October 7, 2015

Justin Trudeau
Liberal Party of Canada
350 Albert Street, Suite 920
Ottawa, ON
K1P 6M8

Dear Mr. Trudeau:

**RE: The Repeal of Part XXI.I of the *Criminal Code* and the Creation of a Criminal Case Review Commission**

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I enclose a brief of materials that I have prepared as Senior Counsel for the Association in Defence of the Wrongly Convicted (AIDWYC).

AIDWYC is an association that investigates cases of wrongful conviction and champions those individuals whom we believe have been wrongly convicted. We also make representations to government on reforms to the justice system that will assist in uncovering wrongful convictions, and aid in their future prevention.

In the enclosed brief, I am urging your party to conclude that Part XXI.1 of the *Criminal Code,* which provides for the ministerial review of miscarriages of justice, should be repealed and, in its stead, an independent tribunal should be created to examine claims of wrongful conviction. AIDWYC believes that this would constitute an important step to improving our criminal justice system.

Would the Liberal Party of Canada consider adopting a policy in advance of the election on October 19 to create such a tribunal?

Yours sincerely,

James Lockyer
Senior Counsel

**Association in Defence of the Wrongly Convicted**
**(AIDWYC)**

/cw

*Encl.*

# The Need for a Criminal Cases Review Commission in Canada for the Wrongly Convicted

## For Consideration by the Liberal Party of Canada

## BOOK OF MATERIALS

Prepared by: James Lockyer
Senior Counsel
Association in Defence of the
Wrongly Convicted (AIDWYC)

103-30 St. Clair West,
Toronto, ON
M4V 3A1

October 2015

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# The Need for a Criminal Cases Review Commission in Canada for the Wrongly Convicted

## A Presentation to the Liberal Party of Canada

Prepared by: James Lockyer
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Association in Defence of the
Wrongly Convicted (AIDWYC)

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## INTRODUCTION

The only process available for a person wrongly convicted of a crime who has exhausted all his appellate remedies is to apply to the Federal Minister of Justice under s. 696.1 of the *Criminal Code*, for a ministerial review of his conviction.

Section 696.1 *Criminal Code* provides:

> 696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by … a person who has been convicted of an offence … and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Section 696.3(3) provides:

> …The Minister of Justice may
>
> (*a*) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,
>
> (i) direct … a new trial
>
> (ii) refer the matter at any time to the court of appeal for hearing … as if it were an appeal … or
>
> (*b*) dismiss the application.

In deciding whether there has been a miscarriage of justice, s. 696.4 requires the Minister to consider whether there are "new matters of significance" not considered previously by the courts. It can be said that to succeed in an application, the applicant has to produce fresh evidence that was not available trial which undermines the prosecution's case at trial and/or establishes innocence.

Since its inception, the Association in Defence of the Wrongly Convicted (AIDWYC) has urged the Federal government to create an independent tribunal to review cases of wrongful conviction.

The tribunal would have the exclusive power to refer a potential wrongful conviction to the appellate court of the province where the conviction occurred. In essence, the tribunal would replace the ministerial power of review and provide for a more reliable and satisfactory process for the review of wrongful convictions. Such a tribunal was created for wrongful conviction claims in the U.K. in 1995 and is known as the Criminal Cases Review Commission.

## Part I: History of Section 696.1

S. 696.1 of the *Criminal Code*, formerly s. 690 of the *Criminal Code*, is founded in the former Home Secretary reference powers under U.K. legislation, which dates back to the late 19th Century.

In Canada, the Minister has created a group in Ottawa called the Criminal Convictions Review Group (CCRG), which consists of a group of lawyers (3 or 4 in total) who investigate applications made to the Minister and make a recommendation to the Minister as to whether or not the Minister should grant some form of relief. The CCRG is presently headed by Senior Counsel Kerry Scullion.

Commencing in 1998, the Liberal government of the day conducted a review of the ministerial review power. AIDWYC provided a lengthy brief to the Minister in 1999, drafted by myself and Professor Diane Martin (now deceased), and its signatories included AIDWYC's then Executive Director Rubin "Hurricane" Carter (now deceased); Joyce Milgaard , an AIDWYC director; Mr. Justice Melvyn Green, then an AIDWYC director; Professor Kent Roach; and Paul Copeland,

then an AIDWYC director. Mrs. Milgaard and I also appeared before a Parliamentary standing committee to speak to our position that the ministerial review system should be abolished and an independent tribunal substituted for it.

In the event, in 2002, the Liberal government (when Anne McLellan was the Minister of Justice), enacted the now ss. 696.1 – 696.6 of the *Criminal Code*. These sections preserved the ministerial review system, codified practices that the Minister had relied on under the old s. 690, and gave some new powers to the Minister in reviewing a claim of wrongful conviction.

With this document, I am attaching an affidavit used in the Supreme Court of Nova Scotia in November of 2014, to help secure the release of an AIDWYC client Glen Assoun, who was at the time in the seventeenth year of his life sentence for second degree murder, and whom AIDWYC believes is innocent of the crime. I have updated the affidavit somewhat. It sets out a short history of AIDWYC, as well as a history of the significant applications to the Minister commencing at the beginning of the 1980s.

## Part II: The Problems with the 696.1 Process.

Applications to the Minister for ministerial review are few and far between. There are a number of reasons for this. First, a prisoner serving a sentence will rarely have the resources to challenge his conviction. Second, he or she is unlikely to have much faith in a system that relies on the Minister of Justice for a remedy— one only has to consider the Justice Ministers of the last ten years, whose focus seems to have been exclusively on "law and order" rather than "justice" issues. Seeking a remedy from the Minister can take years and years, and the Minister (through

the CCRG), not surprisingly, generally takes an adversarial position to an applicant in the investigation of a wrongful conviction claim.

*(1) Section 696 is Incompatible with the Constitutional Separation of Powers Between the Courts and the Executive*

AIDWYC has summarized the problems inherent in the s. 696.1 process as follows:

> Traditionally, the separation of powers between the courts and the executive has ensured that the executive does not interfere with the judicial process. Section 696.1 is an anomaly; since an applicant cannot obtain access to the courts without a Reference by the Minister, the Minister is effectively authorized by s. 696.1 to prevent the courts from reviewing a case by refusing a Reference. Once it is acknowledged, as it has been by the courts and Ministers, that wrongful convictions occur with some regularity, it should be for an independent tribunal to decide on an application for a Reference.

In 1991, the Government of the United Kingdom established a Royal Commission on Criminal Justice, under Viscount Runciman. It was his report which led to the creation of the Criminal Cases Review Commission in 1997 in that country. In his report, recommending the creation an independent tribunal to review wrongful conviction claims, Runciman wrote:

> 9. Our recommendation is based on the proposition, adequately established in our view by Sir John May's Inquiry, that the role assigned to the Home Secretary and his Department under the existing legislation is incompatible with the constitutional separation of powers as between the courts and the executive. The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to enquire deeply enough into cases put to it and, given the constitutional background, we do not think that this is likely to change significantly in the future.
>
> 10. We have concluded that it is neither necessary nor desirable that the Home Secretary should be directly responsible for the consideration and investigation of alleged miscarriages of justice as well as being responsible for law and order and for the police. The view that these two heavy responsibilities should be divided was expressed to Sir John May's Inquiry by a former Home Secretary and confirmed in oral evidence to us by the then Home Secretary and two of his predecessors.
>
> 11. We recommend therefore that the Home Secretary's power to refer cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 should be removed and that a new body should be set up to consider alleged miscarriages of justice, to

> supervise their investigation if further inquiries are needed, and to refer appropriate cases to the Court of Appeal. We suggest that this body might be known as the Criminal Cases Review Authority."

The conflicts of interest inherent in the s. 696.1 process are readily apparent in times of public or political demands for "law and order". The political realities undoubtedly weigh on the executive in these circumstances. Political considerations are allowed to dominate over considerations of individuals being the victims of miscarriages of justice. Institutional considerations result from the Minister seeking to defend the *status quo* of a conviction once it has been confirmed by the appellate process.

Only an independent tribunal should be able to rule on a claim upon which access to the Courts to demonstrate innocence depends. For the Minister, miscarriages of justice are often viewed as embarrassments to the justice system as a whole.

In fact, the rectification of a miscarriage of justice should reflect *well* on the system. It not only remedies an individual case of injustice but, as well, flags systemic issues that can be addressed for the future. Rectification can also lead to the apprehension of the real culprit. In two cases in which AIDWYC has been involved, the Newfoundland case of Greg Parsons (which did not require a ministerial review application because his case did not leave the appellate process) and the Saskatchewan case of David Milgaard, our work helped apprehend the real killers.

*(2)* *The Section 696.1 Investigatory Practices are Unsatisfactory*

Since the legislative changes in 2002, the investigatory practices used by the CCRG and the Minister have improved, but are still unsatisfactory. They are conducted in an adversarial way, defensive of the *status quo* and often premised on an assumption of guilt. The best-known example of this was the manner in which the investigation of David Milgaard's first ministerial review application was undertaken. Witnesses favourable to the prosecution were interviewed in a friendly and leading way; witnesses favourable to Mr. Milgaard were cross-examined in a hostile and disbelieving manner. Extraordinary statements, which reflected an abiding and cynical belief in Mr. Milgaard's guilt, were made to the media by Justice Ministry officials during their investigation of the case.

In short, it might best be said that the CCRG *reacts* to an application and does not see its mandate as being to investigate it thoroughly to determine whether there has been a wrongful conviction. Rather, it takes the evidence already accumulated by the applicant, if any, and examines it to determine whether it can be successfully undermined.

*(3) Prohibitive Costs to the Applicant*

Section 696.1 applicants face almost impossible financial hurdles in seeking a review. There is some limited access to funding in some provinces. In Ontario, for example, the Ontario Legal Aid Plan may provide assistance. In most provinces, no publicly funded assistance is provided. AIDWYC assists individuals where it can, but its resources are limited. As has been said by several experts in the field, for a miscarriage of justice to be exposed, it is more a question of good fortune or "pot luck" than justice at work. At the Morin Inquiry in 1998, Professor Radelet,

an expert in the field from the University of Florida, testified:

> So the bottom line answer is that unless somebody is incredibly lucky, unless they get a juror who retains doubts about the case, unless that police officer who investigated or prosecuted, or who worked on the case, unless the defence attorney is lucky enough to have extra time to pursue the conviction, then the person is in prison and living that life in prison alone.

*(4) Disclosure and Subpoena Powers*

A s. 696.1 applicant has no right to subpoena records or individuals. His or her rights to disclosure are also seriously circumscribed. Those engaged in wrongful conviction advocacy are often unable to obtain access to original police and Crown files. Individual privacy considerations are regularly used to deny access to records. In a few cases, the authorities cooperate fully, but in most cases they do not. This reflects the absence of a proper process of review.

*Conclusion*

The systemic problems associated with s. 696.1 applications demand reform. It can be assumed that they constitute a real impediment to the number of applications brought, as well as an impediment to successful applications. The 2002 amendments to the *Criminal Code* amounted to little more than tinkering; a newly created independent tribunal to review applications is the only acceptable model for the future.

## Part III: The UK Experience — the Criminal Cases Review Commission

*(1) The Establishment of the Commission*

Until 1997, the post-appellate route for claims of wrongful conviction in England and Ireland was identical to that currently in place in Canada. Under s. 17 of the *Criminal Appeals Act*, 1968,

applicants had to make their claims of wrongful conviction to the Home Secretary (or the Secretary of State for Northern Ireland) who had exclusive power to refer cases to the Court of Appeal for reconsideration. In the late 1980s and early 1990s, approximately 700 to 800 applications were received by the Home Secretary each year. Of these, only a very few were referred to the Court of Appeal.[1]

On March 14, 1991, as a result of growing concerns about the justice system's failure to properly investigate and identify several high-profile wrongful convictions, the Home Secretary announced the establishment of the Royal Commission on Criminal Justice, headed by Viscount Runciman. After an extensive review of the practices of the Office of the Home Secretary, the Commission adopted the words of Sir John May who had led the inquiry into the convictions of the Maguire Seven (wrongly convicted in the U.K. of bomb-making offences):

> The very nature and terms of the self-imposed limits on the Home Secretary's power to refer cases have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial ... the approach of the Home Office was throughout reactive, it was never thought proper for the Department to become proactive.

The very same complaints can be made about Canada's s. 696.1 system of ministerial review. Viscount Runciman reported in July, 1993 and recommended, *inter alia*, the establishment of an independent body to investigate claims of wrongful conviction with the power to refer to the

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[1] In the years 1981-88, 36 cases involving 48 individuals were referred to the Court of Appeal as a result of concerns about the safety of the convictions. Between 1989 and 1992, 28 cases involving 49 individuals were referred, many of them arising from trials of individuals accused of terrorist activities in the United Kingdom.
*The Runciman Report* at p. 181

Court of Appeal those cases in which there was a real possibility that the convictions would not be upheld.

The *Criminal Appeal Act*, 1995 repealed the sections of the earlier Act which provided for references by the Home Secretary and the new Act created the Criminal Cases Review Commission as an independent body. It came into formal existence in January of 2007.

*(2)* *Investigatory Powers Given to the Criminal Cases Review Commission in the U.K.*

The Commission's mandate includes investigating all allegations of wrongful conviction in summary or indictable proceedings in England, Wales and Northern Ireland. The Commission is given wide-ranging investigative powers, not formerly available to the Home Office. The Commission has the power to subpoena documents or other materials (s. 17); to require the appointment of independent police officers to investigate on its behalf (s. 19); and a general power to take whatever steps it considers necessary to assist it in the exercise of its duties. These wide-ranging statutory powers have proved to be essential to the Commission's work.

At the conclusion of its review, the Commission must consider whether

> … there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.[2]

If so, the Commission must refer the case to the Court of Appeal. The Commission is required to provide written reasons for its decision in all cases. In the case of a Reference, the statement

[2] *Criminal Appeal Act*, 1995, s. 13(1)

must be furnished to the Court of Appeal and to any person likely to be a party to any proceedings in the forthcoming appeal. If the Commission declines to make a Reference to the Court, the applicant must be provided with the written reasons for the Commission's decision.

*(3) Twenty Years of the Commission*

Between April 1997 and July 31, 2015, the CCRC referred 595 cases to the Courts. Of the 573 cases where appeals have already been heard by the Courts, 392 appeals were allowed, 73 of these were homicide convictions, and 167 were dismissed. It can be seen that the Commission's work has had a large impact on the criminal justice system in the U.K.

*(4) The Commission and the Judiciary*

When the Commission commenced its work, there were fears expressed by members of the judiciary that there would be a mass of referrals by incompetent Commissioners that would then be denied by the Court of Appeal, and that this would hurt the Court of Appeal's reputation. Trial judges expressed concern that their reputations would be damaged.

However, judicial opinion about the Commission quickly changed. Their work is now seen as a fail-safe mechanism essential to the proper functioning of the administration of justice. In one of the Commission's earlier cases, the case of Mahmoud Mattan, a Somali seaman who, in 1952, was hanged in Cardiff, Wales, for a murder he did not commit, Lord Justice Rose of the Court of Criminal Appeals quashed the conviction 46 years after the execution, and said:

> The Criminal Cases Review Commission is a necessary and welcome body, without whose work the injustice in this case might never have been identified."

Similar laudatory comments have been made in subsequent cases by the Court of Appeal. It is notable that, as a result of the Commission's work, four people hanged in the 1950s, one of whom was Mr. Mattan, have had their convictions referred to the Court of Appeal, and the Court has posthumously quashed them.

AIDWYC has always maintained a close relationship with the Commission. We have visited the Commission in Birmingham, England, and met with several of the Commissioners. We believe that the Commission has been remarkably effective, and has helped restore confidence in the administration of justice in that country.

## Part IV: The United States Experience

There are a large number of wrongful conviction organizations in the United States, including the Innocence Project out of New York, NY, and Centurion Ministries, out of Princeton, NJ. Applications to set aside wrongful convictions have to be brought in the court and before the judge before whom the person was originally tried. This process has proved to be extraordinarily wanting, and legislation from the Clinton era has further reduced the ability of a wrongly convicted person to seek a remedy. Canada has nothing to learn here.

## Part V: The Creation of a Criminal Cases Review Commission Equivalent in Canada

AIDWYC has been urging the creation of a system modelled on the British system of the Criminal Cases Review Commission for 20 years. The Commission's power should be limited to

a power of referral to the appellate court in the province in which the conviction was registered. The Commission should not, itself, have the power to quash a conviction. The British system has been adopted in New South Wales and, surprisingly, to some extent in North Carolina.

The creation of such a Commission would solve the problems associated with the ministerial review system. It would constitute an independent and impartial tribunal, and remove political considerations from the review of applications submitted to it. A separation of powers between the executive and the judicial process would be maintained, a desirable result that reflects the traditional separation of powers. The incompatible roles of the Minister as Chief Prosecutor and as the person to review wrongful convictions would come to an end.

An independent Commission would not be compromised by dangers of partiality, bias or law-and-order considerations presently inherent in the s. 696.1 process. As a body with investigative powers, it could conduct its reviews in an inquisitorial fashion. The inquisitorial process will also remove the present financial and resource handicaps for an indigent person attempting to establish under the s. 696.1 process that he or she has been wrongly convicted, because it will be the Commission's task, where asked, to commence an investigation if it considers it appropriate. The Commission should, of course, be accountable for its work and be required to provide annual reports to the Legislature using the Auditor General model.

## Part VI: The Appropriate Test for a Commission Reference to an Appellate Court

Section 13(1)(c) of the U.K. legislation provides that the Criminal Cases Review Commission

shall refer a case to the Court of Appeal if there is a "real possibility" that the conviction would not be upheld by the Court of Appeal. This test is similar to the least demanding of the three tests set out by the Supreme Court of Canada in David Milgaard's case for allowing a conviction appeal after a Reference by the Minister under s. 696.1. The three guidelines set out by the Court in *Milgaard* (1992), 71 C.C.C. (3d) 260 are as follows:

> (a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this court in its discretion may receive and consider, the court is satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code* to grant a free pardon to David Milgaard.
>
> (b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this court in its discretion may receive and consider, the court is satisfied on a preponderance of the evidence that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed and a verdict of acquittal entered, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.
>
> (c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground we would consider advising the Minister of Justice to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In the event it would be open to the Attorney-General of Saskatchewan to enter a stay if a stay were deemed appropriate in view of all of the circumstances including the time served by David Milgaard.

The "real possibility" test, or a test akin to it, which does not necessarily require the production of fresh evidence, should be adopted in any new legislation. A "real possibility" test should

include “lurking doubt” cases in which no fresh evidence is available.

## Part VII: The Cost of a Commission

The costs associated with setting up an independent review commission would be small compared with the enhanced confidence in the administration of justice that would result from the creation of a Commission. It would also be small compared to the human cost, and the societal aversion to imprisoning the innocent for crimes they did not commit.

The Commission would eliminate the need to fund a Criminal Conviction Review Group within the Department of Justice. The Commission’s work, insofar as it uncovers cases of wrongful conviction, will save public funds that would otherwise be spent in the continued imprisonment of the wrongly convicted person.

I have neither the expertise nor resources to project anticipated costs. I do believe that the price to be paid will be minimal compared to the benefits to our system of justice. I would imagine that the additional costs would be, at the most, a few million dollars.

## Part VIII: The Recommendations of Commissions of Inquiry.

I am attaching to this presentation, the recommendations for the creation of a new tribunal from five public inquiries into wrongful convictions. AIDWYC had standing at the Morin, Sophonow, Driskell and Milgaard inquiries (we were not in existence at the time of the Marshall Inquiry) and pushed hard for recommendations for the repeal of the ministerial review process and the

creation of an independent body with exclusive jurisdiction over wrongful conviction claims. ***The Royal Commission on the Donald Marshall Jr. Prosecution*** (for murder) was the first to address the need for reform of the s. 690 process. In their report, the Commissioners said:

> The Marshall case is not unique, and it would be unrealistic to assume otherwise. 'Justice', the British Section of the International Commission of Jurists, for example, estimates there are at least 15 cases a year in the United Kingdom in which people are imprisoned for crimes they did not commit. One such incident, of course, is clearly too many, so the question for us is how do we bring these situations to light and provide wrongly convicted people with a fair opportunity to establish their innocence.
> We believe someone — or some body — has to be appointed to serve as a kind of 'court' of last resort, not only for individuals who claim they have been wrongfully convicted but also for others who may have information that someone else has been wrongly convicted.
>
> ....
>
> **Recommendation 1**
>
> We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism — an individual or body — to facilitate the reinvestigation of alleged cases of wrongful conviction.
>
> **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 material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.

In 1998, Mr. Justice Kaufmann, a retired justice of the Quebec Court of Appeal, presided over a commission into the **wrongful conviction of Guy Paul Morin** for a child murder in Queensville, Ontario. Recommendation 117 of the his Report provided:

> **Creation of a Criminal Case Review Board**
>
> **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 pursuant to section 690 of the *Criminal Code*.**

In support of this recommendation, Justice Kaufman wrote:

> Based upon my ruling and the limited evidence I have heard, I am not able to make recommendations as to the existing or any proposed review mechanisms for cases involving potential wrongful convictions. However, the availability of an adequate review is an issue of great importance. I am able to recommend that the Government of Canada study the adequacies of the present regime and the desirability of a criminal case review board, drawing upon the representations of all interested parties.

**Thomas Sophonow's wrongful conviction** for the murder of a waitress in Winnipeg, Manitoba, was the subject of a Commission of Inquiry presided over Mr. Justice Cory, a retired justice of the Supreme Court of Canada. After noting that, once convicted, "it will always be exceedingly difficult for an individual to demonstrate his innocence", he said:

> It is essential that the administration of justice does all that is humanly possible to avoid instances of wrongful conviction. It should not happen. If it does, the occasions must be rare. To argue that there are many cases of wrongful conviction is to contend that our system is fundamentally flawed and in disarray and that is not apparent. Yet I agree that there may well be some cases which should be reconsidered. **This case demonstrates the need for the establishment of an independent body to review, in appropriate cases, allegations of wrongful convictions.**

In January 2007, Mr. Justice LeSage of the Ontario Superior Court of Justice, published his report into the **wrongful conviction of James Driskell** for murder in Winnipeg, Manitoba. He wrote, under the heading "The Post-Conviction Review Process":

> In the *Thomas Sophonow Inquiry Report,* Commissioner Cory recommended that:
>
> > There should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged…
>
> I concur with this recommendation.

In 2008, Mr. Justice MacCallum of the Alberta Queen's Bench wrote the ***Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*** for the murder of a

nurse in Saskatoon. He said:

> This Commission will be the fifth provincial commission of inquiry to recommend the creation of an independent review body to investigate cases in which wrongful conviction is alleged. Such reform is necessary in order to adequately address the inevitability of wrongful convictions in this country. Public inquiries will continue to be desirable, or even necessary, in some situations, but they are very expensive exercises, and they are not the answer. **The answer lies in the creation of an independent review body which will be able to investigate, detect and assist in remedying wrongful convictions.**

In the last several years, there have been several editorials in the *Globe and Mail*, the *National Post*, the *Toronto Star*, and the *Winnipeg Free Press*, calling for the creation of an independent commission to review claims of wrongful convictions. As far as I know, no one except Department of Justice officials in Ottawa has opposed the creation of a commission. Jerome Kennedy, while he was Minister of Justice in the province of Newfoundland and Labrador, tried to convince his fellow provincial Ministers of Justice, and the Federal government, to take up the cause, but was unsuccessful. Mr. Kennedy is now a member of the board of AIDWYC.

## CONCLUSION

I hope the Liberal Party of Canada can adopt this as a policy position in the field of Criminal Justice during the campaign. It would constitute a significant advance for our criminal justice system.

October 2015

James Lockyer
Senior Counsel, AIDWYC

**CRH No. 149825**

**IN THE SUPREME COURT NOVA SCOTIA**

**IN THE MATTER OF the conviction of Glen Eugene Assoun of second degree murder in the Supreme Court of Nova Scotia on the 17th day of September, 1999;**

**AND IN THE MATTER OF an application to the Minister of Justice for review of the said conviction pursuant to Part XXI.1 of the Criminal Code;**

**AND IN THE MATTER OF an application for the judicial interim release of Glen Eugene Assoun pending the determination of the said application**

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

**-and-**

**GLEN EUGENE ASSOUN**

**AFFIDAVIT OF JAMES LOCKYER**

I, JAMES LOCKYER, of the City of Toronto in the Province of Ontario, HEREBY MAKE OATH AND SAY:

1. I am senior counsel for the Association in Defence of the Wrongly Convicted (AIDWYC). AIDWYC is a national public interest organization. It has two broad objectives: first, proposing legislative and other changes to reduce the likelihood of miscarriages of justice, and second, participating in the review and correction of wrongful convictions. It is a voluntary, non-profit association dedicated to assisting persons who have been wrongly convicted.

2. AIDWYC was founded in 1993. It is the direct successor of the justice for Guy Paul Morin Committee, as grass-roots organization that came into existence in support of Guy Paul Morin following

his wrongful conviction for first degree murder in July, 1992. When Mr. Morin was released on bail in February, 1993, pending his appeal, this Committee reconstituted itself as AIDWYC. The Committee decided to broaden its perspective and assist all persons who have been wrongly convicted. In this regard, AIDWYC uses the Amnesty International model of adopting an individual whom it believes has been convicted of a crime that he/she did not commit. The directors of AIDWYC include lawyers, academics, and other interested members of the public.

