Post-Conviction Review of Wrongful Convictions: A Failure to Reform

by

Kristy Pedersen, B.A. Hons.

**A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of**

Master of Arts

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Abstract

Section 696 of the Canadian *Criminal Code* is an insufficient mechanism to detect and remedy wrongful convictions in Canada. One of the main criticisms of this process is that the Minister of Justice should not be responsible for reviewing alleged wrongful convictions because it is a conflict of interest for the same agency to prosecute criminal offences and also to review them. This thesis compares the independent review commission in the United Kingdom to Canada's section 696 to determine if an independent review commission would improve the current post-conviction review process of handling alleged miscarriages of justice in Canada. The conclusion is that Canada has failed to provide appropriate means to address wrongful conviction cases and that the role of the Minister of Justice under section 696 of the *Criminal Code* should be replaced with an independent review commission similar to the Criminal Cases Review Commission.

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Chapter 1

Introduction

“No criminal justice system is, or can be perfect. Nevertheless, the manner in which society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.”¹

The former Minister of Justice Anne McLellan expressed concern “about the doubts many Canadians have about the ability of the courts, the corrections and the legal system to deal adequately with crime...and to provide timely access to justice.”² To emphasize this, she stated that an issue that goes to the very heart of the public confidence with the justice system is wrongful convictions.³ If someone is wrongly convicted, then that person is punished for an offence he or she did not commit. Not only is this a problem, but when a person is wrongly convicted the actual perpetrator of the crime remains at large.

The credibility of any justice system rests upon the fairness accorded to every individual charged with a criminal offence. The Canadian commitment to fairness is reflected in the presumption of innocence, the Crown’s burden of proving guilt beyond a reasonable doubt, and in the ability of appellate review to correct mistakes of legal and factual error.⁴ When a person is wrongly convicted the fairness and legal

¹ This quote was from *Justice* the British Section of the International Commission of Jurists, in its report on miscarriages of justice in 1989. The quote was taken from C. Karp and C. Rosner. *When Justice Fails: The David Milgaard Story*. (Toronto: McClelland & Stewart 1991) at 262.

² Canada. Department of Justice. News Room. Notes from a Speech by the Honourable Anne McLellan Minister of Justice Attorney General of Canada and Member of Parliament for Edmonton West to the Canadian Bar Association Annual Meeting. St. John’s, Newfoundland. 26 August 1998 Available at <http://www.canada.justice.gc.ca/en/news/sp/1998/s260898.html>. [Accessed 10 October 2002].

³ *Ibid.*

⁴ Canada. Department of Justice. *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*: Consultation Paper: 1998 [hereinafter Consultation Paper].

procedures designed to protect against such errors are challenged. The legitimacy of the criminal justice system is questioned.

Recent instances of wrongful convictions in Canada that survived all levels of appeal, such as Donald Marshall Jr., David Milgaard, Guy Paul Morin, Thomas Sophonow, and Clayton Johnson emphasise that our criminal justice system is fallible. Because the criminal justice system relies on human beings to make decisions about guilt and innocence mistakes will be inevitable.⁵ “Neither truth nor justice can ever be guaranteed.”⁶ Since mistakes can and do happen it is vital to have a proper system in place to investigate and correct wrongful convictions. However, Canada’s present criminal justice system does not provide a satisfactory mechanism to deal with alleged miscarriages of justice after all statutory means of appeal have been exhausted.

In Canada very little research has been done to determine the number of people who have been wrongfully convicted.⁷ Also, it is suggested that this number is unknown and unknowable.⁸

...There may be thousands of cases of wrongful convictions in Canada because, for a variety of reasons, innocent people may plead guilty during plea bargaining. Although justice officials stress that wrongful convictions are rare occurrences, the available evidence indicates that the cases that do come to our attention are only the tip of the proverbial iceberg. In 1997, 690 Canadians convicted applied to the Canadian government’s Conviction Review Group [to have their convictions reviewed on the basis of a miscarriage of justice].⁹

⁵ A. Manson, “Answering Claims of Injustice.” (1992) 12 (4th) *Criminal Reports*: 305.

⁶ *Ibid*, at 305.

⁷ B. Anderson and D. Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada*, (Halifax: Fernwood, 1998).

⁸ *Ibid*.

⁹ *Ibid*, at 8 and 9.

Unfortunately, there is no simple method of separating legitimate claims of innocence from those of the guilty.¹⁰

While there is no accurate indication of the number of innocent people convicted, any wrongful conviction calls the legitimacy of the criminal justice system into question. Legitimacy in the criminal justice system is based largely upon its effectiveness and fairness.¹¹

Its effectiveness is judged by its ability to investigate and detect crime, identify offenders and mete out the appropriate sanctions to those who have been convicted of offences. Its fairness is judged by its thoroughness and the efforts it makes to redress the resource imbalance between the accused and the state at the investigatory, pre-trial, trial and appellate stages.¹²

Wrongful convictions undermine the effectiveness and fairness of the criminal justice system. As well, public confidence in the system declines when wrongful convictions are identified.¹³

Philip Rosen has stated that “the causes of wrongful convictions are easy to identify.”¹⁴ However, this may be a slight understatement and is not meant to suggest that these causes are easy to correct. The literature pertaining to the sources of wrongful convictions tells us there is no one identifiable cause of convicting an innocent person.¹⁵ In fact, there have been various aspects, at different stages of the criminal justice process, that have contributed to a wrongful conviction.¹⁶ “One cause

¹⁰ *Ibid.*

¹¹ P. Rosen, *Wrongful Convictions in the Criminal Justice System*. (Ottawa: Library of Parliament. Research Branch. Background Paper 285E: 1992)

¹² *Ibid.*, at 2.

¹³ *Ibid.*

¹⁴ *Ibid.*, at 3.

¹⁵ S.D. Westervelt & J.A. Humphrey eds., *Wrongly Convicted: Perspectives on Failed Justice*. (New Brunswick: Rutgers University Press, 2001).

¹⁶ *Ibid.*

is not the singular, or even primary, reason for wrongful convictions.”¹⁷ The mistakes made at various stages of the criminal justice system that have led to a wrongful conviction can result from either intentional or unintentional human error.¹⁸ Failures and mistakes that are made in the early stages of police investigation may influence later stages. This may compound the problem or lead to other mistakes further along in the process.¹⁹ The literature reveals that there may be any number or combinations of elements present which could lead to a miscarriage of justice.

Specifically, causes of wrongful convictions have been attributed to “police and prosecutorial overzealousness,”²⁰ which could include “shoddy police work, the planting and/or manufacturing of evidence by police, police threats to potential witnesses, coaching witnesses at police lineups, obtaining confessions through brutality and threats, and prosecutorial misconduct, such as suppressing exculpatory evidence.”²¹ Police officers may use such tactics when they truly believe they have the right man and they just need to gather the evidence to establish the guilt of the accused. London’s Metropolitan Police Commissioner stated that “noble cause corruption...is rife within the police ranks...such that the police may lie, commit perjury, or behave in an unlawful manner, provided that [they are] convinced [they are] putting away the ‘right’ person.”²² In some cases police and prosecutors may engage in deliberate misconduct, but it has been found that, overall, most wrongful convictions occurred because of “unintentional errors made by witnesses and by those

¹⁷ *Ibid*, at 10.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ R. C. Huff et al. *Convicted but Innocent: Wrongful Conviction and Public Policy* (London, England: Sage, 1996) at, 64.

²¹ P. Braiden and J. Brockman, *Wrongful Convictions and Section 690 of the Criminal Code: An Analysis of Canada’s Last-Resort Remedy* (M.A. Thesis Simon Fraser 2000) at 47.

²² *Ibid*, at 48.

who staff the justice system.”²³ Other causal factors of wrongful convictions can include incompetent, biased, or false forensic analysis and expert testimony, false confessions, the use of jailhouse informants, plea-bargaining, community pressure for conviction, tunnel vision, witness perjury, incompetent defence counsel, accusations against the innocent by the guilty, prior records, racism, the unequal resources between the state and the accused, and media fueled prejudice of high profile cases.²⁴

In addition to identifying the causal factors that facilitate wrongful convictions, researchers have also pointed to the importance of identifying systemic criminal procedures which can inhibit the discovery of miscarriages of justice, or the ability to rectifying them in a timely fashion.²⁵ For example,

[O]verly restrictive rules of procedure and evidence hamper efforts to rectify wrongful convictions. The sacrosanct principle of finality, according to Malleson, is one of the main reasons why judges in English courts of appeal “take a restrictive approach to their roles in reviewing convictions.” Appellant courts are also reluctant to tamper with jury verdicts. The emphasis on legal, rather than factual issues, also hinders those seeking conviction remedies through appellate courts... Lack of resources also precludes many from accessing the appeal process.²⁶

How should a criminal justice system respond to a claim that a conviction or sentence has been imposed unfairly as a result of a wrongful conviction?

Historically, the pardon was the traditional vehicle by which the Crown or its representatives attempted to rectify defects in the criminal justice system.²⁷ The

²³ Huff et al., *Supra*, note 20, at 143.

²⁴ Braiden and Brockman, *Supra*, note 21 at 50 and 51.

²⁵ *Ibid*, at 52 and 53.

²⁶ *Ibid*, at 53 and 54.

²⁷ Manson, *Supra*, note 5. For more information see Cole David P. and Allan Manson. *Release From Imprisonment: the Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990).

establishment of the modern court of appeal came about much later²⁸ and was intended to rectify judicial errors that arose at trial.²⁹ The court of appeal did not replace the pardon but acted as an additional avenue to challenge judicial problems that arose during trial. The pardoning power has become known as the Royal Prerogative of Mercy (RPM) and still exists in Canada.³⁰

Most Commonwealth countries have adopted intermediate mechanisms, in addition to the RPM, which permit the executive arm of the government to refer a case back to the courts.³¹ In Canada, this vehicle is section 696 (formerly section 690) of the *Criminal Code*.³² Section 696 allows a person to submit an application to the Minister of Justice, asking the Minister to further review their conviction on the basis of a miscarriage of justice. This section can only be applied once the convicted person has exhausted all statutory means of appeal. Section 696, as shall be seen, does not permit the Minister to overturn a conviction, but only to grant a person further review of his or her case.

Section 696 is important and should be considered distinct from the RPM. This is because section 696 can be used to challenge the validity of a conviction, and does not simply seek mercy or compassion through the granting of a pardon. In November, 2002, when section 696 replaced section 690 of the *Criminal Code*, there was no longer any reference to “mercy” in the new section, further underlining the fact that this post-conviction review section is distinct from the RPM. While various

²⁸ In Canada this took place in 1892. See the *Criminal Code*, 1892, S.C. 1892, c.29, ss. 742-751. In the United Kingdom, an appellate court in criminal matters was established in 1907. See *Criminal Appeal Act* (U.K.), 7 Edward 7, c.23.

²⁹ Manson, *Supra*, note 5.

³⁰ *Ibid.*

³¹ *Ibid.*, at 307.

³² *Canadian Criminal Code* R.S.C. 1985, c. C-46. See Appendix I for section 690 and Appendix II for Section 696. These sections will be discussed in greater detail in Chapter 2.

avenues exist within the criminal justice system which allow a convicted person to seek mercy from their conviction, section 696 is distinct from the RPM because it can overturn the original conviction and consequently clear a person's name of any wrongdoing. The granting of a pardon through the RPM can only dispense mercy, which means that the validity of the conviction is recognised but the convicted person is given some sort of relief from punishment on humanitarian or compassionate grounds.

Various attempts have been made in Canada to reform the post-conviction review process. Recently, amendments were passed by Parliament in Bill C-15A.³³ Bill C-15A repealed section 690 of the *Criminal Code* and created section 696 of the *Criminal Code*. Section 696 came into force and effect in November 2002. While a few changes were made, the essence of section 690 still exists and there has been little to no change in post-conviction review procedures. Many people expressed disappointment and dissatisfaction with the amendment and there remain calls for further reform. The Marshal, Sophonow, and Morin inquiries pointed out that the post-conviction review system to the federal Minister of Justice was inadequate to deal with wrongful conviction and should be replaced.

While the recommendation for an independent review body in Canada has often been proposed as a way to remedy some of the current problems with the section 696 post-conviction review process, no action has been taken to address the feasibility, desirability, and effectiveness of such a reform. This thesis will seek to

³³ Canada. Bill C-15A (As passed by the House of Commons). *Criminal Law Amendment Act, 2001*. 1st Sess, 37th Parl. Royal Assent 4 June 2002. Available at <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-15A>.

answer the question: Would replacing the role of the Minister of Justice, found now under section 696 of the Canadian *Criminal Code*, with an independent review commission, improve the current post-conviction review process of handling alleged miscarriages of justice in Canada?

In addressing this question I look at issues such as the present post-conviction review system utilized in Canada and its need for further reform. Another issue that will be addressed is why the government continually fails to implement effective reform to the post-conviction review process. The Canadian government denies the need for an independent review commission but cannot adequately deal with post-conviction review applications on the basis of an alleged miscarriage of justice. Another important issue that will be discussed is the conflict of interest associated with the Minister of Justice being responsible for prosecuting criminal offences and also for reviewing alleged wrongful convictions under section 696. Finally, in seeking to answer the question, this thesis will look at the United Kingdom and their new approach to post-conviction review. The United Kingdom has recently replaced the government's role in reviewing alleged cases of wrongful convictions with an independent review commission. Is there something that Canada can learn from the experiences of the United Kingdom?

The phrase 'alleged miscarriage of justice' is intended to include people who have been convicted of any criminal offence by a Canadian court, and who have exhausted all possible appeal processes available, yet still claim they have been erroneously convicted. The majority of people who apply through section 696 for a post-conviction review do so because they claim to be innocent. An 'independent

review commission' (or committee, or body), is a publicly funded, independent entity separate from government that does not operate under the direction or control of the Minister of Justice or the Attorney General of Canada.

The terms 'wrongful conviction' and 'miscarriage of justice' have been used in a variety of ways and can have different definitions. A 'wrongful conviction' can mean that a factually innocent person was erroneously convicted by the criminal justice system. An example of this would be David Milgaard, Guy Paul Morin and Donald Marshall. The term 'wrongful conviction' can also be used, more generally, to indicate that an error has been made by the criminal justice system in convicting an individual. While it may not be conclusively determined that a person is factually innocent, the conviction is seen to be wrong because of errors made during judicial proceedings that question the correctness of the conviction. A good example of this is the case of Steven Truscott.³⁴ The lack of evidence, the incorrect interpretation of evidence by the scientific community, the shoddy police investigation, the recanting of eyewitness testimony, the withholding of key evidence from the defence, and the numerous judicial errors made by various lawyers and judges all suggest that Truscott did not receive a fair trial. Truscott has still not been officially declared innocent of the rape and murder of Lynne Harper but few would argue that he was not wrongly convicted.

In Criminal Injustice: An Evaluation of the Criminal Justice Process in

Britain Belloni and Hodgson define "miscarriage of justice":

A miscarriage of justice refers to the failure of the criminal process to function in such a manner as to achieve outcomes which are considered 'just' from

³⁴ For details of this case see J. Sher, "Until you are Dead:" *Steven Truscott's Long Ride into History*" (Toronto: Alfred A. Knoph Canada:, 2001).

several different perspectives – that is, of those who directly experience it or are impacted by it; of those who are responsible for its operation; and of the community of which is served by the process. Thus the scope of matters that might be considered a miscarriage of justice is quite broad. Furthermore, while miscarriages of justice generally are seen as deriving from the criminal process...defects in the criminal law itself might also be considered responsible.³⁵

In *Justice in Error*, Walker and Starmer suggest three categories of miscarriages: when the state abuses individual rights; when adverse treatment of individuals by the State is disproportionate to what is required to protect the rights of others; or when the State fails to protect and vindicate the rights of potential or actual victims.³⁶ Carlson Anyangwe in his article, *Finality and Miscarriage of Justice in Criminal Law: Post-Conviction Remedies in common and Civil Jurisdictions*, states that “miscarriage of justice means a failure of justice.”³⁷ He further explains that;

Justice fails if the conviction by the trial court is wrong, or if an error or omission in the court may reasonably be considered to have brought about the conviction, or if there is a material irregularity in the course of the trial, or if the judgement of the trial court is wrong on a point of law.³⁸

This thesis refers to both of the terms ‘miscarriage of justice’ and ‘wrongful conviction’. While many people who utilize section 696 of the *Criminal Code* do so in order assert their innocence, this section is not limited solely to those claiming to be innocent. Post-conviction review through section 696 encompasses anyone who has not been correctly convicted or sentenced by the criminal justice system, whether or not they are factually innocent. As specified by the heading of section 696 post-

³⁵ F. Belloni and J. Hodgson. *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain*. (London, England: MacMillan, 2000) at 1.

³⁶ C. Walker and K. Stramer (eds.) *Justice in Error*. (London: Blackstone, 1993).

³⁷ C. Anyangwe. “Finality and Miscarriage of Justice in Criminal Law: Post-Conviction Remedies in common and Civil Jurisdictions.” (1998) 30 *Zambia Law Journal* 51: at 55.

³⁸ *Ibid*.

conviction review is intended to include anyone who believes they have been a victim of a miscarriage of justice.

In this thesis the concept of miscarriage of justice is used mainly in the sense “understood by those committed to the application of due process principles and procedures in the criminal justice system.”³⁹

It refers not only to the wrongful conviction of innocent persons that result from the failed application of due process, but also to those who may be guilty, but who are convicted as a result of wrongful police practices. Otherwise, to condone conviction procedures by malpractice undermines the rational of the criminal process, the object of which is (or should be) to ensure that only those against whom there is sufficiently strong evidence are prosecuted and convicted, thereby minimizing the prospect of innocent people being wrongly convicted.⁴⁰

The question of whether replacing the role of the Minister of Justice, found in section 696 of the *Canadian Criminal Code*, with an independent review commission will improve the post-conviction review process of handling alleged miscarriages of justice in Canada will be addressed in a comparative format. Canada’s current section 696 post-conviction review system, under the auspices and control of the Minister of Justice, will be compared to the United Kingdom’s independent review system carried out by the Criminal Cases Review Commission. Other countries employ different means of addressing miscarriages of justice, but a full analysis of all the various methods utilized is beyond the scope of this thesis. Also, no other country, besides the United Kingdom, uses an independent body to address miscarriages of justice.⁴¹

³⁹ Belloni and Hodgson, *Supra*, note 35, at 2.

⁴⁰ *Ibid.*

⁴¹ The state of New South Wales in Australia has seen recent calls to adopt a similar approach to the United Kingdom but this was eventually rejected. However, there is still some movement towards the

By way of addressing the question, chapter two will address Canada's current post-conviction review system. Specifically, the process which a person must go through when they have exhausted all statutory means of appeal and still claim they have been wrongly convicted will be looked at. A person must apply to the Minister of Justice in the hope that the Minister will grant a further review of the case by the Court. Since the law changed during the writing of this thesis, the section 690 post-conviction review application process will first be outlined. Section 690 was repealed and replaced with section 696 on 25 November 2002, but very little change was made to the post-conviction review process. To address the change in law a comparison of the two sections will be given. The section 690 post-conviction review process will be set out simply as a process. Any criticisms of this section will be addressed later in the paper. It is important to have a clear and unbiased understanding of the process as it currently exists so that one can make an informed decision as to whether criticisms are warranted and reform is necessary.

Chapter three will address Britain's post-conviction review system. This will be done in three parts. The first will look at post-conviction review applications to the Home Secretary prior to the creation of the Criminal Cases Review Commission in 1997 and the various problems that existed with this system. Canada currently employs a very similar system to that utilized by Britain prior to 1997. The second part will address the period when a growing number of wrongful convictions came to light as well as the various calls for reform. Some cases will be described to provide an example of wrongful conviction cases during this time. The 1991 *Royal*

creation of an independent review body since a Bill has again been introduced to create such a body. See Consultation Paper, *Supra*, note 4.

Commission on Criminal Justice, chaired by Viscount Runciman, with a mandate to examine the effectiveness of the criminal justice system in securing the conviction of the guilty and the acquittal of the innocent, will also be looked at in this section. This Commission made many recommendations on how to improve the post-conviction review system. Out of this Commission came the recommendation for an independent review commission to replace the role of the Home Secretary when reviewing alleged miscarriages of justice. Such a body was implemented in 1997 and came to be known as the Criminal Cases Review Commission (CCRC). The third section will look at the CCRC and its operation. This will include the make-up of the Commission, how the CCRC reviews wrongful conviction applications, as well as the criteria used by the CCRC to send cases back to the Court. Criticisms of the CCRC will also be looked at. Finally, how the CCRC compares to the Home Office in reviewing alleged wrongful convictions will be addressed.

Chapter four will discuss the problems with section 696 of the *Criminal Code*, as well as recommendations to replace section 696 with an independent review body. David Milgaard's application to the Minister of Justice will be looked at as it provides a concrete example of how the post-conviction review system operates. Secondly, the problems with Canada's present post-conviction review system will be discussed. Specific problems with section 696, as well as systemic problems within the justice system that can affect post-conviction review, will be addressed. The third section will address recommendations to implement an independent review commission to review alleged cases of miscarriages of justice. The *Commission on Proceedings Involving Guy Paul Morin*, *The Royal Commission on the Donald Marshall Jr.*

Prosecution, and *The Inquiry Regarding Thomas Sophonow* either recommended the government study the advisability of implementing an independent review commission or specifically suggested the creation of such a body. However, the government has always rejected the need for an independent review commission and the reasons for this will be discussed in the fourth section of this chapter. Finally, the benefits of having an independent review commission to addressing miscarriages of justice will be addressed in the fifth section.

The principle reason for writing this thesis is to address whether the role of the Minister of Justice under section 696 of the *Criminal Code* is an appropriate mechanism to address alleged wrongful convictions. There are many criticisms of the section 696 post-conviction review process and there have been numerous calls for reform. One reoccurring suggestion has been to replace the role of the Minister of Justice with an independent review body. This has been done in the United Kingdom, yet the government of Canada feels that this is not necessary. This thesis will address whether an independent review commission, similar to the CCRC, will improve post-conviction review of alleged wrongful convictions. Wrongful convictions have dire consequences for the individual through their loss of liberty and also for the legitimacy of the criminal justice system as a whole. Since all systems are fallible, the existence of an appropriate mechanism to detect, review and rectify errors made in the criminal justice system is of utmost importance.

Chapter 2

The Canadian Post-Conviction Review System.

I. Introduction

Section 690 of the *Criminal Code*¹ is seen as a ‘last resort’ remedy. It is a final petition to the Minister of Justice once all conventional avenues of appeal have been exhausted. Wrongful convictions are usually addressed and remedied through the appellate courts.² However, once these judicial avenues have been exhausted, section 690 of the *Criminal Code* “stands as a final safety net which allows the Minister of Justice to review alleged wrongful convictions that have not been detected and remedied by the courts.”³

This chapter will explain the process Canada has to deal with alleged cases of miscarriages of justice through section 690 of the *Criminal Code*. This will be done by outlining section 690 and by stating the conditions and processes a person must meet and go through in order to challenge their conviction under this section. It is important to set out this process, as it currently exists, without any comments or bias so a clear understanding of the section can be formed.

Part two of this chapter will outline section 690. Subsection one of part two will outline the history of section 690 while subsection two will explain under what circumstances a person can utilize this section to have their conviction reviewed.

Once it has been determined that a person qualifies for a section 690 review by the

¹ *Canadian Criminal Code*. R.S.C. 1985, c. C-46, s. 690.

² Canada. Department of Justice. *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*: Consultation Paper: 1998 [hereinafter Consultation Paper].

³ *Ibid*, at 2.

Minister of Justice they can submit an application. Subsection three describes the application requirements that must be followed by many person applying through section 690. These requirements are stipulated by the Department of Justice. One of the major requirements is that the applicant must submit ‘new and significant information’ that has arisen in their case that has not previously been considered. Subsection four will describe the meaning of ‘new and significant information’.

When a section 690 application has been submitted, a Department of Justice review will take place. Subsection five will explain the various stages of this process. Once the review has been completed, a brief summarizing all of the relevant information is prepared for the Minister. Upon reviewing this information the Minister has complete discretion whether to reject or grant a section 690 remedy. If the application is successful, the Minister will grant a remedy by invoking either subsection “a,” “b,” or “c” of section 690. The determination of which subsection of the *Criminal Code* will apply and is crucial and will have a significant impact on the applicant because each subsection has “different procedural, evidentiary and redress implications.”⁴ Subsection six will outline section 690(a), 690(b), and 690(c).

During the writing of this thesis the law was amended. On 25 November 2002 Section 690 of the *Criminal Code* was repealed and Section 696 replaced it. Despite a few changes added into section 696, the post-conviction review system is essentially the same as it was under section 690. Due to this, part three of this chapter will explain the section 696 process for conviction review by the Minister of Justice. This process is still the same except for a few changes which will be outlined.

⁴ P. Rosen. *Wrongful Convictions in the Criminal Justice System*. (Ottawa: Library of Parliament. Research Branch. Background Paper 285E: 1992): at 4 [hereinafter Rosen].

Subsection one will discuss the calls to reform section 690 and subsection two will provide a comparison between the new section 696 and the old section 690 in order to outline the similarities and differences between the two sections.

II. Applying to the Minister of Justice for a Post-Conviction Review Under Section 690 of the Canadian *Criminal Code*.

i) History of the Post-Conviction Review Section of the *Criminal Code*.

Ministerial powers to grant a post-conviction review originate in the Royal Prerogative of Mercy (RPM).⁵ A pardon exercised by a sovereign authority is “perhaps the oldest form of relief from a punishment.”⁶ Historically, the RPM allowed the sovereign to “extend mercy whenever he thinks it is deserved.”⁷ For example, “if the commission of an offence offended the letter (but not the spirit) of the law, the sovereign could prevent the appearance of injustice by utilizing the power to relieve a convict of criminal liability.”⁸ “The modern pardon...is used to respond to miscarriages of justice and to particular situations of punishment which seem inordinately harsh.”⁹ A.T.H. Smith has explained that “although the pardon is used to temper justice with mercy, it is also used as a regular instrument of the system of criminal justice, rectifying errors that the judicial system is prone to make from time to time.”¹⁰ The problem with the RPM is that it can be used to either “lessen punishment for reasons of pity and compassion, as well as for reasons related to the

⁵ Consultation Paper, *supra*, note 2.

⁶ Rosen, *supra*, note 4, at 2.

⁷ Consultation Paper, *supra*, note 2, at 3.

⁸ *Ibid*, at 3.

⁹ A. Manson, “Answering Claims of Injustice.” (1992) 12 C.R. (4th) 305 at 309 [hereinafter Manson].

