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WRONGFUL CONVICTIONS IN CANADA

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Wrongful Convictions in Canada
(Background Paper)

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CONTENTS

EXECUTIVE SUMMARY

In Canada's criminal justice system, people are sometimes found guilty of crimes that they did not commit. These errors are known as wrongful convictions.

The number of wrongful convictions in Canada is unknown. In part, this is because it is very difficult for wrongfully convicted people to establish their innocence.

Normally, legal errors can be corrected through judicial review or appeals to higher courts. After this process has finished, people who believe that they have been wrongfully convicted can apply to the federal Minister of Justice for a review of their conviction. The minister must assess all relevant considerations – such as new evidence in the case – to decide whether it is likely that a wrongful conviction occurred.

If the minister decides that a wrongful conviction likely occurred, the minister has several options, including referring the case to a court of appeal or ordering a new trial.

Wrongful convictions may affect some groups more than others. For example, women, youth and Indigenous people experience various forms of pressure to plead guilty. In addition, the criminal conviction review process can take several years, which can make it less useful to people who are serving shorter sentences.

Several public inquiries have investigated specific wrongful convictions. These investigations have highlighted some of the factors that contribute to wrongful convictions, including racial bias, unreliable witnesses and tunnel vision. They have also produced recommendations to improve the justice system.

One consistent recommendation has been to consider creating an independent body to review wrongful convictions, modelled after the system used in the United Kingdom. Advocates argue that this would make the conviction review process more accessible and transparent. The federal government is studying this option.

WRONGFUL CONVICTIONS IN CANADA

1 INTRODUCTION

To have legitimacy, the criminal justice system must be both fair and effective. When it fails to meet these standards, the human cost can be substantial and public confidence can be shaken.

Though presumed to be rare, wrongful convictions are among the most serious forms of failure within the criminal justice system. At its most basic level, a wrongful conviction occurs when an innocent person is found guilty of a crime.

The term "miscarriage of justice" is sometimes used to describe cases in which a wrongful conviction has either been established or is likely, based on the available evidence.[1] A miscarriage of justice can be said to have occurred whenever new, credible evidence emerges that could have affected the verdict.[2] In other words, a miscarriage of justice can be thought of as a potential wrongful conviction. While this distinction may be important in some contexts, this paper will generally use the terms "wrongful conviction" and "miscarriage of justice" interchangeably.

By their nature, wrongful convictions are likely to remain undetected, making it impossible to know the precise number of such cases in Canada.[3] Establishing that a wrongful conviction has occurred often requires extraordinary persistence as well as luck, such as a development in technology that sheds new light on old evidence, or the discovery of new evidence pointing to a different suspect.

Over the past several decades, high-profile wrongful convictions and miscarriages of justice have resulted in multiple public inquiries at the provincial level. These cases include the specific wrongful convictions of Donald Marshall Jr., Guy Paul Morin and David Milgaard, as well as public inquiries related to the flawed practices of Manitoba Crown prosecutor George Dangerfield and of Ontario forensic child pathologist Dr. Charles Smith. Each inquiry produced a series of recommendations for criminal justice reform, which are discussed in the relevant sections below.

One consistent recommendation in these reports has been the consideration or implementation of an independent body to review alleged wrongful convictions. Recent events indicate that Canada may be moving towards such an approach. In December 2019, in a ministerial mandate letter, the Prime Minister of Canada instructed the Minister of Justice and Attorney General of Canada, David Lametti, to "[e]stablish an independent Criminal Case Review Commission to make it easier and faster for potentially wrongfully convicted people to have their applications reviewed."[4]

This publication discusses the history of wrongful convictions in Canada, current laws and practices affecting people who may have been wrongfully convicted, critiques of these systems and possible areas for reform.

2 SURVEY OF WRONGFUL CONVICTIONS IN CANADA

Wrongful convictions have likely always been present in Canada's criminal justice system to some degree. An early example is the potential wrongful conviction and execution of Patrick Whelan for the 1868 murder of one of the "Fathers of Confederation," Thomas D'Arcy McGee.[5]

Canada's long history of processes intended to rectify wrongful convictions is further evidence of the long-standing existence of such convictions. Most notably for the purposes of this paper, since 1892, Canada's Minister of Justice has had the explicit power to review potential wrongful convictions. The current legal framework governing this ministerial power has been in place since 2002 and will be discussed further under the heading "Current Law and Practice."[6]

The current legal framework and its critiques have been largely shaped and informed by high-profile wrongful convictions that have come to light in the past several decades. Below are some of the miscarriages of justice that have received significant scrutiny in the past several decades and that provide context for current discussions about possible reforms.

