

ARTICLE

WRONGFUL CONVICTIONS AND THE AVENUES OF REDRESS: THE POST-CONVICTION REVIEW PROCESS IN CANADA

Andrea S. Anderson*

CITED: (2015) 20 Appeal 5

INTRODUCTION

In an ideal criminal justice system, only the guilty are punished while the innocent remain free. In reality, some individuals spend upwards of ten years in prison for crimes they did not commit, or crimes that never even took place at all. The Canadian media has showcased several high-profile cases of wrongful convictions, leading to increasing public awareness of the fallibility of the criminal justice process. In Canada, wrongful convictions are usually addressed and remedied through the appellate courts. Once these judicial avenues have been exhausted, section 696.1 of the *Criminal Code of Canada* (the “*Criminal Code*”) allows the Minister of Justice to review alleged wrongful convictions.¹ Canada’s post-conviction review process has been heavily criticized for not providing an adequate mechanism to deal with alleged miscarriages of justice after all statutory means of appeal have been exhausted.² As such, the public remains unsatisfied that the issue is being addressed.

This paper presents an overview of the current post-conviction review system in Canada and examines the continued calls for improvements. It is crucial for an appropriate mechanism to detect, review, and rectify errors within the criminal justice system to exist, yet the development of such a measure has been neglected in the discourse on wrongful convictions. Since 1986, seven public commissions of inquiry have been held in Canada following cases of confirmed wrongful convictions. Most recently, the Ontario government launched a public inquiry following the revelation that pathologist Dr. Charles Smith’s discrete testimony had allegedly contributed to a number of

* Andrea S. Anderson is a PhD Candidate at Osgoode Hall Law School, York University. She wishes to thank Professor David M. Tanovich, University of Windsor, Faculty of Law, and Professor Faisal Bhabha, Osgoode, for their continued support. She is particularly grateful to those who read multiple drafts of this paper and provided extremely insightful comments.

1 *Criminal Code of Canada*, RSC 1985, c C-46, s 696.1 [*Criminal Code*].

2 See Julian Roy & Elizabeth Widner, *Systemic Submissions of the Association in Defence of the Wrongly Convicted* (Toronto: The Association in Defence of the Wrongly Convicted, 2006); P Braiden & J Brockman, “Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code” (1999) 17 Windsor Yearbook of Access to Justice 3.

miscarriages of justice relating to infant deaths.³ The Smith inquiry has drawn attention once again to the fallibility of the criminal justice system and has reignited discussion about post-conviction remedies. The manner in which causes of wrongful convictions are studied and what recommendations are presented to eradicate them are largely dependent on the effectiveness of the review process that investigates wrongful convictions. While the power of the Minister of Justice to review convictions has been amended, it has failed to challenge the status quo and does not increase public confidence in the criminal justice system. It is imperative to question whether there exists an effective alternative to section 696.1 of the *Criminal Code* for individuals who apply for a conviction review once they have exhausted all avenues of appeal.

This paper examines the review mechanisms in both the United States and Britain, and asks whether the role of the Minister of Justice in Canada should be replaced with an alternative system to review claims of innocence. Further, this paper argues that the Canadian government should create an independent review body to examine post-conviction claims because this approach is the best way to evaluate and address miscarriages of justice. Part I of this paper analyzes the ways that researchers, particularly in the United States, have attempted to define and identify cases of wrongful conviction. Part II describes the origins of the review process used in Canada, with a specific focus on the process that an individual who claims to have been wrongly convicted must go through when all avenues of appeal have been exhausted. Part III analyzes the limitations of Canada's current post-conviction review system, using case illustrations to demonstrate the difficulties inherent to the review process. The paper then discusses specific post-conviction review mechanisms in the United States and Britain aimed at reducing the imprisonment and execution of the innocent. In the conclusion, this paper addresses whether the establishment of an independent review process modeled closely after the United Kingdom's Criminal Cases Review Commission is feasible, and whether it is a more effective means for addressing miscarriages of justice in Canada, all while taking into account possible implications for Canada's criminal justice system.

PART I. SETTING THE STAGE—DEFINING WRONGFUL CONVICTIONS

A number of different terms are used throughout the literature to describe wrongful convictions, including 'miscarriage of justice', 'false imprisonment', and 'malicious prosecution'. However, there is no universally agreed-upon definition for wrongful conviction.⁴ The major studies conducted in the United States⁵ and the United Kingdom⁶ make distinctions between legal and factual innocence. Legal innocence refers to individuals whose convictions are quashed due to errors of law (for example, inadmissible evidence), and to those acquitted by the courts. In the Canadian legal system, however, a finding of legal innocence does not necessarily mean that the individuals are, in fact,

3 See Frank Dobrovnik & Omi Agency, "Compensation Means Little to a Wrongful Conviction Victim", *Canoe News* (10 May 2010) online: <<http://cnews.canoe.ca/CNEWS/Canada/2010/05/10/13893366.html>>; "Dr. Charles Smith's Victims to be Compensated", *CBC News* (10 August 2010) online: <<http://www.cbc.ca/news/canada/toronto/dr-charles-smith-s-victims-to-be-compensated-1.974472>>.

4 For example, see Hugo A Bedau & Michael L Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40:1 *Stan L Rev* 21; C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

5 Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (New York: Garden City Publishing, 1932); Ruth Brandon & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: George Allen and Uwin, 1973); Bedau & Radelet, *supra* note 4; Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Buffalo, NY: Prometheus Books, 1991); Huff et al, *supra* note 4.

6 Brandon & Davies, *supra* note 5.

innocent of committing the crime. Factual innocence refers to individuals who have been wrongfully convicted for crimes that they did not commit. In this paper, wrongful conviction is defined as the conviction of a factually innocent person.

American scholars suggest that a miscarriage of justice occurs whenever a suspect, defendant, or convict is treated by the state in a manner that breaches their constitutional rights.⁷ A miscarriage of justice is also used to describe (1) pre-trial detention for individuals who cannot afford bail⁸ and against whom the charges are later dropped, or who are acquitted after trial;⁹ (2) “individuals implicated in a crime or who were accessories to a crime in a minor way but not guilty of the more serious charge for which they were convicted”;¹⁰ (3) individuals whose convictions are later overturned on appeal;¹¹ (4) individuals whose convictions are later quashed;¹² and (5) false accusations of crime.

PART II. RESPONSES TO WRONGFUL CONVICTIONS

A. Overview of the Post-Conviction Review Process in Canada

Once convicted of a criminal offence, defendants have the opportunity to have their convictions revisited through the ministerial review process. Post-conviction review is available to most individuals who have been convicted of an offence under the criminal law, including both summary and indictable offences. Post-conviction review is also available to individuals who have been designated as dangerous or long-term offenders. However, in all cases, post-conviction review does not occur until all avenues of appeal have been exhausted.¹³

B. Origins—Common Law and Section 690

The ability to revisit a conviction is entrenched in Canadian legal history.¹⁴ Historically, the only method available for reconsideration of a criminal conviction following the exhaustion of appellate review was the common law Royal Prerogative of Mercy.¹⁵ This power, which continues to be part of the *Criminal Code*, allows the Crown to grant pardons and correct judicial errors. The right of the accused person to appeal criminal

7 Clive Walker, “Miscarriages of Justice in Principle and Practice” in Clive Walker & Keir Starmer, eds, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) 31 at 33.

