the case after any significant period of time is often untenable, key witnesses may not be alive and if they are their memories often have faded with time. When this occurs, the Attorney General of the province will have three options: stay the charge, withdraw the charge, or have the appellant arraigned before trial court and offer no evidence against him. In any of these circumstances a final verdict would not be ordered.

If the Minister refers the matter to the Court of Appeal as an appeal it is treated as an appeal by the convicted person.<sup>67</sup> Therefore, like any other appeal, the matter is not retried but is conducted according to the statutory provisions of Part XXI of the *Criminal*

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<sup>66</sup> *Reference re Milgaard* (1992), 71 C.C.C. (3d) 260 (S.C.C.).

<sup>67</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.696.3(a)(ii).

*Code*, which define the Appeal Courts procedural, substantive and remedial powers which were previously discussed.

If the Minister directs an appeal, the powers of a Court of Appeal hearing an ordinary appeal under s.686 of the *Criminal Code* would apply, and the applicant would have the burden of convincing the Court of Appeal of the wrongful nature of their original conviction. Again, as previously discussed, the rules of evidence under Part XXI, applicable to criminal trials apply in determining the admissibility of material offered as fresh evidence on appeal. The Court does not deviate from the rules even though appellants often are at a disadvantage due to the significant length of time that has passed. Appeal courts usually deal with convictions soon after they are entered; but in most cases of wrongful conviction, new information providing a basis to challenge the conviction becomes known only after all appeals are exhausted.

Since it is an appeal by the convicted, the appellant carries the burden of demonstrating that a miscarriage of justice has occurred. Also, the appellant carries the burden of establishing the basis to support the admissibility of fresh evidence.

The Ontario Court of Appeal in the Reference re *R. v. Truscott*,<sup>68</sup> in reviewing a miscarriage of justice application, went over the *Palmer* rules on the admittance of fresh evidence. The Court summarized three components of the case:

1. Is the evidence admissible under the operative rules of evidence?
2. Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
3. What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?<sup>69</sup>

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<sup>68</sup> *R. v. Truscott*, [2007] ONCA 575.

<sup>69</sup> *R. v. Truscott*, at 614.

The Court went on to state that the first two components were more preconditions to the admissibility of *Palmer* evidence under s. 683(1), while the last condition was not a precondition but rather a potential limitation on the admissibility of fresh evidence.

Evidence that is not admissible under the usual rules of evidence governing criminal proceedings, or is not sufficiently cogent to potentially affect the verdict, cannot be admitted on appeal. The last component, sometimes referred to as the due diligence requirement, is not a precondition to admissibility. It becomes important only if the proffered evidence meets the first two preconditions to admissibility. The explanation offered for the failure to adduce evidence at trial, or in some cases the absence of any explanation, can result in the exclusion of evidence that would otherwise be admissible on appeal.<sup>70</sup>

The Ontario Court of Appeal further defined the second criterion of *Palmer*, the cogency criterion. The Court stated that the cogency criterion asks three questions:

- i. Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
- ii. Is the evidence credible in that it is reasonably capable of belief?
- iii. Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result?<sup>71</sup>

The Court went on to state that the “cogency inquiry requires a qualitative assessment of the evidence proffered on appeal. That evaluation must measure the probative potential of the evidence considered in the context of the entirety of the evidence admitted on appeal and heard at trial.”<sup>72</sup>

If fresh evidence is proffered, and the Court decides that the admissibility of fresh evidence sufficiently undermines the reliability of the verdict so as to render the conviction a miscarriage of justice, the evidence is admitted and the conviction is quashed. At this stage the Court either directs an acquittal or orders a new trial. If a

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<sup>70</sup> *R. v. Truscott*, at 614.

<sup>71</sup> *R. v. Truscott*, at 614.

<sup>72</sup> *R. v. Truscott*, at 617.

new trial is ordered the Court may also decide whether a stay of proceedings should also be ordered.<sup>73</sup>

This test used by the Court of Appeal is similar to that used by the Minister of Justice when deciding if an intervention should be made. The Minister decides if a miscarriage of justice has likely occurred based on whether there exists new matters of significance that are relevant and reliable. The Court of Appeal determines if a miscarriage of justice exists based on fresh evidence that is relevant, credible and sufficiently probative such that it would sufficiently undermine the verdict. The reason given for the similar tests is that the Minister of Justice is not merely deciding if a matter should proceed to the Court of Appeal or not, but he or she is also deciding if a new trial should be ordered. In this respect, the threshold test that must be met before the Minister of Justice grants an intervention is high considering it is the similar test used by the Court of Appeal. However, since the Minister also has the ability to order a trial the need for the higher threshold is seen as necessary.

### **3.5 MISCARRIAGES OF JUSTICE AND WRONGFUL CONVICTIONS**

The term “miscarriage of justice” is the term both the Minister of Justice and the appellate courts are to determine. The legislation uses the wording “miscarriage of justice” however, it is silent on the meaning of the term. Although it is generally understood that wrongful convictions are miscarriages of justice, “miscarriage of justice” has not been found to equate synonymously with “wrongful conviction”. A review of how both the Minister of Justice and the judiciary have defined “miscarriage of justice” will be undertaken.

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<sup>73</sup> *R. v. Truscott*, at 608.

### **3.5.1 Minister of Justice and Miscarriage of Justice**

The Minister of Justice is under no obligation to publicize the an applicants final report, so determining how the Minister defines “miscarriage of justice” is challenging. However, in the Federal Minister’s 2007 Annual Report on Applications for Ministerial Review – Miscarriages of Justice, the Report stated:

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice may also be suspected where new information surfaces which casts serious doubt on whether the applicant received a fair trial. Thus, the Minister’s decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system, where the relevant legal issues are determined by the courts according to law.<sup>74</sup>

Therefore, the Minister of Justice will find a miscarriage of justice in a situation in which an innocent person has been found guilty. He will also find a miscarriage of justice if it is deemed that a person has not received a fair trial. But the Minister will not make a declaration that in finding a miscarriage of justice an innocent person has been found guilty.

### **3.5.2 The Judiciary and Miscarriage of Justice**

According to judicial interpretation, a miscarriage of justice will have occurred if a person has received an unfair trial.<sup>75</sup> Unfair trial may include:

...those situations in which there is a suspected failure or breakdown of the checks and balances or in which one or more decisions made throughout the process may have been influenced by factors not properly brought to bear in a criminal prosecution. Obviously it is neither possible nor

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<sup>74</sup> Canada, Department of Justice, online: <[http://justice.gc.ca/eng/pi/ccr-rc/rep07-  
rap07/02.html](http://justice.gc.ca/eng/pi/ccr-rc/rep07-<br/>rap07/02.html)>.

<sup>75</sup> The Honorable Mr. Justice Edward P. MacCallum Commissioner, *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, (September 2008) at 371.

desirable to compile a complete list of all the circumstances in which the term "wrongful conviction" is appropriate, but they would include convictions following, for example, perjured testimony or willful non-disclosure of evidence pointing to the innocence of the accused. In such situations, there cannot be a fair trial, and neither a trial court nor an appellate court would have before it the facts necessary to remedy the wrong.<sup>76</sup>

Miscarriages of justice, therefore, include a broad category of people; those who are factually innocent, to those who have received an unfair trial. Therefore, according to judicial interpretation, as with the Minister of Justice, a miscarriage of justice includes, but is not limited to, a wrongful conviction of a factually innocent person.

Factual innocence, according to the judiciary, "although obviously the best reason for remedying a wrongful conviction, should have no necessary role in the conviction review process. It needlessly complicates the detection and remedying of wrongful convictions".<sup>77</sup> Equating miscarriage of justice with factual innocence, arguably and unnecessarily, narrows the scope of such miscarriages and sets the bar too high for obtaining a remedy.<sup>78</sup> It is argued that without the use of unequivocal scientific evidence, such as DNA, many cases will not be discovered.<sup>79</sup> An example given is the David Milgaard case. "The focus on factual innocence in the conviction review process ultimately hurt David Milgaard and prolonged his incarceration, which ended only following the decision of the Supreme Court of Canada in 1992."<sup>80</sup> Although courts are willing to acknowledge that miscarriages of justice include factually innocent people, they are not willing to distinguish between those who are factually innocent and those

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<sup>76</sup> The Honorable T. Alexander Hickman, Q.C, Chair of the Royal Commission of Inquiry into the Prosecution of Donald Marshall Jr., "Wrongful Convictions and Commissions of Inquiry: A Commentary" (January, 2004) CJCCJ 183 at 184 .

<sup>77</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, at 368.

<sup>78</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74.

<sup>79</sup> *R. v. Truscott*, [2007] ONCA 575.

<sup>80</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 368.

who have received an unfair trial. In other words, courts will decide if a miscarriage of justice has occurred but will not make a further declaration of whether the particular miscarriage of justice was a case of a wrongful conviction in the ordinary understanding of the term.

The courts have concluded that they have no jurisdiction to declare factual innocence on cases of postconviction reviews.<sup>81</sup> In *R. v. Truscott*, the Court allowed Truscott's appeal, set aside the conviction against him and entered an acquittal.<sup>82</sup> Truscott's legal counsel asked the Court not only to acquit him but to declare him innocent. The Ontario Court of Appeal concluded that they could not make such a declaration and noted the lack of a statutory basis in Part XXI of the *Criminal Code*.

In *Her Majesty the Queen v. William Mullins-Johnson* the Ontario Court of Appeal declined to make an order of factual innocence. It stated:

The fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion. With the entering of an acquittal, the appellant's legal innocence has been re-established. The fresh evidence is compelling in demonstrating that no crime was committed against Valin Johnson and that the appellant did not commit any crime. For that reason an acquittal is the proper result. There are not in Canadian law two kinds of acquittals: those based on the Crown having failed to prove its case beyond a reasonable doubt and those where the accused has been shown to be factually innocent. We adopt the comments of the former Chief Justice of Canada in *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Annex 3, pp. 342:

[A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of criminal law.<sup>83</sup>

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<sup>81</sup> *R. v. Truscott*, [2007] ONCA 575 and *R. v. Mullins*, [2007] ONCA 720, 228 C.C.C. (3d) 505.

<sup>82</sup> *R. v. Truscott*, [2007] ONCA 575.

<sup>83</sup> *R. v. Mullins*, [2007] ONCA 720, 228 C.C.C. (3d) 505 at 511-512.



Therefore, courts have concluded that the criminal law does not allow a verdict of factual innocence. The only verdicts allowed are either guilty or not guilty and do not extend to the determination of factual innocence.

It could be argued that in setting aside a wrongful conviction the courts are restoring to the applicant the presumption of innocence. However, as previously discussed legal innocence and factual innocence are two distinct concepts. In this sense the law may have found the applicant not legally responsible for a crime of which he has been accused and found guilty; however, the public will not necessarily find him innocent of the crime. According to the Association in Defence of the Wrongfully Convicted (AIDWYC) there is nothing as important as public recognition of factual innocence.

The harder truth, however, is that, in the public eye, there is a terrible disconnect, a moral chasm, between 'legal' and 'factual' innocence, between a finding of 'not guilty' and a declaration of 'wrongly convicted'.<sup>84</sup>

According to Professor Kent Roach, "there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict".<sup>85</sup> The recognition of a third verdict would create two types of people, those found to be factually innocent and those who were not factually innocent but who "benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt."<sup>86</sup> However, the AIDWYC notes that factual innocence is important in the assessment of whether compensation should be payable, and in what

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<sup>84</sup> Written submissions of the AIDWYC Re Commission's Terms of Reference dated October 17, 2003, filed with the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken.

<sup>85</sup> The Honourable Patrick LeSage, Q.C. Commissioner, *Report for the Commission into Certain Aspects of the Trial and Conviction of James Driskell*, (2007) at 39.

<sup>86</sup> *R. v. Mullins*, [2007] ONCA 720, 228 C.C.C. (3d) 505 at 511-512.

amount. In Canada, it is often the case that compensation is not paid to individuals who have suffered as a result of a wrongful conviction unless factual innocence can be established.<sup>87</sup>

Although courts will not acknowledge cases of factual innocence many who have gone through the postconviction review process have ultimately been found and understood to be factually innocent. The government has exonerated and paid compensation for many who have been subject to miscarriages of justice. Such cases indicate an acknowledgment of a wrongful conviction and not merely a miscarriage of justice.<sup>88</sup> Other cases, not formally exonerated, have been deemed cases of wrongful convictions by the court of public opinion. Therefore, although the postconviction review legislation may include a broader category than factually innocent people having their convictions remedied, in practice the postconviction review mechanism is used to remedy wrongful convictions in the true sense of the phrase.

### **3.6 OTHER FORMS OF RELIEF**

Researchers of Canada's postconviction review have noted the existence of other forms of review mechanisms such as the pardon under s.748(2)<sup>89</sup>, or the pardon pursuant to the *Criminal Records Act*<sup>90</sup> or the Royal Prerogative of Mercy pursuant to s.748(1).<sup>91</sup>

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<sup>87</sup> Written submissions of the AIDWYC Re Commission's Terms of Reference dated October 17, 2003, filed with the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken.

<sup>88</sup> Examples include: Donald Marshall; David Milgaard; Guy Paul Morin; Thomas Sophonow; Romeo Phillion; Simon Marshall; Stephen Truscott.

<sup>89</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>90</sup> *Criminal Records Act*, R.S.C. 1985, c. C.-47.

<sup>91</sup> *Criminal Code*, R.S.C. 1985, c. C-46. According to s.749 Nothing in the Act limits or affects Her Majesty's royal prerogative of mercy, 1995, c.22, s.6.

With respect to pardons granted under the *Criminal Records Act*, pardons are granted only after the person has served his or her sentence. Such pardons are not meant to rectify wrongful convictions, but rather, according to the *Criminal Records Act*, to remove the stigma of conviction if the person becomes and remains a law-abiding citizen. According to s.5 of the *Act*, a pardon means that the conviction no longer reflect adversely on the applicant's character.<sup>92</sup> Such pardons clearly are not an avenue for a wrongfully convicted person to have their conviction remedied.

With respect to s.748 pardons, there exist both free and conditional pardons. The conditional pardon effectively "substitutes one form of sentence for another".<sup>93</sup> In effect, the original punishment is set aside but a new, generally less punitive, punishment is imposed. The commutation of the death penalty to life imprisonment is an example of the use of the conditional pardon. Again, such a pardon is not a process for a wrongful conviction candidate to seek redress.

A free pardon, on the other hand, allows the person to be deemed never to have committed the offence.<sup>94</sup> This route may seem like a viable route to exoneration for a wrongfully convicted person. However, there is controversy surrounding the interpretation of a free pardon.

Smith outlines three interpretations. One is "that the free pardon wipes out not only the sentence for the offence, but the conviction and all its consequences and puts

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<sup>92</sup> *Criminal Records Act*, R.S.C. 1985, c. C.-47.

<sup>93</sup> David P Cole and Allan Manson, *Release From Imprisonment: The Law of Sentencing, Parole and Judicial Review*, (Toronto: Carswell, 1990) at 404.

<sup>94</sup> Greenspan and Rosenberg, *Martin's Annual Criminal Code* (Aurora Ont.: Canada Law Book, 2008), at 1460.

the person pardoned in exactly the same position as if he had never been convicted.”<sup>95</sup> The second interpretation is that “the free pardon does not automatically declare the recipient to have been innocent of the crime charged... It says no more than that he was wrongfully convicted.”<sup>96</sup> The third interpretation is that the free pardon relieves a person “of all penalties and other consequences of the conviction (but) does not go so far as to say that the conviction is wiped out, or even that the recipient was wrongly convicted.”<sup>97</sup> According to Smith whether the free pardon “wipes out the conviction...depends on the terms in which the pardon is couched.”<sup>98</sup>

The varying interpretations of free pardons are explained by the infrequent use of such pardons and the “absence of careful reasoning explaining the conceptual premises for its exercise...”<sup>99</sup> There is one recent case that illustrates this point. On April 15, 2010 the Province of Nova Scotia granted the late Viola Desmond a free pardon. In November 1946 Ms. Desmond sat in a section of a theatre that was reserved for white people and refused to move. Ms. Desmond was charged for defrauding the province one cent, which was the difference in price between the two seating areas. Ms. Desmond received a pardon for the charge and an apology from the province of Nova Scotia for her wrongful conviction. This pardon was the first posthumous free pardon ever granted and it was based on innocence. Therefore, although it could be argued that free pardons are a means to achieving vindication for wrongful convictions, practice indicates that it is not a practical, viable alternative.

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<sup>95</sup> A.T. H. Smith, “The Prerogative of Mercy: The Power of Pardon and Criminal Justice” (Autumn 1983) P.L. 398 at 417.

<sup>96</sup> Smith, “The Prerogative of Mercy” at 418.

<sup>97</sup> Smith, “The Prerogative of Mercy” at 419.

<sup>98</sup> Smith, “The Prerogative of Mercy” at 419.

<sup>99</sup> Cole and Manson, *Release From Imprisonment*, supra n.92 at 407.

The last type of pardon is the historical Royal Prerogative of Mercy. According to s.749 of the *Criminal Code*, nothing in the *Act* “limits or affects Her Majesty’s royal prerogative of mercy.” Therefore, at least in theory “the common law continues...to vest extensive powers and privileges” in the Queen. However, in practice, “as a matter of constitutional convention, the Queen does not, even in England, independently exercise the legal powers, including the prerogative powers, allowed to her under the common law.”<sup>100</sup> If the prerogative was considered a viable alternative, the prerogative (as previously discussed) is considered to be more of a mercy application, generally used for requesting the Crown’s mercy for lessening punishment and is not a way to remedy wrongful convictions.

### **3.7 CONCLUSION**

Wrongful conviction cases are a part of our current culture, and our criminal justice system is now working with the understanding that such occurrences do happen. A person found guilty of a crime he or she did not commit may appeal the conviction to a superior court and, if applicable, to the highest court, the Supreme Court of Canada. If a wrongfully convicted person has exhausted all avenues of appeal, he or she has only one viable option; to apply to the Minister of Justice on the basis of a miscarriage of justice. If the Minister concludes a miscarriage of justice likely occurred the Minister may send the matter to court either for a new trial or appeal. If the appellate court finds a miscarriage of justice a new trial may be ordered or an acquittal may be directed.

The postconviction review process is used to remedy not necessarily “wrongful convictions” but the broader category of injustices “miscarriages of justice”.

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<sup>100</sup> Gerald Chipeur, “The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?” (1992) 30: 2 *Alta. L. Rev.* 627.

Although the Minister of Justice and the judiciary focus on whether a miscarriage of justice has occurred, those applying for a postconviction review are generally making the claim that they are factually innocent and that their conviction is wrongful. The discrepancy between applying for a miscarriage of justice and making a claim of a wrongful conviction is not merely technical.

Most cases that have gone through the process of determining a miscarriage of justice have also been cases in which it is understood that the person is factually innocent. In other words, cases determined to be miscarriages of justice are not understood to be mere cases of a person receiving an unfair trial but rather, they are understood to be cases of persons who have been found guilty of crimes they did not commit. Therefore, although the postconviction review legislation may include a broader category than factually innocent people having their convictions remedied, in practice the postconviction review mechanism is used to remedy wrongful convictions in the true sense of the phrase.

# CHAPTER 4 – A REVIEW OF CANADA’S POSTCONVICTION REVIEW

## 4.1 INTRODUCTION

The postconviction review process was first enacted in Canada in 1892. The process was amended over the years and ultimately became s.696 in the *Criminal Code* in 2002. During the late 1980’s, following several high profile wrongful convictions cases, including Donald Marshall Jr., David Milgaard and Guy Paul Morin, Canada’s postconviction review came under severe criticism. In 1998 the Federal government decided to examine the postconviction review process. After a full investigation the government identified criticism of the system and proposed options for reform. After canvassing each available option the government decided to amend the existing legislative procedure to address the shortcomings.

Chapter 4 outlines the legislation from 1892 to the present and then examines whether the issues that plagued the postconviction review process prior to 2002 have been remedied by the 2002 legislative changes. The Chapter begins by describing the history of the postconviction review process of the *Criminal Code*, from its inception in 1892 until 1985 when the postconviction review process was enacted as s.690. The next part describes the pre-2002 postconviction review legislation under s.690, and goes on to review the identified criticisms and problems of the conviction review process of s.690. Finally, the post 2002 conviction review legislation under s.696 is examined to determine whether the new legislated process has corrected the problems plaguing the process prior to 2002.

