WRONGFUL CONVICTIONS AND SECTION 690 OF THE *CRIMINAL CODE*: AN ANALYSIS OF CANADA'S LAST-RESORT REMEDY

by

Patricia Lynn Braiden
B.Soc.Sc. (Honours), University of Ottawa, 1996

Thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Arts
in the
School of Criminology

SIMON FRASER UNIVERSITY

April 2000

ABSTRACT

Wrongful convictions are an inherent product of all fallible criminal justice systems and there is some literature which analyzes how and why such miscarriages occur. Much less is known, however, about one of the remedial processes designed to identify and correct such injustices--section 690 of the *Criminal Code*. Section 690 empowers the federal Minister of Justice to refer cases back to courts if, after inquiry, he or she "is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed." This research was prompted by a concern for convicted innocents and, more specifically, by the need to examine the efficacy of section 690 in identifying and remedying such injustices.

Triangulated research methods are used because of significant restrictions on access to conviction review data, including Ministerial decisions. Prisoners are most impacted by section 690; therefore, questionnaires were distributed to all federal correctional institutions across Canada. Interviews were conducted with defence counsel, a lawyer with the Criminal Conviction Review Group at the federal Department of Justice, ad hoc counsel to the Department of Justice and a member of The Association in Defence of the Wrongly Convicted (AIDWYC). In addition, an historical review of the Royal Prerogative of Mercy examines whether the rationales underlying its exercise can shed light on contemporary decision-making under section 690 of the *Criminal Code*. Although section 690 is distinct from Royal Prerogative pardon powers, both types of decisions are influenced by legal and extra-legal factors.

Despite perceptual differences among these individuals and groups about the conviction review process, all agree that section 690 needs reform; however, the nature of such reform remains a subject of debate. What is clear, however, is that only a minuscule number of applicants obtain relief through this conviction review mechanism. As it stands, the conviction review process is overly secretive, plagued by inordinate delays, prohibitive for many applicants, and is not sufficiently independent from the Crown arm of government. Evidence also suggests that Ministers of Justice unduly fetter their discretion which may help explain the rare exercise of section 690 powers. At best, section 690 might identify, remedy and compensate an applicant. At worst, it represents a safety valve for government, rather than a safety net for convicted innocents.

DEDICATION

In memory of my father, Thomas Patrick "Paddy" Braiden (1934-1993), who taught me the value of the underdog.

And to the wrongfully convicted, whose life-stories/nightmares provided the impetus for this research.

ACKNOWLEDGMENTS

I would like to acknowledge the assistance of Professor Joan Brockman who provided much needed advice and support throughout the research and writing process. I am also grateful to Professor Mark Carter, whose critical eye helped make this a better thesis.

I would also like to extend many thanks to my good friend Harry Disbrow, who volunteered his time and effort to assist in the translation of French documents.

Finally, my journey through the university process would have been much more arduous without the constant care and support of my family. For that, I am eternally grateful.

TABLE OF CONTENTS

Page

APPROVAL ii
ABSTRACT iii
DEDICATION iv
ACKNOWLEDGMENTS v
TABLE OF CONTENTS vi
LIST OF TABLES ix
LIST OF APPENDICES x

CHAPTER 1 - INTRODUCTION: WRONGFUL CONVICTIONS AND SECTION 690 OF THE *CRIMINAL CODE*: AN ANALYSIS OF CANADA'S LAST-RESORT REMEDY 1

CHAPTER 2 - WRONGFUL CONVICTION: A LITERATURE REVIEW
- I. Introduction 11
- II. Defining Wrongful Conviction 12
- III. Forms of Literature in the Wrongful Conviction Field 24
  - (i) Case Study Literature 24
  - (ii) Socio-Psychological Literature 27
  - (iii) Compilation Research of Wrongful Convictions 34
  - (iv) Commissions of Inquiry 42
- IV. What the Literature Reveals 46
  - (i) Causal Factors 46
  - (ii) Race, Ethnicity and Class 55
  - (iii) Theoretical Considerations of Wrongful Conviction ... 58
- V. What the Literature Fails to Reveal 64
  - (i) Cross-National Research 64
  - (ii) Gender 65
  - (iii) Canadian Analysis and Quantification of Wrongful Convictions and Section 690 of the *Criminal Code* 65

CHAPTER 3 - THE PREROGATIVE OF MERCY IN ENGLAND AND IN CANADA: AN HISTORICAL REVIEW
- I. Introduction 67
- II. Pardoning Authority in England and Canada 69
- III. Types of Pardons 92
- IV. The Exercise and Rationales of the Royal Prerogative of Mercy in England 95
- V. The Exercise and Rationales of the Royal Prerogative of Mercy in Pre- and Post-Confederation Canada 111
- VI. Conclusion 128

Page

CHAPTER 4 - SECTION 690 CONVICTION REVIEWS: REMEDY OR RED-TAPE?

I. Introduction 136
II. The Historical Genesis of Section 690 of the *Criminal Code*..... 140
III. The Nature of the Section 690 Conviction Review Process, the Role of the Minister of Justice and the Role of the Courts .. 142
(i) The Nature of the Section 690 Conviction Review Process 142
(ii) The Role of the Minister of Justice 148
(iii) The Role of the Courts 150
IV. Section 690 Applications to, and the Nature of Interventions by, the Minister of Justice 153
(i) Ordering a New Trial Under Section 690(a) 160
(ii) Referring a Case to the Court of Appeal to Hear and Determine the Case as if it Were an Appeal, under Section 690(b) 163
(iii) Asking the Court of Appeal For an Opinion on a Question Under Section 690(c) 170
(iv) Asking the Court of Appeal a Question under Section 690(c), Followed by an Appeal under Section 690(b)..... 171
(v) Referring the Case to the Supreme Court of Canada 176
(vi) Joint Recommendation with the Solicitor General for a Free Pardon 179
V. Section 690 Applications Rejected by the Minister of Justice, and Other Known Applications 179
VI. Ministerial Reasons for Decision Under Section 690 of the *Criminal Code* 195
(i) Allen M. Kinsella 195
(ii) Patrick Kelly 201
(iii) Sidney V. Morrisroe 211
(iv) W. Colin Thatcher 221
(v) David Milgaard 230
(vi) Wilfred Beaulieu 241
(vii) Clayton N. Johnson 244
VII. Summary of Research Results: Analysis of the Efficacy of Section 690 248

TABLE OF CONTENTS

Page

CHAPTER 5 - CONVICTION REVIEW APPLICANTS: A SURVEY
I. Introduction 267
II. Research Method 267
III. The Research Process 270
IV. Data Analysis 276
V. Summary of Research Results 291

CHAPTER 6 - THE CONVICTION REVIEW PROCESS: LEGAL COUNSEL PERSPECTIVES
I. Introduction 292
II. Research Method 293
III. The Research Process 296
IV. Legal Counsel Perspectives - A Narrative 298
(i) Ad Hoc Counsel 344
(ii) Department of Justice Respondent 357
V. Data Analysis 362

CHAPTER 7 - CONCLUSION 369

APPENDICES 384

BIBLIOGRAPHY 426

LIST OF TABLES

		Page
Table 3.1	- Commutations: Murder	114
Table 4.1	- Number of Applications Rejected at Initial Assessment Stage	146
Table 4.2	- New Trials Ordered by the Minister of Justice Under Section 1022 Former *Criminal Code*	155
Table 4.3	- Applications to, and Interventions by, the Minister of Justice (1980 - 1991)	157
Table 4.4	- Applications to, and Interventions Denied/Granted by Justice Minister (1992 - 1998)	159
Table 4.5	- New Trials Ordered by Minister of Justice Under Section 690(a)	162
Table 4.6	- The Nature of Section 690(b) Interventions (1960 - 1998)	164
Table 4.7	- All Known Ministerial References to Courts of Appeal Under Section 690(b)	169
Table 4.8	- Known Ministerial References Asking the Court of Appeal a Question Under Section 690(c), Followed by an Appeal Under Section 690(b)	175
Table 4.9	- Section 690 Applications Rejected by the Minister of Justice	188
Table 4.10	- Distribution of Section 690 Applications by Province	249
Table 5.1	- Institutional Responses to Survey Request	275
Table 5.2	- Demographic Distribution of Respondents	277
Table 5.3	- Status of Applicants' Section 690 Conviction Reviews	279
Table 5.4	- Reasons for Conviction Reviews	284
Table 6.1	- Years Worked as Defence Counsel	299
Table 6.2	- Acquittals on Appeal of Clients Believed to be Factually Innocent	300
Table 6.3	- Do Appellate Courts Provide Sufficient Protection Against Wrongful Conviction?	308
Table 6.4	- Time Span From Application Submission to Ministerial Decision	320
Table 6.5	- Defence Counsel - Major Grounds for Clients' Section 690 Applications	324
Table 6.6	- Defence Counsel Recommendations to Improve the Conviction Review Process	338
Table 6.7	- Defence Counsel Recommendations to Minimize Wrongful Convictions	341

LIST OF APPENDICES

Page

Appendix 1 - Ministers of Justice and Attorneys General (1867 - 1999) 384
Appendix 2 - Chronology of Events in the Section 690 Application of W. Colin Thatcher to the Minister of Justice 386
Appendix 3 - Chronology of Events in the Section 690 Application of Wilfred Beaulieu to the Minister of Justice 389
Appendix 4 - All Known Section 690 Applications, Interventions and Outcomes .. 390
Appendix 5 - Questionnaire for Incarcerated Section 690 Applicants 393
Appendix 6 - Federal Institutions - Questionnaire Distribution 397
Appendix 7 - Explanatory Letter Sent to Wardens 399
Appendix 8 - Research Approval Letter From Corrections Canada (Ottawa) 400
Appendix 9 - Explanatory Letter Sent to Inmates 401
Appendix 10 - Availability of Legal Aid Services to Section 690 Applicants 402
Appendix 11 - Respondent Application to the Minister of Justice Under Section 690 of the *Criminal Code* 404
Appendix 12 - Explanatory Letter Sent to Defence Counsel 409
Appendix 13 - Proposed Interview Questions for Defence Counsel 410
Appendix 14 - Consent Form - Interview Participants 412
Appendix 15 - Explanatory Letter Sent to Department of Justice Counsel 413
Appendix 16 - Proposed Interview Questions for Department of Justice Counsel 414
Appendix 17 - Explanatory Letter Sent to Ad Hoc Counsel 416
Appendix 18 - Proposed Interview Questions for Ad Hoc Counsel - Department of Justice 417
Appendix 19 - Explanatory Letter Sent to the Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC) 419
Appendix 20 - Proposed Interview Questions for the Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC) 420
Appendix 21 - Interview Participants (Consented to be Identified) 423
Appendix 22 - (i) Distribution of Defence Counsel Experience as Defence and Crown Counsel
(ii) Distribution of Defence Counsel by Province 424
Appendix 23 - Intake Information Sheet (AIDWYC) 425

Chapter 1

INTRODUCTION

Myriad motivations generated this research, not the least of which is my passionate reaction to the horrors endured by convicted innocents, notwithstanding non-empirical claims that such miscarriages are 'rare.' Thus began a journey to understand how and why such miscarriages occur and, more specifically, what mechanisms exist in Canada to identify and rectify these inevitable products of fallible human institutions. Wrongful convictions of the factually innocent are a social justice problem that have been inherent to criminal justice systems for centuries, and they continue to manifest themselves in contemporary justice systems around the world. The literature details hundreds of accounts worldwide, spanning the late 19th and 20th centuries, of innocent men and women tried, convicted, and in some cases, executed for crimes that they did not commit.

In Canada, many of us are familiar with the wrongful convictions of David Milgaard, Donald Marshall, and Guy Paul Morin. However, these are not the only cases; they merely represent the most highly profiled ones. As some research suggests, many, if not most, wrongful convictions are revealed through sheer chance or luck.[1] Thus, many miscarriages of justice remain hidden from view, which not only obscures the extent of the problem, but also serves to minimize threats to the perceived integrity of the criminal

---

[1] For example, see Ruth Brandon and Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London, Eng.: George Allen & Unwin, 1973), 20; Samuel R. Gross, "The Risks of Death: Why Erroneous Convictions are Common in Capital Cases," *Buffalo Law Review* 44 (1996): 497, 469-500. As Gross argues, "everybody knows that direct and collateral review are more painstaking for capital cases than for any others." With respect to whether "all these mistakes are caught and corrected somewhere in [this] exacting process" of capital case review, Gross argues that they are not. In his view, "at best, we could do an imperfect job of catching errors after they occur, and in many cases we don't really try." As a result, he argues that "most miscarriages of justice in capital cases never come to light."

justice process. Similarly, 'remedial' processes designed to identify and correct such injustices--the Royal Prerogative of Mercy and section 690 of the *Criminal Code*[2]--are equally secretive. Section 690 allows those who claim to be wrongfully convicted to apply to the federal Minister of Justice for conviction reviews. In addition, any person convicted of an offence[3] may apply to the Governor-in-Council (federal Cabinet), which is empowered to grant free and conditional pardons, under section 748 of the *Criminal Code*. Applications may also be made to the Solicitor General of Canada for a pardon under the *Criminal Records Act*.[4] An additional mechanism for pardon exists under section 749 of the *Criminal Code*, which states that "[n]othing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy," which "preserv[es] a traditional historical source of pardoning authority in Canada."[5]

The literature does provide some analyses of wrongful convictions in Canada, but it is virtually silent with respect to the conviction review process pursuant to section 690 of the

---

[2] R.S.C. 1985, c. C-46.

[3] With respect to convictions arising from provincial statutes, the Lieutenant Governor has authority to grant pardons.

[4] R.S.C. 1985, c. C-47. It should be noted that the National Parole Board (NPB), through the Solicitor General, also receives applications for pardon under the royal prerogative of mercy. See Solicitor General Canada, *Annual Report* (Canada, Solicitor General, 1990-1991), 46.

[5] Philip Rosen, "Wrongful Convictions in the Criminal Justice System," (Ottawa: Library of Parliament, Background Paper 285-E, January 1992): 4, 1-16. Also see Lynn Ratushny, *Self-Defence Review: Final Report* (Report submitted to the Minister of Justice of Canada and to the Solicitor General of Canada, 11 July 1997): 59-60. Ratushny describes the ten possible remedies available under the royal prerogative of mercy: free and conditional pardons under s. 748(2) of the *Criminal Code*; pardons under the *Criminal Records Act* (R.S.C. 1985, c. C-47); remission of sentence, respite of sentence, and commutation of sentence (these powers derive from the Letters Patent constituting the office of the Governor General, R.S.C. 1985, App. No. 31); new trial (s. 690(a), *Criminal Code*), referral of case to a court of appeal (s. 690(b), *Criminal Code*), referral to a court of appeal on a legal issue (s. 690(c), *Criminal Code*); and reference to the Supreme Court of Canada (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53).

Criminal Code, the subject of this thesis. This last-resort remedy is available to those who have exhausted all conventional avenues of appeal and who claim to be wrongfully convicted. Despite such a 'safeguard,' this study of section 690 applications--spanning the last 100 years--reveals that only a minuscule number of applicants benefit from this so-called remedy. Research conducted in the United States suggests that there may be thousands of wrongful convictions each year in that country alone. Although no attempts have been made to estimate the number of wrongful convictions in Canada, both countries utilize similar legal systems (i.e., the adversarial system). Notwithstanding demographic differences, the United States research provides some evidence to suggest that the 42 Ministerial interventions identified in this study over the past century do not reflect the actual number of such miscarriages. This begs the question as to whether section 690 of the *Criminal Code* is an effective mechanism to identify and remedy most, if not all, wrongful convictions. The search for answers to this research question is the purpose of this thesis. Such evidence, however, is elusive and obtaining it is challenging. Ministerial decisions are not usually publicized and there is a general paucity of information concerning section 690 conviction reviews in the literature. Consequently, a triangulated methodology was required, utilizing both quantitative and qualitative methods.

The absence of section 690 research and the desire to understand the causal genesis of wrongful convictions--which necessitate the use of this last-resort remedy--prompted my review of the general 'wrongful conviction' literature. Chapter 2 describes what the literature does and does not reveal about wrongful convictions, including issues of

causality, race, class, and theoretical frameworks. I also review available section 690 literature, noting the research void concerning this remedial process. Moreover, it should be noted that there is no single and agreed-upon definition for 'wrongful conviction'; therefore, in this chapter, I discuss the difficulties of operationally defining this term.

Section 690[6] is an adjunct to the ancient pardoning power,[7] now known as the Royal Prerogative of Mercy. In Chapter 3, I also review this literature as it is important to understand how the prerogative power functioned within specific socio-historical contexts in order to gain insight into the factors that might influence Ministerial decision-making under section 690. The pardon power was not simply a mechanism used to remedy injustice and to dispense mercy; its exercise was also driven by a variety of social, political and economic factors. This chapter traces the prerogative's historical evolution and authority, as well as the rationales underlying its exercise in England and in pre- and post-Confederation Canada. The types of pardons available in Canada through the royal prerogative, and the distinctions between them, are also described. The essential purpose

---

[6] Section 690 reads:

POWERS OF MINISTER OF JUSTICE

690. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part 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 inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

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

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

[7] Allan Manson, "Answering Claims of Injustice," (1992) C.R. (4th) 305, 308.

of Chapter 3 is to illuminate how historically-specific imperatives, both practical and ideological, might also influence contemporary decision-making under section 690 of the *Criminal Code*.

The core of the thesis, found in Chapter 4, begins by describing the history of section 690 of the *Criminal Code*. This is followed by a description of the nature of the section 690 process, the role of the Minister of Justice, and the role of the courts (Section III). Applications to and interventions by the Minister of Justice, and the nature of these section 690 interventions are discussed in Section IV. The next section (V) examines applications rejected by the Minister of Justice, and other known section 690 applications. Finally, I analyze the seven available Reasons for Decision by the Minister of Justice (Section VI), and summarize my research results (Section VII) in order to identify intervention and case patterns and the merits and problems with the current conviction review process. All efforts have been made to locate as many section 690 cases as possible, and, while some cases may have been missed, it is likely that most Ministerial interventions which occurred over the past century have been identified. My purpose here is to facilitate a more informed understanding and analysis of how Canadian society presently deals with allegations of wrongful conviction, and how such miscarriages are investigated and reviewed. As Chapter 3 illustrates, the historical exercise of the Royal Prerogative of Mercy was influenced by specific political, social and economic rationales. Section 690 is distinct from royal prerogative powers; however, the factors that influence such Ministerial decisions are in some instances comparable. Those who claim to be wrongfully

convicted, and those who decide their fate, inhabit specific political, social and economic milieus, all of which I have tried to consider in the analysis of the conviction review process.

It is of equal import to attempt to understand the conviction review process from the perspectives of those most intimately involved. Section 690 applicants are most affected by the conviction review process. Therefore, I wanted to hear their experiences and insights about this process. To facilitate this objective, I designed an anonymous mail-out questionnaire and distributed it to federally-incarcerated prisoners across Canada. The goal was two-fold: to understand the conviction review process from the perspectives of section 690 applicants themselves, and to collect empirical data about the section 690 process. Thus, my questionnaire was prompted by both empirical and phenomenological rationales. Chapter 5 describes the questionnaire method used and the research process involved in obtaining national approval from Corrections Canada and other research committees, to distribute inmate questionnaires. The low number of responses is disappointing; however, they do provide some valuable insights about the conviction review process from those who apply for conviction reviews.

In addition to soliciting the conviction review experiences of prisoners, I also wanted to hear the perspectives of others who are actively involved with section 690 reviews. Therefore, I conducted telephone interviews with defence counsel, a lawyer with the Criminal Conviction Review Group at the federal Department of Justice, ad hoc counsel to the Department of Justice and the Executive Secretary of The Association in Defence of

the Wrongly Convicted (AIDWYC).[8] Chapter 6 contains the results of these interviews, beginning with a description of research methods and the research process (Sections II and III). The central section (IV) of this chapter provides a descriptive narrative of participant perspectives. Finally, section V analyzes this qualitative data and attempts to link such perspectives to broader social and political structures.

I have utilized a variety of research methods and strategies for both practical and empirical reasons. For practical reasons (i.e., the non-availability of section 690 data), it is necessary to obtain section 690 data and information from those who participate in the conviction review process. Thus, I employ both quantitative and qualitative methods. Furthermore, the historical record can provide a variety of insights which shed light on contemporary practices and legislation. To reveal such insights, I review the historical literature pertaining to the Royal Prerogative of Mercy. In addition, I analyze Ministerial Reasons for Decision and case law. My methodological strategy was to obtain sufficient data from which to adjudicate the efficacy of section 690 of the *Criminal Code*. In other words, does the section 690 conviction review process substantively achieve its raison d'être: the identification and correction of most, if not all, conviction errors?

---

[8] The Association in Defence of the Wrongly Convicted, established in 1993, is a privately-funded, volunteer organization, whose mandate is to assist individuals who they believe are innocent of the crime for which they were convicted. Due to funding difficulties, AIDWYC is able to assist only those individuals who, in most cases, have exhausted the appeals process and have been convicted of first or second degree murder and manslaughter. AIDWYC is administrated by a Board of Directors and currently has offices in Toronto, Edmonton and Winnipeg.

Another research objective is to "understand meaning in a given context"[9]--hence my use of an inmate survey and legal counsel interviews. It is equally important, however, to examine the social and political relations through which the various respondents express the meanings of the conviction review process. To facilitate this goal, I employ a critical ethnographic approach because such an approach facilitates my desire to link participant perspectives of the conviction review process to "wider social [and political] structures... ."[10] As Thomas cogently argues, ethnography "is neither more nor less scientific than the 'hard' sciences; [i]t is simply another language for being scientific, because science is a way of thinking and not simply a technique for data processing."[11]

This study, like any social scientific endeavour, is not value-free; I designed a questionnaire and interview questions based upon my own research interests and the exigencies of addressing the research question. As such, I have directly influenced the information provided by respondents. That said, an analytic inductive approach to data analysis attempts, as much as possible, to accurately reflect the perceptions of the research participants. Such an approach is also conducive to linking investigation with theoretical hypotheses. For example, do particular patterns or regularities concerning the section 690 process emerge from the data? Moreover, as this study is directed by a specific research question, an analytic inductive approach facilitates the development of theoretical

---

[9] Julia O'Connell Davidson and Derek Layder, *Methods, Sex and Madness* (London, Eng.: Routledge, 1994).

[10] Lee Harvey, *Critical Social Research* (London, Eng.: Unwin Hyman, 1990), 11.

[11] Jim Thomas, *Doing Critical Ethnography* (Newbury Park, Cal.: Sage, 1993), 17.

explanations.[12] Epistemologically, I prefer an inductive approach to this research as it allows theory and hypotheses to emerge from the data, rather than "fitting data" to a predetermined theory.

This research is also exploratory. Although I had some previous knowledge of the section 690 process, conviction reviews are a closed process. As an 'outsider', it is not possible for me to know exactly what transpires at the federal Department of Justice as a section 690 application progresses through the investigatory stage. A triangulated methodology, therefore, fosters a broader understanding of this remedial process, which remains unscrutinized and, consequently, unchallenged. Moreover, the desire to generate grounded theory using an inductive approach makes exploration a major focus of this study.[13]

Given my preference for an inductive approach to this project and the informational void concerning conviction reviews, it was important, theoretically, to consider the historical record in an attempt to gain understanding of the exercise and rationales of section 690 of the *Criminal Code*. As such, the search for answers to the following two-part question forms the substance of this study's theoretical framework: (a) what does history tell us about the social, political and economic factors that influence Cabinet and Ministerial decision-making in the exercise of the royal prerogative and section 690, and

---

[12] Patrick J. Schloss and Maureen A. Smith, *Conducting Research* (Upper Saddle River, New Jersey: Prentice-Hall, 1999), 190.

[13] Ted Palys, *Research Decisions: Quantitative and Qualitative Perspectives* (Toronto: Harcourt Brace Jovanovich Canada, 1992), 83.

(b) what comparisons, if any, can be made to contemporary practices? Put another way, what factors, other than strictly legal ones, influence Ministerial conviction review decisions? An historical approach provides an effective tool through which to explicate the complex social and political relations at work in the section 690 decision-making process. As I am neither an historian nor a political scientist, my analysis of such influences is interpretive, particularly in attempts to compare royal prerogative decision-making to the exercise of section 690. Nevertheless, I hope that such interpretations are enhanced by a more historically-grounded understanding of the function and rationales driving these last-resort remedies. Moreover, increased understanding of the factors that influence section 690 decisions enhances our ability to adjudicate not only its efficacy, but most importantly, the suitability of a conviction review process that is directed by the federal Department of Justice.

The intent of this research and thesis is threefold: to provide some theoretical explanations of the section 690 decision-making process, to fill substantial gaps in existing knowledge about section 690 of the *Criminal Code*, and to assess the efficacy of Canada's conviction review process. There is, however, another more personal goal--namely, to play some part in the creation of a more timely, efficient and humane conviction review mechanism for convicted innocents.

Chapter 2

WRONGFUL CONVICTION: A LITERATURE REVIEW

I. Introduction

Literature specific to section 690 of the *Criminal Code* is minimal, consisting of a handful of academic[1] and newspaper articles. Therefore, in this chapter, I review the wrongful conviction literature in order to illuminate what it does and does not reveal. Such a review also provides better understanding of such miscarriages, which necessitate section 690 conviction reviews.[2] Due to the difficulties of operationally defining 'wrongful conviction,' the chapter opens with discussion of this complicated task. Section III describes the various forms of literature in the wrongful conviction field. The next section (IV) explores further what the literature reveals with respect to causal factors, race, ethnicity, class, and theoretical considerations. Finally, section V identifies some areas which have either not been the subject of research, or which deserve further study.

My review of the literature was initiated through preliminary sources: *Psychological*

---

[1] Allan Manson, "Answering Claims of Injustice," 12 C.R. (4th) 305; David P. Cole and Allan Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990); Rosen, "Wrongful Convictions"; D. J. Avison, "Last Resort - The Exercise of Discretionary Powers Under s. 617 [now 690] of the *Criminal Code*," (address to the Halifax Prosecutors' Seminar, June, 1988): 1-27; The Association in Defence of the Wrongly Convicted (AIDWYC), "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal Code* (Submitted to the Minister of Justice and Attorney General of Canada, the Honourable Anne McLellan, no date): 1-50; Michelle Fuerst, (Gold & Fuerst, Toronto), "The Section 690 Process," National Criminal Law Program, University of Victoria, Victoria, B.C. (July 1998): 1-9; Neil Boyd and Kim Rossmo, "David Milgaard, The Supreme Court and Section 690: A Wrongful Conviction Revisited," *Canadian Lawyer* 18, no. 1 (1994): 28-32; H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course," *Windsor Yearbook of Access to Justice* 9 (1989): 96-153.

[2] The historical evolution of the Royal Prerogative of Mercy is the focus of Chapter 3; therefore, a review of that literature is contained therein.

Abstracts, *Sociofile* and *Canadian Business Current Affairs* (CBCA).[3] Primary sources and bibliographies concerning research and analysis of wrongful convictions were subsequently identified and are the subject of this review.

II. Defining Wrongful Conviction

It is important to emphasize that there is no single and agreed-upon definition for *wrongful conviction*.[4] A variety of terms and definitions are used throughout the literature, including *wrongful conviction*, *miscarriage of justice*, *false imprisonment*, and *malicious prosecution*.[5] Beyond the obvious conception of *miscarriage of justice* as the conviction of individuals later proven to be innocent, this term is also used to describe: (1) pre-trial detention for individuals who cannot afford bonds,[6] and against whom the charges are later dropped,[7] or who are acquitted after trial,[8] (2) "individuals implicated in a crime or who were accessories to it in a minor way but not guilty of the more serious

---

[3] A variety of search terms were used, including 'wrongful conviction', 'miscarriage of justice', 'erroneous conviction', 'false conviction' and/or 'false imprisonment'.