2.1 THE WRONGFUL CONVICTION OF DONALD MARSHALL JR.: THE ROLE OF RACIAL BIAS

In 1971, Donald Marshall Jr. – a 17-year-old Mi'kmaw boy – was wrongfully accused of murder. He was subsequently convicted and incarcerated for more than a decade before his release and exoneration. While there were several systemic failures that contributed to Marshall's wrongful conviction, his story represents a clear and precedent-setting acknowledgement of racial bias and systemic discrimination contributing to a wrongful conviction.[7]

In 1986, the government of Nova Scotia appointed a Royal Commission to investigate the errors that had occurred in Marshall's case (the Marshall Inquiry) and to make recommendations designed to avoid similar mistakes in the future. In its report, the Marshall Inquiry identified errors at virtually every stage of the process, including the following:

- The responding police officers failed to search the area and question witnesses.

- The investigating officer held racial bias against Marshall (sharing a general sense with his community "that Indians were not 'worth' as much as Whites").[8] This racial bias led the officer to focus disproportionately on evidence that supported his narrow theory of Marshall's guilt.
- The Crown prosecutor failed to interview witnesses who gave contradictory statements and to disclose these inconsistencies to the defence.
- Marshall's defence counsel did not interview any Crown witnesses and failed to ask for disclosure of the Crown's case.
- The officers who reinvestigated the case in 1982 improperly pressured Marshall to falsely admit to attempted robbery, and the Court of Appeal used this statement to suggest that Marshall was partly to blame for his wrongful conviction.[9]

The Marshall Inquiry made 82 recommendations. Many have been adopted, such as the establishment of the Nova Scotia Public Prosecution Service in 1990,[10] a Race Relations Division within the Nova Scotia Human Rights Commission in 1991 (currently Race Relations, Equity and Inclusion),[11] and a tripartite forum in 1997 to resolve outstanding issues – including justice issues – between the Mi'kmaq, the Province of Nova Scotia and the federal government.[12]

Other recommendations have been resolved indirectly, such as the recommendations related to Crown disclosure obligations. These latter issues were largely addressed by the Supreme Court of Canada in *R. v. Stinchcombe*,[13] which recognized that the Crown has a broad legal obligation to disclose all relevant information to the defence.

The Marshall Inquiry also recommended the establishment of an independent review mechanism with investigative powers to review alleged wrongful convictions.[14] This recommendation has been echoed in subsequent public inquiries and will be discussed further in the final section of this paper.

2.2 THE WRONGFUL CONVICTION OF GUY PAUL MORIN: THE ROLE OF TUNNEL VISION

In October 1984, a nine-year-old girl was murdered in Queensville, Ontario. Police quickly focused their investigation on a single neighbour with no criminal record – Guy Paul Morin – initially for no clear reason other than that he had been described as a "'weird-type guy' and a clarinet player."[15] This singular focus on Morin was a leading factor in his wrongful conviction for murder. He was acquitted in 1995 after new DNA evidence established his innocence.

In 1996, the government of Ontario directed that a public inquiry be held to identify the errors that had contributed to Morin's wrongful conviction and to make recommendations.

The report of the Commission on Proceedings Involving Guy Paul Morin (the Kaufman Commission) pointed to several flawed practices that had contributed to Morin's wrongful conviction, such as the misuse of scientific evidence.[16] Specifically, the hair comparison analysis that the prosecution relied upon was of little value, but these limitations were not adequately or accurately explained at trial.

More broadly, Morin's case illustrates the problem of tunnel vision. Though tunnel vision was a factor in the Marshall case and many other wrongful convictions, it was a particular focus of the Kaufman Commission. The Kaufman Commission report defines tunnel vision as a "single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received."[17] This single-minded focus on Morin as a suspect contributed to his wrongful conviction, and may also have hampered the investigation of the real murderer, who remained unidentified until 2020.[18] Tunnel vision was so extreme in this case that some of the people involved in the investigation and prosecution continued to believe that Morin was guilty even when faced with DNA evidence establishing his innocence.[19]

The Kaufman Commission's 119 recommendations included requiring that better explanations of the limitations of forensic evidence be provided to juries, and (in an echo of the Marshall Inquiry a decade earlier) studying the possible establishment of an independent criminal case review board to review wrongful convictions. The report also emphasized the need to shift police culture in order to avoid systemic problems like tunnel vision. While acknowledging that "techniques and thought processes are, at times, deeply ingrained and difficult to change,"[20] the report encouraged introspective examination of police culture and further training for police and Crown counsel on the identification and avoidance of tunnel vision.