8 Huff et al, *supra* note 4 at 10-11.

9 Barrie Anderson et al, *Manufacturing Guilt: Wrongful Conviction in Canada* (Halifax: Fernwood, 1998).

10 Brandon & Davies, *supra* note 5 at 19.

11 Anderson et al, *supra* note 9 at 73.

12 Brandon & Davies, *supra* note 5 at 20.

13 See *Criminal Code*, *supra* note 1, s 684(1):

[A] court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

See *R v Henry*, 2010 BCCA 462 (available on CanLII): Ivan Henry was wrongfully imprisoned, spending 27 years in jail for sex crimes. The Attorney General appointed a special prosecutor to investigate the potential miscarriage of justice. In 2008, the special prosecutor recommended that the Crown not oppose efforts by Mr. Henry to reopen his appeal. As a result, in 2010 the British Columbia Court of Appeal quashed his conviction and entered acquittals on all charges.

14 Anderson et al, *supra* note 9 at 118-28.

15 Canada, Department of Justice, *Addressing Miscarriage of Justice: Reform Possibilities for Section 690 of the Criminal Code* (Consultation Paper), (Ottawa: Communications Branch, Department of Justice, 1998) at 3 [Department of Justice, 1998].

cases was introduced in Canada in 1923.¹⁶ As well, section 1022 of the *Criminal Code* allowed the Minister of Justice to order new trials or refer to the Court of Appeal for its opinion. This provision underwent various amendments, culminating in the enactment of section 690 of the *Criminal Code* in 1968.¹⁷

Section 690 enabled the Minister of Justice, “upon application for mercy of the Crown by, or on behalf of, a person convicted in proceedings by indictment, or sentenced to preventive detention to”:

1. Direct a new trial, or a new hearing for a person in preventive detention if, after inquiry, the Minister is satisfied that in the circumstances a new trial or hearing should be directed;
2. Refer the matter to a court of appeal for hearing as if it were an appeal; or
3. Refer any question to a court of appeal for its opinion on which the Minister desires assistance.¹⁸

To apply for mercy under section 690, the Department of Justice generally required an applicant to submit trial transcripts, factums, reasons for judgment, and a brief setting forth the evidentiary and legal basis upon which the application to the Minister of Justice (who is also the Attorney General of Canada) was based.¹⁹ The literature notes that “successive federal Ministers of Justice have been of the view that the jurisdiction given to them by section 690 should not constitute another level of appellate review.”²⁰ Further, the extraordinary remedies provided by this section were not available unless new information demonstrated that there was a reasonable basis to conclude that a miscarriage of justice likely occurred. The legislation did not specify what evidence was required to satisfy the Minister of Justice that a remedy should be granted.²¹ In addition to lack of procedural rules, there was also a lack of guidelines and standardized forms. Once an investigation was complete, a report was prepared and then sent through various channels before being received by the Minister of Justice.²² Applicants were not given access to the reports or documents prepared by the Department, nor were they provided notice of any adverse findings or any opportunities to adduce evidence before the report went to the Minister.²³

Following several high profile wrongful convictions cases in the 1980s (including those of Donald Marshall Jr. and David Milgaard), section 690 came under heavy criticism.²⁴ In the 1990s, the Department of Justice implemented an internal study of the conviction review process. As a result of this study, the Department initiated changes in an attempt to “improve the timeliness of case review, provide more openness, and provide greater

16 *Ibid.*

17 *Ibid* at 3-4.

18 *Ibid.*

19 Philip Rosen, *Wrongful Convictions in the Criminal Justice System* (Ottawa: Library of Parliament, Research Branch, 1992) at 5.

20 Department of Justice, 1998, *supra* note 15 at 3.

21 However, in 1994, the Honourable Allan Rock, then Minister of Justice, in his reasons for decision in the section 690 application of W Colin Thatcher, articulated the principles which guide the discretionary powers found in section 690. For more information, see Department of Justice, 1998, *supra* note 15 at 3.

22 Rosen, *supra* note 19 at 5.

23 *Ibid.*

24 Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: Royal Commission on the Donald Marshall, Jr, Prosecution, 1989) [Marshall Inquiry].

independence.”²⁵ In 1993, following many years of ad hoc review, the Criminal Conviction Review Group (“CCRG”) was formed, and it reported to the Assistant Deputy Minister of Justice. The CCRG consisted of a group of lawyers who reviewed convictions thought to be in error and made recommendations to the Minister. For a variety of reasons, discussed below, the conviction review process was considered inadequate and section 690 of the *Criminal Code* was amended and replaced by sections 696.1 to 696.6 in 2002.

C. 2002 Amendments—Current Conviction Review Process

Bill C-15A repealed section 690 of the *Criminal Code* and created sections 696.1 to 696.6. These amendments were intended to address the growing dissatisfaction with the previous legislation, particularly criticism of “the role of the Minister of Justice, procedural delays, secrecy, lack of accountability, and prosecutorial bias.”²⁶ Sections 696.1 to 696.6 set out the current law and procedures governing applications for post-conviction review in Canada. These sections give the Minister of Justice the power to review a conviction to determine whether a miscarriage of justice may have occurred. The amendments also included non-legislative changes in an attempt to distance the review process from the Department of Justice. These changes included the physical separation of the CCRG through relocation to another building, and the appointment of a Special Advisor to oversee the review process and provide advice directly to the Minister.²⁷

The new provisions were consistent with the previous legislation in many respects. Under the 2002 amendments the role of the Minister of Justice in determining applications for review was preserved; an application for ministerial review would not be accepted until the applicant had exhausted all available rights to appeal, and an applicant was still required to establish on a reasonable basis that a miscarriage of justice likely occurred. There were, however, some notable changes. For example, the Minister was now required to submit an annual report to Parliament concerning applications for review.²⁸ In addition, the amendments provided the Minister or his designate the powers of a commissioner under the *Inquiries Act* to take evidence, issue subpoenas, enforce attendance of witnesses and compel them to give evidence, and otherwise conduct an investigation in relation to the application for review.²⁹ These amendments also permitted the Minister of Justice to direct a new trial or to refer the matter to the Court of Appeal for hearing and determination if the Minister is “satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”³⁰ In rendering his or her decision, the Minister is invited to take into account all matters that are considered relevant including, “whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister” and, “the relevance and reliability of the information that is presented.”³¹

Before applying to have a conviction reviewed by the Minister, the applicant must have exhausted all levels of judicial review or appeal and have new and significant information (often referred to as fresh evidence) relating to the conviction. As Kerry Scullion notes, this requirement means the application must be based on evidence that was not examined by the trial court, evidence that the applicant did not become aware of until all proceedings

25 Department of Justice, 1998, *supra* note 15.

26 Kathryn M Campbell, “The Fallibility of Justice in Canada: A Critical Examination of Conviction Review” in M Killas & R Huff, eds, *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008) 117 at 127.

27 James Bell & Kimberley A Chow, “Student Attitudes Toward the Post-Conviction Review Process in Canada” (2007) 90 *J Inst Just Int'l Stud* 3 at 91.

28 *Criminal Code*, *supra* note 1, s 696.1.

29 *Ibid*, ss 696.2(2), (3).

30 *Ibid*, s 696.3(3)(a).

31 *Ibid*, ss 696.4(a)-(b).

were over, or evidence that is reasonably capable of belief, relevant to the issue of guilt, and capable of having affected the trial verdict.³² Regulations governing applications also require that the applicant provide copies of all documents and transcripts related to pre-trial and appeal proceedings. No application can be considered until the original copies of all the prescribed documents have been submitted.³³ The conviction review process then takes place in four stages.