[4] For example, see Hugo A. Bedau and Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases," *Stanford Law Review* 40, no. 1 (November 1987): 39-47, 21-179; C. Ronald Huff, Arye Rattner, and Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal.: Sage, 1996), 10-12.

[5] Malicious prosecution, although distinct from 'wrongful conviction,' is also defined as a 'miscarriage of justice.'

[6] Keith S. Rosenn, "Compensating the Innocent Accused," *Ohio State Law Journal* 37 (1976): 705-726.

[7] Huff et al., *Convicted But Innocent*, 10-11; Tim Anderson, "Miscarriages - What is the Problem?," *Current Issues in Criminal Justice* 5, no. 1 (July 1993): 72-84; Kaiser, "Wrongful Conviction," 98; George Zdenkowski, "Remedies for Miscarriage of Justice: Wrongful Imprisonment," *Current Issues in Criminal Justice* 5, no. 1 (July 1993): 105, 105-110; Malcolm Sinclair, *The Imprisonment of the Innocent* (London, Eng.: Frederick Muller, 1983).

[8] Anderson, "Miscarriages," 73; Kaiser, "Wrongful Conviction," 98; Zdenkowski, "Remedies," 105.

charge for which they were convicted,"[9] (3) individuals whose convictions are later overturned on appeal,[10] (4) individuals whose convictions are later quashed,[11] (5) women who kill abusive partners in self-defence but for various reasons this defence was either not advanced at trial or was unavailable at the time of trial,[12] (6) individuals who are convicted on evidence "which is legally inadmissible or which is not proven beyond reasonable doubt,"[13] (7) imprisonment of political dissenters,[14] (8) conviction (and on

---

[9] Brandon and Davies, *Wrongful Imprisonment*, 19.

[10] Anderson, "Miscarriages," 73; Kaiser, "Wrongful Conviction," 98; Brandon and Davies, *Wrongful Imprisonment*, 20; Zdenkowski, "Remedies," 105.

[11] Brandon and Davies, *Wrongful Imprisonment*, 20.

[12] Ratushny, *Self-Defence Review*, 14.

[13] Clive Walker and Keir Starmer, ed., *Justice in Error* (London, Eng.: Blackstone Press, 1993), 4.

[14] For example, the 'October Crisis' in Quebec resulted in the imprisonment of political dissenters pursuant to the *War Measures Act*. In the United States, the convictions and executions of Nicolo Sacco and Bartolomeo Vanzetti were precipitated by the government's desire to repress anarchist politics in the late 1920s. See David Felix, *Protest: Sacco-Vanzetti and the Intellectuals* (Bloomington, Ind.: Indiana University Press, 1965); Felix Frankfurter, *The Trial of Sacco and Vanzetti* (New York: University Library, 1961). See also Donal E. J. MacNamara, "Convicting the Innocent," *Crime and Delinquency* 15, no. 1 (January 1969): 59, 57-61.

occasion, execution) of the mentally incompetent,[15] and (9) false accusations of crime.[16] Most of these descriptions also apply to the terms *wrongful conviction* and *false imprisonment*. Thus, the specific terms used and their operational definitions vary across different research studies.

In addition to varying operational definitions, the test or standard used to determine proof of innocence may also differ across research projects. Bedau and Radelet studied erroneous convictions "in which the defendant was, or might have been, sentenced to death."[17] They found 350 cases "in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent."[18] The primary evidence Bedau and Radelet use to determine 'proof of innocence' includes legislative indemnity, reversals by trial or appellate courts, appellate acquittals, and executive pardons.[19] Apart from indisputable proof of innocence (e.g., a

---

[15] See Ludovic Kennedy, *10 Rillington Place* (London, Eng.: Victor Golanz, 1961); Iris Bentley with Penelope Dening, *Let Him Have Justice*, Pan Books ed. (London, Eng.: Sidgwick & Jackson, 1995; London, Eng.: Pan Books, 1996); Hugo A. Bedau, "Miscarriages of Justice and the Death Penalty, in *The Death Penalty in America*, 3d ed., ed. Hugo A. Bedau (New York: Oxford University Press, 1982): 236; Bedau and Radelet, "Miscarriages of Justice;" Sara R. Ehrmann, "For Whom the Chair Waits," *Federal Probation* 26, no. 1 (March 1962): 19, 14-25.

[16] Even if prosecuted and acquitted, individuals who are falsely accused of crimes suffer harm in a variety of ways. See Walker and Starmer, *Justice in Error*, 4. In their view, a miscarriage of justice occurs "whenever individuals are treated by the State in breach of their rights; whenever individuals are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; or whenever the rights of others are not properly protected or vindicated by State action against wrongdoers."

[17] Bedau and Radelet, "Miscarriages of Justice," 23.

[18] *Ibid.*, 23-24. Bedau and Radelet assert that 23 innocent people were executed in the United States between 1905 and 1974 (see Bedau and Radelet, Table 10, 73).

[19] *Ibid.*, 49-50. The authors note that although pardons, "standing alone," are "good indicator[s] of innocence," they are "neither a necessary nor a sufficient ground for including a case in [their] catalogue."

crime was not, in fact, committed), Bedau and Radelet posit that "the most one can hope to obtain is a consensus of investigators after the case reaches its final disposition."[20] In another major United States study, Huff, Rattner, and Sagarin determine proof of innocence only in cases where indisputable error has been discovered.[21] Borchard's analysis of 65 American and British cases was confined to cases where innocence was proven, including cases where the 'murdered person' turned up alive, or when the "real culprit" was subsequently convicted.[22] Brandon and Davies consider innocence proven in cases where free pardons are granted, or in cases that are quashed following referrals to the Court of Appeal by the Home Secretary.[23] Such narrow criteria are challenged by Anderson, however, who argues that "it is an entirely artificial distinction to suggest that acquittal by special inquiry warrants the badge of 'miscarriage' and therefore also warrants

---

[20] *Ibid.*, 47. See also Stephen J. Markman and Paul G. Cassell, "Protecting the Innocent: A Response to the Bedau-Radelet Study," *Stanford Law Review* 41, no. 1 (November 1988): 121-160. According to Markman and Cassell, the evidence used by Bedau and Radelet to determine innocence is severely flawed (discussed *infra*).

[21] Huff et al., *Convicted But Innocent*, 15. See also Arye Rattner, "Convicted But Innocent: Wrongful Conviction and the Criminal Justice System," *Law and Human Behavior* 12, no. 3 (1988): 284, 283-293. Rattner's operational definition of wrongful conviction refers only to "those cases in which a person was convicted of a felony but later was exonerated, generally due to evidence that had been available but was not sufficiently utilized at the time of the conviction, new evidence that was not previously available, or in some cases the confession of the actual culprit."

[22] Edwin M. Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (Garden City, NY: Garden City Publishing, 1932), vi. See also MacNamara, "Convicting the Innocent," 60. MacNamara cites the Pennsylvania murder convictions of three teenagers (Joseph Antoniewicz, Edward Park, and William Hollowell), who spent 16 years in prison before the judge ruled, "that the murder never occurred."

[23] Brandon and Davies, *Wrongful Imprisonment*, 19. The Home Secretary's role in investigating alleged miscarriages of justice and referring cases back to Courts of Appeal has been replaced by the Criminal Cases Review Commission, which was established in 1997. However, the Home Secretary retains his role with respect to the exercise of the Royal Prerogative of Mercy.

compensation, while acquittal by collapse of a prosecution, by magistrate, by judge, by jury or by appeal court, does not."[24]

The artificiality of the various distinctions used to classify 'wrongful conviction' are aptly demonstrated by the Supreme Court of Canada in the David Milgaard case. The Court devised three standards by which a court could find that a conviction represented a miscarriage of justice: (1) when the court is *satisfied beyond a reasonable doubt* that the individual is innocent (the highest standard), (2) when the court is *satisfied on a preponderance of the evidence* that the individual is innocent, and (3) when the court considers new evidence, which is reasonably capable of belief, and which *could reasonably be expected to have affected the verdict* (the lowest standard).[25] In *Milgaard*, the court was not satisfied beyond a reasonable doubt, nor on a preponderance of the evidence, that Milgaard was innocent. However, the court was satisfied that the new evidence presented was reasonably capable of belief and could reasonably have affected the verdict. Thus, the court advised the Minister of Justice to quash the conviction and to order a new trial under section 690(a) of the *Criminal Code*.[26] However, the court's

---

[24] Anderson, "Miscarriages," 73-74. Anderson himself was accused of the 1978 Sydney Hilton Hotel bombing, but was acquitted following a high-profile trial. He believes that the most useful definition of 'miscarriage of justice' is: "*a serious wrong within the justice system* involving any or all three of the following: (a) wrongful accusation or arrest by police, (b) wrongful treatment by the courts, most often including wrongful conviction, and (c) wrongful penalty or serious abuse in prison" (emphasis in original).

[25] Emphasis added. See *Reference re Milgaard* (1992), 90 D.L.R. (4th) 1 (S.C.C.), 3-4.

[26] It was then open to the provincial Attorney General to decide whether or not to reprosecute.

decision was cast "in a new light"[27] when DNA evidence later proved that it was not Milgaard's semen on the victim's clothing, thereby providing compelling evidence of his innocence. The point is not that the Supreme Court's "caution regarding the impact of the fresh evidence was misplaced, but to demonstrate how artificial such distinctions must inevitably be."[28]

In the major studies conducted in the United States[29] and in England,[30] distinctions are made between *legal* and *factual* innocence in order to focus subsequent analysis on the *factually*[31] innocent. *Legal* innocence refers to individuals whose convictions are quashed due to errors of law (e.g., inadmissible evidence), and to those acquitted by the courts. Although in the eyes of the Canadian legal system, individuals who are acquitted or have their convictions quashed are *legally* innocent, this does not necessarily signify that the

---

[27] The Association in Defence of the Wrongly Convicted, "Wrongful Convictions: An International Comparative Study," Unpublished report submitted to the Inquiry Into Proceedings Against Guy Paul Morin (November 17, 1997): 10, 1-182.

[28] *Ibid.*

[29] Huff et al., *Convicted But Innocent*; Bedau and Radelet, "Miscarriages of Justice"; Borchard, *Convicting the Innocent.*

[30] Brandon and Davies, *Wrongful Imprisonment.*

[31] Borchard, *Convicting the Innocent*; Erle Stanley Gardner, *The Court of Last Resort* (New York: William Sloane Associates, 1952); Jerome Frank and Barbara Frank, *Not Guilty* (Garden City, N.Y.: Doubleday & Co., 1957); Edward D. Radin, *The Innocents* (New York: William Morrow & Co., 1964); Eugene B. Block, *The Vindicators* (London, Eng.: Alvin Redman, 1964); Brandon and Davies, *Wrongful Imprisonment*; Bedau and Radelet, "Miscarriages of Justice"; Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Buffalo, NY: Prometheus Books, 1991); Huff et al., *Convicted But Innocent.*

individuals are, *in fact*, innocent.[32] Conversely, *factual* innocence refers to individuals who have been wrongfully convicted and/or imprisoned for crimes they did not, in fact, commit (i.e., they are "behaviourally innocent"[33] of the crimes for which they were convicted). Huff further distinguishes *factual* and *legal* innocence by referring to convicted innocents as *false positives*--a Type II error--and guilty offenders who "beat the system" or who are "not apprehended" as *false negatives*--a Type I error.[34]

The criteria used for case selection in research projects may also differ, which is closely related to the question of what test or standard ought to be used to consider a conviction 'wrongful.' For example, Bedau and Radelet include in their 350-case catalogue only those cases "in which...the defendant was convicted of homicide or sentenced to death for rape and...when either...no such crime actually occurred or...the defendant was legally and physically uninvolved in the crime."[35] In the Huff et al.[36] study, only 'convicted innocents' who have been clearly exculpated are included: "people who

---

[32] For example, O. J. Simpson is *legally* innocent, however, there remains considerable doubt about his *factual* innocence. See Vincent Bugliosi, *Outrage: The Five Reasons Why O.J. Got Away With Murder* (W. W. Norton & Co., 1996); Marcia Clark with Teresa Carpenter, *Without a Doubt* (New York: Penguin, 1997); Alan Dershowitz, *Reasonable Doubts: The O. J. Simpson Case and the Criminal Justice System* (New York: Simon & Schuster, 1996); Toni Morrison and Claudia Brodsky Lacour, ed., *Birth of a Nation'hood: Gaze, Script, and Spectacle in the O. J. Simpson Case* (New York: Pantheon Books, 1997).

[33] This term has been utilized by Bedau and Radelet, "Miscarriages of Justice, and by Huff et al., *Convicted But Innocent*.

[34] C. Ronald Huff, "Wrongful Conviction: Societal Tolerance of Injustice," *Research in Social Problems and Public Policy* 4 (1987): 101, 99-115.

[35] Bedau and Radelet, "Miscarriages of Justice," 45.

[36] Huff et al., *Convicted But Innocent*, 10. Obviously cognizant of the operational definition problem, Huff et al. take pains to explain their rationale for case selection. The authors also note that their book is not "about injustice broadly defined, but about one special aspect of injustice, the conviction of an innocent person."

have been arrested on criminal charges, although not necessarily armed robbery, rape or murder; who have either pleaded guilty to the charge or have been tried and found guilty; and who, notwithstanding plea or verdict, are in fact innocent."[37] Conversely, in Wilson's examination of wrongful convictions in Australia, no assumptions of guilt or innocence are proffered; he confines analysis to those cases in which "guilt was not established beyond reasonable doubt."[38] Therefore, some researchers confine their analysis to convicted innocents who have been officially exonerated because of indisputable error,[39] while others do not.[40] In other studies, the authors fail to specifically operationalize 'wrongful conviction,' but nevertheless focus their case analyses on the factually innocent.[41] In most research projects from various countries, official exoneration refers to convictions where it was later determined the alleged crime never occurred or the convicted person was not the perpetrator;[42] to persons granted free pardons, or, when convictions are quashed after a

---

[37] *Ibid.*, 10. Huff et al. determine an individual to be 'clearly exculpated' "either because the alleged crime was never committed or, more frequently, the convicted person was not the perpetrator." See also Brandon and Davies, *Wrongful Imprisonment*, 19. Brandon and Davies define "wrongful imprisonment" as those who have been wrongfully convicted and imprisoned for "a crime [they] did not in fact commit and who [have] been sent to prison on the basis of this conviction."

[38] Paul R. Wilson, "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia," *Australian Journal of Social Issues* 24, no. 1 (February 1989): 5, 3-22.

[39] Borchard, *Convicting the Innocent*; Brandon and Davies, *Wrongful Imprisonment*; Bedau and Radelet, "Miscarriages of Justice"; Huff et al., *Convicted But Innocent*.

[40] For example, see Wilson, "When Justice Fails."

[41] Gardner, *The Court of Last Resort*; Frank and Frank, *Not Guilty*; Radin, *The Innocents*; Yant, *Presumed Guilty*. See also James McCloskey, "Convicting the Innocent," *Criminal Justice Ethics* (Winter/Spring 1989): 53-59.

[42] Borchard, *Convicting the Innocent*; Huff et al., *Convicted But Innocent*.

case is referred to the Court of Appeal by the Home Secretary,[43] or the Home Secretary's counterpart in other countries, such as Canada and the United States;[44] and to persons who receive indemnification following state recognition of conviction error.[45]

In some instances, case selection is based upon subjective judgments when proof of innocence is less than definitive.[46] This subjective selection of what qualifies as 'proof of innocence' in non-definitive cases has spawned academic disagreements. The Bedau and Radelet[47] study, for example, has been criticized as "seriously flawed," particularly with respect to the authors' "reliance on material irrelevant to the risk of wrongful executions and their method of determining innocence."[48] Markman and Cassell charge that Bedau

---

[43] Brandon and Davies, *Wrongful Imprisonment*, 19. Court of Appeal referrals are now made by the Criminal Cases Review Commission.

[44] The federal Minister of Justice is Canada's counterpart to the Home Secretary in England.

[45] Bedau and Radelet, "Miscarriages of Justice."

[46] In some cases, for example, there may be strong doubts about an individual's guilt, but the crime occurred decades earlier and there is a lack of physical evidence, such as testable DNA samples, to prove innocence.

[47] Bedau and Radelet, "Miscarriages of Justice," 23.

[48] See Markman and Cassell, "Protecting the Innocent," 121-122.

and Radelet are overly subjective in their determination of 'proof of innocence.'[49] This debate is fueled, in part, by ideological disagreements about capital punishment and whether the risks of executing the innocent outweigh the benefits of the death penalty.[50] Notwithstanding incontrovertible proof of innocence, disagreements as to the appropriate

---

[49] *Ibid.*, 126. Also see the following trilogy of articles: Richard A. Leo and Richard J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 429-496; Paul Cassell, "Protecting the Innocent From False Confessions and Lost Confessions--And From *Miranda*, *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 497-556; Richard A. Leo and Richard J. Ofshe, "Using the Innocent To Scapegoat *Miranda*: Another Reply to Paul Cassell," *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 557-577. Cassell challenges Leo's and Ofshe's methodology and argues that "*Miranda* warning and waiver requirements present more risks to the innocent [false confessor] than they would prevent" (p. 558). Conversely, Leo and Ofshe, amongst others, point out the "ideological nature of [Cassell's] scholarship" (p. 557), and argue that Cassell has "a larger ideological agenda: abolishing *Miranda* and promoting state power in the criminal justice system" (p. 563). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court "directly addressed the policy problem of psychologically-based [interrogation] methods by mandating that police issue a set of code-like constitutional warnings and elicit a waiver from suspects prior to custodial questioning" (Leo and Ofshe, "The Consequences of False Confessions," 433).

[50] Bedau and Radelet, "Miscarriages of Justice"; Markman and Cassell, "Protecting the Innocent." Also see Hugo A. Bedau and Michael L. Radelet, "The Myth of Infallibility: A Reply to Markman and Cassell," *Stanford Law Review* 41, no. 1 (November 1988): 169-170, 161-170. Bedau and Radelet counter that the Markman and Cassell critique is "an effort to protect the myth of systemic infallibility: the myth that prosecutors in capital cases never indict an innocent person; that if they do the trial courts can be counted on to acquit; that if the courts convict they sentence to prison rather than to death; that if courts do convict and sentence to death the appellate courts may be relied on to rectify an erroneous conviction; and that if the appellate courts fail, then the chief executive will come to the rescue." Bedau and Radelet reject these 'myths' and "stand firmly behind every conclusion reached in [their] original essay."

criteria to be used to identify wrongful conviction are bound to persist.[51] For research and policy purposes, it may be prudent to categorize wrongful convictions according to specified standards of proof of innocence (e.g., incontrovertible, probable, and unsafe verdict). Although all can reasonably be considered 'miscarriages of justice,' identifying those individuals whose innocence is proven could at least provide more definitive and quantifiable estimates of this segment of the wrongful conviction problem.[52] Thus, the operationalization of 'wrongful conviction' is a difficult, but important task, which depends, in part, upon the particular values and interests of researchers and/or the exigencies of specific research projects.[53]

Although from a legal perspective there is no distinction between *legal* and *factual* innocence, this should not exclude 'other' perspectives from wrongful conviction research and analysis. There is, in fact, a distinction between an acquitted individual who "beats the system," and a factually innocent person proven beyond any semblance of doubt to be

---

[51] Of course, disagreements also arise as to whether or not distinctions should be made between the *factually* and *legally* innocent (discussed briefly *infra*). See Rattner, "Convicted But Innocent," 284. As Rattner puts it, "by limiting the data base to 'pure' cases in which error has been acknowledged officially, rather than merely claimed, we can have far more confidence in the findings and their implications."

[52] Although miscarriages of justice take many forms, I believe that the wrongful conviction of the factually innocent constitutes the worst form of injustice.

[53] Obtaining complete information in suspected cases of wrongful conviction is an inherent problem in wrongful conviction research, and this further exacerbates the task of 'determining proof of innocence.' Moreover, the potential for cross-national research is hindered when various operational definitions are used.

innocent of the crime for which s/he was convicted.[54] Furthermore, distinguishing between legal and factual innocence should not portend doom for the sacred legal principle of the presumption of innocence.[55] However, Kaiser argues that this distinction creates a "hierarchy of acquittees," which "calls into question the basic meaning attributed to a not guilty verdict."[56] In his view, a "presumptive direction for compensation could be twofold: (1) that the person whose conviction is overturned is *ipso facto* wrongfully convicted or is a victim of a miscarriage of justice, and (2) this unjustly convicted (and imprisoned) person would be presumptively entitled to compensation upon application."[57] Nevertheless, I agree with Huff et al. who argue that "there is a need to examine *both* kinds of innocence."[58]

These constitute some of the thorny definition problems in the wrongful conviction field. As such, most major research projects in this field take pains to clearly articulate the operational definitions used. This not only facilitates scrutiny of 'proof of innocence' criteria, but also allows for cross-national comparisons of various research studies.

---

[54] Obviously, many individuals who are acquitted are factually innocent; however, others are not, and therefore, have "beaten the system." See Huff et al., *Convicted But Innocent*, 11, who use the well-known *Miranda* and *Escobedo* acquittals as examples of individuals "whose factual guilt, rather than legally established guilt, has not been effectively disputed."

[55] Kaiser, "Wrongful Conviction," 139. As Lamer, J, noted in *Grdic v. R.* (1985), 19 C.C.C. (3d) 289 (S.C.C.), "there are not two different kinds of acquittal in the Canadian system and "to reach behind the acquittal, to qualify it, is, in effect, to introduce the verdict of 'not proven,' which is not, has never been and should not be part of our law."

[56] *Ibid.*

[57] *Ibid.*, 140. The question of the proper ambit for compensation is beyond the scope of this research.

[58] Huff et al., *Convicted But Innocent*, 12.

III. Forms of Literature in the Wrongful Conviction Field

The existing literature in the wrongful conviction field can be categorized into five major genres; (i) case studies, (ii) socio-psychological literature relating to human perception and memory, (iii) analyses of compilations of wrongful conviction cases, (iv) Commissions of Inquiry, and (v) legal literature.[59] Newspapers and other media also constitute an important element of the literature as they reveal cases that may otherwise remain unknown to researchers and the public, and provide a useful mechanism by which to gauge various ideological viewpoints concerning wrongful convictions and the media's role in such errors.[60]

(i) Case Study Literature

Case study analyses of individual wrongful convictions constitute the overwhelming majority of literature in this field. Case studies detail hundreds of wrongful convictions

---

[59] For thesis purposes, the literature I refer to as "legal" includes only legal databases (e.g., Quicklaw), section 690 literature, case law and the historical evolution and current operation of sections 690 and 748 (Royal Prerogative of Mercy) of the *Criminal Code*. This review, therefore, excludes discussion of a broad range of additional 'legal' literature, such as police culture and practices, legal aid, and juries. Literature pertaining to the historical evolution of sections 690 and 748, and case law gleaned from Quicklaw databases is discussed in Chapters 3 and 4.

[60] For example, see Adrian Howe, "Chamberlain Revisited: The Case Against the Media," in *Criminal Law & Procedure: Proof, Defences, and Beyond*, ed. Jennie Abell and Elizabeth Sheehy, (North York, Ont.: Captus Press, 1995), 144-151; John Lofton, *Justice and the Press* (Toronto: Saunders, 1966). Lofton describes several criminal convictions in the United States which later proved to be wrongful, and the media's seminal role in these convictions. See also E. S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

and executions, both alleged and proven, in the United States,[61] Canada,[62] the United Kingdom,[63] Australia,[64] New Zealand,[65] and many other countries, with varying degrees of success in terms of the analytical, legal and/or research skills of the authors. Some of these analyses are written by the wrongfully convicted themselves.[66] In general, case studies are valuable because they illustrate the genesis of particular wrongful convictions and their causes. Similar to findings expressed in other genres, these causal factors are

---

[61] See Sam Chaiton and Terry Swinton, *Lazarus and the Hurricane: The Untold Story of the Freeing of Rubin "Hurricane" Carter* (Toronto: Penguin Books, 1991); Cynthia L. Cooper and Sam Reese Sheppard, *Mockery of Justice: The True Story of the Sheppard Murder Case* (Boston: Northeastern University Press, 1995); L. Dinnerstein, *The Leo Frank Case* (New York: Columbia University Press, 1968); Ludovic Kennedy, *The Airman and the Carpenter: The Lindbergh Kidnapping and the Framing of Richard Kauptmann* (New York: Viking Penguin, 1985); Willard J. Lassers, *Scapegoat Justice: Lloyd Miller and the Failure of the American Legal System* (Bloomington, Ind.: Indiana University Press, 1973).

[62] See Isabel LeBourdais, *The Trial of Steven Truscott* (Philadelphia: J. B. Lippincott, 1966); M. L. Friedland, *Cases and Materials on Criminal Law and Procedure*, 4th ed. (Toronto: University of Toronto Press, 1974), 694-775; David R. Williams, *With Malice Aforethought: Six Spectacular Canadian Trials* (Victoria, B.C.: Sono Nis Press, 1993), 135-167. Williams believes that Steven Truscott is guilty and in a postscript to his chapter about the Truscott case (p. 166-167), he voices a similar view with respect to the Supreme Court's recommendation to quash David Milgaard's conviction and to order a new trial. He refers to the Court's decision as "extraordinary" and one that "has pleased no one... ."; Brian E. Burtch, "Reflections on the Steven Truscott Case," *Canadian Criminology Forum* 3 (Spring 1981): 131-145; Kirk Makin, *Redrum the Innocent* (Toronto: Penguin Books Canada, 1993); Michael Harris, *The Judas Kiss*, M & S Paperback ed. (Toronto: McClelland & Stewart, 1996); Michael Harris, *Justice Denied: The Law Versus Donald Marshall* (Toronto: Macmillan, 1986; reprint, Toronto: HarperCollins, 1990; page citations are to the reprint edition); Jacques Hebert, *The Coffin Affair*, General Paperback ed. (Montreal: Editions du Jour, 1964; reprint, Montreal: Editions du Jour, 1982; page citations are to reprint edition); Carl Karp and Cecil Rosner, *When Justice Fails: The David Milgaard Story* (Toronto: McClelland & Stewart, 1991); Mick Lowe, *Conspiracy of Brothers*, Seal ed. (Toronto: Bantam-Seal, 1989); Steven Truscott, *The Steven Truscott Story*, Pocket Book ed. (Montreal: Montreal Standard, 1971); Joy Mannette, ed., *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992).

[63] Kennedy, *10 Rillington Place*; Bentley with Dening, *Let Him Have Justice*.

[64] Lindy Chamberlain, *An Autobiography: Through My Eyes*, Mandarin Paperback ed. (London, Eng.: Mandarin Paperbacks, 1991).

[65] David A. Yallop, *Beyond Reasonable Doubt?* (Auckland, N.Z.: Hodder and Stoughton, 1978).

[66] For example, see Chamberlain, *An Autobiography*; Truscott, *The Steven Truscott Story*.

fairly consistent across cases and countries (discussed *infra*). One of the strengths of case study analyses is that they provide in-depth dissection of individual cases, which is invaluable to our understanding of the wrongful conviction phenomenon, including the trauma inflicted on those who suffer such injustices. Many case studies also illustrate the complex interplay of factors that contribute to wrongful convictions, which, in many cases, conforms to academic research findings. However, the major limitation of case studies is that they fail to provide a more compelling conduit for reform in their inability to synthesize and analyze case compilations. Although case studies are common, this type of research isolates individual wrongful conviction cases from others and, therefore, tends to perpetuate conceptions that such miscarriages are rare. It is important to determine patterns across wrongful conviction cases so as to increase our understanding of the systemic structural elements of the criminal justice system that contribute to such convictions. Such knowledge is necessary in order to conceive meaningful safeguards and to better understand the potential extent of the wrongful conviction problem. According to research conducted in the United States, "a high volume of prosecutions, even if 99.5% accurate when guilty verdicts are rendered, can still generate about 10,000 erroneous convictions for index crimes in a single year" in that country alone.[67] Although the "dark

[67] Huff et al., *Convicted But Innocent*, 62.

figure of innocence"[68] cannot be definitively determined, the Huff et al. study is certainly cause for alarm, particularly in view of the fact that the American legal system has many similarities to the Canadian system (e.g., adversarial legal system).