3. AIDWYC's work consists of the following:

(i) It advocates on behalf of the wrongly convicted in Canada. Mr. Assoun's application for Ministerial Review is an example of its advocacy.

(ii) It has been granterd leave to intervene in appellate courts including the Supreme Court of Canada on issues which fall within its mandate.

(iii) It has been involved in a number of public inquiries into wrongful convictions.

(iv) It is involved in advocating for reforms in the criminal justice system and other public policy areas.

(v) It advocates for wrongfully convicted individuals in other countries.

(vi) It assists Canadians abroad who are facing the death penalty.

(vi) It is closely affiliated with similar organizations in the United States and elsewhere.

(vii) It is regularly involved in and/or organizes conferences and public events for professional and public education.

4. I have made myself familiar with those Ministerial Review applications for the last 34 years which have received serious consideration as potential miscarriages of justice.

5. From AIDWYC's own sources and consultation with the Criminal Conviction Review Group of the Department of Justice, the following data has been collected with respect to the time taken by the Minister in making a decision on an application for ministerial review of a conviction pursuant to what is now Part XXI.1 of the Criminal Code (cases are listed chronologically according to the date of disposition by the Minister):

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Fox, Norman (aka Kenneth Warwick) (No. 1) (British Columbia) Rape** | April 1979 | June 1980 | 1.2 years | Application denied by the Minister | | |
| **Marshall, Donald (Nova Scotia) Non-Capital Murder** | March 26, 1982 | June 16, 1982 | 0.2 years | Reference to Nova Scotia Court of Appeal | 690 (c) | Acquittal entered in Court of Appeal. |
| **Fox, Norman (aka Kenneth Warwick) (No. 2) (British Columbia) Rape** | April 1984 | October 11, 1984 | 0.5 years | Free Pardon | 748(2) | Pardon issued by an Order-in-Council as a result of joint recommendation by the Solicitor General and the Minister of Justice. |
| **Kinsella, Allen (1) (Ontario) First Degree Murder** | November 1981 | August 1989 | 7.8 years | Application denied by the Minister | | |

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Comeau, Gary Sauve, Richard McLeod, Jeff Hurren, Larry Blaker, Murray (Ontario) First Degree Murder** | December 1988 | December 1990 | 2.0 years | Application denied by the Minister | | |
| **Milgaard, David (1) (Saskatchewan) Non-Capital Murder** | December 28, 1988 | February 27, 1991 | 2.2 years | Application denied by the Minister | | |
| **Nepoose, Wilson (Alberta) Second Degree Murder** | April 11, 1991 | June 1991 | 0.2 years | Reference to Alberta Court of Appeal | 690 (b) | Court of Appeal ordered new trial; Crown stayed proceedings. |
| **Milgaard, David (2) (Saskatchewan) Non-Capital Murder (assisted by AIDWYC)** | August 14, 1991 | April 14, 1992 | 0.7 years | Order-in-Council to Supreme Court of Canada | | Governor-in-Council referred case to Supreme Court of Canada. Court advised Minister to quash conviction and order new trial. Proceedings were subsequently stayed by the Crown. |
| **Thatcher, W. Colin (Saskatchewan) First Degree Murder** | October 11, 1989 | April 14, 1994 | 4.5 years | Application denied | | |
| **Morrisroe, Sidney (British Columbia) First Degree Murder** | June 11, 1992 | October 18, 1995 | 3.4 years | Application denied | | |
| **Kelly, Patrick (Ontario) First Degree Murder** | December 20, 1993 | November 25, 1996 | 2.9 years | Reference to Ontario Court of Appeal | 690 (b) and (c) | Court of Appeal (May 21, 1999) split 2/1 dismissing appeal; appeal to Supreme Court of Canada dismissed. |

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Beaulieu, Wilfred (Alberta) Rape** | August 31, 1994 | November 25, 1996 | 2.2 years | Reference to the Alberta Court of Appeal | 690 (b) and (c) | Beaulieu acquitted in the Court of Appeal on one charge; new trial ordered on second. Crown subsequently stayed proceedings. |
| **Gruenke (Breese), Adele R. (Manitoba) Second Degree Murder** | July 11, 1997<br><br>(Report of the Self-Defense Review by Justice Ratushny was released. No s. 690 application was filed as such.) | September 26, 1997 | 0.2 years | Reference to Manitoba Court of Appeal | 690(b) and (c) | Court of Appeal dismissed appeal; Supreme Court of Canada dismissed appeal. |
| **McArthur, Richard (Alberta) Second Degree Murder** | Application commenced December 18, 1991; completed March 1992 | January 20, 1998 | 7.1 years | Reference to Alberta Court of Appeal | 690 (b) and (c) | Appeal allowed by the Court of Appeal and an acquittal entered. |
| **Johnson, Clayton (Nova Scotia) First Degree Murder (assisted by AIDWYC)** | March 31, 1998 | September 21, 1998 | 0.5 years | Reference to Nova Scotia Court of Appeal | 690 (b) and (c) | New trial ordered by Court of Appeal; acquittal entered on new trial. |
| **Kinsella, Allen (2) (Ontario) First Degree Murder** | 1994 | January 13, 1999 | 4.5 years | Application denied by the Minister | | |
| **Dumont Michel (Quebec) Rape** | March 31, 1995 | October 4, 2000 | 5.5 years | Reference to Quebec Court of Appeal | 696.3(3)(a) (ii) | Appeal allowed and acquittal entered in Court of Appeal. |

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Taillefer, Billy Duguay, Hugues (Quebec) First Degree Murder** | June, 1999 | October 16, 2000 | 1.3 years | Referral to Quebec Court of Appeal | 690 | Court of Appeal dismissed the appeals of both Taillefer and Duguay. They both appealed to the Supreme Court of Canada. In Taillefer's case, the Supreme Court of Canada ordered a new trial. He was acquitted at the re-trial. In Duguay's case, the Supreme Court of Canada quashed his conviction and entered a stay of proceedings. |
| **Kaminski, Steven Richard (Alberta) Sexual Assault** | July 31, 1996 | January 27, 2003 | 6.5 years | New trial ordered by the Minister | 696.3(3)(a)(i) | Proceedings stayed by Crown. |
| **Cain, Rodney (Ontario) Second Degree Murder** | May 27, 1996 | May 19, 2004 | 8.0 years | New trial ordered by the Minister | 690 | Convicted of manslaughter at re-trial. This conviction is under appeal. |
| **Truscott, Steven (Ontario) Capital Murder (assisted by AIDWYC)** | November 28, 2001 | October 28, 2004 | 3.0 years | Reference to Ontario Court of Appeal | 696.3(3)(b) | Appeal allowed and acquittal entered by Court of Appeal. |
| **Bjorge, Darcy (Alberta) Stolen Property** | June 2000 | February 10, 2005 | 4.8 years | New trial ordered by the Minister | 696.3(3)(a)(i) | Charge stayed in the Alberta Provincial Court in Westaskiwin. |
| **Wood, Daniel (Alberta) First Degree Murder** | November 28, 1993 | February 10, 2005 | 11.3 years | Reference to Alberta Court of Appeal | 696.3(3)(a)(ii) | New trial ordered and charge stayed on re-trial. |

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Driskell, James (Manitoba) First Degree Murder (assisted by AIDWYC)** | June 4, 2003 | March 5, 2005 | 1.8 years | New trial ordered by the Minister | 696.3(3)(a)(i) | Proceedings stayed in the Manitoba Queen's Bench on the same day as the Minister's Order. |
| **Tremblay, Andre (Quebec) First Degree Murder** | July 2, 1992 | July 12, 2005 | 13.0 years | Reference to Quebec Court of Appeal | 696.3(3)(a)(ii) | Present status of case is unknown. |
| **Phillion, Romeo (Ontario) Non-Capital Murder (assisted by AIDWYC)** | May 15, 2003 | August 2, 2006 | 3.3 years | Reference to Ontario Court of Appeal | 696.3(2) | Appeal allowed by the Court of Appeal and a new trial ordered. The new trial remains outstanding. |
| **Mullins-Johnson, William (Ontario) First Degree Murder (assisted by AIDWYC)** | September 7, 2005 | July 17, 2007 | 1.8 years | Reference to the Ontario Court of Appeal. | 696.3(3)(a)(ii) | Appeal allowed and acquittal entered by Court of Appeal. |
| **P.(L.G.) (Alberta) Sexual Assault** | 2002 approximately | September 1, 2007 | 5 years | Reference to the Alberta Court of Appeal | 696.3(3)(a)(ii) | Appeal allowed and new trial ordered by Court of Appeal. The charge was stayed at the re-trial. |
| **Erin Walsh (New Brunswick) Non-Capital Murder (assisted by AIDWYC)** | August 29, 2007 | February 28, 2008 | 0.5 years | Reference to the New Brunswick Court of Appeal | 696.3(3)(a)(ii) | Appeal allowed and acquittal entered by Court of Appeal. |
| **Unger, Kyle (Manitoba) First Degree Murder (assisted by AIDWYC)** | September 13, 2004 | March 11, 2009 | 4.5 years | New trial ordered by the Minister | 696.3(3)(a)(i) | The new trial remains outstanding. |
| **D.R.S. (Alberta) Sexual Assault** | February 15, 2001 | January 12, 2010 | 8.9 years | Reference to the Alberta Court of Appeal | 696.3(2) | Appeal allowed and acquittal entered by Court of Appeal. |
| **Leon Walchuk (Saskatchewan) Second Degree Murder** | October 5, 2006 | November 4, 2011 | 5.1 years | Application denied by Minister | | |

| Applicant | Date of Application | Date of Disposition by the Minister (or Gov. in Council) | Total Time | Disposition by the Minister | Section of Code | Final Result |
|---|---|---|---|---|---|---|
| **Yves Plamondon (Quebec) First Degree Murder x3** | August, 2003 | May 30, 2012 | 8.8 years | Reference to the Quebec Court of Appeal | 696.3 | Appeal allowed and new trials ordered on all three murders. At the new trial, one charge was stayed and there were acquittals on the other two charges. |
| **Devryn Ross (Manitoba) Fraud Over $5,000.00** | May 26, 2004 | Denied by Minister on September 29, 2010. Minister's decision quashed in the Federal Court. Minister then re-considered and allowed the application on May 14, 2014. | 10 years | Reference to the Manitoba Court of Appeal | 696.3 | Appeal remains outstanding |
| **Frank Ostrowski (Manitoba) First Degree Murder (assisted by AIDWYC)** | July 30, 2009 | A decision by the Minister is believed to be imminent. | 5.75 years | Referred to the Manitoba Court of Appeal | 696.3 | Appeal remains outstanding |
| **Glen Assoun Nova Scotia) Second Degree Murder (assisted by AIDWYC)** | April 18, 2013 | A decision remains outstanding. Bail granted November 14, 2014 | | | | |
| **Mohamed Khan (Manitoba) First Degree Murder (assisted by AIDWYC)** | July 7, 2014 | A decision remains outstanding. | | | | |
| **Jacques Delisle Quebec) First Degree Murder (assisted by AIDWYC)** | March 20, 2015 | A decision remains Outstanding | | | | |

6. The cases on this list include:

- all convictions (of which I am aware) in the last 34 years regarding which the Minister ordered a reference,

- other applications (of which I am aware) which were the subject of a substantial review by the Minister but were dismissed.

7. Romeo Phillion's case provides a typical example of the kind of time involved. His application was filed on May 22, 2003. A Canadian Press story that ran in several newspapers across the country after he filed his application recorded Patrick Charette, a federal spokesperson from the Department of Justice, saying that Mr. Phillion's case "could take years to review." He was further quoted as follows:

> "Some cases [are] . . . in the works for years. Others can proceed more easily. But it's difficult at this point in time to put a time on it."

A decision was eventually made by the Minister on Mr. Phillion's application in August, 2006.

8. Accepting the data at face value, the average length of time taken by the Minister to process an application has been 4.24 years. Admittedly, these statistics can be misleading. For example, Donald Marshall's case was referred expeditiously, presumably because the RCMP had already concluded that Mr. Marshall was innocent *before* the application was commenced. Mr. Nepoose's case was referred in two months, presumably because the Attorney General of Alberta consented to the reference. Ms. Gruenke's matter was referred to the Manitoba Court of Appeal after a thorough investigation and report by Madam Justice Ratushny had already been completed. On the other hand, in Steven Kaminski's case, I understand that more than a year passed from the initial filing of his application before Mr. Kaminski's counsel filed the balance of his materials. Mr. Kinsella's first application was filed in 1981, but did not properly get off the ground until April 1987. In Andre Tremblay's case, I understand that several years of the thirteen years between his application and its being granted by the Minister can be attributed to his not having counsel to assist in his application and/or his counsel not responding for several years to the

investigation report from the Minister's representative (likely because the report was viewed as negative to Mr. Tremblay's application). It can be concluded that the process of review under section 696.1 and its predecessor is often a lengthy one, although there is no doubt that in recent years the Minister has been doing his utmost through the Criminal Conviction Review Group to speed up the process.

9. It is, therefore, difficult to predict how long the Minister's continued investigation of Mr. Assoun's

case will take. As a further example, James Driskell's application to the Minister to review his 1992 conviction for first degree murder was filed on June 4, 2003, and was based, in part, on post-conviction DNA typing which undermined the validity of hair microscopy comparison evidence used at trial to incriminate him. On November 4, 2003, the Minister advised Mr. Driskell that his case was proceeding

to the investigation stage of the conviction review process. On December 1, 2003, Manitoba Attorney General Gord McIntosh informed the Federal Minister that the Manitoba government was of the view that Mr. Driskell's application for ministerial review of his conviction should be granted. On March 5, 2005, the Minister granted the application, quashed the conviction and ordered a new trial.

10. In light of the time factors that are usually at play in an application for ministerial review, and considering Mr. Assoun's application as a whole, it may be reasonably concluded that it will likely be at least another two years before the Minister gives his decision on Mr. Assoun's case.

SWORN BEFORE ME at )
the City of Toronto )
in the Province of Ontario )
this day of , )
)
) _____
) JAMES LOCKYER

_____
A COMMISSIONER ETC.

to it with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 695; 1999, c. 5, s. 27; 2008, c. 18, s. 31.

561.1(6), les paragraphes 561.1(6) à (9) s'appliquant avec les adaptations nécessaires.

L.R. (1985), ch. C-46, art. 695; 1999, ch. 5, art. 27; 2008, ch. 18, art. 31.

APPEALS BY ATTORNEY GENERAL OF CANADA

Right of Attorney General of Canada to appeal

**696.** The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part.

R.S., c. C-34, s. 624.

APPELS PAR LE PROCUREUR GÉNÉRAL DU CANADA

Droit, pour le procureur général du Canada, d'interjeter appel

**696.** Le procureur général du Canada a les mêmes droits d'appel dans les procédures intentées sur l'instance du gouvernement du Canada et dirigées par ou pour ce gouvernement, que ceux que possède le procureur général d'une province aux termes de la présente partie.

S.R., ch. C-34, art. 624.

## PART XXI.1

## APPLICATIONS FOR MINISTERIAL REVIEW — MISCARRIAGES OF JUSTICE

## PARTIE XXI.1

## DEMANDES DE RÉVISION AUPRÈS DU MINISTRE — ERREURS JUDICIAIRES

Application

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

Demande

**696.1** (1) Une demande de révision auprès du ministre au motif qu'une erreur judiciaire aurait été commise peut être présentée au ministre de la Justice par ou pour une personne qui a été condamnée pour une infraction à une loi fédérale ou à ses règlements ou qui a été déclarée délinquant dangereux ou délinquant à contrôler en application de la partie XXIV, si toutes les voies de recours relativement à la condamnation ou à la déclaration ont été épuisées.

Form of application

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

2002, c. 13, s. 71.

Forme de la demande

(2) La demande est présentée en la forme réglementaire, comporte les renseignements réglementaires et est accompagnée des documents prévus par règlement.

2002, ch. 13, art. 71.

Review of applications

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

Instruction de la demande

**696.2** (1) Sur réception d'une demande présentée sous le régime de la présente partie, le ministre de la Justice l'examine conformément aux règlements.

Powers of investigation

(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under section 11 of that Act.

Pouvoirs d'enquête

(2) Dans le cadre d'une enquête relative à une demande présentée sous le régime de la présente partie, le ministre de la Justice possède tous les pouvoirs accordés à un commissaire en vertu de la partie I de la *Loi sur les enquêtes* et ceux qui peuvent lui être accordés en vertu de l'article 11 de cette loi.

Delegation

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister,

Délégation

(3) Malgré le paragraphe 11(3) de la *Loi sur les enquêtes*, le ministre de la Justice peut déléguer par écrit à tout membre en règle du barreau d'une province, juge à la retraite, ou tout autre individu qui, de l'avis du ministre, pos-

has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

2002, c. 13, s. 71.

sède une formation ou une expérience similaires ses pouvoirs en ce qui touche le recueil de témoignages, la délivrance des assignations, la contrainte à comparution et à déposition et, de façon générale, la conduite de l'enquête visée au paragraphe (2).

2002, ch. 13, art. 71.

Definition of "court of appeal"

**696.3** (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part relates was tried.

**696.3** (1) Dans le présent article, « cour d'appel » s'entend de la cour d'appel, au sens de l'article 2, de la province où a été instruite l'affaire pour laquelle une demande est présentée sous le régime de la présente partie.

Définition de « cour d'appel »

Power to refer

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

(2) Le ministre de la Justice peut, à tout moment, renvoyer devant la cour d'appel, pour connaître son opinion, toute question à l'égard d'une demande présentée sous le régime de la présente partie sur laquelle il désire son assistance, et la cour d'appel donne son opinion en conséquence.

Pouvoirs de renvoi

Powers of Minister of Justice

(3) On an application under this Part, the Minister of Justice may

(*a*) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(*b*) dismiss the application.

(3) Le ministre de la Justice peut, à l'égard d'une demande présentée sous le régime de la présente partie :

*a*) s'il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite :

(i) prescrire, au moyen d'une ordonnance écrite, un nouveau procès devant tout tribunal qu'il juge approprié ou, dans le cas d'une personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, une nouvelle audition en vertu de cette partie,

(ii) à tout moment, renvoyer la cause devant la cour d'appel pour audition et décision comme s'il s'agissait d'un appel interjeté par la personne déclarée coupable ou par la personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, selon le cas;

*b*) rejeter la demande.

Pouvoirs du ministre de la Justice

No appeal

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

2002, c. 13, s. 71.

(4) La décision du ministre de la Justice prise en vertu du paragraphe (3) est sans appel.

2002, ch. 13, art. 71.

Dernier ressort

Considerations

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

**696.4** Lorsqu'il rend sa décision en vertu du paragraphe 696.3(3), le ministre de la Justice prend en compte tous les éléments qu'il estime se rapporter à la demande, notamment :

Facteurs

(*a*) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(*b*) the relevance and reliability of information that is presented in connection with the application; and

(*c*) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

2002, c. 13, s. 71.

Annual report

**696.5** The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

2002, c. 13, s. 71.

Regulations

**696.6** The Governor in Council may make regulations

(*a*) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

(*b*) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

(*c*) respecting the form and content of the annual report under section 696.5.

2002, c. 13, s. 71.

## PART XXII

## PROCURING ATTENDANCE

### Application

Application

**697.** Except where section 527 applies, this Part applies where a person is required to attend to give evidence in a proceeding to which this Act applies.

R.S., c. C-34, s. 625.

### Process

Subpoena

**698.** (1) Where a person is likely to give material evidence in a proceeding to which this

*a*) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;

*b*) la pertinence et la fiabilité des renseignements présentés relativement à la demande;

*c*) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

2002, ch. 13, art. 71.

**696.5** Dans les six mois suivant la fin de chaque exercice, le ministre de la Justice présente au Parlement un rapport sur les demandes présentées sous le régime de la présente partie. Rapport annuel

2002, ch. 13, art. 71.

**696.6** Le gouverneur en conseil peut prendre des règlements : Règlements

*a*) concernant la forme et le contenu de la demande présentée en vertu de la présente partie et les documents qui doivent l'accompagner;

*b*) décrivant le processus d'instruction d'une demande présentée sous le régime de la présente partie, notamment les étapes suivantes : l'évaluation préliminaire, l'enquête, le sommaire d'enquête et la décision;

*c*) concernant la forme et le contenu du rapport annuel visé à l'article 696.5.

2002, ch. 13, art. 71.

## PARTIE XXII

## ASSIGNATION

### Application

**697.** Sauf dans les cas où l'article 527 s'applique, la présente partie s'applique lorsqu'une personne est tenue d'être présente afin de témoigner dans une procédure visée par la présente loi. Application

S.R., ch. C-34, art. 625.

### Assignation ou mandat

**698.** (1) Lorsqu'une personne est susceptible de fournir quelque preuve substantielle Assignation

# Royal Commission on the Donald Marshall, Jr., Prosecution

Findings and Recommendations 1989

# Part 2
# Recommendations

## 2.1
## Righting the Wrong: Dealing with the Wrongfully Convicted

No criminal justice system is, or can be, perfect. Nevertheless, the manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.

*Justice*
Report on Miscarriages of Justice (1989)
The British Section of the International Commission of Jurists

We intend to make comments and recommendations about broad public policy issues involved in the administration of justice and in the day-to-day operations of police forces, but we would be remiss if we did not also address a much narrower and more specific, but no less troubling issue - wrongful conviction.

How should society deal with situations like the one involving Donald Marshall, Jr., in which people are convicted and jailed for crimes they did not commit? First of all, how do we make sure we find out about situations in which someone has been wrongly convicted, and second, how do we determine a fair method to compensate those who have been wrongly convicted?

In this section of the Report, we will deal with these issues separately and draw on the evidence we heard concerning the Marshall case as a starting point for the recommendations we will make.

### 2.1.1 Finding and releasing the wrongfully convicted

The Marshall case is not unique, and it would be unrealistic to assume otherwise. "Justice", the British Section of the International Commission of Jurists, for example, estimates there are at least 15 cases a year in the United Kingdom in which people are imprisoned for crimes they did not commit. One such incident, of course, is clearly too many, so the question for us is how do we bring these situations to light and provide wrongly convicted people with a fair opportunity to establish their innocence.

We believe someone - or some body - has to be appointed to serve as a kind of "court" of last resort, not only for individuals who claim they have been wrongfully convicted but also for others who may have information that someone else has been wrongly convicted.

### 2.1.2 The Marshall case

Consider the number of people associated with the Donald Marshall, Jr. case who had information that - if it had reached the right ears - might have uncovered Marshall's wrongful conviction much earlier.

John Pratico, Maynard Chant and Patricia Harriss knew they had lied at Marshall's 1971 trial. Pratico's mother knew her son did not see the murder because he asked her the morning after the stabbing

what had happened in the park. Chant told both his mother and his minister what had happened. Sandra Cotie, Barbara Floyd and Joan Clemens all knew Pratico lied at trial. Donna Ebsary had seen her father wash blood from a knife on the night Seale was murdered, and later told a friend, David Ratchford, about what she had seen. Jimmy MacNeil, of course, witnessed Roy Ebsary stab Sandy Seale.

For every case where a person is wrongly convicted, there may be Barbara Floyds, Donna Ebsarys and David Ratchfords. Where can they go with this information and be certain their information will be seriously considered and investigated?

There is evidence in the Marshall case that at least some of these people did attempt to bring their information to the attention of those they considered proper authorities. Barbara Floyd and her friends did telephone Marshall's counsel to tell him what they knew but were told it was too late. After that, Floyd testified, "We didn't know what else to do." Donna Ebsary and David Ratchford took their information to Gary Green, an RCMP officer they knew. Green, in turn, directed them to the Sydney City Police Department. When the local police refused to reopen the case, Green not only went to discuss it with officers in the department himself, but he also passed the information on to the RCMP's General Investigation Section in Sydney. He testified he was given the impression the investigation was closed, and he did nothing further.

Jimmy MacNeil also took his information to the Sydney City Police Department following Marshall's conviction in 1971. Although the matter was turned over to the RCMP and a reinvestigation was conducted, we have already concluded that this investigation was handled in a shockingly inept manner. Inspector Marshall, who conducted the investigation, was frank with us in admitting that he accepted without hesitation the interpretation of the original investigating officer MacIntyre.

Given what we have learned about the way in which various police forces handled information brought to them in the Marshall case, we would be hard pressed to argue that people should - or would want to - take such information to a police force.

Similarly, given what we now know about the tactics used by the Sydney City Police to obtain false statements from witnesses in the Marshall case, one could not reasonably have expected Pratico, Chant or Harriss to then go back to the same Sydney City Police Department after the trial and tell them that they had lied in their statements. Nor, given their experience with one police force, could they be expected willingly to approach another with their information.

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 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 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 is the nature of its powers.

## Recommendation 1

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

## 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 material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.*

It is our view that this review body would have a jurisdiction and responsibility that includes both the "administration of justice" (Section 92(14) of the *Constitution Act, 1867*), and substantive "criminal law and procedure" (Section 91(27)). It would be a national body, formed on a cooperative basis by the Federal and all the Provincial Governments, and would report jointly to both the federal Minister of Justice and the relevant provincial Attorney General.

