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## WRONGFUL CONVICTIONS IN CANADA

*Kent Roach*\*†

### I. INTRODUCTION

An awareness of the alarming reality of wrongful convictions in both Canada and other criminal justice systems led the Supreme Court of Canada in 2001 to overturn prior jurisprudence that allowed Canada to extradite fugitives to face the death penalty.<sup>1</sup> The Court decided that extradition to face the death penalty would generally violate the principles of fundamental justice in the Canadian Charter of Rights and Freedoms.<sup>2</sup> The Court stressed that DNA would not be available in all cases,<sup>3</sup> and that even “a fair trial does not always guarantee a safe verdict.”<sup>4</sup> This case presents a challenge to all courts and policy-makers to do better in responding to the risk of wrongful convictions.<sup>5</sup> It is also a reminder that all criminal justice systems that use the death penalty run an unacceptable risk of executing an innocent person.

Another measure of the recognition of the reality of wrongful

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1. *United States v. Burns*, 2001 SCC 7(Can.). Before this decision, Canada had extradited fugitives to face the death penalty in the United States. See *Re Ng*, [1991] 2 S.C.R. 858 (Can.); *Re Kindler*, [1991] 2 S.C.R. 779 (Can.). Note that all Supreme Court of Canada decisions are available at <http://scc.lexum.org/en/index.html>.

2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 § 7 (U.K.), *reprinted in* R.S.C. app. II, no. 44 (Can.).

3. The Court noted that many miscarriages of justice revealed by the Criminal Cases Review Commission in England and Wales did not depend on DNA testing and concluded, “[T]hese cases demonstrate that the concern about wrongful convictions is unlikely to be resolved by advances in forensic sciences, welcome as these advances are from the perspective of protecting the innocent and punishing the guilty.” *Burns*, 2001 SCC 7, at ¶¶ 116.

4. *Id.* at 98. In reference to the David Milgaard case, the Supreme Court stated: “Milgaard was represented by able and experienced counsel. No serious error in law or procedure occurred at the trial. Notwithstanding the fact that the conviction for murder followed a fair trial, new evidence surfaced years later.”

5. See Kent Roach, *The Protection of Innocence Under Section 7 of the Charter*, 34 SUP. CT. L. REV. 249 (2006) for a detailed critical evaluation of the Court’s performance on various innocence issues.

convictions is that since 1986, provincial governments in Canada have made discretionary decisions to call seven different public inquiries into notorious wrongful convictions.<sup>6</sup> The findings and recommendations of these commissions of inquiry provide a unique and important source of information about Canadian wrongful convictions. They also provide a partially implemented reform agenda to prevent wrongful convictions. The federal government in Canada has unfortunately been resistant to implementing the recommendations of the provincial inquiries into wrongful convictions, even though criminal law and procedure is exclusively a matter of federal jurisdiction in Canada.

Canada has a legal system that is similar to the United States, with a constitutional bill of rights enforced through an adversarial system. On the other hand, the Canadian system is staffed only by appointed judges and prosecutors, and has much more centralized policing and forensic science systems than in the U.S. The Canadian system has wide rights of appeal and generous tests for the admission of fresh evidence. It has many similarities to the British system. Canada, like Australia, however, retains a system where petitions to re-open cases after appeals have been exhausted must be granted by elected politicians, unlike the independent commission in England and Wales.

The first part of this Essay will examine what is known about the number of wrongful convictions in Canada. Much depends on the somewhat murky definition of a wrongful conviction. Even if there was agreement about such a definition, the ultimate number of wrongful convictions is unknowable, given that efforts to discover wrongful convictions in Canada, as in the United States, have been focused on the most serious cases, namely those involving homicide and sexual assault, or both. That said, the Canadian experience is of interest because in recent years an increasing number of wrongful convictions arising from

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6. ROYAL COMM'N ON THE DONALD MARSHALL JR. PROSECUTION, DIGEST OF FINDINGS AND RECOMMENDATIONS (1989) [hereinafter MARSHALL INQUIRY]; COMM'N ON PROCEEDINGS INVOLVING GUY PAUL MORIN, REPORT (1998) [hereinafter MORIN INQUIRY]; MANITOBA JUSTICE, INQUIRY REGARDING THOMAS SOPHONOW (2001) [hereinafter SOPHONOW INQUIRY]; ANTONIO LAMER, LAMER COMM'N OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN, REPORT AND ANNEXES (2006) [hereinafter LAMER INQUIRY]; PATRICK J. LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007) [hereinafter DRISKELL INQUIRY]; EDWARD P. MACCALLUM, REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008) [hereinafter MILGAARD INQUIRY]; STEPHEN T. GOUDGE, REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY (2008) [hereinafter GOUDGE INQUIRY]. Most of the reports of these inquiries are available on the internet. On the Canadian inquiries see Kathryn Campbell, *Policy Responses to Wrongful Conviction in Canada: the Role of Conviction Review, Public Inquiries and Compensation*, 41 CRIM. L. BULL. 145 (2005); Kent Roach, *Inquiries and the Processes of Accountability*, in ACCOUNTABILITY FOR CRIMINAL JUSTICE 268, 268–93 (Stenning ed. 1995). Some of the Canadian inquiries have attracted international attention. See, for example, ST. OF ILL., REPORT OF GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), which relied heavily on the Canadian Morin Inquiry.

guilty pleas have been discovered. This phenomenon suggests that the unknown number of wrongful convictions may be much larger than many have appreciated. In other words, wrongful convictions may result not only from contested trials, but from the majority of cases in which accused plead guilty.

The next part of this Essay will explore two case studies of wrongful convictions to provide an overview of the main causes of wrongful convictions, as well as the two main legal mechanisms for overturning wrongful convictions. The first case study is the Donald Marshall Jr. case. Marshall was as a young Aboriginal man from Nova Scotia, imprisoned eleven years for a murder he did not commit. The Marshall case was the subject of the first public inquiry into a wrongful conviction in Canada. The inquiry first raised awareness about wrongful convictions and it also made important recommendations about how to prevent them in the future. The second case study will examine the case of Tammy Marquardt, a young single mother from Ontario who was imprisoned for thirteen years for the murder of her two and one-half year old son, on the basis of erroneous forensic pathology expert testimony that the cause of her son's death was asphyxia.

These two case studies illustrate the two main ways that wrongful convictions are revealed in Canada. Marshall's murder conviction was overturned after the federal Minister of Justice granted his petition for a new appeal on the basis of fresh evidence and after Marshall had exhausted appeals all the way to the Supreme Court of Canada. Marquardt's wrongful conviction was overturned when the Supreme Court of Canada granted her leave to make a late and normally out of time appeal. The Supreme Court remanded the case to the Ontario court of appeal. The court of appeal then held that the murder conviction was a miscarriage of justice, in light of new forensic pathology evidence that the cause of death was not asphyxia but unascertained. A new trial was ordered, but the prosecutor withdrew charges and the trial judge apologized for what happened to Marquardt.

The two case studies demonstrate some of the strengths of the Canadian system in recognizing wrongful convictions, including a fairly liberal approach to late appeals, the availability of bail pending appeal, the reception of a wide range of fresh evidence, and the willingness of Canada's unelected prosecutors at times to agree to the reversal of convictions on the basis of new evidence. At the same time, an important weakness of the Canadian approach to reversing wrongful conviction is the maintenance of a system in which an elected politician, the federal Minister of Justice, has responsibility for re-opening cases after appeals have been exhausted. The slow, adversarial and risk adverse nature of this petition procedure will be examined. The federal

government has refused to implement recommendations made by six different public inquiries that an independent body patterned after the Criminal Cases Review Commission (CCRC) for England and Wales be created. Another weakness the two case studies reveal is the haphazard Canadian approach to the recognition of and compensation for wrongful convictions. Compensation for wrongful convictions in Canada is formally based on factual innocence, but there is no legal mechanism for determining factual innocence.

Having examined the strengths and weaknesses of the legal mechanisms for overturning wrongful convictions, this Essay will examine the main causes of wrongful convictions and the role that police, prosecutors, defence counsel, judges, and juries play in wrongful convictions. The most important reform to prevent wrongful convictions is likely the Supreme Court of Canada's 1991 recognition of a broad constitutional right of the accused to disclosure of all relevant information the prosecution possesses.<sup>7</sup> Many pre-1991 wrongful convictions in Canada might have been prevented had such broad rights of disclosure been respected.<sup>8</sup> The Court's decision was inspired by the vision of the prosecutor as an official concerned with ensuring justice, rather than winning. It also responded to the refusal of the federal government to amend the Criminal Code to require disclosure as recommended by the commission of inquiry into Marshall's wrongful conviction.

The role of the police in wrongful convictions will be examined, with attention to the findings of various inquiries about tunnel vision. The failure of the Criminal Code to regulate police interrogation and identification procedures will be critically examined. Although the Supreme Court has recognized that the dangers of false confessions should influence the admissibility of confessions,<sup>9</sup> there are limits to judicial regulation of interrogation procedures. For example, Canadian courts continue to allow testimony from jailhouse informers,<sup>10</sup> and allow prolonged stings and interrogations of vulnerable suspects that create risks of false confessions.<sup>11</sup> The courts also allow eyewitness

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7. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

8. For examples of "historical" wrongful convictions that might have been prevented by full disclosure see *Re Truscott*, 2007 ONCA 575 (Can.) (overturning 1959 murder conviction in part on the basis of undisclosed material); *Re Walsh*, 2008 NBCA 33 (Can.) (overturning 1975 murder conviction in part on the basis of undisclosed material); *Re Phillion*, 2009 ONCA 202 (Can.) (overturning 1972 murder conviction in part on the basis of undisclosed material); *R. v. Henry*, 2010 BCCA 462 (Can.) (describing 1983 sexual assault convictions that were overturned in part on the basis of undisclosed material). Note that many of these decisions are available at <http://www.canlii.org/en/>.

9. *R. v. Oickle*, 2000 SCC 38 (Can.).

10. *R. v. Brooks*, 2000 SCC 11 (Can.); *R. v. Hurley*, 2010 SCC 18 (Can.).

11. *R. v. Singh*, 2007 SCC 48 (Can.); *R. v. Spencer*, 2007 SCC 11 (Can.); *R. v. Grandinetti*, 205

identifications to be made despite improprieties in obtaining such identifications<sup>12</sup> and concerns about the lack of probative value of courtroom identifications.<sup>13</sup> The courts allow police to be civilly sued for negligent investigations, but the absence of established standards makes it difficult to establish police negligence.<sup>14</sup> The Parliament of Canada has jurisdiction over all criminal law and procedure throughout Canada, but has unfortunately failed to regulate police interrogation and identification procedures.

Forensic evidence has played a role in many Canadian wrongful convictions and the findings of various inquiries and related judicial decisions will be examined. In 2007, the Supreme Court held in a 4–3 decision that post-hypnosis identifications should not be admitted, because of their unknown reliability and the risk of wrongful convictions.<sup>15</sup> This decision presents a potential for Canadian courts to place stricter reliability-based restrictions on the admissibility of expert evidence, including unreliable forensic evidence. At the same time, various inquiries have made many important recommendations about reforming the practice of the forensic sciences. Many of these recommendations have been implemented, though the tendency has been to do so on a discipline-by-discipline basis in particular provinces.<sup>16</sup>

The Essay will also explore the role of defence lawyers in Canadian wrongful convictions. Canada’s constitutional standard of ineffective assistance of counsel, based on *Strickland v. Washington*,<sup>17</sup> is not particularly effective in reducing the risk of wrongful convictions. Canada has remained too wedded to restrictive rules of jury secrecy, despite some evidence that jurors have contributed to wrongful convictions.<sup>18</sup> The Essay will also examine the role of judges in wrongful convictions, including the performance of appeal courts in Canada and their refusal to adopt a “lurking doubt” standard for reversing convictions.<sup>19</sup>

The last part of this Essay will examine compensation for the wrongfully convicted, including the steps that Canada has taken to comply with Article 14(6) of the International Covenant on Civil and

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SCC 5 (Can.); *R. v. Sinclair*, 2010 SCC 35 (Can.).

12. *Mezzo v. The Queen*, [1986] 1 S.C.R. 802 (Can.).

13. *R. v. Hibbert*, 2002 SCC 39 (Can.).

14. *Hill v. Hamilton Wentworth Police*, 2007 SCC 41 (Can.).

15. *R. v. Trochym*, 2007 SCC 6 (Can.).

16. Although criminal law and procedure is a matter of exclusive federal jurisdiction in Canada, the administration of justice is subject to provincial jurisdiction.

17. 466 U.S. 668 (1984) followed in *R. v. G.D.B.*, 2000 SCC 22 (Can.).

18. *R. v. Pan*, 2001 SCC 42 (Can.).

19. *R. v. Biniaris*, 2000 SCC 15(Can.); *R. v. W.H.* 2013 SCC 22.

Political Rights with respect to compensation. There is no statute governing compensation and restrictive administrative guidelines are often ignored in practice. Although Canadian governments formally require factual innocence for compensation, there is no legal mechanism for establishing factual innocence in Canada.

## II. THE NUMBER OF WRONGFUL CONVICTIONS IN CANADA

It is extremely difficult, if not impossible, to determine the number of wrongful convictions in Canada. One reason is ambiguity about what constitutes a wrongful conviction.<sup>20</sup> Another reason is an unwillingness of the legal system to make determinations of innocence. Yet another reason is that there is simply no way to determine how many wrongful convictions occur, but remain undetected.

Most recognized wrongful convictions in Canada, as in the United States,<sup>21</sup> arise in homicide or sexual assault cases, even though these cases constitute only a small percentage of all criminal cases and convictions. These identified wrongful convictions may be the proverbial tip of the iceberg in the wider universe of criminal cases. Such concerns have increased in Canada, because a number of recently

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20. Wrongful convictions especially in the context of DNA exonerations and public and media discourse are sometimes limited to those who have been proven to be factually innocent. See BARRY SCHECK, ET AL., ACTUAL INNOCENCE (2001). In many cases, however, it may not be possible to make definitive conclusions about factual innocence. In British-influenced systems, the term miscarriage of justice includes not only the conviction of the innocent, but convictions that are improper and overturned on appeal. For various approaches to the definitional issue see Clive Walker, *Miscarriages of Justice in Principle and Practice*, in JUSTICE IN ERROR 37 (Walker and Starmer eds., 1993) (containing a broad definition of miscarriage of justice by including rights violations and detention under unjust laws); MICHAEL NAUGHTON, RETHINKING MISCARRIAGES OF JUSTICE BEYOND THE TIP OF THE ICEBERG (2007) (explaining that miscarriages of justice are broadly defined to include all successful appeals); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN. ST. L. REV. 967 (2005) (containing a narrower definition of miscarriage of justice to include those who should not be detained under the liability rules of the relevant legislation); Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, in CRIMINAL CASES REVIEW COMM'N, HOPE FOR THE INNOCENT? 31 (Naughton ed., 2010) (focusing on claims of "factual innocence"). This Essay will not enter into this important definitional debate but will, consistent with Canadian legal practice, define wrongful convictions somewhat more broadly than cases of proven factual innocence given the difficulty and impossibility of establishing factual innocence in many cases lacking DNA evidence as well as the reluctance of the Canadian system to make determinations of factual innocence. See *Re Milgaard*, [1992] 1 S.C.R. 875 (Can.); *Re Truscott*, 2007 ONCA 575 (Can.) (examples of courts not finding innocence in cases widely accepted as convictions of the innocent); *Re Mullins-Johnson*, 2007 ONCA 720 (Can.) (a criminal appeal court determining it had no jurisdiction to make determinations of "factual" innocence).

21. Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (4% of exonerations in cases that did not involve murder or rape); SAMUEL GROSS AND MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 18. available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (18% of exonerations in cases that did not involve murder or rape).

revealed wrongful convictions stem from cases where the accused pleaded guilty.<sup>22</sup> The fact that those who plead guilty may be innocent suggests that the potential pool of the wrongfully convicted has increased from those who are tried and convicted to the much larger numbers who decide to plead guilty. Defendants often plead guilty in response to incentives such as reduced sentences that the state offers. They also plead guilty because of the practical difficulties of defending oneself against the state's much greater resources.

The criminal justice system in Canada does not generally recognize factual innocence. There is also no consistent definition of what constitutes a wrongful conviction. Canadian appellate courts can overturn convictions on a number of grounds, including not only error of law, but also that the guilty verdict is unreasonable, that it cannot be supported by the evidence, or that "on any ground there was a miscarriage of justice."<sup>23</sup> In addition, the Minister of Justice can re-open convictions after appeals have been exhausted on the ground that "there is a reasonable basis to conclude that a miscarriage of justice likely occurred."<sup>24</sup>

The term miscarriage of justice is not defined in legislation, but has been broadly defined by courts to include cases

where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.<sup>25</sup>

Miscarriages of justice are not limited to cases of proven or factual innocence, and include both cases where there have been unfair trials or the reliability of the conviction is in serious doubt. Justice Kaufman, in an important report advising the Minister of Justice whether to re-open a conviction, has stressed that a miscarriage of justice would occur either if an innocent person was convicted or if new evidence could reasonably

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22. *R. v. Marshall*, 2005 QCCA 852 (Can.) (explaining a case where a mentally disabled person who was falsely accused confessed and pleaded guilty to sexual assault, but was later exonerated by subsequent DNA evidence); *R. v. Hanemaayer*, 2008 ONCA 580 (Can.) (explaining a case in which the conviction of an innocent person for breaking and entering, and committing assault and assault with threatening to use a weapon was overturned after a guilty plea had been entered); *R. v. Sheratt Robinson*, 2009 ONCA 886 (Can.); *R. v. C.F.*, 2010 ONCA 691; *R. v. C.M.*, 2010 ONCA 690 (Can.); *R. v. Kumar*, 2011 ONCA 120 (Can.); *R. v. Brant*, 2011 ONCA 362 (Can.) (describing cases where parents pled guilty to reduced homicide in their child's death in the face of forensic pathology evidence later shown to be unreliable).

23. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.686(1).

24. *Id.* s.696.3(3)(a).

25. *Re Truscott*, 2007 ONCA 575, ¶ 110 (Can.).



have affected the verdict. In the latter circumstances, “it would be unfair to maintain the accused’s conviction without an opportunity for the trier of fact to consider new evidence.”<sup>26</sup> Thus convictions in Canada can be both re-opened and quashed on grounds short of proven innocence. This is a strength of the Canadian system, given the practical difficulties of establishing innocence in a definitive manner.