(ii) Socio-Psychological Literature[69]

A second common form of wrongful conviction literature concerns the socio-psychological study of human perception and memory, particularly with respect to eyewitness identification.[70] The unreliability of eyewitness identification and its major role

---

[68] Bedau and Radelet, "Miscarriages of Justice," 83.

[69] This body of literature is extensive; therefore, an exhaustive review will not be attempted here. However, some of this literature is reviewed to illustrate how such research relates to the wrongful conviction problem.

[70] See Elizabeth F. Loftus, *Eyewitness Testimony* (Cambridge, Mass.: Harvard University Press, 1979). Loftus notes that "nearly all of the theoretical analyses of the [eyewitness] process divide it into three stages" (p. 21). The perception of the original event, "in which information is encoded, laid down, or entered into a person's memory system," is referred to as the *acquisition* stage. The *retention* stage refers to the "period of time that passes between the event and the eventual recollection of a particular piece of information" (p. 21). The *retrieval* stage occurs when a person recalls this stored information (p. 21). The author also explains the various factors that influence an eyewitness's ability to perceive events; for example, the violence of the event and exposure time (p. 23-32). Influencing factors are also inherent to witnesses themselves, such as the amount of stress or fear someone experiences or the "prior knowledge or expectations that a witness brings to bear upon the event" (p. 32). See also Gary L. Wells, *Eyewitness Identification: A System Handbook* (Toronto: Carswell, 1988), 1-9.

in wrongful convictions is well documented in psychological[71] and other literature,[72] and has prompted extensive socio-psychological research to enhance our understanding of how human memory and perception function. One of the objectives of such research is to develop procedures to safeguard against misidentifications.[73] This research includes

---

[71] *Ibid.*, 179. Loftus argues that the "unreliability of eyewitness identification evidence poses one of the most serious problems in the administration of criminal justice and civil litigation." See also Michael R. Leippe and Gary L. Wells, "Should We Be Partial to Partial Identification," *Criminal Justice and Behavior* 22, no. 4 (December 1995): 373-385; Robert Buckhout, "Eyewitness Testimony," *Scientific American* 231, no. 6 (December 1974): 23-31; Felice J. Levine and June Louin Tapp, "The Psychology of Criminal Identification: The Gap From *Wade* to *Kirby*," *University of Pennsylvania Law Review* 121 (1973): 1079-1131.

[72] Michael L. Radelet, Hugo L. Bedau and Constance Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: Northeastern University Press, 1992); Barrie Anderson with Dawn Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (Halifax: Fernwood Publishing, 1998); Ronda Bessner, "Eyewitness Identification in Canada," *The Criminal Law Quarterly* 25 (1982-83): 313-347; David Deutscher and Heather Leonoff, *Identification Evidence* (Canada: Thomson Professional Publishing, 1991); Arye Rattner, "Social Science v. The Judicial System: The Impact of the Accumulated Knowledge of Eyewitness Identification on Criminal Procedures," *International Journal of the Sociology of Law* 23, no. 2 (June 1995): 97-105; Gross, "The Risks of Death"; Samuel R. Gross, "Loss of Innocence: Eyewitness Identification and Proof of Guilt," *The Journal of Legal Studies* 16, no. 2 (June 1987): 395-453.

[73] For example, see Wells, *Eyewitness Identification*, ix. Wells argues that a "significant proportion of the errors that occur in eyewitness identification can be prevented by the use of proper procedures." He also notes that police "often use procedures that significantly deviate from those that have been proven safe, effective and reasonable for obtaining identification evidence from eyewitnesses."

studies of cross-ethnic identifications,[74] the benefits[75] and drawbacks[76] of using expert

[74] For example, see Arye Rattner, Gabriel Weimann, and Gideon Fishman, "Cross-Ethnic Identifications and Misidentifications by Israelis," *Sociology and Social Research* 74, no. 2 (January 1990): 73-79; June Chance, Alvin G. Goldstein, and Loren McBride, "Differential Experience and Recognition Memory For Faces," *The Journal of Social Psychology* 97 (1995): 243- 253; John C. Brigham and Roy S. Malpass, "The Role of Experience and Contact in the Recognition of Faces of Own- and Other-Race Persons," *Journal of Social Issues* 41, no. 3 (1985): 139-155. Brigham and Malpass argue that "people are better able to identify members of their own race than members of another race" (p. 139).

[75] Roger B. Handberg, "Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury," *American Criminal Law Review* 32, no. 4 (Summer 1995): 1063, 1013-1064. Although Handberg is an attorney, not a psychologist, he is familiar with much of the eyewitness identification research. He notes that jurors misunderstand certain aspects of human memory and perception and argues that over the past 20 years, "few courts have been receptive to eyewitness expert testimony," likely due to their concerns about an "expert testifying about a witness's credibility." See also F. C. Woocher, "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification," *Stanford Law Review* 29 (May 1977): 969-1030; Gary L. Wells, "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables," *Journal of Personality and Social Psychology* 36, no. 12 (1978): 1546-1557; Loftus, *Eyewitness Identification*, 191-203.

[76] Michael McCloskey and Howard E. Egeth, "Eyewitness Identification: What Can a Psychologist Tell a Jury?," *American Psychologist* 38, nos. 1-6 (May 1983): 550-551, 550-563. In this article, the authors examine the arguments offered in favour of the use of expert eyewitness testimony and suggest that "it is by no means clear that expert psychological testimony about eyewitnesses would improve jurors' ability to evaluate eyewitness testimony," and can have detrimental effects, such as creating a "battle of experts" in court. However, they also note that the data do not "rule out the possibility that expert testimony could have beneficial effects" but that such testimony should only be offered "if there is clear evidence that [it] has salutary effects" (p. 558). See also Donald N. Bersoff, "Psychologists and the Judicial System," *Law and Human Behavior* 10, nos. 1-2 (June 1986): 151-165; Robert G. Pachella, "Personal Values and Expert Testimony," *Law and Human Behavior* 10, nos. 1-2 (June 1986): 147, 145-150, who argues that it is a mistake to bring experimental psychology expertise into courts because of the "lack of generalizability and the misrepresentation of results."

psychological testimony concerning eyewitness identification in courts,[77] applied socio-psychological research and its applicability to lineup and photo identification procedures,[78] the role eyewitness testimony plays in the legal system,[79] and recommendations to

---

[77] See Bessner, "Eyewitness Identification in Canada," 337. Bessner notes that Canadian courts are "reluctant to permit an expert to testify as to the issue of identification" and that trial judges "have consistently excluded expert evidence on the ground that to allow a psychologist to testify as to the perceptions of an eyewitness is to usurp the functions of the jury."

[78] See Wells, *Eyewitness Identification*. Wells provides many practical recommendations with respect to the proper procedures to be used when police interact with potential eyewitnesses. Lineups, photo-spreads, mugshots, and composite drawings are briefly described and policy recommendations made as to how to minimize eyewitness error and thereby protect the innocent. See also A. M. Levi and Noam Jungman, "The Police Lineup: Basic Weaknesses, Radical Solutions," *Criminal Justice and Behavior* 22, no. 4 (December 1995): 347-372; Woocher, "Did Your Eyes Deceive You?"

[79] Loftus, *Eyewitness Identification*; Deutscher and Leonoff, *Identification Evidence*. Deutscher and Leonoff discuss how Canadian courts deal with the issue of eyewitness identifications with respect to judicial warnings to juries concerning the unreliability of such evidence. Although such warnings are given, the strength of these warnings differ depending upon the province and the circumstances surrounding individual cases (p. 53-69). Furthermore, there is no legislation in Canada "governing the means by which the police obtain pre-trial eyewitness identification" (p. 109). See also A. Daniel Yarmey, "Ethical Responsibilities Governing the Statements Experimental Psychologists Make in Expert Testimony," *Law and Human Behavior* 10, nos. 1-2 (June 1986): 101-115.

minimize eyewitness error to protect against wrongful conviction.[80] Experimental studies using "simulated or staged-crime" methodologies "have tended to find that false identifications occur with surprising frequency."[81] Bessner argues that:

> The courts in Canada have failed to fully comprehend the inherent unreliability of eyewitness identification evidence. This is reflected in the fact that individuals continue to be convicted after having been subjected to flawed police practices and improper procedures at trial. Guilty verdicts have been rendered in cases in which not one member of the line-up resembled the accused, the sole eyewitness suffered from impaired vision, photographs were improperly shown to the eyewitness and the trial judge did not properly instruct the jury.[82]

Wells makes a useful distinction between approaches used by eyewitness testimony researchers: in the *system variable* approach, the "critical variables" that are experimentally manipulated "can also be controlled in actual cases by people in the criminal justice system" (e.g., the structure and size of a police lineup).[83] In contrast, *estimator variables* are "sources of eyewitness error or accuracy that are beyond the

---

[80] See Wells, *Eyewitness Identification*; Loftus, *Eyewitness Testimony*; Woocher, "Did Your Eyes Deceive You?"; Nathan R. Sobel, *Eyewitness Identification: Legal and Practical Problems*, 2d ed. (Deerfield, Ill.: Clark, Boardman, & Callaghan, 1994); Levine and Tapp, "The Psychology of Criminal Identification"; Frank O'Connor, "'That's the Man': A Sobering Study of Eyewitness Identification and the Polygraph," *St. John's Law Review* 49, no. 1 (Fall 1974): 1-30.

[81] Gary L. Wells, "What Do We Know About Eyewitness Identification?" *American Psychologist* 48, no. 5 (May 1993): 554, 553-571. Also see Gross, "Loss of Innocence." Gross approaches the issue of eyewitness identification by asking a different question: why are eyewitness misidentifications so rare? (p. 396). The predominant focus, he argues, has been on "one side of the problem of eyewitness identification;" why such mistakes "are so common, and how [they can] be prevented." Gross concedes that eyewitness misidentification "is by far the most frequent cause of erroneous convictions," but that "in absolute terms they are rare." Gross's core argument is "that eyewitness testimony is frequently less important to the determination of the identity of a criminal than it appears to be because the eyewitness evidence is corroborated by other information" (p. 405). Nevertheless, corroboration "by other information" can be as tenuous as erroneous eyewitness misidentification.

[82] Bessner, "Eyewitness Identification in Canada," 346-347.

[83] Wells, "What Do We Know," 555; Levi and Jungman, "The Police Lineup."

control of the criminal justice system"[84] (e.g., the amount of time the eyewitness viewed the criminal event). Wells argues that both approaches are required for a "complete understanding of the social and cognitive processes that can affect eyewitness testimony."[85]

Research indicates that perception and memory are decision-making processes "affected by the totality of a person's abilities, background, attitudes, motives and beliefs, by the environment and by the way his recollection is eventually tested."[86] Psychological research also reveals the factors that limit a person's ability to give complete accounts of past events or to identify with complete accuracy the people who were involved: (1) the insignificance - "at the time and to the witness - of the events that were observed,"[87] (2) the length of the period of observation,[88] (3) the conditions under which events are observed (e.g., lighting, inclement weather conditions, stress),[89] (4) the observer's physical

---

[84] Wells, "What Do We Know," 555.

[85] *Ibid.*

[86] Buckhout, "Eyewitness Testimony," 24.

[87] *Ibid.* Also see Levine and Tapp, "The Psychology of Criminal Identification."

[88] Buckhout, "Eyewitness Testimony," 25; Woocher, "Did Your Eyes Deceive You?"; Peter N. Shapiro and Steven Penrod, "Meta-Analysis of Facial Identification Studies," *Psychological Bulletin* 100, no. 2 (1986): 139-156; Bessner, "Eyewitness Identification in Canada," 314; Deutscher and Leonoff, *Identification Evidence*, 4-5.

[89] Woocher, "Did Your Eyes Deceive You"; Buckhout, "Eyewitness Testimony"; Wells, "What Do We Know"; Loftus, *Eyewitness Identification*; Bessner, "Eyewitness Identification in Canada," 315; Deutscher and Leonoff, *Identification Evidence*, 6-7.

condition (e.g., age, vision capabilities),[90] (5) witness prejudices and biases,[91] and (6) cross-racial identifications.[92] Socio-psychological research also demonstrates the significance of improper police procedures during the identification process.[93] For example, police may, either consciously or unconsciously, draw undue attention to a suspect in a lineup or in a photo array, and lineups may consist of suspects who bear no similarity to each other; and in some cases, may be of different ethnic groups.[94] Due to the variety of social-psychological variables which impact the accuracy of memory and perceptions of criminal events, Levine and Tapp argue that the legal system "has a particular responsibility in regard to the effect of psychological and social structural variables at and on actual identification proceedings, such as lineups."[95] Suggestions to minimize deficient or suggestive identification procedures in police lineups include:

---

[90] Buckhout, "Eyewitness Testimony"; Levine and Tapp, "The Psychology of Criminal Identification"; Deutscher and Leonoff, *Identification Evidence*.

[91] Levine and Tapp, "The Psychology of Criminal Identification"; Brigham and Malpass, "The Role of Experience"; Woocher, "Did Your Eyes Deceive You"; Deutscher and Leonoff, *Identification Evidence*.

[92] Wells, "What Do We Know"; Brigham and Malpass, "The Role of Experience"; Levine and Tapp, "The Psychology of Criminal Identification"; Chance, Goldstein, and McBride, "Differential Experience"; Deutscher and Leonoff, *Identification Evidence*. The scientific strength of cross-racial identification studies is far from certain, however. See Yarmey, "Ethical Responsibilities" and Pachella, "Personal Values."

[93] Bessner, "Eyewitness Identification in Canada," 323. Bessner notes that "Canadian case law is replete with examples of improprieties in...lineup procedures." For example, Bessner cites the case of *R. v. Armstrong*, whereby the proprietor of a confectionery store and two boys who witnessed the robbery, described the offender as oriental. A six-man lineup was constructed, and the only oriental in the lineup was the accused. See also Wells, *Eyewitness Identification*.

[94] Wells, "What Do We Know"; Buckhout, "Eyewitness Testimony"; Levine and Tapp, "The Psychology of Criminal Identification."

[95] Levine and Tapp, "The Psychology of Criminal Identification," 1109.

(1) structuring lineups to contain at least six people, (2) choosing lineup suspects of the same approximate height, weight, age, race, hair and skin colour, (3) ensuring witnesses do not discuss their identifications with other witnesses, and (4) ensuring that the police officer administering the lineup does not know which lineup member is the suspect.[96] As the literature demonstrates, eyewitness identification is a complex process which involves psychological, systemic, and social and cultural factors.[97]

(iii) Compilation Research of Wrongful Convictions

Until 1998, only American and British researchers had analyzed compilations of wrongful conviction cases. The two major research studies of wrongful conviction in the United States are those conducted by Huff et al.[98] and Bedau and Radelet.[99] Huff et al. analyze more than 500 wrongful convictions of the factually innocent in order to assess how and why they happen, and to whom. The authors then make policy recommendations to minimize such injustices and are the first researchers to attempt to quantify the extent of

---

[96] Brigham and Malpass, "The Role of Experience"; Sobel, *Eyewitness Identification*; C.A. Elizabeth Luus and Gary L. Wells, "Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups," *Personality and Social Psychology Bulletin* 16 (1990): 106-117; Leippe and Wells, "Should We Be Partial."

[97] Rattner, "Social Science v. The Judicial System."

[98] Huff et al., *Convicted But Innocent.*

[99] Bedau and Radelet, "Miscarriages of Justice."

the wrongful conviction problem.[100] Huff et al. estimate nearly 10,000 wrongful convictions for index crimes each year in the United States.[101]

In the Bedau and Radelet study of 350 potentially capital cases, the main objective was to reach a better understanding of such miscarriages in the United States during this century. These two studies use different 'proof of innocence' criteria and offence categories, and therefore, are not strictly comparable. However, many of the major causal factors are the same, as they are in wrongful conviction research conducted in other countries.[102] Other United States compilations include Borchard's examination of 65

---

[100] Huff et al., *Convicted But Innocent*, 53-54. As the authors note, there is "no accurate, scientific way to determine how many innocent people are convicted," therefore, they constructed a questionnaire to "study the perception of [the] prevalence [of wrongful conviction] by criminal justice personnel," in the State of Ohio. The authors acknowledge that such perception research "measures only that; it does not measure the extent or prevalence of a phenomenon" (p. 57).

[101] *Ibid.*, 61-62. Most questionnaire respondents (presiding judges of Ohio county pleas courts, Ohio county prosecuting attorneys, Ohio county public defenders, Ohio county sheriffs and chiefs of police of seven major cities, and state attorneys general) perceived that nearly 1% of all convictions were wrongful. The researchers chose the midpoint between zero and 1%, as a conservative perception estimate of annual wrongful convictions. Using the U.S. Department of Justice's Bureau of Justice Statistics for 1990, the "estimated total number of persons arrested and charged with index crimes was 2,848,400." Although conviction rates vary, the "best available data" indicates an average conviction rate of 70% of all felony arrests. This yields 9,969 estimated wrongful convictions for index crimes in a single year (2,848,000 [1990 arrests for index crimes] x 70% [conviction rate] = 1,993,880 [1990 convictions for index crimes] x .005 [wrongful conviction rate, 0.5%] = 9,969. See also McCloskey, "Convicting the Innocent," 54. McCloskey is the founder of Centurion Ministries, a New Jersey-based volunteer organization which assists those who they believe are innocent of the crimes for which they were convicted. Although McCloskey concedes that it is impossible to know the proportion of wrongful convictions, he suggests that "at least 10 percent of those convicted of serious and violent crimes are completely innocent."

[102] Although causal factors are similar across countries, the predominant causes may vary from one research project to another. For example, see Gross, "The Risks of Death," 485. In his discussion of some of the causes of erroneous convictions in capital cases in the United States, Gross argues that the major contributing factors differ in homicide versus other capital offences. For example, Gross notes that "false confessions are a much more common cause of errors for homicides than for other crimes."

wrongful conviction cases;[103] Gardner's book describing the evolution of the Court of Last Resort, and some of the cases investigated by this volunteer organization dedicated to freeing convicted innocents;[104] Frank and Frank's narration of 36 cases to illuminate the causes of wrongful convictions and what preventative measures may be initiated to minimize them;[105] Block's study of wrongful convictions in the United States and England which, he argues, demonstrates the increased integrity and diligence of the police and other criminal justice agents to minimize such miscarriages;[106] Radin's analysis of the causes of wrongful conviction in 80 cases in order to determine patterns of behaviour so that remedies and reforms can be proffered;[107] Yant's analysis of the causes of wrongful conviction in the United States and what can be done to minimize them;[108] and Humes'

---

[103] Borchard, *Convicting the Innocent*. The 65 cases (predominantly American cases, but also a few English cases) examined by Borchard range from 1812 to 1931, although most of the wrongful convictions occurred in the 20th century.

[104] Gardner, *The Court of Last Resort*. The 13 wrongful convictions discussed in Gardner's book involved convictions that occurred in the 1920s and 1930s. In one of the cases discussed, the individual was found to be properly convicted.

[105] Frank and Frank, *Not Guilty*. Jerome Frank was a judge in the United States. The 36 cases described in this book involve convictions between 1919 and 1948. Half of the cases discussed consist of short paragraphs; however, in many of these, pardons were granted, suggesting innocence.

[106] Block, *The Vindicators*, 267. Although Block concedes that some police officers, either through malice or incompetence, contribute to miscarriages of justice, this book emphasizes the overall integrity and persistence of police officers to ensure that innocent people are not wrongfully convicted. Block's choice of cases, therefore, highlights the efforts of police officers to vindicate individuals who they believed were wrongfully convicted.

[107] Radin, *The Innocents*. Radin discusses cases ranging from 1887 up to the 1960's. The author also estimates the prevalence of wrongful convictions by calculating the arrest and conviction rate for annual felonies in the United States and assuming that doubt may exist in 5% of these cases. This yields an estimated 14,000 doubtful convictions per year (p. 9). The criteria Radin uses for case selection includes only those cases "of conviction and imprisonment that have been fully recognized as miscarriages of justice in which either an unconditional pardon has been granted or a new trial ordered so that the indictment could be dismissed" (p. 13-14).

[108] Yant, *Presumed Guilty*.

fascinating exposé of the hysteria that arose in the United States in the 1980s, concerning the alleged proliferation of sexual-molestation rings. In many cases, these prosecutions resulted in wrongful convictions.[109] The common theme in all of these studies is the desire to understand the causal factors leading to wrongful conviction, so as to identify preventative strategies.

In England, Brandon and Davies,[110] starting with a list of wrongful conviction cases provided by the Home office, gathered information about individual cases from newspaper reports, trial transcripts, books, and interviews with the persons concerned. Their goal in analyzing a compilation of cases was to facilitate more generalizable understanding of the wrongful conviction problem in order to inform preventative measures. They identified 70 cases of "acknowledged wrongful imprisonment" in a 20-year period.[111] As this number is such a "small proportion of the total number of people" who were imprisoned between 1950 and 1970, the authors argue that "it is very hard to believe that it is anything like an

---

[109] Edward Humes, *Mean Justice: A Town's Terror, A Prosecutor's Power, A Betrayal of Innocence* (New York: Simon & Schuster, 1999). Although Humes focuses on the conviction of Pat Dunn, for the murder of his wife, the book also examines the alleged sexual-molestation cases that arose in the United States in the 1980s, as well as many other cases whereby the convictions were later proven to be wrongful (i.e., the person was found to be innocent).

[110] Brandon and Davies, *Wrongful Imprisonment*, 13. The authors note, however, that the list of cases provided by the Home Office was just that, a list: the Home office provided no details about these cases.

[111] *Ibid.*, 20. The wrongful convictions revealed by Brandon and Davies occurred between 1950 and 1970.

adequate measure of the true number of wrongful imprisonments."[112] Moreover, many wrongful convictions are revealed through sheer chance which further reinforces the authors' view that many wrongful convictions remain unknown, and therefore uncounted.[113] Eyewitness misidentification and confessions and statements allegedly made by accused persons were found to be the most dominant causes of wrongful conviction in their study. Brandon and Davies also compare the French, American, and British criminal justice systems in order to identify components which might be usefully incorporated into the British criminal justice system.[114]

David Rose examines the "crisis in English criminal justice" by highlighting the wrongful convictions of the Guildford Four, Birmingham Six, Tottenham Three, and other

---

[112] *Ibid.* See also A. A. S. Zuckerman, "Miscarriage of Justice - A Root Treatment," *The Criminal Law Review* (May 1992), 326-331, 323-345; Michael L. Radelet, William S. Lofquist and Hugo A. Bedau, "Prisoners Released From Death Row Since 1970 Because of Doubts About Their Guilt," *Thomas M. Cooley Law Review* 13 (1996): 919-920, 907-966.

[113] See also Gross, "The Risks of Death," 497-498. The author notes three factors that are "usually responsible for a defendant's exoneration...: Attention, Confession, and Luck." When a defendant is sentenced to death, he or she "may well get more careful and attentive consideration from the courts on review." This may apply in some cases, but the wrongful executions of Leonel Herrera and Roger Coleman (explained more fully *infra*, note 183) due to lapsed "appeal time limits" demonstrates that guilt or innocence is irrelevant to some appellate courts, even when the penalty is death. Moreover, Gross argues that "in most cases in which miscarriages of justice are uncovered, the real criminal confesses to the crime."

[114] Brandon and Davies, *Wrongful Imprisonment*, 223. For example, Brandon and Davies argue that, in general, "French attitudes towards compensation and indemnification seem altogether more sensible" than those in England. In France, when an individual has been convicted and later proven innocent, announcements are printed in several newspapers informing readers of the individual's vindication. See also Report by Justice, British Section of the International Commission of Jurists, *Home Office Reviews of Criminal Convictions*, by A.E. Cox, chair (London, Eng.: Stevens & Sons, 1968), 3, 1-34. As Justice notes, the English system of justice "is accusatorial and not inquisitorial, and, as is freely admitted, is not so much an inquiry into truth as an examination of the admissible evidence." See also Zuckerman, "Miscarriage of Justice," 331, who, after examining the inquisitorial legal systems of France, Germany, Italy, and the Scottish model, argues that "[w]hether progress can be made by importing foreign devices is doubtful," because "[e]ven in non-adversarial systems, the police investigation occupies a central place."

cases.[115] These high-profile wrongful convictions in the United Kingdom are also examined by Clive Walker and Keir Starmer.[116] These researchers found common themes in many of the cases they examined and offer recommendations to minimize conviction errors. Following these and other wrongful convictions, the Runciman Commission[117] examined the effectiveness of the criminal justice system in England, Wales and Northern Ireland.[118]

Woffinden initially intended to examine "every major post-war case in which a miscarriage of justice had been widely suspected," but discovered that there were "too many" such cases for inclusion in one book.[119] His major objectives were to "explain how [miscarriages] occurred," and "to demonstrate how the avenues of redress theoretically

---

[115] David Rose, *In the Name of the Law: The Collapse of Criminal Justice* (London, Eng.: Jonathan Cape, 1996).

[116] Walker and Starmer, *Justice in Error*.

[117] See *Report of the Royal Commission on Criminal Justice*, by Lord Runciman, chair (1993) [hereinafter *Runciman Commission*].

[118] See "Criminal Cases Review Commission: Management Statement for the Criminal Cases Review Commission," (accessed 26 October 1998); available from http://www.coi.gov.uk/coi/depts/GRC/coi0184e.ok; Internet, 1, 1-20. The most significant reform following the Runciman Commission was the establishment of an independent body to investigate wrongful convictions in England, Wales and Northern Ireland (the Criminal Cases Review Commission).

[119] Bob Woffinden, *Miscarriages of Justice* (London, Eng.: Hodder & Stoughton, 1987), xii. The author examines English and Irish cases between 1946 and 1986.

available to wrongly convicted prisoners have failed."[120] DuCann[121] examines the British criminal justice system in general, and how, for example, the rules of criminal procedure and the prevalence of perjured trial testimony facilitate wrongful convictions. To illustrate his points, DuCann examines nine wrongful conviction cases, including Derek Bentley, whose conviction was quashed and a post-humous pardon awarded in 1998,[122] 38 years after the publication of DuCann's book.

The Justice group has, since 1957, endeavoured to assist prisoners with "appeals and petitions to the Secretary of State," as well as to investigate the criminal justice system in the United Kingdom.[123] This group "doubts whether there are less than 15 cases of wrongful imprisonment a year after trial by jury," and in 1989, concludes that "in Great Britain there is insufficient protection against miscarriage[s] of justice."[124] The report's objective was to examine why, and how often wrongful convictions occur, with a view to recommending preventive reforms.

---

[120] *Ibid.*, 322-323. Woffinden identifies "four fundamental reasons why, historically," appellate review "has been so narrowly circumscribed." First, courts adhere to the need for finality in the criminal trial process. Second, the judiciary are concerned that expansion of appellate court powers to hear cases would open the flood-gates, resulting in legal-system overload. Third, appellate review is thought to undermine the role of the jury. Finally, a "flourishing appeals system might have the disadvantage of allowing barristers to tackle their own briefs less assiduously."

[121] C. G. L. DuCann, *Miscarriages of Justice* (London, Eng.: Frederick Muller, 1960).

[122] Derek Bentley was executed in 1953, despite the fact that he had "a mental age of 11." See Sally Pook, "Conviction quashed 45 years after hanging" *The Vancouver Sun* (31 July 1998), A14. Also see Bentley with Dening, *Let Him Have Justice*. The book's co-author is Derek Bentley's sister, who died the year before her brother's pardon was granted.