Based on the findings and recommendations of the review body, the federal Minister of Justice may choose to invoke the powers of either Sections 690 and 749 (formerly 617 and 683) of the *Criminal Code*, or alternatively, take no action at all. In cases where the review body recommends that the Minister invoke his powers pursuant to these sections of the *Criminal Code* and the Minister chooses not to do so, the federal Minister should be required to publicly state the reasons for such decision. Corrective action may also be taken at the provincial level, where necessary.

We are not attempting to create another layer of bureaucracy. For the time being, all that may be necessary is for one person to be given the powers referred to above. It may not even be necessary for this responsibility to occupy that person full time. He or she may call upon police expertise to assist in or to carry out the necessary

investigative work.

What is necessary is that steps be taken immediately to set up such a review facility and that Canadians be made aware that this review facility exists. It will not help wrongfully convicted persons if people do not know its services are available. Steps must be taken to ensure extensive and continuing publicity.

### 2.1.3 The methodology for compensation

When a convicted person is found to have been innocent and seeks compensation for his or her wrongful imprisonment, those in authority must respond not only fairly and compassionately, but also quickly.

During the course of our hearings, the Federal-Provincial Task Force Report on Compensation of Wrongfully Convicted and Imprisoned Persons and the Federal-Provincial Guidelines relating to such compensation were placed in evidence. (A copy of the Guidelines is attached as Appendix 14.) In March 1988, at a meeting in Saskatoon of federal and provincial Justice Ministers, those Guidelines were accepted. In addition, the Federal Government announced it would pay 50 percent of the cost of compensation awarded in accordance with these Guidelines to those who were wrongfully convicted.

We have considered all of this information in coming to our own recommendations.

### Recommendation 3

*We recommend that when a person is found to have been wrongfully convicted, a judicial inquiry be constituted to consider any claim for compensation. The person or persons appointed to this inquiry should be completely independent of any involvement with the administration of justice in the province which gave rise to the wrongful conviction.*

We do not believe a Court of Appeal should deal with claims for compensation arising from a wrongful conviction because it may have already determined the innocence of the wrongly convicted person. A Court of Appeal does not customarily hear *viva voce* evidence, and the amount of time which it would take to properly present a full case for compensation would inevitably take up a substantial portion of the time of a Court of Appeal.

# The Commission on Proceedings Involving Guy Paul Morin

REPORT
Volume 2

The Honourable
Fred Kaufman, C.M., Q.C.

1998

with adequate resources.

**Recommendation 117: Creation of a Criminal Case Review Board.**

**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 pursuant to section 690 of the *Criminal Code*.**

During the Inquiry, counsel for Mr. Morin, who was supported by counsel for AIDWYC, requested that I hear a panel of experts, specifically constituted to testify as to the adequacy of section 690 of the *Criminal Code* to redress the legitimate injustices of persons who have been wrongly convicted of offences that they have not committed. He argued that section 690 may be unconstitutional. He submitted that, under that section, the Minister of Justice is not able to give to the applicants' cases the consideration that they warrant, nor is the Minister empowered to provide the remedy that is merited. Both the Morins and AIDWYC contend that there are serious substantive and procedural problems with the present system that compel the substitution of an independent review board, created by statute. AIDWYC's written submissions to me outline, in some detail, not only the alleged inadequacies in the present regime, but also the blueprint for an independent review board.

The issue is not a new one. In 1989, the Marshall Inquiry made this ecommendation:

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

With some regret, I ruled that I would not hear a panel so constituted. y Paul Morin had not made application for relief under section 690 of the

*Criminal Code*, given the favourable disposition of his appeal before the Ontario Court of Appeal. Put succinctly, any inadequacies in section 690 did not arise in Guy Paul Morin's own proceedings, which is the subject matter of my mandate. As well, I note that the federal Minister of Justice did not have standing at this Inquiry. However, some evidence was adduced and submissions made that bore indirectly on the adequacy of that section. For example, Mr. Sherriff felt that such a body would help restore the integrity of the criminal justice system in the face of public concern over wrongful convictions. Mr. Durno believed that the availability of a review by a body independent of the government would be of enormous benefit. Mr. Wintory said this:

> I do agree very strongly ... that we should have a systemic capacity in our criminal justice system for collateral review and attacks on convictions, so that newly discovered evidence or evidence of ineffective assistance of counsel, or prosecutor's failure to disclose evidence can be identified and presented, and if found to have merit, result in new trials.

Mr. Hadgkiss testified that there has been movement in New South Wales, Australia, towards the creation of a criminal cases review body. A Bill has recently been introduced in the legislature to establish a reviewing body which will investigate matters referred to it by the Court of Appeal, the Governor or Attorney General, and refer cases to the Court of Appeal where it considers that there may have been a miscarriage of justice. The Bill also provides for the payment of compensation by the government in cases of miscarriage of justice.

As earlier noted, David Kyle was tendered as a witness by the Ontario Crown Attorneys' Association. The United Kingdom now has an independent criminal case review board entitled the Criminal Cases Review Commission. Mr. Kyle is a member of that commission. The commission was created by the *Criminal Appeal Act, 1995,* as a result of recommendations contained in the Runciman Report. It began operations on April 1, 1997. It currently has about 1,000 applications before it.

The mandate of the Commission is to review convictions, sentences, and special verdicts of insanity and unfit to stand trial. Applications are usually made by a convicted person after all normal appeal routes are exhausted. The Criminal Cases Review Commission determines whether the

case should be referred back to the Court of Appeal. The Commission can also bypass the Court of Appeal and refer cases to the Home Secretary where it feels a Royal pardon should be considered. Mr. Kyle was not sure what factors might lead to such a referral, but stated that Royal pardons tend to be given in circumstances where the Court of Appeal would be unable to interfere with the conviction.

Prior to the establishment of the Commission, applications by convicted persons who had exhausted their rights of appeal were made to the Home Secretary, who was empowered to refer cases back to the Court of Appeal. Mr. Kyle testified that the Commission performs essentially the same functions as the Home Office used to perform, but with an expanded jurisdiction to review summary conviction cases. Mr. Logan, however, testified that the power formerly vested in the Home Secretary was not often used because the Home Office was not a pro-active department, was not staffed by legally trained people, few applicants had legal representation because legal aid was not available, and the Home Secretary kept narrowing the criteria for sending cases back to the Court of Appeal. Mr. Kyle testified that the Commission regards itself as "having a very pro-active role to play, very much more than was the view taken when the responsibility for looking into this type of case rested with the Home Office." The powers given to the Criminal Cases Review Commission under the *Criminal Appeal Act*, and the resources and staff allocated to it, reflect that more pro-active role. He believed that the Commission has expanded the mandate of the Home Secretary to review cases because, in the past, the Home Secretary would only refer cases back to the Court of Appeal where there was new evidence which did not exist at the previous proceedings.

Reviews are usually initiated by a letter from a convicted person alleging a miscarriage of justice. The Commission then sends an application form to him or her, and screens any response. Mr. Kyle testified that it is too early in the life of the Commission to say how it will distill true applications from those which do not merit its attention. Legal aid funding has been approved for the presentation of applications.

The Court of Appeal is also permitted to refer cases to the Commission. Mr. Logan testified that such referrals are useful where the Court of Appeal has a matter before it and is not happy with the extent to which it has been investigated.

After a case is referred to the Commission, an investigative is ordered. The Commission has the power to formally appoint an investigating officer. Mr. Logan testified that two problems with this aspect of the Commission's work are that it has to rely on the police to carry out its investigations, limiting its direct control over the investigation, and funding for the investigation has to come from the police force concerned.

Mr. Kyle expected that in the future the Commission's own staff will carry out investigations on its own or with assistance from police officers who are not formally appointed as investigating officers. This will allow the Commission to retain direct control of the investigations. The Commission will ask police officers to do specified tasks and, consequently, the officers will not be exercising any expertise or judgment in carrying out those tasks. The Commission will, however, appoint an investigating police officer where the scale of the inquiry is such that it would not have the resources to undertake the investigation properly.

The Commission has ultimate authority to approve the investigating officer, and Mr. Kyle stated that its practice is to only appoint officers not involved in the original investigation (sometimes from another force). A different force would likely be retained in cases where there are allegations of substantial police misconduct in the original investigation. At all times, the Commission will supervise the investigation:

> So it isn't simply a question of handing the matter over to the police and saying: Please come back to us when you've done it. We are expected to supervise, control, direct the investigation, and right from the very outset, the expectation is that we will identify the terms of reference of the investigation. And we are allowed, and intend to do so, to give directions to the investigating officer as to what should be done.

Mr. Kyle stated that the members of the Commission see themselves in a much more inquisitorial than adversarial role. Investigations are carried out impartially, and the Commission will act on the results, whatever they may be.

Under the terms of its enacting legislation, the Commission should not send a case to the Court of Appeal unless there is a real possibility that the conviction or sentence would not be upheld, *i.e.* if the Court of Appeal

would think the conviction is unsafe. There is no definition of 'real possibility.' Mr. Kyle felt that the unsafe standard is wide enough to include the concept of there being a lurking doubt, and believed that the Commission would be prepared to send cases back to the Court of Appeal where there is such a doubt.

Mr. Logan testified that the problem with the Commission's criterion for referral to the Court of Appeal is that the Commission must then take its lead from the Court of Appeal. Mr. Kyle was unsure how the Commission's views of the Court of Appeal would affect its willingness to send cases to that Court for review:

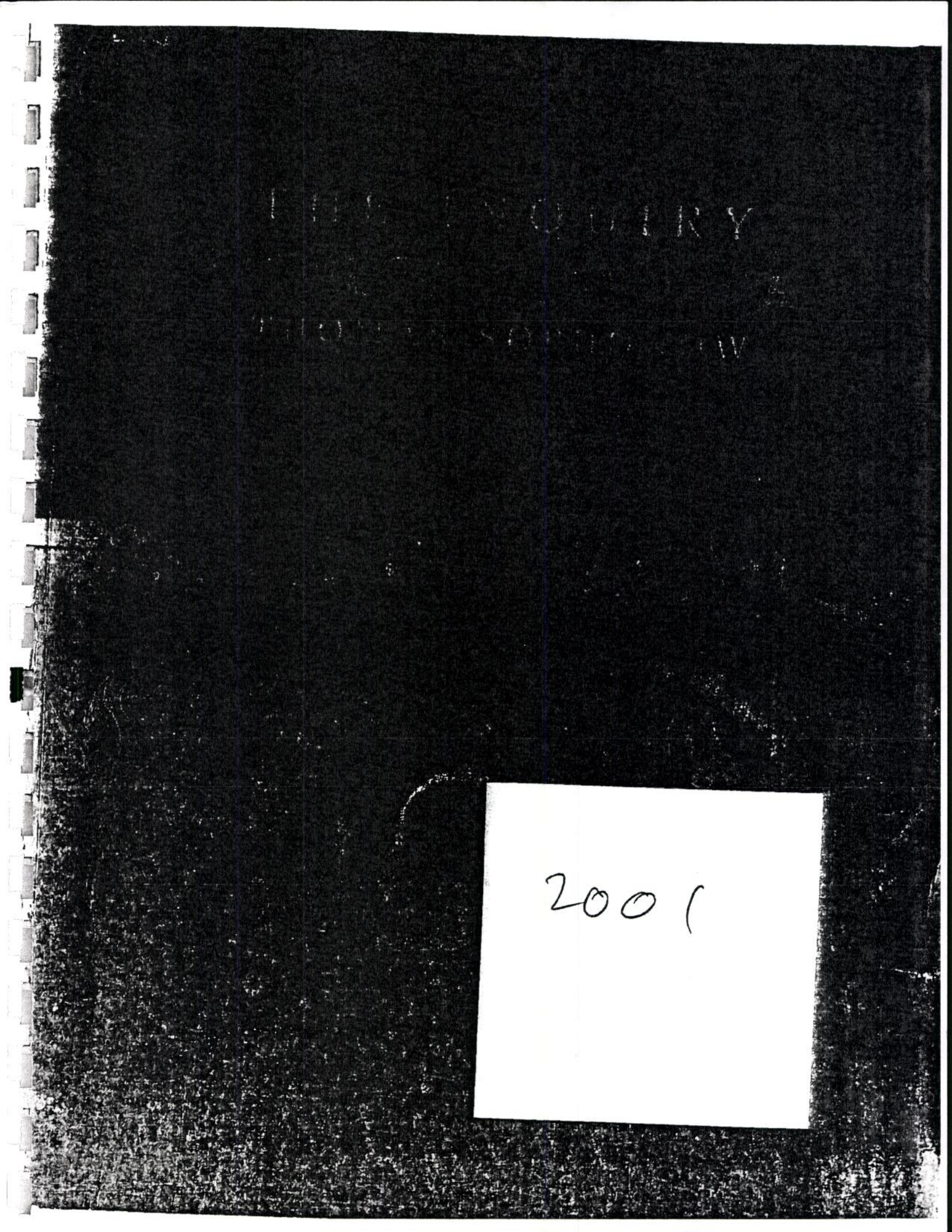
> What I do say, and certainly, the way in which we are approaching our work in the commission, is that we intend to be very broad-based in the way we assess these cases, and we do intend to press at the boundaries in the way in which we deal with cases, and we will be looking to refer cases and to test and to extend the way in which they are dealt with by the Court of Appeal.

Since its inception, the Commission has completed 25 reviews and has referred six cases to the Court of Appeal. Two of the six referrals have involved persons who were convicted when the United Kingdom still had the death penalty and who were executed.

Based upon my ruling and the limited evidence I have heard, I am not able to make recommendations as to the existing or any proposed review mechanisms for cases involving potential wrongful convictions. However, the availability of an adequate review mechanism is an issue of great importance. I am able to recommend that the Government of Canada study the adequacies of the present regime and the desirability of a criminal case review board, drawing upon the representations of all interested parties.

**Recommendation 118: Committee to Oversee Implementation of Recommendations.**

**The Government of Ontario should constitute a committee to oversee the implementation of recommendations contained in this Report which are accepted. Such a committee should issue periodic reports, which are publicly accessible.**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***Humiliation***

The life of a prisoner is one of myriad instances of personal humiliation. This is demonstrated by the constant presence of guards, by transportation in handcuffs and the often degrading searches required on the occasion of visits by family members.

***Danger of physical assaults***

To live in prison is to swim with sharks and to walk with tigers. Prisoners live in an atmosphere of high tension and resulting stress. There is the ever-present danger of physical attack. The constant threat of violence is palpable in a penitentiary setting. This is particularly true of a maximum-security facility but often equally true of over crowded, understaffed remand centres.

***Loss of enjoyment of life***

A prisoner is deprived of many of these attributes which contribute to the enjoyment of life. They would include the loss of the ability to associate with friends and family. To work in a garden, to undertake a home improvement project, to assist family members or neighbours, to attend a show, a play or a concert, to teach a child to skate or swim, all of these activities are taken away by imprisonment.

***Continuing effects of imprisonment***

Prison means a disruption and termination of so many plans, whether for the home, the family or the community. It means that, even upon release, there is always a difficulty in obtaining employment, and that there will be a loss of income, loss of job training, loss of possibility of job promotion and loss of pension benefits, which may never be recouped.

***Resulting psychological damage flowing from the subjection of the individual to prison life and prison discipline***

Time in prison may often result in a lifetime of psychiatric disability.

We will later review the effects of imprisonment on Thomas Sophonow. Before doing that, we should consider first of all whether there should be a cap on the damages flowing from wrongful conviction and imprisonment.

## Should There be a Cap Placed on the Damages Flowing from Wrongful Conviction and Imprisonment?

On behalf of the Province of Manitoba, it was strongly urged that there should, indeed, be a cap placed on damages for wrongful conviction and imprisonment.

Counsel for Manitoba also argued that to award compensation without a cap would result in flooding the courts with claims and straining the financial resources of the Province. I cannot accept this argument. Claims such as these will always be difficult to establish. It will never be easy for a claimant to establish his innocence. In the absence of a scientific discovery, such as the ability to test for DNA, which may establish the innocence of the

accused and the guilt of another party, it will always be exceedingly difficult for an individual to demonstrate his innocence.

The argument of Mr. Olson suggests that the criminal justice system is replete with instances of wrongfully convicted accused. I pray God that this is not correct. If Crown Counsel, Defence Counsel and the Judiciary fulfil their demanding roles our system should work effectively. Yet I acknowledge that constant vigilance will always be required to ensure that it does. It is essential that the administration of justice does all that is humanly possible to avoid instances of wrongful conviction. It should not happen. If it does, the occasions must be rare. To argue that there are many cases of wrongful conviction is to contend that our system is fundamentally flawed and in disarray and that is not apparent. Yet I agree that there may well be some cases which should be reconsidered. This case demonstrates the need for the establishment of an independent body to review, in appropriate cases, allegations of wrongful convictions.

## RECOMMENDATION

- **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.**

In any event, if the State commits significant errors in the course of the investigation and prosecution, it should accept the responsibility for the sad consequences which will inevitably flow from them.

Next, it was said that the Manitoba Guidelines themselves indicate that there should be a cap of $100,000 placed on non-pecuniary damages, subject only to any increases that would flow from inflation. Further, it was stated that the Supreme Court of Canada, in the trilogy of negligence cases (*Arnold v. Teno*, [1978] 2 S.C.R., 287; *Thornton v. School District no. 57*, [1978] 2 S.C.R., 267; *Andrews v. Grand & Toy*, [1978] 2 S.C.R., 229), placed a cap upon non-pecuniary damages, even for these most grievously injured plaintiffs. The position taken on behalf of the province was that the damages suffered as a result of wrongful conviction cannot be any greater than those suffered by someone who has become a paraplegic as a result of a negligent act.

As well, in submissions made for imposing a cap, reliance was placed upon the case of *Muir v. Alberta* (1996), 36 Alta L.R. (3d) 305. In that case, an action was brought against the State, namely, the Province of Alberta. Ms Muir was sterilized and confined in a secure institution for nearly 10 years. It is true that her case was, of course, brought against the Province of Alberta and that the trilogy cap was applied to the non-pecuniary damages. This may have been either inappropriate or appropriate in the context of that case. In any event, for the reasons which follow, I cannot agree with these submissions that a cap should be placed on non-pecuniary compensation arising from wrongful conviction and imprisonment.


# REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL

THE HONOURABLE PATRICK J. LESAGE, Q.C., COMMISSIONER

January 2007

The recommendations regarding note taking, report writing and disclosure should cover all dealings with these witnesses, however, I would also recommend that the WPS policies and Manitoba Justice policies be revised to specifically provide that *all benefits* requested, discussed, or provided or intended to be provided *at any time* in relation to any "central" witness be recorded and disclosed.

## 5. The Post-Conviction Review Process

In the *Thomas Sophonow Inquiry Report*, Commissioner Cory recommended that:

> ...there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged...[21]

I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process. Driskell could not launch an application until he had sufficient disclosure to satisfy the Department of Justice standard for launching a section 696.2 review. However, the WPS would not make disclosure for purposes of a section 696.2 review until Driskell's application was made. This is a classic 'catch 22' situation. If there was an independent inquisitorial body, as in the U.K., it could, after having been satisfied that a threshold, not necessarily a high threshold, has been met, commence the section 696.2 process of its own initiative. In this way, information that is unavailable to the applicant because of their inability to compel disclosure,

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[21] *Thomas Sophonow Inquiry Report*, p. 291.

would be available to the independent agency to allow them to make a better determination of whether a miscarriage of justice occurred.


Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard

Honourable Mr. Justice Edward P. MacCallum, Commissioner

# Chapter 6
# Canada's Conviction Review Process

## 1. Introduction

David Milgaard was investigated by the Saskatoon Police and the RCMP for the murder of Gail Miller. He was prosecuted by a representative of the Attorney General of Saskatchewan, and convicted on January 31, 1970. His appeals were exhausted in 1971.

The Attorney General of Saskatchewan could not set aside Milgaard's conviction after his appeals were exhausted. The only way for Milgaard to challenge his 1970 murder conviction was to apply to the federal Minister of Justice pursuant to s. 690 of the *Criminal Code* and seek the mercy of the Minister. The federal Minister had the power to return Milgaard's case to the judicial system.

Milgaard applied in 1988 and again in 1991. Ultimately, in 1992, after two s. 690 applications to the federal Minister, a reference to the Supreme Court of Canada and 23 years in prison, his murder conviction was set aside and he was released from prison. The Attorney General of Saskatchewan did not proceed with a new trial against Milgaard, choosing instead to follow the advice of the Supreme Court of Canada and enter a stay of proceedings.

On July 18, 1997, DNA testing identified Larry Fisher as the donor of semen found on Gail Miller's clothing. Both the Saskatchewan Minister of Justice and the federal Minister of Justice apologized to Milgaard for his wrongful conviction. Saskatchewan Justice and the police reopened the Gail Miller murder investigation. Larry Fisher was arrested and charged with the murder of Gail Miller on July 25, 1997 and convicted on November 22, 1999. In 1999, Milgaard was compensated for his wrongful conviction. On February 18, 2004, the Government of Saskatchewan ordered an inquiry into Milgaard's wrongful conviction.

Milgaard's s. 690 proceedings are relevant to the Commission's Terms of Reference. The Commission has been asked to determine not only why Milgaard was wrongfully convicted, but why it took so long for his wrongful conviction to be detected and for the murder investigation to be reopened. The Commission has also been asked to make recommendations relating to the administration of criminal justice in the province of Saskatchewan.

In order for the Commission to perform its work and fulfill its mandate, it was necessary to obtain a complete factual record. A significant part of the record in Milgaard's case relates to the two applications for mercy filed with the federal Minister. The s. 690 proceedings figured prominently in decisions made by the police and Saskatchewan Justice on whether, and when, to reopen the murder investigation. The federal Minister's handling of the s. 690 applications, and the subsequent decisions of the Attorney General of Saskatchewan and the police on reopening the investigation into Gail Miller's death were inextricably linked.

Furthermore, having investigated and prosecuted Milgaard, Saskatchewan Justice has a valid interest in the detection and remedying of his wrongful conviction as a matter relating to the administration of criminal justice. His wrongful conviction cast a shadow over the administration of criminal justice in the province for many years. Recommendations relating to the administration of criminal justice in the province can only be made in the context of a full factual record.

Following Milgaard's case, the federal Minister of Justice acknowledged the need to reform the conviction review process in Canada. In 1998, the federal Minister published a Consultation Paper entitled "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code".[1] Input was sought from interested parties, and different options for reform were considered. The Consultation Paper noted that critics of the s. 690 process suggested it should be replaced with an independent review mechanism, but the federal Minister chose amending the existing process instead.

In 2002, the *Criminal Code* was amended and s. 690 was replaced with ss. 696.1 to 696.6[2]. The amendments did not fundamentally alter the conviction review process. Today, an individual seeking a review of his or her conviction, having exhausted all avenues of appeal, can make an application to the federal Minister for review on the grounds of miscarriage of justice. The discretion to either reject the application or grant a remedy still lies with the federal Minister.

The Commission has always been mindful that its reach is constitutionally limited to matters within the jurisdiction of the provincial legislature. Only the federal Minister has the power to grant remedies under the provisions of the *Criminal Code* dealing with conviction review. However, this does not supplant the province's valid interest in the detection and remedying of wrongful convictions in which it may have played a role. In *MacKeigan v. Hickman*, a case arising out of the Royal Commission on the Donald Marshall prosecution, the Supreme Court of Canada confirmed that a provincially appointed commission can validly inquire into the conviction review process as a matter pertaining to the administration of criminal justice in the province[3]. The province's ability to inquire is not, however, unfettered, but subject to the limitations expressed in *A.G. of Que. and Keable v. A.G. of Can. et al* ("*Keable*")[4].

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1 "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code, a Consultation Paper" (1998) published by authority of the Minister of Justice and Attorney General of Canada. See http://www.canada.justice.gc.ca.

2 *Criminal Law Amendment Act, 2001*, S.C. 2003, Ch. 13. See also Appendix S to this Report.

3 [1989] 2 S.C.R. 796.

4 [1979] 1 S.C.R. 218.

The constitutional limitations on the Commission's ability to inquire into Milgaard's s. 690 proceedings, as set out in *Keable*, were defined in the course of the Commission's proceedings. In anticipation of hearing testimony from federal Justice witnesses, the Commission was asked by the federal Minister to set limits on the questioning of its witnesses regarding Milgaard's s. 690 applications. I issued a ruling which became the subject of a judicial review application brought by the federal Minister before Chief Justice Laing of the Saskatchewan Court of Queen's Bench. He held that the Supreme Court of Canada decision in *Keable* precluded the Commission from asking federal Justice lawyers questions seeking to probe reasons behind actions, including questions about advice given or received in connection with Milgaard's s. 690 applications.[5]

Following Laing C.J.'s decision, the Commission heard extensive evidence from two federal Justice lawyers about the investigation and consideration of Milgaard's s. 690 applications. Legal counsel for the federal Minister was present throughout the hearings and the Commission's record shows that the constitutional limitation identified by Laing C.J. was respected.

As I will outline in this chapter, the Commission has the statutory and constitutional authority to inquire into certain aspects of Canada's conviction review process, and to make recommendations relating to the administration of criminal justice in Saskatchewan.

## 2. Jurisdiction of the Commission

### (a) Statutory Jurisdiction

The Commission is a provincial commission of inquiry constituted pursuant to the *Public Inquiries Act* and derives its statutory jurisdiction from the Terms of Reference.[6] The Terms of Reference, set by the Government of Saskatchewan, define and guide the work of the Commission. They read, in part, as follows:

> The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan.[7]

It is the role of the Commission to interpret the Terms of Reference. They are important because they set out the Commission's specific duties and responsibilities, while setting the legal boundaries and scope of the Commission's inquiry. It is my role to determine the relevance of evidence and issues to the Commission's mandate.