## **4.2 HISTORICAL OVERVIEW OF POSTCONVICTION REVIEW 1892 - 1985**

### **4.2.1 England**

Canada's postconviction review found in s.696 is derived from the Royal Prerogative of Mercy. The Royal Prerogative is an historical power that allowed the sovereign to "extend mercy whenever he thinks it is deserved."<sup>101</sup> An historical review in England of the Royal Prerogative reveals that the prerogative was used as a means to remedy injustice and grant mercy. According to Cole and Manson, historically, the criminal law lacked distinctions between intentional and accidental harms. Due to the lack of defences in the criminal law, pardons were used to "excuse homicides in cases of mischance, involuntary killing and defence of life and property."<sup>102</sup> On this same basis, pardons were also used to excuse murders committed by the very young and mentally disabled offenders.<sup>103</sup> In this respect, therefore, pardons served to soften the harshness and inflexibility of the criminal law which lacked legal defences and distinctions between intentional and accidental harms.

According to Patricia Braiden, pardons were also used to provide labour to the "New World" and to recruit naval personal.

Capital offenders were sometimes offered a pardon, on condition that they agree to go to the New World and work on the plantations for a number of years... Also, the ships of the growing British navy were staffed in part by

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<sup>101</sup> Department of Justice Canada, *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code: A Consultation Paper* (Justice Canada:1998).

<sup>102</sup> Cole and Manson, *Release From Imprisonment*, supra n. 92 at 400.

<sup>103</sup> Cole and Manson, *Release From Imprisonment*, at 402.



reluctant sailors who accepted a conditional pardon as preferable to execution.<sup>104</sup>

Sending prisoners off to the New World, otherwise known as transportation, and enlisting prisoners to the Royal navy, were not implemented for merely social and economic reasons but were also used to counter the harshness of the criminal law.<sup>105</sup> At this time all felonies were subject to the penalty of death and by 1819 there existed 220 such offences.<sup>106</sup> Therefore, if an offence was committed but the imposition of punishment (usually death) would be considered unjust, the Royal Prerogative could be used to mitigate the punishment.

#### **4.2.2 Canada**

##### **1886-1892**

The Royal Prerogative of Mercy was brought from England to Canada and became a part of Canadian law at least as early as 1886.<sup>107</sup> According to Jonathan Swainger, Crown prerogatives at this time typically involved two types of cases; petitions for early release from imprisonment, and appeals for mercy in sentences of death.<sup>108</sup>

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<sup>104</sup> Patricia Lynn Braiden, “Wrongful Convictions and Section 690 of the Criminal Code: An Analysis of Canada’s Last Resort Remedy” (2000) Thesis for Master of Arts in Criminology, at 90.

<sup>105</sup> J.M. Beattie, “The Royal Pardon and Criminal Procedure in Early Modern England”, *Historical Paper/Communications Historiques* (1987) 9 at 9.

<sup>106</sup> Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* (New York: Oxford University Press, 1989) at 17.

<sup>107</sup> Cole and Manson, *Release From Imprisonment*, supra n. 92 at 399.

<sup>108</sup> Jonathan Swainger, “Governing the Law: The Canadian Department of Justice in the Early Confederation Era” (1992) PhD. Diss, University of Western Ontario 173.

According to Gary Trotter, the prerogative was used in Canada to both show compassion by relieving an individual of the full weight of his or her sentence and to correct errors such as wrongful convictions in the judicial process.<sup>109</sup>

Section 696 was created by codifying one aspect of the Royal Prerogative of Mercy.<sup>110</sup> Applications were to be made to the Governor General and were called mercy applications.<sup>111</sup> According to Jonathan Swainger, in order to be successful, such applications needed to demonstrate one of the following: “a legitimate doubt in the mind of the Minister of Justice that justice had been served by the original verdict or sentence”; or a “well substantiated claim that further imprisonment would lead directly to either death or permanent disability”; or that a petitioner “performed some extraordinary service while imprisoned”.<sup>112</sup>

The historical use of the Royal Prerogative of Mercy in both England and Canada seemed to be similar. Both countries used the prerogative as a means to provide mercy or leniency to those who had committed criminal acts but who could put forward a reason to have the punishment lessened. The historical usage, therefore, of Canada’s postconviction review process was not the identification of and rectification of wrongful convictions but rather the softening of the harshness of the criminal law. Although the impact of wrongful convictions could be remedied through the prerogative, the focus seemed to be on lessening punishment, not on addressing factual guilt. The fact that postconviction review applications were originally pardons, and then became “mercy” applications supports such a conclusion. Rather than supporting the conclusion that an

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<sup>109</sup> Gary Trotter, “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self Defence Review” (2001) 26 *Queens L.J.* 339.

<sup>110</sup> *Criminal Code*, 1892, S.C. 1892, c. 29.

<sup>111</sup> Swainger, “Governing the Law” *supra* n. 107 at 197-202.

<sup>112</sup> Swainger, “Governing the Law” *supra* n.107 at 197-202.

innocent person had been wrongfully convicted, both terms support the idea that a guilty person should be pardoned or mercy shown to him in the form of lessening of punishment.

### **1892-2002**

When Canada's first *Criminal Code* was enacted in 1892, part of the Royal Prerogative was codified.<sup>113</sup> This codified section of the Royal Prerogative allowed the federal Minister of Justice to review criminal convictions after all appeals had been exhausted. The legislation went through several revisions and ultimately became Canada's postconviction review process of s.696. The original remedy was s.748 and read as follows:

If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.<sup>114</sup>

This section gave the Minister of Justice the discretion to deal with applications for mercy. Such applications were available only to those who had been convicted of indictable offences. The Minister had to "entertain doubt" whether the offender ought to have been convicted and the inquiry into the matter was solely at the Ministers discretion. If the Minister determined that mercy should be granted he could direct a new trial.

In 1921, s. 748 had become s. 1022:

Nothing in the ten last preceding sections of this Act shall in any manner limit or affect His Majesty's royal prerogative of mercy.

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<sup>113</sup> *Criminal Code*, S.C. 1892, c. 29 s.748.

<sup>114</sup> *Criminal Code*, S.C. 1892, c.29.

2. Upon any application for the mercy of the Crown on behalf of any person convicted on indictment, the Minister of Justice,
- (a) if he entertains a doubt whether such person ought to have been convicted, may, after such inquiry as he thinks proper, instead of advising His Majesty to remit or to commute the sentence, direct by an order in writing a new trial at such time and before such court as the Minister of Justice thinks proper; or
  - (b) may, at any time, refer the whole case to the court of appeal, and the case shall then be heard and determined by that court as in the case of an appeal by a person convicted; and
  - (c) at any time, if the Minister of Justice desires the assistance of the court of appeal on any point arising in the case with a view to the determination of the petition, he may refer that point to the court of appeal for its opinion thereon, and that court shall consider the point so referred and furnish the Minister of Justice its opinion thereon accordingly.<sup>115</sup>

The legislation remained essentially the same almost thirty years later. However, there were a few additions. If the Minister entertained doubt about a conviction, as well as ordering a new trial, he or she now also could refer a case to a court of appeal as if it were an appeal by the accused; or he or she could seek the court of appeal's opinion on a particular question.

In 1953-54 the legislation was again amended. Section 1022 of the *Criminal Code* became s. 596:

- The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,
- (a) direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;
  - (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or
  - (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.<sup>116</sup>

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<sup>115</sup> *Criminal Code* S.C. 1923, c.41, s.9.

<sup>116</sup> *Criminal Code* S.C. 1953-54, c.51, s.596.

Again, the legislation remained very similar although, the standard of proof required of the Minister became higher. The original “entertains a doubt” standard for granting a remedy was removed and was replaced with the higher standard that the Minister “be satisfied” that a new trial should be ordered.

In 1969 s. 596 was amended and re-enacted as s. 617 of the *Criminal Code*. In 1985 s.617 was re-enacted as s.690. The two statutes were virtually identical except for some minor variations unrelated to the substance. Therefore, only s.690 will be cited:

The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.<sup>117</sup>

Both s.617 and s.690 remained virtually identical to the previous legislations.596, but for the addition of allowing not only those convicted of indictable offences but also those subject to a preventive detention to be able to apply for mercy.

Ultimately, s.690 was very similar to the original statute on mercy applications, s.748. The legislation was broadened to include not only those convicted of indictable offences, but also those subject to preventive detention. Additionally the Minister had the power to order a new trial or refer the matter to the court of appeal for an appeal or

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<sup>117</sup> *Criminal Code*, S.C. 1968-69, c.38, s.62.

an opinion. Although there was the one significant change, the Minister of Justice's discretion had changed from "entertaining a doubt" to "being satisfied", the fact remained that neither standard provided any guidance or boundaries for the Minister to take into account.

### **4.3 A REVIEW OF POSTCONVICTION REVIEW PRE-2002 SECTION 690**

To apply for mercy, the Department of Justice generally required applicants to submit trial transcripts, appellate factums, the appeal case reasons for judgment, and a brief setting forth the evidentiary and legal basis upon which the application to the Minister of Justice is based.<sup>118</sup> The legislation did not indicate what evidence was required to satisfy the Minister of Justice that a remedy should be granted. In addition to the lack of procedural rules there also existed a lack of guidelines and standardized application forms. Without the existence of standardized forms, applications to the Minister came in many forms, "from a one page letter from an inmate to an exhaustive legal brief with supporting documentation."<sup>119</sup> As guidelines were non-existent, applications for mercy were being processed on an *ad hoc* basis by legal counsel involved in federal prosecutions.<sup>120</sup> Once an investigation was complete a report was prepared and after being sent through many channels it ultimately arrived at the Minister of Justice.<sup>121</sup> Applicants were given neither access to the reports or documents

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<sup>118</sup> Philip Rosen, "Wrongful Convictions In The Criminal Justice System" (Ottawa: Library of Parliament, Research Branch, 1992) at 5.

<sup>119</sup> Rosen, "Wrongful Convictions In The Criminal Justice System" at 5.

<sup>120</sup> *Applying for a Conviction Review*, supra n.63.

<sup>121</sup> Rosen, "Wrongful Convictions In The Criminal Justice System" at 5

prepared by the Department, nor “notice of adverse findings (n)or an opportunity to adduce evidence before (the) report (went) to the Minister.”<sup>122</sup>

During the late 1980’s, following several high profile wrongful convictions cases including Donald Marshall Jr. and David Milgaard, s.690 came under severe criticism. In October 1986, a Royal Commission was appointed to review the case of Donald Marshall and make recommendations. In the “Report of the Royal Commission on the Donald Marshall Jr. Prosecution”, Commissioners Hickman, Poitras and Evans recommended that:

1. the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism – an individual or a body – to facilitate the reinvestigation of alleged cases of wrongful conviction; and
2. the review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.<sup>123</sup>

The Royal Commission further stated that an independent review mechanism should be established to deal with cases of wrongful convictions and that such a body should be well publicized so that:

...both those who claim to have been wrongfully convicted and those who have knowledge about a wrongful conviction will know who to approach with their concerns. The review mechanism must be independent so that those with information will be willing to come forward. Finally, if it is to be effective, this body will need to have investigative powers to look into the allegations and obtain access to all relevant information and interview all witnesses.<sup>124</sup>

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<sup>122</sup> Rosen, “Wrongful Convictions In The Criminal Justice System” supra n. 117 at 5.

<sup>123</sup> The Honourable Mr. Gregory T. Evans, Q.C. Commissioner, “Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations” (December 1989) at 25.

<sup>124</sup> “Royal Commission on the Donald Marshall, Jr.” at 9.

In 1993, the Department of Justice undertook an internal study of the conviction-review process.<sup>125</sup> As a result of this study, the Department initiated changes in an attempt to “improve the timeliness of case review, provide more openness, and provide greater independence.”<sup>126</sup> Although no legislative changes occurred, the following steps were taken. To improve the timeliness of s.690 applications, a case management system was implemented and additional lawyers were hired. The Criminal Conviction Review Group (CCRG) was established. The CCRG’s sole function was to investigate s. 690 applications and report to the Minister. To provide greater independence from the prosecution function of the Department, the CCRG, upon its creation, was transferred to the Policy Sector. To provide greater openness, the Department of Justice published a booklet entitled, *Applications to the Minister of Justice for a Conviction Review* that outlined the required documents, guidelines, and process to apply for a section 690 review. Applicants were to be given a copy of the Department’s investigative summary so that they could make written submissions and reply, prior to the final submissions and recommendations. Although it was not legislated, for the first time a standard procedure was in place to address s.690 applications.

In 1994, the Minister of Justice summarized the principles for the exercise of ministerial discretion under s.690 of the *Criminal Code* in his decision regarding the application of Colin Thatcher:

1. The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.
2. The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury’s verdict or a result on appeal. Merely because [the Minister] might take a different view of the same evidence that was

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<sup>125</sup> *Addressing Miscarriages of Justice* supra n.100.

<sup>126</sup> *Addressing Miscarriages of Justice* supra n.100.



before the court does not empower [the Minister] to grant a remedy under section 690.

3. Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were before the trial and the appellate courts. Applicants under section 690 who rely solely on alleged weaknesses in the evidence, or on arguments of law that were put before the court and considered, can expect to find that their applications will be refused.
4. Applications under section 690 should ordinarily be based on new matters of significance that either were not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.
5. Where the Applicant is able to identify such "new matters", the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be examined to determine whether they are relevant to the issues of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be "is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict?"
6. Finally, an Applicant under section 690, in order to succeed, need not convince the Minister of innocence nor prove conclusively that a miscarriage of justice has actually occurred. Rather, the Applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.<sup>127</sup>

The onus is on the applicant to "demonstrate... that there is a basis to conclude that a miscarriage of justice likely occurred" and the applicant will need to base his application on "new matters of significance". "New" has been interpreted to mean that the information "was not examined by the courts during trial or (the applicant did not) become aware of it (until) all court proceedings were over."<sup>128</sup> "Significant" has been

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<sup>127</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, released April 4, 1994, Dept. of Justice, at 3-4.

<sup>128</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, at 3-4.

interpreted to mean whether it was “reasonably capable of belief”, “relevant to the issues of guilt”, and “could reasonably be expected to have affected the verdict”.<sup>129</sup>

The application guidelines were published in the Department’s booklet along with the *Thatcher* principles and required documents. The booklet informed applicants that once all necessary documents were provided the review process would begin.<sup>130</sup> The review process consisted of four stages: the preliminary assessment, the investigation, the investigative summary, and ministerial review and decision.<sup>131</sup>

At the initial preliminary assessment stage the information in the application would be compared to the trial and appellate records to determine whether “new and significant information” existed. Generally, a member of the CCRG conducted this assessment. If, however, the prosecution of the applicant had been undertaken by the Department of Justice itself or if special circumstances existed, the Department would appoint outside counsel to avoid a conflict situation.<sup>132</sup> If the application revealed “new and significant information” that could have affected the outcome of the case and was not available at trial or on appeal the application would go on to the next phase. If not, the application would be rejected.<sup>133</sup>

This preliminary screening of applicants provided a preliminary and potentially lower threshold to allow applicants to proceed to the next stage. The preliminary assessment did not require a finding of a miscarriage of justice but a requirement of “new and significant” information that could have affected the outcome of the case. This

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<sup>129</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, *supra* n.126.

<sup>130</sup> Canada, “Applications to the Minister of Justice for a Conviction Review Under Section 690 of the Criminal Code” (Ottawa: Department of Justice, 1994).

<sup>131</sup> *Addressing Miscarriages of Justice* *supra* n.100.

<sup>132</sup> *Applying for a Conviction Review*, *supra* note 63.

<sup>133</sup> *Addressing Miscarriages of Justice* *supra* n.100.

requirement from the *Thatcher* principles is akin to the preconditions of *Palmer* for appellate matters. If a matter is at the Court of Appeal, whether from a direct appeal or sent there by the Minister of Justice under a conviction review, and new evidence is offered, *Palmer* requires (as previously stated) that the evidence be “sufficiently cogent in that it could reasonably be expected to affect the verdict.”<sup>134</sup>

The next stage was the investigation. The Department of Justice booklet stated that "depending on the type of evidence submitted, the investigation could involve interviewing witnesses to clarify or verify the information in the application, carrying out scientific tests or obtaining other assessments from forensic and social science specialists, or consulting police agencies and prosecutors who were involved in the original prosecution."<sup>135</sup> If further information was requested and not forthcoming, the application would be considered abandoned.<sup>136</sup> If an application was abandoned it would be summarily dismissed and the applicant would need to reapply.<sup>137</sup>

At the third stage, the results of the investigation were organized into an investigative summary or brief. An investigative summary was a summary of the information so far and did not contain any submissions or recommendations. The applicant was given a copy of the investigative summary and was allowed to make written submissions regarding it.<sup>138</sup>

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<sup>134</sup> *R. v Palmer and Palmer*, [1979] 1 S.C.R. 759 at 775.

<sup>135</sup> “Applications to the Minister of Justice for a Conviction Review” supra n. 129.

<sup>136</sup> Patricia Braiden & Joan Brockman, “Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code” (1999) Windsor Y.B. Access Just. 3 at 5. Information was obtained by CCRG member orally.

<sup>137</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment: Accountability, Independence & Vulnerability in a Post-Appellate Conviction Review Process” (2002) 21 Windsor Y.B. Access Just. 569 at 10.

<sup>138</sup> *Addressing Miscarriages of Justice*, supra n. 100 at p.15.

At the fourth and final stage, the application, the investigative summary, the applicant's response, and the CCRG's conclusions and recommendations were forwarded to the Minister for review and decision.<sup>139</sup> The Minister had the option of intervening or dismissing the application. The Department booklet stated that before the Minister intervened, the Minister must be "satisfied by your application that there is reason to conclude that a miscarriage of justice likely occurred."<sup>140</sup>

#### **4.4 PROBLEMS OF SECTION 690**

Although in 1994 the Department instituted changes in response to s.690 criticism, the review process continued to be criticized by many groups and individuals, which included academic writers, interested parties, and applicants' representatives. Four years after the implemented internal changes, the federal government decided to examine the postconviction review process of s.690. In October 1998, the Minister of Justice released a consultation paper entitled "*Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code.*" The paper identified some of the criticisms of the postconviction review process:

- the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted;
- the procedure has led to inordinate delays in the reviews of individual cases.
- the procedure is largely conducted in secret and is consequently without accountability;
- counsel who review section 690 applications are former prosecutors who will look at miscarriage of justice evidence with a prosecutorial bias and will therefore not investigate allegations of error in a fair and objective manner.
- only a handful of cases have ever been re-opened in Canada;
- the response of the Courts to the occasional section 690 referral has been unsatisfactory.<sup>141</sup>

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<sup>139</sup> *Addressing Miscarriages of Justice*, supra n. 100 at p15.

<sup>140</sup> "Applications to the Minister of Justice for a Conviction Review" supra n. 129.

<sup>141</sup> *Addressing Miscarriages of Justice*, supra n.100.

The criticisms of s.690 under the pre-2002 process can be categorized into the following: lacking independence, lacking openness, lacking effectiveness and lacking accessibility.

#### **4.4.1 Lacking Independence**

The Department of Justice attempted to provide independence to the process in 1994 by creating the CCRG and transferring the group to the Policy sector (as opposed to the Prosecutorial sector) of the Department, and by using outside counsel when there was deemed to be a conflict situation.<sup>142</sup>

The process was still criticized as lacking independence due to the dual nature of the roles assumed by the Minister of Justice. The Minister of Justice is also at the same time the Attorney General of Canada. The Minister of Justice and the Attorney General perform different and potentially contradictory functions.

The Minister of Justice provides policy advice, while the Attorney General provides legal advice to government. Both the criminal policy component advising the Minister of Justice and the criminal prosecution component of the Attorney General of Canada may be involved in the development of criminal law. The Minister of Justice appoints judges before whom the Attorney General of Canada or her agents may appear. The Minister of Justice ensures that legislation complies with the *Canadian Charter of Rights and Freedoms*, while the inadequacies of this legislation may be defended by the Attorney General of Canada. These are just a few of the potential conflicts in having the two roles performed by one Minister.<sup>143</sup>

As the Minister of Justice acts also as the Attorney General he or she is seen as being in a “position of conflict between the role as defender of the legal and constitutional

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<sup>142</sup> *Applying for a Conviction Review*, supra n.63

<sup>143</sup> Rosen, “Wrongful Convictions In The Criminal Justice System” supra n.117 at 7.

*status quo* and arbiter of the fate of claimants alleging systemic error.”<sup>144</sup> As stated by Philip Rosen, the “conflict in roles has an impact on the perception, at least, of the fairness and thoroughness with which s. 690 applications are investigated and considered by the Department of Justice.”<sup>145</sup>

Further, as a political figure, the Minister of Justice is subject to political pressure. Should a politician who is subject to the vagaries and pressures of political life be making such decisions? A case in point is that of David Milgaard. Mr. Milgaard’s case was highly politicized. The Justice Minister Kim Campbell had a widely-reported confrontation with David’s mother Joyce Milgaard. Less than one year later, Joyce spoke with the then Prime Minister Brian Mulroney in another widely-reported meeting at which time Mr. Mulroney stated that he was going to discuss the case with the Minister of Justice. The case was ultimately referred to the Supreme Court of Canada. Campbell acknowledged that because of the public concern and interest in the case it deserved a judicial inquiry.