D. Stages of Review

i. Preliminary Assessment

In most cases, applications to the Minister of Justice are reviewed and investigated by the CCRG. If, however, an application is based on a matter that was prosecuted by the Attorney General of Canada, lawyers independent of the CCRG will conduct all stages of the review process. The process begins by assessing whether an application contains all of the necessary information and documentation. A preliminary assessment is then conducted to determine whether the application is based on new and significant evidence. If the application does not meet these criteria, the application will be screened out prior to proceeding to the investigation stage.³⁴ In this case, the applicant is not required to convince the Minister of their innocence, “but rather that there must be a reasonable basis to conclude that a miscarriage of justice likely occurred.”³⁵

ii. Investigation

The purpose of the investigation stage is to verify the information provided by the applicant. To assist the Minister of Justice in conducting the investigation, section 696.2(2) of the *Criminal Code* gives the Minister the power to subpoena witnesses to testify or produce evidence. The Minister has the authority to delegate this power to the CCRG or the independent lawyer(s) responsible for conducting the investigation.³⁶

iii. Investigation Report

Upon completion of the investigation, the CCRG or independent lawyer(s) prepare an investigation report summarizing the information gathered and send copies of the report to both the applicant and the Attorney General of the province or territory responsible for the prosecution. At this time, both the applicant and the Attorney General can submit any comments they might have. After these submissions have been received, the CCRG or independent lawyer(s) may conduct further investigation based on these comments. The CCRG or independent lawyer(s) conducting the review then create a final investigation report and prepare their recommendations.³⁷

32 Kerry Scullion, “Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 of the Criminal Code of Canada” (2004) 46:2 Can J Criminology & Crim Just 189 at 190.

33 Bell & Chow, *supra* note 27 at 92.

34 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2005) [Department of Justice, 2005].

35 Campbell, *supra* note 26 at 119.

36 Department of Justice, 2005, *supra* note 34: The investigation stage may involve (1) interviewing or examining witnesses; (2) carrying out scientific tests; (3) obtaining other assessments from forensic and social scientists; (4) consulting police agencies, prosecutors, and defence lawyers who were involved in the original prosecution and/or appeals; or (5) obtaining other relevant personal information and documentation.

37 Bell & Chow, *supra* note 27 at 2-3.

iv. Decision by the Minister

After considering the recommendations made by the CCRG and the Special Advisor, if the Minister believes there is new evidence that presents a compelling reason to re-open a case, the Minister may order a new trial or refer the matter to the Court of Appeal.³⁸ The Minister may also, at any time, refer a question to the Court of Appeal for its opinion.

PART III. CRITICISMS OF THE REVIEW PROCESS

Despite the 2002 amendments to the *Criminal Code*, the conviction review process continues to be criticized for a variety of reasons. These criticisms can be grouped into two areas: (1) those aimed at the process itself and (2) those relating to the role of the Minister of Justice as the arbiter of conviction review.³⁹ The case of Steven Truscott illustrates two of the main issues with the current review process. In 1959, 14-year-old Steven Truscott was convicted of murdering 12-year-old Lynne Harper in Ontario. Truscott was initially sentenced to death, but this was commuted to life imprisonment. Truscott would serve ten years before being released on parole. During that time, his appeals against his conviction to the Ontario Court of Appeal and the Supreme Court of Canada were refused. In 2001, Truscott filed a conviction review application with the CCRG. Given the high profile nature of his case and conviction, the Minister appointed retired Justice Fred Kaufman to conduct the review. Kaufman completed his investigative report in 2004.⁴⁰ The Minister of Justice referred the case back to the Ontario Court of Appeal. The Court of Appeal heard the case in 2006, and acquitted Truscott a year later, “but fell short of declaring him innocent.”⁴¹ The Court of Appeal concluded that “while it cannot be said that no jury acting judicially could reasonably convict, we are satisfied that if a new trial were possible, an acquittal would clearly be the more likely result.”⁴² In the end, it would take six years from the time Truscott’s application was received by the CCRG for the Court of Appeal to reach a decision.

A. Shortcomings in Canada’s Current Review Process

Critics maintain that section 696.1 through 696.6 represent little more than a cosmetic change to preceding legislation and, as such, fall short in providing a reasonable standard of independence, fairness, efficiency, and transparency. Braiden and Brockman identify a number of problems with the post-conviction review process, such as the secrecy surrounding the process, the high cost of applying for a review, and the conflict of interest in the Minister’s role.⁴³ Many of the same criticisms of the section 690 process can be reiterated for the current legislation. The literature examining this topic has pointed to six broad categories in which the current system has failed: (1) lack of independence, (2) evidentiary burden too high, (3) barriers of access, (4) potential of application to be dismissed, (5) delays, and (6) lack of transparency.

38 *Criminal Code*, *supra* note 1, s 696.39(3).

39 Campbell, *supra* note 26. These recommendations and advice are then sent to the Minister. The Minister also receives advice on the application from the independent Special Advisor. The Special Advisor provides advice at all stages of the review process.

40 Canada, Department of Justice, *Report to the Minister of Justice* by F Kaufman (Ottawa: Department of Justice, 2004).

41 *Ibid.*

42 Clive Walker & Kathryn Campbell, “The CCRC as an Option for Canada: Forwards or Backwards?” in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent* (New York: Palgrave MacMillan, 2010) 191 at 193-94.

43 Braiden & Brockman, *supra* note 2.

i. Lack of Independence—Conflict of Interest

The most obvious objection to the current review process in Canada is the lack of institutional independence on the part of the body responsible for determining applications for review. In Canada, the Minister of Justice serves a dual role as the Attorney General, meaning that he or she also supervises the prosecution of violations of federal statutes (other than the *Criminal Code*) in all provinces, as well as the prosecution of all federal offences (including the *Criminal Code*) in the territories.⁴⁴

The federal Minister of Justice, as the chief lawmaker, is too close to the prosecution of a case to render an impartial decision when approached with a post-conviction review application.⁴⁵ Having the power to grant a remedy in a case where a miscarriage of justice occurred is essentially incompatible with the role of the prosecution of crimes.⁴⁶ On the one hand, a prosecutor must balance his or her function as an adversary with the responsibility to exercise discretion as a guardian of the public interest. Yet, at the same time this individual is asked, through the conviction review, to critically examine those very same practices undertaken by members of the same team.⁴⁷ In those cases where a remedy is ordered by the Minister, “a member of the executive branch of government is essentially overruling the judiciary.”⁴⁸ Philip Rosen believes that this practice reflects a prosecutorial bias on the part of the Department of Justice, resulting in a “deference to judicial determinations of guilt and an insufficiently rigorous questioning of the foundations of criminal convictions.”⁴⁹ Traditionally, the constitutional separation of powers ensures that the executive does not interfere, nor can it be perceived as interfering with judicial processes. Through section 696.2 the Minister of Justice acts as a gatekeeper to the courts and is effectively authorized to usurp the powers of the court by refusing a reference. As noted by Braiden and Brockman, whether or not the Department of Justice officials are partial or impartial in their decisions, it is imperative that justice appears to have been achieved.⁵⁰ Any perceived conflict of interest, whether well-founded or not, undermines the integrity of the process.⁵¹

ii. Evidentiary Burden

Under the 2002 amendments, applicants are still required to investigate their own wrongful convictions, with the onus falling upon them to identify the legal grounds for their application. Critics of the current review process argue that this imposes too high a threshold on the applicant. For example, the requirement that the applicant “demonstrate a reasonable basis to conclude that a miscarriage of justice likely occurred” imposes a higher standard than would be applied by the Court of Appeal on a review.⁵² Additionally, opponents criticize the requirement that applications for post-conviction

44 Department of Justice, 2005, *supra* note 34.

45 Scullion, *supra* note 32 at 194.

46 Campbell, *supra* note 26 at 123; see also Braiden & Brockman, *supra* note 2 at 25.

47 M Bloomfield & D Cole, “The Role of Legal Professionals in Youth Court” in Kathryn M Campbell, ed, *Understanding Youth Justice in Canada* (Toronto: Pearson Education, 2005) 198; see Campbell, *supra* note 26 at 123.