2.3 THE WRONGFUL CONVICTION OF DAVID MILGAARD: THE ROLE OF YOUTH VULNERABILITY

In January 1969, 16-year-old David Milgaard set out to travel from Regina to Vancouver with a group of young people. Passing through Saskatoon to pick up a friend, Milgaard stopped within blocks of where a woman was sexually assaulted and murdered. Milgaard was charged with the murder, largely based on conflicting testimony from his friends, who ultimately changed their stories to match the police theory of the case. The inspector who took these incriminating statements failed to prepare a report, keep notes, produce polygraph charts or provide a list of the questions that were put to the witnesses. Milgaard was wrongfully convicted and incarcerated for almost 23 years before being released in April 1992.

Milgaard's path to exoneration was long and difficult, only beginning to gain traction in 1991, when his lawyer became aware of a new suspect in the case and one of the original witnesses recanted his testimony.[21] Amid a media campaign led by Milgaard's mother, the Minister of Justice referred his case to the Supreme Court of

Canada for an opinion. The Supreme Court noted that a stay of proceedings might be appropriate, though that decision rested with the Attorney General for Saskatchewan. The Court advised the minister to quash Milgaard's conviction, order a new trial and consider granting a conditional pardon if a new sentence was imposed.[22] Milgaard was released from custody after the Crown attorney entered a stay of proceedings.

The practical effect of the stay of proceedings was that Milgaard was free, but not yet fully exonerated. Five years later, in 1997, DNA evidence matched with the new suspect in the case, and not with Milgaard, resulting in an official apology from the government of Saskatchewan.[23] In 2004, the Government of Saskatchewan formally acknowledged that Milgaard was factually innocent. Milgaard received $10 million in negotiated compensation and a public inquiry was held.[24]

The Commission of Inquiry into the Wrongful Conviction of David Milgaard (the Milgaard Inquiry) identified several problems with the tactics of the police and prosecution, including exerting pressure on vulnerable young people in a way that led to unreliable and misleading evidence against Milgaard. The report emphasized that "[y]oung witnesses and young accused should be handled with great care. An extra person should be present when taking a statement from a young person, and video or audio recording is needed."[25]

In addition to problematic questioning and the possibility that witnesses were induced to lie, the report indicated that Milgaard's youth also made him vulnerable to the effects of bias. It noted that societal bias against young people – and hippies in particular – at the time of the investigation and trial created a "real possibility that [Milgaard] would be viewed as a degenerate," including by the jury.[26] This bias may have contributed to Milgaard's wrongful conviction.

Finally, the Milgaard Inquiry added to the calls for an independent conviction review agency to replace ministerial review, noting that if such an agency had been in place to proactively identify wrongful convictions, Milgaard's case may have been recognized as a wrongful conviction sooner. Such an agency could help to ensure that the review of potential wrongful convictions is not only factually independent of political considerations, but also seen to be independent by the general public, convicted persons and other key stakeholders.

2.4 THE GEORGE DANGERFIELD CASES: THE ROLE OF PROSECUTORIAL ETHICS AND JAILHOUSE INFORMANTS

Several high-profile wrongful convictions have been linked to the flawed practices of former Manitoba Crown Attorney George Dangerfield. These include the wrongful convictions of Thomas Sophonow, James Driskell, Kyle Unger and Frank Ostrowski. Although Dangerfield was the common thread through these cases, his flawed practices serve as an example of broader issues in the criminal justice system.

The Sophonow and Driskell cases led to two separate public inquiries, the Sophonow Inquiry and the Driskell Inquiry. Each implicated Dangerfield in practices that contributed to wrongful convictions, and highlighted the importance of prosecutorial ethics. The Driskell Inquiry specifically found that the conduct of Crown counsel in the case – including Dangerfield – "fell below then existing professional standards."[27] These breaches primarily related to non-disclosure issues.

One particularly concerning practice that arose from these inquiries was Dangerfield's use of jailhouse informants. Jailhouse informants are people awaiting trial or sentencing who testify against another accused person, often in exchange for leniency in their own case. While jailhouse informants may in some cases serve a legitimate purpose, their testimony often lacks credibility due to possible incentives to lie. In some cases, these concerns were amplified by the fact that Dangerfield did not disclose to the defence that he had made these types of deals with witnesses.