The issue of what constitutes a wrongful conviction in Canada is further complicated because appeal courts have decided that they lack statutory jurisdiction to make findings and declarations of factual innocence.<sup>27</sup> At the same time, however, they do make findings of miscarriages of justice, sometimes describe cases as wrongful convictions, and have made apologies to the accused in cases where long standing convictions have been overturned on the basis of new evidence and where the innocence of the person is generally accepted in the media and elsewhere.<sup>28</sup> Canadian appellate courts also enter acquittals, as opposed to ordering new trials, in cases where they are convinced that no reasonable jury could convict<sup>29</sup> and also in old cases where they conclude that the accused would probably be acquitted at a hypothetical new trial.<sup>30</sup>

Not all those who are recognized in the media or the courts as wrongfully convicted will necessarily obtain an acquittal. In the case of Romeo Phillion, the Ontario Court of Appeal, in a divided 2–1 decision, overturned his 1972 murder conviction. The Court of Appeal did not enter an acquittal because of its conclusion that a hypothetical jury at a new trial could reject his alibi evidence and still accept what he claims were his false confessions.<sup>31</sup> The prosecutor’s subsequent decision to withdraw the murder charges, but not to offer any evidence so that Phillion could receive a not guilty verdict, was upheld as consistent with constitutional guarantees of fundamental fairness.<sup>32</sup> At the same time, the media and innocence projects widely acknowledge Phillion as a wrongfully convicted and innocent person. The recognition of innocence and exoneration is a political, social, and scientific process that the criminal justice system does not fully support.<sup>33</sup>

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26. HON FRED KAUFMAN, REPORT ON THE STEPHEN TRUSCOTT APPLICATION ¶ 164 (Sept. 2004).

27. *R. v. Mullins-Johnson*, 2007 ONCA 720 (Can.).

28. *Id.*

29. *R. v. Hinse*, [1997] 1 S.C.R. 3 (Can.); *Re Walsh*, 2008 NBCA 33 (Can.).

30. *Re Truscott*, 2007 ONCA 575 (Can.); *R. v. D.R.S.* 2013 ABCA 18 (Can.).

31. *Re Phillion*, 2009 ONCA 202, ¶ 244 (Can.).

32. *R. v. Phillion*, 2010 ONSC 1604 (Can.).

33. Kent Roach, *Exonerating the Wrongful Convicted: Do We Need Innocence Hearings*, in HONOURING SOCIAL JUSTICE 55–84 (Beare ed., 2009). For arguments about differences between legal and media understandings, see SCHIFF & NOBLES, UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, MEDIA AND THE INEVITABILITY OF CRISIS (2000). For arguments that declarations of innocence should

Although factual innocence is not generally recognized in the Canadian criminal justice system, it is formally required for payment of compensation. Federal and provincial guidelines for compensation require factual innocence, even though criminal courts do not make such findings. Section 748(3) of the Criminal Code provides that when the Governor-in-Council grants a free pardon “that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.” This provision suggests that a free pardon may be a means to recognize innocence in Canada. In 1992, the Supreme Court indicated that a free pardon would be the appropriate remedy if David Milgaard satisfied the very high standard of establishing his innocence beyond a reasonable doubt.<sup>34</sup> Milgaard did not satisfy this high standard at the 1992 reference. He was only exonerated and paid \$10 million in compensation in 1997 after a DNA exclusion. The Milgaard case stands as a reminder of the difficulties of establishing innocence in the Canadian legal system, especially in cases where there is no DNA or other scientific evidence that is accepted as definitive.<sup>35</sup>

Pardons are an awkward and arguably inappropriate device to recognize an accused’s innocence.<sup>36</sup> One problem is the connotation of pardons with mercy. Another problem is that the federal Cabinet, and not the courts, grants pardons. A public inquiry in Canada recommended three women be given free pardons because they killed in legitimate self-defence. The Cabinet, however, refused to grant the free pardons because of concerns about public safety and the lack of compassionate grounds that were not related to the question of guilt or innocence.<sup>37</sup>

Another measure of the number of wrongful convictions in Canada is the number of public inquiries, appointed by governments, into such

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be available in Canadian law, see Christopher Sherrin, *Declarations of Innocence*, 35 QUEENS L.J. 437 (2010).

34. Reference re Milgaard, [1992] 1 S.C.R. 866 (Can.); see also, Re Therrien, 2001 SCC 35, ¶ 121 (Can.) (recognizing the distinct nature of the free pardon). In the Milgaard reference, the Supreme Court recommended that Milgaard should receive a new trial. It also indicated that it would be open to the prosecutor not to proceed and to issue a prosecutorial stay and suggested that Milgaard should receive a conditional pardon if he was convicted at a new trial. The prosecutor did issue a stay while publicly maintaining his belief in Milgaard’s guilt until Milgaard’s 1997 DNA exoneration.

35. Before the Ontario Court of Appeal held it had no jurisdiction to make declarations of factual innocence, it decided that it could not declare Stephen Truscott to be innocent and speculated that it would be difficult to make any such declarations in the absence of DNA evidence. Re Truscott, 2007 ONCA 575, ¶ 264 (Can.) (“The appellant has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant’s best efforts, that kind of evidence is not available.”).

36. They are used less frequently in Canadian wrongful conviction cases than American cases where 68 of 250 DNA exonerations obtained a pardon. BRANDON GARRETT, *CONVICTING THE INNOCENT* 230 (2011).

37. Gary Trotter, *Justice, Politics, and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, 26 QUEENS L.J. 353, 392 (2001).

matters. Since 1986, seven public inquiries have been appointed. These inquiries generally are headed by sitting or retired judges. They take a few years to examine and hold public hearings into wrongful convictions and to make recommendations for their prevention.<sup>38</sup> Public inquiries are appointed at the discretion of the provincial governments and have only been appointed in a minority of all cases in which wrongful convictions have been recognized. The inquiries are generally only held when wrongful convictions have received sustained media attention, thus creating pressures on governments to respond by appointing an inquiry.

Canada's leading innocence project, the Association in Defence of the Wrongfully Convicted (AIDWYC), at present lists forty-three cases of wrongful convictions, starting with the 1959 conviction of Stephen Truscott. Eighteen of these cases are listed as exonerations.<sup>39</sup> The eighteen exonerations recognized by AIDWYC are all homicide cases, except two that involved sexual assault and one that involved a break and enter. The profile of recognized wrongful convictions in Canada is closer to the profile of wrongful convictions in the United States<sup>40</sup> than the United Kingdom.<sup>41</sup> In other words, the vast majority of recognized wrongful convictions in Canada, like the United States, involve homicide or sexual assault. As such, the North American cases do not represent the wider range of cases that the CCRC has referred back to the court of appeal and the convictions that have been overturned in England and Wales.<sup>42</sup> The fact that recognized wrongful convictions in Canada are generally limited to homicide or sexual assault cases suggests that many wrongful convictions may remain undetected in less

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38. THE ROYAL COMMISSION ON THE DONALD MARSHALL JR. PROSECUTION (1989); THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998); THE INQUIRY REGARDING THOMAS SOPHONOW (2001); THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN (2006); REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL (2007); REPORT OF THE INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2008); REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY (2008). MARSHALL INQUIRY, *supra* note 6; MORIN INQUIRY, *supra* note 6; SOPHONOW INQUIRY, *supra* note 6; LAMER INQUIRY, *supra* note 6; DRISKELL INQUIRY, *supra* note 6; MILGAARD INQUIRY, *supra* note 6.

39. *Case Overview*, ASSOC. IN DEF. OF THE WRONGFULLY CONVICTED, [http://www.aidwyc.org/AIDWYC\\_Cases.html](http://www.aidwyc.org/AIDWYC_Cases.html) (last visited Nov. 26, 2011) [hereinafter AIDWYC] (containing an international website lists 73 cases from Canada); *see also* Hans Sherrer, *Wrongfully Convicted Database Index*, FORE JUSTICE, [http://forejustice.org/db/location/innocents\\_1.html](http://forejustice.org/db/location/innocents_1.html) (last visited Nov. 26, 2011).

40. *See, e.g.*, Samuel Gross et al, *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); BRANDON GARRETT, *CONVICTING THE INNOCENT* (2011).

41. LAURIE ELKS, *RIGHTING MISCARRIAGES OF JUSTICE: TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION* (2008).

42. DNA exonerations may be slightly less important in Canadian than American profiles with 7 of the 19 exonerations recognized by AIDWYC involving DNA. *See* AIDWYC, *supra* note 39.

serious cases. Cases other than murder and sexual assault have been overturned in England and Wales, suggesting that an independent review commission in Canada might help discover more wrongful convictions.<sup>43</sup>

How many wrongful convictions in Canada are never detected? Even if the error rate resulting in wrongful convictions in Canada was exceedingly small,<sup>44</sup> there may be large numbers of undiscovered wrongful convictions, given that about 90,000 criminal court cases result in a person being sentenced to custody in Canada each year. An error rate of only 0.5% would result in approximately 450 wrongful convictions a year. Two-thirds of cases in adult criminal court result in convictions on the basis of guilty pleas, but given the recent evidence of innocent people making both irrational and rational decisions to plead guilty,<sup>45</sup> it cannot be assumed that all those in Canada who plead guilty actually are guilty. The prosecution terminates most of the remaining third of criminal cases. Only 3% of cases result in an acquittal,<sup>46</sup> suggesting that criminal trials only reject a very small percentage of all prosecutions.

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43. At the same time, some of the cases where convictions were quashed after a CCRC referral may not be accepted by all as wrongful convictions and the North Carolina Innocence Inquiry Commission which has a mandate restricted to claims of proven factual innocence has referred comparatively fewer cases than the CCRC. See BIBI SANGHA, ET AL., *FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE* 351–56 (2010); see also Kent Roach, *The Role of Innocence Commissions: Errors Discovery, Systemic Reform or Both?*, 85 CHI-KENT L. REV. 89 (2010).

44. See C.R. Huff, *Wrongful Convictions and Public Policy*, 40 CRIMINOLOGY 1 (2002) (applying a similar methodology to much larger numbers of felony convictions in the United States).

45. For an example of an irrational decision to plead guilty by a mentally disabled accused who provided a false confession see *R. v. Marshall*, 2005 QCCA 852 (Can.). For an example where the accused who had already served 8 months in pre-trial custody may have made a rational decision to plead guilty to break and enter and assault after being wrongfully identified in court and being offered a sentence of two years less a day see *R. v. Hanemaayer*, 2008 ONCA 580, ¶ 18 (Can.), where Rosenberg J.A., stated, “[T]he court cannot ignore the terrible dilemma facing the appellant. He has spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if [he] was convicted. . . . The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.” Note, in Canada those serving sentences of two years and more serve them in federal penitentiaries and those serving less than two years serve their sentences in provincial correctional institutions. See *R. v. Kumar*, 2011 ONCA 120, ¶ 34 (Can.) (recognizing the “powerful inducement” of a guilty plea in a child death case where the prosecutor withdrew a murder charge and a father who pled guilty to criminal negligence causing death received a 90 day sentence and was able to maintain custody of his other children and avoid deportation); see generally Joan Brockman, *An Offer You Can’t Refuse: Pleading Guilty when Innocent*, 56 CRIM. L.Q. 116 (2010).

46. In total, the adult criminal courts dispose of almost 400,000 cases a year involving 1.1 million charges. Jennifer Thomas, *Adult Criminal Court Statistics 2008/2009*, 30 JURISTAT. 4 (2010), available at <http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.pdf>. More recent data has found just under 86,000 cases resulting in custody in Canada in a year but that the median custodial sentence was 30 days. Mia Dauvergne *Adult Criminal Court Statistics 2010/2011*, 28 (2012), available at <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11646-eng.pdf>. Most people serving a sentence of a few months or less would not have the incentive to contest a wrongful conviction.

In summary, there is an increasing recognition of the reality of wrongful convictions in Canada, with many cases being recognized as wrongful convictions. A number of recent wrongful convictions, stemming from guilty pleas, suggest that the incidence of wrongful convictions among the majority of accused who pled guilty may be higher than previously appreciated. The Canadian criminal justice system only acquits about 3% of cases that are prosecuted, again suggesting that the criminal trial only infrequently protects the innocent. It is simply impossible to determine how many wrongful convictions occur but remain undetected. Most discovered wrongful conviction cases in Canada, as in the United States, are homicide or sexual assault cases and generally require much time and pro-bono assistance to reveal. This again suggests that there may be many undiscovered wrongful convictions in Canada.

### III. TWO CASE STUDIES OF WRONGFUL CONVICTIONS

The following case studies examine one of the oldest recognized wrongful conviction in Canada—the 1971 conviction of a seventeen year old Aboriginal man Donald Marshall Jr. for a murder that he did not commit, and one of the most recently recognized wrongful convictions—the 1995 murder conviction of a twenty-one year old woman, Tammy Marquardt, for the killing of her son. Marshall served eleven years in jail and Marquardt served thirteen years in jail.

#### *A. The Wrongful Conviction of Donald Marshall Jr.*

Donald Marshall Jr. was convicted in 1971 of the murder of Sandy Seale in the Nova Scotia community of Sydney. The seventeen year-old Aboriginal man was known to the local police and the lead investigator badgered three teenaged witnesses until they eventually testified at Marshall's preliminary inquiry that they saw Marshall stab Seale in a park. In reality, Roy Ebsary had stabbed both Marshall and Seale. None of the witnesses' prior inconsistent statements that they had not seen Marshall stab Seale were disclosed to the accused. At the time, there was no right to disclosure and disclosure was voluntary. The prosecutor in the case often provided disclosure, but Marshall's lawyers did not even ask for disclosure. Two of the witnesses attempted to recant their false testimony at trial, but the judge disallowed full cross-examination about why one witness had recanted out of court. The judge seemed to assume that the recantation may have been related to threats from Marshall, even though Marshall had been denied bail and was imprisoned. Another witness at first declined to testify at trial that

Marshall had stabbed Seale, but eventually did so after his prior testimony to that effect at a preliminary inquiry was read to him as a prior inconsistent statement.

Marshall testified at his trial before an all-white, all-male jury that a man who fit Ebsary's description had made racist remarks about both Marshall and Seale, who was African-Canadian, and stabbed them both. Marshall was not allowed to ask prospective jurors questions about racial bias, as he would be now,<sup>47</sup> and one of the jurors explained the verdict later to a reporter through racist assumptions.<sup>48</sup> The commission of inquiry that subsequently examined Marshall's wrongful conviction did not examine the jury's verdict, despite the fact that the conviction depended on them finding the testimony of witnesses, who reluctantly lied and said they saw Marshall stab Seale, more credible than Marshall's testimony that he did not stab Seale, and the possibility that the jury might have been influenced by irrelevant evidence such as Marshall's "I hate cops" tattoo and the testimony of Seale's grieving parents.

Marshall's own lawyers, though well paid by Marshall's Indian band, conducted no independent investigation and may have believed that Marshall was guilty, in part because Marshall was Aboriginal.<sup>49</sup> Marshall was also not well represented at his first appeal, with his lawyers not raising legal errors, such as the prevention of a full cross-examination of a recanting witness, errors that the inquiry subsequently found would have prevented his wrongful conviction. Marshall's lawyers also unsuccessfully argued to the court of appeal that the lesser offence of manslaughter should have been left to the jury,<sup>50</sup> something that was inconsistent with Marshall's constant claims of innocence. A three-judge panel of the Nova Scotia Court of Appeal unanimously dismissed Marshall's appeal, and the Supreme Court of Canada subsequently refused to grant leave to appeal.

Ten days after Marshall's conviction, James McNeil told the police that his companion Ebsary, and not Marshall, had killed Seale. Unfortunately, this new evidence known to both police and prosecutors was not disclosed to the accused at the time. It was, however, eventually used as new evidence to reverse Marshall's conviction. Because his appeals had been exhausted, Marshall had to petition the federal Minister of Justice for the mercy of the Crown. He obtained an order for a new appeal in 1982, but only after the Chief Justice of Nova Scotia

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47. *R. v. Williams*, [1998] 1 S.C.R. 1128 (Can.).

48. Kent Roach, *Inquiries and Processes of Accountability*, in *ACCOUNTABILITY FOR CRIMINAL JUSTICE* 268, 268–93 (Stenning ed., 1995).

49. *MARSHALL INQUIRY*, *supra* note 6, at 77.

50. *R. v. Marshall*, (1972) 8 C.C.C. (2d) 329 (Can.).

had expressed reservation about hearing the case as a simple reference, which would have meant that Marshall would not bear the burden of proof or face the possibility of a new trial.<sup>51</sup> Marshall was granted bail pending this new appeal.

In 1983, the Nova Scotia Court of Appeal quashed Marshall's murder conviction after considering new evidence, including McNeil's testimony that he was with Ebsary when Ebsary stabbed Seale. The prosecutor in the case agreed that an acquittal should be entered, though he was pressured by his superiors not to do so. At the same time, the court of appeal blamed Marshall for his wrongful conviction. The court of appeal stated that Marshall had perjured himself by not admitting that he and Seale had intended to rob Ebsary and concluded that "any miscarriage of justice is, however, more apparent than real."<sup>52</sup> Although legal errors played a role, Marshall's wrongful conviction was factually based. Both the jury that convicted him and the Court of Appeal that eventually overturned his conviction simply refused to believe that Marshall was telling the truth, despite the existence of other evidence that supported the truth of his statements.

The inquiry subsequently criticized the court of appeal for defending the justice system at Marshall's expense and for allowing a person who had been attorney general and ultimately responsible for Marshall's prosecution to sit as a judge on the appeal. The inquiry, however, lost a court battle to have the judges on the reference explain themselves on the grounds that such questioning would interfere with judicial independence.<sup>53</sup> The five court of appeal judges who sat on the reference were subsequently found by the Canadian Judicial Council, composed of judges, to have engaged in misconduct, but not misconduct that warranted their removal from the bench.<sup>54</sup> Marshall attempted to sue the police, but his case was dismissed when he could not post security for costs. He subsequently received \$225,000 plus interest in compensation.

A 1989 inquiry into Marshall's wrongful conviction contributed to his official exoneration, with a report that included a refutation of the court of appeal's conclusion that Marshall had been engaged in robbery. The inquiry recommended that the Criminal Code be amended to require the prosecution to disclose useful information to the accused. Parliament did not act, but the Supreme Court cited the Marshall case and the inquiry's

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51. MARSHALL INQUIRY, *supra* note 6, at 115. Governments in Canada can refer questions to courts in part because of the absence of a case and controversy requirement in the Canadian constitution.

52. R. v. Marshall, (1983) 57 N.S.R. (2d) 286 (Can.).

53. Mackeigan v. Hickman, [1989] 2 S.C.R. 796 (Can.).

54. C.J. MCEACHERN, ET AL., REPORT TO THE CANADIAN JUDICIAL COMMITTEE (1990), available at [http://cjc-ccm.gc.ca/cmslib/general/conduct\\_inq\\_HartJonesMacdonald\\_ReportIC\\_199008\\_en.pdf](http://cjc-ccm.gc.ca/cmslib/general/conduct_inq_HartJonesMacdonald_ReportIC_199008_en.pdf). For articles, many that are critical of this decision, see The Symposium, 40 U. NEW BRUNSWICK L.J. 262 ff. (1991).

report in a 1991 case that created a broad constitutional right for the accused to receive disclosure of all relevant and non-privileged information in the prosecution's possession.<sup>55</sup> The inquiry also recommended that an appointed Director of Public Prosecution supervise all prosecutions and that the law school in Nova Scotia promote the training of both Aboriginal and African-Canadian minorities, both reforms that were subsequently implemented. The inquiry also recommended that an independent review mechanism be available to re-investigate alleged cases of wrongful convictions, but this recommendation has not been implemented.