[123] Report by Justice, British Section of the International Commission of Jurists, *Miscarriages of Justice*, by Sir George Waller, chair (London, Eng.: Justice Educational and Research Trust, 1989), 1, 1-104.

[124] *Ibid.*, 5-6.

Until very recently in Canada, analysis of wrongful convictions has been confined to case study accounts.[125] In a 1998 book, Anderson and Anderson[126] compiled and analyzed six Canadian wrongful conviction cases. The authors argue that "there may be thousands of cases of wrongful conviction in Canada," although definitive estimates are "unknowable."[127] Although Anderson and Anderson acknowledge the role played by "unavoidable human error" in wrongful convictions, they suggest that "many of the official explanations for wrongful conviction miss the mark."[128] In their view, it is the "underprivileged [who] are most frequently the victims of this 'human error,'" and the cases they examine "demonstrate a consistent pattern of who becomes the victim and how they have been victimized."[129] The authors argue that the Canadian criminal justice system

---

[125] See note 62. Also see Dean Jobb, *Shades of Justice: Seven Nova Scotia Murder Cases* (Halifax: Nimbus Publishing, 1988), v. Jobb combines his interest in history and the law by examining seven Nova Scotia murder cases in the mid-19th century. Jobb considers one of these cases a miscarriage of justice because the accused "was too poor to mount an effective defence." There was no dispute that Everett Farmer had shot and killed the victim, but he claimed it was self-defence. Farmer was sentenced to death and ultimately hanged on December 13, 1937. The book is useful because it illustrates how "law and evidence can take a back seat to religious intolerance, politics, bureaucratic bungling, or social status." Furthermore, analysis of 19th-century cases provides an historically-specific snapshot of the influences on law, politics and society.

[126] Anderson and Anderson, *Manufacturing Guilt*, 8. It should be noted that the authors state that "690 Canadian convicts applied to the Canadian Government's Conviction Review Group" in 1997 (p. 9). This is not correct. Annually, the Department of Justice receives less than 80 conviction review applications pursuant to section 690 of the *Criminal Code* (the figures vary from year to year, with an average of about 50 applications per year).

[127] *Ibid.* Anderson and Anderson selected cases for analysis based upon (1) the extensive media exposure directed towards them, and the absence of "analysis regarding the social forces that led to the convictions, and (2) the fact that they are "truly representative of the vast majority of wrongful convictions." However, it would be instructive to examine lesser known cases, not only to raise public awareness of previously unknown miscarriages, but also to compare them with the most highly publicized cases in terms of the social, political and economic factors that underlie wrongful convictions (p. 27).

[128] *Ibid.*, 11.

[129] *Ibid.*

is "infected with overt secrecy, corruption, brutality, racism and class prejudice on the part of some police, lawyers, judges and others... ."[130] This book presents a scathing analysis of the criminal justice system in Canada and focuses attention on how the "root cause of wrongful convictions is to be found primarily in the social structure itself."[131] As such, this work constitutes an important contribution to a subject that has been neglected by Canadian researchers. Furthermore, Anderson and Anderson provide cogent reform recommendations which include substantive punishment for criminal justice personnel who wilfully subvert justice, restructuring the legal aid system, and mandatory compensation.

(iv) Commissions of Inquiry

Commissions of Inquiry constitute the fourth type of wrongful conviction literature, and are important mechanisms for scrutinizing the evolution of specific wrongful conviction cases, from initial suspicion to conviction and imprisonment. Although Commissions of Inquiry act under specified mandates, most examine all components and actors within the criminal justice system to determine what went wrong and why, and to draw attention to areas in need of reform. Commissions of Inquiry in Canada have been conducted for the wrongful convictions of Guy Paul Morin[132] and Donald Marshall Jr.[133]

---

[130] *Ibid.*, 27.

[131] *Ibid.*

[132] Ontario. *Commission on Proceedings Involving Guy Paul Morin, Volumes 1 and 2*, by The Honourable Fred Kaufman, chair (Toronto: Queen's Printer, 1998), [hereinafter *Kaufman Commission*].

[133] Nova Scotia. *Royal Commission on the Donald Marshall Jr. Prosecution, Volume 1 - Findings and Recommendations*, by Chief Justice T. Alexander Hickman, chair (Halifax: Province of Nova Scotia, 1989), [hereinafter *Marshall Commission*].

The *Kaufman Commission's* mandate was threefold: "investigative, advisory and educational."[134] The investigative role was to determine "how and why...the administration of justice fail[ed] in this case;" the advisory role concerned recommendations for change "to prevent future miscarriages of justice;" and the objective of the educational role was to inform the general public about the administration of justice generally, as well as "the criminal proceedings against Guy Paul Morin."[135] The *Kaufman Commission* discovered that police tunnel vision and incompetence, the use of jail-house informants, and shoddy forensic analysis all contributed to Morin's conviction.[136] Commissioner Kaufman concluded that in addition to individual failings, Guy Paul Morin's conviction was "rooted in systemic problems," and that "it is these systemic issues that must be addressed in the future."[137] Although beyond the Commission's mandate, Kaufman did recommend that the Canadian government "study the adequacies of the present regime [of rectifying wrongful convictions] and the desirability of a criminal case review board."[138] Other recommendations include the admissibility and overall policies

---

[134] *Kaufman Commission*, 3.

[135] *Ibid.*, 4-10.

[136] *Kaufman Commission*. Despite Morin's official exoneration, some refused to accept that he was, in fact, innocent. Similar sentiments were voiced in the David Milgaard case. After Milgaard's exoneration, following DNA testing in 1997, a spokesman for the Saskatoon police service stated that "assuming it was Mr. Fisher's semen on the [victim's] clothing, all that shows is that he was in contact with the victim. It doesn't say Mr. Milgaard didn't commit the murder." See David Roberts and Kirk Makin, "DNA test exonerates Milgaard" *The Globe and Mail* (19 July 1997) A6.

[137] *Ibid.*, 1243.

[138] *Ibid.*, 1241.

concerning forensic evidence, guidelines for limited use of jailhouse informants, police training, education of all criminal justice personnel as to the causes of wrongful conviction, and potential expansion of appellate court powers.

The *Marshall Commission* found that "the criminal 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...in 1983."[139] The Commission also noted that one of the most distressing aspects of Marshall's conviction was that the Nova Scotia Court of Appeal blamed Marshall for "having contributed in large measure to his own conviction," and that "any miscarriage of justice was more apparent than real."[140] The causal factors leading to Marshall's wrongful conviction include systemic racism, police intimidation of so-called eyewitnesses, non-disclosure by the Crown of potential exculpatory information, police tunnel vision and incompetence, and inadequate defence. The *Marshall Commission* also suggested the establishment of an independent review body to investigate alleged cases of wrongful conviction.[141] Other recommendations include the establishment of judicial inquiries for those found to be wrongfully convicted, which would consider claims for compensation, and education of criminal justice personnel with respect to race relations.[142] However, Mannette argues that "one institutional expression of racism is carried by the quasi-judicial format of

---

[139] *Marshall Commission, Vol. 1*, 15. The Marshall case is discussed more comprehensively in Chapter 4.

[140] *Ibid.*, 16.

[141] *Ibid.*, 145.

[142] *Ibid.*, 145-158.

commissions of inquiry."[143]

An additional inquiry into the wrongful conviction of David Milgaard has also been promised by the Saskatchewan government.[144] Like the Marshall and Morin wrongful convictions, some of the causal factors in Milgaard's case involved police intimidation of witnesses, dubious forensic evidence, public pressure for a conviction, and Milgaard's 'hippie' lifestyle.

Similar inquiries have been conducted in Australia (for the Lindy Chamberlain conviction), New Zealand (for the Arthur Allan Thomas conviction),[145] the United

---

[143] J. A. Mannette, "'Not Being a Part of the Way Things Work': Tribal Culture and Systemic Exclusion in the Donald Marshall Inquiry," *The Canadian Review of Sociology and Anthropology* 27, no. 5 (November 1990): 508-509, 505-530. Mannette notes that Marshall Inquiry "testimony resonates with the interpretive frameworks, modes of speech, looks, gestures and silences which are commonplace expressions of institutionalized, or systemic, racism." For example, inquiry testimony includes references to police associating Indians with crime. Nevertheless, Mannette argues that, although "unintended by the Inquiry architects, the widely publicized Marshall Inquiry has also delivered knowledge about another way of being" (p. 523). See also J. A. Mannette, "A Trial in Which No One Goes to Jail: The Donald Marshall Inquiry as Hegemonic Renegotiation," *Canadian Ethnic Studies* 20, no. 3 (1988): 169-170, 166-180. Mannette examines the purpose of a commission of inquiry, "in a general structural sense, and how that purpose gets expressed" in the Marshall Inquiry. One such purpose is that commissions are "an ideal and discursive appropriation of a material problem. ...that is, inquiries allow for social control through consent" (170). Inquiries are also a useful mechanism through which the state "is seen to be doing something." See also Bob Wall, "Analyzing the Marshall Commission: Why It Was Established and How It Functioned," in *Elusive Justice: Beyond the Marshall Inquiry*, ed. Joy Mannette (Halifax: Fernwood Publishing, 1992), 13-33. Wall argues that the establishment of the Marshall Commission "can be seen as an attempt at damage control by the government; [w]hat was needed was a public relations gesture that would appear to deal with the problem" (p. 21).

[144] In October of 1999, Larry Fisher stood trial for the murder for which David Milgaard was wrongfully convicted. On November 22, 1999, Fisher was found guilty of first-degree murder. Further details about this case are provided in Chapter 4.

[145] New Zealand. *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe*, by The Honourable R. L. Taylor, chair (Wellington, New Zealand: P. D. Hasselbert, Government Printer, 1980), 1-125.

Kingdom (for a series of miscarriages of justice in the 1970s and 1980s),[146] and other countries. Similar to critiques expressed about the ability of Commissions of Inquiry to achieve substantive benefits, Field and Thomas note that a "radically different analysis is to define commissions as institutions for crisis management."[147]

IV. What the Literature Reveals

(i) Causal Factors

As academic researchers note, wrongful convictions are most often the product of multiple causal factors. Huff et al. typically discovered 'system failure' with more than one error occurring, and note that "isolating any one individual factor misses the point."[148]

---

[146] Kate Malleson, "Appeals Against Conviction and the Principle of Finality," *Journal of Law and Society* 21, no. 1 (March 1994), 157, 151-164. The Runciman Commission's report, although lauded by many, was also severely criticized within the academic community and other groups. For example, see Stewart Field and Philip A. Thomas, "Justice and Efficiency? The Royal Commission on Criminal Justice," *Journal of Law and Society* 21, no. 1 (March 1994): 1-19. The then Home Secretary, eager to maintain political power, responded to the Report by announcing a number of law and order reforms, including abolition of the right to silence, "rejecting the majority view of the Royal Commission" (p. 7). The Commission also attributed most of the high-profile wrongful convictions to 'individual failings' with respect to 'human error.' Field and Thomas charge that "some of the weaknesses in the report are consistent with the individualistic view of...miscarriages" of justice (p. 12). The Commission's failure to emphasize and theoretically explore systemic structural elements of the criminal justice system, was, in the authors' view, a major weakness of the Royal Commission's report and inquiry.

[147] Field and Thomas, "Justice and Efficiency,?" note 146, 15. Field and Thomas charge that the end result of the Royal Commission was that "the Government was able to pick over the bones of the recommendations, to sift out the elements which supported their 'back to basics' ideology, and ignore those features which reflected concern over the origins of the Commission: the miscarriages of justice" (p. 16). For an even more scathing critique of the Royal Commission on Criminal Justice, see Lee Bridges, "Normalizing Injustice: The Royal Commission on Criminal Justice," *Journal of Law and Society* 21, no. 1 (March 1994), 20-38.

[148] Huff et al., *Convicted But Innocent*, 65. See also Bedau and Radelet, "Miscarriages of Justice," 56. In the Bedau-Radelet study, however, they found that "at least three types of errors" occurred in only 10% of the cases in their database. Also see Anderson and Anderson, *Manufacturing Guilt*, 21, who argue that the mistaken eyewitness identifications that occurred in the Canadian cases were "not simply the result of human error. ... witnesses were pressured by police."

Therefore, such "interaction effects" are an important aspect of wrongful convictions.[149] Nevertheless, Huff et al. argue that if they "had to isolate a single 'system dynamic' that pervades large numbers" of wrongful conviction cases, they would describe it as "police and prosecutorial overzealousness."[150] Such misconduct includes shoddy police work,[151] the planting and/or manufacturing of evidence by police,[152] police threats to potential witnesses, coaching witnesses at police lineups, obtaining confessions through brutality or threat,[153] and prosecutorial misconduct, such as suppressing exculpatory evidence.[154] Police targeting of minorities and other disadvantaged groups constitutes another systemic causal factor and, as Anderson notes, in Australia, Aboriginal people "are twenty times

---

[149] See Wilson, *When Justice Fails*; Alistair Logan, "What Causes a Miscarriage of Justice?," *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995), 7, 6-9.

[150] Huff et al., *Convicted But Innocent*, 64. The authors define 'overzealous' as the "anxiety to solve a case." Also see C. Ronald Huff, Arye Rattner, and Edward Sagarin, "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy," *Crime & Delinquency* 32, no. 4 (October 1986): 518-544; Wilson, "When Justice Fails," 8. Wilson's study confirms an earlier finding by Huff et al., that overzealous and unprofessional police conduct is one of the major contributing causes of miscarriages of justice.

[151] McCloskey, "Convicting the Innocent."

[152] See Frank and Frank, *Not Guilty*; Walker and Starmer, *Justice in Error*; Wilson, "When Justice Fails"; Anderson, "Miscarriages."

[153] See Bedau and Radelet, "Miscarriages of Justice"; Radin, *The Innocents*; Walker and Starmer, *Justice in Error*; Anderson and Anderson, *Manufacturing Guilt*; Lawrence Marshall, "Justice USA," *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995), 8-10; Ian Dennis, "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions," *Public Law* (Summer 1993), 291-313; Gerhard Falk, "The Blind Moloch: In the Criminal Justice Industry, Guilt is Our Most Important Product," *International Review of History and Political Science* 19, no. 2 (1982), 59-72.

[154] Huff et al., *Convicted But Innocent*, 71-72; Bedau and Radelet, "Miscarriages of Justice"; Radin, *The Innocents*; Brandon and Davies, *Wrongful Imprisonment*; Walker and Starmer, *Justice in Error*; McCloskey, "Convicting the Innocent"; Patrick O'Connor, "Prosecution Disclosure: Principle, Practice and Justice," *The Criminal Law Review* (July 1992), 464-477.

more likely to be imprisoned than non-Aboriginal people."[155] Moreover, as noted by London's Metropolitan Police Commissioner, "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 that [they are] putting away the 'right' person."[156] Zuckerman argues that the "roots of miscarriages of justice are to be found in police investigations."[157] Eyewitness error that is "usually unintentional"[158] and perjury are also pervasive causal factors that facilitate wrongful convictions.[159] Other causal

[155] Anderson, "Miscarriages," 75.

[156] See Logan, "What Causes a Miscarriage," 9; McCloskey, "Convicting the Innocent."

[157] Zuckerman, "Miscarriage of Justice," 323-324. However, the author argues that police errors are generally not due to "malpractice, ill will or...slackness."

[158] Huff et al., *Convicted But Innocent*, 66. The authors believe that "the single most important factor leading to wrongful conviction in the United States and England is eyewitness misidentification." Brandon and Davies (*Wrongful Imprisonment*) also identify eyewitness misidentification as a major factor leading to wrongful conviction. In contrast, Wilson's ("When Justice Fails," 12) examination of Australian cases of suspected and proven wrongful convictions suggests that erroneous eyewitness identifications are of "secondary importance to other factors such as errors by a judge or ambiguous expert testimony."

[159] Bedau and Radelet, "Miscarriages of Justice"; Gardner, *The Court of Last Resort*; Frank and Frank, *Not Guilty*; Radin, *The Innocents*; Brandon and Davies, *Wrongful Imprisonment*; Justice, *Miscarriages of Justice*; Anderson and Anderson, *Manufacturing Guilt*, 11. Anderson and Anderson argue that with respect to human error such as erroneous eyewitness identification, "we must surely consider the possibility that those with wealth can retain the best of defence counsels who will ensure that such 'human error' does not often happen to them."

factors include incompetent, biased, or false forensic analysis and expert testimony,[160] false confessions,[161] the use of jailhouse informants,[162] plea-bargaining,[163] community

---

[160] See Carol A. G. Jones, *Expert Witnesses: Science, Medicine, and the Practice of Law* (Oxford, Eng.: Clarendon Press, 1994). Jones (p. 3) notes the case of Dr. Alan Clift, a Home Office 'expert' who was "discredited as a scientist and as a witness, leading to an unprecedented scrutiny of the cases he had handled since 1953." Similar complaints arose in the Australian case of Lindy Chamberlain and many British cases. See also Paul Roberts, "Forensic Science Evidence After Runciman," *The Criminal Law Review* (November 1994), 780-792; Paul C. Giannelli, "'Junk Science': The Criminal Cases," *The Journal of Criminal Law & Criminology* 84, no. 1 (Spring, 1993), 113-116, 105-128. Giannelli discusses the infamous Dr. James Grigson (alias 'Dr. Death,' a name coined in the documentary film, *The Thin Blue Line*, concerning the wrongful conviction of Randall Dale Adams), who consistently presented erroneous psychiatric evidence in courts, which in many cases, led to wrongful convictions. By May of 1990, "juries had returned death penalties in 118 of the 127 cases in which [Grigson] testified." See also Edward Connors, Thomas Lundregan, Neal Miller and Tom McEwen, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, "Convicted By Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial," (June 1996): i-xxxi, 1-85. This report documents 28 proven cases of wrongful conviction based on faulty DNA evidence and testimony. Three of these cases involved 'expert' scientific testimony by Fred Zain. Zain was ultimately indicted for perjury and the West Virginia State Supreme Court ruled "that none of the testimony given by Zain in more than 130 cases was credible" (p. xvii). Most of these 28 cases "involved convictions that occurred in the 1980s, primarily mid- to late 1980s, a period when forensic DNA technology was not readily accessible" (p. 12). Furthermore, all 28 cases involved "some form of sexual assault" (p. 12).

[161] Huff et al., *Convicted But Innocent*; Bedau and Radelet, "Miscarriages of Justice." See also Leo and Ofshe, "The Consequences of False Confessions," 478-479. Leo and Ofshe describe 60 false confession cases, which they break down into three groups: proven false confession, highly probable and probable. Of the 29 individuals convicted following false confessions--which were unsupported by any other inculpatory evidence--the authors found that 12% of these false confessors "chose to plead guilty to avoid an anticipated harsher punishment - typically the death penalty." Many of the cases they describe also involve mentally-handicapped suspects, several of whom were later proven to be innocent when the real perpetrators were found. Leo and Ofshe also note how interrogation techniques by police have evolved from the often tortuous "third degree" methods to increasingly sophisticated psychological techniques which can, and do, produce false confessions of guilt.

[162] For example, see Anderson and Anderson, *Manufacturing Guilt*; *Kaufman Commission*.

[163] C. Ronald Huff, "Wrongful Convictions," 104. As Huff notes, "since the outcome of a legal case is never a certainty, many defendants can be enticed to plead guilty, even though they are innocent, in order to avoid even more severe consequences," such as a death sentence.

pressure for conviction,[164] tunnel vision,[165] witness perjury,[166] incompetent defence

[164] Barry Tarlow, "The Truth May Set You Free," *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995), 16-19. Huff et al., *Convicted But Innocent*; Bedau and Radelet, "Miscarriages of Justice"; Wilson, "When Justice Fails"; Anderson and Anderson, *Manufacturing Guilt*.

[165] Frank and Frank, *Not Guilty*; Radin, *The Innocents*; Brandon and Davies, *Wrongful Imprisonment*; *Kaufman Commission*; Anderson and Anderson, *Manufacturing Guilt*; Edward Humes, *Mean Justice*.

[166] Anderson and Anderson, *Manufacturing Guilt;* Brandon and Davies, *Wrongful Imprisonment*; A. A. S. Zuckerman, "A Strategy for Reducing the Incidence of Miscarriage of Justice," *Northern Ireland Legal Quarterly* 44, no. 1 (Spring, 1993), 3-11.

counsel,[167] accusations against the innocent by the guilty,[168] prior criminal records,[169] racism,[170] the unequal resources between the state and many accused,[171] and media-fueled prejudice of high-profile cases.[172] Although Huff et al. acknowledge that, in some cases, police and prosecutors engage in deliberate misconduct, they found that, overall, most of the subjects in their study were wrongly convicted because of "unintentional errors made by witnesses and by those who staff and operate the justice" system in the United

---

[167] Joel J. Finer, "Ineffective Assistance of Counsel," *Cornell Law Review* 58, no. 6 (July 1973), 1077-1120. Finer notes that "[h]istorically, for assistance to be ineffective, counsel's efforts must have been so perfunctory as to render the trial a farce, a mockery of justice" (p. 1078). See also David L. Bazelon, "The Defective Assistance of Counsel," *Cincinnati Law Review* 42, no. 1 (1973), 1-46. In his position as Chief Judge for the United States Court of Appeals for the District of Colombia, Bazelon notes that his 23 years on the bench "leads [him] to believe that a great many - if not most - indigent defendants do not receive the effective assistance of counsel guaranteed by the 6th Amendment" (p. 2).

[168] Huff et al., *Convicted But Innocent*. See also Gross, "The Risks of Death," 482-483. Gross notes the wrongful conviction case of Randall Dale Adams, whereby David Harris, the true killer of the police officer, perjured himself by accusing Adams of the murder.

[169] Huff et al., *Convicted But Innocent*; Gardner, *The Court of Last Resort*; Zuckerman, "Miscarriage of Justice"; Anderson and Anderson, *Manufacturing Guilt*; Huff, "Wrongful Conviction."

[170] *Marshall Commission*; Huff et al., *Convicted But Innocent*; Anderson and Anderson, *Manufacturing Guilt*; Logan, "What Causes a Miscarriage"; Falk, "The Blind Moloch."

[171] Anderson, "Miscarriages," 80; O'Connor, "Prosecution Disclosure.

[172] Anderson, "Miscarriages," 80; Michael Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America," *American Journal of Comparative Law* 45, no. 1 (Winter, 1997), 109-147; Adrian Howe, "Chamberlain Revisited." The media's 'commitment to conviction,' (a phrase coined by Nobles and Schiff), produces an inescapable irony; although the media may condemn a defendant prior to trial, many wrongfully convicted individuals would not have been exonerated *without* the persistence and help from journalists and other media personnel. See Richard Nobles and David Schiff, "Miscarriages of Justice: A Systems Approach," *The Modern Law Review* 58, no. 3 (May 1995), 313, 299-320.

States.[173] In his examination of the Morin, Milgaard and Marshall cases, along with some high-profile wrongful convictions in the United Kingdom and the United States, Logan found that "one of the most pernicious causes [of wrongful conviction], and the one that is always scathingly denied by the establishment, is politics."[174] Logan notes the Leonard Peltier case in the United States and some British terrorism cases to illuminate how politics do "enter the courtroom" and also affects police and prosecutorial behaviour.[175]

In addition to identifying the causal factors that facilitate wrongful convictions, researchers also point to the importance of identifying the systemic criminal justice procedures which militate against either discovering miscarriages,[176] or rectifying them in a

---

[173] Huff et al., *Convicted But Innocent*, 143. For a less sympathetic view, see Humes, *Mean Justice*, 436-437. Humes provides a scathing litany of prosecutorial misconduct that resulted in numerous wrongful convictions. Although the author notes that there is "no reliable or complete source of data on the total number of individuals released from prosecution or prison due to official misconduct," during the course of his research, he identified "more than 100 major felony cases around the [United States] that were undone by prosecutorial misconduct" during a 12-month period (July 1992 - June 1993).

[174] Logan, "What Causes a Miscarriage," 7.

[175] *Ibid.*, 7-8. For example, Logan notes that the British cases involving terrorism "had a high profile political input and were stage managed as media events to convince the public that the police were equal to the threat that terrorism posed to society when the police and the establishment knew that that was far from the truth." Logan also cites the Rubin Carter wrongful conviction in the United States, and the "politics of race and colour and the influence that they had upon the quality of justice that he received."

[176] Huff et al., "Guilty Until Proven Innocent," 534. In their research, Huff et al. discovered an "important systemic phenomenon that has significant implications for the production of false convictions;" ratification of error. That is, the criminal justice system, "starting with the police investigation of an alleged crime and culminating in the appellate courts, tends to ratify errors made at lower levels in the system." Thus, the further a case progresses in the system, "the less chance there is that an error will be discovered and corrected... ." See also House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, "Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions," staff report prepared by chair Don Edwards (D-Calif.), 103d Cong., 1st sess., October 21, 1993, in *The Death Penalty in America: Current Controversies*, ed. Hugo A. Bedau (New York: Oxford University Press, 1997), 344-360. In Texas, for example, "a defendant has only 30 days after his conviction to present new evidence, and the state strictly adheres to that rule" (p. 356). Although death row inmates are "assured representation to make one direct appeal in their state courts," if the appeal is denied, "representation is no longer assured" (356-357).

timely fashion. For example, overly restrictive rules of procedure and evidence hamper efforts to rectify wrongful convictions.[177] 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."[178] Appellate courts are also reluctant to tamper with jury verdicts.[179] The emphasis on legal, rather than factual issues, also hinders those seeking conviction remedies through appellate courts.[180] Generally, appeals on questions of fact are "granted only if some new evidence is produced which could not be produced at the original trial."[181] At its most extreme, the execution[182] of an innocent person is 'constitutional,' provided that he or she "received, though to no avail,

---

[177] AIDWYC, "Addressing Miscarriages"; Justice, *Home Office Reviews*; Malleson, "Appeals Against Conviction"; Kate Malleson, "Miscarriages of Justice and the Accessibility of the Court of Appeal," *The Criminal Law Review* (May 1991), 323-332; Report by Justice, *Remedying Miscarriages of Justice* (England: Joseph Rowntree Charitable Trust, 1994); Richard Donnelly, "Unconvicting the Innocent," *Vanderbilt Law Review* 6 (1952), 20-40; David Weinstock and Gary E. Schwartz, "Executing the Innocent: Preventing the Ultimate Injustice," *Criminal Law Bulletin* 34, no. 4 (1998): 345, 328-347. Weinstock and Schwartz argue that in the United States, the current standard of review presently used to determine whether a defendant is entitled to a new trial based on newly discovered evidence is too high. They suggest the use of "two different standards concerning newly discovered evidence, one for death penalty cases and one for non-death penalty cases" such that "a more lenient standard could be created for death penalty cases." Moreover, to minimize capital executions of innocent people, these authors suggest the establishment of "a higher standard at the sentencing phase of capital trials--i.e., the individual must be proven guilty 'beyond any doubt.'"

[178] Malleson, "Appeals Against Convictions," 151.

[179] *Ibid.*, 153. Also see Brandon and Davies, *Wrongful Imprisonment*, 104; Woffinden, *Miscarriages of Justice*, 323.

[180] Anderson, "Miscarriages, 83; Humes, *Mean Justice*.

[181] Brandon and Davies, *Wrongful Imprisonment*, 117; Woffinden, *Miscarriages of Justice*, 324-325.