48 *Ibid.*

49 Rosen, *supra* note 19 at 15-16.

50 Braiden & Brockman, *supra* note 2 at 29.

51 Rosen, *supra* note 19.

52 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2010) at 1 [Department of Justice, 2010].

review be based on ‘new’ and ‘significant’ evidence as being overly restrictive.⁵³ Although the Department of Justice now has the ability to compel evidence, the onus still remains primarily on the applicants themselves to identify what evidence is necessary for their application. As stated in the *Milgaard Commission*:

The key to exposing wrongful convictions is having the will and the resources to go out and investigate to see whether there is anything wrong and not simply sit back and say to the applicant, well, if you can show me something new I may react to it, but if you can’t, I’m sorry, there’s nothing I can do.⁵⁴

iii. Barriers to Access

a. Cost

In the current conviction review process potential applicants face a number of financial barriers. For example, the regulations provide that no application will be considered until the applicant provides all the necessary documents. Regulations governing applications for ministerial review require that they be accompanied by copies of all documents related to pre-trial, trial, and appeal proceedings.⁵⁵ Critics maintain that this requirement is prohibitive, as these documents are often so large that they fill numerous boxes.⁵⁶

Currently, if individuals wish to obtain legal assistance in making an application for ministerial review, they must either pay for it themselves or apply for legal aid from the province or territory in which they live. Only some provinces and territories will consider such a request.⁵⁷ When legal aid for post-conviction review is available, stringent criteria must be met. For example, similar to the requirement for making an application for ministerial review, an application for legal aid may not be considered unless the applicant can demonstrate, amongst other criteria, that ‘new’ and ‘significant’ evidence exists.⁵⁸ As noted by James Bell and Kimberley Chow, the majority of applicants are incarcerated and thus “unable to conduct their own investigation.”⁵⁹ As a result, volunteers from organizations such as Association in Defence of the Wrongly Convicted (“AIDWYC”) and other innocence projects like those found at Canadian law schools are often left with the burden of uncovering new evidence and providing legal assistance, which hardly seems fair or just.⁶⁰

b. Effectiveness

From April 2005 to March 2007, the CCRG received fifty-seven applications, completed five investigations, and made three decisions: one case was dismissed and two were referred to the Court of Appeal.⁶¹ These figures do not represent the actual incidences of

53 PL Braiden, *Wrongful Convictions and Section 690 of the Criminal Code: An Analysis of Canada’s Last-Resort Remedy* (Master’s Thesis, Simon Fraser University, 2000) [unpublished].

54 Saskatchewan, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1 (Saskatoon: Attorney General, 2006) at 389.

55 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2014).

56 Bell & Chow, *supra* note 27 at 92-93.

57 *Ibid.*

58 *Ibid* at 92.

59 *Ibid* at 91-92.

60 *Ibid.*

61 Kathryn Campbell, *Miscarriages of Justice in Canada: Causes, Response and Prevention* (Toronto: University of Toronto Press, 2009).

wrongful convictions in Canada.⁶² According to AIDWYC, “the Minister intervenes in about one percent of all applications.”⁶³ While AIDWYC’s report admitted that this low number of decisions reflects the integrity of the applications, it also demonstrates that the process may not be the most effective means of addressing wrongful convictions. Bell and Chow note that long-held criticisms of the ministerial review process center around lack of accountability and expediency.⁶⁴

iv. Delays

Reviews and investigations conducted by the CCRG are characterized by delays. According to Julian Roy and Elizabeth Widner, “the current review process makes no provision for ensuring that applications for review are considered and determined on a timely basis.”⁶⁵ The experience of AIDWYC demonstrates that applications can take years to process, with the applicant being largely uninformed during the process.⁶⁶ Statistics reported by the Minister in the 2013 Annual Report show that of the twelve applications received at the preliminary assessment, only three were completed during the reporting period (April 1, 2012 – March 31, 2013).⁶⁷ During this period the CCRG only rendered a decision in one case.⁶⁸ While the CCRG defends these delays by claiming that investigations take time, critics argue that these delays are inexcusable.⁶⁹ Further, even when investigations have been completed and recommendations and advice have been provided to the Minister, decisions may take up to an additional five years to be delivered.⁷⁰

v. The Potential of the Application to be Dismissed

According to AIDWYC, the preliminary assessment stage of the current conviction review process is also a significant concern. AIDWYC argues that the requirement that the applicant demonstrate to the satisfaction of the Minister that there “may be a reasonable basis to conclude that a miscarriage of justice likely occurred” puts the applicant in a catch 22 situation, in that “it is almost inconceivable that an unrepresented applicant, from his prison cell, could meet any such standard prior to some form of investigation (however modest) being conducted.”⁷¹ While the disclosure of the investigation report provides information to the applicant, the applicant is still not provided copies of the CCRG’s final submission to the Minister. The applicant is provided with facts, but is not fully informed of the findings, issues, and considerations on which the Minister proposes to make a decision.

62 Braiden & Brockman, *supra* note 2 at 35.

63 Bell & Chow, *supra* note 27 at 92.

64 *Ibid* at 93.

65 Roy & Widner, *supra* note 2.

66 *Ibid*.

67 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2013) at 9-10.

68 Department of Justice, 2010, *supra* note 52: An application is considered to be “completed” when a person has submitted the forms, information and supporting documents required by the regulations. The Minister received seven completed applications during this reporting period. An application is considered to be “partially completed” where a person has submitted some but not all of the forms, information and supporting documents required by the regulations. For example, a person may have submitted the required application form but not the supporting documents required.

69 Braiden & Brockman, *supra* note 2.

70 *Ibid*.

71 Roy & Widner, *supra* note 2 at 23.

vi. Transparency

Finally, Kerry Scullion notes that, aside from the *Criminal Code* and the regulations, there are no publicly accessible guidelines or rules that prescribe how an application is to be considered, such as what documents ought to be provided for the Minister's consideration, or how evidence is considered and against what standard.⁷² The lack of legislative guidelines allows the discretion of the Minister to remain private and unscrutinized. These problems with transparency in the review process are compounded by the fact that the Minister's decisions are not made public. While annual reports to Parliament do provide some new information that is useful for statistical analysis, they reveal only a limited amount of statistical information. The essence of section 690 remains; what few changes have been made are primarily superficial—there has been little substantive change in post-conviction review procedures, and as such it is not surprising that there continue to be calls for reform in Canada.

B. Recommendations

This overview of the post-conviction review process as a last resort for the wrongfully convicted in Canada serves to illustrate its many challenges, deficits, and difficulties. With sufficient time and resources, individuals can apply for review but, as the past has indicated, the chances of being granted a remedy are remote. The current review process is cumbersome, onerous, and lengthy, rendering it inaccessible and ultimately ineffective for most wrongfully convicted individuals seeking redress. As a result, it is important to inquire whether an alternative method to effectively address post-conviction review in Canada exists.

i. Post-Conviction Review Mechanisms in Other Jurisdictions

a. The American Experience

In 2004, the *Advancing Justice Through DNA Technology Act* and the *Innocence Protection Act* (“IPA”) were included within a bill called the *Justice for All Act* of 2004.⁷³ The IPA is a package of criminal justice reforms intended to reduce the risk of innocent persons being executed by the State and ensure that potentially wrongfully convicted inmates have access to evidence that can establish their innocence.⁷⁴

b. Post-Conviction DNA Testing for Qualified Inmates

In federal cases, the IPA allows an inmate “under a sentence of imprisonment or a sentence of death” to apply for post-conviction DNA testing.⁷⁵ The court orders DNA testing if it finds that the specific requirements of section 411(a) of the IPA have been met. A motion for post-conviction DNA testing must be filed within five years after the enactment of the IPA or within three years of the applicant's conviction, whichever comes later.⁷⁶ After this period, an inmate can apply for such testing if he or she can demonstrate reason for failing to apply within the required time period. If the results of the DNA testing reveal that the applicant was the true source of DNA found at the crime scene, the court will consider whether the applicant's assertion of actual innocence

72 Scullion, *supra* note 32 at 193; Roy & Widner, *supra* note 2 at 24-25.

73 Michael E Kleinert, “Improving the Quality of Justice: The Innocence Protection Act of 2004 Ensures Post-Conviction DNA Testing, Better Legal Representation, and Increased Compensation for the Wrongfully Imprisoned” (2006) 44 *Brandeis LJ* 491; US, Bill HR5107, *Justice for All Act of 2004*, 108th Cong, 2003-2004 (enacted) [*Justice for All Act*].