### *B. The Wrongful Conviction of Tammy Marquardt*

Tammy Marquardt, a twenty-one year-old woman and single mother, was convicted of murder in 1995 for killing her two and one-half year old son. Her son had a history of epileptic seizures and had, at Marquardt's request, temporarily been placed in the custody of child welfare officials. Marquardt consistently denied killing her son. Marquardt's lawyer attempted to question prospective jurors about whether they might be prejudiced by the allegations of child killing, but the trial judge did not allow such questions to be put to prospective jurors, concluding that he was "not persuaded that there is a reasonable potential for the existence of partiality in the minds of the proposed jurors based upon all of the material before the court including the very nature of the charge itself."<sup>56</sup> Potential jurors are not as readily questioned in Canada as in the United States about whether they may be biased against the accused.

The main evidence at trial against Marquardt came from the testimony of Dr. Charles Smith, a pathologist who testified that the cause of her son's death was asphyxia and cited petechial haemorrhages and brain swelling as evidence in support of his opinion.<sup>57</sup> The defence called no medical evidence to challenge this testimony, but argued that the child's death might have been caused by an epileptic seizure.

Forensic pathologists subsequently found flaws in Dr. Smith's work in this, and other child death cases. They found his work flawed in twenty of forty child death cases that they reviewed, and a subsequent

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55. *Stinchcombe*, [1991] 3 S.C.R. 326.

56. *R. v. Marquardt* (1995), 44 C.R. (4th) 4th 353, ¶ 910 (Ont.Ct. (Gen.Div.)).

57. Dr. Smith testified "his findings were "consistent with" suffocation with a soft object, a pillow, a plastic bag or if someone held his nose and mouth closed and he was suffocated that way. He discounted seizure as a cause of death as he had no evidence "of that at all." In particular, he testified that "you don't have evidence of asphyxia" from sudden and unexpected death in epilepsy (SUDEP). However, he allowed that he was not an expert on this condition and the opinion of a pediatric neurologist would be better than his opinion on that issue. *R. v. Marquardt*, 2011 ONCA 281, ¶ 9 (Can.).



inquiry found that Smith's work was not adequately supervised, and frequently not subject to adequate adversarial challenge in court. In Marquardt's case, the reviewing forensic pathologists found that asphyxia was not supported in the evidence as the cause of death, which in their view was unascertained, with a fatal epileptic seizure not being excluded. The inquiry also found that Dr. Smith saw his role as supporting the prosecution, as opposed to providing impartial expert evidence. Dr. Smith also made inappropriate references to his personal experience and irrelevant, but prejudicial, factors about the families of deceased children and used inappropriate language when he testified.<sup>58</sup>

Marquardt appealed her conviction to the Ontario Court of Appeal, but the appeal was dismissed in 1998. The appeal did not challenge Dr. Smith's evidence but rather suggested that the trial judge erred by not relating the evidence to a possible manslaughter verdict. This ground of appeal implicitly suggested that Marquardt might be guilty, but should have been convicted of a lesser form of homicide. This feature of both the Marquardt and Marshall cases suggests that defence lawyers may not have been as attentive to their client's claims of innocence as they should. As in the Marshall case, the manslaughter argument raised by Marquardt's lawyer on appeal was not successful, with the court of appeal correctly stressing that the only defence raised at trial was that her son died through natural causes or accident.<sup>59</sup>

In a number of other cases involving Dr. Smith, parents accepted plea bargains to lesser forms of homicides to avoid the mandatory sentence of life imprisonment that follows a murder conviction in Canada.<sup>60</sup> Both with respect to guilty pleas and appeals, the Canadian criminal justice system does not provide sufficient protections for accused to persist in

58. GOUDGE INQUIRY, *supra* note 6, at 162, 183, 188.

59. The Court of Appeal concluded that the manslaughter "verdict was tenuous . . . . The only defence advanced at trial was accident. The trial judge properly directed the jury that if they had a reasonable doubt that the death was accidental, the appellant was entitled to an acquittal. The appellant, in her extensive and detailed testimony, gave no evidence capable of supporting a manslaughter verdict either on the basis of a loss of control or excessive use of force to quiet the child. The appellant denied being angry, denied being under any special stress due to her relationship with her husband, denied any need to discipline the child, denied having had a black-out, in short denied being in any kind of mental state that would support a lack of intent. There was no other physical or circumstantial evidence to suggest that the appellant lacked the requisite intent at the time of the death. On the other hand, the medical and other evidence strongly suggested at least an intent to cause bodily harm that the appellant knew was likely to cause death and was reckless whether death ensued or not. It was sufficient that the intent and the act of suffocation coincided at some point." *R. v. Marquardt*, (1998) 124 C.C.C. 3d 375, ¶ 6–7 (Can.).

60. For examples of guilty pleas being subsequently overturned in cases involving Dr. Smith see *R. v. Sheratt Robinson*, 2009 ONCA 886 (Can.); *R. v. C.F.*, 2010 ONCA 691 (Can.); *R. v. C.M.*, 2010 ONCA 690 (Can.); *R. v. Kumar*, 2011 ONCA 120 (Can.); *R. v. Brant*, 2011 ONCA 362 (Can.) (parents pled guilty to reduced homicide in the child's death in the face of forensic pathology evidence later shown to be unreliable).

claims of innocence. Both Marshall and Marquardt would have spent less time in jail if they had pled guilty to manslaughter, even though both were innocent. In some respects, the Canadian criminal justice system penalizes accused for persisting in claims of innocence.

Marquardt never appealed to the Supreme Court of Canada because she had been denied legal aid funding. In 2009, after the revelations and inquiry into Dr. Smith, she appealed to the Supreme Court with notice of fresh evidence relating to the unreliability of Dr. Smith's testimony at trial. In a short summary judgment, the Supreme Court of Canada granted the leave to appeal out of time and remanded the case to the Ontario Court of Appeal to consider the fresh evidence. The prosecution did not oppose this motion.<sup>61</sup>

A judge of the court of appeal granted Marquardt bail, pending the hearing of appeal, thus releasing her from thirteen years of imprisonment.<sup>62</sup> In 2011, the Ontario Court of Appeal considered the fresh medical evidence and found that it "shows that Dr. Smith made several significant errors that could have misled the jury and led to a miscarriage of justice."<sup>63</sup> The errors included finding asphyxia on the basis of non-specific petechial haemorrhages and stating that the autopsy excluded epilepsy as a cause of death. The court of appeal held that in light of the new evidence, the conviction was a miscarriage of justice. It did not acquit Marquardt, but instead ordered a new trial, in part because it did not accept expert testimony that epilepsy was the cause of death, as it was outside the scope of expertise of two pediatric neurologists who gave portions of the fresh evidence.<sup>64</sup> The Crown subsequently withdrew the murder charge with the trial judge expressing regret for what had happened.<sup>65</sup> The government has offered \$250,000 in compensation,<sup>66</sup> but Marquardt is understandably seeking more, given both her thirteen years in prison and her loss of contact with two other sons who the state subsequently put up for adoption after she was wrongfully convicted.

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61. Tammy Marie Marquardt v. Her Majesty the Queen, 2009 Can LII 21729 (SCC), available at <http://canlii.ca/t/23dkg>.

62. She was granted parole at one time, but it was subsequently revoked.

63. Marquardt, 2011 ONCA 281, ¶ 16.

64. *Id.* ¶ 21.

65. Tracey Tyler, *Murder Charges Withdrawn Against Mother Wrongfully Convicted of Killing Son*, 2, TORONTO STAR, June 7, 2011, available at [http://www.thestar.com/news/crime/2011/06/07/murder\\_charges\\_withdrawn\\_against\\_mother\\_wrongfully\\_convicted\\_of\\_killing\\_son\\_2.html](http://www.thestar.com/news/crime/2011/06/07/murder_charges_withdrawn_against_mother_wrongfully_convicted_of_killing_son_2.html).

66. Kevin Connor, *Wrongfully Accused Mom to Get \$250,000*, OTTAWA SUN, Aug. 11, 2010, available at <http://www.ottawasun.com/news/Canada/2010/08/10/14982991.html>.

#### IV. THE LEGAL MECHANISMS FOR OVERTURNING OLD CONVICTIONS ON THE BASIS OF NEW EVIDENCE

The above case studies represent the two major methods for overturning wrongful convictions in Canada. In Marshall's case, a new appeal was ordered as a result of a petition to the federal Minister of Justice and Marshall was granted bail pending that appeal. In Marquardt's case, the Supreme Court granted an appeal out of time and remanded the case back to the Ontario Court of Appeal to hear fresh evidence. Marquardt was granted bail pending this appeal which considered the fresh evidence and overturned a conviction. The Court of Appeal ordered a new trial but the prosecutor withdrew the charge.

Canadian courts are relatively generous in allowing both appeals out of time and new evidence to be admitted, especially in cases where the prosecutor consents to such procedures. This procedure has been used with the prosecutor's consent to reverse convictions, often from guilty pleas, in a series of child death cases where new evidence demonstrated that the conviction based on the evidence of pathologist Charles Smith was flawed. Although due diligence is a formal prerequisite for the admission of new evidence, Canadian courts have consistently held that this requirement should not stand in the way of a correction of a miscarriage of justice.

Another important mechanism for recognizing wrongful convictions in Canada is the ability of courts to grant bail to a person pending a new appeal or even pending a petition to the Minister of Justice to order a new trial or a new appeal.<sup>67</sup> For many of the wrongly convicted in Canada, such bail decisions are their first breath of freedom and their first official recognition that they have been wrongfully convicted.

##### *A. Appeals*

Canada has a unitary criminal court system, but one that has fairly wide appeal rights that can assist in the overturning of wrongful convictions. The accused has a right to appeal to the provincial court of appeal on any ground that raises a question of law alone. The accused can also appeal questions of mixed law and fact and other matters with the leave of the court of appeal, which generally hears appeals in panels

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67. Bail pending appeal is governed by s.679 of the Criminal Code and can be ordered in cases where the ground of appeal is not frivolous and detention is not necessary in the public interest. For an example of the use of this power in a miscarriage of justice case see *R. v. Parsons*, (1997) 124 C.C.C.(3d), 92 (Can. Nfld. C.A.). For examples of bail being granted pending the Minister of Justice's decision whether to re-open a case and order a new trial or a new appeal see *R. v. Phillion*, [2003] O.J. No. 3422 (Can. Ont. Sup. Ct. of Just.); *R. v. Driskell*, 2004 MBQB 3 (Can.); *R. v. Unger*, 2005 MBQB 238 (Can.); *Ostrowski v. The Queen et al.*, 2009 MBQB 327 (Can.).

of three judges.<sup>68</sup> The appeal court can assign publicly funded counsel to assist in the appeal when it is desirable in the interests of justice.<sup>69</sup> The accused has a right to an additional appeal to the Supreme Court of Canada on any question of law on which an appeal court judge dissents.<sup>70</sup> The Supreme Court can also hear appeals on matters of national importance, but denies the vast majority of such applications without written reasons. Various rules of courts provide time limits for the accused to give notice of appeal, but appeal courts have a statutory right to extend time<sup>71</sup> and have done so after decades of delay in cases where the accused presents fresh evidence as a reason for a delayed appeal. In cases involving possible wrongful convictions, appeal courts have also granted their discretion to hear moot appeals involving dead accused.<sup>72</sup> Canada does not have a tradition found in the United States of statutes of limitations barring appeals or the admission of fresh evidence.

The court of appeal can allow an appeal from the conviction on the basis of 1) legal error that is not harmless<sup>73</sup> or 2) the conviction is unreasonable or cannot be supported by the evidence or 3) any ground that there was a miscarriage of justice.<sup>74</sup> The Ontario Court of Appeal has characterized the accused's appeal rights, combined with the power to admit fresh evidence and hear evidence from witnesses under s.683 of the Criminal Code "in the interests of justice," as "broad rights of appeal." It has stated that "the broad rights of appeal, the power to receive fresh evidence, and the court's wide remedial powers are all designed to maximize protection against wrongful convictions."<sup>75</sup> This statement was made in the course of a ruling in which the accused sought disclosure of material related to Dr. Smith, a pathologist whose faulty work led to the appointment of the Goudge Inquiry and the recognition of a number of wrongful convictions. The Supreme Court

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68. Criminal Code of Canada, R.S.C. 1985, c.C-46 s.675.

69. *Id.* s.684. Neither this section nor the Charter provides an automatic right to have assistance of state funded counsel. *R. v. Robinson*, (1989), 51 C.C.C.3d 452 (Alta.C.A.); *R. v. Baig* (1990), 58 C.C.C.3d 156 (B.C.C.A.), leave refused 60 C.C.C.3d vi (S.C.C.).

70. Criminal Code of Canada, R.S.C. 1985, s.691.

71. Criminal Code of Canada, R.S.C. 1985, s.678.

72. *R. v. Smith*, 2004 SCC 14, ¶47 (Can.) (discussing *R. v. Jette*, (1999) 141 C.C.C.3d 52 (Can. Que. C.A.) in which an appeal was allowed and a stay of proceedings entered in a case where fresh evidence was admitted suggesting that the accused's statements had been extracted involuntarily and that perjured testimony about the accused making an incriminating statement to an informant had been introduced at trial).

73. In what is commonly called "the proviso," the Court of Appeal can dismiss an appeal under s.686(1)(b)(iii) in cases where, even though the trial judge made an error of law, the Court of Appeal "is of the opinion that no substantial wrong or miscarriage of justice has occurred."

74. Criminal Code of Canada, R.S.C. 1985, s.686(1)(b)(iii).

75. *R. v. Trotta* (2004), 23 C.R. (6th) 261, ¶ 24 (Ont. C.A.).

eventually ordered a new trial in the *Trotta* case, despite the Crown's argument that a conviction could be sustained without Dr. Smith's testimony given the pattern of child abuse. The Supreme Court held that it was:

[N]either safe nor sound to conclude that the verdicts on any of the charges would necessarily have been the same but for Dr. Smith's successfully impugned evidence. To attempt at this stage to insulate the effect of Dr. Smith's evidence on one count from its possible effect on the others would amount to an unwarranted exercise in appellate speculation.<sup>76</sup>

The Court ordered a new trial, but one of the accused was convicted of manslaughter at the retrial. The Supreme Court's concern about the safety of the first guilty verdict may respond to criticisms that, unlike in Britain or Australia, the Canadian Criminal Code does not specifically authorize appeals due to concerns about the safety of verdicts.

Justice Kaufman, in his commission of inquiry report on the Guy Paul Morin case, recommended that consideration should be given to changing the powers of the court of appeal so that they could "set aside a conviction where [there exists] a 'lurking doubt' as to[] guilt . . ."<sup>77</sup> He found that appellate courts implicitly, and in a few cases explicitly, considered the safety of verdicts when determining whether a conviction was reasonable or cannot be supported by the evidence. He stressed the following:

[A]n appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of credibility is the internal consistency of a witnesses' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this—sometimes indirectly—through their determination of whether there was a legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly. It recognizes the most important, though not exclusive, function of a criminal appellate court: to

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76. *R. v. Trotta*, 2007 SCC 49, ¶ 14(Can.). This decision reversed an earlier one of the Ontario Court of Appeal that had upheld the conviction on the basis that "there was cogent, if not overwhelming, evidence that Paolo was a battered child and that Marco was his abuser." *R. v. Trotta*, (2004), 190 C.C.C. (3d) 199, ¶ 31 (Can.) and on the basis that the Crown had provided overwhelming evidence that the child was abused during his eight month life and that "there will never be a perfect trial." *Id.* at ¶ 98.

77. MORIN INQUIRY, *supra* note 6, at 1176.

ensure that no person is convicted of a crime that he or she did not commit.<sup>78</sup>

Despite this recommendation, s.686 of the Criminal Code has not been amended to allow convictions to be reversed on the basis of a lurking doubt or even the British ground of safety, though courts of appeal continue, as in the *Trotta* case, to make reference to the safety of convictions.

In *R. v. Biniaris*,<sup>79</sup> the Supreme Court was asked to adopt the lurking doubt standard. In that case, the Court upheld a murder conviction, even though the Crown pathologist changed her testimony after having consulted with the defence pathologists to the effect that the accused's actions in stomping on the deceased did not cause the victim's death. Justice Arbour for the Court rejected the lurking doubt standard, stating:

It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner. In that case, the court of appeal must proceed further with its analysis.<sup>80</sup>

The Court did, however, state that appellate courts should examine convictions "through the lens of judicial experience which serves as an additional protection against an unwarranted conviction."<sup>81</sup> The Court also indicated that an appellate court could overturn a conviction as unreasonable on the basis of a mix of objective and subjective factors.

Appellate courts are more likely to find convictions unreasonable in the majority of Canadian cases where a judge alone tries the accused and the appeal court can review the trial judge's reasons for convicting,<sup>82</sup> as

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78. *Id.* at 1187–88.

79. 2000 SCC 15.

80. *Id.* at ¶ 38.

81. *Id.* at ¶ 40.

82. *Compare*, *R. v. Burke*, [1996] 1 S.C.R. 474 (Can.) (reversing a historical indecent assault conviction on the basis of the judge's reasoning), *with* *R. v. Francois*, [1994] 2 S.C.R. 827 (Can.) (upholding a historical rape conviction rendered by a jury). The Supreme Court has recently affirmed that judge's verdicts will be subject to more searching reasonableness review because "judges, unlike juries, give reasons for their findings which the appellate court may review and consider as part of its reasonableness analysis. However, this expanded reasonableness review entered by trial judges do not apply to reasonableness review of a jury verdict." *R. v. W.H.*, 2013 SCC 23, ¶ 26. The differences of appellate review of judges alone and jury convictions was narrowed in *R. v. Beaudry*, 2007 SCC 5 (Can.) where the majority of the Court upheld a judge alone conviction stressing that the issue was

opposed to the minority of cases in Canada which are tried before a judge and jury.<sup>83</sup> The Supreme Court has confirmed its deference to jury verdicts when it recently held that an appellate court had erred in reversing a jury's conviction in a historical sexual assault because of the judges' concerns about inconsistencies in the complainant's account of the case. The Court specifically warned that the reviewing court must not "act as a '13<sup>th</sup> juror' or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court had a reasonable doubt based on its review of the record."<sup>84</sup> The Court recognized that "appellate review for unreasonableness of guilty verdict is a powerful safeguard against wrongful convictions" but nevertheless insisted that it "must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record."<sup>85</sup>

Another ground for allowing appeals from convictions is "on any ground that there was a miscarriage of justice." "In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice."<sup>86</sup> In such cases a new trial is the minimal remedy that the appellate court must order. There may also be a miscarriage of justice where the trial judge misapprehended evidence on matters of substance rather than detail, but only if such matters are material to the verdicts and the error plays "an essential part not just in the narrative of the judgment but 'in the reasoning process resulting in a conviction.'"<sup>87</sup>

The miscarriage of justice ground for allowing an appeal is of particular importance in cases where new evidence is admitted on appeal. In its *Truscott Reference*,<sup>88</sup> the Ontario Court of Appeal commented that on appeals that consider fresh evidence:

[S]ection 686(1)(a)(iii) is the only provision that is potentially relevant. It allows an appellate court to grant an appeal 'on any ground there was a

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whether the conviction was reasonable, not the trial judge's reasons. This case is a step backward in overturning wrongful convictions because as the minority emphasized it is dangerous to uphold a conviction based on bad or illogical reasoning.