¹⁰ A.T.H. Smith, “The Prerogative of Mercy, the Power of Pardon and Criminal Justice.” (1983) *Public Law* 398 at 439 [hereinafter Smith].

guilt or innocence of [an] individual.”¹¹ This can lead to the effect of pardoning a person “on the grounds of innocence [and this] is in itself, to say the least, an exceedingly clumsy mode of procedure.”¹² Until 25 November 2002 there was a link between the post-conviction review reference to the Minister of Justice and the notion of mercy.¹³ This was apparent from the wording in the relevant section; “the Minister of Justice may, on an application for the mercy of the Crown...”¹⁴

The ability to apply to the Minister of Justice for a post-conviction review was first codified in section 748 of Canada’s first *Criminal Code* in 1892.¹⁵ This section allowed anyone convicted of an indictable offence to apply to the Minister of Justice “for the mercy of the Crown.”¹⁶ If the Minister “entertain[ed] a doubt whether such person ought to have been convicted...after such inquire if he [thought] proper” he or she could “direct a new trial.”¹⁷ Section 748 also stated that this option could be utilized “instead of advising Her Majesty to remit or commute the sentence” through the Royal Prerogative of Mercy. This section remained unchanged until 1923. Trotter comments that, “the 1923 revision further solidified the link between the [post-conviction] reference procedure and the RPM.”¹⁸ Section 1022(1) reaffirmed that nothing in the *Criminal Code* limited the RPM.¹⁹ The 1923 amendment codified in section 1022(2) what are now section 696.3(3)(a)(i) and 696.3(2), allowing the Minister of Justice to refer a case to a court of appeal as if it were an appeal by the

¹¹ G. Trotter, “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review.” (2001) 26 *Queen’s Law Journal* 339 at 346 [hereinafter Trotter].

¹² *Ibid.*

¹³ *Ibid.*, at 354.

¹⁴ *Supra*, note 1.

¹⁵ *Canadian Criminal Code* S.C. 1892, c. 29, s. 748.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Trotter, *supra*, note 11, at 353.

¹⁹ *Canadian Criminal Code* S.C. 1923, c.41, s.1022

accused or to seek that court's opinion on a particular question.²⁰ The option to grant a new trial was also still available to the Minister.

The 1954 revisions to this section removed the Minister of Justice's option of advising the Governor General to grant mercy or referring the matter to the Courts.²¹ Responsibility for the exercise of the RPM was then reposed in the Solicitor General. Rosen believes that the 1954 amendments only "made some technical drafting changes."²² However, Braiden and Brockman correctly point out that the section no longer read, "if [the Minister] entertains a doubt whether such a person out to have been convicted," but rather, "if [the Minister] is satisfied that in the circumstances a new trial should be directed."²³ Braiden and Brockman comment that, "the earlier wording favours the applicant more so than the amendment."²⁴ The rest of the section remained unaltered. The only change to this section in the 1968 amendment was to extend post-conviction review by the Minister of Justice to people sentenced to preventative detention. After the 1968 amendment the post-conviction review section appeared as it does in section 690.

ii) Section 690 of the *Criminal Code* and When it Can be Utilized.

Section 690 of the *Criminal Code* reads as follows:

690. Powers of minister of justice - The minister of Justice may, upon 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,

²⁰ Rosen, *supra*, note 4.

²¹ Trotter, *supra*, note 11, at 354.

²² Rosen, *supra*, note 4, at 4.

²³ P. Braiden and J. Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the *Criminal Code*." (1999) 17 *Windsor Yearbook of Access to Justice* 3 at 5. [hereinafter Braiden and Brockman] (See *Canadian Criminal Code* S.C. 1953-54, c. 51, s.596).

²⁴ *Ibid.*

- 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 the 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 or 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.

As section 690 specifies, in order for a person to qualify to have their conviction reviewed a person must have been convicted of an indictable offence. This excludes anyone convicted of an offence punishable by summary conviction from applying through section 690 to have their conviction reviewed. People who have been sentenced to preventative detention as a dangerous offender²⁵ may also apply to have their conviction reviewed under section 690. Under this section a person is able to submit an application to the Minister of Justice for a post-conviction review.

iii) Application Requirements.

“There is no specific application form for a section 690 application.”²⁶

However, the applicant needs to collect and submit certain information. The information required from a person to be submitted to the Minister of Justice for a section 690 conviction review has been outlined in a 1994 Department of Justice

²⁵ See Part XXIV- Dangerous Offenders and Long-Term Offender - *Canadian Criminal Code*. R.S.C. 1985, c. C-46.

²⁶ Canada. Department of Justice. Publication (Booklet), “Applications to the Minister of Justice for a Conviction Review Under Section 690 of the *Criminal Code*” at 4, Available at <http://Canada.justice.gc.ca/en/dept/pub/amjcr/main.html> [Accessed 10 October 2002] [hereinafter Booklet].

publication entitled: *Applications to the Minister of Justice for a Conviction Review Under Section 690 of the Criminal Code* (Hereinafter referred to as “The Booklet”).²⁷

According to the Department of Justice the intent of the booklet is to describe “the nature of the remedy that section 690 provides, how the process of assessing applications works and what the Minister of Justice has the power to do.” The opening paragraph states:

If you have been convicted of an offence in proceedings by indictment or sentenced by a court as a dangerous offender and you believe that you have been wrongly convicted, you may apply to the Minister of Justice to review your case under section 690 of the *Criminal Code*.²⁸

In the booklet published by the Department of Justice, the initial “application requirement” the applicant must provide is specified under the heading “personal information.” The applicant must include their name, address, date of birth and finger print and photograph service number [F.P.S.]. It is added that if another person is making the application on the applicant’s behalf, the applicant must include that person’s name and address. The second category of “application requirements” is “supporting evidence.”²⁹ Under this heading the Department of Justice states the applicant must; a) explain “the reasons [they] believe that there was a miscarriage of justice”, b) provide “a detailed description of the new information that supports [their] belief,” and c) provide “affidavits of witness, letters, photos, plans, drawings, scientific reports or other documents that present proof of the new information.”³⁰

The third “application requirement” is for the applicant to submit court records. The

²⁷ *Ibid.*

²⁸ *Ibid.*, at 1.

²⁹ *Ibid.*, at 4.

³⁰ *Ibid.*

applicant must provide the Department of Justice with the following information: a) the complete transcript from trial, and the information about the trial including trial date, jurisdiction of the court, plea at trial, mode of trial (judge or judge and jury), and date of conviction, b) information about all pre-trial motions including the type of motion, date of motion, the court, and motion judgement, c) a copy of all material filed by both the defence and the Crown in support of all pre-trial or trial motions, d) all factums filed on appeal, and e) a copy of all appeal court judgements.

The booklet states that, “applications cannot be reviewed until all the information listed above is submitted.” However, it is also stipulated that if an applicant cannot supply some of the information required they should explain why not. In appropriate cases, departmental officials may obtain or get access to court records.³¹

A final “application requirement” is that the applicant complete, sign and witness the *Waiver of Solicitor-Client Privilege* and the *Consent to the Release of Personal Information* form. It is stated that these waivers are necessary for an application to receive a thorough review.

It is specified in the booklet that the application “should describe the information and include proof of the evidence, such as the identity of a new witness, a copy of the person’s statement, or a summary of their information.” It is further stated that the applicant “should also try and explain how the new information might have affected the outcome of [their] case.” An example of this is provided in the booklet by suggesting that; “if [there] is new information from a witness, explain how

³¹ *Ibid.*

this new information affects the evidence that was heard at trial or considered on appeal.”

The applicant is cautioned by the Department of Justice that,

[t]he section 690 remedy is not meant to provide a substitute for a court’s decision. In assessing an application the Minister of Justice will not decide whether [the applicant] is guilty or innocent. That is for the court to decide. The Minister cannot substitute his or her opinion for a jury’s verdict or a judge’s decision. An application will be denied if it is clear that it is being used as another form of appeal to overturn a court’s decision. Nor is the section 690 process meant to be a substitute for an appeal to a provincial court of appeal. Arguing that there were weaknesses in the evidence presented to the trial or appeal court is not enough. The Minister cannot just take a different view of the same evidence and arguments that were presented in court.³²

iv) The Meaning of *New and Significant* Information.

As outlined above, the second ‘application requirement’ is that section 690 applications provide “supporting evidence.”³³ This means the applicant must provide a description of the new information that supports the belief that a miscarriage of justice occurred. The Booklet outlines what they consider to be ‘new and significant information.’

Information will be considered ‘new’ if it was not examined by the courts during your trial or if you became aware of it after all proceedings were over. The information you present will be considered ‘significant’ if it meets all of the following tests:

- It is reasonably capable of belief.
- It is relevant to the issue of guilt.
- The information could have affected the verdict if it had been presented at trial.³⁴

³² *Ibid*, at 1.

³³ *Ibid*, at 4.

³⁴ *Ibid*.

The Department of Justice provides some examples of the “kinds of information that *might* be a basis for a section 690 application if the information were both new and significant (emphasis added).” These are:

- Information that establishes or confirms an alibi.
- The confession of another person to the crime.
- Information that identifies another person at the scene of the crime.
- Scientific evidence that points to another person’s guilt or supports a claim of innocence.
- Proof that important information was suppressed.
- Information that shows that a witness gave false testimony.
- Information that substantially contradicts testimony given at trial.

v). How the Department of Justice Reviews a Section 690 Application.

Once the applicant has submitted their application with the required information to the Department of Justice, the review process begins. Post-conviction reviews through section 690 of the *Criminal Code* are considered by the Criminal Conviction Review Group (CCRG). The CCRG operates within the Policy Sector of the Department of Justice and is accountable to the Minister of Justice.³⁵ Its “function is to investigate section 690 applications and report to the Minister.”³⁶ The CCRG consists of six full- time Department of Justice lawyers who have experience both as Crown and Defence counsel.³⁷ Usually, one Department of Justice lawyer will be assigned the task of reviewing the section 690 application. “However in exceptional cases, such as when the conviction being reviewed was obtained by a

³⁵ The CCRG was created in 1994 in response to an internal review which considered ways to enhance the efficiency of the section 690 process. Prior to 1994, section 690 applications were usually assigned on an *ad hoc* basis to legal counsel within the Litigation Sector of the Department of Justice. See Consultation Paper, *supra*, note 2.

³⁶ Consultation Paper, *supra*, note 2, at 5.

³⁷ *Ibid.* See also P. Braiden, “Wrongful convictions and Section 690 of the *Criminal Code*: An Analysis of Canada’s Last-Resort Remedy” (M.A. Thesis. Simon Fraser University, 2000) at 146.

federal prosecution, outside counsel may be asked to assess the application or provide advice on it.”³⁸

Although no procedure is outlined in the *Criminal Code* as to how one applies for a conviction review, a standard procedure has been in place since 1994 to assist the review of section 690 applications.

The post-conviction review process administered by the CCRG within the Department of Justice is divided into four stages:

1. Preliminary Assessment.
2. Investigation.
3. Investigative Summary.
4. Recommendations and Ministerial Decision.

The *preliminary assessment* is the initial review stage of a section 690 application. During this stage a Department of Justice lawyer, operating within the CCRG, who has been assigned to review the application, will examine the information the applicant has provided and compare it with trial and appellate courts.³⁹ “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.”⁴⁰ If the application reveals new and significant information that was not available at trial, or on appeal, and the CCRG finds that this information could have affected the outcome of the case, the application will go to the next step.⁴¹ If the applicant does not raise information that is deemed by the CCRG lawyer to be new and significant, or this information is not

³⁸ Booklet, *supra*, note 26, at 2. This was the case with David Milgaard’s application. When the Department of Justice was faced with allegations that their lawyers were not impartial in the Milgaard application, the Minister of Justice sought the advice of the Honourable William R. McIntyre, Q.C., of Vancouver. See also P. Braiden, “Wrongful convictions and Section 690 of the *Criminal Code*: An Analysis of Canada’s Last-Resort Remedy” (M.A. Thesis. Simon Fraser University, 2000) at 146.

³⁹ Booklet, *supra*, note 26.

⁴⁰ Consultation Paper, *supra*, note 2, at 6.

⁴¹ Booklet, *supra*, note 26.

deemed to have an air of reality, or this information has already been raised at trial, or it was concluded by the CCRG lawyer that no miscarriage of justice occurred, the application will fail at this stage. The Department of Justice specifies that the applicant will be notified at this stage whether the application will be further investigated or whether the application has been denied.⁴² Further, if any additional information is required from the applicant for the preliminary assessment they will be asked to supply it to the CCRG. The applicant will be given a specified time period to do so.⁴³ If the information is not supplied by the deadline the application will be considered “withdrawn.” The applicant may reapply when they have gathered the required information.⁴⁴

The second stage of a section 690 application review, conducted by the CCRG lawyer, is the *investigation*. While the *preliminary assessment* stage appears to be a passive assessment of the application based on the information provided, the *investigation* stage is more active. “At the *investigation* stage, the new information will be looked at more closely to see if it is reliable (i.e., it is reasonably capable of belief) and relevant (i.e., it relates to guilt or innocence).”⁴⁵ An investigation by the CCRG lawyer could involve interviewing witnesses to clarify or verify the information in the application, carrying out scientific tests, obtaining assessments from forensic and social science specialists and/or consulting police agencies and prosecutors who were involved in the original prosecution.⁴⁶ “This process allows the CCRG lawyer to formulate a recommendation as to whether there is a basis to

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 3.

⁴⁶ *Ibid.*

conclude that a miscarriage of justice likely occurred.”⁴⁷ If the investigation lawyer raises issues that were not covered in the application, the applicant may again be asked to provide additional information within a specified time period. The Department of Justice does not set a time limit on the investigative stage, but states the length of time taken will “depend on the complexity of the case and the availability of evidence.”⁴⁸

When all the information is gathered and assessed, and the investigation is considered complete, a *preparation of an investigative brief* will take place. This is the third stage of the section 690 review process conducted by the CCRG lawyer. The investigative brief summarizes the information found during the investigation. The applicant is asked to review and comment on the investigative brief and is given a deadline to do so. Once the CCRG lawyer has received the applicant’s comments, or the time for making comments expires, a report will be prepared. The report is written by the CCRG lawyer and contains a summary of the application, the investigative brief, the applicant’s comments and the lawyer’s own recommendations. This subsequent brief is what is presented to the Minister of Justice for final review. The Minister will then review this report.

The fourth and final step in this process is the *decision by the minister*. “Section 690 does not set out the test that should be applied by Ministers of Justice in determining whether a remedy should be available to the applicant.”⁴⁹ However, in 1994, then Minister of Justice Allan Rock,⁵⁰ listed certain principles that are to taken

⁴⁷ Consultation Paper, *supra*, note 2, at 6.

⁴⁸ Booklet, *supra*, note 26, at 3.

⁴⁹ Consultation Paper, *supra*, note 2, at 3.

⁵⁰ Allan Rock was the Minister of Justice from 4 November 1993 until 10 June 1997.

into consideration when exercising discretion on whether to grant, or reject, a section 690 application.⁵¹ These are known as the Thatcher principles and they are to be used by the Minister of Justice to guide their decision on deciding section 690 applications.

These principles are:

1. The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.
2. The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict as a result on appeal. Merely because the Minister might take a different view of the same evidence that was before the court does not empower him, under section 690, to grant a remedy.
3. Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were before the trial and appellate courts. Applicants under section 690 who rely solely on alleged weakness in the evidence, or on arguments of law that were put before the court and considered, can expect to find that their applications will be refused.
4. Applications under section 690 should ordinarily be based on new matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted.
5. Where the applicant is able to identify such "new matters," the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all the circumstances. Such new matters will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the new matters when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be "is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have effected the verdict?"

⁵¹ Canada. Department of Justice. "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by W. Colin Thatcher to the Minister of Justice of Canada for Certain Discretionary Relief Under Section 690 of the *Criminal Code* of Canada; Reasons for Decision of the Minister of Justice" (14 April 1994) [hereinafter Thatcher Decision].

6. Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.⁵²

The Department of Justice clearly states that, “the Minister of Justice will not decide whether [the applicant is] guilty or innocent. The Minister’s power is limited to referring [the applicant’s] case back to an appropriate court.”⁵³ If the applicant’s case meets all the criteria it is still within the power of the Minister of Justice to turn down the request for a conviction review. The Minister’s decision to grant or deny any section 690 review is completely discretionary. If the Minister is satisfied “that there is reason to conclude that a miscarriage of justice likely occurred” he or she will invoke section 690 “a”, “b”, or “c”.⁵⁴ “At present, there is no statutory test that dictates what specific remedy should be ordered once the Minister is satisfied that a remedy is required.”⁵⁵ This means that there is no procedure or rule in place to indicate whether the Minister should invoke sub-section “a”, “b”, and/or “c” of section 690 of the *Criminal Code*. This is completely at his/her discretion.

Section 690 of the *Criminal Code* gives the Minister of Justice a broad discretion to respond to a person who believes that he or she has been wrongfully convicted. The section provides a special remedy to be used in exceptional circumstances where the Minister feels that there may be a miscarriage of justice, to correct that injustice after the ordinary passage of the case through the courts is over. If the Minister of Justice finds that there is no reason to conclude that a miscarriage of justice likely occurred, he or she will dismiss the application and inform [the applicant] of the decision.⁵⁶

⁵² *Ibid.*

⁵³ Booklet, *supra*, note 26, at 1.

⁵⁴ *Ibid.*, at 4.

⁵⁵ Consultation Paper, *supra*, note 2, at 4.

⁵⁶ Booklet, *supra*, note 26, at 1.

If the Minister of Justice turns down the section 690 application, “the Minister may, under another section of the *Criminal Code*, recommend to the Governor in Council that [the applicant] be given a free or conditional pardon.”⁵⁷ It is also open to the Minister to direct a Reference to the Supreme Court of Canada under section 53 of the *Supreme Court Act*.⁵⁸

vi) Proceeding by Section 690(a), (b) and (c) of the *Criminal Code*.

If the Minister of Justice decides to grant a conviction review under section 690, it is completely at his/her discretion to proceed by invoking subsection “a,” “b,” or “c.” However, this decision by the Minister will have a profound effect on the way the applicant’s case is heard as “each method for the exercise of the ministerial discretion is separate and has different procedural, evidentiary and redress implications.”⁵⁹

If the Minister of Justice chooses to proceed under section 690(a), then a “new trial or hearing may be ordered.”⁶⁰ Ordering a new trial or hearing “means that the Crown has the evidentiary burden of proving all constituent elements of the offence beyond a reasonable doubt to secure a conviction.”⁶¹ This also has the effect of resurrecting the presumption of innocence.⁶² It would be consistent with having a fresh start, or a new trial. Due to this, the “accused has all the evidentiary benefits of

⁵⁷ *Ibid*, at 4.

⁵⁸ *Supreme Court Act* R.S.C. 1985, c. S-26, s.53.

⁵⁹ Rosen, *supra*, note 4 at 4.

⁶⁰ *Canadian Criminal Code*. R.S.C. 1985, c. C-46, s. 690(a).

⁶¹ Rosen, *supra*, note 4 at 4.

⁶² Manson, *supra*, note 9.

being a defendant in a trial before a court of first instance.”⁶³ This allows the prosecution and defence to have “full rights to appeal procedural and evidentiary rulings as well as an acquittal/conviction or any sentence to the court of appeal and ultimately, with the court’s leave, to the Supreme Court of Canada.” Since the creation of the Canadian *Criminal Code* in 1892, the Minister of Justice has ordered a conviction review under section 690(a) in five cases.⁶⁴ In these five cases, four people were acquitted.⁶⁵ The verdict in the other case is unknown.⁶⁶

If the Minister of Justice grants a conviction review under section 690(b) he or she “refers the matter to the court of appeal.”⁶⁷ The Court of Appeal will hear and determine the case as if it were an appeal by the convicted person or by a person under sentence of preventive detention.⁶⁸ This means that the person challenging the validity of their conviction has “the procedural and evidentiary burden of convincing the court of appeal of the wrongful nature of the original conviction or sentence of preventative detention.”⁶⁹

A hearing by the Court of Appeal, granted under section 690(b), is subject to the rules of judicial appeal set out in section 686 of the *Criminal Code*.⁷⁰ Section 686 is a lengthy and very detailed part of the *Criminal Code*. Generally, this states that an appeal may succeed where it is shown that the original trial verdict; (a) “was

⁶³ Rosen, *supra*, note 4, at 4.

⁶⁴ P. Braiden, “Wrongful convictions and Section 690 of the *Criminal Code*: An Analysis of Canada’s Last-Resort Remedy” (M.A. Thesis. Simon Fraser University, 2000) at 162 [hereinafter Braiden].

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Canadian Criminal Code*. R.S.C. 1985, c. C-46, s. 690(b).

⁶⁸ *Ibid.*

⁶⁹ Rosen, *supra*, note 4, at 5.

⁷⁰ *Canadian Criminal Code*. R.S.C. 1985, c. C-46, s. 686.

unreasonable,”⁷¹ (b) “cannot be supported by the evidence,”⁷² (c) was reached by a “wrong decision on a question of law,”⁷³ or (d) the appeal may succeed if the Court is of the opinion that “on any ground there was a miscarriage of justice.”⁷⁴ In any of these instances the conviction will be quashed and an acquittal entered, or a new trial is to be ordered.”⁷⁵ The Court of Appeal may dismiss an appeal where, (a) the accused has been properly convicted on one count of the indictment⁷⁶, (b) the grounds of the appeal have not been argued successfully, (c) “any error of law did not occasion a substantial wrong or miscarriage of justice (i.e. the verdict would necessarily have been the same),”⁷⁷ and (d) “the error at trial was a procedural irregularity which did not prejudice the accused.”⁷⁸ If the Court of Appeal dismisses the appeal the court “orders the verdict that should have applied and affirms the sentence.”⁷⁹

Due to the “strict nature of the rules of evidence, the court of appeal will only admit fresh evidence that did not exist or could not have been discovered with reasonable diligent efforts at the time of the original conviction.”⁸⁰ However, these rules are to be applied with a degree of flexibility due to the extraordinary nature of the recourse under section 690.⁸¹ “When considering fresh evidence on appeal which comes before the Court by a Reference under section 617(b)” [now s.690(b)], the

⁷¹ *Ibid*, s. 686.1(a)(i).

⁷² *Ibid*.

⁷³ *Ibid*, s. 686.1(a)(ii).

⁷⁴ *Ibid*, s. 686.1(a)(iii).

⁷⁵ Rosen, *supra*, note 4, at 5.

⁷⁶ *Supra*, note 70, s. 686.1(b)(i).

⁷⁷ *Martin’s Annual Criminal Code 2001*, (With Annotations by Edward L. Greenspan and The Honourable Mr. Justice Marc Rosenberg, 2001), at 1159.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ Rosen, *supra*, note 4, at 5.

⁸¹ See *Reference Re R. v. Gorecki* (No. 2) (1976), 32 C.C.C. (2d) 135 and *R. v. Marshall* (1983) 57 N.S.R. (2d) 286.

court should not be “bound by inflexible rules...lest the impression might arise that a review of [the] case has been refused for a reason which is merely procedural.”⁸²

Further, any decision by the Court of Appeal can be appealed to the Supreme Court of Canada.⁸³ Between 1892 and 1998 the Minister of Justice referred eleven cases to the Court of Appeal under section 690(b).⁸⁴ Only two of these cases succeeded, by either having their conviction quashed or by being exonerated.⁸⁵

When section 690(c) is invoked the Minister of Justice is seeking the advice and opinion of the Court of Appeal on a specific question.⁸⁶ For example, in *Reference Re R. v. Gorecki* (No.1), the Minister asked the Court whether the accused “was at the time of his trial, incapable on account of insanity of instructing counsel and conducting his defence.”⁸⁷ Since the nature of section 690(c) “is a reference for a judicial opinion, the procedures and rules of evidence usually applicable before the court of appeal will be interpreted with greater flexibility than in regular appellate proceedings.”⁸⁸ The Minister will then make a decision based on the opinion of the Court of Appeal. However, the Minister is not bound by the opinion received from the Court.⁸⁹ It is unclear whether a decision by the court can be appealed to the Supreme Court of Canada.⁹⁰

It is open to the Minister of Justice to proceed under section 690(c), by asking the Court of Appeal a question and then, depending on the answer, proceed under

⁸² See *Reference Re R. v. Gorecki* (No. 2) (1976), 32 C.C.C. (2d) 135 [hereinafter *R.v.Gorecki(2)*].

⁸³ This was affirmed by the Supreme Court of Canada in *Marcotte v. The Queen*, [1965] 3 C.C.C. 285.

⁸⁴ Braiden, *supra*, note 64, at 169.

⁸⁵ *Ibid.*

⁸⁶ *Canadian Criminal Code*. R.S.C. 1985, c. C-46, s. 690(c).

⁸⁷ See *R.v.Gorecki(2)*, *supra*, note 82.

⁸⁸ Rosen, *supra*, note 4, at 5.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

section 690(b) to further decide the matter. For example, “the Minister referred the Kelly case to the Ontario Court of Appeal and asked for its opinion as to whether new information from one of the witnesses and from scientific experts would be admissible on appeal. If the court concluded that [it was] admissible, the Minister asked the Court to consider the case as if it were an appeal.”⁹¹

III. The New Law: Section 696 of the *Criminal Code*.

During the writing of this thesis the law changed. On 25 November 2002 Section 690 of the *Criminal Code* was repealed and Section 696 replaced it. Despite a few changes added into section 696, the post-conviction review system is essentially the same as it was under section 690.

i) The Calls to Reform Section 690.

In a 1998 press release by the Department of Justice, the Honourable Anne McLellan, then Minister of Justice and Attorney General of Canada stated:

Canada has an excellent criminal justice system, but no system of justice is perfect. Regrettably, wrongful convictions sometimes can and do occur and, when they do the entire justice system is called into question. Section 690 is an important safeguard in the criminal justice system to address miscarriage of justice.⁹²

In an attempt to strengthen the process for responding to cases of wrongful convictions, Minister Anne McLellan announced the release of a consultation paper

⁹¹ Braiden and Brockman, *supra*, note 23, at 18.

⁹² Department of Justice, “Minister to Consult on Options to Improve the Conviction Review Process.” (Press Release. Ottawa. 26 October 1998) Available at www.canada.justice.gc.ca/en/news/nr/1998/690.html [Accessed 10 October 2002] [hereinafter October 1998 Press Release].

entitled *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*.⁹³ This paper was part of a consultation process that examined potential options for reforming the post-conviction review process in Canada. The Department of Justice asked for responses to the consultation paper from the public and various institutions in order to take into consideration the many different interests and concerns in reforming section 690.⁹⁴ This consultation was to examine the following possibilities for reform:

- a) enhancing the actual and apparent independence of post-conviction review;
- b) establishing an independent body;
- c) amending the *Criminal Code* to include standards and procedures;
- d) extending the jurisdiction of courts of appeal; and
- e) broadening the appeal process.⁹⁵

In response to the consultation paper, defence lawyers and advocacy groups for accused persons recommended that an independent review commission be established, similar to Britain's, which would have the authority to refer cases back to the court of appeal without any interference from the government⁹⁶ (This will be discussed in detail in Chapter 3). The provincial governments and those who have investigated alleged wrongful convictions recommended that the Minister retain her powers under section 690, but make some changes to improve the independence and transparency of the process.⁹⁷ A year and a half after the introduction of the consultation paper, and to the disappointment of many, the proposed amendments to

⁹³ Consultation Paper, *supra*, note 2.

⁹⁴ October 1998 Press Release, *supra*, note 92.

⁹⁵ *Ibid.*

⁹⁶ Tibbetts, Janice and Jim Bronskill. "Justice Minister Eyes Independent Board to Review Convictions." (17 January 2000, *Victoria Colonist* A4).