Both Kim Campbell and Brian Mulroney discussed Mr. Milgaard’s conviction review in their books. In her book Kim Campbell discussed her handling of Mr. Milgaard’s two s. 690 applications and more specifically she discussed the Prime Minister’s meeting with Joyce Milgaard:

...The PM had blindsided me on one of my most difficult issues. In the eyes of the media, the meeting signaled that the PM was involved. Norman Spector, the PM’s chief of staff, called to assure me, somewhat sheepishly, that Mulroney had said nothing to Mrs. Milgaard about the section 690 application but had only agreed to look into her concerns about her son’s living conditions in prison. Several months later, we began to understand the thinking behind this inappropriate intervention. In a chat with the B.C.

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<sup>144</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135 at 11.

<sup>145</sup> Rosen, “Wrongful Convictions In The Criminal Justice System” supra n.117 at 9.

caucus, Hugh Segal, who replaced Spector in early 1992, talked about the upcoming election and efforts to improve the PM's image. He then turned to the Joyce Milgaard incident in Winnipeg and said something like, "That's the kind of thing he should be doing more of. It was brilliant and portrayed a side of him that the people haven't seen before."

As I told the press, Brian Mulroney was much too good a lawyer to intervene improperly in this matter. He never breathed a word to me about Milgaard, nor did anyone in his office ever attempt to influence my handling of the case. However, Joyce Milgaard is convinced he did, and the media accepted this view. This sort of thing made it very difficult to establish that the only motivation guiding me and my officials was a desire to make the right decision.<sup>146</sup>

Brian Mulroney writes in his book that he did intervene in the Mr. Milgaard's application for conviction review and states:

When I got back to Ottawa, I arranged for a fast review of David Milgaard's medical condition. He was soon transferred to a minimum-security institution. In an exchange of letters with Mrs. Milgaard, I told her, "I too, hope the matter will soon be resolved." I then had Hugh Segal summon Justice Minister Kim Campbell to my parliamentary office in Centre Block, where, because of the sensitivity of the matter, I met with her alone, although I debriefed Hugh Segal and Gilbert Lavoie immediately after. "The matter had been reviewed by the department and I have conveyed our decision," she told me. "Kim," I answered, "that is not acceptable to me. The law provides for a reference to the Supreme Court, and it is my intention to ensure that this case is in fact referred to the Supreme Court." My tone was firm and my words unequivocal. She understood and changed her tack quickly. "Prime Minister," she answered, "if this is the case, may I make the announcement myself?"<sup>147</sup>

Although the events are in dispute, at least Mr. Mulroney states that he did intervene in a process that was supposed to be free of political pressure. At the end of the day the Minister of Justice's decision was seen a political one.

Although the Milgaard case was in the media a significant amount, other wrongful conviction applicants have attempted to use public support to put pressure on the

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<sup>146</sup> Kim Campbell, *Time and Chance: The Political Memoirs of Canada's First Women Prime Minister* (Toronto: Doubleday Canada Limited, 1996) at 195.

<sup>147</sup> Brian Mulroney, *Memoirs: 1939 – 1993* (Toronto: McClelland and Stewart, 2007).

Minister of Justice. As stated by the Commission for David Milgaard:

The office of the federal Minister of Justice, identified as it is by the public, with prosecutions, and being occupied by a political figure, does not lend itself well for the adjudication of issues which arise in the judicial system and are to be returned there. Parties unhappy with the Minister's decision to either grant a remedy for conviction relief or to refuse it are able to accuse someone of political favoritism, or of having succumbed to political pressure. Conviction review should be carried out by an agency independent of the government of the day.<sup>148</sup>

#### 4.4.2 Lacking Openness

Section 690 allowed the Minister of Justice to “direct...a new trial...if he is satisfied...(that)...a new trial or hearing...should be directed.” However, the *Criminal Code* did “not set out any other criteria to govern the exercise of the Minister's discretion.”<sup>149</sup> There existed no legislative test to determine if a remedy should be granted by the Minister and there was no legislative process in place to indicate which remedy should be granted once the Minister was satisfied that a remedy was required. As this test was not set out in s. 690, it was left to the Minister's discretion. The discretion of the Minister was very wide. As stated by then Minister of Justice Allan Rock:

In creating the role of the Minister of Justice under section 690 of the Code, Parliament used very broad language, and the discretion of the Minister has been cast in the widest possible terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being “satisfied that in the circumstances a new trial or hearing...should be directed.”<sup>150</sup>

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<sup>148</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n. 74 at 377.

<sup>149</sup> Michelle Fuerst, “*The Section 690 Process*,” National Criminal Law Program, University of Victoria, Victoria, B.C. (July 1988) at p. 2.

<sup>150</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, supra n.126.



The Supreme Court of Canada in the David Milgaard Reference in 1992, however, set out the different burdens of proof that would have to be met in order to trigger the different remedies the Minister may order. Proof of innocence beyond a reasonable doubt would warrant a grant of a free pardon under s.749(2) of the *Criminal Code*; proof of innocence on a preponderance of the evidence would warrant a reference to a court of appeal to determine whether the conviction should be quashed and a verdict of acquittal entered; new evidence relevant to the issue of guilt which, taken together with the evidence at trial, could reasonably be expected to have affected the verdict would warrant an order for a new trial. These principles do not bind the Minister but were meant as a guide. They have not been referred to by the Minister of Justice since originally stated.

Although s.690 did not set out a legal test as previously discussed, in 1994 in *W. Colin Thatcher*, the Minister of Justice stated the principles that should govern the discretionary powers of s.690.<sup>151</sup> The onus is on the applicant to "demonstrate... that there is a basis to conclude that a miscarriage of justice likely occurred"; and the applicant will need to base his application on "new matters of significance". "New" meaning that the information "was not examined by the courts during trial or (the applicant did not) become aware of it (until) all court proceedings were over."<sup>152</sup> "Of significance" meant whether it was "reasonably capable of belief", "relevant to the issues of guilt", and "could reasonably be expected to have affected the verdict".<sup>153</sup> The

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<sup>151</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher supra n.126 at 3.

<sup>152</sup> "Applications to the Minister of Justice for a Conviction Review, supra n.129.

<sup>153</sup> Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, supra n.126 at 3-4.

guiding principles of the *Thatcher* decision helped set out the discretionary powers of the Minister of Justice.

Although the question has been addressed of when the Minister may exercise his discretion when “new matters of significance” have been adduced, the question of what constitutes a miscarriage of justice was not clearly articulated or defined. The legislation is silent on this issue and since the Minister is under no obligation to publicly make available his decisions, determining what may or may not constitute a “miscarriage of justice” is not clear. The public has no way of knowing why an application was allowed or denied and cannot discern what will be considered a miscarriage of justice and what will not. Therefore, the changes did not address the absence of guidelines or tests to determine whether or not a miscarriage of justice had likely occurred and if so, which remedy should be ordered. For these reasons s.690 was criticized as not providing clear guidelines and for being shrouded in secrecy.

The changes instituted in 1994 by the Department of Justice allowed applicants the opportunity to read and respond to the Investigation Brief. However, the conclusions and recommendations of the CCRG were considered to be governed by solicitor-client privilege; therefore applicants were not allowed to read or respond to the final recommendations to the Minister of Justice.<sup>154</sup> This was criticized as applicants were not advised of adverse findings and, therefore, not given the opportunity to make further legal evidentiary responses.<sup>155</sup> As Cole and Manson argue, "simply because the power

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<sup>154</sup> Braiden & Brockman, “Remedying Wrongful Convictions” supra n.134 at 16.

<sup>155</sup> Rosen, “Wrongful Convictions In The Criminal Justice System” supra n.117 at 6.

resides in the executive is no excuse for precluding accountability to the applicant and the public."<sup>156</sup>

It is interesting to note that in a similar case involving the Minister of Justice and internal memorandums, the majority of the Supreme Court of Canada refused to make a finding that such evidence fell under solicitor-client privilege. In *Idziak v. Canada (Minister of Justice)*,<sup>157</sup> the Supreme Court of Canada dealt with an extradition case in which the United States sought to extradite Boniface Idziak to face charges of participating in a conspiracy to obtain funds from investors through fraudulent representations. Under s.25 of the *Extradition Act*, Mr. Idziak sought to have the Minister of Justice refuse to exercise the Minister's discretionary authority to surrender him to the U.S. authorities. The Minister advised him that there were no grounds justifying a refusal to surrender him and signed the warrant of surrender. Mr. Idziak then learned that the Minister had reviewed an internal memorandum before making his decision. He had requested but had never received a copy. He then commenced proceedings to the Supreme Court of Ontario for a writ of *habeas corpus* with *certiorari* in aid to set aside the warrant of surrender on the ground that the Minister had denied his rights to fundamental justice guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. The application was dismissed as was the appeal to the Court of Appeal. The Supreme Court of Canada unanimously dismissed his appeal. However, the court was divided on the issue of solicitor-client privilege.

The minority, Justices L'Heureux Dubé, Cory and Iacobucci, held that solicitor-client privilege protected the memorandum prepared by the Minister's staff. However, the majority, Justices Lamer, McLachlin, LaForest, Sopinka, refused to determine whether

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<sup>156</sup> Cole & Manson, *Release From Imprisonment*" supra n. 92 at 415.

<sup>157</sup> *Idziak v. Canada (Minister of Justice)*, [1992]3 S.C.R. 631.

the memorandum fell under solicitor-client privilege. Since the court found that s.7 of the *Charter* had not been infringed upon, the issue did not need to be dealt with. It is interesting that the courts have respected the solicitor-client privilege argument put forward by the Minister of Justice with respect to memorandums dealing with “mercy applications” but have not made similar findings of the Minister in other situations. This issue should be put forward directly to the courts. As stated by Justice LaForest, then, a finding of whether these memorandums fall under solicitor-client privilege can be fully assessed and the court can “weigh the full implications” of such a decision.

Not only were applicants restricted from the internal memorandums but applicants were also not given reasons for why their application has been rejected. The decision of the Minister of Justice to accept or reject an application is not made available to applicants nor is it made available to the public. Not only can the applicant not scrutinize the decision made on his or her behalf but there exists a lack of public scrutiny as well. This lack of transparency in the postconviction review process is a hindrance; decisions cannot be assessed for fairness and duly compared and analyzed. As stated by the Commission of Inquiry into Mr. Milgaard’s case:

This, in my view, amounts to a serious lack of transparency in the s. 690 process, as it then was. How is an applicant to know he was treated fairly when the decision maker relies on unspecified reasons which he/she refuses to divulge? This secrecy in itself is a strong argument for having wrongful conviction inquiries dealt with by a commission, independent of government. Some might argue that solicitor/client privilege could be involved in any case, so the advice would remain secret. So it might, but it could also be waived (in contrast to constitutional prerogative), and should be if it is relied upon for the decision.<sup>158</sup>

The combined effect of both the applicant’s and the public’s lack of access to the Minister’s decision is confounding. Even if a “miscarriage of justice” has been found,

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<sup>158</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 374.

many people will not be satisfied. They may question the finding that the applicant did not commit the crime in question, thinking rather, that the system merely was not able to prove the guilt to the legal standard. Although the decisions of the Minister of Justice may not unequivocally state "innocence" they can go a long way to help explain how a miscarriage of justice has occurred.

#### **4.4.3 Lacking Effectiveness**

Under s.690 the applicant has the onus of investigating his or her own wrongful conviction case and of identifying grounds to support the application. Placing the onus on the applicant is ineffective. Applicants are generally not the best persons equipped to identify the grounds for the application; furthermore, they are usually incarcerated and have few, if any, resources. They generally lack the skills needed to detect the grounds to support their claims. Applicants do not have the power or the resources to gain access to documents held by police or crown counsel, nor the right to compel witnesses to be interviewed.<sup>159</sup> By placing the burden on the applicants to review their own convictions it is inevitable that the identification and remedying of wrongful convictions will be challenging, and if successful, will take an inordinate amount of time.

According to research, s.690 applicants could wait up to three to five years for an intervention.<sup>160</sup> This time period, in part, generated criticism that s.690 was not an effective postconviction review process. The Department of Justice held that the length of time for an assessment "is in part related to the thoroughness of the investigations, and the ability to have access to potential witnesses and documents. As well, some of

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<sup>159</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 373.

<sup>160</sup> Braiden & Brockman, "Remedying Wrongful Convictions" supra n.134 at 22-3.

the delay is attributable to applicants who adjust or supplement their application with further submissions during the course of the review process.”<sup>161</sup> Critics claimed that the time delay stemmed not from the applicant but from the Ministry. An example given is the case of Mr. Patrick Kelly. It took three years before the Minister of Justice intervened in Mr. Patrick Kelly’s mercy application and the time delay seemed to originate not from Mr. Kelly, but from the Department.

In Kelly’s case, it took two months for the Justice Department to respond to the initial letter from counsel and to request the standard transcripts and waivers. One and a half years after the Department of Justice heard about a witness recanting her testimony, Michelle Fuerst, independent counsel for the Department of Justice, interviewed her.<sup>162</sup>

Applicants who have had their applications denied can wait even longer for a response. For example, both Colin Thatcher and Sidney Morrisroe had to wait five years for their rejection. It took thirteen years and significant political and public pressure for the Minister of Justice to reject David Milgaard’s first s.690 application. According to Mr. Milgaard’s lawyers “no sense of urgency seemed to accompany (the department’s) work.”<sup>163</sup>

More than a year passed while the bureaucrats studied the Milgaard application... The original application had just two central elements: Ferris’s [forensic] report and Deborah Hall’s statement. Justice officials didn’t even bother contacting Ferris, and it took them more than nine months to take a statement from Hall. No sense of urgency seemed to accompany their work.<sup>164</sup>

Although one reason for departmental delay was stated to be the thoroughness of the investigation, it must be remembered that the onus of the investigation is on the

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<sup>161</sup> *Addressing Miscarriages of Justice* supra n.100 at 4.

<sup>162</sup> Braiden & Brockman, “Remedying Wrongful Convictions” supra n.134 at 15.

<sup>163</sup> C. Karp & C. Rosner, *When Justice Fails: The David Milgaard Story* (Toronto: McClelland & Stewart, Inc., 1991) at 213.

<sup>164</sup> C. Karp & C. Rosner, *When Justice Fails: The David Milgaard Story* Revised ed. (Toronto: McClelland & Stewart, 1998) at p. 213..

applicant. An applicant must conduct his own wrongful conviction investigation, identify credible grounds and provide those grounds to the Minister of Justice along with all the supporting evidence. The Minister of Justice's role is limited to only reviewing the grounds put forward by the applicant. This information contradicts the departmental theory for delay. Further, it demonstrates the ineffectiveness of the Department due to the lack of investigative authority needed for a postconviction review body.

Along with the long wait time and the lack of investigatory powers, critics argued that the rate of intervention by the Minister was very low. This low intervention rate, too, contributed to an ineffective postconviction review process. While it is impossible to estimate how many interventions were actually required, there are those who suggest that only a small number of legitimate s. 690 applications were successful in obtaining an intervention.

Despite the difficulty in estimating the prevalence of wrongful convictions, hundreds of such convictions have been documented. An American study suggests that there could be as many as 10,000 erroneous convictions for index crimes in any one year. James Lockyer, a Toronto criminal lawyer and founding Director of The Association in Defence of the Wrongly Convicted, conservatively estimates that 40 innocent people are currently serving life sentences in Canada. Others argue that the wrongful convictions of Donald Marshall, Jr., David Milgaard, and Guy Paul Morin are merely the "tip of the iceberg."<sup>165</sup>

The low rate of interventions may be explained at least in part, due to the high threshold required of the Minister of Justice. The Minister of Justice may only grant a remedy if he is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. As previously noted this test is similar to the test used by the Court of Appeal when hearing a case that has been referred to it by the Minister of

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<sup>165</sup> Braiden & Brockman, "Remedying Wrongful Convictions" supra n.134 at 14.

Justice. The high threshold test that applicants have to meet to have their case heard again by the appeal courts makes it a challenge to be heard.

#### **4.4.4 Lacking Accessibility**

Section 690 was criticized as lacking clear procedures for making an application. The Department of Justice attempted to remedy the situation in 1994 by publishing the applications booklet which set out the guidelines, the process, and the documents required. However, the applications booklet set out the process in only a general way. For example, the applicant was required to provide all previous court files and transcripts and, according to *Thatcher*, the applicant must provide “new and significant information which casts doubts on the correctness of (their) conviction”. What type of evidence and documents would be required to fit these criteria was neither examined nor explained. Therefore, although the applications booklet was a start, the process was still criticized for not being substantively helpful to applicants.<sup>166</sup>

In addition to the lack of procedural guidance, s.690 was also criticized with respect to accessibility due to the lack of financial assistance for applicants. Many applicants were expected to submit the required documentation and evidence at their own expense.<sup>167</sup> Gathering copies of all required documentation, and investigating and unearthing “new and significant information” is very expensive. Since most applicants are incarcerated getting the resources to gather such information is extremely challenging. The Commission of Inquiry into the case of Mr. Milgaard stated that putting

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<sup>166</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135 at.10.

<sup>167</sup> Legal aid is not an option for most applicants as many provincial plans have refused to assist applicants.



the onus on the applicant to provide the grounds to establish the miscarriage of justice leads to many problems including some of the following:

1. The convicted person is not always able, and certainly not the best equipped, to identify grounds to support a wrongful conviction. He is usually incarcerated, has few if any resources, and lacks the expertise needed to analyze and detect what may give rise to a remedy. He will usually rely upon the skills and advice of family, friends and advocates, who, although well intentioned, typically are very emotional and focused on innocence and compensation rather than upon the identification of specific grounds supporting a claim of wrongful conviction.
2. Few are fortunate to have the assistance of legal counsel. The identification of grounds to support a remedy is a difficult task even for legal counsel. A remedy should not be dependent upon legal counsel's skill and competence or the lack thereof.
3. The premise that a convicted person is in the best position to identify the grounds of a wrongful conviction is flawed. In many wrongful convictions, it is not what is known by the convicted person that will give rise to a remedy, but rather what is unknown. New information, not known at the time of trial, is needed to support the request for a remedy. Sitting through his own trial did not put Milgaard in a position to know that the Fisher information could have provided a basis to challenge his conviction. Nor did it help him to recognize procedural errors.
4. A convicted person does not have coercive power to gain access to documents such as police and crown files, nor does a convicted person have any right to compel witnesses to be interviewed.<sup>168</sup>

Unless the applicant can find someone to volunteer the time, they will need to hire someone to both retrieve and submit the necessary documentation and to investigate the case. As stated by Patricia Braiden and Joan Brockman:

Unless an applicant is fortunate enough to have personal resources or financial support from groups such as The Association in Defence of the Wrongly Convicted (AIDWYC), legal counsel or other advocate, she or he may not gain access to a section 690 conviction review.<sup>169</sup>

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<sup>168</sup> Commissioner, *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 373.

<sup>169</sup> Braiden & Brockman, "Remedying Wrongful Convictions" supra n.134 at 16.

In addition to the difficulty applicants face gathering the necessary information and documents to submit their applications, if the Department requests further information and it does not arrive, the Department will consider the application abandoned and will summarily dismiss it.<sup>170</sup> If an application is dismissed the applicant will need to reapply. This creates difficulties for applicants because, as previously mentioned, most are in prison and getting access to information is costly and time-consuming. Having an application abandoned because requested information is not submitted in a timely manner makes the process that much more difficult and much longer for applicants.

#### ***4.5 A REVIEW OF POSTCONVICTION REVIEW POST-2002***

The criticisms of s.690 led the Minister of Justice to review the entire process. The 1998 federal consultation paper not only identified the criticism of the process but also examined potential options for reforming the conviction review process. The consultation paper identified possible reform options such as the following: the creation of a separate agency for reviewing criminal convictions, the elimination of section 690 altogether with a broadening of the scope of appellate review, or amending the s.690 process.

The same year the consultation paper was released, the “Report of The Commission on Proceedings Involving Guy Paul Morin” was issued. In this report it was recommended that:

The government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those

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<sup>170</sup> Braiden & Brockman, “Remedying Wrongful Convictions” supra n.134 at 5. Information was obtained by CCRG member orally.

powers currently exercised by the federal Minister of Justice pursuant to section 690 of the *Criminal Code*.<sup>171</sup>

The recommendation of the Morin Inquiry was similar to the recommendations of the Donald Marshall Inquiry ten years previous, that there be established an independent review mechanism with powers to investigate alleged cases of wrongful convictions.<sup>172</sup>

Further support for an independent review came from the “Report of the Inquiry Regarding Thomas Sophonow”:

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.<sup>173</sup>

Therefore, there were in total three public inquiries into wrongful convictions which recommended the creation of an independent review tribunal.