83. Accused in Canada only have a constitutional right under s.11(f) of the Charter to be tried before a jury if they face five years imprisonment or more and even in such circumstances most accused elect under the Criminal Code to be tried by judge alone. See M.L. Friedland & Kent Roach, *Borderline Justice: Choosing Juries in the Two Niagaras*, 31 ISRAEL L. REV. 120 (1997).

84. R. v. W.H., 2013 SCC 22 at para 27. (Can.).

85. *Id.* at ¶ 32.

86. R. v. Khan, 2001 SCC 86, ¶ 27 (Can.).

87. R. v. Loher, 2004 SCC 80, ¶ 2 (Can.).

88. 2007 ONCA 575 (Can.).

miscarriage of justice'. This power can reach virtually any kind of error that renders the trial unfair in a procedural or substantive way. The section has been applied on appeals where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. In these cases, the miscarriage of justice lies not in the conduct of the trial or even the conviction as entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.<sup>89</sup>

Appeals on grounds of miscarriages of justice in Canada thus allow convictions to be quashed both on the basis that the trial was not fair and on the basis that new evidence places the reliability of the conviction in serious doubt. This decision demonstrates the flexibility of the legal term miscarriage of justice and its ability to include, but not be limited to, cases of factual innocence.

The most common grounds of appeal are not, however, that the verdict is unreasonable or constitutes a miscarriage of justice, but rather that trial judges erred in law in either their reasons or instructions to juries. Even if an appeal court finds an error of law, it can sustain a conviction if it concludes "no substantial wrong or miscarriage of justice has occurred."<sup>90</sup> In other words, the trial judge's errors of law can be held to be harmless to the guilty verdict. The proviso at least requires the appellate court to address its mind to the question of whether there has been a miscarriage of justice. The proviso or harmless error rule can be applied to even major errors of law, but "only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible."<sup>91</sup> A new trial should be ordered after a finding of an error of law unless there is no reasonable possibility that the verdict would have been different.<sup>92</sup> In cases where the error of law was the exclusion of exculpatory evidence, any reasonable effect that the evidence could have had on the jury should be considered.<sup>93</sup> In cases where the error of law was the inclusion of inadmissible evidence, the appeal should be allowed and a new trial ordered if there is any possibility that a trial judge would have had a reasonable doubt about the accused's guilt on the basis of the admissible evidence.<sup>94</sup>

In a recent case, the Supreme Court split 5-4 and held that the trial judge's admission of prejudicial investigative hearsay without a limiting

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89. *Id.* at ¶ 110.

90. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.686(1)(b)(iii).

91. Khan, 2001 SCC 86, ¶ 31.

92. *R. v. Bevan*, [1993] 2 S.C.R. 599 (Can.).

93. *R. v. Wildman*, [1984] 2 S.C.R. 311 (Can.).

94. *R. v. S (P.L.)*, [1991] 1 S.C.R. 909 (Can.).



instruction to the jury was a harmless error in a case where the accused alleged that the police had inadequately investigated an alternative hypothesis that loan sharks had attempted to murder the victim. The majority held that the admission of the investigating officer's opinion that the accused was guilty did not result in a substantial wrong or miscarriage of justice. In contrast, the dissenting judges concluded that the Crown had not discharged its onus that there was no reasonable possibility that the legal error did not make a difference to the outcome of the case.<sup>95</sup> Unfortunately, the Court did not advert to American studies finding that appeal courts had found legal errors to be harmless in 38% of cases of DNA exonerees.<sup>96</sup> There is a danger that appeals are not as effective as they should be in detecting wrongful convictions.

The prosecutor in Canada can appeal an acquittal, but only on the basis that the acquittal was based on an error of law.<sup>97</sup> In at least one case, a prosecutor's successful appeal from an acquittal resulted in a wrongful conviction. In that case, the Crown successfully appealed Guy Paul Morin's original acquittal of murder on the basis that the trial judge had erred in law by inviting the jury to apply the reasonable doubt standard to each piece of evidence.<sup>98</sup> The Commission of Inquiry into Morin's wrongful conviction recommended that the Criminal Code be amended to require the Crown to demonstrate that the verdict likely would have been different had the trial judge not made the error of law.<sup>99</sup> The Supreme Court has subsequently held that an error of law must be reasonably thought to have a material bearing on the acquittal. That said, the prosecutor does not have to establish that the verdict would necessarily have been different to receive an order for a new trial after a successful prosecutorial appeal from an acquittal.<sup>100</sup> The relatively broad appeal rights enjoyed by accused in Canada are balanced by the ability of the prosecutors to appeal acquittals.

### *B. Fresh Evidence on Appeal*

Section 683 of the Criminal Code provides courts of appeal with broad powers to consider fresh evidence. The court of appeal can also order production of things and provide for the examination and cross-

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95. *R. v. Van*, 2009 SCC 22 (Can.).

96. BRANDON GARRETT, CONVICTING THE INNOCENT 201 (2011) (involving 62 of 165 cases with written decisions); *See also* Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 108 (2008) (an earlier study finding 32% of exonerees).

97. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.676.

98. *R. v. Morin*, [1988] 2 S.C.R. 345 (Can.).

99. MORIN INQUIRY, *supra* note 6, at 1188.

100. *R. v. Graveline*, 2006 SCC 16 (Can.).

examination of witnesses before the court of appeal or other body. The test for the admission of fresh evidence is that the evidence must:

- (1) bear on a decisive or potentially decisive issue;
- (2) the evidence must be credible;
- (3) the evidence, if believed, could affect the result; and
- (4) the evidence should generally not have been obtainable at trial by due diligence.<sup>101</sup>

Courts have consistently held that the due diligence requirement should not be applied as strictly in criminal as in civil cases. The Supreme Court made clear that the due diligence requirement was not essential and must yield where a miscarriage of justice would otherwise result.<sup>102</sup> In a recent case, the Supreme Court allowed the accused to admit as fresh evidence a forensic dentist's opinion that an injury to an accused convicted of sexual assault was not a bite mark, even though the accused conceded that the new evidence could have been obtained by due diligence at trial. The Court stressed that "it would be unsafe to uphold the convictions" given the closeness of the case and the fact that a police officer was allowed at trial to provide his opinion that the injury was the result of a bite mark.<sup>103</sup>

The court of appeal can also appoint a special commissioner to inquire and report back on matters, including scientific matters that cannot "conveniently be inquired into before the court of appeal."<sup>104</sup> This provision is an interesting inquisitorial aspect of the appellate process in Canada that has been used in at least one wrongful conviction case.<sup>105</sup> The addition of inquisitorial aspects to the adversary system could in some cases help prevent or remedy wrongful convictions by demonstrating an official commitment that the state should take efforts to discover the truth.<sup>106</sup>

### *C. DNA*

DNA has played a decisive role in revealing many wrongful convictions in Canada, particularly those involving hair analysis and sexual assault or murder. At the same time, however, the Supreme Court of Canada, in holding that it would be unconstitutional to extradite a person without assurances that the death penalty would not be applied,

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101. *Manhas v. The Queen*, [1980] 1 S.C.R. 591 (Can.).

102. G.D.B, 2000 SCC 22, ¶ 37.

103. *R. v. J.A.A.*, [2011] 1 S.C.R. 628, ¶14(Can.).

104. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.683(1)(e).

105. *R. v. Nepoose*, [1992] 125 A.R. 28, 29 (Can.).

106. Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. INT'L L. & COM. REG. 387, 430-32 (2010).

has rightly stressed that DNA will not be available in many potential wrongful conviction cases.<sup>107</sup> DNA evidence can reveal flaws in the criminal justice system that result in wrongful convictions, but it is not a panacea for the problems of wrongful convictions.

The Criminal Code allows judges to grant warrants to obtain DNA samples and to collect DNA samples from an expanding list of convicted offenders.<sup>108</sup> There are provisions that limit the use of such DNA samples to the investigation of designated offences and that provide for destruction of the DNA sample after an acquittal or dismissal of charges.<sup>109</sup> The focus of this legislation and the DNA data bank containing over 200,000 convicted offender profiles and over 65,000 crime scene profiles<sup>110</sup> is on crime control though it may also preserve DNA evidence that will be critical in revealing wrongful convictions.

There are no specific provisions in the DNA legislation, as there are in the American Innocence Protection Act,<sup>111</sup> that provide for a person who has been convicted to have access to DNA samples. At the same time, an appeal court under s.683(1) of the Canadian Criminal Code could order the production of DNA material as evidence relating to proceedings, and trial judges would likely have similar powers. In many cases, prosecutors consent to the testing of evidence that may contain DNA. Disputes and delays do occur and they can delay the discovery of wrongful convictions.

The Morin Inquiry recommended that protocols for DNA testing be developed between prosecutors and defence lawyers and that material be retained for such testing. The inquiry also approved of the development of a national DNA data bank, but did not recommend statutory entitlement to DNA testing for those claiming to be wrongly convicted.<sup>112</sup> The Milgaard Inquiry found that the RCMP lab missed discovering DNA material that could have led to Milgaard being more quickly exonerated for murder.<sup>113</sup>

The lack of specific statutory regulation of post-conviction DNA testing is another example of statutes in Canada failing to make

107. Burns, 2001 SCC 7, ¶ 109 (quoting Peter Neufeld's testimony to Congress).

108. Criminal Code ss.487.04-487.0911(Can.).

109. Criminal Code ss.487.08-487.09 (Can.).

110. The labs that process DNA are run by the RCMP with separate provincial forensic science labs in the largest provinces of Ontario and Quebec. The data bank provides statistics on over 19,000 offender hits but not on whether the bank has ever produced exonerations. See *National DNA Data Bank*, ROYAL CANADIAN MOUNTED POLICE, [http://www.nddb-bndg.org/images/stats\\_e.pdf](http://www.nddb-bndg.org/images/stats_e.pdf) (last visited Nov. 7, 2011).

111. Pub L. No. 108-405, 118 Stat. 2260 (2004) (codified at 42 U.S.C. 13701).

112. MORIN INQUIRY, *supra* note 6, at 395-96.

113. MILGAARD INQUIRY, *supra* note 6, at 808-11.

adequate acknowledgement of the possibility of wrongful convictions. It may also demonstrate a faith that unelected prosecutors will generally consent to DNA testing or that judges will exercise their powers, including those relating to the admission of fresh evidence on appeal, to ensure that evidence that may contain DNA will be tested. Some commentators have argued that Canadians have historically demonstrated greater trust of those who hold state power than Americans<sup>114</sup> and this may help explain the lack of a statutory entitlement to DNA evidence that is provided in most American jurisdictions.

*D. Appellate Discretion to Enter an Acquittal or to Order a New Trial*

If the accused is successful on the appeal, the appellate court has discretion to enter an acquittal or to order a new trial. The choice between these two remedies can have a profound effect on the wrongfully convicted. An acquittal means that the accused has been found not guilty and the presumption of innocence has been restored, whereas a new trial order may either place the accused in continued jeopardy or result in a prosecutorial stay of proceedings, which may produce residual stigma in the case of an accused who has previously been convicted.

There is a long but not invariable practice of entering acquittals in cases where the accused likely suffered a miscarriage of justice. The Manitoba Court of Appeal entered an acquittal after Thomas Sophonow's third trial, in part because he had already faced three trials and served close to four years in jail, and because the identification evidence in the case was not reliable.<sup>115</sup> In *R. v. Hinse*, the Supreme Court of Canada set aside a stay of proceedings the Quebec Court of Appeal entered in a case of a thirty-year-old wrongful robbery conviction. It entered an acquittal on the basis that the "evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt."<sup>116</sup> In *Re Truscott*, the Ontario Court of Appeal held that while it might normally order a new trial, an acquittal was appropriate given that a new trial on the 1959 murder was not possible, a prosecutorial stay would impose continuing stigma on Truscott, and it was more probable than not that Truscott would be acquitted at a hypothetical new trial.<sup>117</sup>

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114. SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE* (1990); DAVID JONES AND DAVID KILGOUR *UNEASY NEIGHBORS* (2007).

115. *R. v. Sophonow*, (1985) 38 Man. R. 2d 198, 202 (C.A.).

116. [1997] 1 S.C.R. 3, ¶2.

117. *Re Truscott*, 2007 ONCA 575, ¶265.

In other miscarriages of justice cases, courts of appeal have been able to conclude that an acquittal should be entered because no reasonable jury would convict the accused. The New Brunswick Court of Appeal in *R. v. Walsh*, after hearing new evidence from a variety of witnesses and examining archival material that should have been disclosed to an accused who had served twenty-seven years imprisonment on a murder charge, entered an acquittal. It stressed that the prosecutor had agreed that the fresh evidence should be admitted, that there was a miscarriage of justice, and that a new trial was not feasible.<sup>118</sup> The Court of Appeal concluded that:

[I]n view of the fact we have a complete record, we have considered the entire case as it was presented to the judge and jury. We have also considered the fresh evidence. On the evidence as it now stands, the trial record as augmented by the fresh evidence, we are of the opinion that no reasonable jury could convict Walsh of murder.<sup>119</sup>

In the William Mullins-Johnson case, an acquittal was also entered, with the agreement of the Crown, after the court of appeal had considered fresh pathological evidence indicating that the cause of the death of Mullins-Johnson's niece was undetermined and that the medical evidence did not support the original conviction of murder and sexual assault.<sup>120</sup>

The practice of entering acquittals is not invariable. The Ontario Court of Appeal refused to enter an acquittal when overturning a 1972 murder conviction in Phillion's case. The court of appeal stated that a new trial was necessary because "depending on how the fresh evidence were to unfold at a new trial, it would be open to a jury to reject the defence of alibi and conclude, essentially on the basis of the appellant's confessions," that the accused was guilty. It concluded that "substituting a verdict of acquittal on the basis that the fresh evidence is 'clearly decisive' of innocence is not a tenable position."<sup>121</sup> Phillion had not established under the *Truscott* test that it was more probable than not

118. *Re Walsh*, 2008 NBCA 33, ¶ 96 (Can.).

119. *Id.*, ¶ 91.

120. *Re Mullins-Johnson*, 2007 ONCA 720 (Can.). For other wrongful convictions stemming from Dr. Smith's flawed forensic pathology testimony where the Court of Appeal entered an acquittal, see *R. v. Sheratt Robinson*, 2009 ONCA 886 (Can.); *R. v. C.F.*, 2010 ONCA 691 (Can.); *R. v. C.M.*, 2010 ONCA 690 (Can.); *R. v. Kumar*, 2011 ONCA 120 (Can.); *R. v. Brant*, 2011 ONCA 362 (Can.). For a historical case in which the prosecutor conceded that "Given the Crown's submissions, it is open to the Court to conclude that as matters stand today, no reasonable jury could convict. In the event that such determination is made, the appropriate remedy is to enter acquittals on the counts at bar." *R. v. Henry* 2010 BCCA 462, ¶ 10 (Can.). For another wrongful conviction involving a mistaken identification where the prosecutor consented to the entry of an acquittal see *R. v. Webber*, 2010 ONCA 4 (Can.).

121. *Re Phillion*, 2009 ONCA 202, ¶ 244 (Can.).

that he would be acquitted at a hypothetical new trial, even though there was new alibi evidence that “may well have left the jury in a state of reasonable doubt . . . ”.<sup>122</sup> One judge dissented in this appeal, and would have upheld the conviction. As in *Truscott*, a new trial was impossible given the age of the events and the prosecutor subsequently decided to withdraw the charge. As discussed above, the Ontario Court of Appeal refused to enter an acquittal when it overturned Marquardt’s murder conviction, though the prosecutor subsequently withdrew the murder charges.

### *E. Prosecutorial Conduct at New Trials*

If a new trial, as opposed to an acquittal, is ordered in a case of a suspected miscarriage of justice, the prosecutor has the option of 1) conducting a new trial, or 2) issuing a prosecutorial stay of proceedings, 3) withdrawing charges, or 4) of calling no evidence. The previously convicted person only receives a formal acquittal if no evidence is called. Prosecutors have been surprisingly reluctant to follow this approach. In many miscarriage of justice cases, they have simply stayed proceedings. In response to recent criticisms of this practice, the more recent trend is towards withdrawing charges.

The Lamer Inquiry concluded that a prosecutorial stay “may leave an impression with the public that the charge is merely being ‘postponed’ or ‘the authorities,’ in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.”<sup>123</sup> Similarly, the Driskell Inquiry expressed concerns that a prosecutorial stay leaves “a residual stigma” and is not an appropriate remedy when the Minister of Justice has ordered a new trial under the petition procedure. It recommended that the preferable course in most cases of a suspected miscarriage of justice is for the prosecutor to call no evidence so that the accused receives an acquittal and is protected by double jeopardy provisions from further prosecutions for the alleged offence. Prosecutorial stays should only be entered by the Attorney General personally and if there is still an active investigation of the formally convicted person.<sup>124</sup> A third commission of inquiry recognized that a prosecutorial stay in 1992 in Milgaard’s case “left him with significant stigma” that was not dispelled until DNA exonerated him in 1997, but that it was nevertheless a reasonable

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122. *Id.* at ¶ 246.

123. LAMER INQUIRY, *supra* note 6, at 317–18.

124. DRISKELL INQUIRY, *supra* note 6, at 129–39.

decision.<sup>125</sup> The Milgaard commission also endorsed the recommendations of the Driskell Inquiry about the limited use of prosecutorial stays in cases of suspected miscarriages of justice.

In light of these criticisms, prosecutors have become more reluctant to enter stays in miscarriages of justice cases. The new trend in cases such as Marquardt seems to be to withdraw charges, a practice that, like the stay, does not result in a formal acquittal. The prosecutor similarly withdrew charges in the Phillion case, discussed above. Phillion challenged this decision, arguing that he was entitled to an acquittal once his 1972 murder conviction had been reversed on the basis of new evidence. The subsequent challenge to the prosecutorial withdrawal failed, with the judge emphasizing the important role of prosecutorial discretion.<sup>126</sup> In the end, Canadian victims of wrongful convictions may not always receive a formal acquittal,<sup>127</sup> let alone a finding of factual innocence from the criminal justice system that is formally required for compensation.

#### *F. Petitions to the Federal Minister of Justice When Appeals are Exhausted*

If a person's appeals have been exhausted, the only means to re-open a case is to petition the federal Minister of Justice, who is an elected official who also serves as the Attorney General of Canada.<sup>128</sup> This power has been used in a number of high profile cases, including that of Marshall examined above. Nevertheless, it is a second best approach because the ultimate decision-maker is an elected politician. In addition, there are frequent delays that accompany the petition process in part because of the onus it places on the petitioner to present new evidence and full records of the case and in part because of the investigations that are conducted to advise the Minister of Justice. The petition process has the potential to trigger investigative powers that can be exercised by the Minister of Justice or his or her designate. However, the petitions have

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125. MILGAARD INQUIRY, *supra* note 6, at 336.