The answers to what might have gone wrong in the investigation and subsequent prosecution of Milgaard resulting in his wrongful conviction and incarceration for 23 years could only be found in the context of a

5 *Canada (Attorney General) v. Saskatchewan (Milgaard Inquiry Commission)* 2006 SKQB 385, 287 Sask. R. 212.
6 *Public Inquiries Act*, R.S.S. 1978, C.P-38.
7 See http://www.milgaardinquiry.ca/pdf/orderincouncil.pdf.

full and complete factual record. Milgaard's efforts to have his murder conviction overturned comprised an important part of that record.

It has long been recognized that the primary purpose of a public inquiry is to investigate, educate and inform the public, and provide advice to government. Justice Cory in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System) ("Krever")* described commissions of inquiry and their purpose:

> Commissions of inquiry have a long history in Canada, and have become a significant and useful part of our tradition. They have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations.
>
> ...
>
> Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.[8]

In *Phillips v. Nova Scotia (Commission of Inquiry Into the Westray Mine Tragedy ("Westray")*, Justice Cory discussed the fact-finding function of public inquiries:

> One of the primary functions of public inquires is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.[9]

The importance of a full factual record in the investigation of wrongful convictions was noted by former Justice Marshall in his paper entitled "The Bounds of Redress and the Need of Full and Credible Inquiries in Wrongful Convictions" delivered to the AIDWYC conference in 2005.[10] On the issue of the necessary scope of inquiries into wrongful convictions, Marshall stated the following:

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8 [1997] 3 S.C.R. at 440 at para 29-30.

9 [1995] 2 S.C.R. 97 at para 62.

10 William W. Marshall, "The Bounds of Redress and the Need of Full and Credible Inquiries in Wrongful Convictions" (delivered at the AIDWYC Conference, 2005).

> It is extremely difficult to comprehend how an inquiry into how a wrongful conviction occurred can be held in the absence of examination of the conduct of every stage of the process.
>
> This would engage the conduct of the investigation that led to prosecution of the wrongly convicted and the entire judicial process that led to the faulty verdict and all affirmations of it. It would entail scrutiny of the manner in which police, prosecutors, defence counsel and judges acquitted their responsibilities.
>
> ...
>
> This paper argues that redress for the wrongly convicted should extend beyond the confines of factual innocence to at least instances where the miscarriage of justice has been materially influenced by egregious error or conduct by officers or agents of the state. The inquiries must extend to every stage of the entire process in which the wrongly convicted individual was involved.
>
> The stakes of wrongful convictions are too high for the wrongly convicted, their families and society as a whole to countenance any less.[11]

An understanding of Milgaard's s. 690 proceedings is essential to the Commission's ability to make findings and recommendations in fulfillment of its mandate. Information was gathered in the course of the s. 690 proceedings that is helpful to the Commission in evaluating the propriety of the original police investigation and prosecution of David Milgaard. As well, information gathered through the s. 690 proceedings is important in assessing whether the Miller murder investigation should have been reopened by police or Saskatchewan Justice prior to July 1997.

The decision to reopen the investigation into the death of Gail Miller and proceed with any prosecution of another individual for that crime was the constitutional responsibility of Saskatchewan Justice. However, as long as Milgaard's conviction remained in place, the Attorney General of Saskatchewan would not initiate proceedings against another individual for that same crime.

The remedy for Milgaard's wrongful conviction rested in the hands of the federal Minister. Pursuant to s. 690, the federal Minister could order a new trial or hearing by the Saskatchewan Court of Appeal. After rejecting the first application, the Minister chose, on the second application, to refer the matter to the Supreme Court for its consideration and advice pursuant to s. 53 of the *Supreme Court Act*.[12] Saskatchewan Justice was an active participant in the Supreme Court Reference Case.

The federal Minister's review of Milgaard's conviction under s. 690, and the decision of the Supreme Court, affected the Attorney General of Saskatchewan. Once Milgaard's conviction was set aside by the federal Minister, decisions on the conduct of further proceedings fell to the Attorney General of Saskatchewan, as part of its responsibility over matters pertaining to the administration of criminal justice. In his testimony before the Commission, Brown said that the investigation of Milgaard's s. 690 applications by the federal Minister, the federal Minister's responses to those applications and the decision of the Supreme Court of Canada were relied upon by Saskatchewan Justice in deciding not to proceed

11 Ibid at 3, 6.
12 *Supreme Court Act*, R.S.C. 1985, c.S-26

with a new trial of Milgaard, or reopen the murder investigation before DNA test results were received in 1997.

### (b) Constitutional Jurisdiction

The *Constitution Act, 1867* sets out the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures.[13] Pursuant to s. 91(27), the Parliament of Canada enjoys exclusive legislative authority over the subject of the criminal law, including procedure in criminal matters. Pursuant to s. 92(14), each provincial legislature is granted exclusive legislative jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."[14]

As a provincial commission of inquiry, the Commission's reach is constitutionally limited to matters within the jurisdiction of the provincial legislature. The administration of justice falls within provincial jurisdiction. In *Di Iorio v. Warden of the Montreal Jail* the Supreme Court of Canada held that the words "administration of justice in the province" are to be given a fair, large and liberal construction such that they encompass the administration of criminal justice:

> Both the federal and provincial governments have accepted for over a century the status of the provincial governments to administer criminal justice within their respective boundaries. The provincial mandate in that field has consistently been recognized as part and parcel of the responsibility of a provincial government for public order within the province.
>
> Under head 92(14) of our Constitution, as I understand it, law enforcement is primarily the responsibility of the Province and in all provinces the Attorney General is the chief law enforcement officer of the Crown. He has broad responsibilities for most aspects of the Administration of Justice. Among these within the field of criminal justice, are the court system, the police, criminal investigation and prosecutions, and corrections. The provincial police are answerable only to the Attorney General as are the provincial Crown Attorneys who conduct the great majority of criminal prosecutions in Canada.[15]

Notwithstanding the division of legislative powers, it was acknowledged in *Di Iorio* by the Supreme Court that implicit in the grant to the provinces of exclusive legislative authority in respect of administration of justice and in the grant to the federal government of exclusive legislative authority in respect of criminal law and procedure, is an acceptance of a certain degree of overlapping.

The constitutional ability of this Commission to inquire into Milgaard's s. 690 proceedings was settled by McLachlin J. in *MacKeigan v. Hickman*. The very issue considered by the Supreme Court of Canada in *MacKeigan* was whether a provincially appointed commission, namely the Royal Commission on the Donald Marshall Jr. Prosecution, could inquire into a reference by the federal Minister of Justice under (then) s. 617(b) of the *Criminal Code*. After 11 years in prison, Marshall was released following a successful resolution of a reference made by the federal Minister of Justice to the Supreme Court of Nova Scotia, Appeal Division. The failure of the justice system in Marshall's case led the Attorney General of Nova Scotia to establish a provincial commission of inquiry into his case. It was argued that the inquiry was invalid because it trenched on the exclusive federal power with respect to the criminal law.

13 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.
14 Ibid.
15 [1978] 1 S.C.R. 152 at 206.

McLachlin J. considered the question of "whether the inquiry is 'into the administration of justice', in which case it falls within the Province's powers under s. 92(14), or into the 'criminal law" or 'criminal procedure', in which case it infringes the federal criminal law power":

> The answer to this question depends on how the phrase "administration of justice" is construed in relation to the federal power over criminal law and procedure. In *Di Iorio v. Warden of Montreal Jail*, [1978] 1 S.C.R. 152, this court held that "administration of justice" should be interpreted broadly as including criminal justice. ...
>
> ...
>
> *Di Iorio v. Warden of Montreal Jail* establishes, at page 205, that the police, criminal investigations, prosecutions, corrections and the court system, all comprise part of the "administration of justice". These are all matters under investigation by the Commission. The term "criminal procedure", reserved exclusively to the federal government, should not be confused with the larger concept of "criminal justice"...
>
> ...
>
> I am satisfied that the Province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall, Jr. These are matters pertaining to the administration of justice within the Province, and, subject to the caveat expressed by Pigeon J. in *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218, that no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question (there the R.C.M.P.), they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: *Di Iorio v. Warden of Montreal Jail*, supra; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, at p. 610.[16]

The decision of the Supreme Court of Canada in *MacKeigan* establishes that Saskatchewan has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of David Milgaard, as matters pertaining to the administration of justice within the province, subject to the caveat expressed in *Keable*. Just as the Marshall Commission could inquire into a reference of Marshall's case to the Court of Appeal by the federal Minister under s. 617(b), this Commission can inquire into Milgaard's s. 690 applications and the reference of his case by the federal Minister to the Supreme Court of Canada.

The Marshall Commission inquired into the facts surrounding the federal Minister's reference of Marshall's case to the Court of Appeal under s. 617(b) of the *Criminal Code*. Douglas Rutherford of the federal Department of Justice testified before the Marshall Commission about his involvement in the Marshall case.[17] At the relevant time he was Assistant Deputy Attorney General for criminal law in the federal Department of Justice. Prior to hearing from Rutherford, commission counsel noted for the record that his giving evidence was not to be taken as a waiver by the federal Justice Department of its right at a subsequent date to question the jurisdiction of the commission in particular areas. Rutherford did give fairly extensive evidence. In particular, he freely discussed the process involved in the federal Department

16 Supra note 3 at 834-835.

17 Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989) Volume 1 at 113. Rutherford testified before the Marshall Commission on March 8, 1988 and his testimony is found in Volume 53 of the Commission's transcripts.

of Justice's determination to refer the Marshall matter to the Court of Appeal under s. 617(b), instead of s. 617(c) of the *Criminal Code*. He discussed with candor his advice to and discussions with the then Minister of Justice, Jean Chrétien. He discussed the steps that were taken in the case, the department's handling of it, and also answered general questions about the application process.

As noted in *MacKeigan*, the Commission's ability to inquire into Milgaard's s. 690 proceedings is limited by the caveat expressed in *Keable* that no provincially constituted commission of inquiry can inquire into the administration and management of a federal institution. In *Keable*, the Province of Quebec established a commission of inquiry to investigate and report on various allegedly illegal or reprehensible incidents or acts in which various police forces were involved, including the RCMP. The terms of reference set by the provincial order-in-council were very broad. In an attempt to fulfill his mandate, Commissioner Keable issued comprehensive subpoenas directed to the Solicitor General of Canada demanding that he produce a substantial number of documents pertaining to the internal administration of the RCMP. The constitutional validity of the provincial inquiry was challenged. In ruling on the validity of the commission's mandate, Pigeon, J. said:

> I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the *Royal Canadian Mounted Police Act*, (R.S.C. 1970, c.R-9). It is a branch of the Department of the Solicitor General, (*Department of the Solicitor General Act*, R.S.C. 1970, c.S-12, s.4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation....[18]

In the result, the Supreme Court deemed inapplicable to the RCMP certain portions of the inquiry's terms of reference. Insofar as the provincial commission's mandate entitled it to look at the conduct of individual members of the RCMP and the methods they used in the specific instances described in the terms of reference, the Commissioner's powers were acknowledged. However, to the extent that the terms of reference authorized a systemic inquiry into the RCMP's policies and regulations for the purpose of making recommendations, they were invalid and inapplicable to the RCMP.

The thrust of the decision in *Keable* is that a provincial commission of inquiry can inquire into what a federal entity did in particular circumstances, but it cannot embark upon a direct and concerted investigation into how that entity conducts its business generally. In other words, a systemic investigation into the internal workings of a federal entity is constitutionally prohibited.

It is accepted that a provincial inquiry may touch upon matters within federal jurisdiction provided it does so only incidentally. The Supreme Court of Canada reinforced this principal in *Starr v. Houlden*, when it stated that:

18 Supra note 4 at 243.

> ... At the outset, it is worth noting that this Court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers.[19]

In *Consortium Developments ( Clearwater) Ltd. v. Sarnia (City)*, the Supreme Court of Canada confirmed the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters to proceed despite possible incidental effects on the criminal law power.[20] In other words, an inquiry established pursuant to provincial legislation is constitutional provided that its primary purpose is to inquire into matters within the constitutional jurisdiction of the province.

It is permissible for a provincial commission of inquiry to comment on federal law. In *Diorio*, Dickson, J. of the Supreme Court stated that a provincial commission of inquiry, inquiring into any subject, might submit a report in which it appeared that changes in federal laws would be desirable.[21] The meaning of this statement was discussed by Pigeon, J. in *Keable*:

> The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The Commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.[22]

The primary purpose of this Commission was to inquire into the circumstances relating to Milgaard's wrongful conviction in the hope that future tragedies could be prevented. As noted by the Government of Saskatchewan, Milgaard's wrongful conviction cast a shadow over the administration of criminal justice in the province. Comment on the desirability of changes to the *Criminal Code* arising from these circumstances is merely incidental to our main purpose.

### (c) Commission Proceedings and Judicial Review Application

Before public hearings commenced, the Commission prepared a Position Paper on the scope and meaning of its Terms of Reference. It was sent to all parties with standing on June 1, 2004 for review and comment. The purpose of the Position Paper was to set out the Commission's preliminary interpretation of its Terms of Reference and the scope of its statutory and constitutional jurisdiction.

The relevance of Milgaard's s. 690 proceedings to the Terms of Reference was considered by the Commission in the Position Paper. Milgaard's applications to the federal Minister under s. 690 of the *Criminal Code*, the investigation of those applications by federal Justice officials, the reporting by those officials to the federal Minister, the federal Minister's decisions in response to the applications and the Supreme Court of Canada Reference Case are all part of the "s. 690 proceedings".

As noted in the Position Paper, the Commission determined that it had statutory jurisdiction (authorized by its Terms of Reference) to inquire into the s. 690 proceedings. The Commission also determined that

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19 [1990] 1 S.C.R. 1366 at 1390-1391.
20 [1998] 3 S.C.R. 3.
21 Supra note 15 at 209.
22 Supra note 4 at 243.

it had constitutional jurisdiction to inquire into the s. 690 proceedings, subject to the limitation prohibiting inquiry into the administration and management of a federal institution (here the federal Department of Justice) identified by the Supreme Court in *Keable*.

Although the federal Minister was not a party with standing when the Position Paper was initially distributed, counsel with the federal Department of Justice requested and was allowed an opportunity to provide a response to the Commission's Position Paper. The response was provided by Kerry Scullion, counsel with the Criminal Conviction Review Group of the federal Department of Justice. In his June 23, 2004 letter to the Commission, counsel for the federal Minister took no issue with the Commission's statutory jurisdiction to inquire into Milgaard's s. 690 proceedings. He also acknowledged that the Commission had constitutional jurisdiction to inquire into Milgaard's s. 690 proceedings subject to some limitations:

> We are in complete agreement that a provincially appointed commission can inquire into some aspects of Mr. Milgaard's application to the Minister pursuant to s. 690 (now s. 696.1 and formerly s. 617) of the *Criminal Code*. We are also in agreement that there are constitutional limitations on any such inquiry, and as you have stated, at this stage it is difficult to ascertain the scope of these limitations without more information as to what area you as Commission Counsel or any other interested party may wish to pursue.

The Position Paper was amended following receipt of submissions from parties with standing. The parties acknowledged that the Commission had authority to inquire into the s. 690 proceedings subject to any constitutional limitations that might apply. There was also consensus with all parties that a ruling on the precise constitutional limitations would be made at a later date of the Inquiry after evidence had been heard.

Public hearings commenced in January 2005, and the Commission's Position Paper was used as a guideline for determining witnesses and the scope of their evidence. On March 4, 2005, the Attorney General of Canada, on behalf of the federal Minister, applied for standing on the basis that the federal Minister was directly and substantially affected by the Inquiry. Standing was granted on March 7, 2005.[23]

The federal Minister actively participated in the Commission's proceedings. The Commission heard considerable evidence from a number of witnesses regarding Milgaard's two s. 690 applications to the federal Minister, the investigation of those applications by the federal Justice department, the Minister's decisions and the Supreme Court Reference. In November, 2005, the Commission heard extensive evidence over a span of eight days from Rick Pearson, a retired RCMP officer. Pearson assisted the federal Justice department in its investigation of Milgaard's s. 690 applications. The RCMP was a party with standing before the Commission and raised no objections to the constitutional jurisdiction of the Commission.

In advance of testimony from federal Justice witnesses involved in Milgaard's s. 690 proceedings, the federal Minister raised concerns about the questioning of its witnesses in areas that were beyond the constitutional scope of a provincial commission of inquiry. The federal Minister suggested that a ruling on the constitutional limits of the Commission should be obtained in advance of the scheduled testimony of its witnesses.

23 See http://www.milgaardinquiry.ca/rulings.shtml.

On May 18, 2006, Commission counsel circulated a memorandum to counsel for all parties with standing outlining the procedure for determination of the constitutional limits. Attached to the memorandum was an outline of areas to be covered in examination of federal Justice witnesses. The outline was drafted to include any potential subject areas of examination of federal Justice witnesses in order to assist counsel for the federal Minister in identifying those areas which the federal Minister believed were outside the constitutional scope of a provincial commission of inquiry.

On May 23, 2006, the Commission received a written submission from the federal Minister.[24] The federal Minister stated that it did not object to federal Justice witnesses testifying, subject to appropriate constitutional boundaries. It was submitted that those boundaries, set by the Supreme Court in *Keable*, prevented the Commission from inquiring into communications which were appropriately characterized as advice. While noting that the legislation governing conviction review had changed, the federal Minister acknowledged that "the s. 690 process as it existed at the time of Mr. Milgaard's applications" was relevant to the Commission's mandate. The federal Minister stated the following:

> Commission counsel has used the terms "gather", "assess" and "analyze" a number of times to describe the Federal Government's role in dealing with Mr. Milgaard's s. 690 applications. The Minister respectfully submits that the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise.
>
> The Minister respectfully submits that those communications which are more appropriately characterized as advice, either written or oral, are at the very core of that which is proscribed by the Supreme Court of Canada's decision in *Keable*.
>
> ...
>
> The Minister concedes that a Provincial Inquiry can inquire into those aspects of the handling of the s. 690 applications filed by Mr. Milgaard, subject to the constitutional limitations, based on the Supreme Court's decision in *McKeigan v. Hickman*, [1989] 2 S.C.R. 796.
>
> However, the mandate of this Commission is only concerned with the s. 690 process as it existed at the time of Mr. Milgaard's applications. The Commission should be conscious of not only the constitutional limitations on its mandate in this regard, but the practical reality that the mercy process is much different now than it was at the time of Mr. Milgaard's applications. The relevant Criminal Code provisions have been significantly amended and the administration of mercy applications has been altered.

On May 30, 2006, the Commission received a written submission from the Government of Saskatchewan.[25] While acknowledging that *Keable* prohibited a provincial commission from undertaking a systemic inquiry into the conviction review process, it was submitted that *Keable* did not prohibit the Commission from inquiring into actions and decisions taken in respect of Milgaard's s. 690 applications. Saskatchewan made it clear that the Terms of Reference were generous and that it intended for the Commission to inquire into Milgaard's s. 690 proceedings:

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24 See http://www.milgaardinquiry.ca/rulings.shtml.
25 See http://www.milgaardinquiry.ca/rulings.shtml.

> 6. When establishing this Commission and formulating its terms of reference, Saskatchewan sought to imbue it with a scope of inquiry as generous as possible within accepted constitutional constraints. Saskatchewan wants the Commissioner to inquire into, and make recommendations about, all aspects of the administration of criminal justice in Saskatchewan which may have contributed to the wrongful conviction of David Milgaard. This would include actions taken by the Department of Justice (Canada) that might have affected decisions made by police, prosecutors and other justice officials in Saskatchewan about this matter. It is precisely for this reason that subject to the comments below, Saskatchewan submits the Commission has the constitutional authority to inquire into the operation of section 690 of the *Criminal Code* in the context of Mr. Milgaard's two applications.
>
> ...
>
> 10. The principles which emerge from *Keable* and subsequent authorities which applied it, demonstrate that this Commission does not lack authority to penetrate the walls of the Department of Justice (Canada), as it were. Saskatchewan submits that this Commission can investigate the various actions undertaken, and decisions taken by officials in the Department of Justice (Canada) subject to valid claims of solicitor/client or Crown privilege, in respect of the two applications under section 690 of the *Criminal Code* brought on behalf of Mr. Milgaard.
>
> 11. Saskatchewan does concede that following *Keable*, this Commission lacks the constitutional authority to embark upon a general systemic inquiry into the Department of Justice (Canada)'s policies, procedures and protocols respecting the operation of section 690 applications either at the time of Mr. Milgaard's two applications or at present.

Following oral submissions, I issued my ruling on June 1, 2006. No evidence had yet been heard from federal Justice witnesses. My ruling was a preliminary one and was intended simply to provide guidance to the parties. I addressed the narrow issue of whether questioning federal Justice witnesses on advice relating to Milgaard's s. 690 applications violated the *Keable* prohibition against inquiring into the administration and management of a federal institution. I did not attempt to set guidelines that would answer all possible future objections. I held that the proscribed areas of administration and management listed in *Keable* had nothing to do with advice concerning Milgaard's s. 690 applications or the Reference Case.

Starting on June 5, 2006, the Commission heard extensive evidence from federal Justice witness Eugene Williams. Williams was the lawyer primarily responsible for the investigation of Milgaard's two s. 690 applications. He discussed the information he obtained in the course of his investigation along with his assessment of its credibility. He also answered questions about his reasons for undertaking various steps in the investigation. Williams testified for seven days with legal counsel for the federal Minister present at all times and without any objection.

By Notice of Motion dated July 4, 2006, the Attorney General of Canada applied for judicial review of my June 1, 2006 ruling on the basis that I had exceeded my constitutional jurisdiction.[26] It was also argued that I had exceeded my statutory jurisdiction, notwithstanding the previous acknowledgement by the

26 See http://www.milgaardinquiry.ca/pdf/Notice_of_Motion.pdf.

federal Minister of the relevance of Milgaard's s. 690 proceedings to the Commission's mandate. The only issue argued before me and addressed in my June 1, 2006 ruling related to the limits on the questioning of federal Justice witnesses arising from constitutional limitations on a provincial inquiry. Before the Commission, and on the judicial review application, the federal Minister was represented by different legal counsel.

On August 18, 2006, Laing, C.J. issued his decision on the judicial review application.[27] He declined to rule on the issue of statutory jurisdiction, finding that it was my role in the first instance to interpret the Terms of Reference and determine issues of relevance. He noted that the federal Minister had not raised the Terms of Reference as an issue until the judicial review application.

On the issue of constitutional jurisdiction, Laing, C.J. held that the constitutional limitation identified by the Supreme Court in *Keable* precluded the Commission from asking federal Justice witnesses "questions which seek to probe the reasons behind actions, including questions about advice given or received" in the course of Milgaard's s. 690 proceedings.[28] My ruling was set aside. The application of Laing's ruling to the questioning of federal Justice witnesses was addressed by the Commission, with the input of legal counsel for the federal Minister, during testimony provided by witnesses Williams and Fainstein. The constitutional limitation was followed in the questioning of these witnesses to the satisfaction of legal counsel for the federal Minister.

The Commission heard extensive evidence regarding Milgaard's s. 690 proceedings from federal Justice lawyers Williams and Fainstein. Williams continued his testimony regarding the investigation of Milgaard's s. 690 applications. Fainstein testified about his involvement as legal counsel for the federal Minister in the Supreme Court Reference Case and in subsequent efforts to have DNA testing done on Gail Miller's clothing.

Legal counsel for the federal Minister was present throughout the hearings and during the testimony of its witnesses. In addition, Williams applied for standing before the Commission and retained his own legal counsel. His August 18, 2006 application for standing was made on the basis of his expertise in connection with Milgaard's s. 690 applications, and his "genuine commitment to ensuring that the Commission can properly meet its Terms of Reference by receiving as complete as possible a picture of the section 690 process".[29] It was also prompted by a concern that his position and the federal Minister's position on certain legal and factual issues may not coincide in all respects.

The questioning of federal Justice witnesses on advice given in connection with Milgaard's two s. 690 applications was not permitted. Williams and Fainstein testified to their involvement in Milgaard's s. 690 proceedings, including the reasons for their actions, without objection by legal counsel for the federal Minister. The record reflects that the Commission was careful to respect the constitutional limitations affecting the scope if its inquiry.

### (d) Position of the Federal Minister

In written and oral submissions made by the federal Minister at the conclusion of the public hearings, the Commission's ability to inquire into Milgaard's s. 690 proceedings was challenged. On the issue of statutory jurisdiction, the federal Minister submitted that:

27 Supra note 5. See also http://www.milgaardinquiry.ca/pdf/Judgment_August 18_2006.pdf.
28 Ibid at 224.
29 See http://www.milgaardinquiry.ca/rulings.shtml.

> The Terms of Reference at the Milgaard Inquiry provide no express authority to inquire into Mr. Milgaard's s. 617/s. 690 process, the Supreme Court reference or the release of David Milgaard.[30]

The federal Minister also asserted that the Commission should not comment on the current process for conviction review as "the Mercy provisions have changed substantially" since Milgaard's applications were considered and "the evidence about the current process was not comprehensive enough to effectively make informed recommendations".[31]

The position taken by the federal Minister in its final submissions on the limited statutory jurisdiction of the Commission was at odds with both the role played by the federal Minister in the Inquiry process as a party with standing, and with earlier acknowledgements by the federal Minister of the relevance of Milgaard's s. 690 proceedings to the Commission's mandate.