After reviewing the recommendations of the consultation paper and the opinions of legal experts and interest groups, the federal government made its decision. It decided not to create a separate review agency or to eliminate s.690 and broaden the scope of appellate review, but rather, to amend the s.690 process. In June 2002, Parliament passed Bill C-15A which amended the criminal conviction review provisions in the *Criminal Code*. On November 25, 2002, s.690 of the *Criminal Code* was repealed and replaced by ss. 696.1 to 696.6 and complementary regulations. The Minister

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<sup>171</sup> Ontario, Report: *The Commission on Proceedings Involving Guy Paul Morin*, v. 1 (Toronto: Ontario Ministry of the Attorney General, 1998) at 1237-41.

<sup>172</sup> Nova Scotia, *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, v. 1 (Nova Scotia: The Commission, 1989) at 143-46.

<sup>173</sup> Report of The Inquiry Regarding Thomas Sophonow (Manitoba, 2001).

announced that the changes would strengthen the process for investigating allegations of wrongful conviction and make it more open, accessible, and accountable.<sup>174</sup>

Sections 696.1, .2(i), and .4 read:

696.1(i) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a longterm offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

696.2(i) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

- a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
- b) the relevance and reliability of information that is presented in connection with the application; and  
the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

As provided by the Regulations the application for miscarriage of justice must be in the prescribed form, contain the required information, and have the necessary documents.<sup>175</sup> In accordance with the regulations under s.696.2(1), when the Minister receives an application, the application must be acknowledged and a preliminary assessment must be conducted.<sup>176</sup> The preliminary assessment is considered a screening mechanism. Section 4 of the Regulations outlines the steps taken by the

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<sup>174</sup> Department of Justice, “Criminal Code Changes Will Strengthen Justice System” (Ottawa, 2000) online: <[www.justice.gc.ca/en/news/nr/2000/doc\\_25319.html](http://www.justice.gc.ca/en/news/nr/2000/doc_25319.html)>.

<sup>175</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.696.6.

<sup>176</sup> *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416, s.3.

Minister. The Minister has to decide whether there may be a reasonable basis to conclude that a miscarriage of justice likely occurred. The Minister's decision determines whether an investigation is to be undertaken.

If the Minister concludes, after the preliminary assessment, that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred, an investigation is conducted.<sup>177</sup> If the Minister determines that a miscarriage of justice likely occurred and there exists an urgency, the Minister may bypass the investigation and direct a new trial or hearing, or refer the case to the Court of Appeal under section 696.3(3)(a) of the *Criminal Code*.

If the Minister concludes after the preliminary assessment that there is no reasonable basis to conclude that a miscarriage of justice has likely occurred an investigation is not conducted.<sup>178</sup> If an application has been denied at this stage, an applicant has one year to provide more information in support of his application.<sup>179</sup>

The new provisions are consistent with the previous provisions in many respects. The Minister of Justice retains the power to review wrongful convictions. An application for ministerial review will not be accepted until the applicant has exhausted all available rights of appeal. Although this was always the practice, it is the first time it was stated in the legislation. An applicant will still need to establish on a reasonable basis that a miscarriage of justice likely occurred. An applicant will still need to produce “new matters of significance”, although now it is a legislated requirement. The same information and supporting documents are required; however, the application is now in regulated form. The CCRG still assesses the conviction review applications in the same

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<sup>177</sup> SOR/2002-416, s.4(1)(a).

<sup>178</sup> SOR/2002-416, s.4(1)(b)(ii).

<sup>179</sup> SOR/2002-416, s.4(3).

four-step process, although, again, this is now a legislated process. The Minister retains the same powers held previously; he/she may dismiss the application, allow the application, or request an opinion from the Court of Appeal.<sup>180</sup> If the Minister is satisfied that there is a reasonable basis for the claim that a miscarriage of justice likely occurred, the Minister retains the same authority to order a new trial or refer the matter to the Court of Appeal.<sup>181</sup>

There were, however, some distinct changes to the law. A conviction review application became formally known as an "application for ministerial review", as opposed to an application for mercy. With the conversion of the word "may" to "shall", the legislation changed the Ministerial discretion to an explicit duty to review applications.<sup>182</sup> The new conviction review process was expanded to include not only indictable offences but summary conviction offences.<sup>183</sup> The Minister, or a qualified delegate,<sup>184</sup> now has the powers of a commissioner under the *Inquiries Act* to investigate an application for ministerial review.<sup>185</sup> Under this power the Minister or delegate has the power to the following: subpoena a witness; require a witness to answer questions and give evidence, orally or in writing, under oath or solemn affirmation; and require a witness to produce documents or other things that may be relevant to an investigation.<sup>186</sup>

Under the new legislation a Special Advisor to the Minister was appointed to assist the Minister. The Special Advisor oversees all stages of the conviction review process

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<sup>180</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.696.3(2).

<sup>181</sup> *Criminal Code*, s.696.3(3)(a)(i) and 696.3(3)(a)(ii).

<sup>182</sup> *Criminal Code*, s.696.2(1).

<sup>183</sup> *Criminal Code*, s.696.1(1).

<sup>184</sup> *Criminal Code*, s.696.2(3).

<sup>185</sup> *Criminal Code*, s.696.2(2).

<sup>186</sup> *Inquiries Act*, R.S., 1985, c. I-11.

and makes recommendations to the Minister once an investigation is complete.<sup>187</sup> According to the regulations, the Minister, if certain exigent circumstances are present, may bypass the investigation stage.<sup>188</sup> Finally, the new legislation requires the Minister to report annually to Parliament.<sup>189</sup>

#### **4.6 PROBLEMS ADDRESSED**

According to the federal government these legislative changes would resolve the criticisms of the postconviction review process such that neither an independent body nor the alteration of appellate procedure was necessary. The legislative changes, arguably, did improve the independence, openness, effectiveness and accessibility of the process to some extent. One positive change outside the scope of these improvements included the more accurate labeling of such applications from “mercy applications” to “miscarriages of justice”. The language used in mercy requests presumed the guilt of the petitioner. However, postconviction review applicants were not requesting a pardon for their criminal conduct, but rather, were requesting a finding that they were not guilty of the criminal conduct of which they had been accused.

... applications alleging miscarriages of justice presume that the applicant was wrongly convicted of a criminal offence. They do not presume guilt and request mercy; they request the correction of error on their merits. They require careful contextual consideration, early dismissal of unworthy claims, investigation of possible potential injustices and, where appropriate, referral to the courts for determination in light of new facts and/or points of law not previously considered fully or at all.<sup>190</sup>

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<sup>187</sup> *Applying for a Conviction Review*, supra n.63

<sup>188</sup> *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416, s.2.4(1)(b)(i).

<sup>189</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.696.5.

<sup>190</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135 at 19.

### 4.6.1 Independence

The appointment of a Special Advisor from outside the Department to advise the Minister directly and oversee the review of applications may increase independence in the review process. According to the Department “the Special Advisor's involvement will ensure that all stages of the review are complete, fair, and transparent.”<sup>191</sup> The Advisor’s main role will be to make recommendations to the Minister once an investigation is complete. But he or she will also oversee all stages of the review process, including the preliminary assessment where applications may be screened out.<sup>192</sup> The Special Advisor may provide some independence as he or she has the ability to request that additional information be collected, or that existing information be clarified before an application is screened out during a preliminary assessment.<sup>193</sup> The Special Advisor has the ability to insist that an application not be screened out but be permitted to proceed to the investigation stage.<sup>194</sup> Finally, the Special Advisor after reviewing the Investigation Report, can come to his or her own conclusions which may or may not agree with the CCRG's views. In this way the role of the Special Advisor may provide a level of independence in the Department.<sup>195</sup>

Although the Special Advisor could provide a level of independent assessment and advice, it has been argued that the "advisor" as a permanent delegate appointed by the Minister and employed by the Department may not be perceived to be independent

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<sup>191</sup> Canada, Department of Justice, *The Role of the Special Advisor*, online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/ccr-rc/app-dem/rev.html>>.

<sup>192</sup> *The Role of the Special Advisor*.

<sup>193</sup> *The Role of the Special Advisor*.

<sup>194</sup> *The Role of the Special Advisor*.

<sup>195</sup> *The Role of the Special Advisor*.



of the Minister or the Department.”<sup>196</sup> Further, the legislated changes to the postconviction review process did not address the issue of having the Minister of Justice and the Department of Justice investigate and decide cases of miscarriages of justice. “Where the same official and departmental forces are statutorily required to act as respondent, judge, and investigator (whether through departmental personnel or by delegation to someone with the Minister’s budgetary and appointive control), it can be said that there is an inherent appearance of potential bias.”<sup>197</sup> In maintaining the status quo, the Department overlooked the findings of the Marshall Commission which concluded that “a failure of justice breeds distrust of governmental authorities perceived as being on the other side of the adversarial divide.”<sup>198</sup>

#### **4.6.2 Openness**

According to the Department of Justice the current conviction review process improved the transparency of the previous process. It did so by including clear guidelines as to when a person is eligible for a conviction review; providing straightforward application forms and clear direction on the information and documents needed to support it; describing the various stages in the conviction review process; specifying the criteria the Minister must consider in deciding whether a remedy should be granted; and finally, requiring the Minister to submit an annual report to Parliament.<sup>199</sup>

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<sup>196</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.134 at 18.

<sup>197</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.134 at 19.

<sup>198</sup> *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, supra n.170.

<sup>199</sup> *Applying for a Conviction Review*, supra n.63.

The Department states that “openness and transparency are among the principles that guide the conduct of conviction reviews.”<sup>200</sup> To support this transparency the applicant is given access to all the relevant information in the investigation report and the appendices.<sup>201</sup> According to the Department this disclosure “ensures that the applicant is fully informed of the facts, findings, issues and considerations on which the Minister proposes to make a decision... Thus, the maximum amount of transparency and access to information is afforded to the applicant whose interests are at stake.”<sup>202</sup>

Although the disclosure of the investigation report provides information to the applicant, the applicants are still not provided copies of the CCRG’s final submissions to the Minister. The applicant, therefore, is provided with the facts, but is not “fully informed of the...findings, issues and considerations on which the Minister proposes to make a decision”. In this respect, the “maximum amount of transparency” is not afforded to the applicant and the applicant is denied his chance for a reply.

Further, the disclosure of the investigation report and the other, “improvements”, (except for the requirement of the annual report) did not provide any new information or guidance, but merely legislated what was already required. There still does not exist a legislative test to determine if a remedy should be granted by the Minister and there is no legislative process in place to indicate which remedy should be granted once the Minister is satisfied that a remedy is required. The lack of legislative guidance allows

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<sup>200</sup> Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice*, Annual Report 2005 Minister of Justice, online Department of Justice Canada <<http://dsp-psd.pwgsc.gc.ca/Collection/J1-3-2005E.pdf>>.

<sup>201</sup> Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice*, Annual Report 2005.

<sup>202</sup> *Applications for Ministerial Review*.

the discretion of the Minister to remain closed and unscrutinized. This is compounded by the fact that the Minister's decisions, as well, are not made public.

The new duty to report annually to Parliament does provide some new information which will be useful for future statistical analysis however, only a limited amount of statistical information is revealed. There is no requirement for the Minister to disclose the reasons for either the acceptance or rejection of conviction review applications.<sup>203</sup> The Minister has the discretion whether to publicize reasons for decisions. The Minister may disclose some information if it is believed that "the public interest in releasing such information clearly outweighs any invasion of privacy that could result from such disclosure."<sup>204</sup> What constitutes "public interest" is not defined. The lack of public disclosure "precludes scrutiny of how (postconviction review) applications are adjudicated and the competence and comprehensiveness by which such investigations are conducted."<sup>205</sup>

#### **4.6.3 Effectiveness**

Under the previous postconviction review process, there was no legal procedure to require witnesses to provide information or to produce relevant documents. The investigation process was dependent on the voluntary cooperation of witnesses. This was a serious weakness in the conviction review process. An effective postconviction review system must have the ability to question and to investigate suspected injustices fully and effectively. Therefore, the addition of the power to compel the production of physical exhibits and oral evidence under the new postconviction review process is a

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<sup>203</sup> Applications to the Minister are considered bound by the provisions of the *Privacy Act*.

<sup>204</sup> Braiden, "Wrongful Convictions and Section 690 of the Criminal Code" supra, n.103 at 261.

<sup>205</sup> Braiden, "Wrongful Convictions and Section 690 of the Criminal Code" supra n.103 at 264.

definite improvement on the effectiveness of the process. However, it still leaves intact a major impediment to applicants.

Applicants are still required to investigate their own wrongful convictions as the onus falls upon them to identify the legal grounds for their application. All of the criticisms identified in the various judicial inquiries that applicants are not necessarily the best people for such a task and are not in the best position to unearth such issues and determine and obtain the necessary documents and witnesses to support their applications, remain problematic under the reformed process. Although the Department now has the ability to compel evidence the onus still remains on the applicants to identify what evidence is necessary for their application. Even when the applicant can find the necessary evidence obstacles still occur. For example, Mr. James Driskell was not allowed to commence an application until he had given sufficient disclosure to the Department of Justice “However, the WPS would not make disclosure for purposes of a section 696.2 review until Driskell’s application was made.”<sup>206</sup> Unfortunately, Mr. Driskell was caught in a “catch 22” situation.

As stated by the Milgaard Commission:

The key to exposing wrongful convictions is having the will and the resources to go out and investigate to see whether there is anything wrong and not simply sit back and say to the applicant, well, if you can show me something new I may react to it, but if you can’t, I’m sorry, there’s nothing I can do.<sup>207</sup>

Until the Department takes a more proactive rather than reactive stance the onus will fall upon the applicant who is in a disadvantaged position for such a task.

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<sup>206</sup> “Commission of Inquiry into the Wrongful Conviction of David Milgaard” supra n.74 at p. 391.

<sup>207</sup> “Commission of Inquiry into the Wrongful Conviction of David Milgaard” supra n.74 at p. 389.

#### **4.6.4 Accessibility**

The new postconviction review legislation included summary conviction offences as being open for postconviction review. This arguably, provides accessibility to those previously denied. However, the legislated changes did not create substantive changes with respect to access. The changes did not address the substantive access issues or the lack of financial aid for those wishing access the postconviction review process.

For example, application requirements are still very onerous and beyond the ability of most applicants to fulfill on their own. Applicants who have very little money and resources have a difficult time filling out the application forms and the necessary documentation. If their application is missing or incomplete the Department will close the application causing more delay and hardship on already severely impoverished applicants. The failure to improve the problem of access leaves intact a major roadblock to applicants seeking conviction review.

#### **4.7 CONCLUSION**

In summation, it seems that the new postconviction review legislation that attempted to address criticism arising under the previous system did make some, albeit modest, improvements. The new system properly named itself; added the potential for an independent element, that of Special Advisor; provided more certainty by legislating existing procedures, guidelines and required documents; improved potential effectiveness by granting some investigatory powers and slightly increased accessibility by incorporating summary conviction offences. However, the new system left intact fundamental and problematic issues. For example, the postconviction review process left intact the conflict arising from having the Minister of Justice and Department of

Justice assess wrongful conviction cases. The changes did not address the lack of openness of the system whereby the wide unfettered discretion of the Minister of Justice remained closed to both the applicant and public scrutiny. The reactive stance of the Department of Justice to applicants who have little resources to meet the onerous requirements leaves in tact a major issue. The changes also did not address the lack of substantive and financial aid support for applicants wishing to access the system. Finally, the changes instituted by the legislative measures left untouched the criticism leveled at the poor response to applications, the low rate of interventions and the length of time applications must wait for a response for the Minister.

## **CHAPTER 5 - STATISTICS**

### ***5.1 INTRODUCTION***

In order to truly assess the efficiency of the postconviction review process an in depth study of the process needs to be undertaken. For example, it should be known how many applications are submitted for conviction review, how many applications have been granted an intervention and how many have not, what type of intervention has been granted, and how long it takes for a response. Answers to these questions will provide insight into whether or not the process is running efficiently and effectively. Further, once information is gathered, it can then be determined if the process was improved upon after the 2002 legislated changes.

This chapter, therefore, will provide a collection of statistical information on the postconviction review process. This chapter begins by describing the importance of statistical information for the understanding of wrongful convictions in general and, more specifically, for the remedying of wrongful convictions through postconviction review. The next part provides information from two tables covering postconviction review applications from 1986 -- 2002 and from 2003 -- 2009. I will then review the information provided by the tables and calculate the number of applications submitted each year to the Department of Justice, the number of interventions granted, the type of intervention granted, the result of each intervention, the length of time it took to grant an intervention and the yearly departmental disposal rate of applications. Each result is tabulated for each time period in order to assess the 2002 legislative changes.

## **5.2 THE IMPORTANCE OF STATISTICS**

Statistics is the science of collecting, organizing, and interpreting numerical facts called data. The most basic form of statistics is descriptive statistics, which lays the foundation for all statistical knowledge. Descriptive statistics simply describes what the data shows and is used to present quantitative descriptions in a manageable form.

There are many agencies that collect descriptive statistics and they take many different forms. Descriptive statistics are used by police to collect data on crimes committed and on the people they arrest. Courts collect data on cases heard and the disposition of those cases. Probation and parole agencies collect data on the people under their jurisdiction. There are also victimization surveys in which random samples of the population are asked whether they have been victims of crime within a specified period of time. The combined information of official statistics and victimization surveys can provide an accurate description and rate of crime. Such statistics are useful, when correctly analyzed, to help us understand just how our various systems are working.

Statistical analysis of wrongful convictions can increase our understanding of the systemic structural elements of the criminal justice system that contribute to wrongful convictions. Information such as this is necessary in order to implement safeguards and also to understand the extent of wrongful convictions.

Studies of wrongful convictions have been conducted on individual cases. For example, there have been several inquiries on wrongful convictions including David Milgaard, Guy Paul Morrin and Thomas Sophonow. Studies and inquiries such as these provide invaluable information on the particular circumstances of each case and are essential elements to understanding wrongful convictions. However, this qualitative type



of study can perpetuate the notion that wrongful convictions are rare, isolated occurrences. The qualitative research approach does not allow for a wide-ranging understanding of the breadth and scope of wrongful convictions. For this understanding to occur, a more quantitative approach is required.

A quantitative statistical approach to wrongful convictions can provide information on the causes of wrongful convictions and also on the potential number of wrongful conviction cases. For example, statistical studies in the United States have shown the number of cases that have been exonerated through the use of DNA evidence. Based on the number of people convicted and the information obtained through DNA studies, statistical extrapolation has also been done to provide an estimate of the number of people wrongfully convicted. Statistical analysis also has been used to show, for example, that eyewitness misidentification is by far the number one cause of wrongful convictions.<sup>208</sup> Information such as this is not only useful for an understanding of wrongful convictions and how they happen but it is also useful in learning how to prevent wrongful convictions in the future. For example, due to the understanding that eyewitness misidentification is the number one cause of wrongful convictions, the National Institute of Justice published the booklet *Eyewitness Evidence: A Guide for Law Enforcement*. The booklet provides recommendations on conducting witness interviews to help decrease the occurrence of misidentification. It includes how to conduct the interviews, the photo spreads, the lineups and how to record the process throughout.<sup>209</sup> Such a reference should help preclude at least some wrongful convictions.

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<sup>208</sup> MacFarlane, Q.C., “Convicting the Innocent” supra n.23 at 22.

<sup>209</sup> MacFarlane, Q.C., “Convicting the Innocent” supra n.23 at 24.

In the field of postconviction review, both qualitative and quantitative research studies have been lacking. Statistical analysis of the postconviction review process can both provide a thorough understanding of specific cases and unearth systemic structural elements of the process that hinder the detection of wrongful convictions. Information such as this would provide an understanding of how to improve the process and to more accurately and efficiently identify wrongful convictions.

A qualitative analysis of postconviction review would assess individual cases and provide an in-depth analysis and thorough assessment of the factors influencing a Minister's decision to either grant or not grant an intervention. This information then could be further assessed to determine the fairness of the review process. However, information on the investigative process is not made public. As noted previously, the Department of Justice states that reasons for postconviction review decisions are not made public unless the Minister is of the opinion that the public interest "outweighs any invasion of privacy that could result from such disclosure".<sup>210</sup> To date only four investigative reports have been released by the Minister of Justice: Patrick Kelly, Sidney Morrisroe, Colin Thatcher and Steven Truscott. With only four reports being released publicly, the information that can be gleaned from the process is relatively sparse. However, the information gathered from such a qualitative analysis is valuable in providing a measure of in-depth detail of the postconviction review process.