[182] Canada abolished capital punishment in 1976.

all the process that [a] society has traditionally deemed adequate."[183] Lack of resources also precludes many from accessing the appeal process.[184] Although not the focus of this review, compensation for miscarriages of justice is also an important issue that needs to be

---

[183] Peter J. Neufeld, "Have You No Sense of Decency?," *The Journal of Criminal Law & Criminology* 84, no. 1 (Spring 1993), 201, 189-202. Neufeld is referring to the Leonel Herrera (Herrera v. Collins, 113 S. Ct. 853 (1993) case and Justice Scalia's suggestion that "it would be perfectly constitutional to let stand an injustice, including the execution of an innocent man," provided all legal procedures had been adhered to. See also House Judiciary Committee, "Innocence and the Death Penalty," 345. This report notes that the United States Supreme Court has "denied habeas review of claims from prisoners on death row with persuasive, newly discovered evidence of their innocence" (p. 357). Despite the presentation of "affidavits and positive polygraph results from a variety of witnesses, including an eyewitness to the murder and a former Texas state judge, both of whom stated that someone else had committed the crime," the Supreme Court ruled that "[Leonel] Herrera was not entitled to a federal hearing on this evidence... ." (p. 357). Herrera was executed in May of 1997. This report also states that "at least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence" (p. 345). Also see Radelet et al., "Prisoners Released," who identify 68 cases where death row inmates have been released since 1970. See also Humes, *Mean Justice*, 465. Humes argues that the court "suggested Herrera seek a commutation from the governor of Texas, George W. Bush, [however] Bush denied the plea, as he has done with every condemned prisoner who has sought a pardon." Humes also notes that "new federal laws and Supreme Court rulings have sharply limited the number of federal appeals allowed in criminal cases... (p. 343). Many states have also imposed "strict time limits on the presentation of new evidence" (p. 343). The time limit in Texas is set at 30 days, for example. These time limits have resulted in the execution of innocent people. In Virginia, Roger Keith Coleman was executed in May of 1992, despite overwhelming evidence of innocence, but which, through police and prosecutorial suppression of evidence, did not come to light during his trial. Although Coleman had "assembled a mountain of new evidence" which was presented to the Supreme Court, Coleman's lawyers had missed a filing deadline by three days. Consequently, the Supreme Court "not only refused to stop the execution, it wouldn't even consider the new evidence" (p. 344). Justice Sandra Day O'Connor stated that "[t]his is a case about federalism. It concerns the respect that federal courts owe the states." There is no defensible argument for the court's decision in the Coleman case; it is judicial murder, pure and simple. See also Jordan Steiker, "Innocence and Federal Habeas," *UCLA Law Review* 41, no. 2 (December 1993): 386, 303-389. According to Steiker, Governor George W. Bush "is powerless to grant any form of clemency (pardon or commutation)," without the recommendation of the Texas Board of Pardons and Parole. Therefore, in the *Herrera* case, the Texas Board of Pardons and Parole is responsible for the wrongful execution of what many are convinced, was an innocent man. See also Weinstock and Schwartz, "Executing the Innocent," 333, who argue that the "governor or members of the clemency board must be held accountable for allowing an individual believed to be innocent to be executed."

[184] Brandon and Davies, *Wrongful Imprisonment*, 115. Also see Malleson, "Miscarriages of Justice"; House Judiciary Committee, *Innocence and the Death Penalty*.

addressed.[185]

(ii) Race, Ethnicity and Class

Although ethnicity and race are salient factors in many wrongful convictions, most research simply identifies these variables as causal factors, among many others. I am not aware of any research which focuses exclusively on how ethnicity and race contribute to wrongful convictions.[186] Bedau and Radelet[187] identify race in their synopses of 350

---

[185] For example, see Kaiser, "Wrongful Conviction." Although Kaiser focuses on compensation for the most egregious examples of wrongful conviction, he also recommends that such redress be considered for a broader group (e.g., persons detained for questioning and released without being charged, and persons detained in custody following judicial refusal of release before trial, who are found not guilty). See also Peter MacKinnon, "Costs and Compensation for the Innocent Accused," *The Canadian Bar Review* 67 (1988), 489-505. In MacKinnon's view, restricting compensation to cases of proven innocence is inadequate because it "threatens to compromise the presumption of innocence" (p. 500). Thus, individuals whose charges are eventually dropped or who are acquitted following conviction should also be entitled to compensation, not just those proven innocent, according to MacKinnon. However, MacKinnon recognizes the need for guidelines in determining costs, such as whether or not the accused misled police. Although acquittal is synonymous with legal innocence, there will be cases where guilty defendants are acquitted; therefore, awarding compensation is problematic. For a contrasting view, see Rosenn, "Compensating the Innocent Accused," 717, who argues that because acquittal means only that "the prosecution failed to satisfy the judge or jury of the defendant's guilt beyond a reasonable doubt, it is consistent with a variety of hypotheses, which should be treated differently for the purposes of compensating the 'innocent' accused." See also Law Reform Commission of Saskatchewan, *Tentative Proposals for Compensation of Accused on Acquittal* (Saskatoon: July, 1987).

[186] The most likely explanation for this is the fact that wrongful convictions are normally the result of a variety of interacting causes. However, there is substantial documentation of the relationship between race and the death penalty. For example, see the annotated bibliography by Michael L. Radelet and Margaret Vandiver, *Capital Punishment in America: An Annotated Bibliography* (New York: Garland Publishing, 1988). Also see Michael L. Radelet and Glenn L. Pierce, "Choosing Those Who Will Die: Race and the Death Penalty in Florida," *Florida Law Review* 43, no. 1 (January 1991): 1-34; Michael L. Radelet and Margaret Vandiver, "Race and Capital Punishment: An Overview of the Issues," *Crime and Social Justice*, no. 25 (1986): 94-113.

[187] Bedau and Radelet, "Miscarriages of Justice."

potentially capital cases, but racial prejudice is not a focus of their paper.[188] However, Bowers and Pierce note that "race is truly a pervasive influence on the criminal justice processing of potentially capital cases, one that is evident at every stage of the process... ."[189] In a later book, Radelet, Bedau and Putnam[190] devote a few chapters to cases involving black defendants and white victims which reveals how racial prejudice often led to lynchings of men who had not yet been tried or convicted. Similarly, Huff et al.[191] identify race as a causal factor, among many others, which contributes to wrongful convictions. They found that "[m]any convicted innocents are white, some are even middle-class, but a disproportionate number are black or Hispanic."[192] As the authors note, many causal factors, including race, "duplicate and overlap one another and synergistically act together."[193] Yant also devotes a chapter in his book to the issue of

---

[188] *Ibid.*, 39. The racial distribution of Bedau and Radelet's 350 defendants shows "that 151, or 43 percent, [were] known to be black." They argue that "because black Americans are more likely than whites to be arrested and indicted for felony offences, it appears that the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but not in comparison to their arrest rates." See also Radelet et al., "Prisoners Released." In the 68 death row cases in which the inmates were released due to doubts about their guilt since 1970, 31 were white, 28 black, 6 Hispanic, 2 Native American, and 1 Jordanian. The authors note that "blacks today make up about 40 percent of those on death row in America, and also approximately 40 percent of the cases in which people are released from death row because of doubts about their guilt" (p. 917).

[189] William J. Bowers and Glenn L. Pierce, "Racial Discrimination and Criminal Homicide Under Post-*Furman*," in *The Death Penalty in America*, 3d ed., ed. Hugo A. Bedau (New York: Oxford University Press, 1982), 220, 206-224.

[190] Radelet et al., *In Spite of Innocence*.

[191] Huff et al., *Convicted But Innocent*.

[192] *Ibid.*, 80. However, the overall arrest rates for various ethnic and racial groups are not provided.

[193] *Ibid.*, 81.

race, describing many of the cases detailed in other research projects.[194] In the Canadian context, the *Marshall Commission* fueled extensive commentary, including discussions about racism.[195] Wildsmith argues that the Marshall Commission "should not have shied away from using the term 'racism' more systematically," and that it "could have benefited from paying more attention to institutional and structural racism" rather than focusing on individual racism.[196] While individual racism needs to be explored, such a focus directs attention to single actors within the criminal justice system, rather than the more important general effects of institutional and structural racism.[197] The Commission concluded that there is a "two-tiered" system of justice in Nova Scotia.[198] Interestingly, the individuals identified in this study who applied under section 690 are predominantly white, despite the overrepresentation of native Canadians in our prisons. One can only

---

[194] Yant, *Presumed Guilty*, 177-204.

[195] For example, see Mannette, *Elusive Justice*.

[196] Bruce H. Wildsmith, "Getting at Racism: The Marshall Inquiry," *Saskatchewan Law Review* 55, no. 1 (1991), 106, 97-126. Wildsmith cites Hughes and Kallen, who make distinctions between *"individual racism* (racial discrimination stemming from conscious, personal prejudice), *institutional racism* (racial discrimination by an individual carrying out the dictates of others who are prejudiced or of a prejudiced society), which are both rooted in conscious prejudice, and, most importantly, *structural racism* (inequalities in the system-wide operation of a society which exclude substantial numbers of members of particular ethnic categories from significant participation in its major social institutions. The crucial issue here is not that of equal opportunity for those with equal qualifications, but beyond this, the question of the access of members of particular ethnic groups to the very qualifications (skills, resources) required by the majority ethnic group or groups for full participation in the life of the society."

[197] *Ibid.*

[198] *Marshall Commission*, 220. The Commission compared Marshall's case with those of two politicians, Roland Thornhill and Billy Joe MacLean to determine "if there [were] differing standards of justice in Nova Scotia, depending on one's race or social standing" (p. 193). However, Wildsmith argues that "a better comparison would have been with a poor, young, white person also charged with murder," although he concedes that the "two-tiered system shows discrimination and lends some weight to the suggestion that the reason was race" (see Wildsmith, "Getting at Racism," 112).

speculate whether there is also a differential 'discovery rate' of wrongful convictions depending upon one's race.

Although wrongful convictions are not confined to marginalized classes, review of the literature demonstrates an inverse relationship between class and wrongful conviction; the lower one's status in the social order, the higher one's chances of arrest and erroneous conviction. Class prejudice and racism are central to the Anderson and Anderson study,[199] and these variables are also evident in most of the major works in this area, with varying degrees of emphasis.[200]

(iii) Theoretical Considerations of Wrongful Conviction

To date, theoretical analysis of wrongful convictions has, with some exceptions, been secondary to research focusing on the causes of such miscarriages. Huff et al. argue that Herbert Packer's[201] 'crime control' versus 'due process' models of criminal justice provide a "useful theoretical framework for analyzing wrongful conviction and public policy in the United States."[202] The authors posit that 'crime control' objectives such as plea-bargaining, assembly-line processing of cases, and the repression of criminal conduct "may

---

[199] Anderson and Anderson, *Manufacturing Guilt*.

[200] For example, see Bedau and Radelet, "Miscarriages of Justice"; Huff et al., *Convicted But Innocent*; Brandon and Davies, *Wrongful Imprisonment*.

[201] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, Cal.: Stanford University Press, 1968).

[202] Huff et al., *Convicted But Innocent*, 144.

not only help control crime but also contribute to system error and wrongful conviction."[203] Conversely, 'due process' objectives are "supposed to operate as an obstacle course" so that as the individual moves from "probable to legal guilt," the process "must be cumbersome and difficult so as to ensure near certainty that persons found guilty are indeed guilty and deserving of punishment."[204] Packer argues that the "polarity of the two models is not absolute;" however, Huff suggests that these models can be used to: (1) "assess the *relative* emphasis of any criminal justice system," and (2) "to assess the relative emphasis of any particular aspect of such a system."[205] According to Huff, Packer's analysis of the two models' "contrasting views of system error is of major theoretical significance," particularly with respect to post-conviction appellate reviews.[206] Given the "applicability of Packer's theoretical models in criminal justice systems across nations," Huff also points to the benefits of cross-national research in terms of "addressing a number of important theoretical issues," such as comparisons between inquisitorial and adversarial justice systems.[207] Malleson, however, notes that the right of appeal is "usually thought of as a feature of a due process model...since it protects and promotes the rights of the

---

[203] *Ibid.*

[204] *Ibid.*, xii.

[205] Huff, "Wrongful Conviction," 106 (emphasis in original).

[206] *Ibid.*, 107-108. In other words, due process objectives present fewer obstacles than do crime control objectives with respect to rectifying errors through post-conviction appellate review.

[207] *Ibid.*, 109.

accused."[208] Thus, a "simplistic explanation" of the rationale underlying the approach of the Court of Appeal "would be that by restricting the appeal process, the judges are rejecting the principle of due process in favour of a crime control model... ."[209] However, Malleson opines that judicial reluctance, for example, to interfere with jury verdicts and concerns about undue delays through the appellate process, cannot be neatly attributed to due process or crime control. For example, when "judges argue that appeals delay the execution of justice, this can reflect a concern to strengthen the principle of due process just as much as a desire to uphold the conviction process."[210] Others argue that the portrayal of 'crime control and 'due process' models as opposing ends of criminal justice imperatives is, in fact, a false distinction.[211] As Rose argues, "[l]awyers' and judges' due process rhetoric was only a mask for the system's crime control objectives."[212] Nevertheless, as Huff notes, the due process versus crime control models are theoretically useful in terms of the "*relative* overall emphasis of a criminal justice system."[213]

---

[208] Malleson, "Appeals Against Conviction," 156.

[209] *Ibid.*

[210] *Ibid.* As Malleson argues, the "issue of delay is problematic in that the quick disposal of a case can promote...production-line justice or, alternatively, the protection of the right to a speedy trial."

[211] See Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (London, Eng.: Macmillan Press, 1981), 155-156. As she explains, "if...the process of conviction is easier than the rhetoric of justice would have us expect--and easier still the lower the status of the defendant--it is hardly surprising. A wide range of prosecution evidence can be legally produced and presented, despite the rhetoric of a system geared overwhelmingly to safeguards for the accused, precisely because legal structure, legal procedure, legal rulings, *not* legal rhetoric, govern the legitimate practice of criminal justice, and there is quite simply a distinct gap between the substance and the ideology of the law."

[212] Rose, *In the Name of the Law*, 49.

[213] Huff, "Wrongful Conviction," 106.

Anderson and Anderson argue that a "comprehensive understanding" of wrongful conviction must be subjected to "two levels of analysis."[214] The first level "involves the 'hands-on' work of the professionals and bureaucrats who run the legal and justice systems."[215] The second level of analysis "involves an understanding of how the systemic political, economic and social inequality endemic to Canadian society leads to the marginalization of large groups of Canadians, some of whom become wrongfully convicted."[216] Analyses of wrongful conviction must consider the society within which a criminal justice system is embedded and operates, as well as the institutional factors within the criminal justice system itself that may hinder or promote conviction errors. As such, Anderson and Anderson's theoretical approach is more likely to provide a more compelling and comprehensive understanding of the wrongful conviction problem.

The theory of relative autonomy[217] and a structuralist conflict model of law[218] have also been posited as useful theoretical tools with respect to the Canadian criminal justice system's response to wrongful conviction. In his analysis of the Donald Marshall

---

[214] Anderson and Anderson, *Manufacturing Guilt*, 12.

[215] *Ibid.*

[216] *Ibid.*

[217] H. Archibald Kaiser, "Legitimation and Relative Autonomy: The Donald Marshall, Jr. Case in Retrospect," *Windsor Yearbook of Access to Justice* 10 (1990), 171-193. Also see Wall, "Analyzing the Marshall Commission."

[218] Kaiser, "Legitimation and Relative Autonomy"; Burtch, "Reflections," 142. Burtch argues that conflict theory may be the "most cogent theoretical perspective which could be applied" to the Steven Truscott case, as well as the "sociological critique of the pronounced emphasis on order, authority, and punishment at the expense of civil liberties" in Canada.

wrongful conviction and subsequent inquiry, Kaiser argues that although such inquiries may serve a "vital legitimation function which capital requires," they may also unleash "an unexpected torrent of criticism and political activity against a state which has behaved not only badly but worse and in a more unbridled way than its elite masters would have permitted."[219] Given the Marshall Commission's scathing commentary concerning the total system failure in this case and assertions that their recommendations might be used for "progressive purposes," Kaiser posits that this provides a "strong exemplar of the relative autonomy thesis"; namely, that "ruling class interests [were] not unequivocally supported" by the Commission's findings and actions.[220] It remains to be seen whether future Donald Marshalls will benefit from the Commission's recommendations. Furthermore, if one views such inquiries as pressure valves that legitimate[221] (i.e., justify) rather than substantively reform systemic problems that facilitate wrongful convictions, ultimately hegemonic interests prevail.[222] Inquiries do succeed in identifying and attempting to address the individual and systemic problems both within and without the criminal justice system. However, given the social-structural inequalities within the Canadian state, such reforms may not achieve their stated objectives. As Wall argues, the

---

[219] Kaiser, "Legitimation and Relative Autonomy," 181.

[220] *Ibid.*, 183.

[221] For example, an inquiry can also be perceived as a valuable political tool which can be used by the state to 'demonstrate' its willingness to admit criminal justice system deficiencies and errors and to make efforts to rectify conviction errors.

[222] See H. Archibald Kaiser, "The Aftermath of the Marshall Commission: A Preliminary Opinion," *Dalhousie Law Journal* 13, no. 1 (May 1990): 374-375, 364-375. As Kaiser puts it, beyond the gains resulting from the Marshall inquiry, "pitfalls" remain, one of which is the "safety-valve problem: a major case is used to let pressure off the system, but the conditions causing the build-up are still extant."

Marshall Commission's mandate was "to look at how the system had treated one individual and to suggest changes to the criminal justice system based on what went wrong in that single case."[223] Nevertheless, Wall believes that the Commission did result in change and provided "an arena in which the state's very autonomy can serve to promote democratization and reverse the class bias still evident throughout criminal justice."[224] Although the province of Nova Scotia "wanted to keep the reins on the Commission" by restricting its focus on what happened to Marshall and the factors that led to his wrongful conviction, the Commission broadened its mandate by expanding it "to include a wide range of political and social issues never intended for scrutiny by the province."[225]

Social constructionist arguments have also been used to explain the 'demonization' of individuals later found to have been wrongfully convicted.[226] Adrian Howe provides a social constructionist critique of the wrongful conviction of Lindy Chamberlain, an Australian mother convicted of murdering her infant daughter. Howe argues that the media's role in constructing Chamberlain's guilt was crucial and describes the media

---

[223] Wall, "Analyzing the Marshall Commission," 22.

[224] Ratner, McMullan, and Burtch, "The Problem of Relative Autonomy and Criminal Justice in the Canadian State," in *State Control: Criminal Justice Politics in Canada*, ed. R. S. Ratner and John L. McMullan (Vancouver, B.C.: University of British Columbia Press, 1987), 118, 85-125, cited in Wall, "Analyzing the Marshall Commission," 28.

[225] *Ibid.*, 23, 25. This expanded mandate included a comparison between the justice system's treatment of two politicians with its treatment of Donald Marshall, and hearing submissions concerning racism.

[226] For example, see Howe, "Chamberlain Revisited"; Edwin Schur, *The Politics of Deviance: Stigma Contests and the Uses of Power* (Englewood Cliffs, N.J.: Prentice-Hall, 1980).

presentation of her trial as a "witch hunt," that portrayed her "as a dangerous woman," and which conjured images of a "counter-stereotypical woman who refused to play her assigned gender role... ."[227] Howe also laments the 'expert' forensic evidence later discredited at the Morling Inquiry which resulted in Chamberlain's exoneration and "reflects on the way in which the media reportage of the so-called scientific knowledge overwhelmed and submerged other knowledges."[228]

V. What the Literature Fails to Reveal

(i) Cross-National Research

In 1986, Huff et al. intended to conduct replication studies of wrongful conviction in several foreign nations, "focusing especially on such cross-national variables as type of justice system; factors contributing to wrongful conviction; mechanisms for identifying, exonerating, and compensating convicted innocents; and societal tolerance for 'false positives' [i.e., convicted innocents] versus 'false negatives'... ."[229] However, to date, this

---

[227] Howe, "Chamberlain Revisited," 145.

[228] *Ibid.*, 148.

[229] Huff et al., "Guilty Until Proven Innocent," 541. The authors published an expanded version of their research in 1996; however, this work does not reveal any information concerning replication studies (see Huff et al., *Convicted But Innocent*).

cross-national research has not been conducted.[230] Cross-national research is an important area for future wrongful conviction research.[231]

(ii) Gender

None of the research studies cited in this review analyze gender differences with respect to wrongful conviction. This is likely due to the fact that the overwhelming majority of serious violent, and other crimes, are committed by males. Thus, in absolute numbers, men are wrongfully convicted on a much larger scale. With two exceptions, all of the section 690 cases described in this research involve men.

(iii) Canadian Analysis and Quantification of Wrongful Convictions and Section 690 of the *Criminal Code*.

To date, Anderson and Anderson are the first Canadian researchers to analyze a compilation of wrongful convictions, and their research was not published until 1998. Thus, wrongful conviction research in Canada has been woefully neglected.[232]

---

[230] Electronic mail message from C. Ronald Huff, Professor and Director of the School of Public Policy and Management and the Criminal Justice Research Center, Ohio State University, to author (17 July 1999). Professor Huff advised that due to other research demands, he has "not been able to conduct cross-national research on wrongful conviction." Moreover, Professor Huff is "not aware of any research on wrongful conviction that [he] would consider truly cross-national and comparative in nature." A review of the literature confirms that cross-national research of wrongful convictions has not yet been conducted and/or published.

[231] For example, comparisons of adversarial and inquisitorial criminal justice systems is useful in terms of identifying system elements that serve to hinder or facilitate wrongful convictions. See Brandon and Davies, *Wrongful Imprisonment*; John Bell, "The French Pre-Trial System," in *Justice in Error*, ed. Clive Walker and Keir Starmer (London, Eng.: Blackstone Press, 1993), 226-247; Report by Justice, *Miscarriages of Justice*; Wilson, "When Justice Fails." Wilson notes that the plea-bargaining process in Australia is not as institutionalized as it is in the United States.

[232] However, some excellent case-study accounts of Canadian wrongful conviction cases have been written, which provide valuable insights into the genesis and nature of such miscarriages. For example, see Makin, *Redrum the Innocent*; Harris, *The Judas Kiss*; Harris, *Justice Denied.*

Furthermore, few researchers have analyzed the function and operation of section 690 of the Canadian *Criminal Code*. Neither have any attempts been made to compile and analyze section 690 applications which prompt Department of Justice intervention.[233] This thesis, therefore, will fill significant gaps in the section 690 literature and provide greater insights about this last-resort remedy for those who claim to be wrongfully convicted.

---

[233] Problems accessing section 690 data and Ministerial decisions likely explains, in part, the lack of research in this area.

Chapter 3

THE ROYAL PREROGATIVE OF MERCY: AN HISTORICAL REVIEW

I. Introduction

Section 690 of the *Criminal Code* is an adjunct to the ancient pardoning power,[1] now known as the royal prerogative of mercy. As such, it is important to understand how this prerogative power functioned within specific socio-historical contexts in order to gain insight into the factors that may influence section 690 Ministerial decisions. Such a review is also a practical one given the absence of section 690 research and data access restrictions to Ministerial decisions and the conviction review process in general. Beyond traditional notions of the prerogative as a mechanism to remedy injustice and to dispense mercy, it is clear that the pardoning power was exercised for a variety of social, political and economic reasons. The royal prerogative of mercy, for example, played a central role in the administration of justice by mitigating "the harshness of the law," particularly during the time of England's 'Bloody Code' in the 17th and 18th centuries.[2] As noted by Sir William Harcourt in 1885, "the exercise of the prerogative does not depend on principles of strict law and justice. Still less does it depend on sentiment in any way. It is really a

---

[1] Manson, "Answering Claims of Injustice," (1992) C.R. (4th) 305, 308.

[2] See Roger Chadwick, *Bureaucratic Mercy: The Home Office and the Treatment of Capital Cases in Victorian Britain* (New York: Garland Publishing, 1992); Cole and Manson, *Release from Imprisonment*; Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989); J. M. Beattie, *Crime and the Courts in England, 1660-1880* (Oxford: Clarendon Press, 1986); Leslie Sebba, "Clemency in Perspective," in *Criminology in Perspective: Essays in Honor of Israel Drapkin*, ed. Simha F. Landau and Leslie Sebba (Lexington, Mass.: Lexington Books, D.C. Heath & Co., 1977a), 221-240; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Movement for Reform, Vol. 1* (London, Eng.: Stevens & Sons, 1948).

question of policy and judgment... ."[3] The political aspect of the prerogative is aptly described by Douglas Hay:

> It was political in the broad sense that the exercise of mercy provided the king with an opportunity to demonstrate his paternal and loving regard for his people and thereby to strengthen their loyalty to him and the dynasty. More narrowly it provided opportunities for the king's ministers to display to a political class that was finely attuned to such signals that they had the favour of the Crown, and opportunities in addition for their dependents and supporters and the elite in general to demonstrate their access to the favour and patronage of those who counted and thus to strengthen the ties of friendship and deference that supported their local eminence or their political ambition. The secretary of state was not simply a bureaucrat who happened to be in charge of the pardon procedure; he was also a leading member of the king's administration. Some of the appeals to him were narrowly and frankly political.[4]

This chapter traces the historical evolution, authority, and rationales underlying the exercise of the royal prerogative of mercy in England and in pre- and post-Confederation Canada.[5] The historical record demonstrates the flexibility of this ancient prerogative, not only to manipulate the administration of law but also to respond to social, political and economic exigencies required within specific historical contexts.[6] The main purpose of

---

[3] Chadwick, *Bureaucratic Mercy*, 381-382.

[4] Cited in J. M. Beattie, "The Royal Pardon and Criminal Procedure in Early Modern England," *Historical Papers* (1987): 17, 9-22.

[5] See Jim Phillips, "The History of Canadian Criminal Justice, 1750-1920," in *Criminology: A Reader's Guide*, ed. Jane Gladstone, Richard Ericson, and Clifford Shearing (Toronto: Centre of Criminology, University of Toronto, 1991), 66, 65-124. Phillips cautions against uncritical acceptance of "interpretive frameworks...formulated for explaining English or American developments" because this can "result [in] the role of criminal law and criminal justice in *Canadian* social, economic, and political development [being] inadequately explored." This is a valid caution and is borne out by research analyzing the exercise of the prerogative in Canadian provinces which demonstrate that the rationales underlying the pardon process can differ, depending upon specific socio-historical imperatives. Nevertheless, valuable insights can still be gained by examining the rationales underlying the exercise of the royal prerogative of mercy in the English context in terms of understanding how the prerogative is linked to specific social, economic and political imperatives in that country.

[6] See, for example, Caleb Foote, "Pardon Policy in a Modern State," *Prison Journal* 39, no. 1 (1959): 4, 3-32. Foote argues that "the flexibility of the [pardon] power has permitted adjustment to changing tastes in crime publicity and retribution."

this chapter is to provide an historically-grounded understanding of how the royal prerogative of mercy functioned in order to determine how historically-specific imperatives, both practical and ideological, might also influence contemporary decision-making under section 690 of the *Criminal Code*. The analysis begins with an examination of the pardoning authority in England and in Canada. Subsequent sections describe the types of pardons available in Canada through the royal prerogative as well as the rationales underlying the exercise of pardons in England and in pre- and post-Confederation Canada.

II. Pardoning Authority in England and Canada

The Royal Prerogative of Mercy is a pardoning power with a lengthy and fascinating history, dating back to the Code of Hammurabi, the oldest known legal code "developed by the Babylonians around the 18th century B.C."[7] With the exception of China, the prerogative is a practice common to all cultures in all periods, and all constitutions in the world provide for such powers.[8]

Initially, the power to pardon was "virtually the sovereign's monopoly."[9] As noted by Hurnard:

---

[7] Moore, *Pardons*, 15.

[8] Leslie Sebba, "Clemency in Perspective," 222. See also Leslie Sebba, "The Pardoning Power - A World Survey," *The Journal of Criminal Law & Criminology* 68, no. 1 (March 1977b): 111, 83-121. In most countries, the pardoning power resides in state constitutions, with the exception of "'basic' or 'organic' laws, which in effect take the place of a constitution.

[9] Cole and Manson, *Release from Imprisonment*, 399. See also Naomi D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* (Oxford: Clarendon Press, 1969), 214-215. The power to pardon could also be exercised by the Lords of the Palatinates of Chester and Durham.