⁹⁷ *Ibid.*

section 690 were tabled in Clause 71 of Bill C-15A.⁹⁸ Bill C-15A received royal assent on 4 June 2002. Clause 71 has created section 696 of the *Criminal Code*, and Clause 70, of the same Act, has repealed section 690. Section 696 came into force and effect 25 November 2002.

Since this amendment was implemented during the writing of this thesis, it is essential to address the change in the law and how it will affect the post-conviction review process. However, until section 696 is fully implemented it will be difficult to ascertain how effective it will or will not be in addressing applications for post-conviction review based on an alleged miscarriage of justice. However, some inferences can be made from comparing the old section 690 to the new section 696. A couple of changes have been made but, it seems, the essence of section 690 is maintained in section 696 with little change that will affect applications to the Minister of Justice for post-conviction review.

ii). The Breakdown of Section 696: How Different is this Section from Section 690?

Clause 71 of Bill C-15A added a new Part XXI.1 (new sections 696.1 – 696.6) to the *Criminal Code* entitled, Applications for Ministerial Review – Miscarriages of Justice.⁹⁹ This new section replaces section 690 of the *Criminal Code*. Bill C-15A made a few changes to section 690, but the essence of the post-conviction review process to the Minister of Justice, on the basis of an alleged wrongful conviction, is still unchanged. While section 696 is a substantially longer section than section 690,

⁹⁸ Bill C-15 (Bill C-15A), *An Act to Amend the Criminal Code*, 1st Sess., 37th Parl., 29 Jan. 2001- 16 Sept. 2002.

⁹⁹ See Appendix II.

the process of post-conviction review by the Minister is essentially the same as it was.

However, there are a couple of important changes from section 690 to section 696.

One change is that ministerial review of an alleged wrongful conviction is no longer available only to people who have been convicted of an indictable offence. The Minister of Justice stated that “in recognition of the fact that any wrongful conviction is wrong and threatens public confidence in the justice system, Bill C-15[A] proposes that conviction reviews be expanded to allow for the review of any federal conviction, thereby including summary convictions.”¹⁰⁰ “Clause 71 extends ministerial review applications based on an alleged miscarriage of justice to all federal offences. Section 690 only applied to offences prosecuted by indictment.”¹⁰¹ Section 696.1(1) states that “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...”¹⁰² Section 696 will now make it possible for a person convicted of a summary offence to apply to the Minister of Justice for a post-conviction review.

¹⁰⁰ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 3 October 2001 at 6. Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev23-e.htm>. [Accessed 10 October 2002] [hereinafter Standing Committee 3 October 2001].

¹⁰¹ Legislative Summaries. Library of Parliament – Parliamentary Research Branch. “Bill C15-A: An Act to amend the *Criminal Code* and to amend other Acts.” (Prepared by: David Goetz, Gerald Lafreniere, Law and Government Division. 12 October 2001. Revised 30 September 2002) at 19. Available at www.parl.gc.ca/commons/bills-ls... [Accessed 7 November 2002] [hereinafter Legislative Summary].

¹⁰² *Canadian Criminal Code* Section 696.1(1) (Available at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-15A/C-15a_3/98148...) [Accessed 24 October 2002] [hereinafter *Canadian Criminal Code* Section 696].

The inclusion of all federal criminal offences in section 696 will increase the number of people who qualify to have their conviction reviewed by the Minister of Justice. Ms. Mary McFadyen, a senior counsel with the Department of Justice's Criminal Case Review Group (CCRG) "anticipates that by expanding to [include] summary conviction offences the number of applications [the Department of Justice] receives will increase."¹⁰³ Under section 690 the Department of Justice received two or three applications a year for post-conviction reviews that were summary conviction offences, even though summary offences were not capable of being reviewed under section 690.¹⁰⁴

This amendment may be a positive addition to the post-conviction review process. However, there has been no indication from the Department of Justice that the number of CCRG staff will increase in response to the predicted increase in applications the Department will receive. While it can be seen that the inclusion of summary convictions is a positive change, without an increase to staff at the CCRG, section 696 may lead to more delays than was the case for section 690. It is also difficult to tell at this early stage if this inclusion will actually lead to an increased number of wrongful convictions being remedied.

The second change to the post-conviction review system set out in section 696.2(2) is that the Minister of Justice is now provided with the powers of a

¹⁰³ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 4 October 2001 at 24. (Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev23-e.htm>. [Accessed 10 October 2002] [hereinafter Standing Committee 4 October 2001].

¹⁰⁴ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 2 October 2001. (Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev23-e.htm>. [Accessed 10 October 2002] [hereinafter Standing Committee 2 October 2001].

commissioner under the *Inquiries Act*,¹⁰⁵ and is authorized to delegate this power to others under section 696.2(3)¹⁰⁶. This will allow the CCRG to summon before them any witness, and require the witness to give evidence, produce documents, and give other materials needed to conduct a full investigation.¹⁰⁷ Previously, in section 690, no such power was allocated to the Department of Justice when investigating cases of alleged miscarriages of justice. The CCRG had to rely on witnesses to cooperate of their own free will. “The power to delegate investigative powers may be an important amendment but [this] will depend on when the power is exercised, the choice of delegates, and any limits placed upon the delegation.”¹⁰⁸ The full effect of such an amendment cannot be predicted, and the reality of this change will be seen only after the section has been applied.

Despite these two “positive” additions to section 696 (the inclusion of summary offences and the granting of the power of a commissioner), which were not available under section 690, “clause 71 preserves the basic elements of the current system for ministerial review provided for in section 690.”¹⁰⁹ The power to return an alleged wrongful conviction case back to the court still remains in the hands of the Minister of Justice. Section 696.1(1) reaffirms that ministerial review of alleged wrongful convictions continues to be an extraordinary and discretionary remedy available only after all the statutory means of appeal have been exhausted.¹¹⁰

¹⁰⁵ See *Inquiries Act* 1985 R.S. c. I-13.

¹⁰⁶ *Ibid.*, See Part III s. 11.

¹⁰⁷ *Ibid.*, See Part I s.4(a) and (b).

¹⁰⁸ Canadian Bar Association. “CBA’s Letter to the Senate Committee on Legal and Constitutional Affairs.” 12 December 2002 at 2 (Available at http://www.cba.org/CBA/News/2001_releases/2001-12-12_wrongltr.asp) [Accessed 10 October 2002] [hereinafter CBA’s Letter to the Senate].

¹⁰⁹ Legislative Summary, *supra*, note 101 at 19.

¹¹⁰ *Canadian Criminal Code* s. 696.1(1), *supra*, note 102. See also Legislative Summary, *supra*, note 101, at 19.

In dealing with such applications, the Minister of Justice continues to have the same options available under section 696, as under section 690; that is, the Minister has full discretionary power to reject the application,¹¹¹ order a new trial,¹¹² refer the case to the court of appeal¹¹³ and/or, refer any question concerning the application to the court of appeal.¹¹⁴

A new section has been added (696.3(4)) that stipulates a decision made by the Minister is final and this decision is not subject to appeal. Before section 696 there was nothing to state that a decision by the Minister of Justice was final. In fact, applicants who had been denied conviction review by the Minister of Justice were known to reapply,¹¹⁵ or appeal their decision.¹¹⁶ The intent of this section seems to be to create some finality to the decision by the Minister of Justice, yet it also places further restrictions on the post-conviction application process that were not present under section 690. However, the legislative summary of Bill C-15A states that “although section 696.3(4) provides that the Minister’s decision on an application is final and not subject to appeal, this language does not appear to preclude judicial review in such matters.”¹¹⁷ The potential effect of this section is unclear. Until section 696 is fully implemented and utilized it will be difficult to see the impact it has on post-conviction review applications to the Minister of Justice.

¹¹¹ *Canadian Criminal Code* s.696.3(3)(b), *supra*, note 102.

¹¹² *Canadian Criminal Code* s.696.3(3)(a)(i), *supra*, note 102. See also *Canadian Criminal Code* R.S.C. 1985, c. C-46, s. 690(a).

¹¹³ *Canadian Criminal Code* s.696.3(3)(a)(ii), *supra*, note 102. See also *Canadian Criminal Code* R.S.C. 1985, c. C-46, s. 690(b).

¹¹⁴ *Canadian Criminal Code* s. 696.3(2), *supra*, note 102. See also *Canadian Criminal Code* R.S.C. 1985, c. C-46, s. 690(c).

¹¹⁵ For example, David Milgaard reapplied to the minister of Justice after his initial post-conviction review application was turned down. *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289.

¹¹⁶ For example, W. Colin Thatcher appeal his post-conviction review decision to the Federal court of Canada. See *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289.

¹¹⁷ Legislative Summary, *supra*, note 101, at 20.

Another new section (696.2(1)) requires the Minister of Justice to review an application in “accordance with the regulations” and section 696.6 allows the Governor-in-Council to make regulations that will affect the process of post-conviction review applications to the Minister of Justice. However, until these regulations are made available, it will be impossible to assess the impact of this section.¹¹⁸

Section 696.6 also has a familiar ring to it. This section specifies that the Governor-in-Council will make regulations that would, (a) specify the information and documents required to be submitted by the section 696 applicant and, (b) to set out the stages of review, namely, preliminary assessment, investigation, reporting on investigation and decision, conducted by the Department of Justice. Although the information presented in this section is newly prescribed in the *Criminal Code* it is not new to the application process of ministerial review. This information has already been set out in the Department of Justice booklet.

One change from section 690 to section 696 is the threshold on which the Minister of Justice bases his or her decision to reject or grant ministerial review applications. Section 690 stipulates that the Minister of Justice must be *satisfied* that a new trial should be directed.¹¹⁹ This implies that the Minister be sure a miscarriage of justice has occurred in the applicant’s case before sending the case back to the appropriate court. However, the Thatcher principles, which guided the Minister’s decision under section 690, state that an applicant need only demonstrate that there is

¹¹⁸ CBA’s Letter to the Senate, *supra*, note 108.

¹¹⁹ *Canadian Criminal Code* R.S.C. 1985, c. C-46, s. 690(a) (Powers of the Minister of Justice).

a basis to conclude that a miscarriage of justice *likely* occurred¹²⁰ and that the applicant did not need to establish their innocence or prove conclusively that a miscarriage of justice actually occurred. These two different thresholds make it difficult to determine how the Minister of Justice in fact decides if a miscarriage of justice has occurred and whether the case should be sent back to the courts.

Under section 696, the Minister need only be “satisfied that there is a *reasonable basis* to conclude that a miscarriage of justice likely occurred (emphasis added).”¹²¹ The wording in section 696 appears to lower the threshold required for an application to be accepted by the Minister. Whether the new wording in section 696 actually leads to a change in practice by the Minister of Justice, granting a greater number of cases be referred back to the court is something that will have to be determined after section 696 has been in effect for some time.

Section 696.5 requires the Minister of Justice to submit an annual report to Parliament on the handling of applications for ministerial review.¹²² This requirement was not previously present in section 690 and the intent of section 696.5 is to increase the transparency and accountability of the post-conviction review process.¹²³ Again, it will not be known how effective this section will prove to be in making the post-conviction review process more open and accountable until it becomes fully operational but on paper, at least, it can be seen as an improvement over section 690.

¹²⁰ Thatcher Decision, *supra*, note 51, (Principle 6).

¹²¹ *Canadian Criminal Code* s. 696.3(3)(a), *supra*, note 102.

¹²² *Canadian Criminal Code* s.696.5, *supra*, note 102.

¹²³ Standing Committee 2 October 2001, *supra*, note 104, at 5, where then Minister McLellan stated, “in order to make the conviction review process more open and accountable, ministers of justice will now be required to provide an annual report to Parliament with respect to applications to post-conviction review.”

Section 696.4 states that when making a decision of whether to reject or grant an application, the Minister of Justice shall take into account all matters that the Minister considers relevant, including whether the application is supported by new and significant information, not previously considered,¹²⁴ and whether the information is relevant and reliable.¹²⁵ This section also reaffirms that an application to the Minister is not a further method of appeal and any remedy available is extraordinary.¹²⁶ While this section is new to the *Criminal Code* these ideas have already been in use since 1994. They are part of the Thatcher principles. Codifying principles the Minister already takes into consideration upon reviewing an application may appear to improve the post-conviction review process, but it will not change the application process *per se*. While the status may have changed from mere principles to codified laws, these principles have already been guiding the Minister's decision of whether to grant, or reject, section 690 applications for the past nine years. They may hold more weight as laws but their codification will not make any difference to people applying for a post-conviction review by the Minister of Justice.

In regards to this section, the legislative summary stated that “although the criteria and considerations [set out in section 696.4] are not particularly precise, they do provide more guidance to the Minister (and also a greater basis for judicial review of the Minister's decision) than the current provisions.”¹²⁷ However, this is not true because these principles have already been guiding the Minister's decision since 1994. Instead of allowing the Minister of Justice complete discretion to make a

¹²⁴ *Canadian Criminal Code* s.696.4(a), *supra*, note 102.

¹²⁵ *Canadian Criminal Code* s.696.4(b), *supra*, note 102.

¹²⁶ *Canadian Criminal Code* s.696.4(c), *supra*, note 102.

¹²⁷ Legislative Summary, *supra*, note 101, at 19.

decision on a case by case basis (which could in itself be debatably a good or bad thing) a number of guidelines are used to direct the Minister's decision. This could actually hinder the identification and correction of wrongful convictions since a case could be turned down if certain criteria are not met, instead of looking at the case holistically. For example, if the applicant submitted information in his or her application that had already been heard at trial this evidence could be disregarded. Since this evidence has already been accepted as fact it is nearly impossible to revisit the issue. There is no allowance for the possibility that the lower court simply made the wrong decision, and convicted an innocent person.

The Department of Justice has indicated that it intends to appoint a Special Advisor from outside the Department to oversee the review process and report directly to the Minister in an attempt "to make the review process more open, accessible and accountable."¹²⁸ However, there is nothing in section 696 that would commit the government to this course of action.¹²⁹

Neither section 696, nor section 690, contains any requirement that an applicant be provided with the reasons the government refused to refer their case to court. However, the Canadian Bar Association notes that "[i]t is fundamental that the applicant should be given reasons and that those reasons should be available to the public."¹³⁰

One of the most interesting changes is that section 696 does not refer to "mercy", as section 690 did. The wording of section 690 was to state the powers of

¹²⁸ Standing Committee 3 October 2001, *supra*, note 100, at 6.

¹²⁹ Legislative Summary, *supra*, note 101, at 19.

¹³⁰ CBA's Letter to the Senate, *supra*, note 108.

the Minister of Justice “on an application for the mercy of the Crown,”¹³¹ whereas section 696 reads; “applications for ministerial review – miscarriages of justice.”¹³² There is no indication that section 696 is an application for mercy.

“The recognition of the power to dispense “mercy” is deeply controversial.”¹³³ Part of the problem stems from the fact that claims for mercy can be brought either under section 690 or under the Royal Prerogative of Mercy (RPM).¹³⁴ The Anglo-Canadian law on the RPM reveals different concepts of mercy. The RPM has been used to either extend compassion to individuals by refusing to extract the full weight of punishment or to recognise and rectify judicial mistakes, usually wrongful convictions.¹³⁵ Canada’s criminal justice system still “lumps together ‘true’ mercy claims with claims of wrongful conviction. This perpetuates the uncomfortable irony of sometimes pardoning individuals for crimes not committed.”¹³⁶ Before the enactment of section 690 and its predecessors, it seems clear that legal and evidentiary issues could be the appropriate subjects for consideration on an application for the Royal Prerogative of Mercy.¹³⁷

The question then arises as to whether “section 690 in any way abrogates or limits the RPM such as that the only claim of a default in justice, as compared to a claim for mercy, must be to the Minister of Justice pursuant to section 690.”¹³⁸ The answer to this question has not always been clear. Cole and Manson take the view

¹³¹ *Canadian Criminal Code* R.S.C. 1985, c. C-46, s. 690 (Preamble).

¹³² *Canadian Criminal Code* s.696, *supra*, note 102 (Title).

¹³³ Trotter, *supra*, note 11, at 345.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, at 347.

¹³⁶ *Ibid.*, at 345.

¹³⁷ *Ibid.*

¹³⁸ D.P. Cole and A. Manson. *Release From Imprisonment: the Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990) at 410 [hereinafter Cole and Manson].

that section 690 was not a substitute for the Minister's ability to recommend a pardon but rather an alternative or adjunct power.¹³⁹ It is an additional mode of attaining the same objective.¹⁴⁰ Cole and Manson conclude that "accordingly, there is no merit to the argument that the enactment of section 690 and its predecessors abrogates the Royal Prerogative by restricting it only to cases of mercy and directing questions of justice to the Minister of Justice."¹⁴¹

While there are some conflicting opinions on whether section 690 was a subsidiary section of the Royal Prerogative of Mercy, or whether it was distinct from it, the exclusion of the word 'mercy' from section 696 indicates that applications for post-conviction review may finally be completely separate from the RPM. There is no indication that an application under section 696 has any connection to asking the Minister of Justice for mercy, but rather, it is instead an appeal to the Minister on the basis of a miscarriage of justice. The appeal for mercy by an offender, and the appeal for a remedy by a person on the assertion that the criminal justice system has erred, should remain distinct.

That section 696 does not indicate that it is a petition to the Minister of Justice for mercy may have succeeded in conclusively separating requests to the Minister of Justice for the RPM and applications to the Minister of Justice for a post-conviction review on the basis of a wrongful conviction. Claims under the RPM grant relief to prisoners by granting a pardon, but this does not alter their conviction. Section 696 can be used by a person to challenge the validity of their conviction, which, in effect,

¹³⁹ *Ibid.*, at 412.

¹⁴⁰ *Ibid.*, Lord Sumner's words.

¹⁴¹ *Ibid.*

allows the Minister of Justice to rectify a judicial error that has occurred by referring a case to the Court of Appeal where the conviction can be quashed.

The separation of ‘mercy’ and ‘miscarriage of justice’ means there may no longer be a blurring between true mercy claims and assertions that a wrongful conviction has occurred. The inception of section 696 may have finally clarified the blurring of these two very different concepts.

IV. Conclusion.

The application process for a post-conviction review can be a lengthy and difficult process. The onus is clearly on the applicant to establish that a miscarriage of justice occurred. Calls to reform this section had been voiced, but the government failed to adequately reform the post-conviction review process. The changes set out in section 696 for post-conviction review do not go far enough. They do not address the core problems inherent in this process. Section 696 simply codified what was already being followed in practice.

The Canadian Bar Association echoes this sentiment by stating that “the proposed amendments found in clause 71 of Bill C-15A (section 696) will do little to improve the current situation.”¹⁴² Mrs. Milgaard addressed the Standing Committee on Justice and Human Rights, telling the members that the changes to the post-conviction review process set out in section 696 would not have helped to get David Milgaard out of prison or establish his innocence. Based upon the arguments made it can be concluded that something more must be done.

¹⁴² CBA’s Letter to the Senate, *supra*, note 108.

Chapter 3

The United Kingdom's Post-conviction Review System.

I. Introduction.

Prior to 1997, Britain employed a very similar post-conviction review system to Canada's current section 696. In April 1997 an independent review body replaced the government's authority to review alleged cases of wrongful convictions. Upon the recommendation of the Royal Commission on Criminal Justice¹ an independent review body was established in the United Kingdom (U.K.) to deal with alleged cases of wrongful conviction. The Criminal Cases Review Commission (CCRC) was set up as an independent review body to replace the Home Office's Criminal Cases Unit (C3) to investigate allegations of wrongful conviction and/or sentences in England, Wales and Northern Ireland and to refer appropriate cases to the Court of Appeal.² Before the creation of the CCRC alleged miscarriages of justice were referred to the Court of Appeal on the Home Secretary's reference under section 17 of the *Criminal Appeal Act 1968*³ after an examination of the merits of the cases by the C3 Department.

While it cannot be denied that some wrongful convictions were corrected through the Home Office, the department was widely perceived as not providing; a) adequate supervision of investigative work carried out; b) an independent and

¹ United Kingdom, "The Royal Commission on Criminal Justice," (Chaired by Viscount Runciman *Report*. London, England: Queen's Printer, 1993) [hereinafter RCCJ].

² Criminal Cases Review Commission. Official website. Available at <http://www.ccrcc.gov.uk/aboutus/aboutus.html> [Accessed 28 December 2002] [hereinafter CCRC Website].

³ *Criminal Appeal Act 1968*.

objective re-examination of the facts of the case; and c) an open and accountable system of examination.⁴

After a number of high profile wrongful convictions in the 1980's a new system was implemented to deal with miscarriages of justice; that being the CCRC. The transfer of power from the government to an independent review body in order to determine if a criminal case warrants further attention due to a possible miscarriage of justice at the post-conviction level was seen as a positive change that enhanced the legitimacy of the criminal justice system.

Part two of this chapter will look at the role of the Home Secretary in addressing suspected miscarriages of justice prior to the inception of the CCRC. The role of the Home Secretary prior to 1997 was similar to the current role of Canada's federal Minister of Justice when reviewing alleged wrongful convictions. The application review process conducted by the Home Office as well as the role of the Court of Appeal in reviewing alleged wrongful convictions will be addressed. A variety of problems existed with the section 17 post-conviction review process and these will also be looked at.

Part three, a period of transition, will detail the calls for reform to the section 17 post-conviction review process. Specific British cases of wrongful convictions will be outlined. Discussions from the Royal Commission on Criminal Justice concerning the deficiencies of section 17 and the need to implement an independent review body will be looked at.

⁴ United Kingdom. Select Committee on Home Affairs. Appendices to the Minutes of Evidence. Appendix 5. Memorandum by Graysons' Solicitors. 19 November 1998. (Available at www.parliament.the-stationary-office.uk/pa/cm199899/cmselect) [Accessed 9 Dec 2002] [hereinafter Memorandum].

Finally, part four will detail the Criminal Cases Review Commission, the current mechanism in the United Kingdom to deal with alleged wrongful conviction. This will be accomplished by looking at the composition of the Commission, the procedures used by the Commission to review applications, the criteria used to grant a further review of the case by referring it to the Court of Appeal, and criticisms of the Commission. How the CCRC operates in comparison to the Home Office in reviewing and referring alleged wrongful conviction cases will also be discussed.

II. Applications to the Home Secretary Before 1997.

i) Role of the British Home Secretary and a Comparison to the Canadian Minister of Justice.

Prior to the creation of an independent review commission in 1997 the role of the Home Secretary, and the process of applying for a post-conviction review was very similar to Canada's present post-conviction review system.

England and Canada have similar criminal justice systems. Canada's present legal system is derived from various European systems brought to this continent in the 17th and 18th centuries by explorers and colonists.⁵ After the English defeated the French in 1759, the country fell almost exclusively under English law.⁶ Modern Canadian criminal law has its basis in English common and statutory law.⁷

The role of the Home Secretary in Britain and the role of the federal Minister of Justice in Canada are very comparable, but not identical. The Home Secretary is

⁵ Canada. Department of Justice. "Sources of Canadian Law." (Publications. Available at http://canada.justice.gc.ca/en/dept/pub/just/CSJ_page7.html) [Accessed 16 January 2003].

⁶ *Ibid.*

⁷ *Ibid.*

accountable for most justice issues as well as policing in Britain. The Home Secretary is not only responsible for law and order and the police, he or she is also responsible for the investigation of miscarriages of justice.⁸ The Home Office has described its function, in relation to reviewing alleged wrongful convictions, as “the gate-keeper to the Court of Appeal.”⁹

Similarly, the federal Minister of Justice is responsible for justice issues, but does not have any responsibility in policing matters. However, the Minister performs the dual role of the Attorney General of Canada and the Minister of Justice of Canada:

The Attorney General protects the interest of the Crown within the framework of existing legislation. This involves providing legal advice and services to the federal departments and agencies, including the regulation and conduct of litigation. The Attorney General also prosecutes for violations of federal legislation other than the *Criminal Code* in the provinces and for violations of all federal legislation, including the *Criminal Code*, in the territories. The function of the Minister of Justice relates mainly to the policy considerations underlying those areas of substantive law that the Minister is directly responsible for. The Minister of Justice has general responsibility for federal policies related to the administration of justice, except for policing, corrections and parole.¹⁰

The federal Minister of Justice is responsible for protecting the interests of the Crown and for the administration of justice, including reviewing alleged miscarriages of justice. The legal roles of the Attorney General of Canada and the federal Minister of Justice are distinct in law, but “in practice each function is discharged by a single

⁸ N. Padfield, “The Dissenting Voice” (1993) 16 *New Law Journal* 1022.

⁹ P. Thornton. “The Royal Commission on Criminal Justice (Miscarriages of Justice: A Lost Opportunity)” [1993] *Criminal Law Review* 926 at 926 [hereinafter Thornton].

¹⁰ Canada. Department of Justice. *Estimates*. Performance Report. For the period ending 31 March 2001.

Minister.”¹¹ In the provinces the provincial Minister of Justice and the Attorney General are one person. The provincial Minister’s of Justice are the senior law officers of the Crown. They are responsible for the courts, prosecutions and for proceedings under the *Criminal Code* within the province.

The roles and responsibilities of the provincial and federal Minister’s of Justice, as well as the Attorney’s General are not distinct and have many overlapping functions. One could argue that it is a conflict of interest for the federal Minister of Justice to review the criminal convictions of its provincial counterpart. The government justifies this potentially conflicting role by saying that it is the provincial Minister of Justice who is responsible for prosecuting most criminal offences, and not the federal Minister.¹² However, it still seems problematic for the federal Minister of Justice to be reviewing his or her provincial counterpart. The Department of Justice itself admitted this. A 1998 Consultation Paper, published by the Department of Justice, addressing miscarriages of justice found that, “the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted.”¹³

Many people have recognized the conflict of interest in the Home Secretary being responsible for policing and also for reviewing alleged wrongful convictions. Thornton comments that, “[t]he role of the Home Secretary’s reference has long been in question. Support for it is almost non-existent.”¹⁴ The Home Office was

¹¹ Canada. Department of Justice. *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*: Consultation Paper: 1998 at 7 [hereinafter Consultation Paper].

¹² Trotter. “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review.” (2001) 26 Queen’s L.J. 339 [hereinafter Trotter].

¹³ Consultation Paper, *supra*, note 11, at 7.

¹⁴ Thornton, *supra*, note 9, at 928.

considered to be an inappropriate body to investigate miscarriages of justice because it was not seen as “sufficiently independent of the institutions against which serious complaint [was] most often being made.”¹⁵

Bob Woffinden, the author of *Miscarriages of Justice*, also commented on the conflict of interest in the Home Secretary being accountable for both policing and the administration of criminal law:

As the arm of the government responsible for the reputation of both the police and the criminal law, it is – understandably – unlikely to look favourably on any development which undermines the authority of either. Yet incorrect convictions necessarily evince both bungling in police work and deficiencies in the administration of justice. It is hard to avoid the conclusion that the Home Office is saddled with incompatible duties, invigilating a system whose integrity it must protect. In any case, the Home Office and the police are too closely connected. When examining petitions, for example, Home Office staff do no field-work of their own: ‘generally speaking, we are working on impressions and reports and statements collected by the police’. This vitiates the entire system.¹⁶

Both the role of the British Home Secretary (before 1997) and Canada’s Minister of Justice are similar in regards to their involvement in post-conviction review. There has been criticism that both have a significant conflict of interest in their relationship to the State and in their role of reviewing alleged wrongful convictions.

ii) The Post-Conviction Review Application Process to the Home Secretary.