In Sophonow's case, 11 jailhouse informants volunteered to provide testimony against him, and his defence counsel was not told of their credibility issues.[28] The Sophonow Inquiry report emphasized the dangers presented by these types of witnesses, stating:

> They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.[29]

The report recommended that the use of jailhouse informants be strictly limited and proposed that as a general rule, "jailhouse informants should be prohibited from testifying."[30] Since the Sophonow Inquiry, several provinces have adopted new policies on the use of jailhouse informants that have significantly reduced their role in Canada's criminal justice system.[31]

2.5 DR. CHARLES SMITH: THE ROLE OF EXPERT WITNESSES

Dr. Charles Smith worked as a pediatric pathologist at the Hospital for Sick Children in Toronto for more than two decades. Despite having no formal training in forensic pathology, he was recognized as a leading expert in Ontario in the 1980s and 1990s, and was involved in more than 40 autopsies of children whose deaths were considered suspicious.[32] Dr. Smith's serious errors as an expert witness contributed to several wrongful accusations and convictions, often against people grieving the loss of a child in their family.

In 2008, a public inquiry outlined many significant errors that Dr. Smith had made in his capacity as an expert witness. Perhaps most fundamentally, Dr. Smith failed to understand that his role as an expert witness was not to simply support the Crown and "make a case look good."[33] According to Dr. Smith, he never received any formal instruction on the proper role of an expert witness – a role that requires objectivity and impartiality.[34] This fundamental misunderstanding of his role contributed to other significant errors, including overstating his knowledge, using language that was unscientific and lacking in candour, and making "false and misleading statements to the court."[35]

Dr. Smith's pattern of misidentifying accidental child deaths as non-accidental – his "think dirty" approach[36] – called into question many convictions that arose from suspected shaken baby syndrome or pediatric head injuries that turned out to be the result of natural or accidental causes.[37] In many such cases, Dr. Smith's flawed conclusions pressured innocent people to accept a plea agreement in order to avoid a more serious sentence or out of fear that they would lose custody of their other children.[38] Several of these potential wrongful convictions have now been overturned or set aside, including the cases of William Mullins-Johnson, Tammy Marquardt, Dinesh Kumar, Brenda Waudby and Maria Shepherd.[39]

The example of Dr. Smith illustrates many of the risks associated with expert evidence, including that purported expertise can be difficult for non-experts to challenge, or even to understand. The inquiry emphasized the importance of expert witnesses understanding their role in the criminal justice system. In particular, in order to reduce the risk of wrongful convictions, expert witnesses need to avoid advocating for one side, and must ensure that their evidence is understandable, reasonable, balanced and not speculative.[40]

The Dr. Smith cases remain an important example of the risks associated with expert witnesses. The inquiry into these cases led to significant changes to the practice and oversight of forensic pathology in Ontario.

3 CURRENT LAW AND PRACTICE

In theory, when an innocent person is accused of a crime, there should not be enough evidence to prove that person's guilt beyond a reasonable doubt. However, the cases discussed above show that there are exceptions to this assumption, including cases in which innocent people are pressured into pleading guilty.

For these reasons, after all other avenues for judicial review and appeal have been exhausted, a person who alleges that they have been wrongfully convicted can apply to the federal Minister of Justice for a review of the conviction. The process for such applications is set out in part XXI.1 of the *Criminal Code* and is the focus of this section.[41]

Upon receiving an application, the Minister of Justice is responsible for deciding whether "there is a reasonable basis to conclude that a miscarriage of justice likely occurred."[42] In reaching this decision, the minister must take into account all relevant considerations, including any "new matters of significance" such as evidence that was not available at trial.[43] If the minister decides that a miscarriage of justice likely occurred, the minister can refer the case to the Court of Appeal from the relevant province, or direct a new trial to occur.[44] If the minister decides to order a new trial, Crown counsel in the relevant province may then decide to proceed with the trial, withdraw the charges, offer no evidence (resulting in a verdict of not guilty) or bring a stay of proceedings.[45]

In exceptional cases, the minister may propose that the Governor in Council seek an opinion from the Supreme Court of Canada.[46] In *Reference re Milgaard*, the Supreme Court of Canada gave some guidance regarding what constitutes a miscarriage of justice. The Court suggested that the task of assessing whether a miscarriage of justice has occurred requires re-examining the judicial record as well as any new evidence that is relevant to the issue of guilt that "is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict."[47]

In making criminal conviction review decisions, the Minister of Justice is supported by the Criminal Conviction Review Group (CCRG), a separate unit of the Department of Justice tasked with assessing and investigating applications and providing legal advice to the minister.[48] In some cases, the minister will also use outside agents to assist with the caseload or to avoid potential conflicts of interest. Typically, the CCRG conducts the preliminary assessment, investigation and preparation of the investigation report, while the minister personally decides the final result of all applications that proceed to the investigation stage.[49]

The minister is also supported by a Special Advisor on Wrongful Convictions. The special advisor reviews applications at various stages of the process and provides independent legal advice directly to the minister. Since 2018, the special advisor's mandate includes the ability to make broader recommendations to the Minister of Justice relating to systemic problems that arise in the review process.[50]