> ... before Henry III came of age,[10] pardons were granted on the authority of his regent, sometimes with the advice of the King's council. These pardons took the form of letters patent issued under the King's seal or, occasionally, the seal of the regent himself. This practice evolved such that while the King was away on campaign, the pardoning power was usually delegated to the Chancellor who issued pardons in the King's name.[11]

Although the prerogative "was assigned by law to the King as early as the seventh century," Moore[12] notes that the Earls "held a rival pardoning power in their own lands, and the church also had the right to pardon offences through...benefit of clergy."[13] Apparently, no general rules governed the granting of pardons; "the King exercised his discretion according to the particular circumstances of each case coming under the cognisance of his ministers."[14]

From the Fall of the Roman Empire to the Enlightenment in the 18th century, the pardon power was a coveted one and "when rival authorities struggled for power, it was often the power to pardon that they sought. Everyone who claimed a right to punish -

---

[10] Hurnard, *The King's Pardon*, 216. Hurnard notes that Henry III was exercising the prerogative "at least some months before he declared himself of full age in January 1227."

[11] *Ibid.*, cited in Cole and Manson, *Release from Imprisonment*, 399.

[12] Moore, *Pardons*, 17.

[13] For a description of benefit of clergy, see Beattie, *Crime and the Courts*, 141-146. Benefit of clergy was originally permitted to members of the clergy who, although tried in the King's court, would then be passed over to the church for punishment. By the 14th century, benefit of clergy was expanded to include individuals other than clergy who passed a literacy test, but this benefit excluded women until 1623. Later in the 17th century, the reading test was abolished and "[t]hereafter, the fate of convicted felons would rest not on their sex or status (as signaled by their ability to read) but on the crime they had committed." Beattie also notes that this "broadening of the scope of clergy...made it [a] fundamental...determinant of the shape and character of the criminal law over the early modern period." Nevertheless, an increasing number of offences were excluded from benefit of clergy, beginning in the 16th century. See also C.H. Rolph, *The Queen's Pardon* (London, Eng.: Cassell, 1978), 22, who states that benefit of clergy was abolished in 1827. Also see Stanley Grupp, "Some Historical Aspects of the Pardon in England," *The American Journal of Legal History* 7 (1963): 51-62.

[14] Chitty, *Criminal Law*, Vol. 1, 2nd ed. (1826), cited in Radzinowicz, *A History of English Criminal Law, Vol. 1*, 107.

...from Druid priests to archbishops, from clan chiefs to kings, from mobs to legislatures and courts - also claimed a right to pardon."[15] In England, the pardon power was valued "politically and financially"[16] and the "struggle for who would control the privilege of abusing the pardoning power developed into a three-way tug of war [between] King, Church [and] Parliament that spanned [six] centuries."[17] During times of war, for example, pardons were granted on condition that the offender serve in the military for a specified period of time. Pardons were also used as a means of financial exploitation. Authorities with the power to pardon could demand large sums of money and "then apparently held possible revocation over the recipients in order to extort more money."[18] The purchase of pardons was once a common practice.[19] Despite abuses of the pardoning power such as "complaints of favouritism, elitism and financial gain," Cole and Manson[20] argue that the pardon's "antecedent rationale...lay in notions of justice and mercy."[21]

---

[15] Moore, *Pardons*, 17.

[16] *Ibid.*

[17] *Ibid.*, 22. It is not clear what centuries Moore is referring to, but it appears to range from the seventh to 13th centuries (see p. 17-22). See also Chadwick, *Bureaucratic Mercy*, 12. Chadwick argues that "the exercise of [the Crown's] powers of pardon or mitigation came to represent an opportunity to respond to the pressures of general or specific interests, to enrich itself from fines and to demonstrate its ultimate power."

[18] Grupp, "Some Historical Aspects," 59.

[19] *Ibid.*

[20] Cole and Manson, *Release from Imprisonment*, 400.

[21] See also William F. Duker, "The President's Power to Pardon: A Constitutional History," *William and Mary Law Review* 18, no. 3, (Spring 1977): 478, 475-538. Duker argues that the "annals of the royal prerogative of mercy are replete with suggestions of the power's propensity for abuse." Moreover, "the benefits of the power were rarely ever available to those condemned to death in error...[and] [i]n other respects....it was disproportionately overemployed."

In contemporary England, the royal prerogative is a "recognized feature of [its] unwritten constitution" and the pardon power is vested in the Queen.[22] However, constitutional convention "has transferred effective power from the Crown to the Home Secretary."[23]

Although the pardon authority was vested in the Sovereign, judges played a significant role in pardon decisions. In the early 18th century, at the conclusion of assizes, "judges submitted a 'circuit pardon'...listing those they recommended, which when approved by the king began the process by which the pardon would be issued by the Chancery."[24] Judges were not required to justify their decisions, but rather "were told to send in their lists of prisoners to be pardoned," distinguishing which prisoners they wanted transported from "those who deserved to be pardoned absolutely."[25] Moreover, the judges' reprieves "were almost certain to result in a pardon."[26] Through the secretary of state, petitions for mercy from those condemned to death were sent to the trial judge,

---

[22] Scbba, "The Pardoning Power," 111.

[23] *Ibid.*, 114. See also Report by Justice, *Home Office Reviews*. Although the pardon power is exercised by the Home Secretary on behalf of the Queen, investigations of wrongful conviction claims are no longer a responsibility of the Home Secretary and his Office. These investigations are now conducted by the Criminal Cases Review Commission, which was established in January 1997 by authority of the *Criminal Appeal Act 1995*, discussed *infra*. See Criminal Cases Review Commission, *Management Statement for the Criminal Cases Review Commission* (accessed 26 October 1998), available from http://www.coi.gov.uk/coi/depts/GRC/coi084c.ok; Internet, 1-2, 1-22.

[24] Beattie, *Crime and the Courts*, 431. Beattie's study is based largely on the records of courts in the county of Surrey, with some supplementary evidence from Sussex.

[25] *Ibid.*, 432.

[26] *Ibid.*

"whose recommendation was invariably sought."[27]

> For the most part, judges explained in their replies why they had left the condemned prisoner to be hanged, but unless they felt strongly about the case or unless powerful local opinion had formed against the offender, they often went on to provide reasons that would justify the king's extending his mercy if he chose to do so. Judges kept notes on trials, partly at least to be able to respond to those requests.[28]

However, "the vast majority of pardons...originated in the judges' decisions at the conclusion of the session to reprieve some of those they had just sentenced to death."[29] Judicial influence on pardons is also noted by Chadwick, who found that "the role of the Crown in mitigation...lay firmly with the courts by the end of the 18th century."[30]

In the 19th century, "[t]he practice was for the Home Office to consult the judge concerned in the case and to consider a report from him on the evidence; anything new that became known to the Home Secretary was sent to the judge with a request for him to report back."[31]

> It was emphasized that this was not an attempt to re-hear the case, but simply to examine all the circumstances which might justify either a pardon or, far more frequently, an examination of the punishment. The Home Secretary denied that he acted as a Court of Appeal, claiming that he was really a Court of Mercy. He rarely disagreed with a judge who recommended commutation, though he had unfettered discretion to do so. He was firmly against making the proceedings public, as this would come close to acting like a Court of Appeal.[32]

Juries also influenced royal prerogative decisions, although their recommendations

---

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*, 432-433.

[30] Chadwick, *Bureaucratic Mercy*, 14.

[31] Leon Radzinowicz and Roger Hood, *A History of English Criminal Law and its Administration from 1750: The Emergence of Penal Policy, Vol. 5* (London, Eng.: Stevens & Sons, 1986), 677.

[32] *Ibid.*, 677-678.

were not decisive. Radzinowicz and Hood note that, between 1861 and 1881, "68 of the 243 murderers...recommended [for mercy] were nevertheless executed."[33] As evidenced in the 18th century, recommendations for mercy in the 19th century "carried much greater weight when [they] were supported by the trial judge."[34] However, in a study of the English Assize courts from the mid-16th to early 18th centuries, Cockburn found that "trial juries...played a much more positive and significant role in mitigating the severity of the criminal code."[35] Juries could demonstrate their desire for leniency by finding verdicts of not guilty and on many occasions, "undervalu[ed] stolen goods" so as to reduce the offence to a lesser charge and therefore, prevent a death sentence.[36] Furthermore, in most cases, assize judges ordered executions "only if the felony was particularly heinous or after all possibilities for mitigation had been exhausted."[37]

Chadwick analyzed the Home Office and the treatment of capital cases in Victorian England and found that when faced with the task of exercising the royal prerogative of mercy in capital cases, the Home Office "evolved its own rules and precedents in a bureaucratic attempt to formalize and protect [its] procedures."[38] Between 1860 and

---

[33] *Ibid.*, 678-679.

[34] *Ibid.*, 679.

[35] J. S. Cockburn, *A History of the English Assizes, 1558-1714* (Cambridge, Eng.: Cambridge University Press, 1972), 127-128.

[36] *Ibid.*, 128.

[37] *Ibid.*, 132.

[38] Chadwick, *Bureaucratic Mercy*, 2.

1900, centralization and legal administration significantly shifted "from an essentially local operation, with only occasional governmental intervention, to one that was substantially controlled by the Home Office and the Law Officers of the Crown."[39] The role of judges also underwent significant change "both in terms of their courtroom hegemony and in their powers of mitigation."[40]

> In this period, the post-trial phase became increasingly the responsibility of the Home Office and its response is reflected both in an expanded and more professional Criminal Department and in the development of bureaucratic "Rules" through which to impose a superficial rationality and coherence on the disparate decisions which emerged in capital cases and on the sentencing patterns which followed.[41]

Following the *Murder Act* of 1752, "when execution became mandatory within 48 hours of sentence on the last day of an Assize, the prerogative of mercy was wholly in the hands of the judge."[42]

> Without judicial respite and a letter to the Privy Council, hanging was automatic, although an exception must be noted here in the case of those tried in London where all death sentences were referred to the Privy Council for confirmation... . It seems equally clear that the role of the Crown, whether acting in the Privy Council or, after the first decade of the 19th century, on the advice of the secretary of state for the Home Department, was almost entirely formal. When upwards of two thousand cases a year were referred to the Crown by the judges of Assize or the recorder of London, it could hardly have been otherwise.[43]

By the late 19th century, the exercise of the royal prerogative of mercy demonstrated "how rule and precedent came to constrain the personal idiosyncrasies of its practitioners"

---

[39] *Ibid.*, 4.

[40] *Ibid.*

[41] *Ibid.*, 4-5.

[42] *Ibid.*, 14. See also Beattie, *Crime and the Courts*, 434. According to Beattie, the 1752 Murder Act "fixed the time between conviction and execution at *three days* in order...to prevent campaigns for a pardon and thereby to intensify the deterrent effects of the punishment" (emphasis added).

[43] Chadwick, *Bureaucratic Mercy*, 14-15.

and "[l]egal ideology gave to these diverse administrators an increasingly homogeneous character."[44] At the same time, records began to be tabulated of those executed and respited and, on occasion, attempts were made "to express a general Home Office policy towards the principles of intervention."[45] Such precedents "imposed evident constraints on those who exercised the prerogative."[46] Thus, the senior staff of the Home Office Criminal Department "assume[d] a major role in the exercise of the royal prerogative...and impose[d] on this process an increasing coherence and rationality."[47]

Rolph argues that the history of the royal prerogative in England "falls into two parts; before and after the Criminal Appeal Act of 1907."[48]

> From then onwards, the prerogative was no longer the only effective means available for correcting miscarriages of justice to which the English legal system has been readier than most to admit. But innocent men and women were still held to be guilty, and some were even put to death.[49]

Prior to the establishment of the Court of Criminal Appeal in 1907, the Home Secretary's clemency was "virtually the only hope for the wrongly convicted."[50] Moreover, there were limits on the Home Office "when acting in the pursuit of justice rather than mercy"

---

[44] *Ibid.*, 143-144.

[45] *Ibid.*, 156.

[46] *Ibid.*, 157.

[47] *Ibid.*, 166-167.

[48] Rolph, *The Queen's Pardon*, 31.

[49] *Ibid.*

[50] A. T. H. Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice," *Public Law* (Autumn 1983): 401, 398-439.

because "the secretary of state was both the head of an unofficial legal review body and also the responsible authority for the executive arms of justice."[51] Thus, Chadwick argues that "[i]n neither respect was he well equipped for the task."[52]

> In the former, quasi-judicial, capacity the Home Office had no official standing and no formal mechanism for re-examining the facts of a case. The secretary of state could only overturn the verdicts of courts by an arbitrary act of the Royal Prerogative. He could grant a pardon to anyone he felt unjustly convicted. He very rarely did so and never without, at least, the tacit agreement of the trial judge. In such cases there was always clear, or at least preponderant, evidence of a miscarriage. More frequent, however, were those cases where no more than a substantial element of doubt existed about the facts. In such cases it became the practice to create an unofficial, and secret, appeal court from the ranks of senior judges in order to reinforce, at least within the closed world of the judicial establishment, the legal judgment and authority of the secretary of state. In cases where it concluded that only a conviction for some lesser offence than murder was appropriate, 'ad hoc' strategies were adopted to achieve a supposedly just result without the embarrassment of overturning a verdict. Death sentences were commuted without explanation and sentences of penal servitude awarded, and later reviewed, in line with a new perception of the original offence.[53]

The publicity engendered by the wrongful convictions of Adolf Beck[54] and pressure from public figures prompted the creation of a new court and, in 1907, the Court of Criminal Appeal was established, pursuant to the *Criminal Appeal Act 1907*.

> Although the Act creating the new court expressly provided that nothing it contained should affect the prerogative of mercy, it was in practice bound to do so. Hitherto, the use of the prerogative to correct mistakes had been an integral part of the system of criminal justice, whereas after the Act, the task of seeing that justice was done was more securely in the hands of the judges. The Home Secretary was at liberty to dispense mercy rather than justice.[55]

Thus, "the role of the Home Office as a review body in respect of the facts of a

---

[51] Chadwick, *Bureaucratic Mercy*, 179.

[52] *Ibid.*

[53] *Ibid.*, 179-180.

[54] Beck was wrongfully convicted on two separate occasions; in each case, he had been misidentified.

[55] Smith, "The Prerogative of Mercy," 401.

conviction" was reduced, if not wholly eliminated.[56] When doubts arose about convictions, it was now open to the Home Secretary to "refer them to the new court for a fuller review than he was capable of undertaking," but as Chadwick notes, "the role of the Home Office as a tribunal of mercy continued...unchanged."[57]

In his book about the Home Office, Sir Edward Troup crowed that "[i]f the new court of appeal exercised its powers fully...it would correct any wrongful conviction by Assizes or Quarter Sessions."[58] Rolph correctly observes that "this was far too rosy a picture" and the numerous egregious miscarriages of justice in England throughout the 20th century attest to this fact.[59]

Despite this new Court of Appeal, Smith argues for "the continued need for the pardon to remedy injustice[s]" because of the "sacrosanctity of the jury verdict" and the principle of finality.[60] The Court of Appeal is reluctant to overturn jury verdicts and/or admit fresh evidence.[61] Therefore, if new evidence comes to light that was not considered by a jury "which casts...doubt on the correctness of the jury's verdict, and the Court of appeal is unwilling or unable to look at it, the only remedy is an appeal to the Home

---

[56] Chadwick, *Bureaucratic Mercy*, 216.

[57] *Ibid.*

[58] Rolph, *The Queen's Pardon*, 31.

[59] *Ibid.* A few contemporary examples include the cases of the Guildford Four, Birmingham Six, the Maguire Seven, Timothy Evans and Derek Bentley. All have been officially exonerated; however, in the cases of Evans and Bentley, post-humous pardons were granted, as both men were executed. Of course such miscarriages are not restricted by national borders and occur on a regular basis around the world.

[60] Smith, "The Prerogative of Mercy," 403.

[61] *Ibid.*, 402-403.

Secretary."[62] However, as Chadwick argues, the Home Office was reluctant to grant free pardons because their task then became one of "reviewing the jury's verdict rather than...of mitigating the punishment of those already properly convicted."[63] The Home Secretary had the power to grant free and conditional pardons, to remit sentences, or to refer a case to the Criminal Division of the Court of Appeal under section 19 of the Criminal Appeal Act 1907.[64] However, the Home Secretary (like his Canadian counterpart, the federal Minister of Justice) "will only intervene in cases where evidence is presented by the petitioner which was not available to the courts which dealt with the case."[65] The petitioner must also establish his innocence beyond doubt so the "onus of

---

[62] *Ibid.*, 403.

[63] Chadwick, *Bureaucratic Mercy*, 181.

[64] See Report by Justice, *Home Office Reviews*, 17. Section 19 of the *Criminal Appeal Act 1907* [s. 17 of the *Criminal Appeal Act 1968*] in England is similar in content to section 690 of the Canadian *Criminal Code* and reads as follows:
Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on an application made to him by a person convicted on indictment, or without any such application, may, if he thinks fit, at any time either
(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be treated for all purposes as an appeal to that court by the person convicted; or
(b) if he desires the assistance of the Court of Criminal appeal on any point arising in the case, refer that point to the Court of Criminal Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly."
See also Leonard Jason-Lloyd, *A Guide to the Criminal Appeal Act 1995* (London: Eng.: Frank Cass, 1997). This section of the *Criminal Appeal Act* has been repealed by s. 3 of the 1995 *Act*.

[65] Report by Justice, *Home Office Reviews*, 7. Appendix B (p. 30) of this Report describes the procedure followed by the Home Office in dealing with petitions. It was written by the then Permanent Secretary in 1904, but there had "been little or no fundamental change" in these procedures when Justice's report was published in 1968. In the five years prior to Justice's report, the Home Office received approximately 4,000 petitions from prisoners annually and the great majority of these "either dispute the justice of the conviction or ask for mitigation of sentence, or, as frequently happens, urge both these pleas." There are four stages in the petition process to the Home Office: (1) preparation and presentation of the conviction review petition, (2) the "sifting and selection" process whereby petitions which "merit further investigation" are isolated from non-meritorious claims, (3) the "control and nature of the investigation into those complaints which justify" the petition, and (4) the "appropriate action that should follow such investigation" (p. 8).

proof is effectively reversed."[66] As Justice notes, the "overriding factor governing the exercise of the powers available to the Home Secretary is a proper concern to avoid even the appearance of interfering with the independence of the judiciary."[67]

This review mechanism was deficient and, for decades, the British Section of the International Commission of Jurists, among others, advocated the establishment of an independent tribunal to investigate alleged miscarriages of justice.[68] Malleson notes that the principal reason given by the Royal Commission on Criminal Justice (*Runciman Commission*) 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 the 1968 Criminal Appeal Act to refer back cases."[69] In March 1997, the Criminal Cases Review Commission (CCRC), responsible for investigating wrongful convictions in England,

---

[66] *Ibid.*, 7. See also Walker and Starmer, *Justice in Error*..

[67] Report by Justice, *Home Office Reviews*, 7; Walker and Starmer, *Justice in Error*, 165. Walker and Starmer note that as a consequence of the Home Secretary's deference to judicial independence, "he will only act according to an established departmental formula... ."

[68] In Canada, the Association in Defence of the Wrongly Convicted (AIDWYC), and others, are also advocating a similar independent review body to replace the Criminal Conviction Review Group within the federal Department of Justice. In 1998, the Department of Justice released a Consultation Paper titled "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal Code*" (Department of Justice Canada, 1998) asking interested parties to submit suggestions for reform.

[69] Kate Malleson, "The Criminal Cases Review Commission: How Will It Work?" *The Criminal Law Review* (1995): 929, 929-937; Walker and Starmer, *Justice in Error*, 163-164. Walker and Starmer argue that the Home Office's "filtering and selection of...petitions which merit further investigation," are "considered at the outset by officials in the Criminal Department of the Home Office who have no legal expertise whatsoever."

Wales and Northern Ireland, began handling its first cases.[70] Pursuant to the Criminal Appeal Act 1995, a discretion which was exclusively for the Home Secretary and the Secretary of State for Northern Ireland to exercise, is now "regulated by a set of statutory criteria, and entrusted to the members and staff" of the Commission, a body supposedly "removed from political or judicial influence."[71] While this is a welcome development, some challenge the fact that courts of appeal retain decision-making powers. As Thornton argues, the fact that the "decision-making process remains in the hands of the Court of Appeal," is very problematic because it is the "very forum which for many years has failed to deal effectively and consistently with miscarriages of justice."[72]

In pre-Confederation Canada, individuals seeking justice and mercy also relied upon

---

[70] Criminal Cases Review Commission, *Management Statement for the Criminal Cases Review Commission* (accessed 26 October 1998), available from http://www.coi.gov.uk/coi/depts/GRC/coi084e.ok; Internet, 1-3, 1-22. This reform was one of many which followed the *Runciman Commission*, which was established in March 1991. The role of the Criminal Cases Review Commission (CCRC) is to review and investigate cases of suspected wrongful conviction, and/or sentence and to refer cases to the appropriate court of appeal whenever it considers that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld. Other than in exceptional circumstances, the Commission can only consider cases in which an appeal through the ordinary judicial appeal process has failed. It may also refer cases to the Secretary of State with a view to his recommending to the Queen the exercise of the Royal Prerogative of Mercy. The Secretary of State is responsible for setting the overall policy framework within which the CCRC operates. The Home Secretary directs CCRC member remuneration and the CCRC's staff numbers and terms and conditions of service are subject to the Home Secretary's consent. Although the Home Secretary is no longer responsible for investigating wrongful convictions, he retains his role in relation to the exercise of the royal prerogative of mercy.

[71] *Ibid.*, 2. The CCRC is an executive non-departmental public body established by section 8(1) of the *Criminal Appeal Act 1995*. The Criminal Appeal Act 1995 provides that the CCRC should have "no fewer than 11 members, appointed by the Queen on the recommendation of the Prime Minister, one of whom is appointed by the Queen as Chairman. The CCRC employs a Chief Executive and is expected, initially, to employ in the region of 65 other staff." It operates from premises in Birmingham.

[72] Peter Thornton, "Miscarriages of Justice: A Lost Opportunity," *The Criminal Law Review* (1993): 930, 926-935. Thornton also suspects that the "Court of Appeal still harbours a deeply-felt reluctance to overturn convictions," and, citing the JUSTICE group, the Court of Appeal "is currently too concerned with legalities and is loath to address the wider question of guilt or innocence."

the Sovereign's pardoning power. Cole and Manson note that:

> ...the first Governors General were entrusted by the monarch to exercise personal discretion over pardons. However, as a result of the controversy over the pardon granted to Ambrose Lépine, new Letters Patent and Instructions were issued to the Governor General in 1878. In capital cases, the Instructions required the Governor General to receive the advice of the Privy Council. In other cases, the advice of at least one minister was required.[73]

Thus, prior to the new Letters Patent and Instructions of 1878, the exercise of the prerogative power "fell exclusively to colonial governors who, as the local representatives of the Monarch, were expected to dispose of such matters with a minimum of reference to the Home Government."[74] This was not the case in England, where the exercise of the prerogative power "had virtually devolved" upon the Home Secretary who "advised the Monarch how to proceed in such matters."[75] Although the prerogative of pardon had not always been exercised on cabinet advice, Evans notes that, "by and large, at Confederation, parliamentary government in Great Britain had developed to what it is today and the Sovereign's prerogative power was exercised on cabinet advice."[76]

---

[73] Cole and Manson, *Release from Imprisonment*, 401. They note that "with respect to convictions arising from statutes of a provincial legislature the Lieutenant Governor of the province has the power to grant a pardon."

[74] M. Keith Evans, "The Prerogative of Pardon in Canada: Its Development 1864-1894" (M.A. thesis, Carleton University, 1971), 1-154.

[75] *Ibid.*

[76] *Ibid.*, iii-iv.

> Hence, the Monarch assented to legislation; summoned, prorogued and dissolved Parliament; granted honours and pardons; and performed the various other executive acts at the will of the Cabinet. Prior to Confederation, [the] Canadian government assumed many of the evolutions of British parliamentary experience and little was left to be evolved in an exclusively Canadian context. This was not true of the prerogative of pardon. In Canada, pardons started practically at their basic point of origin as a discretionary power of the Monarch. The changes which had brought the pardon under cabinet control by the latter half of the 19th century in Britain were not transplanted to Canada so that the first [G]overnors-[G]eneral of the Dominion were entrusted by the Queen with a personal discretion over pardons. They were required to listen to cabinet advice but were not required to follow it.[77]

Therefore, at the time of Canada's Confederation in 1867, "the ultimate decision whether or not to pardon an offender was [still] entrusted exclusively to the [G]overnor-[G]eneral."[78]

Evans argues that the prerogative of pardon has since been shaped by events of Canadian history and "has evolved from an independent vice-regal power to one controlled by the cabinet."[79] One such event was the Riel Rebellion of 1869-70. Ambroise Lépine, one of those responsible for the murder of Thomas Scott, was apprehended and sentenced to death which precipitated a highly-charged "political controversy over whether or not he should be pardoned... ."[80]

---

[77] *Ibid.*, iv.

[78] *Ibid.*, 137.

[79] *Ibid.*, iv.

[80] *Ibid.*, iv-v.

> Fearing the possible political consequences that would be precipitated by a decision either for or against a pardon and faced with the racial and religious splits within their own ranks, neither Sir John A. Macdonald's nor, later, Alexander Mackenzie's cabinets could decide how to act and both were hesitant to advise the [G]overnor-[G]eneral what to do. Aware of the difficulties involved, the Earl of Dufferin resolved to act entirely on his own authority, relieving his cabinet of even offering him counsel, and commuted the death penalty. Such an action by the Governor-General averted serious difficulties at the time, but it also focused public attention upon one of the last vestiges of independent monarchical action in Canada, the ultimate power of deciding upon pardons. This was to spell its doom. Almost immediately afterwards, Edward Blake, Mackenzie's Minister of Justice and an ardent champion of Canadian autonomy, entered into protracted correspondence and interviews with the Colonial Office which resulted in almost complete control over pardons being assumed by the Canadian cabinet in 1878. Although there was still a very limited sphere in which the [G]overnor-[G]eneral retained ultimate power, the issuance of new Letters Patent and Instructions to the Marquis of Lorne in 1878 brought cabinet control over pardons practically to the point where it is today.[81]

Consequently, the Marquis of Lorne was the first Canadian Governor "to operate under Instructions" to exercise the prerogative of pardon "just as the Queen did--on ministerial advice," with the exception of "extra-Canadian matters."[82] Notwithstanding the Letters Patent and Instructions of 1878, knowledge of the proper authority over pardons was "not

---

[81] *Ibid.*, v-vi. Evans notes the importance of appreciating the "political imbroglio here [i.e., the Ambroise Lépine affair] and the confusion regarding the definition of the gubernatorial-ministerial relationship which existed at that time throughout the Empire" in order to understand "how the pardoning power became fully subject to cabinet control in Canada" (p. 26). For example, as the author argues, (p. 39), "no matter which way the Macdonald government turned, there seemed no solution to their political troubles. To grant the amnesty would be to commit political suicide in Ontario, not to mention the Maritimes, and to refuse it would imperil the hold the Conservative Party had had on Québec since Confederation" (p. 39). Thus, Sir John A. Macdonald "tried to shift the problem to the Imperial Government" but they refused to act (p. 39). The matter was then passed on to Alexander Mackenzie's Liberal Party which defeated the Macdonald government in 1873 (p. 47). Dufferin, the Governor General, ultimately wrote to Carnarvon (Secretary of State for the Colonies) stating his desire for commutation of Lépine's capital sentence (p. 57). This request was approved and Dufferin "directed the Minister of Justice Télesphore Fournier, on January 15, 1875, to take steps for the commutation of Lépine's capital sentence to two years' imprisonment with forfeiture of political rights" (p. 59).