When an appeal to the Court against a conviction failed, the appellant could petition the Home Secretary to have his or her case referred back to the Court of

¹⁵ *Ibid.*

¹⁶ B. Woffinden. *Miscarriages of Justice*. (London: Hodder & Stoughton, 1987) at 334 [hereinafter Woffinden].

Appeal for further review. In order to be eligible to apply to the Home Secretary for a post-conviction review the person must have exhausted all statutory means of appeals.¹⁷ A person must also have been convicted of an indictable offence.¹⁸ There was no post-conviction review available for people convicted of a summary offence. The reason for this appeared to be that a summary conviction was a mere regulatory offence, “the commission of which does not involve moral turpitude and does not generally incur public opprobrium. It seem[ed], therefore, a waste of time and resources to deal with such apparently trivial matters.”¹⁹

On average, the Home Office received between 700-800 applications for post-conviction review a year.²⁰ Approximately eighteen percent of petitions resulted in further inquiries beyond a simple review of the application, and only a “tiny percentage of petitions reach[ed] the Court.”²¹ Applications were sent to the Home Secretary and were investigated by officials in the Criminal Cases Unit (C3) of the Home Office “who had no legal expertise”.²²

The first stage of the post-conviction review process involved the applicant preparing an application. To invoke the review process by the Home Secretary the person would first have to lodge a coherent petition delineating a strong case in need of further review.²³ The onus was clearly on the petitioner to establish “very convincing grounds for thinking that he did not commit the offence of which he has

¹⁷ CCRC Website, *supra*, note 2.

¹⁸ *Ibid.*

¹⁹ C. Anyangwe. “Finality and Miscarriage of Justice in Criminal Law: Post-Conviction Remedies in common and Civil Jurisdictions.” (1998) 30 *Zambia Law Journal* 51 at 64 [hereinafter Anyangwe].

²⁰ M. Mansfield and N. Taylor, “Post-Conviction Procedures” in *Justice in Error*, ed. by Clive Walker and Keir Starmer. (London, England: Blackstone, 1993) at 20 [hereinafter Mansfield and Taylor].

²¹ Thornton, *supra*, note 9.

²² Mansfield and Taylor, *supra*, note 20.

²³ *Ibid.*

been found guilty through the process of the law.”²⁴ One requirement that must be met for the Home Secretary to grant a post-conviction review is that the applicant must produce new evidence, or other considerations of substance which were not available at the original trial and could not be considered properly by the Court of Appeal.²⁵

Bob Woffinden, author of *Miscarriage of Justice*, comments on this first step of the application process:

The applicant had to show that there [had] been a development of some sort in his [or her] case – whether it be as concrete as ‘new evidence’ or as nebulous as ‘a consideration of substance’.”²⁶ However, in the eyes of the C3 unit, it was generally found that one or other of these conditions [were] not met. [Accordingly,] an overwhelming proportion of inquires [were] rejected at the outset.²⁷

The majority of applicants who submitted a post-conviction review application to the Home Secretary were prisoners. Since prisoners were ineligible for Legal Aid, people without access to private funds lacked access to legal advice and were not likely to prepare petitions sufficiently convincing to encourage investigation by C3 staff.²⁸

Applications that passed the initial screening were sent to the C3 department for further investigation. The quality and depth of the investigation by the Home Office was criticized for being “uncertain and variable.”²⁹ Therefore, there is little concrete evidence as to what procedures were used when members of the Home

²⁴ Anyangwe, *supra*, note 19, at 68.

²⁵ Mansfield and Taylor, *supra*, note 20.

²⁶ Woffinden, *supra*, note 16, at 332-333.

²⁷ *Ibid*, at 333.

²⁸ F. Belloni and J. Hodgson. *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain*. (London, England: MacMillan, 2000) [hereinafter Belloni and Hodgson].

²⁹ Mansfield and Taylor, *supra*, note 20, at 164.

Office investigated alleged wrongful conviction cases. One member of the C3 department explained that “[i]n looking at these cases, we are trying to achieve justice; we are not in anyway circumscribed by rules of evidence or anything like that.”³⁰ Woffinden comments that, “this would appear to indicate a proper sense of priorities. Indeed, there can be no argument about the theory behind the system, only about how it works, or does not work in practice.”³¹ Sir David Napley, a solicitor in England, testified to the Commons committee:

Over a long period of time I have made representations to the Home Office on behalf of various persons who allege that they were victims of injustice. I cannot recall a single case where the Home Office has, as a result of its own investigations, felt able to recommend a pardon or any other recognition that a conviction was necessarily wrongful.³²

“Innumerable” other lawyers were not able to “recall a single case” where Home Office channels had proved to be effective in overturning a conviction on the basis of a miscarriage of justice.³³

An investigation by the C3 department might have consisted of asking the relevant police force to re-examine the evidence.³⁴ However, it may have been naive to expect a police force to fully investigate itself for misconduct or even for one police force to investigate another. “In such an instance it seems more likely that the police will try to shore up the case and protect themselves rather than root out any

³⁰ Woffinden. *Supra*, note 16, at 333.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Mansfield and Taylor, *supra*, note 20.

potential miscarriages.”³⁵ Any information that was provided to the Home Office by the police investigation was to be kept confidential.³⁶

After the investigative stage was completed a C3 official working within the Home Office would prepare a report on the case. This report would then be read by the Home Secretary and a decision would be made whether or not to refer the case to the Court of Appeal.³⁷ The applicant was not informed of the contents of the report and they were, therefore, unable to respond, or to submit further information to the official investigating their case.³⁸

Woffinden comments that Home Office procedures failed to adequately detect and investigate alleged wrongful convictions “partly because of the mere insufficiency of the system.”³⁹ Close to a thousand applications were sent to the Home Secretary every year to be dealt with by “a small, overworked staff with limited resources for expert legal advice and no facilities at all for investigation.”⁴⁰ Woffinden also cites “the inherent secrecy and conservatism that pervade[d] the Home Office.”⁴¹

The powers of the Home Secretary to grant or reject a post-conviction review application were found in section 17 of the *Criminal Appeals Act* 1968.⁴² “This section [was] specifically designed to root out miscarriages as, in theory, it always allow[ed] a potential appeal by those who believe[d] they have been wrongly

³⁵ *Ibid.*, at 164.

³⁶ *Ibid.*, at 165.

³⁷ *Criminal Appeal Act* 1968 s.17.

³⁸ Mansfield and Taylor, *supra*, note 20.

³⁹ Woffinden, *supra*, note 16, at 333.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² s. 17 *Criminal Appeal Act* 1968.

convicted.”⁴³ Section 17 stated that the Home Secretary could either “refer the whole case to the Court of Appeal [where] the case shall then be treated for all purposes as an appeal to the Court by that person”⁴⁴ or request an advisory opinion by the Court of Appeal on any point arising in the case.⁴⁵ In practice, this power was exercised in cases where new evidence was brought forward or where some other consideration of substance had emerged after the original trial.⁴⁶

The only statutory restriction on the Home Secretary’s decision to refer a case under section 17 was that she or he should do so only “if he thinks fit.”⁴⁷ There were “no criteria prescribed requiring a section 17 reference to be made in particular circumstances.”⁴⁸ This provided the Home Secretary with complete discretion in deciding whether to grant or reject section 17 applications.

In addition to granting a section 17 post-conviction review by the Court of Appeal the Home Secretary could invoke the Royal Prerogative of Mercy (technically through the Crown) which would have the effect of nullifying, reprieving or remitting the sentence, but not the conviction.⁴⁹ A person would have the benefit of being released from prison but their conviction would still stand.

The Home Secretary appeared to be very reluctant to employ his or her power to refer cases back to the Court of appeal on the basis of a miscarriage of justice. This may have been because the Home Secretary wanted “to avoid being seen as

⁴³ Mansfield and Taylor, *supra*, note 20, at 165.

⁴⁴ s. 17(1)(a) *Criminal Appeal Act* 1968.

⁴⁵ s. 17(1)(b) *Criminal Appeal Act* 1968.

⁴⁶ CCRC Website, *supra*, note 2.

⁴⁷ s. 17(1) *Criminal Appeal Act* 1968.

⁴⁸ Anyangwe, *supra*, note 19, at 55.

⁴⁹ Mansfield and Taylor, *supra*, note 20.

interfering in the Courts.”⁵⁰ Whether the Home Secretary did invoke the power to refer a case to the Court of Appeal seemed to depend “not on the credibility of fresh or newly uncovered evidence or even on the strength of the defendant’s case as a whole, but rather on how effective and successful interested parties and pressure groups were in initially awakening public awareness to a possible miscarriage of justice and then maintaining public concern over a protracted period.”⁵¹ As the Home Affairs Committee reported in 1987 “...the chance of a petition ultimately being successful might sometimes depend less on its intrinsic merits than on the amount of external support and publicity it was able to attract.”⁵² In its closing remarks, the Home Affairs Committee concluded that, “in practice the [Home Office’s] decision to act may depend on the amount of pressure brought to bear on the Home Secretary by people of influence.”⁵³

Complaints concerning the Home Office’s role in reviewing alleged miscarriages of justice also included “its historically restrictive attitude to petitions for referral of cases back to the Court; and the tardy, insensitive and secretive manner in which the Home Secretary, and the C3 Division, dealt with applications claiming wrongful conviction.”⁵⁴

iii) Role of the Court of Appeal in Post-Conviction Review.

⁵⁰ M. Tregilas. “Miscarriages of Justice Within the English Legal System.” (1991) Vol. 144 (No. 6505) *New Law Journal* at 715 [hereinafter Tregilas].

⁵¹ *Ibid.*, at 716.

⁵² House of Commons Select Committee on Home Affairs 6th Report 1981-2 HC papers 421, p. VII. See also Tregilas. “Miscarriages of Justice Within the English Legal System.” (1991) Vol. 144 No. 6505 *New Law Journal* at 716.

⁵³ *Ibid.*

⁵⁴ Belloni and Hodgson, *supra*, note 21, at 176.

In *R. v. McIlkenny*⁵⁵ the House of Lords found that when a case was referred to the Court of Appeal under section 17(a) the case was treated as if it was an appeal to the Court of Appeal. This meant that, the Court was limited to a power of review rather than a full appellate function.⁵⁶ This had the effect of adding a further restriction as to what evidence could be presented in court. When the Court of Appeal receives evidence it must “appear to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies...”⁵⁷ and “they must be satisfied that [the evidence] was not adduced in those proceedings...”⁵⁸ Accordingly, for evidence to be admissible there must be an adequate explanation as to why it was not available at the original trial.⁵⁹ Furthermore, the evidence must likely be credible, which has subsequently been interpreted to mean capable of belief in the context of the issue.⁶⁰

Before 1997, the Court of Appeal would allow an appeal against a conviction if the Court thought the conviction should be set aside on the grounds that the conviction was unsafe or unsatisfactory; on the grounds of a wrong decision of any question of law; or there was a material irregularity during the course of the trial.⁶¹

The 1968 *Criminal Appeal Act* gave the Court considerable discretionary powers to deal with miscarriages of justice.⁶² However, “the Court [was] reluctant to

⁵⁵ *R. v. McIlkenny*, [1992] 2 All ER 417.

⁵⁶ *Ibid.*

⁵⁷ s. 23(2)(a) *Criminal Appeal Act* 1968.

⁵⁸ s. 23(2)(b) *Criminal Appeal Act* 1968

⁵⁹ Mansfield and Taylor, *supra*, note 20.

⁶⁰ *R. v. Stafford and Luvaglio* [1968] 3 All ER 652. See also A. Samuels, “Fresh Evidence in the Court of Appeal Criminal Division” [1975] Crim LR 23.

⁶¹ s. 2(1)(a)(b)(c) *Criminal Appeal Act* 1968.

⁶² Belloni and Hodgson, *supra*, note 21, see page 176.

interfere with the [original] verdict.”⁶³ In reality, according to Lord Scarman, it was a rarity that the Court of Appeal quashed a conviction and the reason for this was twofold: “an overriding preoccupation among senior judges to preserve public confidence in the criminal justice system; and the need to underpin the role of the jury as ultimate arbiter of guilt.”⁶⁴

The notion of referring a case under section 17 back to the Court where it had already been dismissed, seems fundamentally flawed.⁶⁵ This is because such a system relies on the Court of Appeal admitting it erred when it originally decided the case. “The Court is not unnaturally reluctant to admit its part in a catastrophic mistake which has caused such injustice.”⁶⁶ The Home Affairs Committee reported that, “...in cases where the complete process of trial and appeal fails to arrive at a just solution, the same system cannot be regarded as the perfect instrument for ascertaining the merit of a complaint of miscarriage of justice.”⁶⁷

Criticisms of the Court of Appeal have;

centred on its restrictive interpretations of its powers to quash convictions – specifically its aversion to overturn the verdict of a jury in the original trial; its largely unreserved acceptance of convictions based on confessions; its highly sceptical approach to appeals alleging that police misconduct lead to a wrongful conviction; its reluctance to consider errors by lawyers as grounds for quashing convictions; and its strong resistance to appeals referred back to it by the Home Secretary.⁶⁸

⁶³ *Ibid*, see page 177.

⁶⁴ Tregilas, *supra*, note 50, at 715.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*, at 716.

⁶⁷ *Supra*, note 52, at 716.

⁶⁸ Belloni and Hodgson., *supra*, note 21, at 176.

The Court of Appeal has also been criticised for the narrow exercise of its power to consider appeals based on ‘fresh evidence’.⁶⁹ This would consist of evidence not previously before the courts, which, if taken into consideration, might render the verdict unsafe. This could either be new material not available at the trial or material that existed at the time of the trial which was not used. If the latter was the case, this evidence could only be used on appeal if the Court accepted the ‘reasonable explanation’ for it not having been presented at the original trial. Fresh evidence must be admissible, relevant and credible.⁷⁰ Credible means the evidence must be believable in the context of the case.⁷¹ “Most appeals against conviction grounded on fresh evidence have been unsuccessful, being dismissed for failing to meet the Court’s test either of what constitutes ‘fresh evidence’ or of what is considered a ‘reasonable explanation’ for evidence not having been adduced at the trial.”⁷²

The relationship between the Home Office and the courts was not conducive to arriving at an appropriate solution when a miscarriage of justice was alleged in a criminal case.⁷³ Whatever the grounds for an appeal “the consensus among critics is that the Court has not been sufficiently responsive to cases of alleged wrongful conviction.”⁷⁴ Douglas Hurd, a former Home Secretary, commented that reference provisions under section 17 of the 1968 *Criminal Appeal Act* to the Home Secretary should be removed from the executive because he had learned that any “lurking

⁶⁹ *Ibid.*, at 180. See also s.23 *Criminal Appeal Act* 1968.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, at 181.

⁷³ Woffinden, *supra*, note 16.

⁷⁴ Belloni and Hodgson, *supra*, note 21, at 180.

doubt” a Home Secretary had concerning a conviction was not always welcomed by the Courts.⁷⁵

III. A Period of Transition

i) Wrongful Convictions in the United Kingdom.

During the 1980’s a number of high profile cases involving miscarriages of justice again stirred up calls for reform to the criminal justice system, and specifically, for a new mechanism to deal with post-conviction review. Three of the most notorious cases were the Guildford Four, the Birmingham Six and the Maguire Seven. Such cases provided further evidence that the section 17 post-conviction review system which was intended to identify and rectify miscarriages of justice was not working properly. These three cases will be looked at more closely.

Paddy Joe Hill, of the Birmingham Six, was convicted in August 1975, and received twenty-one life sentences for the pub-bombing in Birmingham which killed twenty-one people and injured nearly two-hundred.⁷⁶ On the night of the bombing the police arrested the six men after Hill and four others tried to board a ferry to Northern Ireland to attend the funeral of a known IRA bomber.⁷⁷ The evidence adduced at trial consisted of forensic tests conducted by Dr. Frank Skuse which suggested that two of the accused had been in contact with nitroglycerine (an explosive material) and of confessions by four of the accused men.⁷⁸

⁷⁵ Thornton, *supra*, note 9.

⁷⁶ M. Bright and A. Hill. “Birmingham Six man wins 1m payout.” *Guardian Unlimited* 9 June 2002.

⁷⁷ *Ibid.*

⁷⁸ Belloni and Hodgson, *supra*, note 21.

They twice appealed the decision but in both instances the appeals were dismissed. After being in prison for sixteen years the Court of Appeal finally quashed the conviction of the Birmingham Six in March 1991 because they found the evidence given by Dr. Skuse to be discredited.⁷⁹ This was concluded because Dr. Skuse had not disclosed the possibility that alleged traces of nitroglycerine could have come from innocent contamination, such as from smoking cigarettes.⁸⁰ The court also learned that McIlkenny's confession, which was critical evidence that led to the conviction, had been written by the police after the fact.⁸¹ Three police officers were later charged with perjury and conspiracy to pervert the course of justice. The charges were dropped before trial on the grounds that the adverse publicity surrounding the case would prevent the officers from receiving a fair trial.⁸²

To add to matters, Lord Denning refused to grant legal aid to the Birmingham Six when they tried to sue the West Midlands police. His refusal was based on the assumption that if the Birmingham Six were successful in their claim, "it would go a long way to proving the police had committed perjury and therefore the Birmingham Six would be given free pardons."⁸³ In other words, "public confidence in the English legal system would be so severely undermined by admitting to this appalling miscarriage of justice, that it would be better to avoid any investigation into such allegations altogether."⁸⁴ One could wonder whether Lord Denning was concerned about truth and justice. Surely public confidence is more eroded by actual

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Tregilas, *supra*, note 50, at 715.

⁸⁴ *Ibid.*

miscarriages of justice and an unwillingness on behalf of the judiciary and the Home Secretary to correct such injustices.⁸⁵

In October 1975 four people were sentenced to life imprisonment after being convicted of murdering five people in the 1974 pub bombings in Guildford and Woolwich. This case became known as the Guildford Four. It was alleged the bombing was carried out at the request of the IRA. The Guildford Four were convicted largely on the basis of the alleged confession of Armstrong, one of the accused. Fourteen years later, in October 1989, the Guildford Four were released by the Court of Appeal following the discovery that police had fabricated evidence to gain a conviction.⁸⁶ This discovery came out of a rough set of police notes that were typed with hand written inserts that matched Armstrong's supposedly contemporaneously recorded interview.⁸⁷ On the basis of this evidence Lord Chief Justice Lane concluded that the police detectives involved lied in court.⁸⁸ Five years after this discovery the police detectives were brought to trial on charges of conspiracy to pervert the course of justice. They were acquitted in May 1993.⁸⁹

The Maguire Seven were wrongly convicted in 1976 of possessing explosive substances on the basis of scientific evidence.⁹⁰ Their case was appealed, but the Court of Appeal dismissed it. They then submitted an application to the Home Secretary for a post-conviction review. However, the Home Secretary did not conduct an adequate investigation into the Maguire application asserting a

⁸⁵ *Ibid.*, at 714.

⁸⁶ Belloni and Hodgson, *supra*, note 21.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

miscarriage of justice. Member of Parliament Chris Mullin, summed up his disregard for the C3 department and its investigation, in his evidence to the Royal Commission on Criminal Justice. He stated: “[t]he House of Commons library contains a long memorandum, presumably drafted by C3, explaining why the Maguire conviction is safe. It was written not long before the Maguire convictions were quashed.”⁹¹ After thirteen years in prison the conviction was overturned because the Court learned additional scientific evidence was withheld from the defence and other scientific evidence given at trial was unreliable.⁹²

In each of these wrongful conviction cases those that were falsely convicted spent years maintaining their innocence “in the face of steadfast disbelief, or at least the expression of disbelief, by judicial authorities before finally securing relief from the long sentences that had been imposed.”⁹³ It was not the officials of the criminal justice system – the police and prosecution, the courts, responsible government ministers - who recognized the miscarriages and initiated steps to correct them. It was, instead, the victims themselves, along with their supporters, who finally succeeded in forcing reluctant and resistant officials to take corrective action.⁹⁴

The increasing number and repetitive nature of wrongful conviction cases led to widespread public concern about corruption, incompetence and partiality in the criminal justice system; and to the officially recognised need to restore public confidence.⁹⁵

⁹¹ Thornton, *supra*, note 9, at 928.

⁹² Belloni and Hodgson, *supra*, note 21.

⁹³ *Ibid*, at 9.

⁹⁴ *Ibid*.

⁹⁵ RCCJ, *supra*, note 1, at 6.

The wrongful conviction cases in England are not dissimilar to Canada's experiences. While the Canadian cases of wrongful convictions do not have the same political context of the British cases, they are nevertheless failures in the administration of justice that throw the integrity of the criminal justice system into question. Wrongful conviction cases, whether British or Canadian, can involve police misconduct, the fabrication of evidence, and a failure on the part of the government to promptly recognise and remedy the wrongful conviction.

The infamous cases of David Milgaard, Donald Marshall, Guy Paul Morin, Steven Truscott, and Thomas Sophonow (to name a few) have led to calls for reform to Canada's post-conviction review system. Yet Canada's system for reviewing alleged miscarriages of justice has not fundamentally changed. In Britain the numerous and serious nature of wrongful convictions fully caught the attention of the government who recognized the need for reform.

ii) The Royal Commission on Criminal Justice

On 14 March 1991 the Home Secretary announced the establishment of a Royal Commission on Criminal Justice (RCCJ) to be chaired by Viscount Runciman. The RCCJ was charged with examining "the effectiveness of the criminal justice system in securing the conviction of the guilty and the acquittal of the innocent."⁹⁶ When the Home Secretary made the announcement of the establishment of the RCCJ he referred to such cases as the Birmingham Six, which had "raised serious issues of concern to all, and the undermining of public confidence when the arrangements for criminal justice failed."⁹⁷

⁹⁶ CCRC Website, *supra*, note 2.

⁹⁷ *Ibid.*

The Commissioner's report was presented to parliament in July 1993. One of its recommendations was the establishment of an independent review body to deal with alleged cases of wrongful convictions.⁹⁸ This proposal "was probably the most predictable and least controversial of all its recommendations since there was almost universal support for the change."⁹⁹ The principal reason given by the RCCJ for the need for a new review body was that "successive Home Secretaries had adopted a restrictive approach to their powers under section 17 of 1968 *Criminal Appeals Act* to refer back cases."¹⁰⁰ Similarly, Sir John May, in his inquiries into the Guildford and Woolwich bombings, also criticised the Home Office for adopting a reactive rather than proactive approach to applications for post-conviction review.¹⁰¹ The RCCJ determined that the effect of this policy was that it only investigated and referred cases to the Court of Appeal where fresh evidence had emerged since the appeal.¹⁰² A common reason for this approach was raised in evidence submitted to the RCCJ: "The Home Office did not have the necessary commitment nor the resources to undertake a broader role."¹⁰³ The conclusion reached by The Royal Commission on Criminal Justice was that "the Home Office was constrained by its constitutional position as an executive body"¹⁰⁴ when reviewing cases of wrongful convictions:

The role assigned to the Home Secretary and his Department under the existing legislation is incompatible with the separation of powers as between the courts and the executive. The scrupulous observance of constitutional

⁹⁸ RCCJ, *supra*, note 1.

⁹⁹ K. Malleon. "The Criminal Cases Review Commission." [1995] *Criminal Law Review* 929 at 929 [hereinafter Malleon].

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

principles has meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it.¹⁰⁵

In response to these deficiencies the RCCJ proposed replacing the power of the Home Secretary with a new review body to address post-conviction review which would be better resourced and independent of the executive. “One of the original reasons for the Royal Commission on Criminal Justices recommendation for the establishment of the CCRC was that the Home Office had not in practice investigated cases in sufficient depth to identify possible miscarriages.”¹⁰⁶ Specifically, the RCCJ recommended that the independent review body should “consider suspected miscarriages of justice; arrange for their investigation where appropriate; and refer cases to the Court of Appeal where the investigation reveals matters that ought to be considered further by the courts.”¹⁰⁷ The *Criminal Appeal Act 1995*¹⁰⁸ was subsequently passed, enabling the establishment of the Criminal Cases Review Commission. The Criminal Cases Review Commission was established in response to calls for a new mechanism for redressing alleged miscarriages of justice; “[the] creation [of the CCRC] was a landmark; public and statutory recognition that the system could get it wrong...”¹⁰⁹

Despite the eventual implementation of the CCRC Britain initially rejected the notion of an independent review commission. The House of Commons Select Committee on Home Affairs recommended the establishment of an independent

¹⁰⁵ RCJ, *supra*, note 1, at 182.

¹⁰⁶ United Kingdom. Parliament, House of Commons, Session 1998-99. Select Committee on Home Affairs – First Report. (Available at www.parliament.the-stationery-office.uk/pa/cm199899/cmselect... [Accessed 7 Dec 2002] [hereinafter First Report].

¹⁰⁷ CCRC Website, *supra*, note 2.

¹⁰⁸ *Criminal Appeal Act 1995* c.35 Part II (United Kingdom).

¹⁰⁹ The Times. 30 April 2002 (Available at http://innocent.org.uk/misc/ccrc_2002.html) [Accessed 9 Dec 2002] [hereinafter The Times].

review body to investigate allegations of miscarriages of justice to replace the Home Secretary's power to refer cases to the Court of Appeal in 1981, but the government refused this proposal because, "as a matter of principle, priority should be given to improving and enhancing the part played by the courts in these matters, rather than...curtailing the present arrangements for referring cases to the Court of Appeal."¹¹⁰ It was not until the Royal Commission on Criminal Justice recommended such a body that active steps were taken to implement the CCRC.

The RCCJ also spoke about the role of the Court of Appeal in detecting and remedying wrongful convictions. The role of the Court of Appeal has changed little since the new 1995 *Criminal Appeal Act* replaced the 1968 *Criminal Appeal Act*, despite the recommendations by The Royal Commission on Criminal Justice to make it easier for the Court to quash convictions in cases alleging a miscarriage of justice.¹¹¹ The RCCJ recommended that the grounds on which the Court may allow an appeal be simplified. However, this recommendation was not followed by Parliament. When a case is now referred to the Court of Appeal on the advice of the CCRC, the test to determine if a miscarriage of justice has occurred is whether the conviction 'is unsafe'. Instead of the old 'unsatisfactory or unsafe' test the language simply restates the existing practice by the Court. The Home Office Minister stated that "the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought and they believe that the new test re-states the existing practice of the Court of Appeal."¹¹² The deletion of the word 'unsatisfactory' does nothing to

¹¹⁰ Tregilas, *supra*, note 50, at 716. See also Miscarriages of Justice: Government Reply to the 6th Report from Home Office Committee, Session 1981-82, Cmnd 8656 1983, at 2-3.

¹¹¹ Belloni and Hodgson, *supra*, note 21.

¹¹² *Ibid*, at 177.

achieve the RCCJ's aim of having the Court be more receptive to overturning verdicts on the grounds of a miscarriage of justice.¹¹³

Another recommendation by the RCCJ focused on the criteria used by the Court to receive fresh evidence. The 1968 *Criminal Appeal Act* required that the Court receive fresh evidence if the evidence was 'likely to be credible'. Under the 1995 *Criminal Appeal Act* this test was changed to 'capable of belief'. However, it has been noted that 'credible' means 'believable'.¹¹⁴ Accordingly, there has been no change. The "meaning assigned to these terms will depend, in the end, upon the interpretation of the judges."¹¹⁵

The Court of Appeal's "excessively restrictive" attitude toward fresh evidence was also criticised by the RCCJ.¹¹⁶ Accordingly, the RCCJ recommended that once the Court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless this would be impracticable or undesirable.¹¹⁷

IV. The Present System: Applying for Post-Conviction Review to the Criminal Cases Review Commission.

i) The Composition of the Criminal Cases Review Commission.