The current legal framework emphasizes that the criminal conviction review process is not intended to be a routine feature of the criminal justice system and that remedies for wrongful conviction are considered extraordinary.[51] The Department of Justice states that applications "should ordinarily be based on new matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted."[52] According to the Department of Justice, the types of new and significant information that might meet these criteria include

- information that establishes or confirms an alibi;

- the confession of another person to the crime;
- information that identifies another person at the scene of the crime;
- scientific evidence that points to another person's guilt or supports a claim of innocence;
- proof that important evidence was not disclosed to [the defence];
- information that shows a witness gave false testimony; or
- information that substantially contradicts testimony given at trial.[53]

According to annual reports, in the past 10 years the minister has received fewer than 100 completed applications and has granted a remedy in six cases.[54]

4 CRITICISMS OF CURRENT LAW AND PRACTICE

Among the most common criticisms of the current system for criminal conviction review are the following issues: lack of accessibility and transparency, disproportionate impacts on certain groups, and barriers to compensation when wrongful convictions occur.

4.1 LACK OF ACCESSIBILITY AND TRANSPARENCY

As noted above, in order to be eligible for criminal conviction review, a wrongfully convicted person must generally be able to identify new and significant information in their case. An incarcerated person will normally require outside help – as well as luck – to uncover new evidence that meets this standard.

Some wrongfully convicted people receive financial support from their families in order to retain counsel, but most applicants likely do not have such support.[55] Others may be able to receive legal assistance from Innocence Canada, a non-profit organization that seeks to exonerate wrongfully convicted people.[56] However, financial resources are limited, and Innocence Canada notes that it may take up to two years before it is able to begin to review a case.[57] In short, financial barriers can prevent wrongfully convicted people from securing access to the conviction review process.

Moreover, some argue that the bar has been set too high by requiring applicants to provide new and significant information establishing that a wrongful conviction "likely occurred."[58] One scholar notes that "it may not be the new information per se that will exonerate an individual, but rather a reinterpretation of old information that is not eligible for consideration under this process."[59] In particular, wrongful convictions that stem from erroneous eyewitness identification, errors by counsel or false confessions will not usually meet this high bar and will therefore not move beyond the preliminary assessment stage.[60]

Finally, some experts are critical of the level of transparency in the decision-making process. Because the recommendations to the minister by the CCRG are protected by solicitor-client privilege, applicants, advocacy groups and other stakeholders do not have access to information about the final stage of the conviction review.[61] This perceived lack of transparency can be compounded by the fact that decisions ultimately rest with a political actor – the Minister of Justice – which can further reduce an applicant's trust in the neutrality of the decision.[62]

Although there have been efforts to increase the perception of objectivity and neutrality in the conviction review process, including significant delegation of the minister's role to the CCRG and the Special Advisor on Wrongful Convictions, some argue that the process remains inaccessible, narrowly focused and lacking in transparency. As noted in the Milgaard Inquiry report:

> The federal Minister does not conduct a proactive investigation on receipt of an application, but rather relies on the applicant, lacking in investigative expertise, to identify the grounds for an alleged miscarriage of justice. The test for the exercise by the Minister of his or her discretion to refer a matter to the Court system has not changed. Finally, the decision as to whether a convicted person can have access to the Court to challenge a conviction still lies with the federal Minister, an elected politician.[63]

These concerns are central to the argument for a criminal case review commission, which would theoretically be more accessible, proactive, transparent and independent than the current process.

4.2 DISPROPORTIONATE IMPACTS

Although there is little data available on the extent of wrongful convictions in Canada, many experts contend that particular groups may be overrepresented among the wrongfully convicted or may be less likely to have their cases reviewed. These groups include Indigenous people, racialized Canadians, women, youth and persons with disabilities. Some individuals belong to more than one of these groups and face overlapping vulnerabilities.

Vulnerability to wrongful conviction arises from several factors. Some groups are more likely to be wrongfully convicted for the same reasons that they are overrepresented throughout the criminal justice system. For example, the Public Prosecution Service of Canada acknowledges that Indigenous persons "are more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned."[64] As of 2016, Indigenous adults represented only about 3% of the adult population in Canada, but accounted for 26% of admissions to provincial and territorial correctional services.[65] In 2020, Indigenous people accounted for more than 30% of the total number of people in federal custody and 42% of the female inmate population in Canada.[66]

The reasons for this overrepresentation are complex, but include intergenerational trauma, systemic racism and discrimination.[67] Some of the same factors that lead to overrepresentation in the justice system in general also contribute to wrongful convictions in particular. These factors include "language and translation difficulties, inadequate and insensitive defence representation, pressures to plead guilty and racist stereotypes that associate Aboriginal people with crime."[68] This was illustrated by the example of Donald Marshall Jr., as discussed above.