The Terms of Reference granted to the Commission are broad in scope and clearly encompass an inquiry into all aspects of Milgaard's wrongful conviction, including the process by which his conviction was ultimately overturned. Saskatchewan played a significant role in that process, as it was asked to take an active role in defending the conviction before the Supreme Court of Canada in 1992. On the scope of the Terms of Reference, Saskatchewan stated:

> ... The Milgaard Inquiry was established by the Government of Saskatchewan through Order-in-Council 84/2004 to ascertain what went wrong in the investigation and subsequent prosecution of David Milgaard that resulted in his wrongful conviction for the murder of Gail Miller, and subsequent incarceration for approximately 23 years. This case cast a shadow over the administration of criminal justice in this province. As Wilson J. stated in *MacKeigan v. Hickman*, when the justice system "in some way went awry" by convicting an innocent person of a heinous crime, "it is obviously a matter of great public concern". The Government of Saskatchewan determined that a public commission of inquiry should be established to inquire into any and all matters relevant to the wrongful conviction of Mr. Milgaard and his subsequent incarceration.[32]

In final submissions, the federal Minister conceded that the Supreme Court decision in *MacKeigan* appears "to permit recommendations about the s. 617/s. 690 process" but asserted that the *MacKeigan* decision was inapplicable because the terms of reference for the Marshall Commission were much broader.[33] This argument fails to recognize that the terms of reference for the Marshall Commission, given their widest interpretation, could only encompass matters within the jurisdiction of the provincial legislature. The Terms of Reference given to this Commission could not be more generous. They clearly indicate that the Government of Saskatchewan sought to imbue the Commission with the full scope of its jurisdiction in relation to criminal justice.

The Commission acknowledges that its inquiry was not unlimited in scope. The only case it was empowered to review was Milgaard's. The Commission is aware that the process of conviction review in Canada has changed. The Commission is also aware that it was not permitted to embark on a general systemic inquiry into the Department of Justice (Canada) policies, procedures and protocols respecting

30 See http://www.milgaardinquiry.ca/finalsubmissions/341135.pdf at para. 239.
31 Ibid at para. 245-246.
32 See http://www.milgaardinquiry.ca/pdf/SkJusticeMemorandumofLaw.pdf at para 8.
33 Supra note 30 at para 237.

the operation of s. 690 (now ss. 696.1 to 696.6), either at the time of Milgaard's two applications or at present. No witnesses were called for the specific purpose of providing evidence on the current conviction review process set out in ss. 696.1 to 696.6 of the *Criminal Code*.

Despite these limitations, the Commission is able to provide insight on how the conviction review process operated in Milgaard's case, and to comment on the desirability of changes to the process in Canada.. The Commission heard extensive evidence on Milgaard's s. 690 proceedings as part of its valid provincial inquiry into the circumstances surrounding his wrongful conviction. No other public inquiry has examined a case in such detail, a case which was groundbreaking in many respects. It involved two applications for mercy and a reference to the Supreme Court of Canada. It also prompted the federal Minister to acknowledge the need for reform of the conviction review process.

It appeared from the testimony of Justice Canada lawyer Williams and from a reading of the current legislation, that changes made since review of Milgaard's case have not fundamentally altered the process or addressed all of the problems he faced.

The federal Minister, as a party with standing, participated fully in the Commission's proceedings. A Justice Canada witness provided extensive testimony relating to Milgaard's s. 690 proceedings. Counsel for the federal Minister expressed a desire to assist the Commission with its work and pledged cooperation. With respect, for the federal Minister to now say that the Commission is not able to inquire into Milgaard's s. 690 process, and is not qualified to comment on the conviction review process because only his case was examined, is not only inconsistent but ignores the wide scope of this Public Inquiry.

In making recommendations for the better administration of criminal justice in the province, I would be remiss if I failed to address the conviction review process in Canada.

## 3. The Canadian System of Conviction Review

### (a) Historical Review

Historically, the only power to revisit a criminal conviction after appeal was found in the Royal Prerogative of Mercy which enabled the Crown to pardon offenders, reduce the severity of criminal punishments, and correct miscarriages of justice.[34]

As explained by Gary Trotter in "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review", the Royal Prerogative of Mercy has been used to achieve different objectives: first, to show compassion by relieving an individual of the full weight of his or her sentence and second, to correct errors in the judicial process such as wrongful convictions.[35] The power to dispense the Royal Prerogative of Mercy was transmitted into Canadian law through the office of the Governor General. In *The Attorney General (Canada) v. The Attorney General of the Province of Ontario*, the Supreme Court of Canada said:

> By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's Dominions. The authority to

34 See http://canada.justice.gc.ca/en/ps/ccr/index.html.
35 (2001) 26 Queen's L.J. 339.

> exercise this prerogative may be delegated to viceroys and colonial governors representing the crown.[36]

When Canada's first Criminal Code was enacted in 1892, it recognized the potential for miscarriages of justice and provided a legislative remedy by codifying one aspect of the prerogative.[37] The power to revisit a criminal conviction was codified in s. 748 which read as follows:

> 748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

Since 1892, the statutory power of the federal Minister to review criminal convictions after all appeals have been exhausted has gone through a number of revisions. By 1927, s. 748 had become s. 1022:

> 1022. Nothing in the ten last preceding sections of this Act shall in any manner limit or affect His Majesty's royal prerogative of mercy.
>
> 2. Upon any application for the mercy of the Crown on behalf of any person convicted on indictment, the Minister of Justice,
>
> (a) if he entertains a doubt whether such person ought to have been convicted, may, after such inquiry as he thinks proper, instead of advising His Majesty to remit or to commute the sentence, direct by an order in writing a new trial at such time and before such court as the Minister of Justice thinks proper; or
>
> (b) may, at any time, refer the whole case to the court of appeal, and the case shall then be heard and determined by that court as in the case of an appeal by a person convicted; and
>
> (c) at any time, if the Minister of Justice desires the assistance of the court of appeal on any point arising in the case with a view to the determination of the petition, he may refer that point to the court of appeal for its opinion thereon, and that court shall consider the point so referred and furnish the Minister of Justice its opinion thereon accordingly.[38]

The original "entertains a doubt" standard for granting a remedy remained in this section. However, the Minister's powers were broadened to include the power to refer cases to the Court of Appeal for hearing and determination, or for determinations on points arising in the case.

By 1955, the provision governing conviction review began to take on a modern form. Section 1022 of the *Criminal Code* became s. 596, and the "entertains a doubt" standard was removed and replaced with more ambiguous language that granted authority to the Minister of Justice to "direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed":

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36 (1894) 23 S.C.R. 458 at 469.
37 *The Criminal Code, 1892*, S.C. 1892, c. 29.
38 *Criminal Code*, R.S.C. 1927, c. 36.

596. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,

(a) direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or

(c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.[39]

By 1970, s. 596 was amended and re-enacted as s. 617 of the *Criminal Code*:

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

(a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or

(c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.[40]

### (b) Section 690 of the *Criminal Code* as it Applied to David Milgaard

As part of broad revisions to the *Criminal Code* in 1985, s. 617 was re-enacted as s. 690.[41] With the exception of a reference to "Part XXIV" instead of "Part XXI", s. 690 was virtually identical to its predecessor. Section 690 came into force on December 12, 1988. Both of Milgaard's applications to the federal Minister of Justice for review of his conviction were made under s. 690 of the *Criminal Code*. Section 690 remained in effect until it was revised and replaced in 2002 with ss. 696.1 to 696.6 of the *Criminal Code*.[42]

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

39 *Criminal Code*, S.C. 1953-54, c.51.
40 *Criminal Code*, R.S.C. 1970, c. C-34.
41 *Criminal Code*, R.S.C. 1985, c. C-46.
42 Supra note 2.

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

Milgaard first applied to the federal Minister for a review of his 1970 murder conviction on December 28, 1988. His application was denied by the Minister on February 27, 1991. His second application was made on August 14, 1991. Subparagraphs 690 (b) and (c) allowed the federal Minister to refer the matter to the Saskatchewan Court of Appeal for a new appeal or for the opinion of the court on any question. Milgaard's trial counsel, Tallis, was a member of the Saskatchewan Court of Appeal, effectively precluding a reference to that court. On November 28, 1991, the Governor General, on the recommendation of the Minister of Justice, referred Milgaard's case to the Supreme Court of Canada for a hearing pursuant to s. 53 of the *Supreme Court Act*. The Court was asked to provide its opinion on whether Milgaard's continued conviction constituted a miscarriage of justice and if it did, what was the appropriate remedy.

On April 14, 1992, the Supreme Court of Canada released its decision in the Reference Case. The Court held that Milgaard had not proven his innocence. However, the Court concluded that fresh evidence, particularly in relation to the Fisher rapes, might affect the verdict. The Court recommended to the Minister of Justice that she set aside the conviction and direct that a new trial be held. The federal Minister complied.

On April 16, 1992, the Attorney General of Saskatchewan filed an indictment, charging Milgaard with second degree murder. However, the province elected not to proceed with a new trial. Instead, on the same day, a stay of proceedings was entered by the provincial crown in *Her Majesty The Queen v. David Milgaard*. David Milgaard was released from jail. The provincial Justice Minister stated that an inquiry would not be ordered, nor would compensation be offered to David Milgaard as his innocence had not been established.

Three significant features of the s. 690 process emerged from the Commission's review of Milgaard's case:

1. Milgaard had the onus of investigating his own wrongful conviction, identifying credible grounds and providing those grounds to the federal Minister together with supporting evidence. The federal Minister's role was limited to reviewing the grounds advanced. The federal Minister played no role in identifying potential grounds for a miscarriage of justice.

2. Although not expressly stated in s. 690, in order to obtain a remedy from the federal Minister, Milgaard had to establish a reasonable likelihood of a miscarriage of justice on the basis of new information or evidence that was not available at trial. This onus was very similar to the one Milgaard would have to meet if his case was allowed to be heard by the Court of Appeal.

3. Although the ultimate decision was made by the federal Minister, she relied heavily on the advice of federal Justice lawyers who investigated Milgaard's application on her behalf and on the advice of the Honourable William McIntyre Q.C., who she retained to advise her. The Minister never publicly disclosed the information given to McIntyre to review, nor the nature of the legal opinion sought and provided. The case was highly politicized and concerns were expressed at the time that political pressures might have influenced the Minister's decision.

Although Milgaard's second s. 690 application led to his release from prison in 1992, success owed more to publicity than to process.

It is my view that the publicity harmed the administration of justice, and that the process proved too daunting for the applicant and should be improved. The onus on the applicant is too heavy. He should not be expected to show factual innocence, and an independent and more transparent agency should investigate.

#### (i) Investigative Onus on Applicant/ Reactive Role of Federal Minister

On January 28, 1986, Milgaard wrote to Justice Minister John Crosbie from Stony Mountain Institution. His letter said that he had been in prison for 17 years for a crime that he did not commit. He also told the Justice Minister that he had decided not to eat or drink until he was a free man. He asked the Justice Minister to look at his case and end his ordeal. On March 11, 1986, Milgaard received a reply from the office of the Minister of Justice. He was informed that he could make an application for mercy to the Minister of Justice, who had the power to order a new trial or appeal proceeding:

> If you have not exhausted the court process, you should do so. If you have and feel that yours is a compelling case, you may make an application to the Minister for relief. The following must be sent to the Minister: a brief fully detailing why you say that there was an injustice; copies of transcripts of the preliminary hearing and trial; copies of any judgments and reasons for judgment that were issued in your case; copies of any written arguments filed by the Crown and defence. On receipt of this material, your application will be duly considered.
>
> If you wish the assistance of a lawyer and are unable to afford one, I would suggest you contact Legal Aid Manitoba, 402 – 294 Portage Avenue, Winnipeg, Manitoba, R3C 0B9.[43]

As the letter from the Minister's office reveals, an applicant under s. 690 was required to provide extensive documentation to the Minister including the grounds for the alleged miscarriage of justice and supporting evidence. Milgaard's application was not submitted to the federal Minister until December 28, 1988, almost 19 years after his original murder conviction, and eight years after he and his mother first retained legal counsel and began their efforts to have the conviction set aside.

Milgaard was likely more fortunate than most applicants, in that his family provided him with financial support enabling him to retain counsel. Hersh Wolch was retained in January of 1986 and both s. 690 applications submitted on behalf of Milgaard were prepared by legal counsel. Despite requests to both Manitoba and Saskatchewan Legal Aid programs, neither provided financial assistance for conviction review applications.

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43 Docid 333268.

The federal Minister's role under s. 690 was reactive as opposed to proactive. The federal Minister responded only to what was contained in the application, and did not proactively investigate Milgaard's conviction to identify any possible miscarriage of justice. The task of identifying possible grounds of miscarriage of justice was left to the applicant and his or her counsel.

As explained by Williams:

> Q ... A convicted person can't come to you and say "lookit, I'd like you to investigate, I'm innocent, I don't know what went wrong but would you people please go and investigate this and find out why I was wrongfully convicted"?
>
> A We would say to that person "that is not the role of the department or of the Minister". Certainly, if you've been through the process, sat in on your trial, heard the evidence, you're in the best position to identify to us what it is you say constitutes wrongful – or what the errors were and why they constitute a miscarriage of justice.
>
> Q And what you are telling us, then, it would be incumbent upon Mr. Milgaard and/or his counsel to identify significant grounds that might provide a basis for a remedy under Section 690?
>
> A Yes.
>
> .....
>
> Q Is there anything else – and we'll touch on this later, I don't want to limit you – but is there anything else, again in just trying to get an understanding of the nature and purpose of the investigation, that you would undertake on behalf of the Minister?
>
> A Our job is to test or to examine the facts that were advanced; one, to ensure that it was accurate, and two, if there are any matters that required clarification, to clarify them. Next our job was to summarize that and based on a summary and on the information collected, to provide advice to the minister with respect to whether the grounds advanced and whether the information collected either signaled support for or not for the granting of a remedy. We took the role very, very seriously and we endeavoured to do it as quickly as we could, but as thoroughly as we could, because we recognize the importance of this particular procedure to someone who is sitting in a jail convicted of an offence.[44]

### (ii) Threshold for the Granting of a Remedy

Once over the threshold of getting the Minister to investigate the stated grounds, the investigation begins and the question arises as to what test is to be applied by the Minister in determining whether to grant a remedy to an applicant. The test was not set out in s. 690, so it was left to the Minister's discretion.

In his reasons for decision in the s. 690 application of W. Colin Thatcher, the Honourable Allan Rock said:

> In creating the role of the Minister of Justice under section 690 of the Code, Parliament used very broad language, and the discretion of the Minister has been cast in the widest

44 T32309-T32310; and T32321-T32322.

possible terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being "satisfied that in the circumstances a new trial or hearing...should be directed.[45]

In her February 27, 1991 letter denying Milgaard's first s. 690 application, the federal Minister commented on the test that had been employed "in the past" in evaluating an application for conviction review:

> Section 690 of the Criminal Code provides that the Minister of Justice may direct a new trial if after inquiry the Minister is satisfied that in the circumstances a new trial is justified; similarly, the Minister of Justice may refer the case to an appellate court for hearing. The purpose of this procedure is to permit a review of cases where **new evidence or information raising doubts concerning the correctness of a conviction has arisen after the full judicial process**, including appeals, has been exhausted. I wish to emphasize that it is not the function of the Minister of Justice to retry the case. **The remedy is an extraordinary one, as the normal judicial process is designed to ensure that no miscarriage of justice has occurred.** Ministers of Justice traditionally have declined to act where the basis upon which the application has been brought relates to matters or issues which were considered by the jury at trial. For instance, relief is commonly declined where the applicant points to the unsavoury character of a witness when that issue was placed squarely before the jury. **Ministers of Justice have in the past intervened and referred the case to the courts where it can be demonstrated that a reasonable basis exists to conclude that a miscarriage of justice has likely occurred.**[46]

Williams stated that the test set out in the federal Minister's letter was the one applied to Milgaard's application. Proof of innocence was not the criterion although the Milgaards at times believed that they needed to show that.

Williams testified:

> A At the time the ministers were prepared to grant a remedy where the evidence brought forward established a reasonable basis to conclude that a miscarriage of justice likely occurred. That was, let's say, the word or the attempt to articulate what the standard was. Certainly as you pointed out in your, in your outline, if there were doubts concerning the correctness of the conviction, those doubts had to reach a certain threshold **and it was that if you had a factual foundation where it was probably, more probable than not that there was a miscarriage of justice**, you didn't have to prove that you were innocent or probably innocent, but you had to establish that there was something that was significant that could have affected the outcome had it been known; for example, fresh evidence, new scientific advances that may now cause a court to look at evidence from a completely different perspective and which might signal either that the evidence didn't have the strength that it was given at trial or may be now exculpatory or inculpatory. DNA is a huge

45 Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, released April 14, 1994, Dept. of Justice.

46 Docid 001529.

> example of advancement in science which could be the basis for a successful return of a case back to the courts.[47]

According to the Minister's letter and to the evidence of Williams, Milgaard had to establish that a miscarriage of justice likely occurred in order for the Minister to act. This test is very similar to that which would be applied by an appellate court hearing Milgaard's case on a reference by the federal Minister. In other words, before being granted the opportunity to have his conviction reviewed by the appeal court on the basis of fresh evidence, Milgaard effectively had to satisfy the Minister that he would succeed before the appeal court.

In written submissions filed with the Supreme Court on the Reference Case, the federal Minister described the standard governing the Minister's decision to send a matter back for further adjudication by the courts pursuant to s. 690:

> It is respectfully submitted that the threshold standard he must meet is proof on a balance of probabilities that a miscarriage has occurred. Anything less would not comport with the foregoing principles – the presumption of validity; respect for the integrity of the conventional process of trial and appeals; and the extraordinary nature of the prerogative process. Common sense commends the view that the Applicant can only secure relief where it can be demonstrated that a miscarriage of justice has, more likely than not, occurred. If it is not probable that what he asserts is correct, there is no basis for the special intervention that he seeks.[48]

The federal Minister also stated in written submissions before the Supreme Court that the prerogative power under s. 690 must be exercised with great caution. Otherwise, public confidence in the system would be undermined if the process were allowed to become just another level of appeal.

#### (iii) Political Decision Maker

The decision whether Milgaard would be allowed to go back to Court to challenge his conviction was made by the federal Minister of Justice, Kim Campbell. Her decision was based on advice from federal Justice lawyers, and in particular, Eugene Williams. She also sought the advice of outside counsel, retired Supreme Court Justice William R. McIntyre, Q.C.

Through the s. 690 process, the federal Minister of Justice became involved in individual cases through the exercise of the Royal Prerogative of Mercy. This involvement invited accusations of political influence from parties unhappy with a decision.

Section 690 provided that Milgaard had to apply to the federal Minister for "the mercy of the Crown". Commentators criticized the link between the conviction review process and the notion of mercy evident in the language of s. 690. In his article "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review", Gary Trotter said:

> ...while it is tenable to suggest that one cannot claim an *entitlement* to mercy to ameliorate punishment for reasons of compassion, that suggestion is objectionable when the basis is lack of legal guilt. We have meaningful standards of fault because they are foundational

47 T32290-T32291.
48 Docid 020321 at 326.

> to our modern conceptions of a fair criminal justice system. They do not operate as a charity...[49]

It is one thing to ask the sovereign for mercy, having committed a crime, but quite another to ask a Minister of the Crown to involve herself in an individual case where proof of the crime is still in question.

### (c) Changes to the Section 690 Process Between 1992 and 2002

Following the 1992 Supreme Court Reference in Milgaard's case, and prior to the replacement of s. 690 with ss. 696.1 to 696.6 in 2002, several non-legislative changes were made to the s. 690 process. Those changes were outlined in detail by the federal Minister in a 1998 Consultation Paper entitled "Addressing Miscarriages of Justice: Reform Possibilities for s. 690 of the Criminal Code".[50] The stated purpose of the 1998 Consultation Paper was to examine the Canadian conviction review process and explore ways to improve it.

The 1998 Consultation Paper indicated that in 1993 the Department of Justice conducted an internal review, in an attempt to enhance the efficiency of the s. 690 process. As a result, the following steps were initiated: a case management system was implemented, additional lawyers were hired, the Criminal Conviction Review Group (whose sole function was to investigate s. 690 applications and report to the Minister) was established, timelines were instituted, the CCRG was transferred to the policy sector, and a booklet was published outlining the required documents, guidelines and process by which one could apply for an s. 690 review.

In 1994 the Honourable Allan Rock released his decision in the s. 690 application of W. Colin Thatcher.[51] This decision articulated, for the first time, the principles which would guide the Minister's exercise of the discretionary power found in s. 690. Although the test was still not enunciated in legislation, the decision expressly stated that in order to succeed under s. 690 an applicant would need to demonstrate that there was a reasonable basis to conclude that a miscarriage of justice had likely occurred. The Thatcher case marked the first time that the federal Minister provided an s. 690 applicant with a copy of the investigative summary containing information gathered by departmental counsel in assessing the s. 690 application.

The Consultation Paper explained that a standard procedure had been in place, since 1994, to assist the Minister of Justice in the review of s. 690 applications. Once an applicant had provided the necessary documents to the Minister of Justice, the review process would begin. The review process was divided into the following four stages:

> **Preliminary Assessment:** At this initial stage, a member of the CCRG examines the information in the application and compares it with the trial and appellate records. There must be an "air of reality" to the allegations raised by the applicant. As a threshold, the applicant must disclose grounds that could lead to the conclusion that a miscarriage of justice likely occurred.
>
> If the application reveals new and significant information that was not available at trial or on appeal that could have affected the outcome of the case, the application will go on to a full investigation. If not, the applicant is informed and provided with reasons why the intervention of the Minister is not warranted.

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49 Supra note 35 at 346-347.
50 Supra note 1.
51 Supra note 45.

**Investigation:** During the investigation or evaluation of the application, the function of CCRG counsel is three-fold. First, counsel must verify all the information and evidence submitted in the application. Second, counsel may obtain any additional facts deemed necessary for a full investigation. This may involve interviewing witnesses and obtaining scientific tests or other assessments from forensic and social science specialists. Police agencies, prosecutors, defence and appellate counsel involved in the case may be consulted. In addition, the information obtained may raise issues other than those identified by the applicant. When this happens, the applicant will be asked to provide additional submissions to ensure that the matter is fully considered. Third, this process allows counsel to formulate a recommendation as to whether there is a basis to conclude that a miscarriage of justice likely occurred.

**Investigative Summary:** Counsel reviewing the application then organizes the results of the investigation into an investigative summary. This summary serves as the framework for informing the applicant, his or her counsel, and the Minister of the facts gathered during the investigation. The investigative summary is disclosed to the applicant for comments.

**Recommendation and Ministerial Decision:** Once the applicant's final submissions have been received and CCRG counsel have arrived at an informed conclusion regarding the applicant's eligibility for a section 690 remedy, legal advice is prepared for the Minister. The application, all submissions by or on behalf of the applicant, the investigative summary, and the CCRG's advice are then forwarded to the Minister for review and decision.

A number of options for reform of the conviction review system were considered and discussed in the 1998 Consultation Paper. In the result, the federal Minister decided to proceed with legislative amendments to the s. 690 process.

### (d) Sections 696.1 to 696.6 of the *Criminal Code*

In 2002, s. 690 was repealed and replaced with ss. 696.1 to 696.6 of the *Criminal Code*.[52] Regulations were also enacted outlining the requirements for an application as well as the procedure that is followed once an application has been completed.[53]

The Minister's power to review convictions is set out in ss. 696.1 to 696.6 of the *Criminal Code*. The 2002 amendments did not fundamentally change the conviction review process from that applied to Milgaard's applications.

The reference to the notion of mercy as a basis for a remedy in s. 690 was removed. Section 696.1 now refers to applications for ministerial review on the grounds of miscarriage of justice, as opposed to applications for the mercy of the Crown.

The test is expressly stated in s. 696.3(3). The federal Minister may exercise his or her powers and grant a remedy if "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred".

Section 696.4 sets out the considerations to be taken into account by the federal Minister. The federal Minister shall consider (a) whether the application is supported by new matters of significance, (b) the

52 Supra note 2.

53 *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, S.O.R./2002 – 416.

relevance and reliability of information that is presented in connection with the application, and (c) the fact that an application is not intended to serve as a further level of appeal and that any remedy granted is an extraordinary one.

Williams testified before the Commission that these amendments simply codified the considerations and the test he applied when he investigated the Milgaard applications.

The federal Minister was given the powers of a Commissioner under Part 1 of the *Inquiries Act*, providing investigative powers to those individuals investigating cases on the Minister's behalf, including powers such as issuing subpoenas, forcing the attendance of witnesses, compelling them to give evidence and to produce documents. Williams did not have these powers when he investigated Milgaard's application.

The amendments also require the Minister to provide the applicant with a copy of the investigation report prepared by federal Justice lawyers. The applicant has an opportunity to submit further information in support of the application within one year from the date the investigation report is sent. Although Williams did not share his investigation report with Milgaard's counsel, he met with them, shared the documentary record of his investigation and invited further submissions.