126. Phillion, 2010 ONSC 1604 (Can.).

127. Kyle Unger was, however, acquitted after the Manitoba prosecutor called no evidence after a new trial for murder was ordered after DNA revealed that a hair used to convict him did not belong to Mr. Unger. A previous Manitoba Inquiry had criticized the use of a prosecutorial stay in another case where hair comparison evidence was refuted by DNA testing. *Kyle Unger Acquitted of 1990 Killing*, CBC NEWS (Oct. 23, 2009), <http://www.cbc.ca/news/canada/manitoba/story/2009/10/23/mb-unger-acquitted-manitoba.html>.

128. Kerry Scullion, Criminal Conviction Review Group, Dept. of Justice, Can., *Wrongful Convictions and the Criminal Conviction Review Process pursuant to Section 696.1 of the Criminal Code of Canada*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 189 (2004); *see also* Peter H. Howden, *Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process*, 21 WINDSOR Y.B. ACCESS JUST. 569 (2002).

been characterized as adversarial and reactive by the six commissions of inquiry that have all recommended that the procedure for petitions be replaced by giving an independent body, similar to the CCRC used in England and Wales, power to either refer cases for new appeals or new trials.

The power of the Minister of Justice to re-open a case after appeals have been exhausted is based on the royal prerogative of mercy. It was recognized in Canada's first Criminal Code enacted in 1892, which provided:

748. 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.

In 1955, the provision was re-worded to indicate the Minister could direct a trial or a new appeal in his discretion, as opposed to cases where the Minister "entertains a doubt." The former "doubt" standard both provided more statutory guidance to the Minister and accorded with basic principles of criminal justice, which require guilt to be proven beyond a reasonable doubt.

In Canada, the provincial attorneys general conduct most criminal prosecutions, but the Attorney General of Canada has some prosecutorial responsibilities, for example, with respect to drug and terrorism prosecutions. In addition, the Attorney General of Canada prosecutes all offences in Canada's three northern territories. In recommending that an independent and permanent commission, such as the CCRC, replace the petition process, a number of commissions of inquiry have noted that the federal Minister of Justice is in a perceived and sometimes real conflict of interest in deciding whether to refer a criminal conviction back to the courts. The Milgaard Inquiry documented a lack of transparency in the petition process, which saw Milgaard's petition originally denied but then granted after the intervention of the Prime Minister. As the inquiry detailed, the Prime Minister and the Minister of Justice both claimed responsibility for having the petition ultimately granted, underlining a lack of transparency about how petitions are decided.<sup>129</sup>

Until amendments in 2002, the petition procedure was explicitly tied to applications for the mercy of the Crown. The relevant provision simply granted the Minister the discretion to order a new trial or to refer the case to the court of appeal either as a new appeal or on specific

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129. MILGAARD INQUIRY, *supra* note 6, at 373-376.



questions. There were no legislated rules to govern the Minister of Justice's exercise of discretion. Nevertheless, the courts held there was some duty of fairness that required the Minister to "conduct a meaningful review" and provide the occupant with "a reasonable opportunity to state his case."<sup>130</sup> At the same time, the courts warned that the petition procedure was not an appeal on the merits, there was no general right to disclosure of all material the Minister considered in making his or her decision and that the duty of fairness was less than applied in judicial proceedings.<sup>131</sup> Courts consistently deferred to Ministerial decisions not to grant petitions.<sup>132</sup>

In 1994, Minister of Justice Allan Rock announced a number of principles that guided his decision-making under the petition procedure. He emphasized that the petition remedy was extraordinary and not intended to allow the Minister to substitute his opinion for that of the court or jury or to create a fourth level of appeal. Petitions should ordinarily be based on new matters that the courts had not considered. The Minister would assess the reliability and significance of new evidence the applicant placed before the Minister. Although an applicant does not have to establish innocence to be successful, the applicant would have to establish that a miscarriage of justice likely occurred.<sup>133</sup> The reactive nature of this enterprise was demonstrated in the Milgaard Inquiry when it heard the following from a formal federal official:

Q: . . . A convicted person can't come to you and say "look, I'd like you to investigate, I'm innocent, I don't know what went wrong but would you please go and investigate this and find out why I was wrongfully convicted"?

A: We would say to that person "that is not the role of the department or of the Minister." Certainly, if you've been through the process, sat in on your trial, heard the evidence, you're in the best position to identify to us what it is you say constitutes wrongful – or what the errors were and why they constitute a miscarriage of justice.

Q: And what you are telling us, then, it would be incumbent upon Mr. Milgaard and/or his counsel to identify significant grounds that might provide a basis for a remedy under Section 690?

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130. *Thatcher v. Canada*, [1997] 1 F.C. 289 at 297 [12].

131. *Id.* at ¶ 12–13.

132. *Id.*; *W.R. v. Canada (Minister of Justice)*, [1999] FC 1059; *Bonamy v. Canada*, (Att'y Gen.) 2001 FCT 798; *Daouluv v. Attorney General, (Canada)*, 2008 FC 544; *Bilodeau v. Minister of Justice*, 2008 QCCS 1036, [2008] J.Q.no.2098., *affirmed in Bilodeau c. Canada (Ministre de la Justice)*, 2009 QCCA 746, [2009] J.Q. no 3472.

133. Patricia Braiden & Joan Brockman, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*, 17 WINDSOR Y.B., ACCESS JUST. 3, 9–10 (1999).

A: Yes.<sup>134</sup>

In other words, the Minister of Justice and his or her staff would react and evaluate new evidence that was put before them by a convicted person, but they would not conduct proactive investigations to determine if new evidence, not known to the convicted person, existed.

The 1994 principles established a number of significant hurdles for an applicant to pass before the Minister of Justice orders that the courts reconsider a conviction. The first hurdle was to produce new evidence; the second hurdle was to convince the Minister of Justice that the new evidence was relevant and reliable and the third hurdle was to convince the Minister of Justice that an extraordinary remedy of a new trial or appeal was necessary because a miscarriage of justice likely occurred. These principles have now largely been codified in the 2002 reforms.

In 2002, the prerogative of mercy provisions were replaced with a new procedure under ss. 696.1-6 of the Criminal Code. The new procedures were designed to make the petition process more transparent by providing the Minister of Justice with legal standards for making his or her decisions. The most important provision is s. 696.3(3)(a), which provides that the Minister is to direct a new trial or an appeal “if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.” This standard seems higher than the comparable English standard. The CCRC will refer a case for a new appeal if there is “a real possibility” that the conviction would not be upheld if referred to the court of appeal.<sup>135</sup> A reasonable likelihood is a higher standard than a real possibility. As discussed above, the Canadian legislation does not define a miscarriage of justice, but courts have interpreted it in a manner similar to the English standard that focuses on the safety of convictions as opposed to proven innocence.

Justice Kaufman, in his exhaustive report for the Minister of Justice in connection with Stephen Truscott’s application under this new provision, stressed that a miscarriage of justice would occur both if the conviction of a factually innocent person was established, but also if new evidence could reasonably have affected the verdict. In the latter circumstances “it would be unfair to maintain the accused’s conviction without an opportunity for the trier of fact to consider new evidence.”<sup>136</sup> In reversing Truscott’s conviction, the Ontario Court of Appeal subsequently indicated that a miscarriage of justice would include both trials that have been unfair and trials “where there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of

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134. MILGAARD INQUIRY, *supra* note 6, at 358.

135. Criminal Appeal Act, 1995 c 35 s. 13; *see also* R. v. CCRC ex parte Pearson, [1999] 3 All E.R. 498 (Can.).

136. F. KAUFMAN, REPORT ON THE STEPHEN TRUSCOTT APPLICATION, ¶ 164 (2004).

the conviction in serious doubt.”<sup>137</sup> In other words, a miscarriage of justice is a broad term. It can apply to both an unfair trial and a trial where the factual reliability of the conviction is in doubt.

In deciding whether to re-open a conviction by ordering a new trial or a new appeal, s. 696.4 instructs that the Minister of Justice shall take into account all matters that the Minister considers relevant, including:

1. 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;
2. the relevance and reliability of information that is presented in connection with the application; and
3. 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.

This section codifies many of the principles contained in Minister of Justice Rock’s 1994 statement. It does not require that new evidence or new matters be presented, but as a practical matter this is almost always required, given that the petition procedure is not intended to be a further level of appeal. Indeed, the federal Department of Justice’s website presents the need for new matters to be presented as a requirement.<sup>138</sup>

The internal procedures that are used to decide an application are: (1) a preliminary assessment to determine whether there are new matters that provide an air of reality to the claim of a miscarriage of justice; (2) an investigation in which counsel within the department verifies the information, collects new information, and makes a recommendation to the Minister; (3) preparation of an investigative summary that is disclosed to the applicant for comments; and (4) the preparation of final legal advice for the Minister of Justice’s decision. There is a special advisor within the department who offers advice at various stages of the investigation. The Milgaard Inquiry, however, concluded that the post-2002 changes have not changed the “reactive” nature of the process

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137. 2007 ONCA 575, ¶ 110 (Can.).

138. “An application for ministerial review must be supported by ‘new matters of significance’—generally new information that has surfaced since the trial and appeal and therefore has not been presented to the courts, and has not been considered by the Minister on a prior application. Only after a thorough review of the new matters of significance will the Minister be in a position to determine whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred.” DEPT. OF JUST., CAN., ANNUAL REPORT, ADDRESSING POSSIBLE MISCARRIAGES OF JUSTICE (2008), available at <http://www.justice.gc.ca/eng/pi/ccr-rc/rep08-rap08/02.html>; DEPT. OF JUST., ANNUAL REPORT, APPLICATIONS FOR MINISTERIAL REVIEW—MISCARRIAGES OF JUSTICE (2010), available at <http://www.justice.gc.ca/eng/pi/ccr-rc/rep10-rap10/index.html>. But for arguments that a conviction will be reviewed by the Criminal Cases Review Group within the Department of Justice even if an applicant does not identify a new matter see Narissa Somji, *A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom*, 58 *Crim. L.Q.* 136, 167 (2012).

because it still relies on the applicant identifying new evidence.<sup>139</sup>

The 2002 changes allow the Minister of Justice to appoint individuals to investigate claims of wrongful conviction. Those individuals must be retired judges, members of the bar, or those with similar qualifications. They have powers to take evidence, issue subpoenas, and compel people to give evidence.<sup>140</sup> These powers are broad and, unlike the English CCRC, include a power to obtain documents from private persons. These delegated authorities, however, only make recommendations to the Minister of Justice about whether a conviction should be referred back to the courts and they do not make the actual referral decision.

From November 2002, when the new provisions came into force, to March 31, 2012, the Minister of Justice has made decisions on eighty-seven applications. Most applications were closed after a preliminary assessment on the basis that there were no grounds for further investigation. The remaining applications went to investigation, with thirteen of those cases (15% of total applications) being referred back to the courts. These statistics suggest that the Minister of Justice refers a greater percentage of applications (15% compared to 4%) to the courts than the English CCRC. At the same time, however, the CCRC receives many more applications each year than the Canadian Minister of Justice.<sup>141</sup>

The federal Minister of Justice is more risk adverse than the CCRC in the cases it decides to refer back to the courts. In twelve of the thirteen cases that the Minister has referred since 2002, the applicant has received a favourable remedy resulting in freedom.<sup>142</sup> In contrast, over a third of the cases referred by the CCRC to the court of appeal are not overturned on appeal. This significant difference could be explained by a number of factors. One is that the Canadian Minister has to apply a more difficult standard of a reasonable likelihood that a miscarriage of

139. MILGAARD INQUIRY, *supra* note 6, at 364.

140. Criminal Code of Canada, R.S.C. 1985, c. C-46 s.696.2.

141. The Criminal Case Review Commissions receives about 1,000 applications each year whereas the Canadian Minister of Justice receives about 20 a year. See Graham Zellik, *Facing up to Miscarriages of Justice*, 31 Man.L.J. 555, 556 (2006); Narissa Somji, *A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom*, 58 Crim. L.Q. 136, 188 (2012).

142. The prosecutor stayed proceedings when the Minister ordered a new trial in the cases of Steven Kaminski (sexual assault); Darcy Bjorge (stolen property); Daniel Wood (murder); James Driskell (murder); and L.G.P. (sexual assault). The prosecutor withdrew murder charges against Romeo Phillion. Acquittals were obtained in the cases of Steven Truscott (murder); William Mullins-Johnson (murder); Andre Tremblay (murder); Erin Walsh (murder); Kyle Unger (murder); and D.R.S (sexual assault). Rodney Cain, originally convicted of second degree murder, was convicted of manslaughter at the new trial ordered by the Minister of Justice. See Kent Roach, *An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?*, 58 Crim. L.Q. 283, 290 (2012). This is an updated count that includes the recent entry of an acquittal of sexual assault on a Minister of Justice's reference in *R. v. D.R.S.*, 2013 ABCA 18. (Can.). The new evidence in this case was a recantation by the complainant who was nine years old at the time of the allegations.

justice has occurred, whereas the English CCRC applies a slightly lower standard of a real possibility that the conviction will not be sustained if a new appeal is heard. Another possible factor is that the Canadian Minister is a politician with direct responsibilities for the criminal justice system, whereas the members of the CCRC are independent appointees. The many hurdles that the Canadian petition procedure imposes on applicants results in a much smaller number of applications than the CCRC model in England and Wales. The Canadian applications are, however, more likely to be referred back to the courts. In almost every case where the Minister of Justice makes a referral, the courts or prosecutors agree that a conviction cannot be maintained. In contrast, the courts uphold convictions in a significant minority of cases that the CCRC refers back to the courts.

The 2002 legislation does not provide guidance about how the Minister of Justice is to decide between ordering a new trial or a new appeal. In recent years, the Minister of Justice's preferred remedy is to refer a case for an appeal, as opposed to a new trial. A new appeal is especially useful in historical cases, where a new trial is not possible and will only result in a prosecutorial stay or withdrawal of charges. As discussed above, appeal courts can consider new evidence and even hear testimony or appoint special commissioners to inquire into defined matters. Starting with the 2007 *Truscott* reference, the courts of appeal have also been willing to decide whether an acquittal is more probable than not at a hypothetical new trial and, if so, enter an acquittal. The trend towards relying on new appeals as opposed to new trials also mirrors the practice where the CCRC must refer a case to the court of appeal and is not able to direct a new trial. The Royal Commission on the Marshall case, however, criticized the use of an appeal remedy because it places the onus on the accused and could result in a new trial. At the same time, however, the order of a new trial in a number of miscarriage of justice cases resulted in prosecutorial stays that, as discussed above, have been criticized by other inquiries for imposing a residual stigma on those who have been previously convicted in serious cases.

There have been many criticisms of the delay in processing petition applications, which in some cases can take years. Clive Walker and Kathryn Campbell have concluded that even after the 2002 reforms, the Canadian petition procedure remains "cumbersome, onerous and lengthy" and "ultimately ineffective for most wrongly convicted individuals."<sup>143</sup> In a number of cases, the courts have responded to this

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143. Clive Walker & Kathryn Campbell, *The CCRC as an Option for Canada: Forwards or Backwards?*, in *THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT?* 191 (M. Naughton ed., 2010). They conclude that while an independent commission such as the CCRC would be

delay by granting an applicant bail pending the Minister of Justice's final decision.<sup>144</sup> This is an important act of judicial creativity to respond to delays in the petition procedure and the plight of the wrongfully convicted.<sup>145</sup>

### *G. Summary*

The two major methods of overturning wrongful convictions in Canada are the use of appeals, including appeals out of time and appeals in which fresh evidence is introduced, and petitions to the Minister of Justice for a new trial or appeal once all appeals have been exhausted. As outlined above, Canada has a relatively generous appeal structure. Convictions can be overturned if the guilty verdict was unreasonable, based on an error of law or if it constitutes a miscarriage of justice broadly defined to include both unfair and unreliable verdicts. Courts are also relatively generous in allowing appeals out of time and accepting fresh evidence on appeal. At the same time, however, the Canadian courts will not overturn convictions simply because there is a lurking doubt about guilt. They are more deferential to convictions by juries than convictions by judges sitting alone. They can also uphold convictions based on legal error if they determine that the error is harmless because no substantial wrong or miscarriage of justice has occurred.

The second method for overturning convictions is less generous and more demanding. It requires an applicant who has exhausted all appeals to convince the Minister of Justice, an elected politician with responsibility for a minority of all Canadian criminal prosecutions, that a miscarriage of justice likely has occurred. The Minister of Justice will only order a new appeal or a new trial as an extraordinary remedy and, generally, on the basis of new evidence. The Minister of Justice retains this power despite recommendations by six inquiries that the Minister's powers be transferred to an independent commission, as is the case in England and Wales, Scotland, Norway, and North Carolina.<sup>146</sup> Relatively few convicted people apply to the Minister of Justice,

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an improvement in Canada, that a Canadian version of the CCRC should play more of a policy and inspectorate role than the CCRC and take a more holistic approach to the criminal justice system. *Id.* at 203–04.

144. *R. v. Phillion*, [2003] O.J. No. 3422 (Can. Ont. Sup. Ct. of Just.); *R. v. Driskell*, 2004 MBQB 3 (Can.); *R. v. Unger*, 2005 MBQB 238 (Can.); *Ostrowski v. The Queen et al.*, 2009 MBQB 327 (Can.).

145. The Criminal Code only explicitly authorizes the grant of bail pending appeal and pending a decision of the Minister of Justice under s.696.1-6. *See* Criminal Code of Canada, R.S.C. 1985, c. C-46 s.679.

146. *See generally* Kent Roach, *The Role of Innocence Commissions*, 85 CHI.-KENT L. REV. 89 (2010).

perhaps because of the difficulty of producing new evidence that will satisfy the Minister. It can take years for the Minister to make a decision, especially if there is an investigation. Fortunately, the courts have mitigated the effects of this delay in some cases by granting applicants bail pending the Minister's decision. The Minister of Justice refers about 15% of all applications back to the courts, either for a new trial or a new appeal. The Minister of Justice is quite risk adverse in exercising his or her discretion because in all but one case since 2002, the referred cases have been cases with compelling new evidence that resulted in either courts entering acquittals or prosecutors staying or withdrawing charges.

#### V. CAUSES OF AND REMEDIES FOR WRONGFUL CONVICTIONS

The best information about the causes of wrongful convictions in Canada, as well as the most frequent source for proposals about how to prevent wrongful convictions, come from the seven public inquiries that have examined particularly notorious wrongful convictions. As will be seen, these inquiries have, at various times, examined the role of all major criminal justice actors in wrongful convictions. They have also made many recommendations about how to decrease the risk of wrongful convictions. Provincial governments, responsible for the administration of criminal justice, have appointed all the inquiries. Many of the inquiries' unimplemented recommendations have been made to the federal government. It should be recalled that the federal government in Canada has exclusive jurisdiction over the rules of criminal procedure and criminal evidence.