Aspects of the criminal justice system that create pressures to plead guilty may have stronger effects on certain groups, including Indigenous people, women, youth and persons with disabilities. For example, some scholars note that police sometimes use "a mother's sense of responsibility for the welfare of her children to elicit confessions to criminal acts," such as in cases where women with childcare obligations plead guilty in order to avoid a custodial sentence that would separate them from their children.[69] Similarly, young people are recognized as being more susceptible to pressure from authority figures to waive their rights or to accept a guilty plea.[70] Perhaps most starkly, a 2013 report identified the problem of "inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas."[71]

Moreover, the fact that false guilty pleas tend to lead to relatively short sentences can in fact reduce the chance of exoneration for wrongfully convicted individuals. As discussed above, the criminal conviction review process can take years, which can render it much less useful to people serving shorter sentences.

In addition, the focus of the criminal conviction review process on new and significant evidence – such as evidence pointing to a different suspect – often places the emphasis on demonstrable factual innocence and thus excludes many people already disproportionately affected by wrongful conviction. This focus tends to exclude cases in which an available defence was denied or a breach of constitutional rights within the investigative process was not remedied. For example, someone who kills an abusive partner may be pressured into pleading guilty to manslaughter rather than going to trial for murder and pleading self-defence. Legal scholars Debra Parkes and Emma Cunliffe suggest that these types of wrongful convictions disproportionately affect women, and Indigenous women in particular.[72]

4.3 BARRIERS TO COMPENSATION

Under international law, wrongfully convicted persons are entitled to compensation under certain circumstances. Article 14(6) of the *International Covenant on Civil and Political Rights* – to which Canada is a party – provides for the following:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact

> shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[73]

In Canada, there are currently no legislative provisions implementing this obligation. Instead, Canada relies on the 1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons. Under these guidelines, wrongfully convicted persons are eligible for compensation only if they meet certain conditions, including that they were actually convicted and imprisoned and that there is a finding that they "did not commit the offence."[74]

These prerequisites to compensation have been criticized for presenting an unduly high barrier to compensation, since courts are responsible for determining whether an accused person is "guilty" or "not guilty" in law, and do not normally make findings of factual innocence. Individuals who have been acquitted or whose charges have been withdrawn or stayed are ineligible for compensation under this framework.

The Milgaard Inquiry report criticized this high standard for compensation, arguing that proof of factual innocence should not be an essential condition for compensation and that compensation should be available for a broader range of official wrongdoing, including "egregious error leading to wrongful conviction."[75] The report argued that the issue of compensation should remain a question for governments to decide, but that in some cases compensation should be available even to people who are not factually innocent – for example, if there have been obvious breaches of proper standards by the police, the prosecution, or the courts.[76]

5 THE CONCEPT OF A CRIMINAL CASE REVIEW COMMISSION

Several jurisdictions throughout the world have independent statutory bodies responsible for reviewing potential wrongful convictions.[77] One such model cited frequently by Canadian academics and by the public inquiries discussed above is the Criminal Cases Review Commission (CCRC) of England, Wales and Northern Ireland.[78] A Canadian working group on the CCRC concept was formed in 2020 with the aim of making recommendations to the Minister of Justice for the implementation of a version of the CCRC in Canada.[79]

Since 1995, the CCRC has reviewed thousands of cases and referred hundreds of convictions and sentences back to the appellate court. Approximately 70% of such cases result in the sentence being varied or quashed.[80]

Under section 13 of the United Kingdom's *Criminal Appeal Act 1995*, the CCRC is authorized to refer a case back to the courts where there is "a real possibility" that the conviction would not be upheld.[81] This is a lower bar than Canada's current standard,

which requires a conclusion that a miscarriage of justice "likely occurred." This different standard could help to explain the much higher volume of cases that are successful in the CCRC compared to those in Canada's criminal conviction review process.

However, some similarities between the CCRC and Canada's CCRG exist, including many of their investigative powers, as well as the general requirement that conviction reviews be based on some genuinely new evidence or other new issue. The CCRC has broad investigative powers under sections 17 and 18 of the *Criminal Appeal Act*, including the ability to obtain information from public bodies such as the police, the Crown Prosecution Service and social services, as well as the ability to request court orders for material from private individuals or organizations.[82] When necessary, the CCRC can also interview new or existing witnesses and order new expert evidence, such as psychological reports or DNA testing.[83]

Although the idea of a Canadian CCRC has significant support among experts and stakeholders, some argue that it is unnecessary and potentially too costly. For example, it is possible that Canada has a low number of identified wrongful convictions simply because the criminal justice system is already quite effective at preventing wrongful convictions. If this is true, adding another layer of review would be unnecessary and could call into question cases that have already been fairly decided, which could potentially undermine public confidence in the criminal justice system. A related argument against the concept of a CCRC is that it would undermine the values of judicial finality and economy.[84] These values represent the idea that in order to preserve confidence in the justice system, criminal proceedings should not go on longer than necessary.