74 US, Senate Committee on the Judiciary, 107th Cong, *The Innocence Protection Act of 2002* (S Rep No 107-315) (Washington, DC: US Government Printing Office, 2002) at 2.

75 *Justice for All Act*, *supra* note 73 § 411(a).

76 *Ibid* § 411(a)(10).

was false.⁷⁷ If the applicant has made false assertions, then he or she will be sentenced to a term of imprisonment of not less than three years.⁷⁸ On the other hand, if the DNA testing results establish that the applicant was innocent, he or she may file a motion for a new trial or a new sentencing hearing, as appropriate.⁷⁹ The court shall grant the motion if the DNA results, along with all other evidence, establishes that a new trial would likely produce an acquittal of the offense, or entitle “the applicant to a reduced sentence” or “new sentencing proceedings.”⁸⁰

Section 411 of the *IPA* also ensures that biological evidence in federal cases will not be destroyed while the individual is imprisoned.⁸¹ However, it is important to note that the evidence could be destroyed if the defendant “knowingly and voluntarily waived the right to request DNA testing” in a court proceeding, or if the court previously denied a request or motion for DNA testing.⁸² It could also be destroyed if the defendant failed to file a motion for DNA testing after being informed that the biological evidence could be destroyed. These requirements demonstrate that only certain prisoners are eligible to apply for and obtain post-conviction DNA testing.

Section 412 of the *IPA* established the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to help states pay for post-conviction DNA testing.⁸³ As an incentive for states to consider claims of actual innocence, section 413 of the *IPA* awards grants to eligible entities in states that meet certain requirements. Under a particular state statute, rule, or regulation, the state must provide reasonable procedures for providing post-conviction DNA testing and preserving biological evidence while a person is imprisoned.⁸⁴ If a state has already adopted these procedures through legislation enacted before the *IPA*, it will automatically qualify for these grants. Likewise, the *IPA* authorizes the Attorney General to award grants to improve the ability of prosecutors in state capital cases.

c. Improving the Quality of Counsel

The *IPA* also attempts to fix the issue of ineffective counsel, one of the documented causes of wrongful convictions in the United States.⁸⁵ Some commentators argue that the *IPA* takes a “proactive approach in addressing wrongful convictions by aiming to provide better legal representation” to defendants in state capital cases.⁸⁶ Section 421 awards grants to states to “establish, implement, or improve an effective system for providing competent legal representation [...] to indigents charged with an offence subject to capital punishment.”⁸⁷ Michael Kleinert illustrates that this system may either be a public defender program or an entity that has jurisdiction in criminal cases.⁸⁸ This system must establish qualifications for lawyers, maintain a roster of competent counsel, perform and approve specialized training programs, and monitor the performance of these lawyers.⁸⁹

77 *Ibid* § 412(f)(2).

78 *Ibid* § 412(f)(3).

79 *Ibid* § 412(g)(1).

80 *Ibid* § 412(g)(2).

81 *Ibid* § 411(a)-(c).

82 *Ibid* § 411(c).

83 *Ibid* § 412. Kirk Bloodsworth was the first person on death row to prove his innocence through DNA testing. See Kleinert, *supra* note 73 at 503.

84 *Ibid* § 413(2). See Kleinert, *supra* note 73.

85 *Ibid*.

86 *Ibid*.

87 *Justice for All Act*, *supra* note 73 § 421.

88 *Ibid* § 421(e). See Kleinert, *supra* note 73 at 504.

89 *Ibid*.

In addition, the entity or public defender program must “ensure funding for the full cost of competent legal representation by the defense team and outside experts selected by counsel.”⁹⁰

d. Criticism of the *IPA*

Critics of post-conviction testing note that not every person in the prison system will have the opportunity to apply for such DNA testing.⁹¹ To date, 47 states have adopted post-conviction DNA testing statutes; some have imposed additional limitations that hinder applicants from obtaining testing, such as prohibiting applications from those (1) that have plead guilty; (2) that have admitted to guilt in order to obtain parole; (3) whose attorneys did not request testing; (4) convicted of crimes for which relief could be sought; (5) who are sentenced to death; (6) who are able to establish a likelihood rather than a possibility the testing will be exculpatory; (7) where there are clear and convincing evidence that the new results would be significantly more discriminating than the results of previous testing; or (8) that fail to provide adequate safeguards to preserve biological evidence.⁹² For instance, Alabama and Kentucky only allow DNA testing in capital cases, and Pennsylvania only allows DNA testing for individuals who were convicted before 1995.⁹³

Further, commentators have maintained that the federal statute is limited to cases in which identification was an issue at trial, and contains chain-of-custody requirements that may be impossible to meet if interpreted literally. A few states even retain a statute of limitations in DNA testing.⁹⁴ For example, some of the states have statutes of limitations of six months or less on motions to present newly discovered evidence of innocence.⁹⁵ Such statutes severely “limit the ability of a person believed to be wrongly convicted to gain access to any evidence, let alone DNA, to aid in exonerations.”⁹⁶ Finally, the full effects of the financial assistance depends on numerous factors, including whether concerns over state sovereignty would impact the full utilization of the grant program, and whether the funds allocated to the grant program would be sufficient to cover the requests being submitted by the states.

In 2009, the United States Supreme Court heard a claim by a convict seeking DNA testing.⁹⁷ The convict was William Osborne, who was convicted in Alaska in 1993 of crimes resulting from a sexual assault, kidnapping, and assault. After losing his appeal, he sought post-conviction DNA testing of materials from the crime scene using new DNA technology that, he argued, could prove his innocence.⁹⁸ After seeking DNA testing in the state courts with no success, Osborne filed a complaint in 2003 in the federal district

90 *Ibid* § 421(e).

91 Kleinert, *supra* note 73 at 501-03.

92 Myrna Raeder, “Postconviction Claims of Innocence” (2009) 24:3 Criminal Justice 14 at 15.

93 See “US Supreme Court Decision on DNA Testing Is Disappointing But Will Have Limited Impact, Innocence Project Says” (18 June 2009), online: Innocence Project <http://www.innocenceproject.org/Content/US_Supreme_Court_Decision_on_DNA_Testing_Is_Disappointing_But_Will_Have_Limited_Impact_Innocence_Project_Says.php> [Innocence Project].

94 Raeder, *supra* note 92 at 15. See “Access To Post-Conviction DNA Testing”, online: Innocence Project <<http://www.innocenceproject.org/Content/304.php>>.

95 Myriam S Denvo & Kathryn M Campbell, “Criminal Injustice: Understanding the causes, effects, and responses to wrongful conviction in Canada” (2005) 21:3 Journal of Contemporary Criminal Justice 229 at 243.

96 *Ibid*.

97 *District Attorney’s Office v Osborne*, 552 US 52, 129 S Ct 2308 (2009) [Osborne].