##### *A. The Police: The Problem of Tunnel Vision*

The police play a critical role in almost all wrongful convictions. In the Marshall case discussed above, the police virtually framed Marshall, using oppressive tactics against young and unstable witnesses until they were prepared to perjure themselves and falsely testify that they saw Marshall stab Seale. The local police also persisted in their belief that Marshall had to be guilty, even after a companion of the real killer came forth shortly after Marshall's 1971 conviction and told them that Marshall was innocent.

Many commissions of inquiry that have examined wrongful convictions have found that the police were subject to "tunnel vision" in which they prematurely settled on a person as a suspect, did not adequately explore other hypotheses, and interpreted ambiguous, and even contradictory evidence, as consistent with the accused's guilt. The

inquiry that examined Guy Paul Morin's wrongful conviction found that the investigators settled on him as the prime suspect in part because they considered him "odd." The Commission of Inquiry recommended that police be trained about the dangers of tunnel vision, which it defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information."<sup>147</sup>

In the Thomas Sophonow case, the accused was reluctant to disclose his alibi to the police for fear that they would investigate it in a manner so as to discredit it. The police eventually investigated the alibi in an unsatisfactory manner. The police provided positive feedback to eyewitnesses who identified the suspect, they told the suspect information that would only be known to the killer, and they attempted to bolster their case by using evidence from unreliable jailhouse informers. The same police force, however, eventually undertook the re-investigation that, a decade later, cleared Sophonow of the murder. The inquiry recommended that a double blind procedure be used for eyewitness identifications, that jailhouse informers not be used, that exhibits and notebooks be retained for disclosure to the accused, that interviews involving alibi witnesses be videotaped, and that the police receive annual lectures or courses on the dangers of tunnel vision.<sup>148</sup>

A Newfoundland inquiry found that the police had engaged in tunnel vision in two cases where there were subsequent DNA exonerations. In one case, the police quickly decided that the accused was responsible for his mother's death, questioned witnesses in a manner suggestive of his guilt, and exaggerated the importance of evidence consistent with guilt and minimized the importance of evidence inconsistent with guilt. The commission also found that noble cause corruption – the sense that noble ends can justify any means – heightened the distorting effects of tunnel vision. It recommended recording interviews in major cases, using independent operators for polygraphs, and having independent prosecutors carefully review the case developed by the police. The commission also recommended that courts be more prepared to direct a verdict of acquittal in weak cases that were prosecuted.<sup>149</sup>

Not all inquiries that have examined wrongful convictions have found that the police engaged in tunnel vision. The inquiry into Milgaard's case found that "tunnel vision, negligence and misconduct have been alleged but not shown,"<sup>150</sup> even though it also found that a polygraph

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147. MORIN INQUIRY, *supra* note 6, at 1134.

148. SOPHONOW INQUIRY, *supra* note 6.

149. LAMER INQUIRY, *supra* note 6.

150. MILGAARD INQUIRY, *supra* note 6, at 304.



operator pressured young people to support Milgaard's guilt. The inquiry found no tunnel vision, even though the police did not focus on the real perpetrator who had committed similar crimes in the same area where Milgaard was wrongly alleged to have murdered a young woman. This inquiry's approach underlines the danger of seeing tunnel vision as a form of misconduct rather than a systemic problem, especially in cases where the police are investigating a high profile crime.

Although Canadian inquiries have frequently identified tunnel vision, they have yet to develop effective remedies to counteract this complex process within policing organizations. The inquiries have recommended that superiors regularly review police investigations and that police officers receive better training, but they have not developed organizational solutions that would counter common presumptions of guilt in policing.<sup>151</sup> The inquiries have also not recommended institutional reforms, such as those relating to building quality control units or contrarian devils advocates within police forces.<sup>152</sup>

The inquiries have tended to stress remedies that are external to police forces as a means to counteract police tunnel vision. These remedies include full disclosure to the accused of all relevant information the police hold, review of cases by independent prosecutors, decreased use of jailhouse informers to shore up weak cases, and increased judicial use of the directed verdict of an acquittal. A report on behalf of all prosecutors in Canada has stressed that prosecutors can counteract police tunnel vision by exercising independent, quasi-judicial discretion in deciding whether to proceed with the case. The report also suggested that, where feasible, prosecutors separate from those that advised the police during the investigation should review charges. Second opinions, case review, and contrarian thinking should be encouraged within the prosecutor's office.<sup>153</sup> These prosecutorial checks are especially important because tunnel vision may be difficult to detect at the trial stage. There are restrictions on calling evidence at trial that indicates a third party may have been responsible for a crime.<sup>154</sup> In addition, an accused who alleges tunnel vision at trial opens the door for the state to respond with prejudicial hearsay evidence to support the police's

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151. Dianne Martin, *The Police Role in Wrongful Convictions: An International Comparative Study*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 77 (Westervelt & Humphrey eds. 2005).

152. John Epp, *Penetrating Investigative Practice Post Morin*, 31 U.B.C. L. REV. 95 (1997); Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System*, 31 MAN. L.J. 403 (2006).

153. FTP HEADS OF PROSECUTIONS COMM. WORKING GROUP, CAN. DEPT. OF JUSTICE, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 35-41(2004). See also FTP HEADS OF PROSECUTIONS COMM., *THE PATH TO JUSTICE* 54 (2011).

154. Grandinetti, 2005 SCC 5.

investigation.<sup>155</sup>

### *B. The Police: Identification Procedures*

As in the United States, flawed identifications are a leading cause of wrongful convictions in Canada. The Soponow Commission focused on the frailties of eyewitness identification and recommended the use of a double blind identification system, and the sequential and recorded presentation of at least ten photos in photo line-ups. Although some police forces follow these recommendations as best practices, there are no legislated identification procedures in Canada. Without legislative guidance, many of the police oriented reforms to prevent wrongful conviction depend on individual police forces voluntarily implementing reforms. Exclusive federal jurisdiction over criminal law and procedure may have inhibited legislative experimentation of the type available in Australia or the United States where the states can enact their own criminal law reforms sometimes in response to local wrongful convictions.

The Supreme Court of Canada held in 2007 that police forces can be sued for negligent forms of investigation. Nevertheless, the Court held that the police were not negligent in a case where an Aboriginal man, Jason Hill, was wrongfully convicted and imprisoned for twenty months for a robbery he did not commit. Mr. Hill was identified in a twelve person photo line-up that included him and eleven Caucasian foils and was conducted after Mr. Hill's photo had been released to the media. The identification procedure was also not conducted in a double blind manner and was conducted on two witnesses at the same time. Although the police did not engage in good practices as measured by today's standards, the Court concluded that there was no negligence because the flawed photo line-up did not breach standards that applied in 1995 when the false identification was obtained.<sup>156</sup> The Court also found no negligence, even though the police did not attempt to halt the prosecution when similar robberies continued after Hill's arrest.<sup>157</sup> Even if there is more success in subsequent cases, civil litigation is an indirect, diffuse, and uncertain means of ensuring that the police use proper identification procedures compared to legislated standards.

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155. Van, 2005 SCC 5.

156. *Hamilton Wentworth Police*, 2007 SCC 41, ¶ 78.

157. The Court concluded, "This was not a case of tunnel-vision or blinding oneself to the facts," in part because in 1995 "awareness of the danger of wrongful convictions was less acute than it is today. There was credible evidence supporting the charge." *Id.* at ¶ 88.

*C. The Police: Interrogation Procedures*

The Supreme Court has recognized that false confessions are a cause of wrongful convictions. The Court stressed that one of the purposes of the traditional common law rule that requires the prosecution to prove beyond a reasonable doubt that confessions obtained by persons in authority are voluntary is to protect against the danger of false confessions.<sup>158</sup> At the same time, however, the Court refused to exclude confessions taken after a prolonged interrogation that caused the accused much emotional distress, in part because of his fear that the police would interrogate his fiancé.<sup>159</sup> The Court made the questionable assumption that “false confessions are rarely the product of proper police techniques.”<sup>160</sup> It also ruled that while recording of confessions was advisable, a failure to record an interrogation did not render a confession inadmissible.<sup>161</sup> Serious concerns have been raised that the test for determining whether a confession is voluntary is not sensitive enough to characteristics of the accused, such as mental disabilities or instabilities and drug withdrawal, which could help produce false confessions.<sup>162</sup>

The Supreme Court has held that confessions are still admissible even if the accused has asserted his preference to remain silent<sup>163</sup> and made numerous requests to see his lawyer, so long as the suspect has been afforded a reasonable opportunity to contact a lawyer. The Court also held that there is no constitutional requirement that a defence lawyer be present during an interrogation.<sup>164</sup> These cases suggest that courts are often reluctant to exclude confessions perhaps because of fears of preventing the police from obtaining legitimate confessions and perhaps because of the severity of exclusion as a remedy. In addition, the courts are even more reluctant to exclude confessions that may be false because of personal characteristics, such as a mental disability. The leading case suggests that statements from the accused are admissible as long as they have a basic operating mind.<sup>165</sup> The courts have admitted confessions from people with significant mental disabilities because they have concluded that the police have acted properly in the

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158. Oickle, 2000 SCC 38.

159. *Id.* at ¶ 104.

160. *Id.* at ¶ 45.

161. *Id.* at ¶ 46.

162. Christopher Sherrin, *False Confessions and Admissions in Canadian Law*, 30 QUEENS L.J. 601 (2005).

163. Singh, 2007 SCC 48.

164. Sinclair, 2010 SCC 35.

165. R. v. Whittle, [1994] 2 S.C.R. 914 (Can.).

interrogation process.<sup>166</sup>

The Canadian courts have attempted to encourage the police to videotape interrogations, but they have stopped short of requiring such recording as a pre-requisite to admission.<sup>167</sup> This presents a danger that a false confession may ring true because it includes “hold back” information only known to the real perpetrator and the police. Parliament has not legislated any recording requirements, or indeed any other procedures, for interviewing adults.<sup>168</sup> As with identification procedures, this means that only the courts enforce the rules designed to prevent false confessions. As suggested above, courts are reluctant to exclude confessions even if they are obtained after intense interrogations or from those with significant mental disabilities or mental health issues.

Even the limited protections against false confessions, the voluntariness rule and the right to counsel offer are not available when suspects do not know that they are speaking to police officers. Police forces in Canada have frequently engaged in expensive, prolonged, and sophisticated “Mr. Big” operations, where they pose as criminals and hold out a lucrative life style to a suspect if they admit to committing a crime as a prerequisite to joining the fake criminal organization. The intensity of some of the operations can be seen as a form of tunnel vision in cases where the police are convinced of the suspect’s guilt, but do not have enough independent evidence to convict. There is also a danger that the suspect may be given hold back information known only to the perpetrator during these operations, which are not always recorded or are recorded selectively. The Supreme Court has held that the confessions rule does not apply to these operations.<sup>169</sup> Other courts have refused to admit expert evidence about the dangers and mechanisms of false confessions in Mr. Big cases.<sup>170</sup> One recent case, however, has excluded confessions obtained through an intensive “Mr. Big” operation, in large part because of the risk of a wrongful conviction based on unreliable evidence.<sup>171</sup>

A Mr. Big operation has been associated with at least one wrongful

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166. Kent Roach & Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing*, 42 U.B.C.L. REV. 1, 12-28, (2009) (outlining cases where judges have accepted statements that may have been influenced by brain injuries caused by fetal alcohol spectrum disorder).

167. Oickle, 2000 SCC 38.

168. The Youth Criminal Justice Act ss.25-26, 146 does provide some additional safeguards relating to the right to counsel and the right of a parent to be present, but does not require the recording of interrogations of young persons.

169. R. v. Hodgson, [1998] 2 S.C.R. 449 (Can.); Grandinetti, 2005 SCC 5 (Can.).

170. R. v. Osmar, 2007 ONCA 50 (Can.); R. v. Bonisteel, (2008) BCCA 344 (Can.); R. v. Jeanvenne, 2011 ONSC 7244.

171. R. v. Hart, 2012 NLCA 61, ¶¶ 168, 213, 260 (CanLII), available at <http://canlii.ca/t/fsr1k>.

conviction. Kyle Unger was convicted of a brutal murder on the basis of hair comparison evidence, testimony from a jailhouse informer, and confessions he made during a Mr. Big operation. His conviction was affirmed in 1993, with the Manitoba Court of Appeal refusing to exclude the confession obtained from the Mr. Big operation.<sup>172</sup> In 2005, Unger was granted bail pending his successful application to the Minister of Justice to re-open his conviction. The judge who granted bail noted that the hair comparison was disproved by DNA. The judge also expressed concerns about the reliability of the confessions obtained in the Mr. Big Operation. The judge observed that Unger, who was unemployed, in part because he was suspected of the killing, confessed to the killing only after “being wined, dined, and shown large sums of money.”<sup>173</sup> The Minister of Justice subsequently ordered a new trial, at which Unger was acquitted, but the government has refused to provide compensation because of his confessions made during the Mr. Big operation, even though the details of those confessions have been proven to be false. Mr. Unger is now suing police and prosecutors involved in his wrongful conviction.<sup>174</sup>

*D. Prosecutorial Conduct: The Independent and Quasi-Judicial Role of Prosecutors*

Prosecutors in Canada are all appointed officials who do not stand for election. They are supposed to be interested in seeing that justice is done. In other words, they should not be simple adversaries concerned with obtaining a conviction.<sup>175</sup> Both the Marshall and the Lamer Commissions of Inquiry called for the creation of independent Director of Public Prosecutions systems as a means to re-enforce the independence of prosecutors. Such systems now exist in both provinces, as well as in other provinces and at the federal level. Any communication from the Attorney General, who is an elected politician who sits in Cabinet, to the Director of Public Prosecutions would have to be published and disclosed. The Director of Public Prosecutions holds office in good behaviour for a guaranteed term. The Lamer Commission stressed that independent prosecutors should serve as a check on police investigations and tunnel vision that could result in wrongful

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172. *R. v. Unger*, 1993 CanLII 4409 (MB CA), available at <http://canlii.ca/t/1pfk2>.

173. *R. v. Unger*, 2005 MBQB 238, ¶¶ 17–19.

174. *Unger Won't Get Compensation: Minister*, CBC NEWS (Oct. 23, 2009), <http://www.cbc.ca/news/canada/manitoba/story/2009/10/23/mb-compensation-unger-chomiak-manitoba.html>; *Kyle Unger files 14.5 million wrongful conviction suit*, CBC News (Sept. 21, 2011), available at <http://www.cbc.ca/news/canada/manitoba/story/2011/09/21/kyle-unger-wrongful-conviction-lawsuit.html>.

175. *R. v. Boucher*, [1955] S.C.R. 16 (Can.).

convictions.

Canada's reliance on appointed prosecutors who have autonomy from political interference allows prosecutors, in some cases, to agree to procedures designed to correct wrongful convictions. For example, the prosecutor in the 1983 Marshall appeal persisted in making a joint submission that Marshall's 1971 murder conviction should be quashed, despite receiving some resistance from higher officials. In many of the cases stemming from the flawed forensic pathology of Dr. Smith, the prosecutor has agreed to appeals out of time, the admission of fresh evidence, and the quashing of convictions. There are a number of non-DNA cases where Canadian prosecutors have agreed not only to the quashing of a wrongful conviction, but the entry of an acquittal.<sup>176</sup>

The quasi-judicial role of the prosecutor as a Minister of Justice manifests itself not only in the treatment of individual cases but in systemic matters. In some provinces, prosecutors have agreed to conduct proactive audits of cases involving suspect forms of evidence or the involvement of criminal justice actors that have played a role in wrongful convictions. Such audits are a promising alternative to reliance on the adversarial system as a means to discover wrongful convictions. Prosecutors in Canada have also taken some proactive responsibility on policy matters relating to wrongful convictions. A national task force of prosecutorial officials issued a lengthy report in 2004 based in large part on the findings of Canada's inquiries into wrongful convictions. This report was also supported by scholarship by Bruce MacFarlane, Q.C., who was the most senior civil servant in Manitoba responsible for justice.<sup>177</sup> The same national task force of senior prosecutors issued a revised version of the report in 2011.<sup>178</sup> Canadian prosecutors deserve praise both for recognizing wrongful convictions in many individual cases and for taking a policy interest in the prevention of wrongful convictions.

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176. *R. v. Henry*, 2010 BCCA 462 (Can.); *R. v. Webber* 2010 ONCA 4 (Can.).

177. MacFarlane's work was subsequently published. Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of Criminal Justice*, 31 *Man.L.J.*403 (2006).

178. FTP HEADS OF PROSECUTIONS COMM. WORKING GROUP, CAN., DEPT OF JUSTICE, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 35-41 (2004), available at <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>; FPT HEADS OF PROSECUTION, THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS (2011), available at <http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ptj-spj-eng.pdf>. But see Christopher Sherrin, *Comment in the Report on the Prevention of Miscarriages of Justice*, 52 *CRIM. L.Q.*, 140 (2007) for some criticism of the prosecutors report. In their latest report, the prosecutors consider prior criticisms of their earlier report but still disapprove of expert evidence on the frailties of eyewitness identification while conceding that such expert knowledge can be used in the training of police and prosecutors. They also continue to recommend that only interrogations in cases of considerable violence be recorded. *THE PATH TO JUSTICE* 76, 94 (2011). To its credit, the new report does discuss the problem of the innocent pleading guilty and states that "the Subcommittee wishes to reiterate that all participants in the criminal justice system must be vigilant to guard against creating an environment in which innocent people are induced to plead guilty." *Id.* at 207.

*E. Prosecutorial Conduct: Disclosure*

An important factor in many wrongful convictions has been the failure of prosecutors to disclose all relevant material in their possession. As discussed earlier, the Marshall Commission of Inquiry found that a failure of the Crown to disclose inconsistent statements made by lying witnesses was an important factor in Marshall's wrongful conviction. In addition, a companion of the real killer told the police that Marshall was not the killer shortly after Marshall's conviction—but this critical information was not disclosed by either the police or the prosecutor to Marshall or his lawyer. In response to these findings, the Commission of Inquiry recommended that Parliament amend the Criminal Code to place a continuing statutory disclosure duty on the prosecution. As is, unfortunately, often the case, legislative reform to minimize the risk of wrongful convictions was not a priority and Parliament has yet to enact a statutory code of disclosure. Indeed, Parliament's actions in this area have only sought to place limits on the disclosure of therapeutic records of complainants in sexual assault cases.<sup>179</sup>

In 1991, the Supreme Court of Canada decided the landmark case of *R. v. Stinchcombe*.<sup>180</sup> Justice Sopinka, for a unanimous Court, stated:

The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238).<sup>181</sup>

The Court based the broad disclosure obligation placed on the prosecutor (frequently called the Crown in Canada) on the idea that the prosecutor was not a pure adversary and was interested in ensuring justice rather than winning. The new constitutional rule of disclosure was broader than the statutory rule the Marshall commission proposed because the new rule applied to all relevant information regardless of whether it was classified as exculpatory or inculpatory and regardless of

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179. This legislation was upheld under the Charter in *R. v. Mills*, [1999] 3 S.C.R. 668 (Can.).

180. [1991] 3 S.C.R. 326.