A quantitative analysis of the postconviction review process would provide a broader understanding of the process in general and could reveal any patterns and problems within the system. Such studies have been conducted previously; however, the number of such studies has been very small and the information collected has been

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<sup>210</sup> *Privacy Act* R.S., 1985, c.P-21, s. 8(2)(m)(i).

modest.<sup>211</sup> For example, some researchers compiled some information for short time frames while others had gathered information for larger sections of years. But there were gaps in research, and the depth of information was lacking. The lack of quantitative research is not surprising, however, considering that prior to 2003 the Department of Justice neither recorded nor made public the number of conviction review applications submitted; and there was no record of how many interventions were granted.

According to the new legislated regulations, starting in 2003 the Department of Justice is required to submit a report which will include the number of applications made, the number of applications abandoned and the stage of the applications.

7. An annual report submitted under section 696.5 of the Code shall contain the following information in respect of the financial year under review in the report:
- a. the number of applications made to the Minister;
  - b. the number of applications that have been abandoned or that are incomplete;
  - c. the number of applications that are at the preliminary assessment stage;
  - d. the number of applications that are at the investigation stage;
  - e. the number of decisions that the Minister has made under subsection 696.3(3) of the Code; and
  - f. any other information that the Minister considers appropriate.<sup>212</sup>

Although not all relevant information is required, (including the type of intervention granted and the dates when interventions were both applied for and received), from 2003 onwards information was made more readily available to conduct a statistical

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<sup>211</sup> Braiden & Brockman, “Remedying Wrongful Convictions” supra, n. 134; The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135 and Rosen, “Wrongful Convictions In The Criminal Justice System” supra n.117.

<sup>212</sup> *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416.

quantitative analysis for descriptive study. Such information will provide for a deeper and more comprehensive understanding of the postconviction review process.

Similar to how both the qualitative and quantitative studies have provided more insight into wrongful convictions, so too will such information provide greater insight into the postconviction review process. As previously stated, a qualitative study will provide a deeper appreciation into how and why ministerial decisions are made, how and why certain applicants receive an intervention while others do not, and it would also help explain why one particular intervention is granted over another. However, due to the limited amount of information made available in this respect I am confining my research to a quantitative approach.

There has been very little quantitative research in the field of postconviction review. A quantitative research analysis using descriptive statistics is a good starting point. Such an analysis will provide a general overview of the process and provide the basis to comparatively assess whether the process has improved after the 2002 legislative changes.

Having confined the research to a quantitative descriptive analysis it should be noted that for each positive intervention I found I have given a brief descriptive overview of the applicant himself and what his case entailed. I have done this because I believe the supplementary information is useful for a more comprehensive understanding of the cases that are being remedied through the conviction review process. Further, I think it is important to understand that such applicants are not merely numbers but are individual people who have been wrongfully convicted and have suffered an incredible injustice.

### **5.3 TABLES**

I have divided the statistical information into two tables. Table 1 covers the time frame from 1986 to 2002. Table 2 covers the time frame from 2003 to 2009. Dividing the information into these two time frames provides a comparative analysis of the legislative changes both before and after 2002.

I have assessed postconviction review applications starting in 1986. I chose 1986 for specific reasons. The most complete amount of information I was able to retrieve started from 1986 and s.690 the legislation being assessed, came into force in 1985. Prior to 1986 there was very little information available for any postconviction review; further there were very few applications granted. Finally, since s.690 is the legislation that was sharply criticized, I thought it would be best to confine the analysis to this legislation.

In order to compile my research I relied on the information available from the Canadian Department of Justice annual reports, organizations dealing with those wrongfully convicted, existing research and case law analysis. As previously stated, attempting to find information on postconviction review applications was not an easy task. The fact that information such as this was not previously available was initially unexpected. Such information would provide important insights into both the strengths and weaknesses of a system designed to provide freedom to those wrongfully convicted. Upon further consideration the lack of data reflected the traditional understanding that the criminal justice system prevented wrongful convictions and therefore interest in and study of such occurrences may have seemed unnecessary. The increased awareness of wrongful convictions has lead to an increased need for

information both to prevent and remedy such cases. The requirement of the Ministry to take stock of such information supports this new understanding of the existence of wrongful convictions.

Here are a few more notes which may be helpful regarding the data in this section. Some of the information for Table 1 was not ascertainable; and Table 1 has slightly less information than Table 2 as I was able to gather slightly more information on applications arising after 1994. The Department of Justice follows the fiscal year, from April 1 to March 31 of the following year; therefore, I too, followed the fiscal year. As a final note, it should be mentioned that interventions granted by the Minister do not reflect the total number of wrongful conviction cases. As previously stated, by intervening the Minister is finding a “miscarriage of justice” he or she is not assessing guilt or innocence. It is for this reason that I have included whether or not the applicant was acquitted after an intervention. Again, as previously stated, many cases of wrongful convictions do not leave the appellate system.<sup>213</sup> However, since this paper is assessing the conviction review process, the statistics herein are confined to applicants seeking such a procedure.

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<sup>213</sup> Cases which never left the court system but which are generally accepted by the public to be cases in which an innocent person was convicted: Rejean Hinse, Richard Norris, Benoit Proulx, Michael McTaggart, Thomas Sophonow, Peter Frumusa, Gregory Parsons, Guy Paul Morin, Herman Kaglick. Association in Defence of the Wrongly Convicted (AIDWYC) response to the request from the Minister of Justice, the Honourable Anne McLellan on October 26, 1998, re consultation paper “Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code”.

**TABLE 1: POSTCONVICTION REVIEW PRE 2002 SECTION 690**

Fiscal Year	Number of Applications	Interventions	Date Applied	Date Intervened	Type of Intervention	Result
1986	34	0	/	/	/	/
1987	30	0	/	/	/	/
1988	35	0	/	/	/	/
1989	20	H. St. Cyr.	?	?	Appeal	Acquitted
1990	27	0	/	/	/	/
1991	25	0	/	/	/	/
1992	?	Wilson Nepoose	?	?	Appeal	Trial/Acquitted
		David Milgaard	August 1991 <sup>214</sup>	April 1992	New Trial	Acquitted
1993	?	0	/	/	/	/
1994	?	0	/	/	/	/
1995	40	0	/	/	/	/
1996	50	0	/	/	/	/
1997	37	Gruenke	?	September 1997	Opinion & Appeal	Appeal Dismissed
		Patrick Kelly	December 1993	November 1995	Opinion & Appeal	Appeal Dismissed
		Wilfred Beaulieu	August 1994	November 1996	Opinion & Appeal	Trial/Stayed
1998	40	Richard McArthur	?	February 1998	Opinion & Appeal	Acquitted
		Clayton Johnson	March 1998	September 1998	Opinion & Appeal	Trial/Acquitted
1999	33	0	/	/	/	/
2000	33	0	/	/	/	/
2001	20	Michel Dumont	March 1995	October 2000	Opinion & Appeal	Acquitted
		Billy Taillefer	March 1999	October 2000	Appeal	Trial/Charge Withdrawn
2002	?	0	/	/	/	/

<sup>214</sup> This was Mr. Milgaard's second postconviction review application, the first application was made on December 28, 1988 and was declined February 27, 1991.

In 1988 the Minister of Justice, in *R. v. H. St. Cyr*, ordered an appeal and an acquittal was entered.<sup>215</sup> In 1987 Wilson Nepoose was sentenced to life imprisonment for murder. In June 1991, a s.690 application resulted in his case being referred to the Alberta Court of Appeal. A new trial was ordered but it did not proceed.<sup>216</sup>

In 1971 David Milgaard was convicted of second degree murder and sentenced to life imprisonment. Mr. Milgaard's second s.690 application was granted in 1991. The Governor-General-in-Council referred the matter to the Supreme Court of Canada. The Supreme court advised the Minister to quash the conviction and to direct a new trial under s.690(a). A new trial was ordered but the Attorney General of Saskatchewan decided not to re-prosecute and Mr. Milgaard was released from prison in 1992. DNA evidence eventually exonerated Mr. Milgaard.

On September 26, 1997 the Minister of Justice referred the *Gruenke* case to the Manitoba Court of Appeal, pursuant to s.690(c). The Minister asked the Court of Appeal to consider new evidence to determine whether such information would be admissible on appeal and if so, to treat the matter as if it were an appeal. The Court of Appeal did not allow the fresh evidence and dismissed the appeal.<sup>217</sup> The appeal to the Supreme Court of Canada was also dismissed.<sup>218</sup>

In November 1996 the Minister of Justice granted Mr. Kelly a remedy by referring his 1984 conviction for first degree murder to the Ontario Court of Appeal, under s. 690. The Minister asked the Ontario Court of Appeal to consider the new information presented by Mr. Kelly, to determine whether such information would be admissible on

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<sup>215</sup> *R. v. St. Cy*, [1988] A.J. No. 474.

<sup>216</sup> *R. v. Nepoose*, [1991] A.J. No. 220 (C.A.).

<sup>217</sup> *Reference re Gruenke*, [1998] M.J. No. 549 (C.A.).

<sup>218</sup> *Reference re Gruenke*, [2000] 1 S.C.R. 836.



appeal to the Court of Appeal and, if so, to treat the matter as if it were an appeal. The majority of the Court of Appeal concluded that none of the information presented would be admissible on appeal. Mr. Kelly's further request to the Minister to grant him a remedy, by either ordering a new trial under s. 690 or recommending to the Governor in Council that a question be referred to the Supreme Court of Canada under s. 53 of the *Supreme Court Act* was denied.<sup>219</sup>

In 1992 Mr. Wilfred Beaulieu was sentenced to three and one half years for two sexual assaults. Mr. Beaulieu made a s.690 application based on new information relating to the reliability of the testimony of one of the complainants, including medical records of the complainant. In 1996 the Minister granted Mr. Beaulieu an intervention and the Court was asked to determine whether or not the new information was admissible and if so whether a re-trial or a new appeal should be ordered. The Alberta Court of Appeal allowed the new information and ordered a new trial. The trial was not proceeded with as the charges were stayed.<sup>220</sup>

Mr. Richard McArthur was sentenced in 1986 to life imprisonment for murder. In 1998 Mr. McArthur's s.690 application was referred to the Alberta Court of Appeal for an opinion and if necessary an appeal. The Court allowed the fresh evidence and ultimately an acquittal was entered.<sup>221</sup>

In 1993 Mr. Clayton Johnson was found guilty of first degree murder of his wife and sentenced to life imprisonment. Mr. Johnson's s.690 applications was based, in part, on information suggesting that the victim's injuries were the result of falling down a

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<sup>219</sup> Canada, Department of Justice, *Decision on Application for Conviction Review – Patrick Kelly Case*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc\\_25066.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc_25066.html)>.

<sup>220</sup> AIDWC online: <<http://www.aidwyc.org/cases/item.0-past-cases>>.

<sup>221</sup> *R. v. McArthur*, [1999] A.J. No. 415 (C.A.).

flight of stairs by accident, and were not the result of an assault by himself. In 1998 the Minister referred Mr. Johnson's application to the Court of Appeal of Nova Scotia for its opinion and if necessary an appeal. The Nova Scotia Court of Appeal accepted the new information, overturned the original conviction and ordered a new trial. On February 18, 2002 an acquittal was entered.<sup>222</sup>

In January 1992 Mr. Michel Dumont was sentenced to 52 months in prison for sexual assault. In October 2000 Mr. Dumont's s.690 application was referred to the Québec Court of Appeal for its opinion on new information advanced by Mr. Dumont. The application was based on post-trial statements of the complainant; she recanted her statements six months after Mr. Dumont's conviction after she saw Dumont's lookalike. The Minister asked the Québec Court of Appeal for its opinion as to whether the statements would be admissible on appeal and, if necessary, to hear the matter as an appeal by Mr. Dumont. The Court of Appeal found the information admissible and ultimately Mr. Dumont was acquitted.<sup>223</sup>

In February 1991 Mr. Billy Taillefer was found guilty of first degree murder and sentenced to life imprisonment. On October 16, 2000 the Minister of Justice referred Mr. Billy Taillefer's s.690 application to the Court of Appeal for Quebec for hearing and determination as if it were an appeal by the appellant of his conviction for murder. On September 10, 2001, the Court of Appeal dismissed the Mr. Taillefer's appeal. The matter was appealed to the Supreme Court of Canada and a new trial was ordered.<sup>224</sup>

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<sup>222</sup> AIDWC, supra n.218.

<sup>223</sup> Canada, Department of Justice, *Minister Announces an Application for Mercy by Michel Dumont*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc\\_25702.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc_25702.html)>

<sup>224</sup> Canada, Department of Justice, *Minister Announces on Application for Mercy by Billy Taillefer*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc\\_25728.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2000/doc_25728.html)> and *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307.

The Quebec Superior Court dismissed the statement incriminating Mr. Taillefer and the Crown decided to withdraw the charges.<sup>225</sup>

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<sup>225</sup> Radio, Canada. ca. *No New Trial for Billy Taillefer*, online <http://www.radio-canada.ca/regions/abitiabi/2006/09/07/004-proces-taillefer.shtml>.

**TABLE 2: POSTCONVICTION REVIEW POST 2002 SECTION 696**

Fiscal Year	Applications Received	Applications Disposed by Minister	Interventions	Date Applied	Date Intervened	Type of Intervention	Result
2003	11 <sup>226</sup>	1	Steven Kaminski	1996	January 2003	Trial	Stayed
2004	29	6	0	/	/	/	/
2005	35	6	Rodney Cain Steven Truscott Darcy Bjorge Danny Wood James Driskell	May 1996 Nov. 2001 June 2000 July 1995 Oct. 2003	May 2004 Oct. 2004 Feb. 2005 Feb. 2005 March 2005	Trial Appeal Trial Appeal Trial	Acquitted <sup>227</sup> Acquitted Stayed Trial/Stayed Stayed
2006	39	1	Andre Tremblay	?	July 2005	Appeal	?
2007	18	2	Romeo Phillion	May 2003	Aug. 2006	Opinion & Appeal	Trial/Stay or Withdrawal
2008	32	4	William Mullins-Johnson L.G.P. Erin Walsh	Sept. 2005 1999 Dec. 2006	July 2007 Sept. 2007 Feb. 22, 2008	Appeal Appeal Appeal	Acquitted Trial/Stayed Acquitted
2009	25	1	Kyle Unger	2004	March 2009	Trial	Acquitted

<sup>226</sup> The data available from the Department of Justice indicate applications received only from November 28, 2002 to March 2003.

<sup>227</sup> Mr. Cain was acquitted of second degree murder but was found guilty of manslaughter.

On January 27, 2003 the Minister of Justice granted an intervention to Mr. Kaminski based on new evidence. A new trial was ordered for Mr. Kaminski's 1992 sexual assault conviction, however the trial did not proceed.<sup>228</sup>

On May 19, 2004 the Minister granted Mr. Cain's application for ministerial review, quashed his second degree murder conviction and ordered a new trial. In June 2006, a jury convicted Mr. Cain of manslaughter, and a judge sentenced him to one day in jail in addition to the ten years he had already served on the original murder conviction.<sup>229</sup>

On April 26, 1966 the Government of Canada referred Mr. Truscott's December 1959 murder conviction case to the Supreme Court of Canada and asked how they would have decided an appeal by Mr. Truscott. The Supreme Court ruled that it would have dismissed Truscott's appeal. On November 29, 2001, 42 years after his murder conviction, Mr. Truscott submitted an application for ministerial review. On October 28, 2004 the Minister of Justice concluded that a miscarriage of justice likely occurred in Mr. Truscott's case. Based on the recommendations of the Special Advisor Justice Benard Grenier, the Minister asked the Ontario Court of Appeal to hear the case as if it were an appeal.<sup>230</sup> The Ontario Court of Appeal found a miscarriage of justice and entered an acquittal.

On February 10, 2005 the Minister of Justice determined that there was a reasonable basis to conclude that a miscarriage of justice likely occurred in relation to Mr. Darcy Bjorge's March 1994 conviction for possession of stolen property. A new trial

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<sup>228</sup> Canada, Department of Justice, *Minister of Justice Orders New Trial for Steven Richard Kaminski*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2003/doc\\_30826.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2003/doc_30826.html).>

<sup>229</sup> Canada, Department of Justice, *Remedies Granted by the Minister*, online: <http://www.justice.gc.ca/eng/pi/ccr-rc/rep06-rap06/04.html>.

<sup>230</sup> *Remedies Granted by the Minister*.

was ordered and on February 25, 2005 the Alberta Crown entered a stay of proceedings.<sup>231</sup>

On February 15, 2005 the Minister of Justice found that there was a reasonable basis to conclude that a miscarriage of justice likely occurred in the case of Mr. Danny Wood, as the Crown had failed to disclose significant information. Mr. Wood's 1990 murder case was referred to the Alberta Court of Appeal to be heard as an appeal against conviction.<sup>232</sup> The Court of Appeal ruled that a new trial should be ordered.<sup>233</sup>

On March 3, 2005 the Minister of Justice granted Mr. Driskell's application for ministerial review and ordered a new trial after finding that a miscarriage of justice likely occurred. The Justice Minister concluded that a number of significant factors which included DNA evidence and the failure of the Crown and police to disclose significant information accounted for the remedy. The Justice Minister stated that these issues "so seriously prejudiced the fairness of the original trial and the validity of the original conviction that the only appropriate remedy is to quash the conviction and grant a new trial." On the same day, the murder charge against Driskell was stayed.<sup>234</sup> The federal government requested an inquiry into the miscarriage of justice and a report was released in January of 2007.<sup>235</sup>

On July 12, 2005 the Minister of Justice determined that "there was a reasonable basis to conclude that a miscarriage of justice likely occurred" in the 1984 murder conviction of Mr. Andre Tremblay. The Minister found that new and significant

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<sup>231</sup> *Remedies Granted by the Minister*, supra n.227.

<sup>232</sup> *Remedies Granted by the Minister*, supra n.227.

<sup>233</sup> *R. v. Wood*, [2007] A.B.C.A. 343.

<sup>234</sup> *Remedies Granted by the Minister*, supra n.227.

<sup>235</sup> *Report of the Commission of Inquiry Into Certain Aspect of the Trial and Conviction of James Driskell*, supra n.84.

information that was not disclosed at the time could have had an impact on the fairness of Mr. Tremblay's trial and conviction. As a result the Minister referred the case to the Quebec Court of Appeal as an appeal against conviction.<sup>236</sup>

On August 23, 2006 the Minister of Justice referred two legal questions regarding the 1972 murder conviction of Mr. Phillion to the Ontario Court of Appeal. The Minister requested the Court of Appeal's opinion on whether new material was admissible and whether recent expert reports were reliable, and to order an appeal, if so. The Appeal Court accepted the evidence and ordered a new trial. The Ontario Attorney General is now deciding whether to grant either a stay of charges or a withdrawal of charges.<sup>237</sup>

On July 17, 2007 the Minister referred the September 1994 murder conviction of William Mullins-Johnson to the Ontario Court of Appeal. Mr. Mullins-Johnson was granted bail pending the Minister's decision. The Minister concluded that there was new "significant evidence that casts serious doubt on the correctness of his conviction for murder."<sup>238</sup> On October 15, 2007 the Ontario Court of Appeal acquitted Mr. Mullins-Johnson of all charges.<sup>239</sup>

In September 2007 the Minister referred the December 1994 sexual assault conviction of L.G.P. to the Alberta court of Appeal for an opinion and if necessary an appeal. The Court of Appeal accepted the new evidence and ordered a new trial. The Crown stayed the charge.

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<sup>236</sup> Canada, Department of Justice, Minister of Justice *Finds Miscarriage of Justice: Refers Murder Case to the Quebec Court of Appeal*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc\\_31574.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31574.html)>.

<sup>237</sup> *Remedies Granted by the Minister*, supra n.227.

<sup>238</sup> Canada, Department of Justice, *Minister of Justice Refers Murder Case to the Ontario Court of Appeal*, online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2007/doc\\_32049.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2007/doc_32049.html)>

<sup>239</sup> AIDWC.

On February 22, 2008 the Minister of Justice referred the October 1975 murder conviction of Erin Michael Walsh to the New Brunswick Court of Appeal. The Minister found that Mr. Walsh “submitted relevant new evidence that might have affected the verdict at his trial and is therefore entitled to a remedy.”<sup>240</sup> On the same day, the New Brunswick Attorney General found that a miscarriage had occurred. The New Brunswick Court of Appeal reviewed the case and overturned Mr. Walsh’s conviction of second degree murder.<sup>241</sup>

On March 2009 the Minister ordered a new trial for Mr. Unger. Mr. Unger was convicted of first-degree murder in June 1990. After a Forensic Evidence Review Committee called into question hair comparison evidence used at Mr. Unger’s trial, the Minister found a reasonable basis to conclude a miscarriage of justice.