98 Brandon L Garrett, “DNA and Due Process” (2010) 78:6 Fordham L Review 101 at 102-03; Raeder, *supra* note 92 at 16.

court stating that the due process clause of the Fourteenth Amendment entitled him to obtain DNA testing that could provide profound evidence of his innocence. The state of Alaska refused to permit the testing under its general post-conviction statute because DNA testing had been available, Osborne had admitted guilt to some of the crimes in an application for parole, and no constitutional right to obtain DNA post-conviction testing existed.⁹⁹

In *District Attorney's Office v Osborne* (“*Osborne*”), the Supreme Court held in a five against four decision that there “is no constitutional right to obtain post-conviction DNA testing, and that Alaska’s procedure for DNA testing did not violate due process.”¹⁰⁰ The Court did overcome its concerns about the effect of DNA on finality, declaring “the availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt.”¹⁰¹ In the majority opinion, “the Supreme Court ultimately decided that the finality of a conviction is more important than making sure the right person was convicted.”¹⁰² In effect, the *Osborne* decision concluded that the “floodgates would open to frivolous innocence claims if a right to testing was recognized.”¹⁰³ As noted by American law professor Myrna Raeder, “the Osborne majority ceded DNA post-conviction relief to state and federal legislators, claiming for the most part they had already enacted statutes with varying requirements to provide relief.”¹⁰⁴ In doing so, the Court held that the federal *IPA* was a model for post-conviction procedures regarding access to DNA testing. In states without adequate laws granting DNA testing, the federal court can be the last resort, as in Mr. Osborne’s case. Peter Neufeld, cofounder of the Innocence Project in the United States, has argued that the *Osborne* decision would not greatly impact most federal and state inmates in obtaining testing under existing DNA statutes. However, Neufeld does admit that the ruling would affect a small number of people who are denied testing in state courts, and claimed that “more innocent people will languish in prison.”¹⁰⁵

ii. The United Kingdom

a. Introduction to the Criminal Cases Review Commission

The Criminal Cases Review Commission (the “Commission” or “CCRC”) was established by the British Parliament under the *Criminal Appeal Act of 1995* following recommendations from the 1993 *Royal Commission on Criminal Justice* (the “*Royal Commission*”), a royal commission charged with investigating how effectively the British criminal justice system secured convictions of the guilty while ensuring acquittals of the innocent.¹⁰⁶ The *Criminal Appeal Act* established the CCRC “as an executive Non-Departmental Public Body” to consider applications for “review of the convictions of those who believe they have either been wrongly found guilty of a criminal offense, or wrongly sentenced.”¹⁰⁷ Prior to 1995, the Home Secretary had the power to refer cases to the Court of Appeal. The problems associated with the Home Secretary’s referral power

99 *Ibid.*

100 *Ibid.*

101 *Osborne*, *supra* note 97.

102 See Innocence Project, *supra* note 93.

103 Raeder, *supra* note 92 at 16.

104 *Ibid.*

105 See Innocence Project, *supra* note 93; see also Raeder, *supra* note 92 at 16.

106 UK, Home Affairs Committee, *First Report: the Work of the Criminal Cases Review Commission* (London: Home Affairs Committee, 1999).

107 David Horan, “The Innocence Commission: An Independent Review Board for Wrongful Convictions” (2000) 20:1 N III U L Rev 91 at 189.

are well documented¹⁰⁸ and calls came as early as the 1970s to establish an independent tribunal to reopen cases. These calls continued throughout the 1980s. The high-profile wrongful conviction cases of the Guildford Four and the Birmingham Six served as catalysts for change in the United Kingdom. The *Royal Commission* recommended that the Home Secretary's power to refer cases back to the Court of Appeal be removed and that a new body should be formed. This new body was to consider alleged miscarriages of justice, supervise their investigation if further inquiries were needed, and refer appropriate cases to the Court of Appeal.

By its own account, the CCRC is an independent body charged with “impartial, open, and accountable investigation of suspected miscarriages of justice in both convictions and sentencing in England, Scotland, Wales, and Northern Ireland.”¹⁰⁹ The depth of the Commission's investigative powers enables it to actively investigate miscarriage of justice claims before a decision is made on whether or not to refer the case to the appeal courts. The Commission, which rarely accepts cases that have not been previously appealed, is not restricted to innocence-based applications.

In summary, the CCRC's primary functions are (1) to consider suspected miscarriages of justice, (2) to arrange for their investigation where appropriate, and (3) to refer cases to the Court of Appeal in the event that the investigation revealed matters that ought to be considered further by the courts. The CCRC Members principally partake “in policy-making and final decision-making on references of cases” and “in providing expertise and guidance to Case Review Managers.”¹¹⁰ Further, the CCRC, as envisioned by the *Royal Commission* and established by Parliament, is not “within court structure,” and is not “empowered to take judicial decisions that are properly matters for the Court of Appeal” or “to change a decision made by a court.”¹¹¹

One of the main reasons to establish a new review body to replace the Home Office was the need for investigations that could be carried out independently of the executive. To ensure this, the *Criminal Appeal Act* provides that the CCRC “shall not be regarded as the servant or agent of the Crown.”¹¹² However, the Commission's connection with the Government is not completely severed, in that its eleven Members are appointed by the Queen on the recommendation of the Prime Minister. The Commission relies on the Ministry of Justice for resources and, additionally, the Minister of Justice sets the employment terms and conditions of the Commission's Members.¹¹³

b. Investigation and Review by the CCRC

Anyone claiming to have experienced a wrongful conviction may apply to the CCRC for case review, with or without the aid of a solicitor. A convicted defendant seeking a CCRC review can obtain a straightforward, standardized application form that the CCRC has made available. Upon application, the CCRC “examine[s] each case impartially and

108 See Nicolas Taylor & Michael Mansfield, “Post-Conviction Procedures” in Clive Walker and Keir Starmer, eds, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) 229; Mike McConville & Lee Bridges, eds, *Criminal Justice in Crisis* (Aldershot: Edward Elgar, 1994); Kate Malleson, “Appeals Against Conviction and the Principle of Finality” in S Field and PA Thomas, eds, *Justice and Efficiency? The Royal Commission on Criminal Justice* (Cambridge, MA: Blackwell Publishers, 1994).

109 UK, Criminal Cases Review Commission, *Annual Report 2002-2003* (Birmingham, UK: Her Majesty's Stationery Office, 2003) at 4.

110 UK, Criminal Cases Review Commission, *Annual Report 1997-1998* (London: Her Majesty's Stationery Office, 1998) at 16.

111 *Ibid.*

112 Horan, *supra* note 107 at 148.

113 *Criminal Appeal Act 1995* (UK), ch 35, ss 8(2), (4).

decide[s] whether it would have a real possibility of succeeding in the Court of Appeal.”¹¹⁴ If the CCRC determines that a case is eligible for review, the case is ranked “regularly in priority for allocation of caseworkers, taking into account the human costs of delay, the effective use of resources, and the date of receipt” as well as “whether or not the applicant is in custody, and the impact of the case on public confidence in the criminal justice system.”¹¹⁵ The CCRC has its own investigatory power and can appoint experts to assist in the investigations of cases and examinations of evidence. It can require any British public body to preserve materials under the public body’s control.¹¹⁶ The Commission conducts some inquiries through its own staff and will then inform the applicant of its findings and accept the applicant’s comment on the investigation.¹¹⁷ The CCRC will review the case in light of all the information before it, and the “decision on whether or not to refer the case to an appeal court will then be made by three or more Commission Members.”¹¹⁸

Eligibility for review depends on whether the application arises from a conviction in England, Wales, or Northern Ireland. Only in exceptional circumstances can a case be referred without the applicant having exhausted the normal appeal process. Previously, the Home Secretary could refer cases that he or she believed met the criteria, but the Commission’s referral power is much more restrictive.¹¹⁹

c. Decisions by the CCRC

Once Case Review Managers have completed their reviews, cases are passed to the CCRC members to decide whether the cases should be referred for appeal.¹²⁰ The CCRC may make a referral, under section 13 of the *Criminal Appeal Act*, if there is a real possibility that the conviction or sentence would not be upheld. The real possibility must arise from arguments or evidence not raised during the trial, at appeal, or due to exceptional circumstances. These exceptional circumstances are defined on a case-by-case basis. The CCRC will also make a referral if “an appeal against the conviction has been determined or leave to appeal against it has been refused.”¹²¹ When deciding whether to refer a case, the CCRC is required to consider representations made by the applicant, his or her representatives, the Government or other outside agencies or public or private bodies, and “any other matters which appear to the Commission to be relevant.”¹²² The CCRC is required to give reasons for its decision on whether or not to refer a case for appeal.¹²³ The CCRC’s involvement in a case concludes after a referral.¹²⁴ Following the CCRC’s referral of a conviction or sentence to the Court of Appeal, the applicants and their legal

114 “Applying to the Commission”, online: Criminal Cases Review Commission <<http://www.ccrcc.gov.uk/applying.hmt>>.