181. *Id.*

whether it related to a person that the prosecutor proposed to call as a witness. The only exceptions the Court recognized were for evidentiary privileges, such as the informer privilege and the timing of the disclosure. Finally, the Court made clear that the duty of disclosure was a continuing one.

Subsequent decisions have continued to define disclosure rights broadly to include relevant material that might open up lines of inquiry for the accused.<sup>182</sup> The obligation to disclose relevant information also entails a duty to preserve such information.<sup>183</sup> In 2003, the Supreme Court observed that the idea that disclosure was simply “an act of goodwill” and not a right, “played a significant part in catastrophic judicial errors” that resulted in wrongful convictions.<sup>184</sup> A 2009 decision has affirmed that the police have a duty under *Stinchcombe* to disclose relevant material to the Crown prosecutor and that, in some cases, the duty may extend to disciplinary records of a police officer.<sup>185</sup> In that case, the Court also indicated while the accused must request disclosure, the Crown must disclose not only the evidence it will introduce but “any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence” so long as it is “not clearly irrelevant, privileged or its disclosure is otherwise governed by law.” The Crown’s duty may require it to obtain relevant information from other state agencies. Finally, “the Crown’s obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.”<sup>186</sup> The experience of wrongful convictions and a desire to prevent them has decisively shaped the Supreme Court’s approach to constitutional disclosure obligations.

#### *F. Jailhouse Informers*

Jailhouse informers with incentives to lie have played a role in a number of wrongful convictions. The Morin Inquiry found that two jailhouse informers used to bolster the murder prosecution against Morin were utterly unreliable. It stopped short of recommending a complete ban on the use of jailhouse informer. Instead, the Inquiry recommended that a committee of senior prosecutors approve any use of jailhouse informers, a reform that was subsequently introduced in

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182. *R. v. Dixon*, [1998] 1 S.C.R. 244 (Can.); *R. v. Tallifer*, 2003 SCC 70 (Can.).

183. *R. v. La*, [1997] 2 S.C.R. 680 (Can.).

184. *Tallifer*, 2003 SCC 70, ¶ 1.

185. *R. v. McNeil*, [2009] S.C.R. 66 (Can.).

186. *Id.* at ¶ 17–18.



Ontario and some other provinces. The Sophonow Inquiry took a bolder approach and recommended a general rule that jailhouse informers not be allowed to testify, a recommendation the Lamer Inquiry also approved.<sup>187</sup> The Supreme Court has, however, not followed this recommendation and has allowed jailhouse informers to testify without even a mandatory rule that warnings about their unreliability be given.<sup>188</sup> In a subsequent case, however, the Court allowed new evidence that was inconsistent with a jailhouse informer's testimony to be introduced under its fairly liberal approach to the admission of new evidence.<sup>189</sup> As in the false confession and identification contexts, the Supreme Court has been reluctant to exclude evidence, even though evidence from jailhouse informers has, in the past, contributed to wrongful convictions.

### *G. Defence Lawyers and Ineffective Assistance of Counsel*

Ineffective assistance of counsel can also play a role in wrongful convictions. The Marshall Commission criticized Marshall's lawyers for not requesting disclosure or conducting their own investigations. The Goudge Inquiry into forensic pediatric pathology stressed the need for lawyers to be adequately trained and funded to deal with complex issues of forensic pediatric pathology. Guilty pleas were entered in many of the cases involving Dr. Smith, the defence in those cases may not have been prepared to rebut the flawed forensic pathology evidence offered by the state, even though the accused maintained their innocence.<sup>190</sup> These cases, and other cases involving wrongful convictions arising out of guilty pleas,<sup>191</sup> raise issues of whether it is competent and ethical for a defence lawyer to enter a guilty plea on behalf of a client who maintains his or her innocence, so as to receive a lighter sentence than will be imposed should the client be convicted after the completion of a trial.

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187. SOPHONOW INQUIRY, *supra* note 6; LAMER INQUIRY, *supra* note 6, at 22.

188. Brooks, 2000 SCC 11. The Court did, however, provide subsequent guidance about the ability of trial judges to give warnings about why some forms of testimony should receive special scrutiny and why it may be dangerous to convict on the basis of such unconfirmed testimony. *R. v. Khela*, 2009 SCC 4, ¶ 37.

189. Hurley, 2010 SCC 18.

190. For an example of an early case where Dr Smith testified but the accused was acquitted after a middle class family mortgaged its home and put on a defence containing multiple experts from around the world, see *R. v. M(S.)*, 1991 O.J. 1383 (Can.) (discussed in the GOUDGE REPORT, *supra* note 6, at 12).

191. Hanemaayer, 2008 ONCA 580. Note that there is increasing recognition in the United States of wrongful convictions arising from guilty pleas. See SAMUEL GROSS AND MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 8 (2012) available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (8% of 873 recorded exonerations between 1989 and 2012 involving guilty pleas).

They also raise questions about the dangers of leaving the acceptance of guilty pleas to the discretion of trial judges. There are no special rules in Canada to limit the ability of trial judges to accept guilty pleas from those who maintain innocence or to require the judge to conduct a more searching examination of the factual basis of the guilty plea.<sup>192</sup> Ineffective assistance of counsel combined with judicial passivity in accepting guilty pleas dramatically increases the risk of wrongful convictions.<sup>193</sup>

In *R. v. G.D.B.*,<sup>194</sup> the Supreme Court recognized that the right to effective assistance of counsel was a principle of fundamental justice protected under s.7 of the Charter. The Court held that this right would only be violated if counsel's conduct was unreasonable and incompetent and if the conduct resulted in a miscarriage of justice. The Court followed the oft-criticized United States Supreme Court decision of *Strickland v. Washington*.<sup>195</sup> Following that decision, there is a strong presumption that counsel's conduct is reasonable. Moreover, the court will not even determine the reasonableness of defence counsel's conduct unless the accused can demonstrate that the alleged incompetence resulted in a miscarriage of justice. The Court added, "miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised."<sup>196</sup> In the result, the Court found that counsel had made a tactical decision not to use a tape where the complainant stated the accused had not sexually abused her. The Court held that the defence counsel's failure to use the tape did not affect the reliability of the conviction. Canadian accused have not enjoyed much success in subsequent claims of ineffective assistance of counsel.<sup>197</sup>

#### *H. Forensic and Other Expert Evidence*

A number of wrongful convictions in Canada have been caused by

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192. The leading Supreme Court precedent, rendered long before the recognition of wrongful convictions, maintains that trial judges have discretion whether to accept guilty pleas over a strong dissent by Laskin J. that trial judges should determine the factual basis and voluntariness of the guilty plea. *Adgey v. The Queen*, [1975] 2 S.C.R. 426 (Can.).

193. For a very disturbing example where the Supreme Court accepted a guilty plea to non-capital murder in a case where the defence lawyers at trial maintained that he did not understand the mind of the Aboriginal accused, see *Brosseau v. The Queen*, [1969] S.C.R. 181 (Can.).

194. 2000 SCC 22.

195. *Strickland v. Washington*, 466 U.S. 668 (1984).

196. *R. v. G.D.B.* 2000 SCC 22, ¶ 28.

197. Dale E. Ives, *The 'Canadian' Approach to Ineffective Assistance of Counsel*, 42 BRANDEIS L.J. 239 (2003).

faulty forensic evidence.<sup>198</sup> There are two main ways to respond to such dangers. One is by reforming the production of the state's forensic evidence. The other is for the courts to take steps to ensure that the forensic evidence used in the trial is reliable.<sup>199</sup>

The Commission of Inquiry into Proceedings against Guy Paul Morin in its 1998 report found that Ontario's Centre for Forensic Science had made numerous mistakes in the production of hair and fibre evidence that purported to link Morin to a murder before his DNA exoneration. Before the inquiry, Crown prosecutors had assumed that the Centre was infallible. The Commission, however, found problems in contamination of evidence and the misuse of published research.<sup>200</sup> The Centre for Forensic Science, which is the central crime laboratory in the province of Ontario, undertook many reforms in response to the findings and recommendations of the Morin inquiry.<sup>201</sup> A decade later, a similar inquiry was held in the neighbouring province of Manitoba when hair comparison evidence was again refuted by DNA testing. The Manitoba Inquiry heard that the Royal Canadian Mounted Police labs had stopped conducting hair comparison evidence in light of more advanced DNA testing, but stopped short of recommending that such hair comparison evidence be inadmissible. It also did not recommend that the crime laboratories be separated from the police. Finally, it suggested that it did not have jurisdiction to order a national audit of cases that relied on hair comparison evidence, even though the province of Manitoba had conducted such an inquiry.<sup>202</sup>

Many of the same themes found in the Morin inquiry, which focused on hair and fibre comparison evidence, re-emerged a decade later when the Ontario Commission of Inquiry into Forensic Pediatric Pathology (the Goudge Inquiry) recommended similar reforms to the practice of forensic pathology. The Goudge Inquiry found problems in the lack of forensic training of pathologists, including Dr. Smith, and a lack of supervision of his work and testimony. Medical doctors who were supposed to supervise Dr. Smith did not have the adequate training in

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198. See generally BIBI SANGHA, ET AL. FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE 241–322 (2010).

199. For an evaluation of the balance between these two mechanisms, see Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 U. TORONTO L.J. 343 (2011).

200. MORIN INQUIRY, *supra* note 6, at 117–118.

201. Jeffrey Manishen, *Wrongful Convictions, Lessons Learned: The Canadian Experience*, 13 J. CLINICAL FORENSIC MEDICINE 296 (2006) (the reforms included post-conviction DNA testing of hair "matches," recording of preliminary reports, increased training, new protocols for reports and complaints, documentation of contamination, monitoring of courtroom testimony and the creation of an advisory board and a quality assurance unit).

202. DRISKELL INQUIRY, *supra* note 6, at 174–185.

forensic pathology to do so. The Goudge Inquiry stopped short of recommending that Ontario move from a coroner's system to one where forensic pathologists were fully responsible for death investigations. Subsequent to that inquiry, the chief forensic pathologist was given increased funds and powers to supervise the conduct of forensic autopsies and reports. These reforms included the creation of an oversight counsel and the maintenance of a registry of qualified forensic pathologists.<sup>203</sup> The follow up to this Commission demonstrates that forensic pathology can be reformed within a coroner's system. At the same time, it is unfortunate that those who allowed Dr. Smith to provide unreliable expert evidence ignored many of the earlier recommendations of the Morin Inquiry with respect to report writing, quality assurance, and the monitoring of court-room testimony. The fragmented nature of the forensic sciences presents a danger that they will only be incrementally reformed on a discipline-by-discipline, jurisdiction-by-jurisdiction basis in response to notorious wrongful convictions.<sup>204</sup>

Both the Morin and Goudge Inquiries recommended that trial judges should be more vigilant in excluding expert evidence that does not satisfy threshold reliability standards, regardless of whether the science could be characterized as novel or not. The Goudge Inquiry also emphasized that experts should not be allowed to testify outside of their area of recognized expertise.<sup>205</sup> It stopped short, however, of recommending that the state's expert evidence should, consistent with criminal justice values, be held to a higher standard of demonstrable reliability.<sup>206</sup> Canadian courts apply tests for expert evidence that are influenced by *Daubert*.<sup>207</sup> They have moved away from admissibility tests that focused on general acceptance and whether experts have special knowledge through education or experience, to tests that require

203. *Act to amend the Coroner's Act* S.O. 2009 c.15.

204. Kent Roach, *Forensic Science and Miscarriages of Justice: Some Lessons from Comparative Experience*, 50 *JURIMETRICS* 67 (2009).

205. For a troubling case involving the multidisciplinary child abuse and neglect team that Dr. Charles Smith worked with and in which the Supreme Court deferred to a trial judge's decision to allow a burn expert to testify about child abuse and a child abuse expert to testify about burns see *R. v. Marquard*, [1993] 4 S.C.R. 223. For critical discussion see *GOUDGE INQUIRY*, *supra* note 6, at 473–74.

206. As proposed in Gary Edmond, *Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence*, in *PEDIATRIC FORENSIC PATHOLOGY AND THE JUSTICE SYSTEM* (Roach ed., 2008); see also Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 *U. TORONTO L.J.* 343 (2011). This proposal has drawn criticism on the basis that it would be unfair to impose a higher burden on the prosecutor and that the reasonable doubt standard for conviction adequately controls for the reliability of forensic evidence. See Kenneth Chasse, *Junk Science by Way of a Higher Burden of Proof*, 16 *CAN. CRIM. L.Rev.* 323; Nayha Acharya, *Law's Treatment of Science: From Idealization to Understanding*, 36 *Dal. L.J.* 57 (2013). For our replies see Gary Edmond and Kent Roach, *Comment*, 16 *CAN. CRIM. L.Rev.* 357 (2012); Gary Edmond and Kent Roach, *Trial by Theory*, 36 *Dal. L.J.* 57 (2013).

207. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

that the expert opinion evidence be necessary in assisting the trier of fact and that it be subject to peer review and testing.<sup>208</sup> The Supreme Court has stressed that science that might be accepted in a clinical setting to treat a patient, may have too high an error rate to justify its use as forensic evidence in criminal proceedings.<sup>209</sup> There is a new emphasis in Canada on ‘evidence’ as opposed to ‘experience’ based expert scientific opinion. The Ontario Court of Appeal, in the 2007 Stephen Truscott appeal, for example, disregarded two opinions offered by a forensic pathologist and an entomology expert about the time of death because they were only based on the admittedly considerable experience of the Crown’s experts and did not engage with the scientific literature.<sup>210</sup>

In 2007, the Supreme Court in a 4–3 decision in *R. v. Trochym*, excluded post-hypnosis testimony of a witness who purported to provide eyewitness identification.<sup>211</sup> The majority stressed the importance of determining the threshold reliability of the evidence and started its judgment by noting that recent wrongful convictions had confirmed “the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect, and to ensure the basic fairness of the criminal process.”<sup>212</sup> In deciding that post-hypnosis testimony should be excluded, the Court was not deterred by the fact that it had been accepted in previous cases and might not be characterized as novel science, noting that “the admissibility of scientific evidence is not frozen in time.”<sup>213</sup> The court stressed that what was ‘most troubling’ about post-hypnosis evidence was:

[T]he potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes. At the present time, there is no way of knowing whether such information will be accurate or inaccurate. Such uncertainty is unacceptable in a court of law.<sup>214</sup>

The majority of the Supreme Court in *Trochym* demonstrated an appropriate concern about the risk of wrongful convictions and the risk of relying on evidence of unknown reliability. This decision could potentially lead to the exclusion or qualification of expert evidence provided by experience based forensic sciences, especially those based on comparisons and pattern recognition. The Goudge Inquiry

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208. *R. v. Mohan*, [1994] 2 S.C.R. 9 at 19; *R. v. L.-J.*, [2000] 2 S.C.R. 600 (excluding various forms of novel science offered by the accused).

209. *R. v. L.-J.* [2000] 2 S.C.R. 600.

210. *Re Truscott*, 2007 ONCA at 165–69, 313–14.

211. [2007] 1 S.C.R. 239.

212. *Id.* at 1.

213. *Id.* at 31.

214. *Id.* at 55.

recommended that trial judges should, following *Trochym*, determine the threshold reliability of expert forensic evidence and that legal aid funding and training of defence counsel and judges be increased to achieve this objective.<sup>215</sup>

In a more recent case, the Ontario Court of Appeal has affirmed that trial judges have discretion to exclude expert evidence that otherwise satisfies the criteria for admissibility because of concerns about its threshold reliability and possible prejudicial effect. Nevertheless, the Court of Appeal found that the trial judge had erred by excluding evidence the prosecution offered from a sociologist about the meaning of a tear drop tattoo on an accused charged with a gang-related murder. The Court of Appeal stressed that the trial judge's concerns about the unknown error rate and lack of a random sample for the sociologist's research was inappropriate given the nature of sociology. At the same time, the Court of Appeal regulated the content of the expert evidence by prohibiting the expert from testifying that the tattoo meant the accused killed someone. The accused was, however, subsequently convicted of first degree murder after the sociologist testified that the tattoo meant either that he had either killed someone or someone close to the accused had died when they had not.<sup>216</sup> A critical question is whether similar concerns about the impossibility of determining precise error rates will allow forensic sciences to continue to be used in the absence of basic research on the validity of the experience based opinions drawn by fingerprint and handwriting analysts. If this occurs, judicial admissibility decisions will not provide a strong incentive to reform the forensic sciences. Much will depend on the steps that various provinces and laboratories take to ensure the reliability and quality of forensic evidence the prosecution offers.

### *I. Judges and Juries*

Judges are appointed and not elected in Canada. As in the Marshall case, the decisions of trial judges to admit or exclude evidence can play an important role in wrongful convictions. The Supreme Court has

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215. GOUDGE INQUIRY, *supra* note 6, chs. 17-18.

216. R. v. Abbey, 2009 ONCA 624; *see Man convicted 4 years after acquittal*, TORONTO STAR, Mar. 29, 2011. For criticisms of the Court of Appeal's approach in *Abbey* and arguments that the expert evidence did not satisfy the necessity standard for admissibility see Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic and Medical Evidence*, 61 U. TORONTO L.J. 343, 392-396. For findings that cases such as *Abbey* are not unusual and that courts in Australia, Canada, the United Kingdom, and the United States have all been reluctant to exclude expert evidence because of reliability concerns see Gary Edmond, et al., *Admissibility compared: The reception of incriminating expert opinion (i.e., forensic science) evidence in four adversarial jurisdictions*, U. Denv. Crim. L. Rev (forthcoming).

deferred to the discretion of trial judges to admit expert evidence, even when experts may have strayed from their area of expertise.<sup>217</sup> More recently, it has indicated that trial judges should be more active in determining the threshold reliability of evidence, including expert evidence.<sup>218</sup> Trial judges should help ensure that qualified experts are not allowed to give evidence outside of the realm of expertise. Restrictions on the admissibility of expert evidence can, however, work to the disadvantage of the accused who may be wrongfully convicted. Canadian courts remain reluctant to allow the accused to call expert evidence on the frailties of eyewitness identification<sup>219</sup> or false confessions.<sup>220</sup> One of the reasons why Tammy Marquardt faced the possibility of a new trial was that the Court of Appeal discounted testimony by neurologists that her son may have died from an epileptic seizure because of the limits of their expertise.<sup>221</sup>

Trial judges have much discretion in deciding whether to accept a guilty plea. In light of recent wrongful convictions that have been revealed after guilty pleas, trial judges should be more active in determining whether there is a factual basis for a guilty plea. The National Judicial Institute of Canada provides an intense three day training session for trial judges on the causes and dangers of wrongful convictions. Judges have also made creative decisions in allowing possible victims of wrongful convictions to be released on bail pending the Minister of Justice's decision to re-open their case after appeals have been exhausted.<sup>222</sup>

Public inquiries have been reluctant to criticize juries for the role they have played in wrongful convictions. Although juries are used infrequently in Canadian criminal cases, they are mandatory in murder cases, unless the accused and the prosecutor both agree to a bench trial. The jury that convicted Donald Marshall Jr. was all white and was not screened for possible bias against Marshall because he was Aboriginal. Moreover, one of the jurors subsequently explained the guilty verdict on the basis of racist stereotypes about both Marshall and the African-Canadian victim. Canadian courts now allow potential jurors to be

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217. *R. v. Marquardt*, [1993] 4 S.C.R. 223 (allowing child abuse experts to testify about burns and burn experts to testify about child abuse). The Goudge Commission noted some of the dangers of this approach and that the Court now takes a more rigorous approach to the admissibility of expert evidence. GOUDGE INQUIRY, *supra* note 6, at 473–74.