The Criminal Cases Review Commission (CCRC or Commission) was established as a body corporate by authority of the *Criminal Appeal Act* 1995.¹¹⁸ The

¹¹³ *Ibid.*

¹¹⁴ J.C. Smith. "Criminal Appeals and the Criminal Cases Review Commission," (1995) 145 *New Law Journal* 533 [hereinafter Smith].

¹¹⁵ Belloni and Hodgson, *supra*, note 21, at 177.

¹¹⁶ *Ibid.*, at 181.

¹¹⁷ RCCJ, *supra*, note 1, at 168-169.

¹¹⁸ CAA 1995, *supra*, note 108.

Criminal Cases Review Commission is an executive non-departmental public body, independent of the government, responsible for investigating suspected miscarriages of criminal justice in England, Wales, and Northern Ireland.¹¹⁹ The CCRC is not a servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown.¹²⁰

Applying to the Criminal Cases Review Commission for a post-conviction review is a last resort. A case will not be considered by the CCRC until it has been through the appellate system. The Commission's principal role is to review the convictions of those who believe they have either been wrongly found guilty of a criminal offence, or wrongly sentenced.¹²¹ The CCRC has three further responsibilities:

The Court of Appeal may ask the Commission to help it settle an issue which it needs to resolve before it can decide a case; The Home Secretary can ask the Commission for advice when he is considering advising Her Majesty The Queen to issue a Royal Pardon; The Commission can refer cases to the Home Secretary where it feels a Royal Pardon should be considered.¹²²

The work of the CCRC is carried out by no fewer than eleven Commission members¹²³ who are appointed by Her Majesty the Queen on the recommendation of the Prime Minister.¹²⁴ Civil liberties groups have expressed concern about the government's decision to allow the Prime Minister to have control over who is appointed to the Commission.¹²⁵ They believe this interferes with the independence

¹¹⁹ CCRC Website, *supra*, note 2.

¹²⁰ CAA 1995, *supra*, note 108, Part II s. 8(2).

¹²¹ CCRC Website, *supra*, note 2.

¹²² *Ibid.*

¹²³ At present there are fourteen Commission members.

¹²⁴ CAA 1995, *supra*, note 108, Part II s. 8(4).

¹²⁵ J. Ames. "Righting Wrongs: A New Body to Review Miscarriages of Justice Allegations is One Step Closer." (1995) Vol. 92 No. 9 *Law Society's Gazette* 9.

of the review body. This method of appointment was proposed by The Royal Commission on Criminal Justice which concluded that this would not compromise its independence.¹²⁶ One-third of the Commission members must be lawyers and the remaining two-thirds must have knowledge or experience of the criminal justice system, but do not have to be lawyers *per se*.¹²⁷ In addition to senior management and advisory staff there are twenty-nine “Caseworkers”.¹²⁸ The CCRC is funded by a Grant-in-Aid from within the Home Office.¹²⁹

As of 31 October 2002 the CCRC has received 5,373 applications for post-conviction review; 4,704 cases have been completed. Of those 4,704 cases 179 were referred to the Court of Appeal, the remaining cases have been considered ineligible by the CCRC to be referred to the Court of Appeal or to warrant a full investigation. Of the 179 cases that have been referred to the Court of Appeal, 114 have been heard; 75 of those convictions have been quashed; 37 convictions have been upheld; and two reserved.¹³⁰

ii) How the CCRC Reviews Applications.

On 1 April 1997 the CCRC started handling casework, accepting new applications for post-conviction review and taking a backlog of 250 cases from the Home Office and the Northern Ireland Office.¹³¹ Apart from the cases that were transferred from the Home Office and the Northern Ireland Office, the review process

¹²⁶ Malleon, *supra*, note 99.

¹²⁷ CAA 1995, *supra*, note 108, Part II s. 8(5) and s. 8(6).

¹²⁸ First Report, *supra*, note 106.

¹²⁹ *Ibid.*

¹³⁰ CCRC Website, *supra*, note 2.

¹³¹ The Times, *supra*, note 109.

begins when an application is received.¹³² The majority of the applicants (approximately 80%) are not legally represented at this point.¹³³ While there is an official CCRC application form, applicants may send their post-conviction review request in any format.¹³⁴ For example, a convicted person may send a letter to the CCRC saying, “I am a victim of a miscarriage of justice.” Upon receiving such letter, the Commission would send that person a formal application form to be filled out and returned.¹³⁵ Before an application is filled out the applicant is cautioned that the CCRC only deals with criminal cases and that their application will be considered if: a) there has already been an appeal or leave to appeal has been refused; and b) there is some new factor which the courts have not considered before; or c) there are “exceptional circumstances”.

The application form requests that the applicant; a) provide personal information about him/herself; b) inform the CCRC about the case that is in need of review; c) give details about the appeal; d) explain what went wrong in the case; and provide new information that has not been considered; or e) provide ‘exceptional circumstances’.¹³⁶

The applicant is also asked to submit the court judgements of their case if they have access to them; if not, the CCRC will acquire the documents for them. It should be noted that while the information is requested by the CCRC, it is not required.

However, the more information an applicant can provide to the CCRC the better, but

¹³² See First Report, *supra*, note 106 (The CCRC can also open an investigation into an alleged wrongful conviction case without an application ever being made).

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Ontario. Government of. *The Commission on Proceedings Involving Guy Paul Morin* (By The Honourable Fred Kaufman C.M., Q.C., chair. Toronto: Queen’s Printer: 1998) Oral Evidence given by Mr. Kyle. 9 December 1997 [hereinafter Morin Commission].

¹³⁶ CCRC Website, *supra*, note 2.

very little information is needed for an investigation to be undertaken by a CCRC Caseworker.

Once the CCRC receives the application it is looked at by a small team of Commission staff.¹³⁷ This stage involves an initial assessment as to whether the application is eligible for review by the Commission. During this stage staff will obtain the basic required documents and also ensure that papers relating to the case are preserved by the relevant authorities.¹³⁸ Commission staff will sort applications to determine what kind of review is required, if at all, and if any special circumstances exist that might make the application more of a priority.¹³⁹ If an application is deemed eligible for review but does not contain any information which might likely allow it to succeed, even though true, then the application will still be referred, but will only receive an abbreviated review.¹⁴⁰ Sometimes it will be possible to reach a decision based on the information given in the application form or other correspondence. However, more often, it will be necessary to call for further information or carry out an investigation.¹⁴¹

About one-third of the applications are discarded at this initial stage because the applicant has not completed the appeal process or does not have fresh evidence.¹⁴² Most of the applications to the CCRC are turned down, as was the case with applications to the Home Office. In the five years since its creation 4% of all cases reviewed by the CCRC have been referred to the Court of Appeal. Comparably, the

¹³⁷ First Report, *supra*, note 106.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

Home Office referral rate was near 1.5%.¹⁴³ Applicants will be informed if their application will be passed on to the next stage of assessment or if it does not meet all the criteria to be further considered.

Stage two of the application review by the CCRC is the substantive review. During this stage a Caseworker plus a Commission member is assigned to work on the case. The Caseworker prepares a case action plan and discusses this with the assigned Commission member. The Caseworker then actively investigates the case by going through all relevant documentation and making all the necessary inquiries (or arranging for them to be made).¹⁴⁴

One of the more controversial aspects of the way the CCRC operates concerns the question of who should carry out inquiries needed for the investigation.¹⁴⁵ The CCRC has the power to require an 'appropriate person' from the public body which carried out the original investigation to appoint an investigating officer to carry out the investigation and report back to the Commission.¹⁴⁶ For example, when the original investigation is conducted by a police force, and this is common, it will be the Chief Constable of that force, who appoints either someone from his force, or another force, to conduct the investigation.¹⁴⁷ This provision has been criticised for being too limited.¹⁴⁸ The Commissioner should have the power to appoint an investigating officer from its own staff in difficult cases.¹⁴⁹

¹⁴³ The Times, *supra*, note 109.

¹⁴⁴ First Report, *supra*, note 106.

¹⁴⁵ Malleon, *supra*, note 99.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

All the information obtained during the investigation is then put before a panel of three Commission members and together they will decide if the case should be sent to the Court of Appeal or rejected. However, before this decision is made the applicant will be informed of what has been learned during the investigation and they will be given an opportunity to make comments.¹⁵⁰

iii) Criteria Used by the CCRC to Send a Case to the Court of Appeal

The *Criminal Appeal Act* 1995 states that the Commission shall have regard to the applicant's submissions, other representations, and any other matters which the Commission deems to be relevant when deciding whether to grant a post-conviction review.¹⁵¹ While this statement may be unclear, this leaves the process open and flexible for variations in individual cases but also precludes the existence of established guidelines to be followed.

A case can be referred by the CCRC to the Court of Appeal if "the Commission considers that there is a 'real possibility' that the conviction, verdict, finding or sentence would not be upheld if the reference was to be made."¹⁵² This section provides that a reference of a conviction shall not be made unless the Commission considers that there is a 'real possibility' that the conviction would not be upheld if the reference were to be made.¹⁵³ This test indicates that the Commission member must first consider what is meant by 'real possibility' and then predict whether the Court of Appeal will decide if the conviction to be 'unsafe'. The 'real possibility' must be because of an argument or evidence not previously raised at

¹⁵⁰ CCRC Website, *supra*, note 2.

¹⁵¹ CAA 1995, *supra*, note 108, at Part II s. 14(2).

¹⁵² CAA 1995, *supra*, note 108, at part II s. 13(1)(a).

¹⁵³ Memorandum, *supra*, note 4.

trial or on appeal.¹⁵⁴ However, the CCRC may still send a case to the Court “where there are exceptional circumstances” even though there may not be new evidence.¹⁵⁵ The term ‘exceptional circumstances’ is not defined at statute and it is within the discretion of the Commission members to determine circumstances that would apply.¹⁵⁶

There has been some concern expressed about the ‘real possibility test’. This phrase could be interpreted one way by the public or a lay person within the Commission investigating the case and another way by the court itself.¹⁵⁷ Therefore, there are a variety of possible interpretations pertaining to the meaning of ‘real possibility’.

There is still much uncertainty surrounding the terms of ‘real possibility’ and ‘exceptional circumstances’. Since they have not been defined at statute and are decided on an individual basis by commission members, it is difficult to provide an accurate explanation of each. Leigh comments that, “for present purposes it is perhaps enough to say that the law is manifestly uncertain...”¹⁵⁸

Once a case is referred to the Court of Appeal the involvement of the CCRC ends and it is then up to the applicant and his or her legal representative to present a persuasive case to the Court of Appeal. If an application is denied by the CCRC and some further evidence is uncovered or a new line of argument later appears, there is nothing to prevent a person from re-applying.¹⁵⁹

¹⁵⁴ Malleon, *supra*, note 99.

¹⁵⁵ CAA 1995, *supra*, note 108, at s.13(2).

¹⁵⁶ L.H. Leigh. “Correcting Miscarriages of Justice: The role of the Criminal cases Review Commission.” (2000) 38 (No. 2) *Albta. L.R.* 365 [hereinafter Leigh].

¹⁵⁷ First Report, *supra*, note 106.

¹⁵⁸ Leigh, *supra*, note 156.

¹⁵⁹ CCRC Website, *supra*, note 2.

iv) Criticisms of the CCRC.

There are criticisms of the Criminal Cases Review Commission and its operation. One of the main problems with the CCRC has been the delay in dealing with applications. The Commission took on the backlog of cases from the Home Office and then received a substantial number of applications, running in the thousands, during their first few years of operation. This was more than originally estimated. Besides criticism of the delay due to the excessive number of applications, there have been complaints that “the CCRC has cleared a lot of backlogged cases by saying there is nothing in the case to refer it back to the Courts.”¹⁶⁰ While the “Innocent” organization believes there are some very good caseworkers employed by the CCRC” they also claim that some of the caseworkers will not thoroughly investigate cases since they only read the paperwork and do not leave the office to study the merits of the application.¹⁶¹ However, others have expressed concern that “the CCRC is being meticulous to a fault in preparing and presenting a case that satisfies it that an appeal would be successful.”¹⁶²

Another criticism concerning the ‘real possibility’ test was submitted in a memorandum by Bindman & Partners law firm to the Select Committee on Home Affairs. They stated that the Commission has adopted a “restrictive and legalistic approach that is too concerned [with] the possibility that the Court of Appeal will turn

¹⁶⁰ See “Innocent: Fighting miscarriages of Justice.” in *Inside Time* Spring 2001. Available at http://innocent.org.uk/misc/ccrc_insidetime.html [Accessed 9 December 2002].

¹⁶¹ *Ibid.*

¹⁶² First Report, *supra*, note 106.

down cases it refers.”¹⁶³ Their concern is that the test being applied by Commission members is whether the Court of Appeal will quash the conviction rather than whether there is a ‘real possibility’ of that happening.

Member of Parliament David Trimble stated that he was not satisfied with the qualification that evidence or argument on which the ‘real possibility’ must be based on evidence or argument that has not already been raised. He believes this rule to be “unnecessarily restrictive [since] the point may have been raised but not adequately.” He commented:

I understand the thinking behind it; it is a thinking that pervades so much of the criminal justice system. Rather than look at the merits of a particular case, we look at the procedures and the way in which things have been done. A former colleague of mine characterised the criminal trial as a game. We look to see whether the lawyers and other persons acting for a defendant did the right thing at an earlier stage: For example, if they had the opportunity to raise a point, but failed to do so, the point could not be raised subsequently.¹⁶⁴

Bindman & Partners law firm also suggest that, “applicants will inevitably be suspicious of the involvement of police officers in re-investigating their cases.”¹⁶⁵ Bindman & Partners accept that the CCRC may have to enlist the help of a police force in the re-investigating a case but that the Commission should attempt to dispel suspicions.¹⁶⁶ This could be accomplished by allowing the applicant to object to a particular police force or allowing the applicant’s solicitor to be present during interviews conducted by the police. The applicant should be kept well informed of this process.

¹⁶³ Memorandum, *supra*, note 4.

¹⁶⁴ United Kingdom. Parliamentary debates 1994. (Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199495/cmhansrd/199...-5.htm>) [Accessed 9 December 2002].

¹⁶⁵ Memorandum, *supra*, note 4.

¹⁶⁶ *Ibid.*

v) How Does the CCRC Compare to the C3 Department?

In a broad sense, the description of the Criminal Cases Review Commission responsibilities equate to the responsibilities of the Home Secretary when reviewing alleged cases of miscarriages of justice. However, the way the CCRC has thus far exercised its responsibilities has been quite different from that of the Home Secretary.

Mr. David Kyle, a member of the CCRC, testified before *The Commission on Proceedings Involving Guy Paul Morin* as to how the CCRC views its role in reviewing wrongful convictions.

The broad description of our responsibilities is one which equates to the responsibility which the home secretary previously had before the creation of the Criminal Cases Review Commission, but although it is a broad description which equates to the previous function of the home secretary, the way in which the new commissioners will exercise its function will... be quite considerably different.... We regard ourselves as having a very proactive role to play, very much more so than was the view taken when the responsibility for looking into [wrongful convictions] rested with the Home Office.” We see ourselves as having a very proactive role in the way we tackle cases.¹⁶⁷

Defence lawyers and other campaigners in potential miscarriage of justice cases speak about the CCRC with disbelief in their voices: “They actually talk to us. They ring us up and discuss details of the cases we have sent them. They even come to meet us.”¹⁶⁸ These people spoke of the CCRC in marked contrast to the Home Office’s C3 department. Such sentiments were also expressed by Jim Nichol, who represented the Bridgewater Three, and is now dealing with another alleged wrongful conviction case. He commented that the CCRC is “incomparably better than the

¹⁶⁷ Morin Commission, *supra*, note 135, Oral Evidence given by Mr. Kyle on 9 December 1997.

¹⁶⁸ “The Criminal Cases Review Commission: One Year Down the Line.” *Independent* 30 March 1998. (Available at <http://www.casetrack.com/WATSN>) [Accessed 9 December 2002].

Home Office.”¹⁶⁹ Razi Karim, a legal officer for “JUSTICE”, stated that “in the past you sent a case to the Home Office and it was like a black hole. You heard nothing for years and we were then told yes or no. The Commission will tell you the name of the person reviewing the case, they are very willing to discuss ideas and to come down to London to meet us.”¹⁷⁰

In the Home Affairs – First Report to Parliament concerning the CCRC it was stated that:

We are impressed by the overwhelmingly positive tone of the opinions on the Commission’s work in the submissions received from lawyers who [have] had dealings with it, particularly when compared to the previous arrangements. Ms. Kate Akester for example, giving oral evidence on behalf of ‘Justice’, suggested that many observers took the view that the Commission “is light years ahead of the Home Office in all sorts of ways”; and Mr. Adrian Clarke, from Bindmans, said that once the Commission had begun to investigate a case “then there is no comparison to the sort of work being done by the Home Office”. Graysons, a firm of solicitors in Sheffield, were impressed by the analysis of cases “from the ground up” and described as “outstanding” the readiness of caseworkers to liaise with professional advisors; they also spoke approvingly of the degree of independence the Commission was demonstrating. Stephens & Scown, of Exeter, made similar comments and described their overall experience of working with the Commission as, in the main, “very favourable”. ‘Justice’ also described the Commission as “much more accessible than the Home Office” and credited them with a much more transparent decision-taking process. We note the good start which has been made by the Commission and its staff in those cases which it has examined, particularly [in regards to] the professionalism, independence and openness which it has brought to bear on its work. We note that this view is shared by the Government, who stated in their evidence that “the Commission has crucially established early on a reputation for impartiality, professionalism and sound judgement and thus helped enhance public confidence in the criminal justice system.”¹⁷¹

An example of a case that was not properly dealt with by the C3 department within the Home Office, which was later corrected by the CCRC, was that of Keith

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ First Report, *supra*, note 106.

Twitchell. On 26 February 1982 Keith Twitchell was convicted of manslaughter and robbery by a jury in Birmingham England. He was eventually released on parole eleven years later, but he never gave up his quest to have his conviction quashed. Twitchell applied to the Home Secretary twice to have his conviction reviewed but both times he was turned down. Within months of the inception of the Criminal Cases Review Commission Twitchell's case was referred by the CCRC to the Court of Appeal on the basis that a miscarriage of justice had occurred.¹⁷² The Court quashed the conviction and concluded:

There is before the Court yet another appeal arising from the lamentable history of the now disbanded West Midlands Serious Crime Squad. During the 1980's a significant number of police officers in that squad (some of whom rose to very senior rank) behaved outrageously and, in particular, extracted confessions by grossly improper means, amounting in some cases to torture. During the 1980's, it has been the melancholy task of this Court to examine the safety of many convictions recorded during that period, and approximately thirty have been quashed.¹⁷³

What is important is that the British government was able to recognise existing problems within their criminal justice system and to address them. This can be seen when the government replaced the role of the Home Secretary with an independent review mechanism to address possible miscarriages of justice. While the new CCRC has received various criticisms, and its scheme is not perfect, most agree it is an improvement over the previous system. However, not all aspects of the post-conviction review system changed. The Court of Appeal is still the body that cases are referred back to. They are the ones that ultimately decide whether there has been a miscarriage of justice and if the conviction will be upheld or quashed.

¹⁷² J. Lockyer of the Ontario Criminal Lawyers Association, "AIDWC" *Newsletter* 31 December 1999 Vol. 20, (No. 6.) at 6.

¹⁷³ *Ibid.*

What has changed is the mechanism to decide if a case is referred to the Court of Appeal for a hearing and this is a very important step in addressing and correcting miscarriages of justice. While procedural similarities may exist with the way applications were handled by the Home Office and the CCRC, in reality, the attitude of the CCRC is 'light years ahead' of the Home Office. The Home Secretary was criticised for being secretive, unaccountable and reactive in reviewing applications for post-conviction review. The implementation of the CCRC has alleviated these problems. The establishment of an independent mechanism to deal with alleged miscarriages of justice is a major step forward for accountability in the criminal justice system.

Some criticisms or failures of the CCRC might be alleviated if the commission is provided with additional funds in order to carry out its mandate. With more funding the CCRC could employ a greater number of people to investigate claims of wrongful convictions and this would ease the backlog of cases. Greater funding would also provide the CCRC with more time and resources to conduct a more thorough investigation. However, it must also be acknowledged that funding alone will not guarantee alleged miscarriages of justice will be properly investigated or even detected. The attitude and conviction of individuals working within the CCRC is very important to the functioning of this process.

V. Conclusion.

Thus far, it has been shown that the transition in the United Kingdom from a government agency to an independent review body has had a positive effect on detecting and remedying miscarriages of justice. There has been an increase in the

number of wrongful convictions overturned since the CCRC began operation and various legal professionals and organizations have expressed their satisfaction with the CCRC, citing that it is a welcome improvement from the Home Office.

There are many similarities between Canada's current post-conviction review process and the former British system. There are also similarities between the current problems Canada is experiencing with post-conviction review and the problems Britain had before the CCRC. Yet, the United Kingdom recognised the problematic nature of their post-conviction review system, took action to understand and study the problem, and finally implemented appropriate change through the creation of an independent review body. Canada has also recognised that there are problems with their post-conviction review process, has researched this problem, but has failed to take effective measures to reform their inadequate system that is supposed to remedy miscarriages of justice. The U.K. experience has shown the benefits of having an independent review body, such as the CCRC, to investigate and refer wrongful conviction cases. There are many things Canada can learn from the United Kingdom.

Chapter 4

Problems and Recommendations: Canada

I. Introduction.

It has been asserted thus far that replacing section 690 of the *Criminal Code* with section 696 did not meet expectations of implementing appropriate reforms to enhance Canada's post-conviction review system. There are many problems with the section 696 process that curtail the detection and correction of miscarriages of justice. Calls for reform to the post-conviction review process by numerous interest groups, politicians and individuals have yet to be adequately addressed by the government. There are still pleas to replace section 696 with an independent review body similar to the Criminal Cases Review Commission in the United Kingdom. The United Kingdom was able to recognize problems with their own post-conviction review process and to make suitable changes; Canada has not.

There are a variety of problems with Canada's section 696 post-conviction review system. Deficiencies in this system not only negatively affect the individual involved but also throw the criminal justice system into disrepute. Criticisms have been made that section 696 "is not sufficiently independent of government. It is argued that there is a natural proclivity on the part of representatives of the government against finding fault with the justice system."¹ Recommendations to replace Canada's post-conviction review with an independent review body have been ongoing throughout the last twenty years, but various Justice Ministers have repeatedly curtailed such significant suggestions for reform.

This chapter looks at the deficiencies in the current section 696 post-conviction review process and the recommendations for replacing the problematic role of the Minister of Justice under section 696 of the *Criminal Code*. Part two of this chapter will outline the circumstances of David Milgaard's first section 617 (now section 696) application to the Minister of Justice. The circumstances that surround his application and the treatment of his case by the Department of Justice provide a good account of how the department handles post-conviction review cases. The many deficiencies in the post-conviction review system are exemplified by Milgaard's experience.

Part three addresses a number of problems with Canada's post-conviction review process. In their article, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*², Braiden and Brockman list a number of criticisms of the post-conviction review process such as the secrecy surrounding the process, the high cost of applying through section 696, the lack of established procedures, the conflict of interest in the Minister's role, and the excessive length by the department in reviewing applications. They also point to evidence that indicates the current post-conviction review simply system does not work effectively to detect and remedy miscarriages of justice.

Further problems with section 696 are that the various remedies available to the Minister of Justice under this section have different judicial and evidentiary requirements, and there is little or no public accountability by the Minister of Justice

¹ M. Fuerst, "The Section 690 Process." (National Criminal Law Program, University of Victoria, Victoria, B.C.: 1998) at 19.2 – 19.8.

in regard to post-conviction review applications and decisions. Evidence provided by Toronto lawyer James Lockyer at the October 2001 hearings of the *Standing Committee on Justice and Human Rights* also highlights many of the problems with Canada's section 696 post-conviction review system and these will be discussed. Broader, or more indirect problems, such as the judicial concept of finality and the idea that the adversarial system of justice produces truth at trial, will be discussed. These two ideas may also curtail the detection and remedying of wrongful conviction cases.

Part four of this chapter looks at the various recommendations for the implementation or study of an independent review commission to review allegations of miscarriages of justice. *The Commission on Proceedings Involving Guy Paul Morin, The Royal Commission on the Donald Marshall Jr. Prosecution* and *The Inquiry Regarding Thomas Sophonow* have made one or both of the recommendations. Part five addresses why the government continues to reject implementing an independent review body to address allegations of wrongful conviction.

And, finally, section six suggests the benefits of a well functioning independent review body by outlining how many of the existing problems with section 696 could be improved upon, if not solved, by such a body.

II. David Milgaard's Post-Conviction Review Application to the Minister of Justice.

² P. Braiden and J. Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code." (1999) 17 *Windsor Yearbook of Access to Justice* 3 [hereinafter Braiden and Brockman].

Although there has not yet been a Commission to determine how the justice system erroneously convicted and imprisoned David Milgaard of a murder he did not commit, his case provides a good example of the inadequacies of section 696 (then section 617) in addressing and correcting miscarriages of justice.

On 31 January 1969 Gail Miller was raped and stabbed to death as she walked to catch her bus to go to work in Saskatoon, Saskatchewan. David Milgaard was charged and convicted of her murder. No physical evidence linked Milgaard to the scene of the crime and eyewitness testimony that helped convict him was extracted through the coercion of the police.³ Milgaard appealed to the Saskatchewan Court of Appeal and his conviction was affirmed.⁴ Milgaard then appealed to the Supreme Court of Canada but his appeal was dismissed.⁵

In 1988 Milgaard submitted a post-conviction review application under section 617 of the *Criminal Code* in the hope of having his case reopened. Despite overwhelming evidence to suggest Milgaard was wrongfully convicted, then Minister of Justice Kim Campbell rejected his application for further review.⁶ In August 1991 Milgaard submitted another section 690 application to the federal Minister of Justice which was again turned down. However, due to the continued widespread concern that there was a miscarriage of justice in his case, the Governor General in Council then referred the matter to the Supreme Court of Canada pursuant to section 53 of the Supreme Court Act.⁷ The Court was to review the case and any additional

³ C. Karp and C. Rosner, *When Justice Fails: The David Milgaard Story*. (Toronto: McClelland & Stewart 1991) [hereinafter Karp and Rosner].

⁴ *R. v. Milgaard* (1971) 2 C.C.C. (2d) 206.

⁵ See *Reference Re Milgaard* [1992] 1 S.C.R. 866 [hereinafter Milgaard Reference].

⁶ B. Anderson and D. Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (Halifax, Nova Scotia: Fernwood, 1998) see pages 51-62 [hereinafter Anderson and Anderson].