## **5.4 REVIEW**

In order to have a more complete understanding of the postconviction review process in general and to make a comparative analysis of postconviction review both before and after the legislative changes I have compiled information on how many applications each year are submitted to the Department of Justice, how many interventions were granted, what types of interventions were granted, what the result was, how long it took before an intervention was granted and the disposal rate of applications by the Department of Justice. In order to accurately assess and compare the results I have converted the numbers into percentages.

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<sup>240</sup> Canada, Department of Justice, *Minister of Justice Refers Murder Conviction to the New Brunswick Court of Appeal*, online: <[http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-  
rap09/p4.html](http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-<br/>rap09/p4.html)>.

<sup>241</sup> AIDWC.



#### **5.4.1 Number of Applications**

I was unable to determine the number of applications received by the Department of Justice for the years 1992 to 1994 inclusive, and for 2002 in Table 1. However, in 1991 it was estimated that the Department received about thirty applications per year.<sup>242</sup> If it were to be assumed that the Department received thirty applications for each of the four years for which the numbers are unknown, the total applications received under Table 1 would be 544. Based on the total number of applications made and the 17 years assessed, the average number of applications each year was 32.

For Table 2, I was unable to determine the total number of applications received in 2003 as the department only had data from November 28, 2002 to March 2003. Since eleven applications were received in this time period which was one third of the year, I multiplied this amount by three for an estimated total of 33 applications for the 2003 fiscal year. Based on the preceding estimate the total number of applications received during the seven year time frame is 208 with an average of 35 applications received each year. In total both tables cover a 23 year time frame. During this time period there were 752 applications made with an average of almost 33 applications each year.

#### **5.4.2 Number of Interventions**

As Table 1 illustrates there were ten interventions by the Minister of Justice during the seventeen year period. Taking into consideration the total number of applications and the total number of interventions, the Minister of Justice intervened in less than 2% of all the applications and made an intervention on average, almost every two years.

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<sup>242</sup> Jim Middlemiss, “Guilty Until Proven Innocent” (November 1991) *Can. Lawyer* at 20-25.

As Table 2 illustrates, there were twelve interventions by the Minister of Justice during the seven year period. The Minister intervened in less than 6% of all the applications, and made, on average, two interventions every year.

If we look at the information from both tables it reveals that during the 23 year time period there were 22 interventions granted. Based on the 752 applications submitted during this time frame, the Minister intervened in less than 3% of all applications and made on average one intervention each year.

### **5.4.3 The Type of Interventions**

#### **Trial**

According to Table 1, of the ten interventions granted during this seventeen year time frame, 10% of all interventions consisted of a trial being ordered pursuant to s.690(a). Prior to this trial being ordered, the last time a new trial was ordered was in 1962.<sup>243</sup> The applicant ultimately was acquitted of the charges.

According to Table 2, of the twelve interventions, the Minister of Justice ordered five new trials pursuant to s.696.3(3)(a)(i), 40% of all interventions. Of the five trials being ordered only one case actually went to trial.<sup>244</sup> The four cases that did not go to trial resulted in an acquittal or a stay of proceedings being entered directly; however, the case that went to trial ultimately led to an acquittal of the original charge.

During the 23 year period covered by both tables six of the 22 interventions, 27%, were requests for a trial.

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<sup>243</sup> AIDWC.

<sup>244</sup> Rodney Cain.

## Appeal

According to Table 1 three, 30% of the interventions, resulted in an appeal being ordered pursuant to s.690(b). Two of the applicants were eventually acquitted and one ultimately had the charges withdrawn.

According to Table 2, in six of the twelve, 50% of the interventions, the Minister of Justice ordered were appeals pursuant to s.696.3(3)(a)(ii). Of the six appeals three resulted in an acquittal, one resulted in a stay of charges, one is still waiting for the appeal<sup>245</sup> and in one of the appeals a new trial was ordered. I was unable to find further information with respect to the trial; it is assumed that the trial was not proceeded with and it is likely that a stay of proceedings was entered.<sup>246</sup> Therefore, on the information available, three of the appeals lead to the acquittal, two to stays, and one is yet to be determined.

For the total 23 year period assessed, the Minister of Justice requested an appeal for 9 of the 22 interventions, 41% of all interventions resulted in an appeal.

## Opinion and Appeal

According to Table 1 six cases, 60% of all interventions, were sent to the Court of Appeal for an opinion pursuant to s.690(c) followed by an appeal, s.690(b). Two of the applicants had their appeal dismissed, the Courts of Appeal in the *Gruenke* case and in the *Kelly* case did not allow the admission of fresh evidence and therefore an appeal was not proceeded with. Of the four successful appeals, two resulted in straight

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<sup>245</sup> Andre Tremblay.

<sup>246</sup> Danny Wood.

acquittals; and for the other two, the Court of Appeal ordered a new trial which was not proceeded with and an acquittal and stay of proceedings was each entered.<sup>247</sup>

According to Table 2, of the twelve interventions, the Minister of Justice ordered one opinion, 10%, pursuant to s.696.3(2) followed by an appeal pursuant to s.696.3(3)(a)(ii). Ultimately, the applicant was granted a new trial. The Attorney General of Ontario is currently assessing whether a stay or withdrawal of charges should be entered.

During the 23 year period assessed, the Minister of Justice requested an opinion and, if necessary, an appeal for seven of the 22 interventions, so in 32% of all interventions there was a request for an opinion and appeal.

#### **5.4.4 Length of Time Before Intervention**

Since I am assessing the postconviction review process it is imperative to determine how long applicants had to wait until they had their applications decided. Although the length of time those wrongfully convicted may wait from the time they are incarcerated can be significant (and thus deserves recognition) the total length of time incarcerated does not reflect on the postconviction process, but rather, on the system as a whole. Therefore, to fairly judge only the conviction review process itself, I confined my research to when the applicant initially applied for ministerial review.

I was able to determine the application dates and intervention dates for only five out of the ten interventions in Table 1. They are as follows: *Milgaard* 9 months<sup>248</sup>, *Kelly* 23 months, *Beaulieu* 28 months, *Johnson* 7 months, and *Dumont* 69 months. Based on

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<sup>247</sup> Clayton Johnson.

<sup>248</sup> It should be noted that Mr. Milgaard's first application took 26 months before it was denied.

the preceding time lines, applicants had to wait a little over two years, on average, from the date they applied to the date they received an intervention.

I was able to discover information on application dates and intervention dates for all but one of the applicants for Table 2. They are as follows: *Kaminski* 84 months, *Cain* 96 months, *Truscott* 35 months, *Bjorge* 56 months, *Wood* 115 months, *Driskell* 17 months, *Phillion* 39 months, *Mullins-Johnson* 22 months, L.G.P. 96 months, *Walsh* 14 months and *Unger* 60 months. On average, from the time he applied for to the time he received an intervention, each applicant waited almost 5 years.

Cases that were still ongoing from the previous s.690 process may be seen as increasing the wait time after the 2002 legislative changes. So, for example, if the previous process was less efficient and a backlog of work accrued, the overflow of applications into the new process may be seen as inflating the time applicants had to wait. If we do not include applicants who applied prior to the legislative changes and included only those applicants who applied after the 2002 legislative changes, the assessment of the new process can be judged on its own merits. Taking into consideration only those applicants who applied after the post-2002 legislative changes the wait times are as follows: *Driskell* 17 months, *Phillion* 39 months, *Mullins-Johnson* 22 months, *Walsh* 14 months and *Unger* 60 months. The average wait time for an applicant to receive an intervention comes out at over two and one half years.

#### **5.4.5 Department Workload**

Focusing only on the years between 1996 and 2002 in Table 1, the Minister received 243 applications during this seven year time frame and on average, received

35 applications each year.<sup>249</sup> According to the research of the Honourable Justice Howden, the Minister disposed of 52 applications during the calendar years of 1995 to 2001.<sup>250</sup> Therefore, the Minister disposed of 21% of the total number of applications during this seven year time frame.

The Department of Justice has stated that the number of applications submitted does not reflect the number of active applications as many applications are abandoned and do not reach the active stage. Some applications are screened out,<sup>251</sup> some never make it to the investigation stage,<sup>252</sup> and some applications are abandoned.<sup>253</sup> According to the Department, the average number of completed applications received by the department prior to 2002 was only ten to fifteen each year.<sup>254</sup> Based on these figures, there were 70 to 105 active applications between 1995 and 2001. The disposition of 52 applications in the same time frame means that the Minister disposed of 49% to 74% of the active applications as opposed to the 21% previously assessed.

According to the information available for Table 2 there were an estimated 208 applications received during this seven year time frame or an average of 30 applications each year. According to the 2009 Annual Report the Minister disposed of 22

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<sup>249</sup> The fiscal year and calendar do not align exactly. However, the fiscal year in 1995 starts three months later than the calendar year, and three months of the 2002 year is included in the 2001 fiscal year.

<sup>250</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n. 135 at 18.

<sup>251</sup> Meaning that the applicant did not raise any new matters of significance, raised a civil matter, or their avenues of appeal have not been exhausted.

<sup>252</sup> New matters raised by the applicant were not such that there might be a reasonable basis to conclude that a miscarriage of justice likely occurred.

<sup>253</sup> Often the Department would request further information and if not forthcoming in a certain time frame the application would be considered abandoned.

<sup>254</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135 at 18.

applications during this time period<sup>255</sup>. Therefore, the Minister disposed of less than 11% of the total number of applications. However, again, the number of actual applications submitted may not reflect the number of “active” applications. The Department of Justice did not provide information for the number of active files each year. The Department records the total number of “active” files in that fiscal year, which includes active files from previous years that have not been disposed. Therefore, the recorded number of “active applications” for each year is higher than the recorded number of applications received in that same year. However, the Department statistics indicate that there were 61 files closed between 2003 and 2009 because there was no basis for investigation.<sup>256</sup> Therefore, of the 208 files received, if 61 were closed, 147 files would be considered “active”. If the disposition rate were calculated on the “active applications”, the disposition rate would be 15%.

## **5.5 CONCLUSION**

As noted in the Introduction, I have collected s.690 cases and material from as many sources as possible: media reports, legal databases, reported cases and publications of wrongfully convicted individuals and organizations. The information available does not provide an in-depth review of the s.690 process with respect to the content of the applications and the grounds upon which applications are accepted or rejected. However, the information that is available and assessed does provide an overview of the efficacy of the process.

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<sup>255</sup> Canada, Department of Justice, *Annual Report 2009 Minister of Justice*, online: <[www.justice.gc.ca/eng/pi/ccr-rc/rep09-rap09/p5.html#statisical\\_information](http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-rap09/p5.html#statisical_information)> The Minister referred 12 cases to court and dismissed 10 for a total of 22 cases.

<sup>256</sup> *Annual Report 2009 Minister of Justice*.

The statistics reveal that, on average, a similar number of applicants (32 and 35 respectively) applied for postconviction review both before and after the legislated changes. A slightly greater number of applicants received an intervention after the 2002 legislative changes (less than 6%) than previously (less than 2%). Prior to the legislative changes of 2002, the reference option preferred by the Minister of Justice was to ask the Court of Appeal for its opinion; and, depending upon the court's response, the Court would then hear the case as if it were an appeal (60%), followed by a request for an appeal, (30%), followed by a trial (10%). Since the legislative changes of 2002 the reference option preferred by the Minister of Justice has been to request an appeal (50%), followed by a trial (40%), followed by an opinion and appeal (10%). Applicants waited on average less time for an intervention before the legislative changes. Applicants had to wait more than two years before 2002 and after 2002 either over two and a half years or almost five years, depending on when they applied. On average, the Department's disposition rate on average decreased after the legislative changes from 49-74% disposition to 15% disposition.



## **CHAPTER 6 - MEASURING EFFECTIVENESS**

### **6.1 INTRODUCTION**

As set out in Chapter 4 s.690, the postconviction review legislation, which existed before 2002, was criticized for lacking independence, lacking openness, lacking effectiveness and lacking accessibility. The Department stated that the 2002 legislative changes would make the process run more smoothly and efficiently.

As outlined in Chapter 4, some changes instituted in 2002 could be seen as making a positive contribution to the process and improving on some of the four areas under criticism. For example, the appointing of a Special Advisor could contribute some independence to the process. The granting of investigatory powers could help with the effectiveness of the system. These measures made limited changes in the two areas of independence and openness which could not be directly assessed in my quantitative statistical analysis. However, the legislative changes left intact some fundamental issues which were problematic.

The criticisms of inordinate delays and less than desirable results for those deemed wrongfully convicted can be evaluated. The Department of Justice had instituted changes to make the system more efficient, but it is not known whether the improvements actually made such a difference. In this chapter I will take the statistics from Chapter Five and assess whether the postconviction review process has improved since the 2002 legislated changes in the two areas of efficiency and effectiveness. Firstly, I will look at the number of applications received. The number of applications received by the Department of Justice will indicate potentially how many wrongful

convictions exist in Canada. This number will also indicate the level of confidence in the system that addresses wrongful convictions. Secondly, I will look at the number of interventions granted. The number of interventions granted contrasted with the number of assessed wrongful conviction cases will give a picture of how effective the system is functioning. Thirdly, the type of interventions granted will also be reviewed. There was criticism that the postconviction review process did not provide a just result for applicants. Although the decisions of the Courts of Appeal that determine postconviction review cases have been criticized for not giving favorable results to applicants, this may not be seen as a criticism of the postconviction review process itself. However, the direction of the Minister of Justice in framing the result and any potential questions for the Courts of Appeal directing their process can be evaluated. The Minister of Justice has the option of imposing a trial, an appeal, or an opinion and appeal; each option has advantages and disadvantages that will be assessed. Fourthly, in the next section I will address the length of time it takes for an intervention as this is a very direct measurement of both the efficiency and effectiveness of the system. Fifthly and finally, the departmental disposal rate will be reviewed. The rate at which the Department can review, investigate and dispose of cases is also a direct measurement of how efficiently the system is running. In each of the five categories above, the postconviction review will be compared -- prior to and since the legislative changes -- to determine if the postconviction review process is now running more efficiently and effectively than before the 2002 legislation.

## **6.2 NUMBER OF APPLICATIONS**

The average number of applications received per year during the total 23 year time frame under review was 33. The average number of annual applications received before 2002 was 32 and after 2002 was 35. Therefore, there was a slight increase in the average number of applications received after the 2002 legislative changes.

The number of applications received may reflect upon the perceived effectiveness of the system. If potential applicants do not believe the system for postconviction review is viable they may not take the time to apply. If they believe in the system they will apply. Arguably, therefore, an increase in the number of applications could be viewed as increased confidence in the system. Although there was a slight increase in the number of applications, the actual increase was very low, in fact, not statistical significant. Therefore it cannot be said that such an increase represents an increase in the confidence of the system.

Considering the low number of applications each year, both before and after 2002, perhaps we need to reassess the question. Does the average number of 33 applications each year represent an accurate indication of the amount of wrongful conviction cases? Alternatively, does the number represent an inefficiency in the system or a lack of confidence in the system?

Unfortunately, the answer eludes us; there is no way of knowing for certain the number of wrongful convictions that occur. A number of studies have been conducted in the United States to determine the percentage of wrongful convictions. Some studies have estimated that 7,500 to 10,000 innocent people are sent to prison each year.<sup>257</sup>

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<sup>257</sup> Ronal Huff et al., *Convicted but Innocent: Wrongful Conviction and Public Policy*,

Other studies have suggested that up to 14,000 innocent people are convicted each year.<sup>258</sup> It has been estimated that if the criminal justice system in the US were accurate 99.5% of the time, a .5% inaccuracy rate would result in approximately 10,000 erroneous convictions each year.<sup>259</sup>

Although many studies have been conducted that attempt to calculate the extent of wrongful convictions in the United States such studies have not been conducted in Canada. There are far fewer convictions and cases of wrongful convictions in Canada than in the United States. The smaller data set available in Canada may make the viability of estimating and extrapolating the rate of wrongful convictions more difficult.

As we cannot equate the number of applications with the number of estimated wrongful convictions, it may be more prudent to look at another jurisdiction that has a conviction review process like ours and assess the number of applications it receives. As I will discuss in Chapter 7, the Criminal Cases Review Commission (CCRC) is a more independent postconviction review system in the United Kingdom. According to the CCRC's annual reports they have received over 11,000 applications during the 12 years they have been in operation.<sup>260</sup> Therefore, on average they have received over 917 cases for each year of operation. Although Canada has only about one-half of the population of the United Kingdom, it does have a similar criminal justice tradition. In this light, even though we are not able to compare the two systems in a direct way, the

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(California: Sage Publications, 1996) at 65 and Ronald Huff, "Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address" (2002) 40 *Criminology* 1 at 2.

<sup>258</sup> Ayre Rattner, "Convicted but Innocent" (1988) 12 *Law & Hum Behav.* 283 at 285.

<sup>259</sup> "Innocentrism" *supra* n.36.

<sup>260</sup> United Kingdom, Criminal Cases Review Commission (CCRC) Annual Reports and Accounts 2008/09, online:

<[http://www.ccr.gov.uk/CCRC\\_Uploads/ANNUAL\\_REPORT\\_AND\\_ACCOUNTS\\_2008\\_9.pdf](http://www.ccr.gov.uk/CCRC_Uploads/ANNUAL_REPORT_AND_ACCOUNTS_2008_9.pdf)>.

average number of applications (35) received each year by the Department of Justice in Canada seems inordinately low.

The low numbers of applications may be in part explained by the onerous application requirements. As previously outlined, applicants are expected to determine and unearth the grounds necessary to justify a miscarriage of justice. If applicants are unable to provide all the forms or supporting documents required by the Department of Justice their application can be dismissed and never submitted to the Minister of Justice. Therefore, the low numbers of applications in Canada could be interpreted in two ways: it may reflect a truly low number of wrongful conviction cases occurring in Canada or it may speak of a system functioning ineffectually.

### **6.3 NUMBER OF INTERVENTIONS**

During the entire 23 year time period under review there were 22 interventions granted. The Minister intervened in less than 3% of the applications and made on average one intervention every year. Prior to 2002, the Minister intervened in less than 2% of all the applications and made, on average, an intervention every two years. After the 2002 legislative changes, the Minister intervened in less than 6% of all the applications and made, on average, two interventions each year. Tables 1 and 2 reveal that the number of interventions by the Minister increased after 2002. According to the Department of Justice, the increase in interventions is explained by improvements to the postconviction review process. Such improvements include: the allocation of additional resources to the CCRG to handle the anticipated increase in applications; the creation of a priority system in which applications are immediately screened and assigned priority according to their apparent merits and to whether the applicant is still in custody; and the

ability for others (as opposed to only the Minister of Justice) to decide whether or not an application should proceed to an investigation.<sup>261</sup>

The increase in interventions is an improvement in the system. The greater the number of interventions, the more wrongful convictions are identified and remedied. There is no doubt that intervening on an average of two cases each year is an improvement on intervening on an average of only one case every two years. However, if the actual number of wrongful convictions were to be more than two each year (as it may likely be), then the intervention rate is still too low, suggesting that the system for detecting wrongful conviction is still running ineffectively and inefficiently. As there is no way to conclusively determine the true number of wrongful convictions in Canada assessing the process by comparison with a similar process can reveal potential strengths and weaknesses.

According to the annual reports of the CCRC in the twelve years since the Commission started more than 420 cases have been referred to the appeal courts at an average rate of 35 a year. And most of those, around 70% resulted in convictions being quashed or sentences varied.<sup>262</sup> Since the creation of the CCRC there has been a significant increase in referrals of wrongful convictions.<sup>263</sup> Prior to the creation of the CCRC only approximately five out of 700 to 800 cases each year were being referred to the Court of Appeal.<sup>264</sup> The increase in interventions in the United Kingdom reflects an improvement of the system that is meant to detect and correct wrongful convictions.

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<sup>261</sup> *Applying for a Conviction Review*, supra n.63.

<sup>262</sup> CCRC Annual Reports and Accounts 2008/09, supra n.258.

<sup>263</sup> CCRC Annual Reports and Accounts 2008/09, supra n.258.

<sup>264</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n. 135 at 17.

Again, the number of interventions granted in Canada, on average two each year is comparatively low to the numbers granted by the CCRC, on average 35 each year. However, the results of the CCRC cannot be directly compared to the situation in Canada. As previously stated, the size of the population in United Kingdom is larger and the standard of review for an intervention is different than ours in Canada. In the United Kingdom, the Commission may refer a case to the appeal courts if it is believed that there is a real possibility that the conviction would be quashed or a sentence varied.<sup>265</sup> The standard of review is lower for the CCRC than it is for the Department of Justice. As previously stated, the Minister of Justice is bound to the higher standard of determining if a miscarriage of justice likely occurred. This higher standard makes it much more difficult for applicants to seek an appellate review. Due to the higher threshold applicants have to meet, lower numbers of interventions will be expected to continue regardless of any legislative changes.