[82] *Ibid.*, 105. However, there were two subsequent occasions on which the Governor-General exercised independent judgment to pardon. As Evans notes, "[i]n both instances, cabinets were equally divided and unable to advise him whether or not to extend clemency" (p. 106) and in each case, the Governor General commuted the men's sentences. This again raised a storm of protest from the Opposition government who charged that the constitution had been breached because the cabinet did not "tender [its] advice or resign if it were unable or unwilling to do so" (p. 110). As was set out in the Instructions of 1878, cabinet was specifically empowered to provide advice on pardons in capital cases.

fully appreciated by all at the time."[83] As Evans points out, "some seemed to be of the opinion that there were cases apart from the Imperial and international realms (i.e., 'extra-Canadian matters' referred to above) where the [G]overnor-[G]eneral, under instructions from Britain, could act on his own judgment."[84] However, by 1926, the Governor-General's exclusive discretion over "Imperial and international" spheres was abolished.[85] Subsequently, "all that was required was the alteration of the Letters Patent and Instructions to subject the prerogative of pardon in Canada entirely to cabinet control."[86]

When Governor-General Dufferin commuted Lépine's sentence "without any advice from his cabinet,"[87] this exposed the important constitutional issue of "cabinet responsibility for all executive acts."[88]

---

[83] *Ibid.*, 111.

[84] *Ibid.*

[85] *Ibid.*, 112. The Balfour Report of the Imperial Conference of 1926 provided that "the dominions were in no way inferior to Great Britain in external affairs and that the [G]overnors-[G]eneral were no longer agents or representatives of the British government in the dominions." As such, the "independent authority of the [G]overnor-[G]eneral over this aspect of the pardon ceased to have any meaning."

[86] *Ibid.*

[87] *Ibid.*, 67.

[88] *Ibid.*, 63.

> Under the British parliamentary system of responsible government, it is the accepted practice that when the Monarch or [G]overnor-[G]eneral and his ministers are unable to agree, one must bow to the will of the other. Either the [P]rime [M]inister resigns and the chief executive obtains a new ministry which will assume responsibility for his actions and defend these in the House of Commons; or, the more common practice, the chief executive accedes to the [P]rime [M]inister's views and gives them his formal approval. In Great Britain, it would appear that this was the manner in which such differences of opinion over pardons between the Monarch and the British Ministry were dealt with in the late 1800s; but, in the colonies a different procedure was allowed, with the final result that in the case of a dispute between the cabinet and the [G]overnor-[G]eneral, there was a gap in the operation of parliamentary responsibility. If a [G]overnor refused to follow cabinet advice with regard to a pardon and acted contrary to it, the cabinet was relieved of all responsibility for his actions and was not required to resign.[89]

Disputes also arose "concerning the location of the prerogative of pardon" during the drafting of the *British North America Act*.[90] Evans argues that the delegates to the Québec Conference, "particularly Sir John A. Macdonald,...proposed that the prerogative be vested in the [L]ieutenant-[G]overnors; however, the Colonial Office would not assent to this because they did not consider the [L]ieutenant-[G]overnor a representative of the Monarch to whom such a high prerogative should be entrusted."[91] The Canadian delegates believed it was impractical that all pleas for remission had to be forwarded to the central government, and therefore, "pressed for a change in the Colonial Office attitude" during their visit to London to prepare the final draft of the *British North America Act*.[92] However, the Secretary of State for the Colonies, Lord Carnarvon, strongly disagreed and "the final result was the deletion of any mention of the prerogative of pardon from the *British North America Act*, its devolution from the Monarch being reserved to the Letters

---

[89] *Ibid.*, 63-64.

[90] *Ibid.*, vi.

[91] *Ibid.*

[92] *Ibid.*, vi-vii.

Patent and Instructions."[93] Nevertheless, following Confederation, as the federal and provincial governments continued to grapple for "as large a domain as possible," the Lieutenant-Governors' desire to exercise the pardoning power arose once again.[94] Nova Scotia was the first province to raise this issue in 1868.[95] Later, New Brunswick and Ontario attempted to gain prerogative powers for their Lieutenant-Governors. In Ontario, the matter was ultimately referred to the British government "for its opinion and final settlement" but the "colonial Secretary...denied any power in the [L]ieutenant-[G]overnors to grant pardons."[96] Thus, in the latter part of the 19th century, the provinces vigorously attempted "to stretch their powers to their limits," including an expansion of the "executive sphere."[97] In Liquidators of the Maritime Bank Case, [1892] A.C. 437, it was held that the "[L]ieutenant-[G]overnors were as much monarchical representatives for provincial purposes as the [G]overnor-[G]eneral was for federal purposes" and, as Evans

---

[93] *Ibid.*, vii.

[94] *Ibid.*, 10.

[95] *Ibid.*, 12.

[96] *Ibid.*, 20. The Dominion government's exclusive prerogative power was challenged once again in 1888, when Ontario passed An Act Respecting the Executive Administration of the Law of this Province (51 Vic., Chap. 5, also referred to as the Executive Power Act) (p. 115). The Ontario Court of Appeal found that "since the provinces were empowered to create quasi-criminal offences and to provide for their punishment by virtue of Section 92(15) of the Confederation Act, the legislatures must have the power to pardon for the administration of their punishments. One aspect of this administration was suspension of punishment, or pardon, which was dealt with by Section 2 of the Executive Power Act. Upon appeal to the Supreme Court of Canada in 1893, the Dominion again failed in having the Executive Power Act declared *ultra vires*" (p. 127-128). The result was "that the exercise of the prerogative of pardon was split along legislative lines, the [G]overnor-[G]eneral retaining power with regard to capital cases and other offences against federal Acts and the [L]ieutenant-[G]overnors exercising the prerogative in relation to the legislation of their respective provinces" (p. 22).

[97] *Ibid.*, vii.

posits, this "convinced the Dominion that it was futile to oppose provincial assumption of the pardoning power."[98] Henceforth, "the provinces exercised the pardoning power without federal hindrance,"[99] and, following the decisions in the Executive Power Act and the Maritimes Bank Case, the "federal authorities do not appear to have...challeng[ed] [provincial] activities in the courts."[100] By 1892, when Canada enacted its first *Criminal Code*, the Governor-in-Council was empowered to grant free and conditional pardons to any person convicted of an offence.[101] For convictions arising from "statutes of a provincial legislature, the Lieutenant Governor of the province has the power to grant a pardon."[102] Swainger[103] examined the Crown prerogative and capital punishment in Canada between 1867 and 1878 and argues that the Governor General "was empowered to invoke the prerogative of the Crown to remit sentences and grant pardons," but it was the federal cabinet that "was responsible for guiding the use of that prerogative."[104] With

---

[98] *Ibid.*, ix.

[99] *Ibid.*, xi.

[100] *Ibid.*, 136.

[101] Cole and Manson, *Release from Imprisonment*, 402. Note that "[t]his power [is] distinct from the pardoning power which resides in the Crown [and] extends to the remission of pecuniary penalties but not to remission of sentences of imprisonment." See also Ratushny, *Self-Defence Review*, 56. Ratushny notes that the term "royal prerogative of mercy" is sometimes used to refer only to powers not specifically set out in statute." Therefore, "the term may be used to refer to the powers vested in the Governor General as compared to those given to the Minister of Justice or the Governor-in-Council under the *Criminal Code*.

[102] *Ibid.*, 401. Cole and Manson refer to *Canada (A.G.) v. Ontario (A.G.)*, [1890] O.R. 222. Affirmed (1894), 23 S.C.R. 458.

[103] See Jonathan Scott Swainger, "Governing the Law: The Canadian Department of Justice in the Early Confederation Era" (Ph.D. Diss., University of Western Ontario, 1992), 173-247.

[104] *Ibid.*, 174.

respect to criminal law, "these deliberations typically involved two types of cases; petitions for early release from imprisonment, and appeals for mercy in sentences of death."[105] However, "although in theory, the advice tendered was a product of cabinet discussion," Swainger argues that "in practice, it was the Minister of Justice who determined which policy to follow."[106]

> Although the cabinet was responsible for advising the Governor General on the use of the prerogative, he still maintained residual authority. In practice, rather than attempting to force the Governor General into any particular action, the Minister of Justice typically screened all applications for remission or commutation, dismissed those not warranting further action, and then passed along cases which actually deserved executive attention. If too many, or too few cases were forwarded to the Governor General, the Minister of Justice risked credibility as an advisor. Balance and consistency were crucial to obtain the greatest effectiveness. Therefore, while provincial officials dominated the public's perception of the administration of criminal justice, the Minister of Justice and his advice to cabinet assumed center stage, not only in determining if a convict should be freed, but whether or not a condemned person should be hanged.[107]

Today in Canada, Rosen[108] argues that the pardoning authority can be exercised in three ways: the Governor-in-Council (federal cabinet) may grant a person convicted of an offence a free or a conditional pardon under section 74[8] of the *Criminal Code*;[109]

---

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*, 174-175.

[108] Rosen, "Wrongful Convictions," 4.

[109] R.S.C. 1985, c. C-46, s. 748. The following Table of Concordance, created from Crankshaw's Criminal Code (Vol. 8), summarizes the previous section numbers of the present day section 748. The section numbers marked with asterisks have been taken from respective Criminal Codes (Martin's Annual Criminal Code, 1985-1995 and 1998, and Tremeear's Criminal Code, 1996-1997).

s. 966 (1892-1906)
s. 1076 (1906-1953)
s. 655 (1953-1970)
s. 683 (1970-1988)*
s. 749 (1989-1996)*
s. 748 (1997 to present)*

application may be made to the Solicitor General of Canada for a pardon under the *Criminal Records Act*;[110] and application for mercy may be made to the Minister of Justice under section 690 of the *Criminal Code*.[111] However, an additional mechanism for pardon exists under 749[112] of the *Criminal Code*, which states that "[n]othing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy," which "preserv[es] a traditional historical source of pardoning authority in Canada"[113] In theory, then, "the common law continues...to vest extensive powers and privileges" in the Queen's hands, but in practice, "as a matter of constitutional convention, the Queen does not, even in England, independently exercise the legal powers, including the prerogative

---

[110] R.S.C. 1985, c. C-47. It should be noted that the National Parole Board (NPB), through the Solicitor General, also receives applications for pardon under the royal prerogative of mercy. See Solicitor General Canada, *Annual Report* (Canada, Solicitor General, 1990-1991), 46.

[111] Discussion of the historical development of section 690 is discussed in Chapter 4.

[112] R.S.C. 1985, c. C-46, s. 749. The following Table of Concordance, created from Crankshaw's Criminal Code, (Vol. 8), summarizes the previous section numbers of the present day section 749. The section numbers marked with asterisks have been taken from respective Criminal Codes (Martin's Annual Criminal Code, 1985-1995 and 1998, and Tremeear's Criminal Code, 1996-1997).

s. 970 (1892-1906)
s. 1080 (1906-1927)
s. 1022(1) and s. 1080 (1927-1953)
s. 658 (1953-1970)
s. 686 (1970-1988)*
s. 751 (1989-1996)*
s. 749 (1997 to present)*

[113] Rosen, "Wrongful Convictions," 4. Also see Ratushny, *Self-Defence Review*, 59-60. Ratushny describes the ten possible remedies available under the royal prerogative of mercy: free and conditional pardons under s. 748(2) of the *Criminal Code*; pardons under the *Criminal Records Act* (R.S.C. 1985, c. C-47); remission of sentence, respite of sentence, and commutation of sentence (these powers derive from the Letters Patent constituting the office of the Governor General, R.S.C. 1985, App. No. 31); new trial (s. 690(a), *Criminal Code*), referral of case to a court of appeal (s. 690(b), *Criminal Code*), referral to a court of appeal on a legal issue (s. 690(c), *Criminal Code*); and reference to the Supreme Court of Canada (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53).

powers, allowed to her under the common law."[114] Thus, in Canada today, the prerogatives of the Crown are exercised by the Prime Minister and other ministers of the Queen and while such "prerogatives...are exercised in her name, she is rarely consulted."[115] Although some argue that our court system provides sufficient mechanisms for appeal[116] and, therefore, "it is difficult, on constitutional grounds, to justify appeal above the courts to the executive,"[117] the royal prerogative remains an important last-resort safeguard for exceptional cases.

---

[114] Gerald Chipeur, "The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?" *Alberta Law Review* 30, no. 2 (1992): 627, 625-668.

[115] *Ibid.*, 628.

[116] In this study, however, most defence counsel interviewed stated that courts of appeal focus upon *legal* errors in lower courts, rather than *factual* issues. As such, appeal courts are ill-equipped to effectively deal with individuals whose factual guilt is in doubt. Appeal courts concern themselves with the legal propriety of the trial, rather than with factual issues that may arise following a person's conviction. The problems posed by such narrow appeal criteria are discussed in greater depth in chapters 6 and 7. There are numerous examples of Canadian wrongful convictions which demonstrate not only the fallibility of the criminal justice system, but of the appeal process as well, particularly with respect to how appeal criteria are currently mandated.

[117] Evans, "The Prerogative of Pardon," iii.

III. Types of Pardons

Under section 748[118] of the *Criminal Code*, there are two basic forms of pardon--free and conditional.[119] The effect of a free pardon under section 748 "place[s] the individual in the position of someone who ha[s] never been convicted."[120] It should be noted, however, that the actual effects of a free pardon are not universally agreed upon. Cole and Manson attribute this controversy to the infrequent exercise of the royal prerogative and the "absence of careful reasoning explaining the conceptual premises for its exercise... ."[121] The uncertainty concerns the royal prerogative's "proper scope of inquiry" and the "relevant grounds" for its exercise.[122]

---

[118] R.S.C. 1985, c. C-46. Section 748 currently reads:

> 748.(1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.
>
> (2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.
>
> (3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.
>
> (4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

[119] Cole and Manson, *Release from Imprisonment*, 402. It is important to note that these pardons are distinct from those issued under the *Criminal Records Act*, which are granted *after* the individual has served his or her sentence. The goal of the latter is to remove the stigma of conviction, provided the individual has remained a law-abiding citizen over a specified period of time. Pardons issued pursuant to the *Criminal Records Act* "do not reflect an aspect of the historical pardoning power grounded in notions of mercy and justice." The Clemency and Pardons Division of the National Parole Board carries out these pardon investigations and recommendations are then submitted to the Solicitor General who refers them, if favourable, to the Governor-in-Council for decision.

[120] *Ibid.*, 403.

[121] *Ibid.*, 407. Cole and Manson note that since 1980, only nine prisoners have been granted pardons in Canada. However, additional pardons have likely been granted since the publication of their book in 1990. The authors do not specify whether these nine pardons were "free" or "conditional."

[122] *Ibid.*

Smith[123] argues that "it is not possible to generalize about the legal effects of a free pardon" because several interpretations are possible.[124] One interpretation is "that the free pardon wipes out not only the sentence for the offence, but the conviction and all its consequences, and puts the person pardoned in exactly the same position as if he had never been convicted."[125] Thus, an individual proven to be innocent of the crime for which s/he was convicted may receive a free pardon. Free pardons were often granted "to those wrongfully convicted in the judge's view and occasionally to others who were thought incapable for reasons of age or infirmity of withstanding an alternative punishment."[126] A second interpretation is that "the free pardon does not automatically declare the recipient to have been innocent of the crime charged.... It says no more than that he was wrongly convicted."[127] This interpretation emerged in the New Zealand decision in *Re Royal Commission on* [the] *Thomas* case, where the High Court

> held that the effect of the pardon was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted.... [Thomas] is, by reason of the pardon, deemed to have been wrongly convicted.[128]

---

[123] Smith, "The Prerogative of Mercy," 419.

[124] For example, see Rolph, *The Queen's Pardon*; Samuel Williston, "Does a Pardon Blot Out Guilt?" *Harvard Law Review* 28, no. 7 (1915): 647-663; Beattie, *Crime and the Courts*, 431. Beattie describes the effect of an absolute (free) pardon as the release of a prisoner "as if he had been acquitted."

[125] Smith, "The Prerogative of Mercy," 417.

[126] Beattie, *Crime and the Courts*, 431.

[127] Smith, "The Prerogative of Mercy," 418.

[128] *Ibid.*

Finally, a free pardon may be viewed such that "a conviction is to be disregarded so that, so far as is possible, the person is relieved of all penalties and other consequences of the conviction" which "does not go so far as to say that the conviction is wiped out, or even that the recipient was wrongly convicted."[129] Therefore, whether a free pardon "wipes out the conviction...depends on the terms in which the pardon is couched."[130]

The conditional pardon essentially "substitutes one form of sentence for another" whereby the person is "free[d] from the consequences of the original punishment" but must "abide by the conditions imposed."[131] Commutation of the death penalty to life imprisonment is one example of a conditional pardon. The conditional pardon has also been described as "the forerunner of parole" which has "sometimes been used as a substitute for a parole system."[132]

Remission of sentence constitutes another type of pardon which "is similar in origin to a conditional pardon in that it flows from a conclusion that the sentence appears unduly harsh or inappropriate"; however, "unlike a conditional pardon, it operates to end the

---

[129] *Ibid.*, 419.

[130] *Ibid.* Also see Christopher Gane, "The Effect of a Pardon in Scots Law," *Juridical Review* (1980): 23, 18-46. Gane notes that in Scottish law, "it appears that the correct approach...is to examine the actual terms of the pardon" in order to determine the pardon's actual effect (i.e., whether the person has been freed from *both* the consequences of the conviction and the conviction itself or merely the consequences of the conviction).

[131] Cole and Manson, *Release from Imprisonment*, 404.

[132] Sol Rubin, *The Law of Criminal Correction*, 2nd ed. (St. Paul, Minn.: West Publishing, 1973), 665.

sentence."[133] Such remissions are generally rewarded for compassionate reasons but also as "rewards" for prisoners who "[help] the prison authorities in some way" (e.g., coming to the rescue of a prison guard attacked by other prisoners) and in cases "where serious doubts are raised about the correctness of a conviction but the Home Secretary is not convinced that injustice has been done."[134]

Finally, amnesties "are usually short periods of remission granted to all prisoners in recognition of some event."[135] In Canada, amnesties have been granted "as a result of the Silver Jubilee of King George V...and the Royal Visits in 1957 and 1959."[136]

IV. The Exercise and Rationales of the Royal Prerogative of Mercy in England

Prior to 1307, the primary purpose of pardons was to "excuse homicides in cases of mischance, involuntary killing and defence of life and property,"[137] at a time when distinctions between intentional and accidental harms, for example, were "either lacking or insufficiently developed in the young system of criminal law."[138] By 1535, the Jurisdiction

---

[133] Cole and Manson, *Release from Imprisonment*, 405-406.

[134] Smith, "The Prerogative of Mercy," 424. Also see Ratushny, *Self-Defence Review*, 58-60. In Canada, according to a National Parole Board booklet published in 1994, remission of sentence "amounts to erasing all or part of the sentence imposed by the court because of (a) an error of law; (b) undue hardship; or (c) an inequity, such as a change in legislation which had unintended and unanticipated consequences for a person previously convicted and sentenced." The power to order remission of sentence "derives from the general powers of the Governor General under Article II of the Letters Patent."

[135] Cole and Manson, *Release from Imprisonment*, 406.

[136] *Ibid.*

[137] *Ibid.*, 400.

[138] Moore, *Pardons*, 18.

in Liberties Act "extinguished the power of the Church and the great landowners to grant pardons at all, and for the first time established the royal prerogative in the statutes."[139]

The power to pardon was also used "to develop new forms of punishment - notably transportation."[140] By the 17th century, the conditional pardon was used to "eas[e] the chronic labor shortages in the colonies."[141]

> Capital offenders were sometimes offered a pardon, on condition that they agree to go to the New World and work on the plantations for a number of years... . By 1663, so many felons lived in Virginia that there was constant danger of rebellion. Also, the ships of the growing British navy were staffed in part by reluctant sailors who accepted a conditional pardon as preferable to execution.[142]

By 1718, in England, transportation to the American colonies was established "as a regular punishment for non-capital offences,"[143] but it also provided a useful alternative to capital execution.[144] As Beattie argues, transportation "provided a way of regulating the level of capital punishment while providing proof of the king's care for his people and frequent demonstrations of his exercising his proper role by tempering justice with

---

[139] Rolph, *The Queen's Pardon*, 19.

[140] Sebba, "Clemency in Perspective," 224; Beattie, *Crime and the Courts*, 450-519; Peter King, "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800," *The Historical Journal* 27, no. 1 (1984): 25-58; Leon Radzinowicz, *A History of English Criminal Law, Vol. 1.*

[141] Moore, *Pardons*, 19.

[142] *Ibid.*

[143] Beattie, *Crime and the Courts*, 470.

[144] Beattie, "The Royal Pardon"; Radzinowicz, *A History of English Criminal Law, Vol. 1.*

mercy."[145] Simpson[146] summarizes the evolution of transportation from the 16th century up to the middle of the [19th] century as follows:

> it was first recognized as a punishment for persons leading an incorrigibly idle and disreputable life; then for various classes of the community that were at the time considered equally obnoxious and dangerous to social order - moss-troopers, the Irish Catholics of Cromwell's day, rebels and adherents of rebellion at a later period; afterwards for all felons who through the royal clemency or through having a claim to the benefit of clergy escaped the ordinary penalty for felony, but for whom the law provided no other adequate punishment. Hence transportation came to be used as a secondary punishment for the more heinous misdemeanours as well as for felonies whether of a serious or a trivial kind.

Transportation also "acted as a counterbalance"[147] to the harshness of the Criminal Code. As Radzinowicz and Hood explain, the main rationales underlying England's use of the conditional pardon of transportation was to eliminate "the most dangerous elements from the home community," and, in the longer term, to "disperse the criminal class."[148] Moreover, elimination of such individuals "satisfied the demands for just retribution... [a]t a time when crime was equated with sin."[149] Proponents of transportation extolled its virtue as an effective general and specific deterrent, and such a large supply of "slave

---

[145] Beattie, *Crime and the Courts*, 473.

[146] Cited in Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 466-467.

[147] Beattie, "The Royal Pardon," 9; Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 465-489. See also Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776* (University of North Carolina Press, 1947; reprint, Gloucester, Mass.: Peter Smith, 1965; page citations are to the reprint edition).

[148] Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 471-472.

[149] *Ibid.*, 472.

labour" also provided economic benefits to the colonies.[150] However, these views were not universally held. Critics were unconvinced of its deterrent effects and argued that the system of transportation was inequitable, overly harsh and not conducive to offender reform.[151] Also of interest is the fact that "over half [of those transported] were under the age of 24," unmarried, "four out of ten had only committed small larcenies [and] eight out of ten were offenders against property... ."[152] Radzinowicz and Hood argue that this system of sentencing and selection "was clearly not simply a measure of defence against serious crime but much more generally a measure of elimination of those likely to continue to commit small crimes primarily directed against private property."[153]

In 1776, the "American War of Independence brought transportation to a stop...but three years later the Government was empowered, for the next five years, to send prisoners sentenced to transportation to any parts beyond the seas."[154] Transportation was revived, however, and the first 'shipment' of convicts to Australia occurred in 1787 and continued until 1867.[155]

In England, every felony was subject to the death penalty and, by 1819, there were

---

[150] *Ibid.*, 473.

[151] *Ibid.*, 476-477.

[152] *Ibid.*, 484.

[153] *Ibid.*, 484-485.

[154] *Ibid.*, 466.

[155] *Ibid.*, 467.

220 capital offences.[156] Thus, the royal prerogative of mercy "softened the harshness" of the criminal law,[157] as did benefit of clergy.[158] For example, Alschuler (1979, cited in Moore)[159] notes that "of the 1,254 defendants sentenced to death in England in 1818, only [97] were executed." The royal pardon, when used to regulate the rate of executions, "bolstered the legitimacy of the law, for to have allowed all those condemned to be executed would have reduced the effectiveness of the gallows as a deterrent and provided a substantial disincentive to juries to convict in capital cases."[160] Consequently, from a "high point in the late [16th] and early [17th] centuries, the level of capital punishment first declined sharply and then remained relatively constant."[161]

The royal prerogative was also influenced by changing attitudes towards capital punishment and by dissatisfaction with the existing law of murder.[162] Therefore, in 1864, a Royal Commission was established to examine the provision and operation of the capital

---

[156] Moore, *Pardons*, 17; Phillips, "The History of Canadian Criminal Justice," 71. In 1800 in Nova Scotia, by local statute over 50 offences carried the death penalty.

[157] Moore, *Pardons*; Smith, *Colonists in Bondage*, 90. During the 17th century in America, Smith notes that "[300] crimes were designated as felonies," and offences such as house-breaking or stealing anything of value greater than a shilling were made punishable by death, thus demonstrating the severity of the criminal law at this time.

[158] Smith, *Colonists in Bondage*, 90.

[159] Moore, *Pardons*, 17.

[160] Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815," *University of Toronto Law Journal* 42, no. 4 (fall 1992): 405-406, 401-449.

[161] *Ibid.*, 405.

[162] Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 662.

laws in the United Kingdom.[163] No agreement could be reached on abolition of the death penalty; however, the Commissioners agreed that the existing law of murder was unsatisfactory and recommended that capital sentences be reserved for cases of "the first or higher degree."[164] A number of bills were brought forward in the House of Lords to legislate "degrees of murder," but none were successful.[165]

> The failure to implement the Royal Commission's proposals, combined with the widely felt desire to retain capital punishment and yet to restrict it to "real murder," inevitably brought the royal prerogative of mercy to the forefront... . Of those sent for trial for murder at the turn of the century, four out of ten were acquitted, two out of ten were classified as insane on arraignment or found guilty but insane, and only four out of ten were convicted and sentenced to death. The high proportion of acquittals was attributed to two factors. One was the particular care taken in capital cases to avoid wrongful conviction, the other the fact that juries were often reluctant to be involved in the imposition of capital punishment. There can be no doubt that this must have played a role, but how important it was escapes precise measurement. In contrast, the effect of the royal prerogative was apparent to everybody. In the 16 years, 1866-1881, 47 percent of those convicted were reprieved and, although in the decade 1900-[19]09 the proportion decreased, it still stood at 40 per cent.[166]

Despite unsuccessful efforts to reform the law of murder, there is evidence that Home Secretaries, when making pardon decisions, used the criteria which the Royal Commission

---

[163] *Ibid.*, 661. The Commission was to inquire into, among other issues, "the provisions and operation of the laws [then] in force in the United Kingdom, under and by virtue of which the punishment of death may be inflicted upon persons convicted of certain crimes, and also into the manner in which capital sentences [were] carried into execution." See also Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: Grappling for Control, Vol. 4* (London, Eng.: Stevens & Sons, 1968), 303-353. Radzinowicz notes, however, that "it was the judges whose advice in individual cases lay behind the liberal use of the prerogative of mercy." Also see Chadwick, *Bureaucratic Mercy*, 116. Chadwick found that judges and Home Office officials attached great significance to jury recommendations. Jury recommendations for mercy were influenced by expressions of legal doubt, doubts about the judge's charge, and other mitigating factors such as the prior character of the prisoner or the poor character of the victim.

[164] Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 663.

[165] *Ibid.*, 671-676.

[166] *Ibid.*, 676-677.

"had singled out to distinguish first from second degree murder."[167] Such evidence was found in Parliamentary statements made by Home Secretaries; however, they were often vague and evasive because the Home Secretary "was under no obligation to divulge the considerations which influenced his decisions in particular cases."[168] Herbert Gladstone[169] argued that although important principles were borne in mind in pardon decisions, "it would be wrong to lay down hard and fast rules" and that such decisions "must inevitably rest on a full review of a complex combination of circumstances and often in the careful balancing of conflicting interests."

Chadwick analyzed the exercise of the royal prerogative by examining Home Office capital murder case records for the period 1861-1896. He too found that the prerogative was used to mitigate harsh laws but argues that "such mitigation was a pragmatic attempt to accommodate the sensibilities of the public and win their support for, and participation in, the legal process rather than an exercise in the compassion of individual or collective consciences."[170]

---

[167] *Ibid.*, 678.