More specifically, the CCRC has been criticized for not having objective standards to determine the scope of investigations, with neither a minimum amount of investigation required, nor a logical end point to the open-ended task of proving the absence of error. The CCRC has also experienced large backlogs of cases, which makes prioritizing a challenge.[85]

Although there are no publicly available government estimates on the costs of a CCRC in Canada, some advocates estimate that it could be quite low. As explained by Richard Nobles and David Schiff, the CCRC's work in the United Kingdom:

> represents, as a crude calculation, an expenditure of approximately £200,000 per successful referral. Against this, one should perhaps deduct the £24,000 per year saved by removing 'innocent' persons from prison. For prisoners who would otherwise spend another eight-and-a-third years in prison, the service is relatively cost neutral.[86]

Because the rate of wrongful conviction in Canada is unknown, it is difficult to predict whether a Canadian version of the CCRC would have similar cost dynamics. More broadly, while Canada can learn from experiences in other jurisdictions and anticipate possible effects, the specific strengths and challenges in Canada's criminal justice system will inevitably influence the success of any potential reform.

NOTES

1. Definitions of "wrongful conviction" and "miscarriage of justice" vary. Arguably, wrongful convictions include cases in which the convicted person is not factually innocent but procedural or evidentiary issues led to an improper finding of guilt or an improper sentence. For more information on these distinctions see Commission of Inquiry into the Wrongful Conviction of David Milgaard [Milgaard Inquiry], "Chapter 6: Canada's Conviction Review Process," *Final Report*, Vol. 1, 2008, pp. 365–366.
2. *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866.
3. Kent Roach, "Wrongful Convictions in Canada," *University of Cincinnati Law Review*, Vol. 80, No. 4, 2013, pp. 1470–1476.
4. Justin Trudeau, Prime Minister of Canada, *Minister of Justice and Attorney General of Canada Mandate Letter*, 13 December 2019.
5. Kathryn M. Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies*, University of Toronto Press, Toronto, 2018, p. 3.
6. In 2002, section 690 of the *Criminal Code* was replaced by sections 696.1 to 696.6. See David Goetz and Gérald Lafrenière, *Legislative Summary of Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts*, Publication no. 37-1-LS-410-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 October 2001.
7. Royal Commission on the Donald Marshall, Jr., Prosecution, *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* [Marshall Inquiry], December 1989.
8. Ibid., p. 3.
9. Ibid., pp. 5 and 7.
10. Nova Scotia, Public Prosecution Service, *PPS Independence*.
11. Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 26A.
12. Mi'kmaq–Nova Scotia–Canada Tripartite Forum, *Justice Working Committee*.
13. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
14. Marshall Inquiry (1989), pp. 9 and 25.
15. Ontario, Ministry of the Attorney General, "Chapter V: The Investigation by Durham Regional Police and the Prosecution of Guy Paul Morin," *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin – Executive Summary* [Kaufman Commission], 1998.
16. Ibid., "Chapter II: Forensic Evidence and the Centre of Forensic Sciences."
17. Innocence Canada, "Tunnel Vision," *Causes of Wrongful Convictions*.
18. Jessica Patton, "DNA solves 1984 murder of Christine Jessop, suspect dead: Toronto police," *Global News*, 15 October 2020.
19. Kaufman Commission (1998), "Chapter III: Jailhouse Informants."
20. Ibid., "Chapter V: The Investigation by Durham Regional Police and the Prosecution of Guy Paul Morin."
21. Campbell (2018), p. 224.
22. *Reference re Milgaard (Can.)*.
23. Milgaard Inquiry (2008), "Chapter 4: Executive Summary," p. 296.