The Regulations provide details regarding the investigation and review process. An application form is now contained in the Regulations. The form requires the applicant to set out the grounds for the application and describe new matters of significance that support the application. There continue to be fairly onerous requirements placed upon the applicant regarding the provision of documents. An exhaustive list of required documents is set out in the Regulations. Only on provision of a completed application form and all documents listed in the Regulations will the review process begin.

Following the legislative changes in 2002, some non-legislative changes were implemented as well. The Minister's 2007 Annual Report states the following:

> Following the legislative changes in 2002, a number of structural changes were made to enhance the arm's-length relationship between the CCRG and the Department of Justice.
>
> The CCRG office is located outside of the Department of Justice Headquarters in a downtown Ottawa office building which has both government and private sector tenants.
>
> Rather than formally passing through another branch of the Department, advice passes from the CCRG to the Minister through the Associate Deputy Minister's office. Administration and support services are provided to the CCRG by this same office.[54]

The position of Special Advisor was also created to oversee the conviction review process and give the Minister advice on applications for ministerial review which would be independent of that given by the CCRG. The 2007 Annual Report states the following:

> The Special Advisor's position is an independent one. He is neither a member of the Public Service of Canada nor an employee of the Department of Justice. The Special Advisor is appointed by order-in-council from outside the Department and public service.
>
> While the Special Advisor's main role is to make recommendations to the Minister once an investigation is complete, it is equally important that he provide independent advice at

54 See http://justice.gc.ca/eng/pi/ccr-rc/rep07-rap07/02.html.

> other stages of the review process where applications may be screened out. The Special Advisor's involvement ensures that the review of all applications is complete, fair, and transparent.[55]

While the changes have improved the conviction review process since Milgaard, the fundamental aspects have not changed. The process remains reactive. 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.

### 4. Improvements to the Conviction Review Process in Canada

While it is true that the Commission has only examined the case of Milgaard, his is one of the most well known cases of wrongful conviction in Canada, engaging virtually every aspect of the s. 690 process and involving two separate applications and a reference to the Supreme Court of Canada. The Commission heard significant evidence about his struggles through the conviction review process to obtain a remedy, and also about the role of the province in those proceedings. Although a number of public inquiries examining wrongful convictions have commented on the conviction review process, it can be said that none has examined a case in the same detail. The federal Minister of Justice was a party with standing before the Commission and participated fully in the inquiry process.

There is the potential for much to be learned from Milgaard's case, as it presented significant challenges to the justice system in this country. The conviction review process has been changed since the Milgaard case, but the *Criminal Code* amendments in 2002 did not fundamentally alter it because, for the most part, the amendments simply codified practices and policies in place during the time of Milgaard's s. 690 applications. There remains much to be learned from his experience.

The weaknesses in the criminal justice system which failed Milgaard still exist and can never be entirely eliminated. What is possible however, is an improved response to claims of wrongful conviction. While my recommendations do not bind the federal government, I still am able to comment on the desirability of changes to the law and to the manner in which criminal justice is administered. The conviction review system in Canada is premised on the belief that wrongful convictions are rare and that any remedy granted by the federal Minister is extraordinary. Change is needed to reflect the current understanding of the inevitability of wrongful convictions and the responsibility of the criminal justice system to correct its own errors as I will fully explain later. It is my recommendation that the investigation of claims of wrongful conviction be handled by a review agency independent of government and that the independent review agency, not the federal Minister, act as the gate-keeper. Four public inquiries in this country have already identified the need for substantial change. This will be the fifth.

The Commission's review of David Milgaard's case identified a number of important issues related to Canada's conviction review process:

(a) What is the definition of "wrongful conviction" and what role should factual innocence play in conviction review proceedings?

55 Ibid.

(b) What role should compensation for wrongfully convicted persons play in conviction review proceedings?

(c) What is the appropriate role of the appellate courts in conviction review proceedings?

(d) Is the present system of conviction review responsive enough for the early detection of wrongful convictions? Should the onus be on the convicted person to identify new information that would support a return to the appellate court, or should there be an agency or institution to undertake this task?

(e) Is the federal Minister the appropriate gatekeeper to decide whether a conviction should be returned to the Court of Appeal for review and what is the threshold that should be met to return a case to the court?

### (a) Wrongful Conviction, Miscarriage of Justice and Factual Innocence

There is presently no settled definition of the term wrongful conviction. A wrongful conviction is sometimes equated with a miscarriage of justice. However, a wrongful conviction has also been described as a "sub-category of the broader concept of a miscarriage of justice".[56]

The term wrongful conviction is not used in the *Criminal Code*. The term that is generally used in Canadian criminal law is "miscarriage of justice" which is both a ground for allowing an accused's appeal from a conviction under s. 686(1)(a)(iii) of the *Criminal Code* and a ground for the federal Minister to grant a remedy on conviction review. In the federal Minister's 2007 Annual Report on Applications for Ministerial Review – Miscarriages of Justice, we read:

> When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice may also be suspected where new information surfaces which casts serious doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system, where the relevant legal issues are determined by the courts according to law.[57]

I do not favor a definition of wrongful conviction limited to those who are factually innocent of the crime with which they were convicted. The circumstances in which a conviction can be said to be wrongful are much wider than this. In this regard, I prefer the view expressed by David Kyle, formerly of the CCRC, that wrongful conviction refers to circumstances in which a conviction has been found to be unsafe and has therefore been set aside. He provided the following testimony at the Inquiry:

> Q. Can I ask your comment, or your understanding or your description of two terms that we see in the literature and in the cases, and they are the term wrongful conviction and miscarriage of justice.
>
> A. Uh-huh.

56 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". See http://www.driskellinquiry.ca/pdf/final_report_jan2007.pdf.

57 Supra note 54.

Q. And what do those terms mean to you?

A. Well, I think that the term miscarriage of justice is used quite loosely by people who are considering matters in this area. It's quite interesting I think that the term miscarriage of justice no longer appears anywhere in the 1995 Criminal Appeal Act and indeed the one reference in the 1968 act I think to miscarriage of justice, which was the old proviso test which the Court of Appeal applied, has gone, and from the Commission's point of view, I think that's an extremely good thing because what we're concerned about is not debating the meaning of miscarriage of justice, but considering, on an objective-evidence based, on a – from an objective-evidence based point of view whether or not a person has been rightly or wrongly convicted, so to me, expressing myself from the point of view as a former member of the Commission, **wrongful conviction means either somebody who has been convicted of an offence which that person didn't commit at all, which is what I would describe as someone being innocent in the absolute sense, but equally I regard as a wrongful conviction a situation where somebody who has been convicted of an offence in relation to that person either significant relevant new evidence comes to light subsequently which had it been known to and taken into account by the jury at the trial may have altered their decision as to being sure of the Defendant's guilt or, alternatively, that the process by which the person was convicted was flawed in some significant respect such that it can be said that that person was not fairly convicted in the sense of the proper application of the burden and standard of proof and the proper application of the rules and evidence of procedure which the prosecution is obliged to adhere to in seeking a conviction.**

Q. And again, in your view, then, does a person have to demonstrate or establish factual innocence or innocence in the absolute sense to establish that he has been wrongfully convicted?

A. Not from the point of view of the application to the Commission's test in deciding whether there is a real possibility that the Court of Appeal might find that conviction to be unsafe. I mean, I would make the general observation that whilst, if you do have a situation and you may not ever know whether you do or don't have a situation, but if you do have a situation where someone is innocent in the absolute sense, it would, of course, be very desirable and very gratifying if that could actually be established, **but the reality is that that rarely can be established, it's very rare indeed when carrying out investigations into a conviction which is alleged to be a wrongful one to find wholly-exonerating evidence.** In the great majority of instances where the Commission has referred cases to the Court of Appeal it has been on the basis of that other category of wrongful conviction which I've just described.[58]

Courts do not concern themselves with factual innocence. As stated in "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken":

58 T40043-40046.

> [A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.[59]

In two recent decisions, the Ontario Court of Appeal confirmed that it had no jurisdiction to declare factual innocence as a remedy. Both cases involved appeals referred to the court by the federal Minister under s. 696 of the *Criminal Code*. In *R. v. Truscott*, the Court allowed Truscott's appeal, set aside the conviction against him and entered an acquittal.[60] The subject of factual innocence was discussed by the Court as Truscott's legal counsel asked that the Court not only acquit him but declare him innocent. The Ontario Court of Appeal noted the lack of a statutory basis in Part XXI of the *Criminal Code* for making such a declaration, and commented that establishing factual innocence can be a most daunting task absent definitive forensic evidence such as DNA.

The concept of factual innocence was also considered by the Ontario Court of Appeal in the case of *Her Majesty the Queen v. William Mullins-Johnson*.[61] Mullins-Johnson was convicted of the first degree murder of his four year old niece. He spent 12 years in jail from the time of his arrest until he was released on bail. He protested his innocence throughout. On July 6, 1997, the federal Minister directed a reference to the Ontario Court of Appeal pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*, to determine Mr. Mullins-Johnson's case as if it were an appeal on the issue of fresh evidence. Legal counsel for Mullins-Johnson suggested that this was an appropriate case for the Court to make an order tantamount to a declaration of factual innocence. In declining to do so, the court stated:

> The fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion. With the entering of an acquittal, the appellant's legal innocence has been re-established. The fresh evidence is compelling in demonstrating that no crime was committed against Valin Johnson and that the appellant did not commit any crime. For that reason an acquittal is the proper result.
>
> There are not in Canadian law two kinds of acquittals: those based on the Crown having failed to prove its case beyond a reasonable doubt and those where the accused has been shown to be factually innocent. We adopt the comments of the former Chief Justice of Canada in *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Annex 3, pp. 342:
>
> > [A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of criminal law.
>
> Just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court, which obtains its jurisdiction from statute, has no jurisdiction to make a formal legal declaration of factual innocence. The fact that we are hearing this case as a Reference

59 The Right Honourable Antonio Lamer, "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken" (Newfoundland and Labrador, 2006), Annex 3 – Ruling on the Terms of Reference at 342.

60 2007 ONCA 575, 225 C.C.C. (3d) 321.

61 2007 ONCA 720, 228 C.C.C. (3d) 505.

> under s. 696.3(3)(a)(ii) of the *Criminal Code* does not expand that jurisdiction. The terms of the Reference to this court are clear: we are hearing this case "as if it were an appeal". While we are entitled to express our reasons for the result in clear and strong terms, as we have done, we cannot make a formal legal declaration of the appellant's factual innocence.
>
> In addition to the jurisdictional issue, there are important policy reason for not, in effect, recognizing a third verdict, other than "guilty" or "not guilty", of "factually innocent". The most compelling, and, in our view, conclusive reason is the impact it would have on other persons found not guilty by criminal courts. As Professor Kent Roach observed in a report he prepared for the *Commission into Certain Aspects of the Trial and Conviction of James Driskell*, "there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict" (p. 39). To recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocent and those who benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt.[62]

Factual innocence, although obviously the best reason for remedying a wrongful conviction, should have no necessary role in the conviction review process. It needlessly complicates the detection and remedying of wrongful convictions and sets the bar too high for obtaining a remedy. The focus on factual innocence in the conviction review process ultimately hurt David Milgaard and prolonged his incarceration, which ended only following the decision of the Supreme Court of Canada in 1992.

### (b) Compensation

Following the decision of the Supreme Court of Canada in 1992, Milgaard was released from prison. He was not compensated at that time, his innocence not having been established.

On September 19, 1992, Joyce Milgaard, David Milgaard and Hersh Wolch held a news conference alleging wrongdoing and cover-up by police and Saskatchewan Justice officials. In response to those allegations, the RCMP commenced the Flicker investigation in November 1992. In 1993, Milgaard sought compensation through a civil action against various members of the police and prosecution service, alleging breach of the duty of disclosure, negligence, and wrongdoing. In 1995, he filed a defamation claim against Saskatchewan Justice Minister Bob Mitchell. As reported in a Globe and Mail article, Mitchell allegedly stated in relation to Milgaard: "I think he was properly convicted. I think he did it.[63]

On July 18, 1997, DNA test results were released. The Saskatchewan Minister of Justice publicly stated that Milgaard had been wrongfully convicted of the murder of Gail Miller and that a miscarriage of justice had occurred. An apology was made to Milgaard and to his family. On May 17, 1999, the Saskatchewan Minister of Justice announced that a settlement on compensation had been reached, the total value of which was $10 million. The federal government contributed the sum of $4 million to the compensation package.

The issue of compensation for Milgaard has been resolved. It is not within my Terms of Reference to inquire into the questions of when or in what amounts compensation should be paid to the wrongfully convicted. However, in the course of inquiring into Milgaard's case, two matters related to the issue of compensation came to my attention that require comment.

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62 Ibid at 511-512.
63 Docid 164842.

Firstly, it became clear to me that it is essential to keep concerns relating to compensation out of the conviction review process. It is a mistake to attempt to use the criminal process as a vehicle for obtaining declarations of factual innocence in order to lay the groundwork for a compensation claim. The conviction review process must not be hampered by either the wrongfully convicted individual's desire to receive compensation, or, a desire on the part of the authorities to avoid payment. The only concern of participants in conviction review must be the safety of the conviction. Preoccupation with factual innocence makes it more difficult for the wrongly convicted to obtain a remedy and, ultimately, liberty. The fundamental concern of the conviction review process must be that those who are wrongly convicted and imprisoned regain their freedom.

At the Inquiry, David Kyle testified that the CCRC does not concern itself with questions of innocence or guilt. The only concern of the CCRC is to determine whether there is a real possibility that a conviction would not be upheld by an appeal court. If innocence was a consideration, the test for obtaining a remedy would ultimately be much harder to meet. Kyle expressed his view that issues of compensation and the safety of the conviction must be kept entirely separate:

> ...And I hope that if, sort of, one thing stands out from the evidence that I have been giving to this Commission, I think the two questions are entirely separate. Whether or not somebody has been wrongfully convicted, I think, is a matter of quite wide interpretation, as I was endeavoring to explain yesterday. Whether someone who has been wrongfully convicted is entitled to compensation is an entirely separate question, and that's a matter for which the criteria can be set as a wholly distinct exercise and, as it happens, the legislation in the *Criminal Justice Act 1988*, I think, is being treated by the Home Secretary as effectively saying 'compensation will be paid if I'm satisfied beyond reasonable doubt that this applicant is factually innocent, and not otherwise.'
>
> ...
>
> ...I think the question of whether – there is much – there is much more to being – having a record of a conviction against you, in terms of its impact on your life generally, than the question whether you should – whether you get any monetary compensation for having been prosecuted in the first place. And if you haven't been rightly convicted in the wider sense, as I was describing it yesterday, then you should not have that conviction recorded against you because of the impact it is likely to have on virtually the whole aspect of – virtually every aspect of your life.[64]

Secondly, in my view (contrary to the English position), proof of factual innocence should not be a sine qua non for entitlement to compensation. It is too hard to prove, and official wrongdoing or egregious error leading to wrongful conviction should in themselves be compensable.

A further aspect of compensation is public exoneration through a declaration of factual innocence. This should be left to the Executive and not the courts, for reasons explained above. Neither should it be expected of commissioners conducting public inquiries into wrongful convictions, unless their terms of reference call for consideration of such a finding.

64 T40234-T40239.

AIDWYC submits that an acknowledgment of factual innocence is important to the wrongly convicted for several reasons. Firstly, for the wrongly convicted, there is nothing as important as public recognition of factual innocence. In its submissions before Commissioner Lamer in Newfoundland, AIDWYC stated:

> The harder truth, however, is that, in the public eye, there is a terrible disconnect, a moral chasm, between 'legal' and 'factual' innocence, between a finding of 'not guilty' and a declaration of 'wrongly convicted'.[65]

Secondly, AIDWYC notes that factual innocence is important in the assessment of whether compensation should be payable, and in what amount. In Canada, it is often the case that compensation is not paid to individuals who have suffered as a result of a wrongful conviction, unless factual innocence can be established.

Given the need to establish factual innocence for compensation, courts have been asked to make declarations of factual innocence. So far, as the cases of *Truscott* and *Mullins-Johnson* demonstrate, they have been unwilling to do so for public policy reasons and lack of jurisdiction, declaring that the criminal process is "not a vehicle for declarations of factual innocence".[66]

Many writers have criticized the idea of establishing factual innocence as a criterion for compensation because it detracts from the integrity of the presumption of innocence.

An often cited article on the topic of compensating the wrongly convicted is H. Archibald Kaiser's article entitled "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course".[67] Kaiser states that his article is focused on the special problems raised by the cases of individuals most grievously wronged in the Canadian criminal justice system: those who have been in prison following a criminal conviction (and an unsuccessful appeal), where the verdict later turns out to have been reached in error. His article deals with the question of how these individuals should be compensated, given that most people would view them as victims of a miscarriage of justice. His thesis is that a more liberal approach to compensation than has as yet been adopted by the federal and provincial governments should be implemented.

Kaiser discusses the Federal and Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons which were adopted by provincial and federal Ministers of Justice.[68] These guidelines are not legislatively enacted by any level of government. It was recently noted by Commissioner LeSage in the Driskell Report that these guidelines are presently under review.[69] The Guidelines state that "compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty)." In arguing that a more liberal approach should be taken to compensation, Kaiser says:

> It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under

65 Written submissions of the Association in Defence of the Wrongfully Convicted (AIDWYC) Re Commission's Terms of Reference dated October 17, 2003, filed with the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken.

66 Supra note 61 at 512.

67 (1989) 9 Windsor Y.B. Access Just. 96.

68 Guidelines for Compensation for Wrongfully Convicted and Imprisoned Persons, undated.

69 Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Manitoba, 2007) at 144. see also http://www.driskellinquiry.ca/.

the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:

> ...one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower... There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted.[70]

In a paper delivered in June 2005 to the AIDWYC conference, former Justice Marshall argued that while factual innocence would obviously bring an individual within the ambit of the wrongly convicted, it would be unfair and dangerous to so limit the definition:

> This paper argues that redress for the wrongly convicted should extend beyond the confines of factual innocence to at least instances where the miscarriage of justice has been materially influenced by egregious error or conduct by officers or agents of the state.[71]

In his report on the Driskell Inquiry, Commissioner LeSage noted that the term wrongful conviction was used by Professor Roach "to describe actual/factual innocence, as opposed to legal innocence where the Crown merely fails to discharge its burden", and stated his own view that the term wrongful conviction ought not to be equated exclusively with factual innocence.[72]

While I am of the view that compensation should remain within the purview of the Executive, a criterion of factual innocence as the basis for paying compensation seems unduly restrictive. At one end of the scale, a wrongful conviction can result from trial errors, investigative oversight, and a host of other reasons short of official wrongdoing, which have not traditionally been regarded as calling for compensation. At the other end, a wrongful conviction can mean that an innocent person was convicted and where this has been shown, compensation has followed in many cases. Between these extremes, wrongful convictions can result from a wide range of official misbehavior - from ethical breaches to criminal conduct. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence.

### (c) Role of Appellate Courts in Conviction Review

The *Criminal Code* bestows power on provincial courts of appeal to overturn criminal convictions on a number of grounds including "a miscarriage of justice".

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

70 Supra note 67 at 139.
71 Supra note 10 at 6.
72 Supra note 69 at 139-142.

> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> ...
>
> 686(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial.

Appeal courts also have the power to hear "fresh evidence" on an appeal from a conviction (s. 683(1)). The Supreme Court of Canada stated the principles in *Palmer v. the Queen*:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[73]

Provincial courts of appeal cannot declare factual innocence, but in setting aside a wrongful conviction they restore to the appellant the presumption of innocence, a legal concept relating to the maxim that every accused is presumed innocent until proven guilty beyond a reasonable doubt.

Appeal courts usually deal with convictions soon after they are entered, but in most cases of wrongful conviction, new information providing a basis to challenge the conviction becomes known only after all appeals are exhausted. Such was Milgaard's case.

He was convicted on January 31, 1970 and his appeal was argued on November 6, 1970. The Court of Appeal rendered its judgment on January 5, 1971. At the time Tallis argued before the Court of Appeal, Fisher had been apprehended and confessed to two of the four Saskatoon attacks and was being investigated for the other two. There is no evidence that any police or Crown officer connected Fisher to Miller's murder at this time.

Twenty-two years later, the Supreme Court of Canada in the Reference Case concluded that evidence of the Fisher rapes might reasonably have affected the verdict of the jury, entitling Milgaard to have his conviction set aside and a new trial ordered.[74] Presumably a similar result would have ensued in 1970, had Tallis known of the Fisher proceedings and raised them as fresh evidence before the Court of Appeal.

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73 [1980] 1 S.C.R. 759 at 775.

74 *Reference Re Milgaard (Can.)*, [1992] 1 S.C.R. 866. See also Docid 058828.

Our criminal justice system is already properly equipped with a procedure to provide appellate review of the safety of convictions entered by a Court or jury at trial. There appears to be no dispute that appellate courts in each province are the proper forums to consider and rule upon the safety of convictions, whether heard by way of appeal in first instance or by a return to the Court as part of the system of conviction review. The critical questions are to determine the circumstances in which a convicted person can have another opportunity to have a conviction reviewed by the appellate court, and who is best suited to properly make that decision.

### (d) Who Should be Responsible to Detect Wrongful Convictions?

In the current system, the convicted person bears the sole onus of investigating his own wrongful conviction to identify grounds to support an application for review. Placing the onus on an applicant to identify error and to provide all possible grounds to establish a likely miscarriage of justice gives rise to the following problems:

1. The convicted person is not always able, and certainly not the best equipped, to identify grounds to support a wrongful conviction. He is usually incarcerated, has few if any resources, and lacks the expertise needed to analyze and detect what may give rise to a remedy. He will usually rely upon the skills and advice of family, friends and advocates, who, although well intentioned, typically are very emotional and focused on innocence and compensation rather than upon the identification of specific grounds supporting a claim of wrongful conviction.

2. Few are fortunate to have the assistance of legal counsel. The identification of grounds to support a remedy is a difficult task even for legal counsel. A remedy should not be dependent upon legal counsel's skill and competence or the lack thereof.

3. The premise that a convicted person is in the best position to identify the grounds of a wrongful conviction is flawed. In many wrongful convictions, it is not what is known by the convicted person that will give rise to a remedy, but rather what is unknown. New information, not known at the time of trial, is needed to support the request for a remedy. Sitting through his own trial did not put Milgaard in a position to know that the Fisher information could have provided a basis to challenge his conviction. Nor did it help him to recognize procedural errors.

4. A convicted person does not have coercive power to gain access to documents such as police and crown files, nor does a convicted person have any right to compel witnesses to be interviewed.

5. Requiring the convicted person to investigate his case to detect his own wrongful conviction, can put the convicted person and his agents in contact with witnesses. This can be counter-productive. The valuable recollections of a witness may be influenced by positions taken by the convicted person, or by improperly conducted interviews.

6. By compelling the convicted person to investigate and detect his own case, it is inevitable that it will take far longer to detect and remedy a wrongful conviction. Joyce Milgaard spent eight years investigating and gathering information only to file an application which put forward two grounds that lacked substantial merit.

7. The role of federal Justice lawyers in reviewing and testing information put forward by an applicant invites an adversarial approach to the process. The process would be better served by a proactive and inquisitional approach on the part of legal counsel for the Minister.

A convicted person should not bear the heavy burden of reviewing his or her conviction to identify grounds to challenge the conviction. An independent agency with expertise and sufficient powers is better suited to the important task of exposing wrongful convictions, and identifying and investigating grounds that support a return of the conviction to the Courts for review.

### (e) Is the Federal Minister the Appropriate Gatekeeper to Determine Whether Convictions Should be Returned to the Court for Review?

There is a difficulty in considering the handling of the s. 690 applications by Justice Canada investigators. It is a constitutional one which places the operation and management of a federal entity outside the purview of a provincially appointed public inquiry. Williams and Pearson, however, generated a great deal of information which came to the attention of Saskatchewan Justice and the police and which potentially might have justified an earlier reopening of the case. To answer the question of whether it did, we necessarily had to look into the quality of the information they generated while refraining from any criticism of the manner in which they conducted their affairs.

Justice Canada, relying on constitutional prerogative, stoutly resists any effort to inquire into the reasons for actions or advice between federal officials in connection with s. 690 applications. At the same time, Minister Campbell justified her decision to refuse the first application, by referring to advice she received from outside counsel, retired Supreme Court Justice William McIntyre, not specifying what the advice was.

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

Brown, of Saskatchewan Justice in commenting upon the s. 690 process, observed that Justice Canada has sole jurisdiction, but the subject matter of its investigation originates in the province, and if a remedy is granted involving the courts it will usually find its way back to the province. Another difficulty is that this applicant saw federal investigators as just more "prosecutors" whose mindset favored the conviction. I am satisfied that that was not the case, but the perception could be removed by the use of an independent agency to review wrongful convictions. Such an agency would also be free of the constitutional prerogatives which Justice Canada feels compelled to invoke to restrict the flow of information. That said, any agency might feel the need to control information in the course of its investigation, which would not sit well with some people, but at least reasons for its decision could be more transparent.

With respect, Justice Canada officials devoted much care to this case, but in general it may be said that the s. 690 process under which they worked had a certain built in lack of transparency on the investigative side.

In their application for judicial review in the course of this inquiry, Justice Canada argued that what Williams and other federal officials did was irrelevant to us. The argument was found not to be within the context of the judicial review, but the fact that it was even made indicates a climate of secrecy and parochialism in Justice Canada. This is ill suited to the investigation of claims of wrongful conviction, which necessarily involve aspects of both provincial and federal jurisdiction.