⁷ *Supreme Court Act* R.S.C. 1985, c. S-26 s. 53.

information in order to determine whether the continued conviction of Milgaard constituted a miscarriage of justice, and if so, what remedial action would be advisable.⁸ On 14 April 1992 the Supreme Court brought down the ruling in the Milgaard case on the basis of Ron Wilson recanting his original testimony, which was deemed to constitute 'new evidence' and also because of the documented activities of serial rapist Larry Fisher.⁹ The Supreme Court ruled that both of these discoveries would have affected the outcome of the original jury decision in the 1970 trial. The court emphasized that it was not satisfied beyond a reasonable doubt that Milgaard was innocent of murder, but that the new evidence was sufficient for the Supreme Court to advise the Minister of Justice to quash the conviction and direct a new trial under section 690(a) of the *Criminal Code*.¹⁰ Interestingly, the Court decided to comment that Milgaard had received a fair trial in 1970 and there was no evidence of police misconduct in the investigation of his case.¹¹ Saskatchewan Justice Minister Robert Mitchell decided to stay the charges against Milgaard. This meant Milgaard was free but there would not be a new trial and, therefore, there would be no opportunity for Milgaard to prove his innocence. In justifying his decision not to compensate Milgaard, Minister Mitchell stated, "we didn't do anything wrong and we take comfort in the fact the Supreme Court agreed with that, so we won't be paying."¹² In April 1992 Milgaard was finally released from prison after twenty-two years.

⁸ Milgaard Reference, *supra*, note 5.

⁹ Anderson and Anderson, *supra*, note 6.

¹⁰ Milgaard Reference, *supra*, note 5.

¹¹ Anderson and Anderson, *supra*, note 6.

¹² *Ibid*, at 60.

In 1997, DNA testing was arranged after months of negotiations between Milgaard's lawyers, the federal government and the Saskatchewan government at the request of the Milgaard family.¹³ The testing, which was conducted in London, England, provided positive proof of Milgaard's innocence.¹⁴ David Milgaard was subsequently exonerated.¹⁵ Shortly after, Larry Fisher was charged and convicted of the rape and murder of Gail Miller. It was only at this point the Saskatchewan government announced its intent to compensate Milgaard and to launch a public inquiry into his conviction. Six years later no inquiry has been initiated.

Milgaard's experience with the Department of Justice and the section 696 post-conviction review process exemplifies the deficiencies with this system in detecting and correcting miscarriages of justice. In December 1988, after Milgaard had spent over eighteen years in prison, he appealed to the Minister of Justice under section 617 of the *Criminal Code* to have his case re-opened on the basis that new evidence had emerged that was not presented at his original trial. The first element of the appeal to the Minister of Justice was based on the facts of the case. Although Milgaard's lawyers knew it was pointless to re-argue the facts since the Minister of Justice was not likely to interfere with the jury's verdict merely on the basis of a different interpretation of the facts, they nevertheless considered it important to review some of the evidence.¹⁶ The "time sequence simply does not fit" the application argued.¹⁷ The evidence was that Milgaard was away from his traveling

¹³ S. Bindman, "Milgaard DNA test results expected today," *Calgary Herald* 18 July 1997: A11.

¹⁴ Anderson and Anderson, *supra*, note 6, see pages 51-62.

¹⁵ P. Connolly, "Innocent and foot dragging: Milgaard's DNA test cleared him so why can't he get a new trial?" *Halifax Daily News* 19 July 1997: 18.

¹⁶ Karp and Rosner, *supra*, note 3, at 175-176.

¹⁷ *Ibid*, see page 176.

companions from approximately 6:30 to 6:45am. Gail Miller did not usually leave work until 7:00am and was seen alive at home some time between 6:35 and 6:45am. After 6:45am Milgaard was always in the company of another individual. In order to convict Milgaard the jury must have found that the witnesses, who testified about the times of the offence and Milgaard's whereabouts, were wrong because the times that were accepted as factual evidence did not give Milgaard time to commit the rape and murder.

The strongest piece of evidence tying Milgaard to the offence, the application argued, was the combined testimony of Lapchuk and Melnyk, and the forensic evidence linking Milgaard to the crime.¹⁸ The Minister of Justice was therefore urged to reopen the case on the basis that: "1. Debra [sic] Hall, who was not called at trial, has provided an affidavit contradicting the evidence of Melnyk and Lapchuk. 2. Advances in scientific technology have allowed the applicant to discredit the forensic evidence called at his trial and to provide evidence that exculpates him as the perpetrator of the crime."¹⁹ The Minister of Justice was being asked to order a new trial, or to refer the case to the Court of Appeal or to the Supreme Court of Canada for further judicial review under section 617.

Subsequently, over the next two years more evidence would sporadically be discovered that further cast doubt as to the validity of Milgaard's conviction. This evidence would not be discovered by the Department of Justice actively investigating Milgaard's application, but by thousands of hours of volunteer work conducted by

¹⁸ *Ibid.*

¹⁹ *Ibid.*

lawyers, relatives, politicians and private investigators who believed that the wrong man had been convicted.²⁰

Over a year had passed since the application was filed when the Department of Justice announced that it had completed the fact-gathering stage of Milgaard's case. This essentially involved the Department of Justice acquiring and reading trial transcripts. Justice officials investigating the case did not bother contacting Dr. Ferris, the forensic expert who had conclusively discredited the original forensic evidence submitted at trial and it took officials over nine months to take a statement from Deborah Hall.²¹

After fifteen months had passed since the application had been submitted, and there was still no word from the Department of Justice concerning the status of the Milgaard application, Liberal MP John Harvard questioned then Minister of Justice Kim Campbell in the House of Commons about the delay. Ms. Campbell responded that the hold-up was a result of new witnesses being identified by the applicant. She commented that:

The original submission that was made was under investigation by the department, but recently the applicant identified new witnesses he thought would assist his case. That required the department to prolong its investigation in order to look at those areas of evidence. So it is not delay in the department that has resulted in this time frame, but rather the applicant's identification of new witnesses he felt could assist his case.²²

Essentially, the Minister was blaming David Milgaard for prolonging the investigation by constantly coming up with new evidence.²³ It would be the same

²⁰ *Ibid.*

²¹ *Ibid.*, see page 213.

²² *Ibid.*, see p. 214.

²³ *Ibid.*

argument she would use over and over again during the next few months, much to MP Harvard's frustration.²⁴

Eugene Williams was the case lawyer assigned to handle the Milgaard case at the Department of Justice. He had worked at the department for over a decade and had been involved in more than a dozen wrongful conviction applications when he received the Milgaard application. "Milgaard's application seemed to get mired in the Justice Department's bureaucracy for the first few months in 1989. Whether through willful neglect or a backlog of other work, officials did not pay much attention to the application at first."²⁵ Finally, in October 1989, after a certain amount of media attention, Williams started to investigate the Milgaard application by interviewing Deborah Hall. This would be the first in a series of interrogations that would later lead the Milgaard family to accuse Justice Department officials of being prejudiced against the application.²⁶ Karp and Rosner describe Eugene Williams' interview of Deborah Hall:

Hall remembers feeling intimidated when Williams arrived. He had a tape recorder, court stenographer, and bundles of documents in tow, and the first order of business was to have her sworn in. Williams would later admit that the swearing-in of people he interviewed was a selective process. In the end most of the witnesses who offered evidence favourable to Milgaard's application were sworn, while the original police investigators and others were not.

The interview was far from what Hall imagined it to be like when she first gave David Asper her statement nearly three years before. Instead of a friendly exploration into what Hall might offer as new evidence, the session made her very tense.

²⁴ *Ibid.*, at 214.

²⁵ *Ibid.*, at 218.

²⁶ *Ibid.*

‘He didn’t make me feel like I had any credibility at all,’ she said of Williams. ‘I felt like I was being cross-examined. I thought this has got to be the closest to what it would be like to be grilled up on the stand.’

Hall felt she was at a disadvantage. She was trying to remember events that had occurred twenty years earlier, and didn’t have the luxury of having reviewed the trial transcripts. Williams, on the other hand was well versed in the transcripts and made Hall feel uncomfortable by asking if she could remember small details. What was David wearing that day? Are you positive that George Lapchuk didn’t take you home that night? Is it possible your thinking was impaired by drugs?

‘By the time I left there I couldn’t even think straight,’ she said. ‘He had me doubting myself.’²⁷

The interview of Hall by Williams was the first sign to those involved in the Milgaard case of how the Department of Justice viewed Milgaard’s application. It appeared as if efforts were being made to discredit the new information instead of actively investigating it.²⁸ There were also other indications that the officials assigned to review Milgaard’s case did not think much of his application. For example, Bill Corbett, a senior counsel for the Department of Justice’s criminal prosecution branch, dropped several hints in media interviews that the weight of opinion at the department was not in Milgaard’s favour.²⁹ Corbett even said to a *Globe and Mail* reporter, in regard to Milgaard’s case that, “seventeen percent of people still believe Elvis Presley is alive.”³⁰

Deborah Hall was not the only witness who felt frustrated and angered after being interviewed by Williams.³¹ When Dennis Cadrain tried to explain the doubts he had about his brother’s credibility (Albert Cadrain’s testimony at Milgaard’s trial played a part in his conviction) Williams did not seem to put much stock in his

²⁷ *Ibid.*, at 218-219.

²⁸ *Ibid.*

²⁹ *Ibid.*, see page 219.

³⁰ *Ibid.*

opinion. “To Dennis it seemed the Justice Department had a vested interest in defending the integrity of Albert’s original testimony.”³²

The most crucial witness interviewed by Eugene Williams was Ron Wilson. Wilson’s original testimony played a crucial part in convincing the jury to convict Milgaard and now he had provided a sworn statement that he had lied at Milgaard’s trial.³³ Using trial transcripts and original police statements, Williams tried to find contradictions in Wilson’s story. However, after extensive interrogation, Wilson stuck to his contention that he had wrongly implicated Milgaard for the murder of Gail Miller.³⁴

Karp and Rosner, the authors of *When Justice Fails: The David Milgaard Story*³⁵ comment on the adversarial manner taken by Williams:

It might be argued that the adversarial approach Williams adopted in his interrogations was important to test the accuracy of witness statements, some of which were in direct contradiction to sworn testimony given twenty years earlier. That argument might make sense if the questioning had been done in public with counsel for all sides present. In many cases, the people offering important evidence – such as Deborah Hall and Dennis Cadrain – never considered having their own lawyers present to balance the prosecutorial tone of the questioning. Nor was counsel for David Milgaard allowed to be present at any of the sessions. The resulting, arguably one-sided, transcripts formed the official record of the Justice Department investigation, the record which would ultimately be seen by the justice minister. It’s as if an Appeal Court were asked to rule on a case by reviewing only the prosecution’s questioning of witnesses, without seeing how the defence had attempted to handle the same witnesses.³⁶

A conflict of interest occurred when the Department of Justice asked Bob Caldwell to help them with their investigation of Milgaard’s application. Bob

³¹ *Ibid*, see page 220.

³² *Ibid*, at 220.

³³ *Ibid*. see page 222.

³⁴ *Ibid*, see page 222.

³⁵ *Ibid*.

³⁶ *Ibid*, at 220.

Caldwell was the person that originally prosecuted Milgaard at trial. Caldwell also continually monitored Milgaard's parole applications, personally making sure the parole board remembered the brutality of Gail Miller's murder when Milgaard applied for parole.³⁷ David Asper, Milgaard's lawyer, tried arguing on a number of occasions that it was a direct conflict of interest to employ a person as a resource for an investigation who was the original prosecutor at Milgaard's trial.³⁸ However, to Williams it seemed logical to rely on someone who had intimate knowledge of the case to provide assistance.³⁹ Williams adamantly rejected any charge of bias in any of the Department of Justice procedures, commenting:

We have no axe to grind. An application is brought, and it is our job to look at it and to do so as objectively and impartially as possible... When a minister is called upon to reverse the decision of the highest courts, that's not something that is taken lightly. Consequently, for the proper exercise of that discretion, all the facts that are relevant should be examined in as full and complete an examination that is required. Where allegations of fact are made, those are examined. They are not done with the premise of defeating it. It's done to assure that the factual basis upon which the recommendation is made is an accurate one.⁴⁰

The investigation into Milgaard's application "lacked all semblance of justice."⁴¹ The investigation did not amount to a proper review but only a reaction to the evidence that had been unearthed by Milgaard's supporters.⁴² The Department of Justice did not review all of the relevant files and statements but instead restricted its investigation to the points raised in the application.⁴³ When Larry Fischer's name surfaced, the department did not conduct an independent investigation of police files,

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*, see page 220.

⁴⁰ *Ibid.*, at 221-222.

⁴¹ *Ibid.*, at 223.

but merely seconded an R.C.M.P. officer to see if Fischer would be willing to be interviewed. There was also no indication the Department of Justice attempted to gather any evidence that might lead to the discovery of Larry Fischer's involvement in Gail Miller's rape and murder.⁴⁴ If the department officials had reviewed the police files they would have discovered information that pointed to Fischer's guilt. Milgaard himself was also being blamed by the Department of Justice for his own misfortunes.⁴⁵

The original section 617 application contained Dr. Ferris's forensic report and the evidence of Deborah Hall. By the time the Department of Justice came to a decision more information questioning Milgaard's conviction had come to light, such as Ron Wilson retracting his incriminating testimony; the discrediting of Albert Cadrain's testimony because of his mental state; the discrediting of the original forensic evidence by Dr. Markesteyn; the revelations about serial rapist Larry Fischer and how he might be connected to Gail Miller's murder; and the sheer implausibility of Milgaard having committed the crime, given the facts of the case.⁴⁶

Despite the overwhelming evidence that had come to light suggesting Milgaard was not the killer, the Department of Justice rejected his section 617 application in February 1991, more than two years after he had submitted it. The Justice Department provided only a brief communication to the media regarding the decision. Then Minister of Justice Kim Campbell stated, "[t]here has been a thorough and diligent review of every piece of evidence submitted. I have concluded that there

⁴² *Ibid*, see page 220.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, see page 223.

is no reason to believe that a miscarriage of justice is likely to have occurred in this case.”

The treatment of the Milgaard application by the Department of Justice speaks volumes about how post-conviction review applications are investigated. The deficiencies in this review process are numerous. Milgaard’s case was not impartially investigated. Milgaard, his family, his lawyers, as well as many others, were the ones who supplied the department with all of the evidence, only to have the evidence not investigated sincerely, and, finally, discredited. In essence, Milgaard was being asked to prove his innocence. All he was asking for was his case to be heard by the Court of Appeal based on the amount of new information that had come to light.

III. The Problems with Canada’s Present Post-Conviction Review System.

i) Introduction.

In their article, *Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code*⁴⁶, Braiden and Brockman identify a number of problems with the section 690 (now section 696) process. Their criticisms of this process that will be discussed here are: section 690 does not function effectively; applications get lost in bureaucratic inertia; the process is conducted in secrecy; the cost of applying can be prohibitive; the process lacks an established set of procedures; applicants apply for a review by the same agency responsible for their

⁴⁶ *Ibid*, see page 232.

⁴⁷ Braiden and Brockman, *supra*, note 2.

wrongful conviction is a conflict of interest.⁴⁸ Two other problems with the section 696 post-conviction review are the lack of accountability by the Minister of Justice and the nature of the remedies available to the Minister if a conviction review is granted.

In addition to these specific problems with the section 696 process, there are a number of more general problems inherent in our adversarial system of criminal justice that diminishes the possibility of identifying and remedying wrongful convictions. The concept of finality, so ingrained in our justice system, and secondly, the idea that truth is a result of the adversarial trial, can obscure the identification and correction of wrongful convictions.

ii) Criticisms of Canada's Post-Conviction Review System.

To begin with, Braiden and Brockman assert that, "evidence indicates that section 690 (now section 696) does not work effectively."⁴⁹ There were only twenty post-conviction review interventions⁵⁰ by the Minister of Justice between 1960 and 1997, an average of fewer than one intervention every two years.⁵¹ While there is limited statistical information available to indicate the actual number of people wrongfully convicted, evidence indicates that the numbers may be higher than estimated. James McCloskey, who founded a New Jersey based non-profit organization that investigates alleged wrongful convictions, comments that "what

⁴⁸ Braiden and Brockman, *supra*, note 2, see pages 20-28.

⁴⁹ Braiden and Brockman, *supra*, note 2, at 20.

⁵⁰ 'Intervention' is any referral or remedy granted to a post-conviction review applicant. This is done after the federal Minister of Justice accepts a post-conviction review application through section 696 or its predecessor sections. This means the Minister of Justice accepts a post-conviction review application and either refers the case to the Court of Appeal, orders a new trial, asks the appropriate Court for its opinion on a specific question posed to it, or advises the Governor General in Council to refer the case to the Supreme Court of Canada.

⁵¹ Braiden and Brockman, *supra*, note 2, at 20.

happened to David Milgaard is not an isolated incident. It's not an aberration of the system. It's more than just a mistake. It's systemic."⁵² To exemplify this he cites a number of studies to support his claim. A 1993 study showed that there were 48 cases of wrongful murder convictions in the U.S.A. between 1973 and 1993.⁵³ Another study of murder cases in the state of New York between 1963 and 1988 found 59 wrongful convictions.⁵⁴

The rejection by the Department of Justice of Milgaard's post-conviction review application "[cannot] leave the public with much faith in the proposition that section 690 is an effective remedy for wrongful convictions."⁵⁵ The authors contend that "one might reasonably predict that had Guy Paul Morin applied for a section 690 review, without DNA evidence, it is unlikely that the Department of Justice would have recommended an intervention."⁵⁶ The authors conclude that section 690 is not the most effective means of remedying wrongful convictions.

iii) Section 696 Applications End up in "Bureaucratic Inertia".

A second problem identified by the authors with the application process is that applications end up in "bureaucratic inertia." For example, in the case of David Milgaard, it took the Department of Justice over two years to reject his application. Colin Thatcher submitted his section 690 application in October 1989 and Minister Rock did not make a decision until April 1994⁵⁷; Sidney Morrisroe applied for a

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 21.

⁵⁶ *Ibid.*, at 22.

⁵⁷ *Ibid.*

section 690 review in January 1990 and a decision was made in October 1995; Patrick Kelly presented a post-conviction review application to the department in December 1993 and a decision was reached in November 1996.⁵⁸ Toronto lawyer Daniel Brodsky comments that section 690 applications move “as briskly as a snail with arthritis.”⁵⁹

iv) Section 696 Application Reviews are Conducted in Secrecy.

A third problem with the section 690 process, outlined by Braiden and Brockman, is that it is “conducted in secrecy.”⁶⁰ They claim that “defence counsel, applicants, MP’s, and advocacy groups are often denied access to information while the investigation is being conducted.”⁶¹ When information is sought from the Department of Justice concerning the standing of an application the “response to inquiries are vague and uninformative”. This leaves the clients and their counsel with little or no information about the status of their section 690 application.⁶² Concerning the involvement of the applicant with the Department of Justice in their own section 690 application, the authors state that:

Until 1994, applicants did not have the opportunity to respond to the Investigative Brief prepared by the Department of Justice. The 1994 changes still do not enable them to read or respond to the Department of Justice’s final recommendations, because, according to the Department, they are governed by solicitor-client privilege. Such a claim leads one to question the nature of the section 690 process, as it is presently viewed by the Department of Justice. If there is a solicitor-client relationship between the Department of Justice and the Minister of Justice in a section 690 application, then either the Minister (the client to be served by his or her solicitor) should not be making these

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, at 22-23.

decisions, or the Department of Justice should not be conducting the investigation. In the present system the persons conducting the so called “objective” and “impartial” investigation also provide the decision maker with a secret opinion on whether the Minister should accept the results of their investigation. At the very least the submissions for the Department of Justice to the Minister should be open to comment on the particular applicant.⁶³

v) The High Cost of Submitting a Section 696 Application Can be Prohibitive.

A fourth problem identified by Braiden and Brockman is that “the cost of a section 690 application can be prohibitive for many applicants.”⁶⁴ Unless an applicant is fortunate enough to have personal resources or financial support from a group or supporter, they may not be able to gain access to a section 696 post-conviction review.⁶⁵ The applicant must provide a variety of documents and information, such as trial transcripts, that can be quite costly. Not only is it difficult for a prisoner to access this information from prison without some kind of help from the outside, it can be very expensive to provide it to the Department of Justice, an organization which has easier access to such documents than a prisoner.

vi) There is a Lack of Established Rules with the Section 696 Process.

Braiden and Brockman suggest that another problem is “the lack of established rules” with the section 696 process.⁶⁶ Improvements have been made in recent years concerning the establishment of procedures to be followed by the Department of Justice in reviewing section 696 applications with, for example, the Thatcher principles. However, “as long as the investigation is conducted in secrecy,

⁶³ *Ibid.*, at 23.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

it is difficult to determine which rules are being followed.”⁶⁷ Since each case may require different attention depending on the merits of the application, some flexibility in the investigation will be needed. However, the problem is that applicants are left without any feedback from department officials about how their applications are being investigated or at what stage their application stands.

One of the complaints by the Milgaard family in regard to David’s application was that they never knew what was happening with the application. The Department of Justice did not keep Milgaard informed during the review process. Joyce Milgaard testified before the *Standing Committee on Justice and Human Rights* about their experience:

[The one thing] that rings in my head when I think of our experience with section 690...[is] what’s happened with the application? We never knew. Our only indications came from calls we got from enraged witnesses who had just been visited by a department investigator. They told us the department’s approach was to discredit, as opposed to investigate, their stories.⁶⁸

vii) A Conflict of Interests.

A controversial issue pertaining to section 696 applications is that “applicants apply... to the agency responsible for their wrongful conviction.”⁶⁹ This is a conflict of interest. Braiden and Brockman assert that, “applicants are forced to request that Department of Justice officials review their own practices or that of their provincial counterparts.”⁷⁰ It has been found that Department of Justice officials approach their

⁶⁷ *Ibid*, at 24.

⁶⁸ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 3 October 2001 at 6. Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev23-e.htm>. [Accessed 10 October 2002] [hereinafter *Standing Committee 3 October 2001*].

⁶⁹ Braiden and Brockman, *supra*, note 2, at 25.

⁷⁰ *Ibid*.

investigations of alleged wrongful convictions “with more than a healthy dose of skepticism.”⁷¹

A witness in the Patrick Kelly post-conviction review investigation was left with the impression that, “the Canadian justice system was merely circling the wagon to preserve Kelly’s conviction, rather than dealing honestly with her attempt to set the record straight.”⁷² Similarly, David Asper believed Milgaard’s section 690 application “was not being taken seriously, and efforts were being made to discredit the new evidence that had emerged.”⁷³ Interviews with the Saskatchewan police, Justice officials and with two of Larry Fisher’s rape victims, revealed significant oversights in the department’s investigation of Milgaard’s application.⁷⁴ Morrisroe, in his application for post-conviction review by the Department of Justice “made serious allegations against Justice officials for ‘coercing, intimidating [and] threatening’ witnesses, and asked for an investigation into the ‘state and management of the business’ of the Department of Justice Criminal Conviction Review Group.”⁷⁵

In the Background paper, *Wrongful Convictions in the Criminal Justice System*, Rosen states, “[i]t can be argued that the Department’s prosecutorial bias may lead to an undue deference to judicial determination of guilt and insufficiently rigorous questioning of the foundations of criminal convictions. Any such perceptions, whether well-founded or not, undermines the section 690 review process

⁷¹ Karp and Rosner, *supra*, note 3, at 217.

⁷² This quote was taken from Braiden and Brockman, *supra*, note 2, at 25. It is originally found in M.Harris, *The Judas Kiss* (Toronto: McClelland & Stewart, 1995).

⁷³ Karp and Rosner, *supra*, note 3, at 219.

⁷⁴ Braiden and Brockman, *supra*, note 2, at 25.

⁷⁵ *Ibid.*, at 26.

in the eyes of those who matter the most, the applicants.”⁷⁶ Braiden and Brockman conclude that,

“[w]hether or not justice officials are partial or impartial in their [section 696] applications, it is vitally important that this ‘last-resort’ remedy not only achieve justice, but that justice be seen to be done by those intimately concerned with the process and by the general public. Anything less is counter-productive to a conviction review mechanism.”⁷⁷

viii) There is a Lack of Accountability by the Minister of Justice.

The federal Minister of Justice should be required to publicly state the reasons for rejecting or granting a section 696 decision.⁷⁸ As of 25 November 2002 section 696.5 provides that the Minister of Justice will now have to submit an annual report to Parliament in relation to post-conviction review applications.⁷⁹ However, there is no indication that this will require the Minister to indicate to Parliament the reason for rejecting or granting a section 696 review. This gives the Minister of Justice complete discretion with no accountability for his or her decision. It was suggested by the Marshall Commission that when the Minister of Justice chooses not to grant a post-conviction review application under section 690 (currently 696) of the *Criminal Code*, “the federal Minister should be required to publicly state the reasons for such decision.”⁸⁰

In overturning Donald Marshall Jr.’s conviction for murder the Nova Scotia Court of Appeal gratuitously commented that, “any miscarriage of justice is more

⁷⁶ P. Rosen. *Wrongful Convictions in the Criminal Justice System*. (Ottawa: Library of Parliament. Research Branch. Background Paper 285E: 1992): at 4 [hereinafter Rosen].

⁷⁷ Braiden and Brockman, *supra*, note 2, at 26.

⁷⁸ Nova Scotia. Government of. *Royal Commission on the Donald Marshall Jr. Prosecution, Part 2 Recommendations*. By Chief Justice T. Alexander Hickman, chair. Halifax: Nova Scotia, 1989. at 145 [hereinafter Marshall Commission Recommendations].

⁷⁹ *Canadian Criminal Code* Section 696.5 (Available at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-15A/C-15a_3/98148...) [Accessed 24 October 2002] [hereinafter *Canadian Criminal Code* Section 696].

apparent than real.”⁸¹ Past reluctances of the criminal justice system to admit and correct errors in wrongful conviction cases suggest that greater accountability is needed in this process.

ix) The Various Remedies Available to the Minister of Justice.

Another problem that exists with Canada’s post-conviction review procedure is the various sections available to the Minister of Justice to refer an alleged wrongful conviction case to the court. If the Minister of Justice does decide to grant a section 696 application for further review, it is completely within his or her discretion to refer the case under one of the three available options (either section 696.3(2), 696.3(3)(a)(i), 696.3(3)(a)(ii)). In choosing one of the three avenues the Minister essentially determines how the case will be heard. Choosing one option over another can have the effect of limiting pertinent information about the wrongful conviction.

The *Royal Commission on the Donald Marshall, Jr. Proceeding* (Marshall Commission) recognised the different remedies available to the Minister of Justice under section 617 (now section 696) and the different effects these sections can have on how a person is able to establish that a wrongful conviction has occurred. When the second R.C.M.P. investigation, conducted by Jim Carroll and Harry Wheaton, provided clear evidence of Donald Marshall, Jr.’s innocence and Roy Ebsary’s guilt, Marshall’s lawyer Stephen Aronson wrote to the federal Minister of Justice to inform him that Marshall would apply for a post-conviction review under “one of the

⁸⁰ Marshall Commission Recommendations, *supra*, note 78, at 145.