218. *R. v. Trochym*, [2007] 1 S.C.R. 239.

219. *R. v. McIntosh*, (1997) 117 C.C.C.(3d) 385 (Ont.C.A.); *R. v. Woodard*, 2009 MBCA 42.

220. *Re Phillion*, 2009 ONCA 202.

221. *R. v. Marquardt*, 2011 ONCA 281 at ¶ 21.

222. *R. v. Phillion*, [2003] O.J. No. 3422 (Ont. Sup. Ct. of Just.); *R. v. Driskell*, 2004 MBQB 3; *R. v. Unger*, 2005 MBQB 238; *Ostrowski v. The Queen et al.*, 2009 MBQB 327 (Can.).

questioned about possible racist bias.<sup>223</sup> Canadian courts, however, carefully regulate the questions that can be put to prospective jurors. Tammy Marquardt was not allowed to question prospective jurors about whether they would be biased against her because she was charged (and wrongfully convicted) of killing her young child.<sup>224</sup> The Supreme Court has upheld the absolute secrecy of jury deliberations even in the face of allegations of racist statements from jury members.<sup>225</sup> The role of juries in wrongful convictions, especially those involving accused from minority communities and allegations of horrific crimes, remains an important but understudied topic. This is especially so given the Supreme Court's clear statements that appellate courts should defer to convictions entered by juries, especially those based on credibility determinations.<sup>226</sup>

The Marshall commission criticized the appeal court that heard Marshall's first appeal for not examining legal errors the trial judge made that were apparent in the transcripts but that Marshall's lawyers did not argue on appeal. It recommended that appeal courts be more proactive with respect to errors that might contribute to wrongful convictions.<sup>227</sup> This raises interesting questions about the balance between adversarial approaches that rely on party presentation of the issues and more judge-centred inquisitorial approaches. Appeal courts also have the power to appoint commissioners to gather new evidence to assist on appeals. Although such inquiries have been conducted in at least one wrongful conviction case,<sup>228</sup> the appointment of such commissioners are rare. Appeal courts also have the power to appoint publicly funded counsel to assist with appeals.

Canada has a unitary court system that in most cases only allows the accused one appeal as of right and does not allow collateral challenge by way of habeas corpus. The Canadian system allows much less scope for successive challenges than the American system. This approach is, however, mitigated by the fact that Canadian courts appear to be more willing to entertain appeals out of time and to admit fresh evidence on appeal than most American courts. A related factor is that unelected Canadian prosecutors more frequently consent to measures to correct wrongful convictions than their American counterparts.<sup>229</sup>

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223. *R. v. Williams*, [1998] 1 S.C.R. 1128.

224. *R. v. Find*, [2001] 1 S.C.R. 863.

225. *R. v. Pan*, [2001] 2 S.C.R. 344.

226. *R. v. W.H.*, 2013 SCC 22.

227. MARSHALL COMMISSION, *supra* note 6, at 87.

228. *R. v. Neepose*, 1992 ABCA 77.

229. Kent Roach, *Less Procedure, More Justice? A Comparison of Canadian and American Wrongful Convictions*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 283-308 (C. Ronald Huff



At the same time, the Canadian appeal system has frequently failed to detect wrongful convictions. For example, the Ontario Court of Appeal dismissed William Mullins-Johnson's appeal from his wrongful conviction for the murder and sexual assault of his four-year-old niece. The majority of the court held that the trial judge had adequately instructed the jury about the accused's defence that no crime had been committed. Borins, J.A., however, dissented on the basis that the trial judge did not adequately instruct the jury about the weakness of the evidence that the child victim had been sexually assaulted.<sup>230</sup> The Supreme Court, sitting only as five judges, dismissed Mullins-Johnson's subsequent appeal after an oral hearing but without bothering to provide written reasons.<sup>231</sup> In hindsight, the appeal process failed to prevent a wrongful conviction that was only reversed after the Minister of Justice ordered a new appeal on the basis of new pathology evidence that suggested that a sexual assault did not occur and that the cause of the victim's death was unascertained.<sup>232</sup>

The Supreme Court of Canada has been more sympathetic to the danger of wrongful convictions than the United States Supreme Court. The Canadian Court's two most important decisions with respect to wrongful convictions was its recognition of a broad constitutional right to disclosure in the 1991 case of *R. v. Stinchcombe*<sup>233</sup> and its 2001 decision holding that the risk of wrongful convictions would now require Canada to seek assurances that the death penalty would not be applied before extraditing fugitives.<sup>234</sup> Its 2007 decision excluding post-hypnosis testimony because of its unknown reliability<sup>235</sup> also has promise in minimizing the risk of wrongful convictions from unreliable evidence. The Court has also recognized the ability of people to bring civil suits with respect to malicious prosecution<sup>236</sup> and negligent police investigation.<sup>237</sup>

The Supreme Court's performance on other issues, especially those relating to the admissibility of evidence that may be unreliable, has been less robust. It has neither prohibited nor even required mandatory warnings about testimony from jailhouse informers despite their

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& Martin Killias eds., 2013).

230. *R. v. Mullins-Johnson*, [1996] 112 C.C.C. (3d) 117 (Ont.C.A.).

231. *R. v. Mullins-Johnson*, [1998] 1 S.C.R. 977.

232. *R. v. Mullins-Johnson*, 2007 ONCA 720.

233. [1991] 3 S.C.R. 326.

234. *United States v. Burns & Rafay*, [2001] 1 S.C.R. 283.

235. *R. v. Trochym*, [2007] 1 S.C.R. 239.

236. *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Proulx v. Quebec*, [2001] 3 S.C.R. 9; *Miazga v. Kvello Estate*, [2009] S.C.C. 51.

237. *Hill v. Hamilton Wentworth*, [2007] 3 S.C.R. 129.

frequent use in wrongful conviction cases.<sup>238</sup> It has adopted a strict test for ineffective assistance of counsel without apparent recognition that a very similar test has been widely criticized in the United States.<sup>239</sup> It has allowed in-dock identifications to continue, even while conceding the minimal probative value of such judicial “show-up” identifications.<sup>240</sup> The Court has rejected the idea that convictions should be overturned because the appellate court has a lurking doubt about guilt and stressed the need to defer to convictions entered by juries;<sup>241</sup> it has allowed prejudicial investigative hearsay to be used to counter claims that police investigations are tainted by tunnel vision;<sup>242</sup> it has restricted the admission of evidence of third parties who may be responsible for crimes;<sup>243</sup> it has allowed confessions to be admitted after intense interrogations despite the dangers of false confessions;<sup>244</sup> and it has not prevented intense Mr. Big stings despite the risk that they may result in false confessions.<sup>245</sup>

There is also a danger that the federal Parliament has deferred to uneven judicial regulation of police practices such as identification and interrogation procedures even though legislative regulation would be more comprehensive and likely more effective in changing police and prosecutorial conduct.<sup>246</sup> Parliament has rejected a number of reforms proposed by provincial inquiries to decrease the risks of wrongful convictions. For example, it has refused to follow the recommendations of six inquiries that the petition procedure to the federal Minister of Justice be replaced by applications to an independent commission with investigative powers. In recent years, Parliament has almost uniformly pursued “tough on crime” and “victims rights” agendas and has demonstrated little concern about wrongful convictions. Indeed, its record is worse than that of the American Congress that has enacted some measures to facilitate DNA evidence retention and testing. Parliament’s record is also worse than the record of some state legislatures that have enacted reforms in response to wrongful convictions, including the creation of the North Carolina Innocence Inquiry Commission to respond to claims of factual innocence and various state laws to regulate police identification procedures.<sup>247</sup>

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238. *R. v. Brooks*, [2000] 1 S.C.R. 237; *R. v. Hurley*, [2010] 1 S.C.R. 637.

239. *R. v. G.D.B.*, [2000] 1 S.C.R. 520.

240. *R. v. Hibbert*, [2002] 2 S.C.R. 445.

241. *R. v. Biniaris*, [2000] 1 S.C.R. 381; *R. v. W.H.* 2013 SCC 22.

242. *R. v. Van*, [2009] 1 S.C.R. 716.

243. *R. v. Grandinetti*, [2005] 1 S.C.R.27.

244. *R. v. Oickle*, [2000] 2 S.C.R. 3.

245. *R. v. Hodgson*, [1998] 2 S.C.R. 449; *R. v. Grandinetti*, [2005] 1 S.C.R.27.

246. CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

247. Robert J. Norris et al., *‘Than That One Innocent Suffer’: Evaluating State Safeguards*

## VI. COMPENSATION FOR WRONGFUL CONVICTIONS

The lack of a legislative response in Canada to wrongful convictions is also seen with respect to compensation. Canada, unlike many American states and the United Kingdom, does not have legislation designed to implement the requirement under Article 14(6) of the International Covenant on Civil and Political Rights to provide compensation for victims of miscarriage of justice. In an attempt to discharge this mandate, Canadian federal and provincial governments issued guidelines in 1988 to provide for compensation. Unfortunately, these guidelines are quite restrictive and require statements either from an appellate court or from the executive in a free pardon that the person seeking compensation did not commit the crime. The guidelines exclude compensation for family members of the wrongfully convicted. They limit compensation for non-pecuniary losses to \$100,000.<sup>248</sup> They allow reductions on pecuniary loss of earnings on the basis of “benefits received while incarcerated” and lack of due diligence or “blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction.”<sup>249</sup>

Fortunately, most voluntary awards of compensation have not followed the restrictions in the federal-provincial guidelines. For example, awards have included compensation for family members adversely affected by wrongful convictions and damages for non-pecuniary damages well in excess of the \$100,000 cap. The highest amount of compensation has been \$10 million to David Milgaard who spent 23 years in prison for a murder he did not commit. Thomas Sophonow and Clayton Johnson each received \$2.5 million. The Ontario government recently awarded Stephen Truscott \$6.5 million after his 1959 murder conviction was overturned and the Ontario Court of Appeal acquitted him in 2007. Compensation was paid even though the Court of Appeal did not declare Truscott factually innocent and subsequently held that it did not have jurisdiction to make such findings. In addition, Mr. Truscott’s wife, who suffered with him for the 38 years he was on parole and lived under an assumed identity, received \$100,000. A retired judge who recommended this award to the government suggested that the ex gratia payment was justified even though Mr. Truscott would likely not be able to establish fault at a civil trial and his factual innocence could not be established in the absence of

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*Against Wrongful Convictions*, 74 Albany L.Rev. 1301 (2011).

248. This cap is based on a 1978 judicial cap on non-pecuniary damages in physical injury cases. *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229.

249. FEDERAL PROVINCIAL GUIDELINES—COMPENSATION FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS (1988). These guidelines have been under review by governments for a number of years.

DNA. He also observed that “many if not most of the awards of compensation”<sup>250</sup> made in the last 20 years have departed from the restrictive federal provincial guidelines.

Although some compensation payments paid to victims of wrongful convictions in Canada are generous, others are not. Donald Marshall only received about \$250,000 for 10 years of imprisonment, but this was increased after a public inquiry exonerated him. Almost thirty years later, the Ontario government offered Tammy Marquardt the same modest sum despite her 13 years of imprisonment. Such an offer of compensation to Marquardt is difficult to justify, especially because the same government compensated William Mullins-Johnson, who served 12 years in prison, with a \$4.25 million settlement and both Marquardt and Mullins-Johnson were wrongfully convicted on the basis of Dr. Smith’s flawed forensic pathology testimony.<sup>251</sup> No compensation has been offered to others such as Romeo Phillion and Kyle Unger on the basis that they made false confessions.

Under the Canadian system, a person who brings a civil action will be responsible for the other side’s legal costs if they are unsuccessful. The prospect of such adverse costs awards, along with delays in civil litigation, may deter those who are wrongfully convicted from suing the state even if they have lawyers prepared to work pro bono or on a contingency basis. Canadian courts have imposed their own caps on non-pecuniary damages, such as pain and suffering and loss of family time.<sup>252</sup> Civil litigation brought by the wrongly convicted has encountered problems based on statutes of limitation,<sup>253</sup> a reluctance to recognize a cause of action for negligent as distinct from malicious prosecution,<sup>254</sup> and the imposition of qualified immunity doctrines when damages are sought for violation of constitutional rights under the Canadian Charter of Rights and Freedoms.<sup>255</sup> All of these factors help explain why most compensation cases are resolved out of court. One notable exception is the case of Rejean Hinse who, in 1961, was wrongfully convicted of robbery. In 1997, the Supreme Court finally acquitted him. Represented by counsel acting pro-bono he obtained an \$8.6 million award against the federal government in 2011, 50 years

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250. Hon. Sydney Robins QC, *In the Matter of Stephen Truscott Advisory Opinion on the Issue of Compensation*, at 21 (Mar. 28, 2008), available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins\\_report.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/robins_report.pdf).

251. News Release, Payments offered to victims of flawed pediatric pathology, Aug. 10, 2010, available at <http://www.attorneygeneral.jus.gov.on.ca/english/news/2010/20100810-goudge-nr-en.pdf>.

252. *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229.

253. *Baltrusaitis v. Ontario (Attorney General)*, 2011 ONSC 532 (Can.).

254. *Barton v. Nova Scotia (Attorney General)*, 2013 NSSC 121 (Can.); *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 (Can.).

255. *Henry v. British Columbia (Attorney General)*, 2013 BCSC 665 (Can.).

after his wrongful conviction.<sup>256</sup> The enactment of legislation or compulsory guidelines to govern compensation in Canada might reduce the disparity in awards, but also likely lead to less generous payments in the most egregious cases.

## VII. CONCLUSION

This Essay has provided an overview of wrongful convictions in Canada. There has been increasing recognition of wrongful convictions over the last 20 years, but the precise number of wrongful convictions in Canada remains elusive given ambiguities about what counts as a wrongful conviction. As in the United States, most acknowledged wrongful convictions are found in homicide and sexual assault cases. It is impossible to know how many undetected wrongful convictions have occurred in other types of cases, including cases where the accused has pled guilty. An increasing number of wrongful convictions have been recognized in Canada in the last five years where the accused pled guilty, often to avoid a harsher sentence. These cases support the idea that recognized wrongful convictions are only the tip of the iceberg because they reveal that wrongful convictions can occur in the vast majority of criminal cases where the accused makes a seemingly voluntary decision to plead guilty. Even very low error rates would produce significant number of wrongful convictions given the number of convictions.

There are two main ways that old convictions are overturned in Canada, namely appeals out of time or a petition to the Minister of Justice. In practice, fresh evidence is generally necessary for either mechanism to be successful. Canadian courts do not strictly enforce time limits for appeals or the discovery of fresh evidence. In the guilty plea and other cases, Canadian courts have allowed out of time appeals, sometimes with the consent of the prosecution, and have overturned convictions after appeal courts have considered the new evidence. Canadian prosecutors, who are not elected, have frequently consented to appeals out of time, the admission of fresh evidence, and the overturning of wrongful convictions.

In cases where appeals have been exhausted, a petition to the federal Minister of Justice must be made and that elected politician can order a

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256. *Hinse v. Quebec*, 2011 QCCS 1780. Hinse also sued the provincial Quebec government but they settled out of court for \$4.5 million. The case is also significant because in 1997 Hinse persuaded the Supreme Court to enter an acquittal in his case, reversing a stay of proceedings originally ordered when his 1964 conviction was overturned in 1991 after he had served five years in jail and ten years on parole. *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Hinse*, [1997] 1 S.C.R. 3; *Quebec man wins largest award for wrongful conviction*, GLOBE & MAIL Apr. 15, 2011.

new trial or a new appeal if he or she concludes that a miscarriage of justice likely occurred. In cases where the Minister has ordered a new trial, prosecutors often stay or withdraw charges given the age of the case, but such actions deprive the previously convicted person of an acquittal, let alone a finding of innocence which is generally necessary for compensation. In cases where the Minister orders a new appeal, appeal courts consider the fresh evidence and decide whether the conviction now constitutes a miscarriage of justice defined to include both the conviction of the innocent, unfair trials, and unsafe convictions. Appeal courts, however, do not make determinations of factual innocence. In some cases, the appeal court will order a new trial and in other cases the appeal court will enter an acquittal.

The willingness of Canadian courts to accept fresh evidence without undue emphasis on whether the accused could have obtained the evidence at trial and their willingness to grant bail to free suspected victims of wrongful convictions pending an appeal, or even pending the Minister of Justice's petition decision, are two of the greatest strengths of the Canadian system in responding to wrongful convictions. At the same time, relatively few people apply to the Minister of Justice to re-open cases. Since 2002, the Minister has ordered new trials or appeals in 15% of all applications. In all but one of these thirteen cases, the result has been the undoing of the conviction either through the court entering an acquittal or prosecutors withdrawing or staying the charges. This suggests that the Minister of Justice only grants remedies in cases where there is compelling new evidence that the previously convicted person is not guilty.

The seven public inquiries held in the last 20 years have examined the causes of wrongful convictions. They include police error, including tunnel vision; inaccurate eyewitness identifications sometimes facilitated by improper identification techniques and feedback; false confessions sometimes facilitated by improper police interrogations; the use of unreliable witnesses, especially jailhouse informers; lack of full disclosure by the prosecutor; inadequate defence assistance; and faulty forensic evidence.

Canada has taken some steps to remedy these causes of wrongful convictions. The Supreme Court declared a broad constitutional right to the disclosure of all relevant and non-privileged evidence held by the prosecutor in recognition that non-disclosure had caused wrongful convictions. It also declared that the risk of wrongful convictions in all justice systems make it unsafe to extradite a fugitive without assurances that the death penalty will not be applied. Some provinces have responded to wrongful convictions by improving the identification procedures used by the police and the practice of forensic sciences.

Some provinces have even conducted pro-active audits in cases involving suspect forms of evidence to determine the existence of wrongful convictions.

At the same time, there is much work to be done to lessen the risk of wrongful convictions in Canada and to improve remedies for the wrongly convicted. The federal Parliament has refused to exercise its exclusive jurisdiction over criminal law and procedure to regulate identification and interrogation procedures to minimize the risk of false identifications and false confessions. In turn, the courts have often been unwilling to exclude evidence even when the police used techniques associated with false identifications and false confessions. The appellate courts have refused to overturn convictions when they have a lurking doubt about guilt. The federal Parliament has also refused to follow the recommendations of six public inquiries that the federal Minister of Justice's powers to order new trials or appeals be given to an independent commission that could take a more proactive approach to the investigation of suspected wrongful convictions. Parliament also has not legislated a procedure to allow the wrongly convicted to obtain compensation. The wrongly convicted must demonstrate factual innocence in order to obtain compensation under restrictive administrative guidelines, but Canadian courts refuse to make determinations of factual innocence.