Without question, some of the information gathered by Justice Canada investigators in the s. 690 process was being passed along to Saskatchewan Justice, and therefore became relevant to the reopening of the investigation into the death of Gail Miller.

Another problem with the use of Justice Canada as an investigative agency in matters of wrongful conviction arises from the public failure to distinguish between Justice Canada and the Provincial Crown. According to Brown, Saskatchewan had an interest in the public's perception of how the s. 690 process was going. The media kept reporting a lack of response to its inquiries, which Justice Canada would not answer, and which Saskatchewan Justice felt constrained from answering.

As matters now stand, even if the Minister of Justice believed that, in order to reassure the public that the process had been fair, it was necessary to release an opinion she had sought, she could not. That, it seems to me, is an excellent reason to move the wrongful conviction business to another agency.

Milgaard's case became highly politicized as his supporters actively sought the attention of the media. Joyce Milgaard's confrontation with Justice Minister Kim Campbell in Winnipeg on May 14, 1990 was widely reported in the news media. Later, on September 6, 1991, she spoke to Prime Minister Brian Mulroney, in an encounter that was also widely publicized. She asked that David be transferred to a minimum security institution. Milgaard's request for a transfer to minimum security Rockwood Institution was approved at the end of October, 1991. During their September 6, 1991 meeting, the Prime Minister mentioned to Joyce Milgaard that he would be talking to the Justice Minister when he returned to Ottawa.

The Order-In-Council which referred the case to the Supreme Court of Canada on November 28, 1991 specifically mentioned widespread concern over whether there was a miscarriage of justice in the conviction of Milgaard, and that it was in the public interest for the matter to be inquired into.

Federal Justice Minister Campbell held a press conference on November 29, 1991, to announce that Milgaard's case had been referred to the Supreme Court of Canada. She stated that in order for her to grant a remedy under s. 690 of the *Criminal Code*, she had to be satisfied that there were reasonable grounds for believing that there was likely a miscarriage of justice. She emphasized that in referring the matter to the Supreme Court of Canada she had not come to any conclusion on whether a miscarriage of justice had occurred. She had not formed an opinion because she was faced with evidence, the value of which she was unable to ascertain, without the advice of the Supreme Court of Canada. She acknowledged that given growing public interest and concern, the case deserved a judicial and public examination. However, she denied that the case had ever been dealt with in a political way or that she had been influenced by media discussion.

While neither testified at the Inquiry, both former Minister of Justice Kim Campbell and former Prime Minister Brian Mulroney have, in their memoirs, discussed the handling of Milgaard's conviction review applications.

Campbell's book entitled "Time and Chance: The Political Memoirs of Canada's First Woman Prime Minister", was published in 1996.[75] In Chapter 10, "Doing the Right Thing", she discussed her handling of Milgaard's two s. 690 applications. On the subject of Prime Minister Brian Mulroney's meeting with Joyce Milgaard on September 6, 1991, Campbell complained:

75 Kim Campbell, *Time and Chance: The Political Memoirs of Canada's First Woman Prime Minister* (Toronto: Doubleday Canada Limited, 1996).

> ...The PM had blindsided me on one of my most difficult issues. In the eyes of the media, the meeting signalled that the PM was involved. Norman Spector, the PM's chief of staff, called to assure me, somewhat sheepishly, that Mulroney had said nothing to Mrs. Milgaard about the section 690 application but had only agreed to look into her concerns about her son's living conditions in prison. Several months later, we began to understand the thinking behind this inappropriate intervention. In a chat with the B.C. caucus, Hugh Segal, who replaced Spector in early 1992, talked about the upcoming election and efforts to improve the PM's image. He then turned to the Joyce Milgaard incident in Winnipeg and said something like, "That's the kind of thing he should be doing more of. It was brilliant and portrayed a side of him that the people haven't seen before."
>
> As I told the press, Brian Mulroney was much too good a lawyer to intervene improperly in this matter. He never breathed a word to me about Milgaard, nor did anyone in his office ever attempt to influence my handling of the case. However, Joyce Milgaard is convinced he did, and the media accepted this view. This sort of thing made it very difficult to establish that the only motivation guiding me and my officials was a desire to make the right decision.[76]

In his book "Memoirs: 1939-1993", Brian Mulroney indicates that he did intervene in the matter of Milgaard's application for conviction review.[77] He writes of being privately furious with Campbell over the manner in which she brushed off Joyce Milgaard during their public encounter on May 14, 1990, and relates:

> When I got back to Ottawa, I arranged for a fast review of David Milgaard's medical condition. He was soon transferred to a minimum-security institution. In an exchange of letters with Mrs. Milgaard, I told her, "I too, hope the matter will soon be resolved." I then had Hugh Segal summon Justice Minister Kim Campbell to my parliamentary office in Centre Block, where, because of the sensitivity of the matter, I met with her alone, although I debriefed Hugh Segal and Gilbert Lavoie immediately after.
>
> "The matter had been reviewed by the department and I have conveyed our decision," she told me.
>
> "Kim," I answered, "that is not acceptable to me. The law provides for a reference to the Supreme Court, and it is my intention to ensure that this case is in fact referred to the Supreme Court."
>
> My tone was firm and my words unequivocal. She understood and changed her tack quickly.
>
> "Prime Minister," she answered, "if this is the case, may I make the announcement myself?"[78]

While the recollections of Campbell and Mulroney differ, on either account the Prime Minister intervened (successfully, on his word) in a statutory process which only nominally engaged the prerogative of mercy.

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76 Ibid at 195.
77 Brian Mulroney, *Memoirs: 1939 – 1993* (Toronto: McClelland and Stewart, 2007).
78 Ibid at 901.

Inevitably, the federal Minister's decision was perceived as being political. The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy in a media campaign, a war in which the truth is likely to be the first casualty. Although it can be said that the Milgaard case was unprecedented in the intensity of its media campaign, other wrongful conviction advocates have also relied upon public support to put pressure on the federal Minister.

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

### 5. The British Model (Criminal Cases Review Commission)

One of the reform options considered by the federal Minister prior to the enactment of ss. 696.1 to 696.6 was the creation of an independent tribunal to facilitate the investigation of alleged cases of wrongful conviction. The Minister's 1998 Consultation Paper pointed out the Criminal Cases Review Commission (CCRC), established in the United Kingdom in response to high profile cases of wrongful conviction, as an example of a system in which conviction review is handled by an independent body.[79]

The Commission heard evidence from David Kyle, one of the founding members of the CCRC, on how the CCRC conducts investigations into cases of alleged wrongful convictions. Kyle served as a Commissioner with the CCRC from 1997 until his retirement in August, 2005. He provided the Commission with valuable insight into the reasons for the creation of the CCRC and its operation.

Kyle traced the history of the Commission for us. He explained that initial member appointments were not drawn from amongst those championing the correction of miscarriages of justice. He himself had been a prosecutor for 23 years. This was a help and put him at no disadvantage. One of the Commission's strengths is its wide profile – defence, prosecution and policing are represented.

Prior to the creation of the CCRC in 1997, the system for conviction review in the United Kingdom was very similar to the current Canadian system. Where appeals were exhausted, a convicted person could not challenge his conviction, unless the Home Secretary, an elected politician, referred his case back to the Court of Appeal. Applicants were responsible to investigate their own case to identify grounds to warrant a review by the Home Secretary, who had the discretionary power to refer a conviction back to the Court of Appeal if he saw fit.

Following widespread concern over several high profile cases of wrongful convictions in terrorist bombing cases, the Home Secretary, in 1991, established a Royal Commission on Criminal Justice which was given wide terms of reference to examine the effectiveness of the criminal justice system in England and Wales. The Runciman Report on the Royal Commission on Criminal Justice was presented to Parliament in 1993.[80] It recommended the establishment of an independent body to consider and investigate suspected miscarriages of justice, and the responsibility for conviction review was thereafter removed from the Home Secretary.

79 For information on the CCRC see the CCRC website at http://www.ccrc.gov.uk/.
80 The Royal Commission on Criminal Justice (London: HMSO, 1993).

The report leading to the establishment of the CCRC said:

> The last part of our terms of reference requires us to consider whether changes are needed in the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted. Almost all of those who gave us evidence argued that the arrangements should be changed, with the responsibility for reopening cases being removed from the Home Secretary and transferred to a body independent of the Government. We agree that there is a strong case for change. We therefore argue in this chapter for the establishment of a new independent body to consider allegations of miscarriages of justice, to arrange for their investigation where appropriate, where that investigation reveals matters that ought to be considered further by the courts, to refer the cases concerned to the Court of Appeal. We discuss in some detail the role of such a body, its relationship to the courts and to the Government, its composition and how it should be held accountable, the powers it may need to investigate cases, and how those cases should be selected.[81]

The motivating factors behind the creation of the CCRC were described by Kyle in "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission":

> The Royal Commission voiced two principal concerns about the Home Secretary's role in relation to miscarriages of justice. **First, examination of how the role was exercised revealed a restrictive and essentially reactive approach by the Home Office characterized by the absence of investigative initiative.** Secondly, this role assigned to the Home Secretary was incompatible with the constitutional separation of powers between the courts and the executive; indeed, trying to keep them separate had contributed to the reluctance of the Home Office to enquire deeply enough into cases it was asked to consider. Put another way, it was undesirable for the Home Secretary to be directly responsible for reviewing suspected miscarriages of justice as well as being responsible for law and order and the police.[82]

It was recognized that the state should bear the responsibility to facilitate the investigation of wrongful convictions, and that it was neither appropriate nor expedient to leave this up to the convicted person. One of the mandates of the CCRC is to investigate an alleged wrongful conviction based solely upon an application by a convicted person. The convicted person no longer bears the heavy burden of reviewing his or her conviction to identify grounds to challenge the conviction. The CCRC consists of people with significant expertise and appropriate powers to review convictions and identify those grounds that may give rise to a remedy.

The CCRC is not a servant or agent of the Crown, but rather an independent commission. Commissioners are appointed on the recommendation of the Prime Minister, and there are to be not fewer than 11 members. At least 1/3 of the Commissioners must be legally qualified and at least 2/3 must have experience or knowledge of some aspect of the criminal justice system. One of the strengths of the Commission is the diverse backgrounds of the various Commission members, including non-legal perspectives. In addition to the Commission members, the CCRC employs a staff of case managers and administrators. The Commissioners determine whether to refer cases to the appeal courts. Much of the

81 Ibid at 180. See also docid 340178.

82 David Kyle, "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission" (2004) 52 Drake L. Rev 657 at 661.

investigative work is conducted by case review managers. Some case review managers are lawyers, but people from a wide variety of backgrounds fill this role.

Parliament also concluded that a member of government should not act as gatekeeper in deciding whether a case should be returned to the Court of Appeal. This function was transferred from the Home Secretary to the CCRC. By combining the investigation and the gatekeeper functions, the efficiency of the conviction process improved. The CCRC is knowledgeable about the grounds that have a chance of succeeding before the Court of Appeal, and can tailor its investigative efforts to identify meritorious grounds.

The CCRC has been in operation for 10 years and represents a significant improvement in the manner in which wrongful convictions are detected, investigated and remedied in the United Kingdom. The following is a more detailed review of its process.

### (a) The Application and Investigation

Anyone convicted of a criminal offence in England, Wales or Northern Ireland can apply to the CCRC. Generally speaking, the CCRC will accept an application if (1) there has already been an appeal (or leave to appeal has been refused) and there is some new factor which the Courts have not considered before, or (2) there are exceptional circumstances.

The huge bulk of applications come from applicants directly, with no involvement from legal counsel. The CCRC has a comprehensive website and undertakes initiatives to ensure that it reaches its audience of potential applicants.[83] The application form on the website is written in plain language and is designed to be completed, with relative ease, by an applicant. The application form states:

> This form is for anyone who wants us to review a conviction or sentence that they think is wrong. We have written the form as though the person who was convicted is going to fill it in, but anyone can do this for them.

The applicant is asked to answer all of the questions if he or she possibly can, and is advised that if assistance is required, the CCRC should be contacted. The applicant is asked to tell the CCRC what he or she thinks went wrong and what is new about the case. The applicant is also asked to send the CCRC papers (if able to), and is advised that if the applicant does not have them the CCRC can obtain them. The form includes an authorization to be signed by the applicant allowing the CCRC to contact the applicant's solicitor for the purpose of collecting information and documents about the case.

The applicant is not required to investigate his own case and in fact is encouraged not to, lest it impede the work of the CCRC. Most applications appear in the form of a letter from the complainant. The CCRC listens carefully, but also looks at the case as a whole. It is more proactive than reactive. This cannot be said for Justice Canada who sees its role as the careful examiner of the best case the applicant can put forward.

The CCRC is a non-departmental public body, internally governed, and as such can be perceived as independent. The Home Office has a legitimate interest in the resources of the CCRC but not in its casework. As to informing prisoners of their rights, Kyle acknowledged that potential applicants are typically poor, in prison, and suspicious. But he said that the CCRC's literature is in every prison and they

83 Supra note 79.

have made a conscientious effort to inform prisoners. The CCRC encourages applicants to send what they have, but regards it as its own responsibility to get what it needs.

They have about 40 written policies, operational and legal. Their objective is consistency. Prodding from lawyers or Members of Parliament is not needed.

It is the policies and procedures which are transparent to the public, not the progress of individual cases.

Once an application is received, the CCRC decides how extensive the investigation should be, and what avenues should be pursued. The CCRC sees it as its responsibility to obtain the information necessary to conduct a proper review of the case. This usually includes the police, prosecution and defence files.

The CCRC takes a proactive role in the investigation of applications as Kyle described at the Inquiry:

> Q. Is there an expectation or a requirement that an applicant himself or herself investigate and come to your Commission with the grounds for the application?
>
> A. There is no requirement or expectation that they will do so. Generally speaking – the vast majority of applications received by the Commission appear in the form of a letter written by the applicant possibly from prison in which the applicant gives their understanding of why they think that they are the victim of a miscarriage of justice and quite often, as you might imagine, the reasons why they think things have gone wrong may actually bear no relationship at all to the actual reason why things have gone wrong, and if I tell you, for example, that one of the commonest expressions of grief in applicants who apply to the Commission is that their lawyers didn't act for them properly, that again, as will come as no surprise to hear, is very rarely the basis for referring a case back for an appeal, **so we certainly don't expect them to have done any investigative work of their own**.
>
> Sometimes if they are represented for the purpose of making an application they may have done some investigative work, but our experience leads us to think that if the case is to be investigated by the Commission, **we would actually much prefer it if we could identify the areas of investigation which we wish to undertake and how they should be structured rather than to have something which has been precooked sent to us.**
>
> Q. And so I take it from that that an applicant who may put forward a ground or two in his or her letter to the Commission, that that doesn't limit the Commission in the grounds that they investigate; in fact, it may be that the Commission looks at what it thinks are more appropriate. Is that fair?
>
> A. That's absolutely fair. I mean, the Commission is very interested to consider very carefully what applicants have to say because they are quite likely to be in a better position than anybody else to know where things have gone wrong, but what the Commission does is look, having looked carefully at what the applicant has to say about the predicament he or she finds themselves in, that then to look carefully at the case as a whole an, as I say, this is why this early investigation into how things have

got to where they are is so important, to be able to identify where there are issues which could make a difference to the safety of the conviction.

Q. There are some writers that have described your Commission as being more proactive than reactive as far as the investigation, and would you agree with that description?

A. Yes.[84]

The CCRC has the expertise to investigate the cases of those who feel they have been wrongly convicted or unfairly sentenced. In fact, it is now the expectation, on the part of applicants and their legal counsel, that the CCRC will undertake the investigation of alleged miscarriages of justice. Kyle stated that the CCRC much prefers to do the investigation on its own as it, and not the applicant, has the expertise. He testified as follows:

Q. And can you tell us, what would you see as being the advantages of the Commission investigating possible wrongful conviction, miscarriages of justice, or reviewing information, as opposed to the applicant and/or the applicant's – people assisting the applicant?

A. Well I think the big, the greatest risk with leaving the investigation to the applicant or their representatives – and we've already identified one risk, which was articulated in the Royal Commission report – was that that encouraged the person who was going to make the decision whether to refer the case or not somewhat inactive and put in too – laying too much store by what the applicant was able to come up with by way of persuasion to refer the case back.

But when one looks, say, assuming the investigation is to be done, **the strength, I think, of the Commission doing it rather than leaving it to the applicant is that the Commission, all things being equal, is likely to have a far better understanding of what it is about the case that needs investigating and to what end that investigation is best directed.**

So if we take, for example, a situation where you have a case which was dealt with, in terms of trial, many years ago, and the applicant and his legal representatives are absolutely convinced that witnesses at the trial many years ago either didn't tell the truth or could have said something different and they convince themselves that this is the case, so they run back to the witnesses and ask them to give them another statement telling them what happened 25 years ago, now I think the Commission's view in such circumstances would be that it's extremely unlikely that asking a witness to give a version of events from memory 25 years ago, even if it differed from the evidence which was given at trial, is actually likely to be given a great deal of weight either by the Commission or, indeed, by the Court of Appeal. Because all you're doing is playing off the same witness, playing off the same witness' recollection over a long period of time, but an applicant or representative may be very firmly of the view that that is the best way of doing the investigation whereas in fact the actual, the more effective investigation, might be on very different lines.

84 T40032-T40034.

> And I think, from the point of view of the investigation being an effective one and producing material which has a positive outcome so far as any decision to refer the case is concerned, it is better that if you have a body, as we do with the CCRC, who has both this investigatory and decisive role, that the advantages are very much in favour of the Commission identifying lines of inquiry and how they should be pursued and the objectives which those investigations are – seek to achieve.[85]

The CCRC has wide ranging investigative powers and can obtain and preserve documentation held by any public body. It can also appoint an investigating officer from another public body to carry out inquiries on its behalf. Kyle indicated that while the CCRC has the power to compel the production of documents, it does not have any power to compel witness interviews. The CCRC has not, on the whole, encountered problems in speaking to witnesses but Kyle advised that the CCRC would like to see legislative change in this area.

In some cases, the CCRC will interview the applicant but this is not done routinely. The CCRC does not require the applicant to assert that they did not commit the crime. As discussed in greater detail below, Kyle explained that the circumstances in which a conviction might be unsafe are far wider than the narrow question of whether the applicant is factually innocent.

Kyle said that the CCRC routinely informs applicants of what lines of inquiry are being taken, but generally they do not disclose evidence as they find it. Applicants should be made to understand that they are not partners in the investigation. They are given a chance to make submissions and the commission gives reasons for both referrals and refusals. Internal work of the members such as advice, memos and discussions are not shared with the applicant. The information to be disclosed is that which supports the decision. An applicant may re-apply.

### (b) Test for Referral

In deciding whether to refer a case back to the Court of Appeal, the CCRC employs the "real possibility" test set out in section 13 of the *Criminal Appeal Act 1995*.[86] If the Commission is satisfied that there is a "real possibility" that the conviction will be quashed by the Court of Appeal, it shall refer the case back to the Court of Appeal. A decision to refer a case to the Court of Appeal can only be made by a committee of at least three commissioners.

The Commission serves as a gatekeeper to the Court of Appeal to whom it refers cases. The Commission does not concern itself with guilt or innocence, just whether there is a real possibility that the conviction is unsafe. The court decides whether the conviction is safe and, if it is not, they must quash it.

The CCRC's concern is whether a person is rightly or wrongfully convicted, considered on an objective, evidential basis. Wrongful conviction can mean that someone has been convicted of an offence which he did not commit – he is innocent in the absolute sense – or it can mean that a person was convicted in a flawed trial or because significant, relevant, new evidence has come to light which might have affected the verdict of a jury. The real possibility test has to be applied in finding new evidence or a new factor which could have caused the trier of fact to act differently.

85 T40148-T40151.
86 *Criminal Appeal Act 1995* (U.K.), 1995, c.35.

The Commission does not reassess matters which a jury has considered. Kyle said that they try to identify lines of inquiry likely to result in a remedy. They look for time and resource effective investigative paths through a rigorous process of investigative planning.

Where a decision to refer is made, a statement of reasons is issued and the case is sent to the Court of Appeal. The statement of reasons is a comprehensive document, setting out the case at trial, the issues on appeal and the investigative steps taken. It also contains the CCRC's analysis of the facts and issues, and the impact of new information on the safety of the conviction. A copy of the reasons for making the reference is sent to every person likely to be a party to the appeal proceedings. Kyle explained the grounds of appeal are now limited to those identified by the CCRC in its statement of reasons, unless the applicant obtains leave to extend the grounds. If the case if referred to the Court of Appeal, the involvement of the CCRC is at an end. The applicant is required to prepare and argue the appeal. The Court of Appeal will allow an appeal against conviction if they think that the conviction is unsafe.

Kyle discussed the test for making a reference to be that "...there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made".[87] The reference must be made on argument or evidence not raised in the proceedings which led to it – for example, either at trial or on appeal. And the weight of the new evidence or new argument must be such as to provide the basis for a serious challenge to the safety of the conviction. Examples are new forensic evidence and evidence from recently discovered witnesses. An uncorroborated recanting witness will not likely provide reason enough for a referral. The Court of Appeal is cynical about them. There are two types; one recants his trial evidence and the second comes forward to take all the blame when two people have been convicted. All sorts of pressures cause witnesses to recant, some having nothing to do with the truth. Elapsed time is an important consideration. "What caused you, after all this time, to come forward?" Only a handful of cases have been sent to the Court of Appeal based on recantations but, that said, a recantation can cause inquiry into other evidence at trial.

Where a decision is made not to refer a case to an appeal court, the CCRC must also provide a statement of reasons for its decision to the applicant. As a matter of fairness, applicants are given an opportunity to make further representations. They are given 20 working days to respond to a provisional view not to refer their case. If no response is received, a statement of reasons is then issued and the case is closed. If a response is received, any issues raised by the applicant are considered and the case is passed to a Commissioner to make a decision. If there are grounds to refer the case, a statement of reasons is issued and the case is sent to the appeal courts. If there are no grounds to refer the case, a statement of reasons is issued and the case is closed.

In Kyle's words:

> ....If we make a decision to refer a case to the Court of Appeal, we make that decision, and articulate the reasons for doing it. If we are thinking that this is a case – and this is so in the majority of the cases that the Commission deals with – that it's not a case where there is a basis for referring the case to the Court of Appeal, then we are required to indicate that as a provisional conclusion, and invite representatives – invite further representations from the applicant which we can then take into account before making the final decision not to refer a case. And there is the further requirement that, at the point of notifying the applicant of a provisional conclusion that there are no grounds for referral,

87 T40112.

we are required to disclose all the evidence and information that we have relied on for the purpose of reaching that provisional conclusion." (T40102-40103)

...

"Q. And we'll see some statistics later, but I think about 70 percent of the cases you send to the Court of Appeal result in a remedy; is that roughly –

A. Between 60 and 70, yes.

Q. And from your perspective, is that the right number as far as the real possibility?

A. Well, the real – there is no definition of real possibility and necessarily there has to be a gap between the real possibility evaluation and the outcome in the Court of Appeal itself, and although there may be some who think that the gap is not wide enough, the view which the Commission has traditionally taken is that to find the Court of Appeal, if you like, agreeing with our evaluation in two-thirds of the cases and disagreeing with one-third suggests that we are applying a responsible approach to our evaluation of what is a real possibility.

Q. And is it correct to say that your Commission does not decide the guilt or innocence of an applicant?

A. No, it doesn't.

Q. And does not directly provide a remedy setting aside the conviction or anything of that nature?

A. No.

Q. And that it's up to the court to decide, whether or not the verdict is safe?

A. Yes.

Q. And your role is simply to decide whether or not the applicant should have another chance to go there?

A. Yes.[88]

Kyle spoke of the meaning and practical application of the "real possibility" test used. He described it as setting a relatively low threshold. In his article entitled "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission", he wrote that: "Real possibility is not defined by the statute, and the Commission has consistently taken the view that it should not be given a restrictive interpretation, a view with which the court is on the face of it content."[89] The courts have described "real possibility" as "more certain than an outside chance or a bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty."[90]

88 T40102-T40103; and T40039-T40040.
89 Supra note 82 at 666.
90 Ibid.

The CCRC does not concern itself with questions of guilt or innocence in the absolute sense but rather the safety of the conviction.

Q. And again, in your view, then, does a person have to demonstrate or establish factual innocence or innocence in the absolute sense to establish that he has been wrongfully convicted?

A. Not from the point of view of the application to the Commission's test in deciding whether there is a real possibility that the Court of Appeal might find that conviction to be unsafe. I mean, I would make the general observation that whilst, if you do have a situation and you may not ever know whether you do or don't have a situation, but if you do have a situation where someone is innocent in the absolute sense, it would, of course, be very desirable and very gratifying if that could actually be established, **but the reality is that that rarely can be established, it's very rare indeed when carrying out investigations into a conviction which is alleged to be a wrongful one to find wholly-exonerating evidence.** In the great majority of instances where the Commission has referred cases to the Court of Appeal it has been on the basis of that other category of wrongful conviction which I've just described.

Q. And so if we had a situation where a person was convicted and then 10 years later it became apparent that there was evidence that had it been presented at trial may have affected the verdict of the jury and the Court of Appeal then quashes that conviction, again, in your view, would that then be a wrongful conviction of that person?