115 Horan, *supra* note 107 at 149. See Walker & Campbell, *supra* note 42.

116 Horan, *supra* note 107 at 149-50; see also “Background to the Commission”, online: Criminal Cases Review Commission <http://www.ccrcc.gov.uk/aboutus/aboutus_background.html>; UK, Criminal Cases Review Commission, *Annual Report 2005-2006* (London: Her Majesty’s Stationery Office, 2006) at 17.

117 Horan, *supra* note 107 at 150.

118 *Ibid*; see also *Criminal Appeal Act*, *supra* note 113, Schedule 1, ss 6(2)-(3); Stephanie Roberts & Lynne Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission” (2009) 29:1 Oxford J Legal Stud 43.

119 *Ibid* at 48.

120 See David Kyle, “Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission” (2004) 52:4 Drake L Review 657 at 670: A decision to refer a case must be made by a Committee of at least three Committee Members. A decision not to refer may be made by one or more of the Members or employees of the Commission.

121 *Criminal Appeal Act*, *supra* note 113, ss 13(1)(b)-(2), (c)-(2).

122 *Ibid*, s 14(2)(c).

123 Horan, *supra* note 107 at 150-51; *Criminal Appeal Act*, *supra* note 113, ss 14(4), (6).

124 *Ibid*, ss 14(4)-(b), (6).

representatives assume responsibility for arguing the case before the Court of Appeal. In the design of its procedures, the CCRC separated the review and decision-making functions to ensure that independence and objectivity are consistent throughout the process. This separation means that the Member assigned to assist the Case Review Manager with the review will not be involved in making the decision.¹²⁵

d. Criticism of the CCRC

For critics of the administration of justice in Britain, the CCRC signaled parliamentary acknowledgement of the failure of due process. That said, evaluations of the efficacy of the CCRC have raised serious concerns. In their critical assessments of the CCRC, Robert Schehr and Lynne Weathered identify the following key characteristics that generate serious impediments to the CCRC's ability to perform its oversight role: (1) the subordinate structural relationship of the CCRC to the Court of Appeal, (2) no objective determination of what constitutes a thorough investigation, (3) the role of caseworkers in screening viable cases of review, (4) the limited amount of time for case review, (5) limited resources to fully investigate cases and over-reliance on petitioners to generate grounds for appeal, and (6) limitations on case investigation to meet fresh evidence standards.¹²⁶ Further, some commentators note that, while "the chances of wrongs being righted has increased with the arrival of the CCRC, many innocent inmates may be forced to remain in jail because their cases simply do not qualify for CCRC consideration due, for example, to lack of any new evidence."¹²⁷ Others have severely criticized the CCRC for its slow progress and for being "too meticulous" and setting its standards too high.¹²⁸ Research shows that when the CCRC make the decision to move forward with an investigation, it typically takes three years to complete the case.¹²⁹ The CCRC is essentially the lone gateway to the Court of Appeal. The CCRC has also been heavily criticized for not being independent of the Court of Appeal, in order to focus on whether applicants are innocent as intended by the *Royal Commission* that recommended it be established.¹³⁰ CCRC critics maintain that it does not look at guilt or innocence; rather it considers whether it is a possibility that the Court of Appeal will find a conviction unsafe. In turn, the Court of Appeal hears new evidence offered by the appellant and considers whether, if a jury had heard it, the individual would have been convicted.¹³¹ Further, a single Commissioner is, in many cases, the ultimate decision maker regarding an applicant's case. Given this reality, the composition of the Commission and the caseworkers, along with any personal biases the members may bring to their position, may be highly relevant to the outcome of the applicant's case. Finally, some critics argue that the single greatest challenge facing the CCRC is a lack of adequate funding and resources.¹³²

125 See Kyle, *supra* note 120.

126 Robert Carl Schehr & Lynne Weathered, "Should the United States establish a Criminal Cases Review Commission?" (2004) 88:3 *Judicature* 123.

127 Duncan Campbell, "Guilty Until Proven Innocent", *The Guardian* (19 August 1998) at 17.

128 Horan, *supra* note 107 at 142, 161; see Bob Woffinden, *Justice Delayed* (London: Guardian, 1998) at 17.

129 Schehr & Weathered, *supra* note 126 at 125.

130 Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System" (2012) 58 *Criminal Law Quarterly* 207 at 210.

131 Jon Robins, "Countering Criticism of the CCRC", *Criminal Law & Justice Weekly* (10 December 2011) online: CL&J <<http://www.criminalawandjustice.co.uk/features/Countering-Criticisms-CCRC>>.

132 Horan, *supra* note 107 at 162; see Alan Travis, *Justice Body's Case Plea Rebuffed by Straw* (London: Guardian, 1998) at 12.

C. What is the Best Model for Canada?

The Canadian experience demonstrates an inability to effectively identify, investigate, and challenge alleged miscarriage of justice by depending on the police, prosecutors, and the courts alone.¹³³ While DNA evidence has been used successfully in securing post-conviction exonerations in the United States, the vast majority of Canadian criminal cases and claims of miscarriages of justice are not subjected to DNA analysis. Given the reluctance of the courts to upset the finality of a decision, the Canadian system could benefit greatly by turning to an outside institutions to review claims of miscarriage of justice.

i. Calls for an Independent Review Body

The idea to introduce an independent post-conviction review commission in Canada is not novel.¹³⁴ While section 690 was replaced with sections 696.1 – 696.6, recommendations that a truly independent review body be created to replace the power of the Attorney General have gone unheeded. There has been extensive lobbying for the establishment of an independent body to undertake post-conviction review, particularly by AIDWYC and the Canadian Bar Association, as well as recommendations from commissions of inquiry.¹³⁵ In 1989, the Commissioners in the *Marshall Inquiry* wrote:

Although it is important to note that the RCMP's 1982 investigation did lead to Marshall being freed from prison – implying that one cannot always assume that a police force will not be able or willing to conduct a proper investigation into allegations of wrongful conviction – we believe that most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system, or directly or indirectly involved in the original investigation. We believe that it makes more sense to expect citizens to provide information to a body that would not seem to have any sort of vested interest.

In order for such an independent body to function effectively, people must not only know about that body's existence and role, but also have confidence that such a body has the power and the resources to conduct a thorough reinvestigation of the conviction. There are two issues here. The first is the constitution of a reinvestigative body and the second, the nature of its powers.¹³⁶

The *Marshall Inquiry* made two recommendations, *inter alia*:

[Recommendation 1]

We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorney's General with a view constituting an independent review mechanism – an individual or body – to facilitate the reinvestigation of alleged cases of wrongful conviction.