#### **6.4 TYPE OF INTERVENTION**

From the point of view of the applicant, the type of intervention imposed reflects on the efficiency of the system. For example, if the Minister of Justice were to decide that a new trial should be ordered, the applicant would be returned to the trial court in the same position as anyone else accused of a crime. Therefore, the applicant would have the full benefit of the presumption of innocence; the Crown would have the burden of proving the elements of the offence beyond a reasonable doubt; and full appeal rights would be available.

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<sup>265</sup> CCRC Annual Reports and Accounts 2008/09, supra n.258.

If, on the other hand, the Minister of Justice were to decide that an appeal should be ordered, the applicant's conviction would stand and he or she would have the burden of convincing the Court of Appeal of the wrongful nature of their original conviction. The applicant would also be subject to the same rules of procedures governing ordinary appeals under s.686 of the *Criminal Code*. The latter result places the applicant at a disadvantage, as he or she is then responsible for the burden of convincing the Court of Appeal of the wrongful nature of the original conviction including the time, energy, money and effort the appeal will demand.

It could be argued that sending the matter to trial may place the burden of proof on the Crown instead of the applicant, but will still result in a burden on the applicant with respect to the expenditure of time, energy, and money. However, research indicates that when a new trial is ordered the applicant rarely has to proceed with the actual trial. Generally speaking, when a new trial is ordered the trial does not proceed; the applicant is either acquitted or the charges are stayed or withdrawn. Therefore, when a new trial is ordered the applicant often does not need to go through the court process at all, or to prove or defend his case. However, there appears to be no system in place to aid the Minister in deciding which of the two interventions should be granted. If there is such a system, it has not been made public. Therefore, the criteria dictating a trial intervention or an appeal intervention remain a mystery. If no distinctions exist, an applicant would be most efficiently served by receiving a decision for a new trial.

During the 23 year period under review only six of the 22 interventions resulted in the ordering of a new trial. The remaining sixteen applicants had to go through the appeal process and prove their case to the appellate judges. Of the ten interventions



granted before 2002 only one (10%) was for a trial. Of the twelve interventions granted after 2002, five (40%) were for a new trial. How do we interpret these findings?

The increase in trials being granted may be seen as an improvement of the system. However, it should be noted that of the five trials ordered after the legislative changes, four were ordered by the same Minister of Justice, the Honourable Mr. Irwin Cotler. Since the year 2006 there have been two subsequent Ministers of Justice and only one new trial has been ordered. The significant number of trial interventions ordered by one particular Minister might indicate that the process is more personal than it is objective. Perhaps Mr. Cotler preferred the trial process as an intervention option to the appeal process. Although applicants benefitted by this situation, the fact that such a process could be impacted by personal preferences is not conducive to an efficient system. Perhaps there were valid, objective reasons for choosing a trial alternative over the appellate route; however, again this information is not made public.

### ***6.5 LENGTH OF TIME BEFORE INTERVENTION***

Another gauge of procedural effectiveness is efficiency. How long does an applicant have to wait before an intervention? Has the legislation decreased the wait time and increased efficiency in the postconviction review process?

Based on the information available, prior to 2002 an applicant had to wait on average two years before an intervention took place. The length of time an applicant had to wait for an intervention after the 2002 changes was, on average, almost five years. Therefore, applicants after the post-2002 legislative changes had to wait more than double the wait time than those pre-2002.

According to the CCRC Annual Reports and Accounts the aim of the CCRC is to “investigate cases as quickly as possible and with thoroughness and care.”<sup>266</sup> According to the 2009 Annual Report the Commission’s performance has improved dramatically. For example, in 2005 an applicant with a complex case would have to wait twenty months for a review. However, that same applicant in 2009 would wait just twenty weeks.<sup>267</sup>

It is interesting to note that the most complicated cases in the United Kingdom are being reviewed in twenty weeks whereas in Canada, all cases, on average, are taking significantly longer. It takes almost 5 years to receive an intervention, and some cases have taken considerably longer to resolve. For example, after the legislative changes one applicant had to wait nine and half years for an intervention while others had to wait over seven years. Applicants should be provided with optimum service and should expect to have their applications resolved in a reasonable time frame. A wait time of five years is not optimal or reasonable.

It could be argued that the backlog of cases existing prior to the 2002 legislated changes inflated the figures. Assessing only those cases that applied for review after the changes may lead to a different result. If we take into consideration the date applicants applied for intervention and look at only those cases applied for after the legislative changes, the results would show that applicants had to wait over two and a half years from the date in which they applied for an intervention until an intervention took place. Although two and a half years is an improvement over the potential five years that many applicants had to wait, it is still a significant amount of time and more

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<sup>266</sup> United Kingdom, CCRC Annual Reports and Account 2007/08, online: <[http://www.crc.gov.uk/CCRC\\_Uploads/Annual%20Report%202007%20-%202008.PDF](http://www.crc.gov.uk/CCRC_Uploads/Annual%20Report%202007%20-%202008.PDF)>.

<sup>267</sup> CCRC Annual Reports and Accounts 2008/09, supra n.258.

than the pre-2002 average wait time. No matter how we look at it, it cannot be termed an improvement of the system. Further, the numbers assessed for the CCRC included the huge backlog of cases the commission had to deal with in addition to the new cases submitted each year.

In either case the either two and a half year wait or five year wait is a significant amount of time for someone who is wrongfully convicted and usually suffering the pains of incarceration. This wait time is in addition to the amount of time that someone has gone through the trial process, the appellate process and served a significant amount of time incarcerated. The time in which an applicant is allowed to make an application and when they have the ability to make an application can be a matter of years, to then have to wait an additional five years to rectify a wrongful conviction is not efficient.

## ***6.6 THE DISPOSAL RATE***

With respect to issues of workload and efficiency, the changes did not seem to improve the situation. Prior to the 2002 legislative changes the Department of Justice disposed of 21% of all its files, or 49%-79% of its active files. After the 2002 legislative changes the Department disposed of 11% of all its files, or 15% of its active files. Therefore, the disposal rate decreased after the legislative changes. Whether you look at the total files or the active files disposed, the Department's disposal rate dropped drastically after the legislative changes. Therefore, the legislative changes did not improve the efficiency of the system; in fact, it seems that since the changes the system functions far less efficiently.

This decrease in efficiency must be addressed. If something is not done to rectify the situation it will only compound and increase the wait time for applicants. This is

especially true if the Department's new investigatory process creates longer time lines for applications. If the Department continues to close fewer cases than it receives, the number of cases waiting to be reviewed will increase and the waiting time for applicants will also and accordingly increase.

## **6.7 CONCLUSION**

It seems that the changes to the postconviction review legislation have allowed for little, if any improvement in the system. There is a slight increase in the number of applicants who apply for postconviction review. There is an increase in the overall number of interventions granted and an increase in the number of trial interventions being granted. The numbers suggest that applicants will wait a longer time for an intervention. However, this wait time will, more than likely, increase even more due to the inefficiency of the Departmental workload disposition. The increase in interventions and trial interventions may indicate a greater openness on the parts of the Department and the Minister in scrutinizing wrongful conviction cases. However, the total number of cases assessed is still small and the increase here is only slight. The actual number of applications received, the improvements in the length of time applicants must wait for an intervention, and the number of interventions granted are still very low, relatively speaking. Therefore, it must be said that the system either did not improve or improved only ever-so-slightly. It is still vastly deficient.

In summation, the statistics reveal that the 2002 legislative changes did not make the process run more effectively, efficiently, fairly or smoothly. The number of applications received and the number of interventions granted increased slightly. However, the low numbers in both these areas continue to demonstrate a system that,

arguably, is not running either effectively or fairly. The legislative changes did not positively affect the length of time applicants had to wait for their interventions. With respect to issues of workload and efficiency, the changes did not seem to improve the situation. The workload disposal rate of the Department of Justice is very low and does not represent an efficient system providing justice for those seeking postconviction reviews.

## **CHAPTER 7 - ALTERNATIVES**

### ***7.1 INTRODUCTION***

The problems of the postconviction review process are still apparent. In order to run a satisfactory postconviction review system the process must move independently, openly, effectively, and provide adequate accessibility at all stages. However, the postconviction review process still does not function independently. It remains under the umbrella of the Department of Justice, and in the control of the Minister of Justice. It still does not yet function in a truly open manner. Applications and the decision process determining their success or failure should be disclosed to applicants. In other words, criteria and ensuing decisions should be made public so that these areas can be reviewed and assessed. It continues to lack a high degree of effectiveness, and it continues to have numerous accessibility concerns. With regard to the areas of both effectiveness and accessibility, the onus of investigating claims should not be on applicants. The postconviction review body should be in a position to help applicants surmount any hurdles they may encounter. The review body needs to have the ability to be proactive in investigating claims, obtaining documents and interviewing witnesses. Such measures would both increase the number of applications received and reduce the long delays that exist in the present system. A review body capable of implementing positive changes affecting the efficiency and accessibility of the system, along with changes allowing for more openness and independence in the system would go far to improving upon the current postconviction review process.

Previously, the federal government had canvassed a number of alternatives to address the problems in the existing postconviction process. The alternatives included the following: eliminate the postconviction review process and broaden the powers of the courts of appeal; modify the existing system to address the problems; or create an independent review body. The modification of the existing system has not seemed able to rectify the problems of the postconviction process. Each option will be reviewed and assessed with particular reference to the criticisms that plagued the previous system and which continue to plague the current system. In this way we may better assess if another alternative would be more suitable.

Before delving into possible reforms and alternatives to the postconviction review process, it should be noted that the first issue needing to be addressed is the improvement of the criminal justice system, in order to prevent wrongful convictions from occurring in the first place. We are now more informed than ever on the causes of wrongful convictions, and we know that implementing strategies to help prevent them is the best defence. There has been a realization of those working in the criminal justice system that change is necessary. For example, in 2004 the FPT Heads of Prosecutions Committee Working Group created a *Report on the Prevention of Miscarriages of Justice* which described proactive policies to guard against future miscarriages of justice.<sup>268</sup> The report makes over 100 recommendations, including:

- better practices to assist in deterring ‘tunnel vision’;
- better standards and practices for police and prosecutors relating to eyewitness identification and testimony, confessions, in-custody informers, DNA evidence, forensic evidence and expert testimony;
- improved education for all players on the causes of wrongful convictions;
- using DNA data bank provisions<sup>28</sup> to their fullest potential;

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<sup>268</sup> Report on the Prevention of Miscarriages of Justice, 2004, online: <http://www.justice.gc.ca/en/dept/pub/hop/>.

- ongoing training of prosecutors on the use of experts;
- ongoing education for all players on all of the areas that may contribute to wrongful convictions; and
- the establishment of a resource centre on the prevention of wrongful convictions.<sup>269</sup>

Unfortunately, these recommendations are not mandatory and therefore left to the discretion of local authorities and offices. However, there have been some preventative strategies put forward that have been implemented. For example, due to the Thomas Sophonow Inquiry the Manitoba Department of Justice along with many other provinces, instituted policies with respect to the use of jailhouse informants.<sup>270</sup> However, other recommendations from other inquiries which have not been adopted could go along way to preventing wrongful convictions. For example the Sophonow Commission created a report that detailed the errors that led to the wrongful conviction and also made recommendations for reform. The Commission's report recommended rules requiring the videotaping of all police interrogations of suspects to guard against coerced or disputed confessions. It also recommended improved eyewitness identification procedures, along with jury instructions on the frailty of eyewitness identification evidence. It also recommended severe restrictions on the use of jailhouse informants.<sup>271</sup> Such inquiries and reports reiterate that the emphasis should clearly be on the prevention of wrongful convictions before they occur. However, we also know that human error will always be a factor in such situation; and an effective mechanism to rectify wrongful convictions will always be needed.

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<sup>269</sup> Report on the Prevention of Miscarriages of Justice, 2004, supra n.266.

<sup>270</sup> Richard J. Wolson, Aaron M. London, "The Structure, Operation, and Impact of Wrongful Conviction Inquiries: The Sophonow Inquiry As An Example of the Canadian Experience" (Summer, 2004) 52 Drake L. Rev. 677.

<sup>271</sup> Report of The Inquiry Regarding Thomas Sophonow (Manitoba, 2001).



## **7.2 BROADEN POWERS OF COURT OF APPEAL**

The courts of appeal are the first mechanism after trial in which to rectify wrongful convictions. And it is only after all appeal options have been exhausted that one may apply for a postconviction review. Therefore, it has been suggested that, in lieu of a postconviction review system, the appellate courts could be reformed in such ways that miscarriages of justice could be identified and addressed.

As previously outlined in Chapter 3, the *Criminal Code* allows the court of appeal to overturn criminal convictions on a number of grounds. These grounds include “a miscarriage of justice.” Appeal courts also have the ability to hear “fresh evidence” under s.683(1).<sup>272</sup> The Supreme Court of Canada in *Palmer v. the Queen*, outlined the principles with respect to fresh evidence.<sup>273</sup> Were our appellate courts to be solely responsible for addressing wrongful convictions, we would have the same system that is currently in place in the United States. Accordingly, looking at their system may provide us with insight as to using only appellate courts to rectify wrongful convictions.

The U.S. system provides a defendant with a host of appellate review opportunities. Every federal defendant has the right for one direct appeal, a second opportunity for discretionary direct review and another opportunity for discretionary collateral review.<sup>274</sup> Every state defendant has the same rights of review as federal defendants; however, he or she also has the opportunity for habeas corpus review by federal courts.<sup>275</sup> Although defendants in the U.S. have access to an extensive

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<sup>272</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.683(1).

<sup>273</sup> *R. v. Palmer and Palmer*, [1979] 1 S.C.R. 759.

<sup>274</sup> Lissa Griffin, “The Correction of Wrongful Convictions: A Comparative Perspective” (2001) 16 *Am U. Int’l L. Rev.* 1241 at 1246.

<sup>275</sup> Griffin, “The Correction of Wrongful Convictions” *supra*. n.272 at 1246.

appellate system, the appellate review is limited to the correction of legal and procedural errors as opposed to factual errors. Therefore, the ability of the appellate court to correct wrongful convictions is extremely limited.<sup>276</sup>

Not only is the U.S. appellate review restricted to legal and procedural errors, these claims are limited. For example, appellate courts have a very limited ability to hear new evidence. This severely limits claims of wrongful convictions. Further, even if a defendant is able to show that a procedural error exists the courts frequently invoke doctrines such as waiver and harmless error to avoid reversals.<sup>277</sup> The U.S. federal and state courts have a procedure for granting a new trial based on new evidence, but it is difficult to obtain relief on this basis due to the restrictive nature and onerous time limitations. Most states often bar such motions unless they are brought forward within a year or two, (or even as little as twenty-one days) after conviction.<sup>278</sup> Even if an appellant is within the time limit it is difficult to obtain relief.

For example, evidence that is merely unavailable during trial, but which was in existence at that time, is not sufficient to support a motion for a new trial. Impeachment evidence, regardless of its strength, is not sufficient to warrant relief. Rather, the newly discovered evidence must relate to one of the substantive elements of the charged crime.<sup>279</sup>

On these points, the U.S. appellate system does not appear to be a viable one in dealing with wrongful convictions.

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<sup>276</sup> Griffin, “The Correction of Wrongful Convictions” supra n.272 at 1305.

<sup>277</sup> Keith A. Findley, “Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions” (Spring, 2002) 38 Cal. W. L. Rev. 333 at 6.

<sup>278</sup> Keith A. Findley, “Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions” (Spring, 2002) 38 Cal. W. L. Rev. 333 at 6.

<sup>279</sup> Griffin, “The Correction of Wrongful Convictions” supra n.272 at 1294

The relief of habeas corpus for a wrongfully convicted defendant is also severely limited. In *Herrera v. Collins*, the Supreme Court held that newly discovered evidence establishing "actual innocence" does not raise a constitutional issue upon which substantive habeas corpus relief could be granted. This ruling drastically limited the right of a convicted defendant to invoke habeas corpus based on a claim of actual innocence. It is true that the Court left the door open for a possible narrow exception based on truly persuasive proof of innocence; but the Court emphasized that habeas corpus exists to prevent convictions based on constitutional errors, not to correct factual errors.<sup>280</sup>

Due to the challenge of appellate review for the wrongfully convicted and increasing political pressure many states have enacted statutes for those seeking exoneration. However, defendants must have DNA evidence to support their claims of innocence. Although, these statutes represent positive changes for those seeking relief, they, too are limited with regard to DNA evidence and include many restrictions making it difficult to obtain relief.<sup>281</sup>

...states have included in these statutes arbitrary restrictions that deny DNA testing to those who could otherwise prove innocence if given the chance, and that block relief to many who have demonstrated, to a high degree of certainty, their innocence.<sup>282</sup>

Thus, the U.S. appellate system as an avenue to rectify wrongful convictions does not seem to be an ideal.

It could be argued, however, that Canada's appellate review is distinct from that of the U.S.; perhaps it would be better equipped for the challenge. For example,

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<sup>280</sup> Griffin, "The Correction of Wrongful Convictions" supra n.273 at 1295.

<sup>281</sup> Bradon L. Garret, "Claiming Innocence" (June, 2008) 92 Minn. L. Rev. 1629.

<sup>282</sup> Garret, "Claiming Innocence" at 1717.

although Canada does not provide the opportunity for collateral attacks, our appellate courts have a broader jurisdiction for hearing new evidence. They also have a comparatively more relaxed standard for overturning wrongful convictions. Therefore, arguably, starting with our appellate system and expanding on its appellate powers could provide an adequate means for wrongful conviction review in Canada.

The Honourable Fred Kaufman in the Commission on Proceedings Involving Guy Paul Morin suggested expanding the appellate powers with respect to the admission of fresh evidence, as this is generally a crucial aspect for someone requesting a review of a conviction. It was further recommended to expand the powers to overturn a conviction where there exists a “lurking doubt” as to guilt.

#### Recommendation 86: Fresh evidence powers of the Court of Appeal

- a. In the context of recanted evidence, the requirements that evidence must reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness’ original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.
- b. Consideration should be given to further change the ‘due diligence’ requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.

Recommendation 87: Powers of a court of appeal to entertain ‘lurking doubt’  
Consideration should be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt.<sup>283</sup>

It seems that expanding appellate powers in these areas could improve, at least, the initial stages of the review process.

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<sup>283</sup> *The Commission on Proceedings Involving Guy Paul Morin*, supra n.169 at 29.

However, although granting broader appellate powers to appellate courts might help address the number of wrongful convictions, other problems may arise. For example, having appellate courts address wrongful convictions causes an increase in workload for the court system due to unvetted applications.<sup>284</sup> The courts are not in the position to address the merits of applications, and the increase in court files would have a direct impact on both the efficiency and the effectiveness of the system. Further, a postconviction review system, in order to be truly effective, must have the ability to thoroughly investigate cases of wrongful convictions. “One of the greatest impediments to correcting miscarriages of justice is the difficulty faced by those convicted in uncovering the evidence and arguments necessary to overturn the conviction.”<sup>285</sup> The judiciary is not in a position to conduct investigations of wrongful convictions and arguably should not be. The role of the judiciary is not to ascertain evidence but to “ascertain whether there is new evidence or argument which brings the conviction into question.”<sup>286</sup> The appellate courts would be unduly burdened by the increased workload that such postconviction reviews would entail and they are not in a position to handle the investigatory procedures. The much-needed goal of effectiveness could not be met in such a scenario.

If postconviction review is left in the hands of the appellate courts, the same financial difficulty faced by defendants in the U.S. may become an issue in Canada. In the United States the appellant is typically not funded by legal aid and therefore is left to his/her own financial devices. The result is that those who have the financial means are more able to pursue their wrongful convictions, and those who do not are less able to do

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<sup>284</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135.

<sup>285</sup> Graham Zellick, “Facing up to Miscarriages of Justice” (2006) 31 Man. L.J. at para. 9.

<sup>286</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135.

so. Therefore, unless Canada intends to fund wrongful conviction appeals, applicants without adequate means will be unable to access the process to rectify the injustice. Leaving appeals based more on financial means than on merits certainly could erode public confidence in the justice system.

It could be argued that the appellate courts as a system of postconviction review meets the necessity for the postconviction review process to be independent. Courts and judges are not accountable to the executive or to constituents; nor are they affected by media pressure. However, the fact remains that appellants claiming wrongful convictions are forced to return for help on their cases to the very system that created the injustice in the first place. Many appellants, naturally enough, distrust the system. They perceive it to be neither effective, nor just. It is difficult for any system to operate efficiently when confidence in its abilities has been eroded, but it is particularly difficult in a justice system. This lack of confidence in the system speaks to the perception of a lack of independence and accountability in the system.

Finally, while expanding the powers of the appellate courts may help to decrease the number of wrongful conviction cases, arguably, it is still necessary for a postconviction review system to exist outside the court system. Although meeting the need for openness and adding a measure of independence, the appellate courts cannot adequately meet three of the criteria necessary for a viable functioning postconviction review model; independence, effectiveness and accessibility.