A. Yes.

Q. Regardless of whether that person can or cannot establish his factual innocence?

A. Yes.

Q. Can you tell us, in the work of the CCRC, is factual innocence something that is any part or a significant part of what you investigate?

A. Umm, no, and it's – it certainly isn't any, in any way a motivating factor behind how we go about the investigation. It may be, at the end of the investigation, we do acquire evidence which we can then say "this not only shows the conviction to be unsafe but it also appears to demonstrate that the defendant is factually innocent", but that, if you like, is a bonus, if it happened, but it isn't essential to the meeting of the test or referral to the Court of Appeal.

Q. And is it fair to say that, at least how you've described it, where the English Court of Appeal quashes a conviction that you've referred to them on the basis that the conviction is not safe because new information came to light that might have affected the verdict, that that would be a wrongful conviction, and that the Court would not look at the issue of factual innocence?

A. No, because the Court would only be concerned with the question whether the conviction was safe or not, **and safety doesn't depend on the establishment of factual innocence.**

Q. Well how –

A. Well unsafely, I should say, doesn't depend on the issue of factual innocence.

Q. And then, generally speaking then, are – people who have had their convictions quashed after being referred to your Commission, I think you are telling us, would be considered wrongfully convicted and in some instances entitled to compensation on the basis, solely, that their conviction was quashed; is that correct?

A. Yes. I hesitate for – I'm trying to get the full import of that question. The – a person who is convicted and then successful on appeal may bring themselves into the frame for compensation, but it by no means follows that simply because someone's conviction is quashed on appeal, that they are necessarily entitled to compensation.

Q. Even though I think you are saying they would be wrongfully convicted, the question of compensation depends on other factors, is that –

A. Well, certainly. I mean for the – I mean what I am saying is that the question of whether someone should be compensated for having been convicted, and subsequently that conviction is quashed, is a different question to whether that person has been safely or unsafely convicted.

Q. And I take it the compensation part is not something you people either deal with directly or consider in any way in any of your work?

A. No, we don't. There was a suggestion in the early times, early life of the Commission, that the Commission should actually take over responsibility for considering compensation claims from the Home Office, and the Commission resolutely resisted that suggestion.

Q. And I take it, then, that, once the conviction of a person is quashed, that person reverts to the legal presumption of innocence?

A. Absolutely.

Q. And is innocent in that sense?

A. Yes.[91]

### (c) Review of CCRC Operations

Kyle testified that the number of applications received by the CCRC has remained fairly steady at between 70 to 80 per month. He explained that approximately 1/3 of applications received do not qualify (generally because the appeal process has not been exhausted). Of those applications that do qualify, approximately 2/3 can be dealt with fairly quickly in a streamlined process with the remaining 1/3 constituting more

91 T40045-T40049.

complex and time consuming cases. Overall, the CCRC's rate of referral to the appeal courts is approximately 4 percent. Of cases that are referred, the success rate in the appeal courts is approximately 70 percent. The CCRC's 2006/2007 Annual Report states the following:

> At 31 March 2007 the Commission had referred 356 (4 percent) out of 8,951 cases completed. The appeal courts, including the House of Lords, had determined a total of 313 referrals, quashing 187 convictions (68 percent of those referred) and upholding 88 (32 percent). In the same period, 33 sentences (87 percent of those referred) were varied and 5 (13 percent) upheld. The remaining 43 cases were still to be heard at 31 March 2007. The combined rate of convictions quashed and sentences varied was 70 percent.[92]

The majority of cases where a remedy is granted do not involve misconduct or deliberate wrongdoing, said Kyle. Rather, the cases resulting in referral involve either the discovery of relevant new evidence, or, some flaw in procedure due to human error. In his article "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission", he wrote:

> ...From the Commission's perspective, cases that result in referral tend to fall into two broad categories. The first is cases in which relevant new evidence appears, occasionally if rarely being wholly exculpatory, but more often being of a nature that, had it been heard by the jury, might reasonably have caused them to come to a different verdict...The second category, more closely aligned to the types of issues raised by applicants themselves, involves some flaw in the investigation, prosecution, or trial process not brought about by malice but rather, in plain terms, because someone has not done his or her job properly – and this may well be something to which the defence lawyers have contributed. In today's complex criminal justice system, opportunities for falling down on the requirements of a fair trial are legion, but it is not the simple fact of failure that counts, but its significance to the safety of the conviction, taking account of the whole circumstances of the case.[93]

The time it takes the CCRC to make a decision on whether a case should be referred to an appeal court will depend on its complexity. On average, the CCRC aims to complete its investigation and make a decision on referral within six months.

The CCRC's annual budget is approximately £7 million. The population of the United Kingdom, excluding Scotland, is approximately 65 million, which is roughly double the Canadian population.

When the CCRC came into existence there were some who predicted that the floodgates would be opened, but Kyle indicated that the number of applications received by the CCRC on a yearly basis has remained fairly steady. Applicants can apply more than once and some do. This is likely a hallmark of the accessibility of the system. Many applicants apply on their own but there is also the availability of legal aid. While only a small fraction of applications are referred, Kyle explained that in his view, investigation of an unsuccessful complaint of wrongful conviction is as valuable to maintaining confidence in the judicial system as exposing a wrongful conviction.

92 Supra note 79.
93 Supra note 82 at 672.

### 6. Comparison of Canadian and British Systems

The key to any successful system of reviewing claims of wrongful conviction is attitudinal. Wrongful convictions must be seen as inevitable rather than exceptional, and there must be openness in admitting them and resolve in correcting mistakes.

David Kyle wrote:

> However, because it is idle to pretend that things will not go wrong in even the best regulated criminal justice system, there is a question of critical cultural importance. Will whatever mechanism that is adopted to address the cries of those who claim to have been wrongly convicted have at its heart the will to own up to mistakes and learn lessons, or will it strive to preserve the status quo?[94]

In Canada, while it is acknowledged that wrongful convictions regrettably can and sometimes do occur, they are still regarded as exceptional. And so they are, in numbers at least. But they are disproportionately serious in nature, striking at the heart of the legal presumption of innocence upon which the fairness of our criminal trial process depends.

In his article entitled "Facing up to Miscarriages of Justice", Graham Zellick, Chairman of the CCRC, said:

> No criminal justice system, however good it is or is thought to be, will be immune from error. That, of course, is acknowledged in all developed systems by the process of appeal, but not all errors can be detected at that stage. Evidence may emerge only later, there may be developments in law and practice, there may be later evidence of impropriety, error or irregularity. Thus, in every system, however good and whatever its trial and appellate arrangements, there will be wrongful convictions or miscarriages of justice.
>
> Most developed systems regard the reopening of convictions once the normal appellate processes have been exhausted as fairly rare and extraordinary. A power is usually vested in some person or body with appropriate authority, but it is typically immensely difficult to disturb a conviction or even persuade the relevant authority to reopen the matter for further investigation. These arrangements cannot be said to provide an adequate system for dealing with the inevitability of wrongful convictions. That is why it is essential to have standing machinery of some kind to deal with these issues. **Finality in civil proceedings has everything to commend it: finality in criminal proceedings, where liberty and reputation are at stake, is a singular evil.**
>
> It must, however, be emphasized that post-conviction review machinery is not a substitute for getting the criminal process right, for striking the correct balance between the prosecution and defence, and for having the appropriate procedural rules and safeguards. Post-appeal review presupposes a robust, effective and fair criminal justice system. Otherwise, the burden placed on it will be unsupportable.
>
> The ability and willingness of the criminal justice system in any country to confront miscarriages of justice and wrongful convictions is a fundamental test of its humanity, decency and fairness. Justice demands no less.[95]

94 Supra note 82 at 660.

95 Graham Zellick, "Facing Up to Miscarriages of Justice" (2006) 31 Man. L.J. 239 at 239-240.

### (a) Proactive v. Reactive

The Canadian conviction review system, notwithstanding legislative changes made in 2002, remains essentially a reactive process. Not so the English CCRC, as Kyle explained:

> ...and the key, it seems to me, whoever this power is exercised by, it doesn't matter whether it's – for these purposes, practical purposes it doesn't matter very much whether it's done by a government minister or by an independent person, **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.**[96]

An individual in prison can apply on his or her own and an investigation will be triggered. The process starts with the CCRC gathering relevant records from the court, defence and prosecution, and the police. There is recognition that convicts face great difficulty in getting the evidence, and in developing the argument needed to overturn the wrongful conviction.

Applicants, and even legal counsel, do not have the expertise required to identify the issues which could make a difference to the safety of the conviction.

The conviction review system in Canada is not so accessible. Application requirements are onerous and beyond the ability of most convicted persons. The onus of identifying all the grounds of the alleged miscarriage of justice is heavy.

These difficulties are reflected in the small number of applications received by the federal Minister. His Annual Report for 2007 indicates that in the year ended March 31, 2007, a total of 18 application requests were made.[97] Of these, only four were completed. The remaining 14 were partially completed, meaning that the applicant has submitted some but not all of the forms, information and supporting documents required by the Regulations. Only completed applications are considered by the Minister. In his report to Commissioner LeSage in the Driskell Inquiry, Professor Roach noted that the statistical information now reported by the federal Minister in the annual reports demonstrates "the comparative rarity of applications and the greater rarity of successful applications under s. 696.1."[98]

Access to the review process is more restrictive here than in England, where the emphasis seems to be on an openness to listen to everyone's complaint and accord it appropriate investigative resources.

### (b) Independent v. Political

Prior to creation of the CCRC, conviction reviews were handled by the Home Secretary, the Member of Cabinet responsible for criminal justice. In 1993, the Runciman Report on the Royal Commission on Criminal Justice recommended the establishment of a new body independent of both the government and the courts, to be responsible for dealing with allegations of miscarriages of justice.[99] This recommendation was based on the concern that the role assigned to the Home Secretary was incompatible with the constitutional separation of powers, as between the courts and the Executive.

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96 T40080.
97 Supra note 54.
98 Supra note 56 at 11.
99 Supra note 80.

The argument is not quite as straightforward in Canada, a federal state, where jurisdiction over criminal law matters is shared between Canada and the provinces. The federal Minister, in our case, found herself removed from the process which convicted Milgaard. Still, the appearance of interest remains. Brown testified that the public makes no distinction between Saskatchewan Justice, and Justice Canada. For many it seems that a prosecutor is investigating a prosecutor.

The CCRC is an executive non-departmental public body. It receives funding from the Secretary of State for the Home Department. While the CCRC acknowledges a duty to account fully for funds received from government, it has the independence to decide individual cases without interference or pressure. The CCRC states in its Annual Report 2006/2007 that "our ability to do justice in all cases means that we must also have the freedom to decide how we go about our work, what categories of cases we investigate, and how decisions are reached. These responsibilities are cast on us by Parliament, they are critical to the decisions reached in individual cases, they underpin the confidence our stakeholders have in us, and they must be exercised fearlessly."[100]

In his article noted above, Zellick argues that the most appropriate model for conviction review is a free-standing statutory body. He argues that where responsibility for conviction review is located within central government, as part of the responsibility of a minister, the system will never inspire the degree of confidence that is necessary:

> There is also the issue of principle, namely, that it is no part of a ministerial role to be involved in the administration of justice as it relates to individual cases. It is true that there is a long tradition of such involvement in the British system deriving from the Crown's role in exercising the royal prerogative of mercy. But the historical explanation should not be taken to legitimise a current ministerial role, which also implies a degree of parliamentary scrutiny. That is to risk infusing an individual criminal conviction with a political dimension, which is entirely undesirable...[101]

At the Inquiry, Kyle testified that political pressure is not brought to bear on the CCRC in its handling of individual cases. He commented that were a case to be raised in Parliament, the responsible Minister, presumably the Home Secretary or the Attorney General, would simply indicate that the government had no standing in the way in which the CCRC made its decisions in individual cases.

The Prime Minister, in his memoirs, has said that he intervened in Milgaard's conviction review applications being conducted by his Minister of Justice. Notwithstanding legislative amendments made in 2002, applications for conviction review are still decided by the federal Minister of Justice. So long as the responsibility for conviction review remains with the federal Minister of Justice, an elected politician, there will be the potential for political pressure to play a role in the decision making process, or, at the very least, for the perception to exist that the decision was influenced by political pressure. The conviction review system must not only be truly independent, it must be seen to be independent.

### (c) Inquisitorial v. Adversarial

The CCRC brings a non-adversarial and inquisitorial approach to the process of conviction review, and that is its strength, in Kyle's view. There is now an expectation on the part of applicants and their counsel that the Commission will conduct an investigation with the result that applicants defer to the

100 Supra note 79.
101 Supra note 95 at 240.

CCRC's expertise, in preference to investigating themselves or launching media campaigns. A feature of independence is the ability to inquire without regard to vested interests.

The adversarial nature of the conviction review process in Milgaard's case was largely of the applicant's own making, but the system itself is partly at fault. In the "Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", Commissioner LeSage endorsed the recommendation made by Commissioner Cory in the "Report of the Inquiry Regarding Thomas Sophonow" that there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged.[102] In making this recommendation, Commissioner LeSage noted his concern about the adversarial nature of the current conviction review process. He wrote the following:

> I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process. Driskell could not launch an application until he had sufficient disclosure to satisfy the Department of Justice standard for launching a section 696.2 review. However, the WPS would not make disclosure for purposes of a section 696.2 review until Driskell's application was made. This is a classic "catch 22" situation. If there was an independent inquisitorial body, as in the U.K., it could, after having been satisfied that a threshold, not necessarily a high threshold, has been met, commence the section 696.2 process of its own initiative. In this way, information that is unavailable to the applicant because of their inability to compel disclosure, would be available to the independent agency to allow them to make a better determination of whether a miscarriage of justice occurred.[103]

### (d) Low Threshold v. High Threshold

In the U.K., the CCRC investigates applications on behalf of those alleging they were wrongly convicted or unfairly sentenced, and then decides whether a matter should be referred to the Court of Appeal. In determining whether a referral should be made, the CCRC employs the real possibility test set out in section 13 of the *Criminal Appeal Act 1995*.[104] Section 13 indicates that a reference of a conviction shall not be made unless the CCRC considers that there is a real possibility that the conviction would not be upheld by an appeal court.

The real possibility test has been described as setting a relatively low threshold for an applicant, consistent with the CCRC's view of itself as a gateway into the Court of Appeal. At the Inquiry, Kyle commented that "we see the real possibility test as being a relatively low threshold, it's not a hugely difficult hurdle for an applicant to overcome."[105] Kyle also confirmed that it is up to the court to decide whether or not the verdict is safe. The CCRC's role is simply to decide whether or not an applicant should have another chance to go there.

Pursuant to s. 696.3(3) of the *Criminal Code*, the Minister of Justice may grant a remedy on an application for ministerial review if he is satisfied that there is a reasonable basis to conclude that a miscarriage of

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| 102 | Supra note 69. |
| 103 | Ibid at 121. |
| 104 | Supra note 86. |
| 105 | T40213. |

justice likely occurred. This test is similar to that used by the Court of Appeal when hearing a case that has been referred to it by the Minister of Justice.

In *Truscott*, the Ontario Court of Appeal explained:

> The two kinds of potential fresh evidence described above raise different issues for an appellate court to consider. However, there are two important characteristics that the two kinds of evidence share. First, both attack the reliability of the verdict. **To succeed on appeal, whichever kind of fresh evidence is offered, the appellant must ultimately convince the appellate court that the fresh evidence sufficiently undermines the reliability of the verdict so as to warrant the conclusion that maintaining the verdict would amount to a miscarriage of justice.** Second, both kinds of evidence lead to the same result: the quashing of the conviction. The second stage of the fresh evidence analysis, that is, the determination of the appropriate remedy, must follow regardless of which category of fresh evidence leads to the quashing of the conviction. At the remedial stage, the court can look at all of the material tendered by the parties.[106]

The test used by the Minister and by the Court are necessarily similar because s. 696.3(3) gives the Minister the power not only to refer to the Court of Appeal but also to order a new trial.

It is objected that the gatekeeper Minister should use a lower test than that employed by the Court of Appeal. That objection, in my view, is answered by the fact that under s. 696.3(3) the Minister is more than a gatekeeper. He can order a new trial himself, a fact which actually simplifies matters for an applicant with a strong case. However, were a review agency to be established to act as a gatekeeper as does the CCRC, it would not have the power to order a new trial and could therefore reasonably employ a less onerous test – one of reasonable possibility.

### (e) Delay

Processing the first Milgaard s. 690 application was delayed by incompleteness and incremental advancement of grounds. It is not a good example of how quickly claims could be processed at the time. That said, the CCRC is quicker than the Canadian system, probably because the applicant there faces fewer documentary requirements before investigation can begin.

### (f) Cost

The Commission is not in a position to provide a cost comparison of the two models. However, without early and efficient intervention by an independent, proactive agency, the costs associated with resolving claims of wrongful convictions will remain unacceptably high.

### (g) Public Confidence

Public confidence in the administration of criminal justice was shaken in the Milgaard case by a strident media campaign which found an easy target in the federal Minister of Justice, depicted as lacking in independence and accountability. An agency such as the CCRC, freed of constitutional constraints and political connection, could act with more transparency and effectiveness.

106 Supra note 60 at 349.

## 7. Recommendations

It is my recommendation that the investigation of claims of wrongful conviction should be done by a review agency, independent of government, established along the model of the English Criminal Cases Review Commission. Applications would no longer be made to the federal Minister of Justice under s. 696.1 of the *Criminal Code*. The agency would refer worthy cases to a Court of Appeal where the successful applicant would argue his case as though it were an appeal from conviction at trial.

I am not the first Commissioner to conclude that Canada's conviction review process is in need of change, nor am I the first Commissioner to recommend the establishment of an independent review body. Rather, I add my voice to those who, in four previous provincial commissions of inquiry, have recommended the creation, or study into the advisability of, an independent entity to review and investigate alleged wrongful convictions.

In the "Report of the Royal Commission on the Donald Marshall Jr. Prosecution", Commissioners Hickman, Poitras and Evans recommended that:

> 1) the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism – an individual or a body – to facilitate the reinvestigation of alleged cases of wrongful conviction; and
>
> 2) the review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.[107]

A similar recommendation was made by Commissioner Kaufman in the "Report of The Commission on Proceedings Involving Guy Paul Morin" where he stated:

> **Recommendation 117:** Creation of a Criminal Case Review Board.
>
> 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 pursuant to section 690 of the *Criminal Code*.[108]

Commissioner Peter de C. Cory made a similar, but more concrete recommendation in the "Report of the Inquiry Regarding Thomas Sophonow" where he stated:

> 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.[109]

With Commissioner Cory's recommendation in 2001, a total of three public inquiries into wrongful convictions in Canada had recommended the creation of an independent review tribunal. Nevertheless,

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107 Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989) Volume I at 145.
108 Report of The Commission on Proceedings Involving Guy Paul Morin (Ontario, 1998) Volume 2 at 1237.
109 Report of The Inquiry Regarding Thomas Sophonow (Manitoba, 2001). See http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html#wrongful.

the federal Minister proceeded with legislative amendments to the s. 690 process in 2002 in favor of implementing an independent review tribunal. Section 690 was replaced with ss. 696.1 to 696.6 of the *Criminal Code* in 2002, but further change has been called for.

In the "Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", Commissioner LeSage agreed with the recommendation advanced by Commissioner Cory in the Sophonow Inquiry. He stated:

> In the *Thomas Sophonow Inquiry Report*, Commissioner Cory recommended that:
>
> > ...there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged ...
>
> I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process.[110]

The 1998 Consultation Paper cited above said of the review process:

> A number of objections have been raised regarding the current section 690 process. In general, critics suggest that the present review procedure under section 690 is inadequate and should be replaced with an independent review mechanism. The criticisms may be summarized as follows:
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> - the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted;
> - the procedure has led to inordinate delays in the reviews of individual cases;
> - the procedure is largely conducted in secret and is consequently without accountability;
> - counsel who review section 690 applications are former prosecutors who will look at miscarriage of justice evidence with a prosecutorial bias and will therefore not investigate allegations of error in a fair and objective manner;
> - only a handful of cases have ever been re-opened in Canada;
> - the response of the Courts to the occasional section 690 referral has been unsatisfactory.[111]

Noted as well in the 1998 Consultation Paper was the rejection, in 1991, by a federal-provincial-territorial working group of the Marshall Inquiry recommendations:

> In 1989, the Royal Commission on the Donald Marshall, Jr. Prosecution recommended that provincial Ministers responsible for the administration of justice meet with the federal Justice Minister to consider creating an independent mechanism to facilitate the re-investigation of alleged cases of wrongful conviction.
>
> A federal-provincial-territorial working group was established to examine the Marshall Inquiry recommendations and to report to the next meeting of Ministers. The working group

110 Supra note 69 at 121.
111 Supra note 1.

was satisfied with the existing section 690 procedures but recommended that compulsory powers to compel witnesses and documents would be desirable. In its report, tabled at the 1991 meeting of Ministers responsible for criminal justice, the working group rejected the recommendation of the Marshall Inquiry pertaining to the section 690 reform. It concluded that establishing an independent review body was undesirable because:

- the Marshall Inquiry did not criticize the section 690 review mechanisms that were in place at that time;
- persons who claim that they were wrongfully convicted had the full benefit of the presumption of innocence, a trial in which their guilt had been established beyond a reasonable doubt, and appeal procedures;
- a review mechanism would create another level of appeal that would detract from the notion of judicial finality;
- the establishment of a mechanism as proposed by the Marshall Inquiry would likely result in many requests for reviews, most of which would likely be *pro forma*. The proposed mechanism would permit the re-investigation of cases but would not provide any remedy for the wrongfully accused person;
- the review of these cases would incur significant costs that would divert resources from cases deserving review;
- section 690 of the *Criminal Code* enables the Minister of Justice to order a new trial or an appeal in appropriate cases;
- the section 690 process is independent from the prosecutions conducted by the provincial Attorneys General. It satisfies the requirement for an independent review mechanism, but could be improved by the provision of powers to compel individuals to testify; and
- the review of judicial decisions by a non-judicial body would be inappropriate.[112]

The reasons expressed for rejection of the Marshall Inquiry recommendations demonstrate a lack of understanding of the inevitability of wrongful convictions, which often occur for reasons which do not appear until the appeal process has been exhausted. As well, the reasons make a flood gate argument, that has not been proven in the CCRC experience.

In response to the 1998 Consultation Paper, AIDWYC filed a written submission with the Minister urging the creation of a system modeled on the British Criminal Cases Review Commission. Before this Commission, AIDWYC pointed out that the proposed legislative amendments to s. 690 were the subject of much discussion and debate by the Standing Committee on Justice and Human Rights in October 2001.[113] The Standing Committee heard from the Minister of Justice, representatives of AIDWYC and senior counsel with the Criminal Conviction Review Group of the Department of Justice.

The debates of the Standing Committee on Justice and Human Rights indicate that the members recognized that there was an immediate need to reform the s. 690 process, and that while the proposed legislative amendments might not fully address all concerns with the conviction review process, they would constitute an improvement. It was discussed that further amendments could be considered once the recommendations from the Milgaard Inquiry were received. In particular, the members thought it

112 Ibid.

113 House of Commons, Standing Committee on Justice and Human Rights, 37th. Parl. 1st sess., Nos. 22, 23 and 24 (October 2-4, 2001) online: Parliament of Canada, LEGISinfo http://www.parl.gc.ca/LEGISinfo.

important to hear from the Milgaard Inquiry on the question of whether an independent review body to investigate alleged wrongful convictions was necessary.

Sections 696.1 to 696.6 of the Criminal Code came into force on November 25, 2002. The Minister's decision to reform the conviction review process through legislative amendments was later explained:

> From the submissions received, as well as other contributions from legal experts and interest groups, it was possible to identify several reform options for more detailed consideration. These options ranged from the creation of a separate agency to review criminal convictions, similar to the Criminal Cases Review Commission in the United Kingdom (a change long advocated by some critics of the old review process), to the elimination of section 690 altogether with a proposed broadening of the scope of appellate review.
>
> After this broad consultation, a decision was arrived at whereby the federal Minister of Justice would retain the power to review criminal convictions, but legislative changes would be made to improve the process. These changes, known as the "reform model", represented a compromise position between a separate review agency similar to the United Kingdom model and the *status quo* under section 690 of the *Criminal Code*. The reform model had the full support of the provincial and territorial Attorneys General and Ministers of Justice. The Government of Canada then proceeded with legislative and non-legislative changes to implement the reform model.[114]

The reform model chosen was not a complete answer to the need for reform of the conviction review process. In particular, the role of the federal Minister was preserved, as was the reactive nature of the Minister's approach to applications for conviction review, and the threshold for the granting of a remedy.

This Commission will be the fifth provincial commission of inquiry to recommend the creation of an independent review body to investigate cases in which wrongful conviction is alleged. Such reform is necessary in order to adequately address the inevitability of wrongful convictions in this country. Public inquiries will continue to be desirable, or even necessary, in some situations, but they are very expensive exercises, and they are not the answer. The answer lies in the creation of an independent review body which will be able to investigate, detect and assist in remedying wrongful convictions.

114 Canada, Minister of Justice, 2004 Annual Report on Applications for Ministerial Review – Miscarriages of Justice. See http://www.canada.justice.gc.ca/eng/pi/ccr-rc/rep04-rap04/index.html.