24. Campbell (2018), p. 225.
25. Milgaard Inquiry (2008), "Chapter 4: Executive Summary," p. 318.
26. Ibid., "Chapter 3: Overview of Facts," p. 92.
27. *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, January 2007, p. 111.
28. Manitoba, Department of Justice, *The Inquiry Regarding Thomas Sophonow* [Sophonow Inquiry], Report.
29. Ibid, p. 101.
30. Ibid.
31. Campbell (2018), p. 118.
32. Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* [Goudge Report], Volume One: *Executive Summary*, Queen's Printer for Ontario, Toronto, 30 September 2008, pp. 6–7.
33. Ibid., p. 16.
34. Ibid.
35. Ibid., p. 18.
36. Ibid., p. 33.
37. Ibid., p. 48.
38. For example, the case of Brenda Waudby. See Campbell (2018), p. 179.
39. Ibid., pp. 177–178.
40. Goudge Report (2008), p. 16.
41. *Criminal Code*, R.S.C. 1985, c. C-46, part XXI.1 : Applications for Ministerial Review — Miscarriages of Justice. Other legal avenues exist that could potentially be used to address wrongful convictions, such as the pardon power under section 748 of the *Criminal Code*.
42. Ibid., s. 696.3(3).
43. Ibid., s. 696.4.
44. Ibid., s. 696.3(3).
45. Kent Roach, *Report Relating to Paragraph 1(f) of the Order In Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, Report, 2006.
46. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.
47. *Reference re Milgaard (Can.)*.
48. Department of Justice, "Who Assesses the Application?", *Criminal Conviction Review*.
49. Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2019 – Minister of Justice*.
50. Ibid.
51. *Criminal Code*, s. 696.4.
52. Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2019 – Minister of Justice*.
53. Department of Justice, "What is New and Significant Information?", *Criminal Conviction Review*.

54. Specifically, annual reports by the Department of Justice indicate there was one remedy granted in fiscal year 2019 (see Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2019 – Minister of Justice*), one in fiscal year 2017 (see Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2017 – Minister of Justice*), two in fiscal year 2015 (see Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2015 – Minister of Justice*), one in fiscal year 2013 (see Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2013 – Minister of Justice*) and one in fiscal year 2010 (see Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2010 – Minister of Justice*).

55. Milgaard Inquiry (2008), "Chapter 6: Canada's Conviction Review Process," p. 357.

56. Innocence Canada, *About Us*.

57. Innocence Canada, *Our Case Review Process*.

58. *Criminal Code*, s. 696.3(3).

59. Campbell (2018), p. 203.

60. Ibid.

61. Ibid., p. 201.

62. Milgaard Inquiry (2008), "Chapter 6: Canada's Conviction Review Process," p. 360.

63. Ibid., p. 364.

64. Public Prosecution Service of Canada, "III. First Nations, Inuit, or Métis Persons," in "Chapter 10 – At-Risk Populations," *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada – Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions – 2018*.

65. Department of Justice, "2. Statistical Overview on the Overrepresentation of Indigenous Persons in the Canadian Correctional System and Legislative Reforms to Address the Problem," *Spotlight on* Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*.

66. Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge," News release, 21 January 2020.

67. Senate, Standing Committee on Human Rights, *Interim Report – Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being (1 February 2017–26 March 2018)*, 1st Session, 42nd Parliament, February 2019, p. 20.

68. Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada," *Flinders Law Journal*, Vol. 17, 2015, p. 203.

69. Debra Parkes and Emma Cunliffe, "Women and wrongful convictions: concepts and challenges," *International Journal of Law in Context*, Vol. 11, No. 3, September 2015, pp. 219–244; and Innocence Canada, *Maria Shepherd*.

70. *R. v. L.T.H.*, 2008 SCC 49, paras. 1 and 24.

71. Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci*, February 2013, para. 372.

72. Parkes and Cunliffe (2015).

73. United Nations, Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, art. 14(6).

74. *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons*, as adopted by the Federal, Provincial and Territorial Justice Ministers in 1988.

75. Milgaard Inquiry (2008), "Chapter 6: Canada's Conviction Review Process," p. 369.

76. Ibid., p. 371.

77. Specifically, versions of a Criminal Cases Review Commission [CCRC] exist in England, Wales and Northern Ireland, Scotland, New South Wales, Norway and North Carolina.

78. James Lockyer, Association in Defence of the Wrongly Convicted, *The Need for a Criminal Cases Review Commission in Canada for the Wrongly Convicted: For Consideration by the Liberal Party of Canada*, October 2015, pp. 16–18.

79. Colin Perkel, "Creation of wrongful conviction review board edging closer to reality," *Globe and Mail*, 1 March 2020.

80. John Weeden, "The Criminal Cases Review Commission (CCRC) of England, Wales, and Northern Ireland," *University of Cincinnati Law Review*, Vol. 80, No. 4, September 2013, p. 1418.

81. United Kingdom, *Criminal Appeal Act 1995*, 1995 c. 35, s. 13.

82. CCRC, *What we do*.

83. Ibid.

84. Campbell (2018), p. 207.

85. Richard Nobles and David Schiff, "The Criminal Cases Review Commission: Reporting Success?," *Modern Law Review*, Vol. 64, No. 2, March 2001, pp. 280–299.

86. Ibid., p. 294.