### **7.3 IMPROVE EXISTING PROCESS**

Another option available to improve the postconviction review system is to keep the process with the government but attempt to further rectify the situation. Can the problems of inadequacies in independence, openness, effectiveness and accessibility be remedied with such a model? For instance, to help make the process more open, the applicant could be provided with a copy of the final submission to the Minister and allowed to make submissions before a decision is made. To increase the efficiency and effectiveness of the system, the CCRG could hire more staff to keep up with the workload. It could also take more of a proactive role with respect to investigating applications. This could help improve both the effectiveness and accessibility of the process. To further increase accessibility, the government could grant financial assistance to applicants who required legal aid. However, a change in process also needs to occur at a deeper level.

There needs to be the “recognition that convicts face great difficulty in getting the evidence, and in developing the argument needed to overturn the wrongful conviction” and there needs to be “an openness to listen to everyone’s complaint and accord it appropriate investigative resources.”<sup>287</sup> It is these deeper fundamental changes that may be met by resistance. The Department of Justice, being the prosecutorial branch of the government, is not necessarily in the mindset of defending the rights of convicted individuals. Needless to say, this hurdle may be one that cannot easily be overcome.

Furthermore, there is one key issue that the current process cannot resolve, and that is the issue of independence. No matter how much the Minister tries to distance

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<sup>287</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n. 74 at 389.

the review group from the Department of Justice, it will never be independent. So, because it seems possible to deal with the other three main problems to some degree we must ask the question: how important is the issue of independence in the post-conviction review system?

Arguably, unless a postconviction review group has independence it will never inspire the degree of confidence necessary for it to be considered a viable option by those who most need its service.

So long as the responsibility for conviction review remains with the federal Minister of Justice, an elected politician, there will be the potential for political pressure to play a role in the decision making process, or, at the very least, for the perception to exist that the decision was influenced by political pressure. The conviction review system must not only be truly independent, it must be seen to be independent.<sup>288</sup>

Any process must be independent of “all those bodies and agencies which have hitherto been involved in the case leading up to the conviction.”<sup>289</sup> The small number of applications to the Department of Justice supports this conclusion.

The Canadian experience testifies to this...the number of applications for review it receives is so astonishingly small that it can only support the conclusion that its positioning within central government seriously diminishes its standing in the eyes of those who feel they have been wrongly convicted.<sup>290</sup>

The process must not be entrusted to government and should not be in the hands of the courts, prosecution or police. “A postconviction review system must be able to command confidence. Independence is therefore a *sine qua non*.”<sup>291</sup> Therefore, attempting to improve the process by remedying only some of the issues that plague the current system will not provide a satisfactory outcome. For the postconviction review

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<sup>288</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 390.

<sup>289</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135.

<sup>290</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135.

<sup>291</sup> The Honourable Mr. Justice Peter H. Howden, “Judging Errors of Judgment” supra n.135.



process to be truly effective, it must address all the issues. And for that, a completely independent review body, one that is also perceived as being independent, will be necessary.

#### **7.4 INDEPENDENT REVIEW**

An independent review body could be created and modeled after the Criminal Cases Review Commission (CCRC) in the United Kingdom. The CCRC began operations in 1997.<sup>292</sup> Prior to the creation of the CCRC, the situation in the UK was similar to that in Canada. Wrongful convictions were addressed by the executive arm of government. However, the process was changed as the previous model was seen as political and considered a conflict-of-interest situation.<sup>293</sup>

The objectives of the CCRC are to review and investigate suspected miscarriages of justice, and to refer to the appropriate court of appeal any case where there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made."<sup>294</sup> The "real possibility" test is not defined in the *Criminal Appeals Act*. However, the court of appeal described the standard as requiring a referral when there is "more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty that the conviction will be found unsafe."<sup>295</sup>

As is the case in Canada's review process, an applicant must have appealed his or her conviction to the appropriate court before he or she can apply to the CCRC.<sup>296</sup>

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<sup>292</sup> United Kingdom, CCRC, online: < <http://www.ccrcc.gov.uk/>>.

<sup>293</sup> CCRC.

<sup>294</sup> *Criminal Appeal Act*, 1995, 13(1)(a) (Eng.).

<sup>295</sup> *R. v. CCRC*, ex p. Pearson, 3 All E.R. 498 (1999).

<sup>296</sup> CCRC.

The CCRC has the power, as does its counterpart in Canada, to refer the case back to the court of appeal or to refer any issue to the court of appeal for the court's opinion. However, the CCRC does not have the power to refer the matter for a new trial.<sup>297</sup>

The CCRC resembles Canada's review process in other ways, but differs in some important respects. Similar to the process in Canada, the CCRC starts off with an initial assessment. However, unlike the situation in Canada, the CCRC arranges to obtain documents and is proactive with the application and investigation process. For example, the application form on the website is written in plain English and states:

This form is for anyone who wants us to review a conviction or sentence that they think is wrong. We have written the form as though the person who was convicted is going to fill it in, but anyone can do this for them. Please answer the questions, if you possibly can. If you need any help filling in this form, please contact us.<sup>298</sup>

From this initial application stage onward, the process is made much more accessible to the applicant.

There is aid available to the applicant at each stage of the procedure. The applicant is given a series of questions asking him or her to state what he or she thinks went wrong with the case. The applicant is also asked to send any papers if able; and, if not, the CCRC will obtain the necessary documents. The applicant is not required to investigate his/her case. If the application passes the first stage, which is most likely unless their appellate review has not been exhausted, it proceeds to the next step, the substantive review.<sup>299</sup> At this stage a case review manager and a commission member are assigned. The CCRC has the ability to conduct extensive independent

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<sup>297</sup> CCRC, supra n.290.

<sup>298</sup> CCRC, supra n.290.

<sup>299</sup> CCRC, supra n.290.

investigations and if necessary outside investigations can be conducted. It is decided at this stage whether there is a “real possibility” that the conviction will be quashed.

If the case review manager is not convinced that there is a "real possibility" that the conviction will be quashed, the applicant is sent a "short form" letter with reasons for this conclusion and given twenty-eight days to respond. If the case manager and a commissioner believe that there is a real possibility that the conviction will be quashed, the case is presented to three commissioners who make the final decision whether to refer to the Court of Appeal. Following a referral, the CCRC withdraws from the case and leaves it to counsel to prepare and argue the appeal. Legal Aid is provided for this purpose.<sup>300</sup>

A decision to refer the case to the appellate court is made by a panel of three commissioners; however, a decision not to refer is made by a single commissioner.<sup>301</sup>

The decision is then sent to the applicant. If the decision is not to refer the applicant has the opportunity to respond to the CCRC’s statement, after which a final decision is made.<sup>302</sup>

Since the creation of the CCRC there has been a significant increase in referrals of wrongful convictions and a significant increase in the court of appeal setting aside the conviction as unsafe.<sup>303</sup> Prior to the creation of the CCRC only 5.3 out of 700 to 800 cases each year were being referred to the court of appeal.<sup>304</sup> Since the establishment of the CCRC, forty to fifty cases out of approximately 700 each year are now referred to the court of appeal. Of those cases referred around 70% result in the conviction or sentence being overturned.<sup>305</sup> According to the CCRC’s 2008/2009 Annual Report, they

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<sup>300</sup> Griffin, “The Correction of Wrongful Convictions: A Comparative Perspective” supra n.273 at 1279.

<sup>301</sup> CCRC, supra n.290.

<sup>302</sup> CCRC, supra n.290.

<sup>303</sup> CCRC, supra n.290.

<sup>304</sup> CCRC, supra n.290.

<sup>305</sup> CCRC, supra n.290.

received 918 applications for review, closed 941 cases and referred 39, or 4% of cases to the appeal courts.<sup>306</sup> As previously stated in Chapter 6 the wait time for complex cases is currently at twenty weeks. This wait time was reduced even though there was a tremendous backlog of cases from the previous system and the addition of summary convictions offences. According to the 2008/2009 Report, the backlog of cases awaiting allocation for review has fallen by half: from 225 in March 2006 to 112 in March 2009.

Creating an independent review body similar to the CCRC would allow for a more helpful and successful postconviction review. For example, an independent process, like that of the CCRC, would be truly independent and would, therefore, be better able to fully and objectively consider possible cases of injustice. The independent review group would be perceived as being truly open as they would be able to “articulate (their) findings fully to the applicant and counsel, as well as to the prosecutors and original police investigators and to the public at large.” Further, the perception of openness and objectivity would induce more trust in the system. This, in turn, would increase application numbers and, thereby, demonstrate the increased effectiveness of the process. If the independent review body were to provide easy-to-understand applications, require the reviewer to help acquire paperwork and documentation, and to conduct a proactive investigation, the issue of accessibility and the need for pre-court financial legal aid for applicants would become moot points. The efficiency issue would also be addressed herein. Furthermore, were the case to proceed to court, and were legal aid funding provided for the necessary counsel, accessibility would, once more, become a non-issue. Proactive investigations would result in more cases being referred

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<sup>306</sup> CCRC, *supra* n.290.

to the court of appeal which, again, would increase confidence. As was shown by the CCRC model, wait times would be reduced. All of these improvements would ultimately demonstrate the increased effectiveness of the system. Creating an independent review body would successfully address the outstanding issues of independence, openness, efficiency and effectiveness and accessibility. However, the one issue that would yet need to be addressed is the higher threshold of review.

The threshold of review in Canada could be lessened to allow more applications the ability to be sent for appellate review, as is the case in the United Kingdom. But if the threshold were to be reduced, it would then be necessary also to eliminate the option of ordering a trial. The reason the Minister of Justice in Canada has a higher threshold is due to the fact that not only has he the ability to refer the matter to the court of appeal but also to refer the matter directly for a new trial. If this option for a new trial were eliminated the threshold could then be lowered, and more cases could be referred for appellate review. Due to the fact that of the many cases referred for review in the United Kingdom 70% have been quashed or have had their sentences varied I do not believe that the lower threshold existing there is at odds with the pursuit of uncovering cases of wrongful convictions.

Given the ideal nature that an independent review body could provide, why, then, did the government decide to modify the existing process rather than to create an independent body? According to the federal-provincial-territorial working group, the establishment of an independent review body was undesirable for the following reasons:

- persons who claim that they were wrongfully convicted had the full benefit of the presumption of innocence, a trial in which their guilt had been established beyond a reasonable doubt, and appeal procedures;

- a review mechanism would create another level of appeal that would detract from the notion of judicial finality;
- the establishment of a mechanism ...would likely result in many requests for reviews, most of which would likely be *pro forma*. The proposed mechanism would permit the reinvestigation of cases but would not provide any remedy for the wrongfully accused person;
- the review of these cases would incur significant costs that would divert resources from cases deserving review;
- the conviction review process enables the Minister of Justice to order a new trial or an appeal in appropriate cases;
- the review of judicial decisions by a non-judicial body would be inappropriate.<sup>307</sup>

At first glance, these appear to be weighty criticisms. But, in fact, how much weight do they really carry?

Some of these criticisms could also be said of the current CCRG review process. Applicants had the full benefit of the presumption of innocence; and the review of decisions by the CCRG detracts from the notion of finality. However, the establishment of the CCRC in the UK shows that such a review mechanism would not necessarily lead to an inundation of unfounded claims and increased wait time. Further, the costs associated with an independent review body could be offset by the current costs of prison time erroneously provided, compensation paid, and public inquiries conducted.<sup>308</sup> With respect to the inappropriateness of judicial decisions being reviewed by a non-judicial bodies, it would not be the review body making the final decision, but the appeal courts, as it is now. It would be a requirement that the review and investigation be separated from the process involving the final decision.

It would seem that the criticisms leveled against creating an independent review are not outweighed by the advantages of having such a system. An independent review

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<sup>307</sup> Federal-Provincial-Territorial Meeting of Ministers responsible for Justice, “Prevention of Wrongful Convictions: Significant Measures Proposed by Ministers of Justice” (Ottawa, Ontario – January 2005).

<sup>308</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra, n.74 at 392.

body would have the ability to directly address the main objective of a post-conviction review: to uncover cases of wrongful convictions. To be effective in this endeavour, a postconviction review system must “go beyond mere formal review of applications or fear about lack of finality and concern for preventing misuse of the process to a proactive investigative stance. It should ensure, to the best of human capability, that real possibility of injustice will be uncovered and will occur in as expeditious a manner as possible.”<sup>309</sup> The process that seems to best and most completely address these concerns, as well as the criticisms of the present system, is the independent review model.

## **7.5 CONCLUSION**

Assessing all the available options it is obvious that an independent review body is the clear choice for improving the current postconviction review system. Broadening the powers of the court of appeal would be beneficial to a certain extent and might, in some aspects, help reduce the numbers of those in need of a postconviction review. But this option does little, if anything, to address the needs for independence, effectiveness, and accessibility in the process. Improving the existing system, again, may make some improvements, but it would not meet all the necessary requirements for a comprehensive postconviction review body. In particular, as revealed in Section 7.3, it could not address the over-arching need for independence. An independent review body would meet all the requirements necessary to run an effective postconviction review system.

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<sup>309</sup> *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74 at 389.

A postconviction review body, to function effectively, should be independent, open, and accessible. This body should be proactive in the search for and the investigation of wrongful conviction cases not simply reactive. The only really viable option for such a system would be an independent review body similar to the CCRC in the United Kingdom.

This is not the first time that an independent review body has been called for. There have been five different provincial commissions of inquiry that have recommended the study into, the need for, or the creation of an independent review.<sup>310</sup> When will the government take notice of the real needs of those struggling to gain access to a workable and efficient system? When will true change occur as opposed to the mere tinkering with the status quo? Will we need to uncover yet another horrible injustice where some innocent person's life and liberty have been stamped out by spending years toiling in prison? Just what will it take for adequate reforms to be implemented in the Canadian justice system?

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<sup>310</sup> Report of the Royal commission on the Donald Marshall Jr, Prosecution supra n.170 at 145, Report of the Commission on Proceedings Involving Guy Paul Morin supra n.169 at 1237, Report of the Inquiry Regarding Thomas Sophonow supra n.269, Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, supra n.84, and *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, supra n.74.



## CHAPTER 8 – CONCLUSION

The Department of Justice initiated internal changes to the postconviction review process in 1994 after serious criticism about the process. The changes created were not significant enough to curb more criticism and the need arose to reassess the situation in 1998. After an in depth review of the situation in 2002 the government decided to rectify the problems by making some legislative changes to the existing process. But the years have shown that there was little real improvement in the function of the system. We acknowledge now in 2010 that the changes made are still not substantial enough to address the existing problems. The system is still burdened with many inherent restrictions and is labouring mightily to provide justice. The need to reassess the situation is still paramount.

Many of the areas of concern addressed by the 2002 legislation still remain problematic in the postconviction process today. These problems include a lack of independence in the process, a lack of openness, a lack of effectiveness and efficiency, and the lack of accessibility.

The process still lacks independence: both the Minister of Justice and the Department of Justice are perceived, at the very least, as not being able to function either objectively or fairly because of their links with government.

The process lacks openness. It is still conducted in secret and remains inaccessible both to the applicants themselves and the public at large. For example, applicants still do not have access to their final reports and, therefore, cannot comment on the findings, issues, and/or considerations before the Minister makes a decision. Further, there is still no legislative test to determine if a remedy should be granted by the

Minister; and there is no legislative process in place to indicate which remedy should be granted once the Minister is satisfied that a remedy is required. The lack of legislative guidance allows the discretion of the Minister to remain closed and under no scrutiny. This is compounded by the fact that the Minister's ultimate decisions, also, are not made public. The lack of public disclosure creates a closed system: one in which applications are decided, but in which the thoroughness and competence of any and all investigations remain concealed.

Despite the 2002 legislative changes the postconviction review process remains inefficient. The time applicants must wait to have their application heard by the Minister of Justice is far too long. An average wait time of nearly 5 years is unacceptable. This is especially true when we know that other similar conviction processes have the ability to function at far more efficient levels. The twenty weeks that applicants wait in the United Kingdom is clearly a more appropriate response to the situation. These long wait times in Canada will only be exacerbated due to the inefficiencies in the Department. The Departmental disposal rate has dropped and currently the Department has the ability to dispose of only 11% of all their files or 15% of their active files. This situation will only worsen and longer wait times will be inevitable. The system is still not effective in its function.

The current procedure for postconviction review remains a reactive one. It is not at all proactive in the several ways that would well behoove such a process. The application process is still not readily accessible for most applicants. In addition, the lack of support and the lack of financial aid to help complete the process are huge obstacles facing applicants. Although the postconviction review process added an investigatory component by including the ability to both question witnesses and compel

the production of physical exhibits, it still leaves the onus on applicants to investigate their wrongful convictions. It is left up to the applicants to submit the necessary legal grounds and supporting documentation. The burden on the applicants in this respect is very large, indeed, considering their position in the system, their lack of resources, and their (often inadequate) financial ability.

The application process is still not accessible for most applicants and the lack of support and financial aid to help complete the process is a huge obstacle applicants face. Further, the process still lacks independence as the Minister of Justice and Department of Justice are, at the very least, perceived as not having the ability to function objectively and fairly.

The Canadian postconviction review process continues to have low numbers of interventions each year. At an average of only two interventions per year, we fall significantly short, particularly as compared to a similar system in the United Kingdom where 35 interventions are granted each year. Although, in Canada the standard of review for an intervention is higher than exists in the United Kingdom, the higher standard makes it much more difficult for applicants to seek appellate review. Due to the high threshold applicants must meet, the low intervention numbers can be expected to continue, regardless of any legislative changes. This data displays another example of lack of effectiveness in the system.

The threshold of review in Canada should be lowered. This would allow more applicants to be eligible for appellate review, thus increasing accessibility. The lower threshold in the United Kingdom has led to 70% of its applicants to have their convictions quashed or their sentences varied; so it is reasonable to assume that the lower threshold would be conducive to uncovering cases of wrongful convictions in

Canada too. An effective measure, this recommendation comes with the caveat that only appeals would be permissible as an intervention option.

The low annual numbers of applications for wrongful conviction may be due to several factors. One may be accessibility: this low average of 35, may be, in part, the result of the onerous application requirement. But it may also be indicative of the lack of confidence in the system and the general ineffectiveness of the system. As previously outlined, applicants are expected to determine and unearth the grounds necessary to justify a miscarriage of justice. If applicants are unable to provide all the forms or supporting documents required by the Department of Justice, their applications can be dismissed and never submitted to the Minister. This arduous process, along with the system's lack of independence and the long wait times with often unsatisfactory results, make obvious the ineffectiveness of the system. The ultimate result of such problems and inefficiencies is a low number of applications each year.

The problems of the existing system are too many and too obvious to be ignored. Why, then, has the process not been remedied? Why, after so many calls for an independent review body, is the government resistant to making such a change? Possibly, it may still be believed that the legislative reforms of 2002 remedied many of the problems existing in the previous system and that more change is not necessary. I trust that the results of this research will demonstrate that the post-2002 system has not resolved many of the problems, and the need for further change is still paramount.

One of the reasons that the government may not feel the pressure to change is because of the nature of the review: it is called a "miscarriage of justice". According to the legislative standard, an applicant may seek a review of his or her conviction if there has been a "miscarriage of justice". As already discussed, this term does not

necessarily mean that an innocent person has been found guilty of a crime. Rather a “miscarriage of justice” also includes those who have not had a just trial, those who may be factually guilty of a crime but should not have been found legally guilty. These types of applicants garner neither public sympathy nor support; therefore, and the pressure on government to rectify these types of “injustices” is not dealt with as a priority. However, the fact remains that many (if not most) of the applicants who have been successful in receiving interventions have been found to be factually innocent. In other words, most of those applying for a miscarriage of justice are those who are factually innocent; but there is a discrepancy between what applicants are seeking and what the government is looking for. The distance between “wrongful conviction” and “miscarriage of justice” is the gulf that needs to be bridged. When this disparity is recognized we will be able to effectively put pressure on the government to transform the system. The focus needs to change so that we may expedite justice for those who are factually innocent.

I am not suggesting that we create a third verdict of factual innocence, as this could create problems within the criminal justice system. However, it is imperative that people understand, and particularly that the government recognize, that those persons seeking a review for a miscarriage of justice are actually seeking redemption for their wrongful conviction. I anticipate that with this recognition the government will take notice of the genuine need of those struggling to gain access to a system that is, at least workable and, at best, efficient.

It is my sincere hope that the carefully considered and consolidated research for this paper will help to both inspire and support the changes that are required for our criminal justice system to function effectively. I anticipate that the conclusions herein will

help to provide a firm undergirding that will allow us to step closer to creating a process that is clear of the problems inherent in the current system.

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