⁸¹ Nova Scotia. Government of. *Royal Commission on the Donald Marshall Jr. Prosecution, Part 1 Factual Findings*. By Chief Justice T. Alexander Hickman, chair. Halifax: Nova Scotia, 1989. at 117 [hereinafter Marshall Commission Factual Findings].

available sections of the *Criminal Code*.”⁸² Aronson stated that he wanted Marshall acquitted of Sandy Seale’s murder and not merely pardoned because a pardon would leave the impression that Marshall had actually committed the criminal act and was simply being forgiven for it.⁸³

If the Minister of Justice chose to proceed under section 617(b) (now section 696.3(3)(a)(ii)), “the onus would be on Marshall to prove his innocence.”⁸⁴ His case would proceed to the Nova Scotia Court of Appeal as if it were a regular appeal and all evidentiary restrictions imposed in appeal cases would apply. The legal rules that govern appeal cases could restrict crucial evidence that established Marshall’s innocence from being heard by the court. Under section 617(c) (now section 696.3(2)) the Minister of Justice could have asked the Court to examine certain issues relating to the case which would have opened the door to a more complete examination as to why Marshall was wrongly convicted.⁸⁵ Proceeding under section 617(a) was not discussed as an option in this case because neither Marshall nor the Minister of Justice wanted to proceed by way of a new trial.

According to the evidence submitted to the Marshall Commission, the Minister of Justice (then Jean Chrétien) agreed that a Reference under section 617(c) was the “preferred option”.⁸⁶ The reference question would read as follows: “Does the additional evidence warrant any action being taken in relation to the conviction and, if so, what in the opinion of the Court should be the nature of that action?”⁸⁷

⁸² *Ibid.*, at 113.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at 114.

⁸⁵ *Ibid.*, see page 114.

⁸⁶ *Ibid.*, see page 114.

⁸⁷ *Ibid.*, at 114.

Essentially, the Nova Scotia Court of Appeal would answer this question for the Minister of Justice and then the final determination of how to proceed with Marshall's case would be left in the hands of the Minister. However, after consultation with Ian MacKeigan, the Chief Justice of Nova Scotia, "the Reference was quickly redrafted to reflect a section 617(b) Reference which left the matter with the Court of Appeal for final disposition."⁸⁸

The Marshall Commission came to the conclusion that "this decision to refer under section 617(b) left Marshall with the burden of preparing and presenting the case to prove his own innocence. This reinforced the adversarial nature of an appeal, and it served to limit the issues canvassed before the Court."⁸⁹ By choosing to proceed under section 617(b) the government effectively confined the case to a hearing of the facts of the incident and precluded a complete examination of why the wrongful conviction occurred.⁹⁰ The Marshall Commission determined that:

Given that all parties agreed that a section 617(c) Reference was preferable, that fresh evidence should be admitted, that a full airing of all issues was necessary, and that appropriate executive action could follow with respect to any or all of those issues, we believe it is regrettable that officials in the Department of Justice were influenced by views of the Chief Justice in determining the final form of Reference.⁹¹

With the final decision made to proceed under section 617(b) Marshall's lawyer, Steve Aronson, successfully argued before the Court to have new evidence heard from seven witnesses.⁹² "Once findings of fact have been made by a lower Court, an appellate court normally considers only questions of law, but Aronson

⁸⁸ *Ibid.*, at 115.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, see page 115.

⁹¹ *Ibid.*, at 115.

successfully argued that the circumstances of Marshall's case were different."⁹³ He asked the court to sit as a trier of fact because there was new evidence that "bears upon a decisive or potentially decisive issue in the trial."⁹⁴ This evidence, had it been believed by the court in Marshall's original trial, could reasonably have been expected to have affected the results when taken into consideration along with other evidence.⁹⁵

While legal principles are necessary to establish consistency in the law, it seems peculiar that Aronson had to argue to admit fresh evidence that provided strong proof of Marshall's innocence. This "factual" evidence that Aronson had to argue to be heard was the admission by Chant and Practico that they had lied at Marshall's original trial when they said they witnessed the murder. It seems quite difficult for the legal system to recognise that evidence accepted as "fact" by the lower court could quite plainly be wrong. This was in fact the situation in Marshall's case. The trial court had accepted as fact the eyewitness evidence by Pratico and Chant that Marshall had murdered Sandy Seale. However, this determination of fact was wrong. Neither Pratico nor Chant had witnessed Marshall murder Seale because such an event never occurred. Chant and Pratico could not have been mistaken about the killer's identity because they were not even present when the stabbing occurred. Aronson had to argue before the Court to have the evidence of Pratico and Chant (as well as other evidence) admitted under section 617(b). This would not have been

⁹² *Ibid*, see page 116.

⁹³ *Ibid*.

⁹⁴ *Ibid*, at 116.

⁹⁵ *Ibid*, see page 116.

necessary if the Reference was made under section 617(c) or if the case proceeded under section 617(a).

Section 696.3(2) (section 617(c)) can potentially allow for a wider airing of issues to be heard by the courts because it is the task of the Minister of Justice to determine the issues the Court of Appeal will consider. Section 696.3(3)(a)(ii) (section 617(b)) is a more limiting means of proceeding due to the restrictive nature of evidence that can be aired on appeal. If the Minister of Justice grants a post-conviction review under section 696.3(3)(a)(ii) the hearing of the case before the Court will have to abide by all legal rules of appeal. Section 696.3(3)(a)(i) is the least restrictive option for the appellant as the case is heard fresh. The evidentiary restrictions that are present under section 696.3(3)(a)(ii) do not come into play because the case is not heard as if it were an appeal, but simply as a new case before the Court. As most post-convictions reviews granted by the Minister of Justice do not proceed under section 696.3(3)(a)(i), the airing of the alleged miscarriage of justice can be severely restricted and this can have dire repercussions for the convicted person asserting his or her innocence. It is at the Minister of Justice's discretion as to how the case will be referred to the courts.

x. Evidence before the *Standing Committee on Justice and Human Rights*.

James Lockyer, a Toronto lawyer and the Director of the *Association in Defence of the Wrongly Convicted*, discussed the problems with the post-conviction review process when giving evidence before the *Standing Committee on Justice and Human Rights*. His evidence was given during parliamentary debates concerning Bill

C-15A. This bill was eventually passed and replaced section 690 of the *Criminal Code* with section 696. He stated:

One of David Milgaard's primary problems in establishing that he had been convicted of a crime he didn't commit was trying to get through the section 690 (now section 696) hurdle, which he found next to impossible... The problem with section 690... is that as a last resort for a person convicted of a crime he or she did not commit, that person's only remedy is to apply to the Minister of Justice to review the case and consider whether or not he or she will refer it back to the courts for review. First of all, in practice, it has proven to be a section with bureaucratic obstacles that are virtually insurmountable. The delays inherent to the system are enormous. Section 690 procedures have been said to move as briskly as a snail with arthritis. The secrecy in which a section 690 review is conducted is unacceptable. The lack of resources for a person who claims that he or she has been wrongfully convicted is shameful.⁹⁶

Mr. Lockyer expressed further concern about the systemic problems with section 690 which he believes cannot be cured by amending the current process. Both the old section 690 and the new section 696 reflect the fact that post-conviction review does not adhere to the traditional separation of powers between the executive branch of government and the courts. Lockyer states that "this is because section 690 requires that before the courts can review a conviction, it must first go through the executive for the executive's approval – in particular, the approval of the Minister of Justice."⁹⁷ Lockyer suggests that this leads to two very practical consequences. First of all, "the Minister's office will inevitably conduct an extremely adversarial approach to any section 690 application that is brought to it."⁹⁸ This means that instead of reviewing a conviction to see whether or not it was wrong, the Minister's office reviews the conviction from the point of view of trying to sustain the conviction. Secondly, because the investigation is being conducted by the Minister's office, there is a belief

⁹⁶ Standing Committee 3 October 200, *supra*, note 66.

⁹⁷ *Ibid.*

by department officials that the exposure of a wrongful conviction constitutes an embarrassment to the administration of justice. "Of course the opposite is true. If a person is in jail for a crime he or she did not commit, that is the embarrassment to the administration of justice. Providing a remedy to establish that the person has been wrongly convicted is maintaining a system of good justice."⁹⁹

xi) The Detection of Truth in Our Adversarial Model of Justice.

It has been found that the majority of cases that make it to trial are not concerned with the question of whether the State is prosecuting the right person. Yet these are usually the cases in which wrongful convictions can occur. There are only a small percentage of cases in which factual guilt is in question at trial.¹⁰⁰ The majority of cases in the criminal justice system involve people who are known to each other, and to the system, and are resolved through plea negotiations.¹⁰¹ "Most of the disputes that proceed to court concern matters of justification, such as self-defence, or consent, or of intention or state of mind rather than the identity of the perpetrator or whether a crime has occurred at all."¹⁰² Fewer than 15 percent of people charged with an offence proceed to trial, and of that an even smaller number of cases involve a question of factual guilt.¹⁰³ Cases where the issue in question is "what happened," or "who did it," are rare.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ D.L. Martin, "The Police Role in Wrongful Convictions: An International Comparative Study," in *Wrongly Convicted: Perspectives on Failed Justice*, (New Brunswick: Rutgers University Press, 2001) at 82 [hereinafter Martin].

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

One of the main concerns with the adversarial system of justice is that the court is more concerned with dispute resolution than the determination of truth.¹⁰⁴ A description of the adversarial method of inquiry in regard to the notion that it might be seen as a system of determining truth was given by the Ontario Court of Appeal in *Phillips v. Ford Motor Company*.¹⁰⁵

Our mode of trial procedure is based upon the adversarial system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events of happenings which form the bases of their allegations. This procedure *assumes* that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value support of their respective positions that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice to litigants. Undoubtedly, a Court must be concerned with truth, in the sense that it accepts as true a certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark on a quest for the 'scientific' or 'technological' truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law¹⁰⁶ (emphasis added).

Mr. Justice Haines, in *R. v. Lalonde*, stated that, "[a] trial is not a faithful reconstruction of the events as if recorded on some giant television screen. It is an historical recall of that part of the events to which witnesses may be found and presented in an intensely adversary system where the object is quantum proof. Truth may be only incidental."¹⁰⁷

¹⁰⁴ S.D. Westervelt & J.A. Humphrey eds., *Wrongly Convicted: Perspectives on Failed Justice*. (New Brunswick: Rutgers University Press, 2001) [hereinafter Westervelt]

¹⁰⁵ *Phillips v. Ford Motor Company*, [1971] 2 O.R. 637, 18 D.L.R. (3d) 641 (C.A.) Evans J.A...

¹⁰⁶ *Ibid*, at 657.

¹⁰⁷ Mr. Justice Haines of the Ontario Supreme Court in *R. v. Lalonde* [1972] 1 O.R. 376; 5 C.C.C. (2d) 168 at 4. This quote was taken from *Learning Canadian Criminal Law* (5th ed.) edited by Don Stuart and Ronald Joseph Delisle (Toronto, Ontario: Carswell, 1995), at 55.

There seems to be an assumption within the criminal justice system that the adversarial system is a good method of determining facts. However, this may be an erroneous assumption. The editors of *Learning Canadian Criminal Law* comment on the ability of our criminal law system to establish facts at trial:

One large impediment to our search for truth is the facts to be discovered by our Courts are almost always past facts. Our method of discovering them is normally through the oral testimony of witnesses who have personal knowledge about what happened. This personal 'knowledge' might perhaps be better described as personal beliefs about what they now remember of facts which they believe they observed. The trier of fact then has regard to what the witness says and, based on observations of what the witness said and of the manner of saying it, comes to an opinion as to whether that is an honest belief. One can do no more. One cannot, as the scientific might, duplicate in the laboratory the actual facts and test the hypothesis proposed. Facts as found by the Court are really then only guesses about the actual facts. Subjectivity piled on subjectivity... a trial Court's finding of fact is, then, at best, its belief or opinion about someone else's belief or opinion.¹⁰⁸

If the idea of an adversarial system is to settle disputes between the state and the accused, then there is an implied assumption that the accused is guilty. The trial process is merely a formality the parties must go through to determine the level of guilt and punishment and for the State to legitimize the conviction process in the eyes of the public. H. Packer describes the factual presumption of guilt in the criminal process in his book *The Limits of the Criminal Sanction*:¹⁰⁹

If there is confidence in the reliability of informal administrative fact finding activities that take place in the early stages of the criminal process, the remaining stage of the process can be relatively perfunctory without any loss in operating efficiently. The presumption of guilt...is the operational expression of that confidence.¹¹⁰

¹⁰⁸ *Learning Canadian Criminal Law* (5th ed.) edited by Don Stuart and Ronald Joseph Delisle (Toronto, Ontario: Carswell, 1995) at 55.

¹⁰⁹ H. Packer, *The Limits of Criminal Sanctions* (Stanford, Cal.: Stanford University Press, 1968).

¹¹⁰ *Ibid*, at 160.

The idea that the court process is a mechanism to resolve disputes can actually hinder a person if they are in fact innocent of the crime for which they have been charged. When the court process is not concerned with the determination of the truth but with the resolution of a dispute, the object is to rectify the situation by punishing the offender and restoring order to society. These ideals are not conducive to the accused or to justice as a whole if the accused person is actually innocent. The fundamental goal of the adversarial system is dispute resolution in a socially acceptable manner.¹¹¹ The system is not primarily designed to do a superior job in establishing truth.¹¹² Given that the rules of trial are not really aimed at ensuring the truth of the criminal event is discovered, this process can lead to the conviction of innocent people.¹¹³ This being the case, the adversarial system can be extremely detrimental to an innocent person being prosecuted in the justice system.

xii) The Idea of Finality in an Adversarial Model of Justice.

A conceptual barrier that may prevent cases of wrongful convictions from being re-opened or re-examined is the idea of finality. The concept of finality brings an end to criminal proceedings once a matter has been decided according to law, that is, after all statutory rights of appeal have been exhausted.¹¹⁴

Finality is a judicially developed principle.¹¹⁵ *R. v. H. (E.F.)*¹¹⁶ was a case that concerned the jurisdiction of appellate courts to re-open appeals. In deciding not

¹¹¹ *Ibid.*

¹¹² D. Givelber, "The Adversary System and Historical Accuracy: Can We Do Better?," in *Wrongly Convicted: Perspectives on Failed Justice*, (New Brunswick: Rutgers University Press, 2001.).

¹¹³ Westervelt, *supra*, note 104.

¹¹⁴ G.T. Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" (2001) 26 *Queens L.J.* 339 [hereinafter Trotter].

¹¹⁵ *Ibid.*, at 358-362.

to re-open the case the court relied on the doctrine of finality by stating “the appellate process cannot become or even appear to become a never closing revolving door through which appellants can come and go whenever they propose to argue a new ground of appeal.”¹¹⁷

In his article, *Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review*, Gary Trotter stated that, “the principle of finality is so ingrained in Canada’s criminal process, that it prevents the re-litigation of cases in response to changes¹¹⁸ in the law that benefit convicted individuals.”¹¹⁹

This can be seen in the case of *R. v. Sarson*.¹²⁰ Sarson was charged with constructive murder under section 213(d) of the *Canadian Criminal Code*.¹²¹ After pleading guilty to the lesser included offence of second degree murder Sarson was sentenced to life imprisonment without the possibility of parole for fifteen years. Eleven months later the Supreme Court of Canada struck down s.213(d) of the *Criminal Code* as unconstitutional in *R. v. Vaillancourt*.¹²² Sarson then sought to challenge the validity of his conviction by way of habeas corpus, asserting that his guilty plea had been based on a provision which was struck down and declared unconstitutional. The Supreme Court dismissed Sarson’s claim and stated that, “the common law has imposed strict limitations on the ability of an accused to attack his

¹¹⁶ *R. v. H. (E.F.)* (1997), 33 O.R. (3d) 202. (C.A.).

¹¹⁷ *Ibid.*, at 214.

¹¹⁸ It does not matter whether the change is statutory, common law or even Charter based. This is set out in chapter 11 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.).

¹¹⁹ Trotter, *supra*, note 114, at 359.

¹²⁰ *R. v. Sarson*, [1996] 2 S.C.R. 223 [hereinafter Sarson].

¹²¹ *Canadian Criminal Code* R.S.C. 1970, c. C-34.

¹²² *R. v. Vaillancourt* [1987] 2 S.C.R. 636.

conviction on the basis of subsequently decided judicial authority.”¹²³ In this case the Supreme Court was adhering to the principle of finality by expressing that people who have been convicted cannot appeal their convictions every time there is a change in the law. In fact, they specifically stated that “finality in criminal proceedings is of the utmost importance...”¹²⁴ In deciding this case the Supreme Court relied on *R. v. Wigman*.¹²⁵

The circumstances of *Wigman* are similar to the case of *Sarson* with one very important distinction.¹²⁶ *Wigman* was “still in the justice system”¹²⁷ when the law for attempted murder changed. Therefore, it was determined by the Supreme Court of Canada that *Wigman* was allowed access to the beneficial change in the law. In *Wigman* the Court held that normally a convicted person cannot challenge his or her conviction on the basis of new developments in the law because “finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of res judicata: a matter once finally judicially decided cannot be re-litigated.”¹²⁸ Yet an exception was made in this case because *Wigman* was in the justice system when the law changed.

In the interest of providing some certainty to the trial process and ensuring public order, the idea of finality is a way to ensure cases are not continually being re-examined. In Kate Malleson’s article, *Appeals Against Conviction and the Principle*

¹²³ *Sarson*, *supra*, note 120, at 236.

¹²⁴ *Ibid.*

¹²⁵ *R. v. Wigman* [1987] 1 S.C.R. 246 [hereinafter *Wigman*].

¹²⁶ For further discussions on these cases see P. Braiden, “Wrongful Convictions and Section 690 of the *Criminal Code*: An Analysis of Canada’s Last-Resort Remedy” (M.A. Thesis. Simon Fraser University, 2000).

¹²⁷ For the definition of “in the justice system” and judicial discussion of this concept see *R. v. Thomas* [1990] 1 S.C.R. 713: at 716.

¹²⁸ *Wigman*, *supra*, note 125, at 257.

of *Finality* she explains this idea. “One way of looking at the criminal process is to see it as a method of imposing an artificial termination on disputed events. By way of verdict, the trial process creates certainty when the events themselves are inherently uncertain.”¹²⁹ She continues by stating that uncertain events become certain at trial, but then again become uncertain on appeal, and so on, until the appeal process has been completed.¹³⁰

The idea of finality must be recognised by a justice system so that undue strain is not placed upon the process. However, finality also creates a great deal of difficulty to people who have exhausted all statutory means of appeal and still claim they are innocent of the crime of which they have been convicted. It becomes problematic to have their case re-examined because “the process of reviewing convictions, more than any other aspect of the judicial process, undermines the key principle of finality.”¹³¹

It seems unlucky that Sarson was charged and convicted under an offence that was later declared unconstitutional, and that he had no judicial recourse due to the principle of finality. If Sarson had been in the judicial system a year later the outcome of his trial might have been different. He would have been charged under a different section of the *Criminal Code* and, possibly, received a lesser sentence or been eligible for an earlier parole date. However, it is difficult to feel too much sympathy for Sarson’s predicament due to the fact there is no doubt he committed a crime punishable by law and readily admits to doing so. Applying the principle of

¹²⁹ K. Malleson, “Appeals Against Conviction and the Principle of Finality” (1994) 21 J.L. & Justice 151 at 158-159 [hereinafter Malleson].

¹³⁰ *Ibid.*

¹³¹ Malleson, *supra*, note 129, at 159.

finality to Sarson does not seem overly problematic. The concept of finality becomes problematic when a person has been convicted of an offence and is claiming to have been wrongly convicted.

The judicially recognised principle of finality can frustrate, or even prevent, the reinvestigation of the case. It has been stated that, “conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”¹³² The principle of finality should not prevent the Minister of Justice from hearing cases under s.696 of the *Criminal Code*, yet finality may in fact be playing a part in determining access to challenge an alleged wrongful conviction.

IV. Recommendations for an Independent Review Commission to Review Alleged Cases of Miscarriages of Justice.

i) The Commission on Proceedings Involving Guy Paul Morin.

On 3 October 1984 nine-year-old Christine Jessop was abducted from her home in Queensville, Ontario. Approximately three months later her badly decomposed body was found; the autopsy revealed she had been raped and mutilated.¹³³ Guy Paul Morin was charged with murder and a jury found him not guilty. The prosecution appealed the decision and Morin again stood charged of murder at a second trial in November 1991. After a nine month trial the jury found Morin guilty of first degree murder. He was sentenced to life in prison. His lawyers

¹³² C. Anyangwe, “Finality and Miscarriages of Justice in Criminal Law: Conviction Remedies in Common and Civil Law Jurisdictions” (1998) 30 *Zambia Law Journal* 51 at 54 [hereinafter Anyangwe].

¹³³ Anderson and Anderson, *supra*, note 6, see pages 72-91.

then began their preparation for another appeal. The appeal date was set for 23 January 1995 but it was never heard. The prosecution submitted the badly deteriorating semen stains on Christine's underclothes for DNA testing. The Crown hoped that this might silence the mounting public criticism of the conviction. Morin was eager to oblige.¹³⁴ On 20 January 1995 the DNA results conclusively proved that Morin was not the person who raped and murdered Christine Jessop. Two days later he was released from prison.

There has been no shortage of recommendations to create an independent review commission which would replace the role of the Minister of Justice under section 696 to review alleged cases of miscarriages of justice at the post-conviction review level. A written submission on behalf of the Criminal Lawyers' Association to *The Commission on Proceedings Involving Guy Paul Morin* stated:

It is respectfully submitted that a permanent and independent Criminal Cases Review Commission is needed to review cases of possible wrongful convictions. It is recommended that such a commission be created on the model of the British... It is the submission of the Criminal Lawyers' Association that all phases of this inquiry have revealed the benefit of a focused and coordinated and independent review of cases. The judicial system currently lacks such a mechanism in all but the exceptional cases. Such an inquiry benefits not only the individual wrongfully convicted person but the administration of justice as a whole. The review by the Minister of Justice under s.690 (now section 696) of the Criminal Code or in the exercise of the Royal Prerogative of Mercy is ineffective and anachronistic.¹³⁵

Accordingly, the Criminal Lawyers' Association recommended that a Criminal Cases Review Commission be established to review possible wrongful convictions. "The

¹³⁴ Morin had asked Clayton Ruby during his first trial if DNA testing could be used to prove his innocence but was informed that the process was still in its infancy and that the stains on the clothing were too badly deteriorated. See Anderson and Anderson, *supra*, note 6, at pages 72-91.

¹³⁵ Written Submissions on Behalf of the Criminal Lawyers' Association. December 1997 Timothy R. Lipson et al. (Quicklaw OCLARP/1997-023) [Accessed 19 December 2002].

powers and jurisdiction of the Commission should be established and agreed upon after consultation between federal and provincial governments and study of the current models in Britain...”¹³⁶

Similarly, during the submission of oral evidence before The Honourable Fred Kaufman, the Commissioner of *The Commission on Proceedings Involving Guy Paul Morin*, Mr. Sherriff testified that he would support the creation of a criminal cases review commission in Canada and that such a system would help the administration of justice as well as the public confidence in the administration of justice. He stated: “I have a concern that the public may ... start to lose confidence in the administration of justice due to the understandable attention given to wrongful convictions, and I believe that such an independent commission would help restore the integrity of the system which we all vitally need.”¹³⁷

In his final report The Honourable Fred Kaufman concluded that:

The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin’s conviction are rooted in systemic problems, as well as the failings of individuals.¹³⁸

Recommendation 117 of *The Commission on Proceedings Involving Guy Paul Morin* called for the government to examine the creation of a criminal cases review board. The recommendation reads: “The Government of Canada should study the

¹³⁶ *Ibid.*

¹³⁷ *The Commission on Proceedings Involving Guy Paul Morin*. Oral evidence before Commissioner Kaufman. 11 December 1994.

¹³⁸ Ontario. Government of. *Commission on Proceedings Involving Guy Paul Morin*. By The Honourable Fred Kaufman C.M., Q.C., chair. Toronto: Queen’s Printer: 1998. Executive Summary and Recommendations. [hereinafter Morin Commission] See Conclusion.

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 (now section 696) of the *Criminal Code*.¹³⁹

As Guy Paul Morin did not make an application for a post-conviction review under section 690 (now section 696) it was not in Commissioner Kaufman's mandate to address issues concerning section 690, "as any inadequacies in this section did not arise in Guy Paul Morin's own proceedings".¹⁴⁰ This may explain why Commissioner Kaufman merely recommended the government *study* the creation of an independent review commission. Nonetheless, Commissioner Kaufman, at the request of Morin's counsel, who was supported by AIDWYC, saw the need to address the "adequacy of section 690 to redress the legitimate injustice of persons who have been wrongly convicted of offences that they have not committed."¹⁴¹

ii) *The Royal Commission on the Donald Marshall Jr. Prosecution.*

The *Royal Commission on the Donald Marshall Jr. Prosecution* (Marshall Commission) found that "the justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to – and even beyond – his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983."¹⁴² It also stated that, "[t]he Marshall case is not unique, and it would be unrealistic to assume otherwise. "JUSTICE," the British Section of the International Commission of

¹³⁹ *Ibid*, Chapter V, Recommendation 117, at 1237.

¹⁴⁰ *Ibid*, at 1238.

¹⁴¹ *Ibid*, at 1237.

¹⁴² Marshall Commission Factual Findings, *supra*, note 81, at 15.

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.”¹⁴³

One of the questions asked by the Marshall Commission was, “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?”¹⁴⁴ More specifically, the Marshall Commission asked, “...how do we bring these situations to light and provide wrongly convicted people with a fair opportunity to establish their innocence?”¹⁴⁵ These questions arose because a number of people associated with the Donald Marshall Jr. case had information that, if it had reached the right ears, most likely would have uncovered Marshall’s wrongful conviction.¹⁴⁶ The Marshall Commission describes the number of people who had information which indicated that Marshall did not stab Sandy Seale:

John Practico, Mynard Chant and Patricia Harriss knew they had lied at Marshall’s 1971 trial. Practico’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 Practico 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 McNeil, of course, witnessed Roy Ebsary stab Sandy Seale.¹⁴⁷

Many of these people, at one time or another after Marshall had been convicted, brought information forward to the Sydney City Police, the R.C.M.P., or to

¹⁴³ Marshall Commission Recommendations, *supra*, note 78, at 143.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, at 144.

Marshall's lawyer. However, they were either discredited by the police or were told that the case was closed.¹⁴⁸

Concerning the deficiencies in the way information was handled by authority figures regarding Marshall's wrongful conviction the Marshall Commission stated:

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 have reasonably have expected Pratico, Chant or Harris 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.¹⁴⁹

Due to these problems, the Marshall Commission decided that "...most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system..."¹⁵⁰ It would be more acceptable to bringing forward information concerning a miscarriage of justice to an independent review body who would not have any vested interest in the preservation of a conviction. Accordingly, the Marshall Commission recommended:

[T]hat the provincial Attorney General commence discussions with the federal Minister of Justice the other 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. "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,

¹⁴⁸ M. Harris, *Justice Denied: The Law Versus Donald Marshall* (Toronto: Macmillan, 1986).

¹⁴⁹ Marshall Commission Recommendations, *supra*, note 78, at 144.