133 Horan, *supra* note 107 at 112.

134 Walker & Campbell, *supra* note 42 at 197.

135 Denvo & Campbell, *supra* note 95 at 242; Walker & Campbell, *supra* note 42 at 197.

136 Marshall Inquiry, *supra* note 24 at 143-45.

[Recommendation 2]

We recommend that this review body have investigative power so it may have complete and full access to any and all documents and materials required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.¹³⁷

Similarly, Commissioner Kaufman made the following recommendation in the 1998 *Commission on Proceedings of Guy Paul Morin*:

The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice.¹³⁸

Further, in 2001 following Commissioner Cory's report of the *Inquiry Regarding Thomas Sophonow*, the following recommendation was made:

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently, and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.¹³⁹

ii. CCRC—A Model for Canada?

The section 696.1 process has been criticized for its delay and the burdens imposed on the applicants. Despite recommendations by public inquiries, the requirement that the Minister of Justice alone has the power to re-open a case after all appeals have been exhausted remains. Regardless of the approach adopted, there are compelling reasons to believe that an independent review body that is knowledgeable in cases of wrongful convictions, has special administrative powers, and possesses expertise in reviewing claims is a far more effective way of addressing claims of miscarriages of justice than the current model. While there has been criticism against the CCRC, a review of the model illustrates that there are key elements that a Canadian independent review body needs to include: (1) a committee with the power to investigate cases that raise questions of factual innocence and make policy recommendations to correct structural errors; (2) the power to order investigations in cases where factual innocence is alleged; (3) the power to subpoena documents and people, compel testimony, and bring civil suits against those who refuse their requests; (4) to allow factual records generated by their investigation to become part of the case file; (5) transparency, accessibility, and accountability; and (6) mandatory filing of public reports of their findings and recommendations, with those government bodies named in the reports providing a timely response to the findings.¹⁴⁰ In addition, members of the body must represent all sides of the criminal justice system as well as the diversity of the public in order to achieve the goal of improving public confidence. Further, annual reports, budgetary information, and a website should be available to the public.

137 *Ibid.*

138 Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ministry of the Attorney General, 1998).

139 Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Attorney General, 2001) at 101.

140 Schehr & Weathered, *supra* note 126.

iii. Accessibility

The CCRC demonstrates a commitment to being accessible to its applicants, consistent with an inquisitorial, proactive approach to the identification and referral of possible wrongful convictions. There is no requirement that the applicant gather all of the necessary documentation before an application will be considered; commission staff take on the responsibility of assembling the appeal file, transcripts, and other documentations.

The statutory threshold test for the referral of an application ensures that the Court of Appeal reviews all possible wrongful convictions. There is no requirement to demonstrate a basis for a likely miscarriage of justice, or that the applicant is factually innocent; rather, an inference is made that “there is a real possibility that the conviction, verdict, finding or sentence would be upheld.”¹⁴¹ The low threshold test is consistent with an intention to seek out allegations of wrongful conviction, and to ensure that they are reviewed by the courts where there is a real possibility of success. It specifically contemplates the referral of cases that will not ultimately succeed. For example, addressing the cost of a new independent commission, AIDWYC asserts that the financial cost “would be small compared with the enhanced confidence in the administration of justice that would result from the creation of a Commission.”¹⁴² Further, the Commission’s work, insofar as it uncovers cases of wrongful conviction, would save considerable public funds that would otherwise be spent in the continued imprisonment of the wrongly convicted person.¹⁴³

iv. Fairness

The CCRC has devised a formal and transparent process that governs every stage of the case review process. Each application is assigned to a Case Manager, who is directed and supervised by a Commissioner, and the review follows a written investigation plan. There is an internal process for prioritizing case files to ensure their timely completion and identifying for special attention those cases that have not been subject to a determination within six months.

D. Benefits of an Independent Review Process

Despite the public awareness of wrongful conviction cases in Canada and the calls by advocates and organizations for an independent body to investigate such cases, the Minister of Justice has determined that “an independent body for conviction review [is] not needed in Canada.”¹⁴⁴ The government has rejected calls for such a model, arguing that transferring the job of reviewing alleged miscarriages of justice to an independent commission, similar to the CCRC, is not necessary because the Canadian Minister of Justice does not have the same conflict of interest problem as did the UK Home Secretary because “in Canada the vast majority of criminal prosecutions are conducted by the provinces.”¹⁴⁵ Further, with the appointment of an independent Special Advisor to oversee the review process and provide advice directly to the Minister, the government has rejected calls for an independent commission.

Former Minister McLellan concluded that “the ultimate decision-making authority in criminal conviction review should remain with the federal Minister of Justice, who is accountable to Parliament and the people of Canada.”¹⁴⁶ The Minister of Justice has a

141 *Criminal Appeal Act*, *supra* note 113, s 13(1)(a).

142 Roy & Widner, *supra* note 2 at 35.

143 *Ibid* at 35-36.

144 House of Commons, Standing Committee on Justice and Human Rights, 37th Parl, 1st Sess, Meeting 22, *Evidence* (2 October 2001).

145 *Ibid*.

146 *Ibid*.

stake in upholding criminal convictions in order to preserve the integrity of the country's judicial institutions and to ensure public confidence that the government is capable of ensuring justice in society. However, the continued discoveries of wrongful convictions undermine the justice system. The government has a vested interest in seeing that convictions are sustained to promote the legitimacy of the justice system. In general, an independent review body would not have the same vested interest as the government in maintaining a conviction.

An independent review process in Canada would play a vital role in restoring public confidence in the criminal justice system that has been shaken by the number of wrongful convictions. In addition, it is plausible that this proposed process may serve as a form of deterrence against misconduct by officials within the criminal justice system. An independent body also has the potential of becoming a repository of knowledge concerning the systemic causes of wrongful conviction, and a resource for those seeking to improve the criminal justice system. An independent review commission could also alleviate the hurdles applicants face in establishing the basis for a section 696.1 review. AIDWYC contends that Canadian cases of alleged wrongful convictions should “not [be] examined from the adversarial perspective of trying to show that the convicted person was rightfully treated by the court system” as occurs at present through the Minister of Justice's current practice under section 696.1¹⁴⁷ Rather, AIDWYC argues that an independent review board like CCRC should “undertake a fresh review without bias.”¹⁴⁸

AIDWYC suggests that an independent review body “would remove all political considerations from the review of applications submitted to it” and eliminate “the incompatible roles of the Minister as Chief Prosecutor and as the person to review wrongful convictions.”¹⁴⁹ The independent body would also offer an opportunity for a thorough investigation and review of many cases for which an investigation is not provided on appeal or post-conviction review due to appellate courts' procedural bars and emphasis on legal and procedural errors instead of factual errors. The creation of an independent review body challenges the status quo and could earn the respect of the courts, the prosecuting authorities, and the general public.

CONCLUSION

The current post-conviction review system in Canada attempts to address the criticisms leveled at the previous legislation and, to be fair, some improvements were made. However, the new system left some fundamental problems intact. Erroneous convictions provide a window through which to view the shortcomings and limitations of the criminal justice system. An independent review body is needed because the institutional incentives operating on the police, lawyers, and courts impede the detection and correction of many cases of wrongful conviction. Such a review body would actually enhance the judicial economy by screening out unmeritorious claims for a successful post-conviction review. The reality of wrongful convictions not only raises concerns regarding the fallibility of due process, human rights violations, and the limitations of the adversarial approach, but it also raises questions about the legitimacy of the justice system. Given the seriousness of wrongful convictions, not only for the wrongly convicted but also for the justice system as a whole, this problem demands further exploration. For individuals who believe they have suffered a miscarriage of justice, the conviction review process truly represents the last resort.

147 Horan, *supra* note 107 at 182-83.

148 *Ibid* at 183.

149 *Ibid*; Roy & Widner, *supra* note 2 at 28.