¹⁵⁰ *Ibid.*, at 144 and 145.

and that it have coercive power so witnesses can be compelled to provide information.¹⁵¹

The commission concluded that it is necessary 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.”¹⁵²

iii) *The Inquiry Regarding Thomas Sophonow.*

Fifteen-year-old Barbara Stoppel was murdered by strangulation on 23 December 1981 while she was working at the Ideal Donut Shop in Winnipeg, Manitoba. Thomas Sophonow was charged with murder and subsequently underwent three trials. The first was a mistrial as the jury was unable to reach an unanimous verdict. At the second and third trials he was convicted. In each case the Court of Appeal overturned the verdict and directed a new trial, and on the last occasion acquitted him.¹⁵³ From the time of his acquittal by the Manitoba Court of Appeal in 1985, Sophonow has sought to be exonerated. For fifteen years he was thought of as a murderer by his co-workers, neighbours, and many others.¹⁵⁴

In 1998, the Winnipeg Police Service undertook a reinvestigation of the murder of Barbara Stoppel. On 8 June 2000 it announced that Sophonow was not responsible for the murder and that another suspect had been identified. On the same day the government of Manitoba issued a news release stating that the Attorney General had made an apology to Sophonow as he “had endured three trials and two

¹⁵¹ *Ibid*, at 145.

¹⁵² *Ibid*, at 146.

¹⁵³ Manitoba, Government of. *The Inquiry Regarding Thomas Sophonow*. Introduction. (Available at www.gov.mb.ca/justice/sophonow/intro/thefacts.html) [Accessed 19 September 2002].

appeals, and spent 45 months in jail for an offence he did not commit.”¹⁵⁵ It was also announced that there would be a Commission of Inquiry “to review the police investigations and full court proceeding to determine if mistakes were made” and “to determine whether compensation should be provided.”¹⁵⁶

Thomas Sophonow never applied to the federal Minister of Justice for a post-conviction review under section 690 (as it then was) of the *Criminal Code* since he was eventually acquitted after five trials. Yet the Sophonow Inquiry recommended the “establishment of an entity to consider and review claims of wrongful conviction.”¹⁵⁷ Specifically, it was suggested that:

...[I]n 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.¹⁵⁸

V. The Government’s Response.

Despite the notoriety of wrongful conviction cases in Canada and the clear calls for an independent body to investigate such cases, then Minister of Justice Anne McLellan determined that “an independent review body for conviction review [is] not needed in Canada.”¹⁵⁹ She concluded that “the ultimate decision-making authority in criminal conviction review should remain with the federal Minister of Justice, who is

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Manitoba, Government of. *The Inquiry Regarding Thomas Sophonow*. Recommendations. (Available at www.gov.mb.ca/justice/sophonow/recomendations/english.html) [Accessed 17 November 2002].

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence, 2 October 2001 (Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev22-e.htm>.) [Accessed 10 October 2002] [hereinafter Standing Committee 2 October 2001].

accountable to Parliament and the people of Canada.”¹⁶⁰ In defending her position she stated that “this recognizes and maintains the traditional jurisdiction of the courts while providing a fair and just remedy in those exceptional cases that have somehow fallen through the cracks of the conventional justice system.”¹⁶¹

Minister McLellan’s answer to calls for reforming the post-conviction review process was to amend existing law. She found that “having concluded that an independent body for conviction review was not needed in Canada, I must also say that...maintaining the current state of conviction review [is] not a desirable option.”¹⁶² She went on to state that “[Bill C-15A] contains very important amendments to this process [that] I believe fundamentally improves the current procedures for reviewing alleged wrongful convictions in Canada.”¹⁶³ However, as has already been argued, these amendments (section 696) are insufficient and do little but codify already existing law and procedure (with the exception of the inclusion of summary conviction offences and the granting of investigative powers).

During the October 2001 *Standing Committee on Justice and Human Rights* (Standing Committee) debates concerning Bill C-15A, Member of Parliament Michel Bellehumeur asked McLellan why Britain felt it necessary to implement an independent review commission to review alleged wrongful convictions and Canada did not.¹⁶⁴ The Minister’s response was to distinguish the British system and experiences from Canada’s, stating that Britain had “unique circumstances” that

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

Canada does not have which makes an independent body “unnecessary or inappropriate here (in Canada).”¹⁶⁵

One reason Minister McLellan said she made this distinction was because in the British system the Home Secretary is responsible for the police, whereas in Canada the Minister of Justice has no responsibility in regards to policing.¹⁶⁶ The Minister of Justice was asserting that she believed it to be a conflict of interest for the Home Secretary to be responsible for policing and also responsible for reviewing wrongful convictions, since reviewing miscarriages of justice often means examining the involvement of the police in the case. However, the Minister McLellan neglected to mention that performing a dual role as the Attorney General of Canada and as the federal Minister of Justice could also be seen as a conflict of interest. For one person to act both in the interest of the Crown in prosecuting criminal offences and also in reviewing alleged wrongful convictions is a conflict of interest. In response to this claim, Minister McLellan stated that the majority of criminal convictions arise from provincial prosecutions and it is therefore not a conflict of interest for the federal Minister of Justice to review its provincial counterparts. She further declared that if a federally prosecuted case needs reviewing, the investigation of the case will be done by someone brought in from outside the Criminal Conviction Review Group.¹⁶⁷ While this may appear more impartial, it will still be the Minister of Justice who decides to grant or reject the post-conviction review application. An outside person will only conduct the investigation, not make the final decision.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

Another reason cited by Minister McLellan not to implement an independent review commission was that such a change would “create an ever-expanding bureaucracy.”¹⁶⁸ She told the Standing Committee she met with the head of the U.K.’s Criminal Cases Review Commission (CCRC) as well as some of its commissioners to “talk to them about the strengths and weaknesses of their system.”¹⁶⁹ From this meeting she advised the Standing Committee:

I will tell colleagues that they (U.K.) have created an ever-expanding bureaucracy. They have thousands and thousands of applications, most of which they dismiss as frivolous, but only after they have taken some time on the part of the commission. They do not have the resources to do their job. They will continue to ask for new resources. And the backlog of cases is not less (than when it was the job of the Home Secretary); in fact, it’s growing. Therefore it is not apparent that the independent process is more efficient or effective or necessarily delivers fairer justice than our process.¹⁷⁰

This sentiment gives the impression the Minister is trying to say that implementing an independent review body has elicited too many wrongful conviction allegations against the state and this is reason enough not to implement an independent review body in Canada. She is using the vast number of alleged wrongful convictions “that have created a never ending bureaucracy” as the basis for its failure. On the other hand, one might argue that cases of miscarriages of justice are finally surfacing and being remedied by the Criminal Cases Review Commission, something that was not happening under the auspices of the Home Secretary. This could be the reason for the increase in applications. Because the CCRC has experienced an increase in allegations of miscarriages of justice – partly due to the backlog left to them by the Home Secretary – this is not a good enough reason to

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

dismiss the need for an independent review body; it just means more resources are needed to cope with the higher demand.

Ms. Mary McFadyen, a Senior Counsel with the Criminal Conviction Review Group within the Department of Justice, also addressed the *Standing Committee on Justice and Human Rights*. In regard to the implementation of an independent review body to address possible wrongful convictions, Ms. McFadyen defended the Minister of Justice and the Department of Justice by saying, “the minister did undertake an extensive consultation process, and after receiving submissions from the provinces and various interest groups, determined that an independent body was inappropriate for Canada.”¹⁷¹ However, she did not further expand on this statement nor provide the Standing Committee with reasons why and how this decision was made.

Ms. McFadyen declared that the Department of Justice considered and followed the recommendations of *The Royal Commission on the Donald Marshall Jr. Prosecution* and *The Commission on Proceedings Involving Guy Paul Morin*. She stated that the “Marshall inquiry recommended that the provincial ministers and the federal minister meet to consider the creation of an independent mechanism...and that such a review body be given investigative powers.”¹⁷² However, with respect, the Marshall Commission recommended “the provincial Attorney General commence discussions with the federal Minister of Justice and other provincial Attorneys General with the view to constituting an independent review mechanism – an

¹⁷⁰ *Ibid.*

¹⁷¹ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 4 October 2001 (Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev24-e.htm>) [Accessed 10 October 2002] [hereinafter Standing Committee 4 October 2001].

¹⁷² *Ibid.*

individual or body – to facilitate the reinvestigation of alleged cases of wrongful convictions.”¹⁷³ The Marshall Commission did not suggest “considering the creation of an independent review commission” but recommended that federal and provincial ministers “meet with the view to constituting an independent review mechanism”. Taken in context, the recommendations by the Marshall Commission suggest doing something more than simply “considering” the creation of an independent review commission. The recommendation suggests the parties come to the discussion table with the view of establishing an independent review commission, suggesting that a body outside the Department of Justice be created to address alleged wrongful convictions. Yet Ms. McFayden did not make this clear in her explanation to the Standing Committee. Therefore, I would argue, the Department of Justice did not properly consider and follow the recommendation by the Marshall Commission as Ms. McFayden suggested to the Standing Committee.¹⁷⁴

In regards to the recommendation that the independent review body be given investigative powers, Ms. McFayden stated that this power was now located within section 696. With respect, the Marshall Commission recommended that the independent review body should have investigative powers, not the Minister of Justice. Again, the recommendation by the Marshall Commission was misrepresented to the Standing Committee by the Department of Justice representative.

The Commission on Proceedings Involving Guy Paul Morin recommended that “the Government of Canada should study the advisability of the creation, by

¹⁷³ Marshall Commission Recommendations, *supra*, note 78, at 145.

¹⁷⁴ Standing Committee 4 October 2001, *supra*, note 171.

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.”¹⁷⁵ Ms. McFayden told the Standing Committee that the Minister of Justice had considered this recommendation and subsequently determined that “an independent body (to review alleged wrongful convictions) [is] inappropriate for Canada.”¹⁷⁶

Following Ms. McFayden’s address many questions were directed to her from various Members of the Committee concerning the lack of independence, secrecy, excessive length, and the lack of access to post-conviction review.¹⁷⁷ From examining the question and answer period following Ms. McFayden’s address, there appeared to be a lot of resistance by the Standing Committee members to the proposed section 696 amendments that replaced section 690. Liberal MP (Scarborough East) John McKay, stated that “there is a consensus on the committee that section 690 as it presently operates is awful. You’ve (Ms. McFayden) come before us with something of a response to awful.... I don’t think we need to educe much evidence that the system is really not working” and that the proposed amendments set out in section 696 are not much of an improvement.”¹⁷⁸

The treatment of wrongful conviction cases by the Department of Justice does not appear to be in accord with their mandate. In their 2001 Annual Report the Department of Justice stated that they “as an effective steward, [are] responsible for developing policies, laws and programs that will foster a fair, effective, efficient and

¹⁷⁵ Morin Commission, *supra*, note 138, at 1237.

¹⁷⁶ Standing Committee 4 October 2001, *supra*, note 171.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

accessible justice system in which Canadians can have confidence,... as public confidence is the cornerstone of a well functioning justice system.”¹⁷⁹ Despite this statement, the Department of Justice reports that “[Canadians] have been expressing a growing concern with the efficiency and effectiveness of the justice system, seeing it at times as fragmented, confusing, slow and expensive.”¹⁸⁰ Former Minister of Justice Anne McLellan stated the department is “committed to improving Canadians’ ability to understand and access justice system service...”¹⁸¹ She states that “[t]he accomplishments of Justice Canada (Department of Justice) build on the confidence Canadians have in their justice system. The measure of success is derived not just from our achievements, but also from the positive impact policies and legislation have on Canadians’ quality of life...”¹⁸²

VI. The Benefits of an Independent Review Commission in Addressing Miscarriages of Justice.

It is necessary that Canada replace the role of the Minister of Justice under section 696 of the *Criminal Code* with an independent body to review allegations of miscarriages of justice. It has already been stated that the Minister of Justice has a stake in upholding criminal convictions in order to preserve the integrity of the country’s judicial institutions and to ensure confidence in the people that the

¹⁷⁹ Canada. Department of Justice. *Estimates*. Performance Report for the period ending 31 March 2001 (Available at <http://www.tbs-sct.gc.ca/rma/dpr/dpre.asp>) [Accessed 4 November 2002] at 3 and 4.

¹⁸⁰ *Ibid*, at 4.

¹⁸¹ *Ibid*, at 2.

¹⁸² *Ibid*.

government is capable of maintaining justice in society. The discovery of a wrongful conviction obviously indicates problems with the justice system. Therefore, the government has a vested interest in seeing that convictions are sustained to promote the legitimacy of the justice system. An independent review commission would not have the same vested interest as the government in maintaining convictions. This is because they would be independent of the government and would not have any responsibility for the courts or the administration of justice. The creation of an independent body is needed to improve the way Canada deals with people who allege they have been wrongfully convicted and to maintain the legitimacy of the criminal justice system.

The establishment of an independent review commission armed with appropriate rules and regulations similar to those utilized by the CCRC is needed. Not only should this body be provided with appropriate powers to adequately investigate wrongful conviction, an improvement in attitude from the previous regime by the people who work at investigating claims of wrongful convictions is also needed. An independent body, equipped with appropriate procedures and composed of individuals who are committed to uncovering miscarriages of justice could alleviate many of the problems with the current post-conviction review system. This could substantially increase the ability to detect, properly investigate and remedy wrongful conviction cases.

Having an appropriate independent review body to review alleged miscarriages of justice would solve the restrictive nature of having a case heard under section 696.3(3)(a)(ii), section 696.3(3)(a)(ii) or section 696.3(2). It would no longer

be the decision of the Minister of Justice of whether, or how, to refer an alleged miscarriage of justice but the responsibility of the independent body. With the implementation of an independent body, armed with new regulations, these restrictive sections would no longer exist.

It is also necessary that the separation of powers be maintained between the executive branch of the government and the judiciary. One of the greatest limitations of the section 696 post-conviction review process is that applicants apply to the very agency that originally convicted them. It is a direct conflict of interest for the same person, acting as both the Attorney General of Canada and as the Minister of Justice, to operate in the interest of the Crown in criminal cases and also to review allegations of miscarriages of justice. If an independent review commission reviewed wrongful convictions it would be a more impartial process since a properly established independent body would have no vested interest in maintaining a conviction. The Minister of Justice has a significant amount to lose when a conviction is overturned based on a miscarriage of justice as this compromises the efficiency of the courts to adequately decide criminal cases and throws the legitimacy of the justice system into question. Replacing the Minister of Justice with an independent review body would reinstate the traditional separation of powers and allow for a more independent post-conviction review process.

Creating an independent body could also address the secrecy of the section 696 post-conviction review process. Many complaints from lawyers and applicants involved in the review process indicate that they are left in the dark when they request information about the state of their application. There is also a limited amount of

information concerning the review process itself. While the Department of Justice has made improvements in recent years in an attempt to clarify the post-conviction review process, there is still a lot of uncertainty. The Minister of Justice is still not required to publicly state why he or she has rejected an application. Part of the reason for this is that section 696 applications are protected by the *Privacy Act*. However, an applicant can waive their right under the *Privacy Act* which would provide the public with access to the Minister's decision, but often these reasons for decision are vague and inconclusive. This does not paint a picture of openness and accountability on the part of the government. The establishment of the CCRC in the United Kingdom created an open and accountable system where applicants and their lawyers are kept informed at all stages of the review process. In fact, the CCRC has been commended on its readiness to liaise with the applicant and his or her lawyer.¹⁸³ The CCRC was also recognised for its accessibility, a great improvement over the Home Office, and was credited with a much more transparent decision-making process.¹⁸⁴

The cost incurred by an applicant under section 696 would be substantially reduced with the implementation of an independent review commission having similar procedures to the CCRC. The CCRC does not require that applicants provide them with all necessary documents and court transcripts, which is the case for section 696 applicants. The CCRC recognises the difficulty applicants may have in accessing and paying for documents, especially when they are filing an application from prison.

¹⁸³ United Kingdom. Parliament, House of Commons, Session 1998-99. Select Committee on Home Affairs – First Report (Available at www.parliament.the-stationery-office.uk/pa/cm199899/cmselect...) [Accessed 7 Dec 2002].

¹⁸⁴ *Ibid.*

The conceptually limiting ideas such as finality and the belief that truth is the product of an adversarial system of justice contributes to the reluctance of the Department of Justice to review miscarriages of justice. If an independent body were to be established with the sole responsibility to review alleged wrongful convictions, they would not be limited in the same way as the Department of Justice. This is because an independent review commission would not have any responsibility for maintaining the courts or the administration of justice, as the Minister of Justice does. An independent body would be separate from the government and courts and would not be as constrained to uphold a conviction based upon the judicially recognised principle of finality. This is not to say that they will not respect such a principle and the floodgates will open, just that as an independent body they will feel less bound by such concepts.

Section 696 of the *Criminal Code* and the post-conviction review process has failed to fulfill its purpose to detect and remedy wrongful convictions. The Canadian government has recognised that there are various problems with this system but continually fail to implement effective reform. The benefits of an independent review body have been seen through the United Kingdom's Criminal Cases Review Commission. It is time Canada implemented such a system.

Chapter 5

Conclusion

The criminal justice system is fallible and nothing exemplifies this better than wrongful convictions. Appellate courts are designed to remedy miscarriages of justice, however, this goal is not always fulfilled. In recognition of this, the State has always had a 'last-resort' legal mechanism in place to correct injustices not dealt with in the courts. Today one of those mechanisms is section 696 of the *Criminal Code*. At best, it can help overturn a conviction on the basis of a miscarriage of justice, but while such a 'last-resort' safeguard is essential to any criminal justice system, section 696 is not a satisfactory or sufficient mechanism to detect and remedy wrongful convictions.

In writing this thesis I have sought to illustrate some of the criticisms of the section 696 post-conviction review process. One critical problem with Canada's post-conviction review system is that it is the responsibility of the Minister of Justice. This poses a conflict of interest and does not maintain the traditional separation of powers between the executive and the judicial. Having the Department of Justice responsible for both the prosecution of criminal offences and the review of alleged wrongful convictions is highly problematic. Not only is there a lack of independence, the Minister of Justice is a highly visible public figure with political responsibilities. She or he is subject to social and political responsibilities and pressures, including, but not confined to, the interests of a convicted person.¹ The Minister of Justice, in

¹ P. Braiden, "Wrongful convictions and Section 690 of the *Criminal Code*: An Analysis of Canada's Last-Resort Remedy" (M.A. Thesis. Simon Fraser University, 2000).

exercising her or his responsibilities in reviewing wrongful convictions can be influenced by both legal and extra-legal factors.²

In this thesis I have also sought to show that the Canadian government has recognised that the post-conviction review system is problematic due to a variety of factors, including the fact the Government made various amendments (however insignificant) to this process over the last fifteen years. Despite these window dressing changes, the government has continually failed to implement appropriate solutions. Most recently, this was apparent through the repealing of section 690 and replacing it with the wholly inadequate section 696. Not only does the Minister of Justice still have complete discretion over whether to grant or reject a section 696 application, the various Justice Ministers have shown themselves to be very reluctant to use this discretion to grant a post-conviction review, since less than two percent of all post-conviction review applications are successful. Yet, despite the notoriety of wrongful convictions, and the repeated calls for an independent review body to replace the role of the Minister of Justice, then Minister of Justice Anne McLellan stated that “an independent review body for conviction review [is] not needed in Canada;”³ in fact, “establishing an independent review body [is] undesirable.”⁴

The principal reason for the writing of this thesis was to determine whether post-conviction review would be better served by an independent review commission than by the Minister of Justice. The best way to address this question was to compare

² *Ibid.*

³ Canada. Parliamentary debates. 1st Session, 37th Parliament. House of Commons. *Standing Committee on Justice and Human Rights*. 2 October 2001. Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev22-e.htm> [Accessed 14 November 2001].

⁴ Canada. Department of Justice. *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*: Consultation Paper: 1998, at 4-5.

Canada's post-conviction review system to that of the United Kingdom. Is there something Canada can learn from the establishment of the Criminal Cases Review Commission in the United Kingdom? Although it would be unrealistic to expect the section 696 conviction review system – or any post-conviction review system – to remedy all miscarriages of justice, I have endeavored to show that implementing an independent review commission, similar to that of the United Kingdom's, would significantly improve the way allegations of wrongful convictions are handled and investigated.

The manner in which the Criminal Cases Review Commission has thus far exercised its responsibilities has revealed it to be a substantial improvement over the C3 department in Britain's Home Office (which is similar to Canada's Department of Justice). The CCRC has been commended for their accessibility, openness and diligence in investigating suspected miscarriages of justice. They have exhibited a much more proactive approach to case examinations and are "light years ahead of the Home Office in all sorts of ways."⁵ An independent review body "unencumbered by legal niceties such as the complexities of admissible and inadmissible, could perhaps arrive at the truth."⁶ In the least, an independent review body would not be constrained by political ties as is an executive branch of government, or be bound by strict legal principle as the judiciary is. Technically, an independent review body would be free to investigate and review all aspects of a case that it deemed necessary.

⁵ United Kingdom. Parliament, House of Commons, Session 1998-99. Select Committee on Home Affairs – First Report Available at www.parliament.the-stationery-office.uk/pa/cm199899/cmselect... [Accessed 7 Dec 2002].

⁶ B. Woffinden. *Miscarriages of Justice*. (London: Hodder & Stoughton, 1987) at 332.

The establishment of an independent body to deal with alleged miscarriages of justice would be a major step forward for accountability in the criminal justice system.

One must acknowledge that there are imperfections with any system. The Criminal Cases Review Commission is a relatively new body and has only been in operation since 1995. The beginning years of the CCRC have demonstrated the Commission to be composed of a body of individuals willing and able to uncover an unprecedented number of wrongful convictions, however, we will have to wait and see if the organization will fall into similar difficulties such that the Home Office did. Will the Commission maintain their independence from government and the judiciary? Will they continue to expose wrongful convictions and maintain the integrity that the Commission has become associated with? There is still further research to be conducted and time to pass before the strengths and limitations of an independent review commission can be fully understood.

It would also be useful to study how other countries deal with allegations of wrongful convictions at a post-conviction review stage. While the United Kingdom is the only country which has adopted an independent review body, other countries may have creative solutions that could shed some light on how to more effectively identifying and correcting miscarriages of justice.

Another area that needs further study is the role the courts play in detecting and remedying wrongful convictions. Although this was touched on in this thesis more attention should be given to how reform within the judiciary might reduce the likelihood of a wrongful conviction. An independent review commission would only be able to investigate a case and send it back to the judiciary for further review. In

the end it is still the decision of the court whether a miscarriage of justice has occurred. This in itself can be problematic since an alleged wrongful conviction can be sent back to the same court that has already dismissed or refused to hear the case.

Most importantly, in an ideal criminal justice system, a post-conviction review system would not be needed. The police are generally the first people to come into contact with a crime scene and they have the responsibility of gathering evidence and building a case. Many wrongful convictions are the result of shoddy police work, whether intentional or unintentional. Failures and mistakes made at the early stages of a police investigation can influence later stages. People do make mistakes. In recognition of this, more attention should be placed on preventing miscarriages of justice. While this is easier said than done, further study might shed some light on how society might better prevent these anomalies from happening. For example, could the structure of a police force be changed in some way to lessen wrongful convictions from occurring? What about educating officers within a police force to make them aware of the realities of wrongful convictions, instances of police tunnel vision and false confessions? It is not only the police, but prosecutors and defence lawyers as well as judges and juries, who can contribute to a miscarriage of justice. Further research might indicate how the justice system could ensure that the presumption of innocence is upheld, bias is reduced or eliminated, and that the State maintains its duty to seek the truth, and not aggressively prosecute those charged with criminal offences. Additional research could also lead to the revelation of new ways to prevent or detect and remedy wrongful convictions.

Replacing the role of the Minister of Justice under section 696 of the *Criminal Code* with an independent body to review allegations of miscarriages of justice will not prevent wrongful convictions from occurring. This is not the aim of such a body. What such a body will accomplish is to provide a mechanism, independent from the government, which does not have a vested interest in upholding criminal convictions, to investigate and determine whether a miscarriage of justice has occurred. The effects of implementing such a review commission would not only benefit the wrongly convicted, such an accomplishment will also provide legitimacy to the criminal justice system. James Lockyer, the director of the Association in Defence for the Wrongly Convicted, in his address to the *Standing Committee on Justice and Human Rights*, explains the function of an independent review body:

[W]e are not seeking the creation of a new Court of Appeal. Rather, we are seeking the creation of a new and effective traffic light on the way back to the Court of Appeal. All we're asking is that the section that allows the present situation, where the minister has the ability to stop a case going back to the Court of Appeal be repealed, and that the minister's role be replaced by that of an independent tribunal who could henceforth become the traffic light on the way to a person trying to satisfy the authorities that he's been wrongly convicted.⁷

The change in the way the CCRC dealt with applications, compared to the old system employed by the Home Office, was substantial. Many more applications were investigated by the CCRC than by the Home Office, the investigative process became proactive, rather than reactive, and the system became more open and accessible to those claiming to be wrongfully convicted.

⁷ Canada. Parliamentary Debates. *Standing Committee on Justice and Human Rights*. Evidence. 3 October 2001. Available at <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev23-e.htm>. [Accessed 10 October 2002] at 4.

For the innocent people who are wrongly convicted and imprisoned, there is the “traumatic denial of liberty and deprivation associated with incarceration: separation from family and friends and the loss of reputation, job and home.”⁸ Belloni and Hodgson, the authors of *Criminal Injustice*, recognise that “society also suffers in that the guilty person remains at liberty in a position to possibly offend again.”⁹ The “frequent and serious miscarriages of justice discredit the integrity of the criminal justice process and undermine respect and support for it among the general public. And this may be harmful to the political system as a whole.”¹⁰ As Britain’s Royal Commission on Criminal Justice noted, “for a person to be deprived of his or her liberty, perhaps for many years, on account of a crime which was in fact committed by someone else, is both an individual tragedy and an affront to the standards of a civilized society.”¹¹

In his report into the investigation of the Preece case in the United Kingdom, the ombudsman stated:

A miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilised society. And it seems to me that when an unprecedented pollution of justice at its source is discovered, quite an exceptional effort to identify and remedy its consequence is called for.¹²

Canada, through its section 696 post-conviction review system, fails to provide an adequate system to identify and remedy wrongful convictions. Beyond

⁸ F. Belloni and J. Hodgson. *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain*. (London, England: MacMillan, 2000): at 11.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ United Kingdom. Royal Commission on Criminal Justice, Chaired by Vincent Runciman *Report* Cmnd 2263. (London: Home Office, 1993).

¹² United Kingdom. Parliamentary Debates 1994. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199495/cmhansrd/199...-5.htm> [Accessed 9 December 2002].

the injustice which may be suffered by individuals, wider damage to the integrity of the justice system can and will result from wrongful convictions. Therefore, miscarriages must be rooted out and put right as quickly as possible.¹³ An independent review body is the appropriate agency for this responsibility.

¹³ Belloni and Hodgson, *Supra*, note 8, at 170.

Appendix I*Canadian Criminal Code*

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

- a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after the 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 or 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.

Appendix II

Canadian Criminal Code

696.1(1) An application for ministerial review on the grounds of a 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 right of judicial review or appeal with respect to the conviction or finding have been exhausted.

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

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

(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 the commissioner under section 11 of that Act.

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any individual 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 section (2).

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.

(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.

(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 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.

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

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

- (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
- (b) the relevance and reliability of information that is presented in connection with the application; and
- (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.

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

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.

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