[168] *Ibid.*

[169] Cited in Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*, 678.

[170] Chadwick, *Bureaucratic Mercy*, 3.

> In the context of the criminal law mercy means mitigation, the reduction of a legally mandated punishment where some element of doubt exists about the full criminal liability of a convicted person. It is a matter of compromise between the strict standards of an absolute law and subjective perceptions of relative blameworthiness. This disjunction had its origins in the way in which the criminal law developed and in the character of the common law itself. The efforts of 19th century reformers to standardize legal administration and to rationalize the law itself were only partially successful and opportunities for mitigation remained a feature of the Victorian criminal justice system at every level. The administration of the prerogative of mercy in capital cases was only the most conspicuous example of this process. It was a task which the secretary of state and his staff fulfilled conservatively, protecting both the absolute standards of the criminal law and the moral order of society as they saw it.[171]

Pardons were also the only escape from the death penalty for murders committed by very young or mentally disabled offenders.[172] In Chadwick's view, the issues of "insanity, conceptions about women, and provocation constituted the main grounds upon which capital sentences were mitigated" and also "reflects some of the deepest preconceptions and anxieties of Victorian society" and "of an emergent establishment morality."[173] Secretaries of State were politically "sensitiv[e] to both national and local sympathies" so as to "balance the demands of strict liability under the law and a more elusive concept, 'the general ends of justice.'"[174] During the second half of the 19th century, views concerning the legal liability of the insane and capital punishment of the young and old began to change and the "prerogative powers were used to achieve [a] kind of compromise."[175]

Doubts about a person's guilt also prompted pleas for pardon. Beattie studied the

---

[171] *Ibid.*, 373.

[172] See Moore, *Pardons*; Cole and Manson, *Release from Imprisonment*; Scbba, "Clemency in Perspective."

[173] Chadwick, *Bureaucratic Mercy*, 50.

[174] *Ibid.*, 232.

[175] *Ibid.*, 233.

quarter sessions and assize courts in Surrey between 1660 and 1800 and found that "in dealing with convicted murderers, judges mainly reserved reprieves for those they thought had been wrongfully convicted on the evidence, as a way of overcoming the persistence of juries who ignored their advice and direction."[176] Thus, the royal prerogative was exercised to "respond to the fallibility of the judicial process."[177] However, as Beattie notes,

> the royal pardon was used not simply to correct an occasional miscarriage of justice or to respond to new information when a trial was concluded - as clemency might be in the modern world - but as an ordinary and established aspect of the way the law was administered. The royal pardon was employed regularly to alter and to shape the way convicted offenders were punished in the [18th] century.[178]

Pardons were also used as "aid[s] to prosecution" when "promised to accomplices who were prepared to give testimony which led to the conviction of their confederates."[179] This procedure fell into disuse, but "the practice of granting pardons to suspects who turned 'King's evidence' became increasingly common and appeared to be the mainstay of the administration of criminal justice in the late [18th] and [19th] centuries."[180]

Characteristics of individual offenders and the nature and circumstances of the crime

---

[176] Beattie, *Crime and the Courts*, 433.

[177] Cole and Manson, *Release from Imprisonment*, 407.

[178] Beattie, "The Royal Pardon," 11.

[179] Cole and Manson, *Release from Imprisonment*, 400. See also Sebba, "Clemency in Perspective."

[180] Sebba, "Clemency in Perspective," 225. See also Chadwick, *Bureaucratic Mercy*, 44, who notes that rewards in the form of pardons to accomplices who gave evidence against their confederates were dispensed with because of "the growing specialization and technical expertise available to the central government [in England]."

also influenced petitions for mercy.[181] Chadwick found that gender was "never an exculpatory factor in serious crime," although "establishment perceptions of femininity shaped their judgments of women both as perpetrators and victims of murder."[182] Moreover, as the Victorian era progressed, perceptions surrounding the offence of infanticide "seem...to have undergone a distinct moderation... ."[183] Judges and bureaucrats demonstrated a "growing sympathy" towards the "pressures to which young mothers of illegitimate children were exposed" and "an increasing willingness to accept medical accounts of puerperal insanity."[184] Chadwick also found that judges and civil servants were heavily influenced by "traditional views of the normal behaviour expected of men and women, and of husbands and wives" in cases of domestic homicide.[185] Cases which garnered public opinion also influenced petitions for mercy.[186]

---

[181] Radzinowicz, *A History of English Criminal Law, Vol. 1*; Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*; Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow (London, Eng.: Allen Lane, 1975); King, "Decision-Makers and Decision-Making"; Beattie, *Crime and the Courts*; Beattie, "The Royal Pardon"; Phillips, "The Operation of the Royal Pardon."

[182] Chadwick, *Bureaucratic Mercy*, 289.

[183] *Ibid.*, 293.

[184] *Ibid.* See also Constance Backhouse, *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press for The Osgoode Society, 1991), 136. Backhouse argues that although infanticide was a capital offence, courts increasingly expressed a "pervasive sense of tolerance and even compassion" towards women accused of such crimes. Legal authorities came to view infanticides, she argues, as "rational steps women took to reassert order" over the tragic consequences resulting from illegitimate pregnancies or pregnancies which would have caused women further destitution.

[185] Chadwick, *Bureaucratic Mercy*, 327.

[186] *Ibid.* Also see Radzinowicz and Hood, *A History of English Criminal Law, Vol. 5*.

Although there is broad agreement in the literature about the necessity of the pardon during periods of harsh criminal laws, there is substantial debate among English historians as to why some individuals were selected for the gallows and others not.[187] Hay sought to determine how the "criminal law functions as an ideological system."[188] He distinguishes three aspects of the law as ideology--"majesty, justice, and mercy"-- in order to explain the divergence between ever-increasing capital statutes and "declining executions, and the resistance to reform of any kind."[189] In his discussion of mercy, Hay found that three elements were important in [18th]-century social relations.[190] First, it was class, rather than "claims of humanity" that most influenced petitions for mercy. Second, the pardon played an important role in the "ideology of mercy."

> ...pardon-dealing went on at the highest levels only, well concealed from the eyes of the poor. Therefore, the royal prerogative of mercy could be presented as something altogether more mysterious, more sacred and more absolute in its determinations. Pardons were presented as acts of grace rather than as favours to interests.[191]

Finally, pardons served the dual function of buttressing an ideology of class justice while simultaneously "proclaim[ing] the law's incorruptible impartiality, and absolute determinacy."[192] Therefore, throughout this period of harsh criminal laws, the prerogative

---

[187] See Hay, "Property, Authority"; King, "Decision-Makers and Decision-Making"; Beattie, *Crime and the Courts*; Beattie, "The Royal Pardon."

[188] Hay, "Property, Authority," 26.

[189] *Ibid.*

[190] *Ibid.*, 44.

[191] *Ibid.*, 46-47.

[192] *Ibid.*, 47.

of mercy allowed those with power to "congratulate [themselves] on [their] humanity" and "encouraged loyalty to king and state."[193] Hay found that "respectability"[194] was the most significant factor in obtaining pardons. However, King argues that Hay greatly exaggerates the role played by class in the administration of the criminal law.[195] King studied the process of prosecution in the county of Essex, the sentencing policy of the assize courts and the pardoning procedure in the second half of the 18th century. He found that "a wide variety of participants could influence the outcome of a case" and that "it was...possible for individuals and groups of widely differing social and economic status to modify or choose not to modify the severity of the law in line with their needs, beliefs and ideas of justice."[196] In King's view, the unpropertied labouring poor "made extensive use of the courts" to "prosecute those who had stolen [from them]."[197] Moreover, the majority of sentencing and pardoning decisions were based on "the prisoner's previous good character, youth, the existence of prior convictions, destitution of himself or his family, the possibility of his innocence, his prospects of employment or reform, the nature

---

[193] *Ibid.*, 49.

[194] *Ibid.*, 44-45. "Respectability" refers to the sense of the social and political connections that could be called on by and on behalf of a petitioner. See Jim Phillips, "The Operation of the Royal Pardon," 407.

[195] King, "Decision-Makers and Decision-Making." Also see Chadwick, *Bureaucratic Mercy*, 390. With respect to Victorian society in England, Chadwick found "virtually no evidence...of successful personal intervention or influence from interested people in the prerogative process and no overt social bias." This was not surprising, in his view, "since very few people with connections to the ruling classes found themselves in this situation and those who did were usually 'rejects' from that society."

[196] King, "Decision-Makers and Decision-Making," 26.

[197] *Ibid.*, 33-34.

and surrounding circumstances of his crime, or the respectability of his background."[198] The criterion of 'respectability' "was the least frequently mentioned and most ambivalently treated factor," although King acknowledges that class does play a role in pardon decisions. In fact, King found considerable evidence in the judges' reports that they were "inclined to come down very hard on prisoners who were *relatively well off* and could not therefore plead poverty at the time of the crime" (emphasis added).[199] Most sentencing and pardoning decisions, King argues, "were almost certainly based on universal and widely agreed criteria rather than on 'class favouritism and games of influence.'"[200]

Similarly, in assessing the rationales underlying pardons, Beattie concedes the occasional effectiveness of elite intervention but argues that "over the whole range of pardon decisions that had to be made every year, the play of such influence could only have been of marginal importance."[201] In an earlier study, Beattie suggests that "if the criminal law had served only the interests of the propertied classes it would hardly have attracted the widespread approval that was clearly bestowed upon it; nor, as Edward Thompson has said, would it have worked as effectively as ideology."[202]

---

[198] *Ibid.*, 56. King used a "factor-mentions system to develop a more comprehensive analysis" of judges' and prisoners' petitions. However, factors such as the petitioner's 'good character' and the 'destitution of himself and/or his family' do carry class connotations.

[199] *Ibid.*, 47.

[200] *Ibid.*, 58.

[201] Phillips, "The Operation of the Royal Pardon," 408-409.

[202] Beattie, *Crime and the Courts*, 622.

> From the evidence of two counties from the Restoration to 1800 [Beattie] suggests that while a variety of factors - among them the prevailing crime rate, social and political connections, gender and age - all contributed to the pardon decision, the principal concerns were the 'character and reputation' of the prisoner and the circumstances of the crime.[203]

More specifically, who was being charged and by whom "could clearly influence a jury's verdict" and such character evidence in capital cases significantly influenced the judge "when he decided who to recommend to the king for a pardon and who to leave to be hanged."[204] Moreover, petitions for pardon in crimes of violence "and the judges' recommendations make it abundantly clear that the...character of the offence was a crucial consideration... ."[205]

> It was plainly more advisable to execute those whose death would confirm the wisdom and justice of the law rather than those whose suffering might excite pity, perhaps even hostility. Such considerations help to explain why women were treated more leniently than men by juries and if convicted were more likely to be reprieved and pardoned.[206]

Langbein also provides some compelling counter-arguments to Hay's essay. He argues that the criminal law and its procedures existed "to serve and protect the interests of the...victims of crime, people who were overwhelmingly *non-elite*" (emphasis added).[207] In contrast to Hay's findings, Langbein argues that "prosecution was not a preserve of the

---

[203] Phillips, "The Operation of the Royal Pardon," 408-409.

[204] Beattie, *Crime and the Courts*, 443.

[205] *Ibid.*, 435.

[206] *Ibid.*, 436.

[207] See John H. Langbein, "Albion's Fatal Flaws," *Past & Present*, no. 98 (February 1983): 97, 96-120. The data he draws upon are based on 171 cases conducted at four sessions of the Old Bailey from 1754 to 1756. The data consists of judges' notes (i.e., courtroom minutes of evidence and jury instructions).

ruling class"; in fact, "gentlemen prosecutors were few and far between."[208] He also suggests that Hay exaggerates the "extent of prosecutorial discretion" and underemphasize[s] the importance of jury discretion."[209] Langbein summarizes his critique of Hay's essay as follows:

> ...most of the discretion was exercised by people not fairly to be described as the ruling class, especially the prosecutors and the jurors. Secondly, the discretion that characterized this system was not arbitrary and self-interested, but rather turned on the good-faith consideration of factors with which ethical decision-makers ought to have been concerned. The historian does not need a conspiracy theory to explain the discretion, and the discretion does not fit the theory. I concede fully that when men of the social elite came into contact with the criminal justice system in any capacity, they were treated with special courtesy and regard, just as they were elsewhere in this stratified society. To seize upon that as the *raison d'être* of the criminal justice system is, however, to mistake the barnacles for the boat.[210]

Despite their differences, each of these analyses of the pardon demonstrates that, for 18th century English society, "the criminal law in general, and the pardon system in particular, involved socially and politically significant decisions, not merely formal legal ones, and a complex array of considerations went into deciding who should be hanged and who spared."[211]

The preceding review of the historical function of the pardon would be incomplete without reference to the prevailing philosophies of crime and punishment inherent to specific historical epochs. Such philosophies influence how, and under what conditions,

---

[208] *Ibid.*, 102.

[209] *Ibid.*, 105.

[210] *Ibid.*, 98.

[211] Phillips, "The Operation of the Royal Pardon," 409-410.

the royal prerogative is employed and this is reflected by the frequency of pardons. As Moore points out, "how pardons are understood and used depends to a large extent, on the values and procedures inherent in a system of punishment."[212] In the 17th and 18th centuries, when criminal laws were barbaric and lacked legal defences such as insanity, the pardon served to soften the harshness and inflexibility of the law. Consequently, pardons were central to the administration of law, rather than a seldom-used demonstration of the Sovereign's power to dispense justice and mercy. Although the Age of Enlightenment spawned critics of the pardon power who believed that pardons undermined the effectiveness of punishment and the law, this did not culminate in its demise.[213] In contrast, utilitarians such as Jeremy Bentham advocated less frequent use of the pardon power, although he stopped short of arguing for its abolition.[214] Pardons were also common in the 19th century, in part because probation and parole procedures had not yet been developed and also because distinctions in criminal law between intentional and accidental harms were either lacking or insufficiently developed.[215] The rise of the rehabilitative ideal in the 20th century signaled a shift away from the goal of deterrence and towards the needs of individual offenders. As such, sentences were to be individualized and indeterminate to facilitate the offender's reform. At the same time,

---

[212] Moore, *Pardons*, 66.

[213] *Ibid.* See also Sebba, "Clemency in Perspective."

[214] Moore, *Pardons*, 41.

[215] *Ibid.*, 18, 53.

parole boards emerged and it was now their role to decide when individual offenders had been sufficiently reformed. Thus, as Moore notes, "many of the needs that pardons met were now to be met by the indeterminate sentence and the parole board."[216] However, as history has shown, the rehabilitative ideal proved more difficult than expected, so the need for pardons decreased, but did not disappear.[217] In the 1970s, retributivist ideals were re-invigorated. Offenders were to receive their 'just deserts' according to the harm caused by their actions and reformers pushed for less sentence disparity and discretion.[218] Despite these dramatic shifts in punishment philosophies and the commensurate rise and fall of pardon rates, the royal prerogative stands firm.

V. The Exercise and Rationales of the Royal Prerogative of Mercy in Pre- and Post Confederation Canada

Despite a paucity of Canadian literature focusing on the royal prerogative of mercy, research to date does provide insightful analyses of the decision-making processes underlying pardons. Swainger's[219] study of the Canadian Department of Justice in the early Confederation era provides valuable insights into the pardon process during this time. Other research examines capital punishment and its link to the royal prerogative in

---

[216] *Ibid.*, 61.

[217] *Ibid.*, 62.

[218] *Ibid.*, 69-71.

[219] Swainger, "Governing the Law."

pre-Confederation Nova Scotia[220] and post-Confederation British Columbia.[221]

In most capital cases, applications for mercy were addressed directly to the Governor General and were often "as individual as the circumstances in each case would warrant."[222] In one case, a 14-year-old boy was found guilty of murder by judge and jury in March 1857. During the trial it was argued that his "epileptic fits were responsible for the murder."[223] Although the judge was unconvinced, the jury recommended mercy and his sentence was commuted to life imprisonment. Ten years later, the accused's mother applied for mercy to the Governor General for remission of sentence. Ultimately, the application was refused because "[n]o new facts [were] brought forward in [the] petition... ."[224] Swainger argues that this petition was unsuccessful "not because its basis was primarily one of emotion, but rather because that was its only appeal."[225] In order to achieve remission of sentence from the Governor General, one of three things had to be accomplished: the petitioner had to "raise a legitimate doubt in the mind of the Minister of

---

[220] Phillips, "The Operation of the Royal Pardon."

[221] Jonathan Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880," in *Essays in the History of Canadian Law, British Columbia and the Yukon, Vol. VI*, ed. Hamar Foster and John McLaren (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1995): 204-241.

[222] Swainger, "Governing the Law," 195. As noted earlier in the chapter, although the Governor General had the authority to invoke the royal prerogative to remit sentences and grant pardons, it was the federal cabinet that was responsible for guiding the use of that prerogative. With respect to criminal law, "it was the Minister of Justice who determined which policy to follow," although in theory, "the advice tendered was a product of cabinet discussion" (p. 174).

[223] *Ibid.*, 196.

[224] *Ibid.*, 197.

[225] *Ibid.*

Justice or his deputy, that justice had been served by the original verdict or sentence"; [present a] "well substantiated claim that further imprisonment would lead directly to either death or permanent disability"; or the petitioner must have "performed some extraordinary service while imprisoned," such as preventing an escape.[226] However, each petition was considered on its own merits and even when petitions were based upon similar circumstances and arguments, decisions were neither consistent nor predictable.[227] Therefore, due to these "limited circumstances by which one might hope for a successful application, the chances of gaining a remission of sentence appear to have been relatively slight."[228]

> However, regardless of the obstacles one might encounter, an assortment of 220 applications, comprising approximately 10% of those filed between 1867 and 1878, reveals that almost 40% of those who petitioned were rewarded for their efforts. In this sample, 60.91% failed to meet the approval of the Minister or deputy Minister of Justice, while 39.09% were granted. A further breakdown reveals while 52% of that 60.91% were outright rejections, another 8.64% were retained for further review... . Thus, despite the limited basis one could use for requesting early release, the conditions of prison life and the chance of finding success made these applications a regular component of business in the Department of Justice.[229]

With respect to petitions for mercy in capital death sentences, Swainger argues that the Minister of Justice's decisions "often said as much about the man as they reflected the incidents of any particular case."[230] Therefore, one's chances of being spared from death

---

[226] *Ibid.*, 197-202.

[227] *Ibid.*, 195-247.

[228] *Ibid.*, 203.

[229] *Ibid.*, 203-204.

[230] *Ibid.*, 204.

"depended on who the Minister of Justice was when a case was received."[231] The following table, taken from Swainger, indicates that "the tendencies among these men [were] striking" and demonstrates that "the course of justice was uncertain."[232]

Table 3.1
Commutations: Murder

Minister	Date[233]	Total Cases	No. Commuted	(%)
Macdonald	(1867-1873)	36	16	44.44%
Dorion	(1873-1874)	7	2	28.57%
Fournier	(1874-1875)	14	12	85.71%
Blake	(1875-1877)	20	12	60.00%
Laflamme	(1877-1878)	8	6	75.00%
Total		85	48	56.47%

Swainger suggests several "possible explanations" for these variations in the decision-making process. One is that certain Ministers held different views about "the efficacy of capital punishment."[234] Second, the "nature of the cases" may have influenced Ministerial decisions. For example, "[d]uring the Liberal years, the defence of insanity was far more prominent than it had been under Macdonald" and [Justice Ministers] Fournier and Blake

---

[231] *Ibid.*, 208. See also Moore, *Pardons*, 82. Moore also found that the number of pardons granted in the United States varies depending upon who occupies the Presidency. President Ronald Reagan, for example, demonstrated "the lowest average [of pardons granted] for any president in U.S. history."

[232] Swainger, "Governing the Law," 208.

[233] *Ibid.*, 56-102. The dates of the federal Justice Ministers' terms of office have been added to this table, which I extrapolated from a previous chapter in Swainger's dissertation.

[234] *Ibid.*, 208-209.

were especially sensitized towards these pleas... ."[235] Finally, jury recommendations for mercy influenced petition outcomes.

> During the period from 1867 to 1878, there was approximately a 50% chance of the convicting jury recommending the accused to the mercy of the court. Once the jury recommendation was made, the chances for the accused increased or decreased proportionally... . [W]hen a jury passed a guilty verdict with a recommendation for mercy, 70.83% of those cases received a commutation. However, when a guilty verdict was not accompanied with such a recommendation, 72.97% of the accused were hanged. Even accounting for the variations between the Ministers, a positive recommendation from the jury was a benefit to the accused.[236]

Some Ministers, however, were more likely than others to "rule against the recommendation of a jury."[237] Neither were the Ministers immune "to the prejudices of the society of which they were a part."[238] For example, judicial statements were made that "indiscretions by a married woman were somehow worse in nature than those of a husband" which "often directed the minister's actions in deciding the outcome of a case."[239] Moreover, in Ministerial attempts "to arrive at some unstated balance...the system often failed to satisfy anyone."[240] Swainger's study reveals that the most influential factors in prerogative of mercy decisions in Canada at this time were the personal philosophies of the Ministers of Justice, "the circumstances of the crime..., [p]ublic morality, popular notions about race, perceptions of the relationship between men and

---

[235] *Ibid.*, 209.

[236] *Ibid.*, 211-212.

[237] *Ibid.*, 213.

[238] *Ibid.*

[239] *Ibid.*, 213-214.

[240] *Ibid.*, 214. This observation also applies to Ministerial reviews under section 690 of the *Criminal Code*, the focus of chapter 4.

women, jury recommendations, and the efficacy of punishment and deterrence."[241] Furthermore, "[r]ather than attempting to control all the unknown forces effecting public policy, the law, and its application, the department [of justice] merely attempted to harness that volatility and prevent it from upsetting the government's agenda."[242] Although "[t]he system was far from perfect...," Swainger suggests that it was not a failure and "[i]n those difficult cases where hard decisions had to be made, the system worked as well as any in which human beings are forced to make choices of life and death."[243]

> We must recognize that in handling these cases, an unfettered justice did not, and could not, exist. The justice which was meted out by the system reflected with some distortion, the assumptions, biases, and idiosyncrasies of [19th]-century Canada. To conclude anything else would be to expect the various ministers to have acted as if they were not living in the second half of the [19th] century. As a result, we find a wide array of decisions incorporating beliefs about race, sex-roles, and sexual behavior which, while offensive to late [20th]-century sensibilities, were completely acceptable in the 1860s and 1870s. Therefore, while "wrong" or "unjust" decisions occurred, they were the result of contemporary human frailties and not necessarily a conscious effort to tip the scales.[244]

---

[241] *Ibid.*, 335.

[242] *Ibid.*, 336. The desire to avoid "upsetting the government's agenda," however, was not the case in the Lyman Dartt case. See Jobb, *Shades of Justice*, 67-94. Jobb discusses the case of 17-year-old Lyman Dartt, who was convicted of capital murder and sentenced to death in December 1897, but with a jury recommendation of mercy. Dartt later confessed to the shooting, but claimed it was accidental. The judge forwarded a report on the Dartt case, including the jury's recommendation of mercy, to the federal Minister of Justice, advising him that "the circumstances proved are...quite as consistent with the view that the killing was not intentional, as that it was premeditated" (p. 90). As Dartt's execution approached, however, public sentiment shifted from outrage about the crime to sympathy for the boy. Petitions asking for mercy from the Minister of Justice were begun and the "response was overwhelming" (p. 90). Defence counsel applied for a new trial under s. 748 of the *Criminal Code* which empowered the minister of justice to order a new trial on any application for clemency if the minister "entertains a doubt" about a conviction. However, Justice Minister David Mills chose not to exercise this option and instead, recommended to cabinet that Dartt "was entitled to a verdict of acquittal," despite the fact that this "went beyond anything contemplated by the people who had signed petitions..." and also against the judge's opinion (p. 91-92). In February 1896, cabinet agreed and Dartt was released. The controversy eventually reached Ottawa in 1898 where critics accused Mills of tarnishing the administration of justice and assuming the role of judge and jury. Other than the claim that Justice Minister Mills believed "every word of Dartt's confession" and that it "exactly coincide[d] with the evidence given at trial," the author provides no explanation for Mills' decision.

[243] *Ibid.*, 246.

[244] *Ibid.*

In an essay about the royal pardon in Nova Scotia between 1749 and 1815, Phillips describes the 1752 Nova Scotia capital cases of three men convicted of stealing a boat as a framework to analyze "why pardons were granted to some convicts and not to others."[245] Although all three men were convicted for the same offence, two were hanged and one spared. Phillips was also interested in the social control or disciplinary functions of the pardon process.[246] With the founding of Halifax in 1749, Nova Scotia inherited "English criminal law and procedure" and the Governor Cornwallis Commission "laid out the framework for the operation of the royal pardon."[247]

> The executive in Halifax could issue pardons to those convicted of all offences, relieving them of any punishment prescribed by law, 'Treason and Wilful murder only excepted.' In those cases the power to pardon remained in London, although Cornwallis and his successors had 'power upon extraordinary occasions to Grant Reprieves to the offenders until...our Royal Pleasure may be known.'[248]

The Nova Scotian authorities essentially "played the same role as the English judiciary" whereby judicial recommendations for and against pardons were invariably granted by the executive.[249] Those not recommended for pardon were left to hang although, in

---

[245] Phillips, "The Operation of the Royal Pardon," 403.

[245] *Ibid.*, 409. Phillips argues that focus should be placed on how the authorities "used the criminal justice system as an instrument of social control in individual cases just as they did in a more general way when they manipulated the level of capital punishment to strike a balance between deterrence and the dangers arising from the feelings of anger and disgust which were aroused when the populace was made to view too many hangings." He draws on a sample of 121 men and women sentenced to die between 1749 and 1815. The cases include those which came before the General Court at Halifax before 1754, or the Supreme Court at Halifax or on circuit thereafter, or courts of special commission of oyer and terminer.

[247] *Ibid.*, 411.

[248] *Ibid.*

[249] *Ibid.*, 411-412.

appropriate circumstances, they could obtain a pardon by petition to the Crown.[250] Pardon decisions were not left to the governor alone and from the early 1760s the governor did, on occasion, "consult with his council about the course of action to be taken."[251] However, it is not clear whether the governor always heeded council's advice. Moreover, the pardon process was sometimes discussed before trial by the executive. This occurred in some cases where individuals were pardoned because they turned King's evidence but also in cases where, for example, despite their guilty verdict, the jury believed the killings had been committed in self-defence.[252] Phillips argues that the pardon process could also serve a "disciplinary or social control function."[253] Akin to English practice, executions were "always public, well publicized, and accompanied by substantial religious and secular ritual stressing the penitence of those executed and the power of the law."[254] Phillips stresses, however, that both individual and collective lessons could be "drawn from the fates of those *not* executed."[255] For example, he found that on numerous occasions reprieves were issued on the day set for the execution and that the reprieve and pardon process could be "manipulated to make a more dramatic

---

[250] *Ibid.*, 412.

[251] *Ibid.*, 414.

[252] *Ibid.*, 415-416.

[253] *Ibid.*, 418.

[254] *Ibid.*

[255] *Ibid.*

and lasting impression."[256] As to why pardons were granted to some convicts and not others, Phillips suggests that:

> while the pardon rate appears to have been sensitive to a variety of factors - the crime rate, what kind of offence had been committed, in what circumstances the crime took place, and whether the condemned person could produce character witnesses - the strongest evidence we have [in Nova Scotia] is of a correlation between the pardon rate and an individual petitioner's connections to the military establishment. This last is not a factor considered elsewhere in the literature, and its presence here demonstrates that the administration of criminal justice in Nova Scotia was adapted to the particular social and political structure of the colony in this period. Specifically, the criminal justice system may well have been used as an instrument of social order in a newly and precariously established British garrison and settlement colony.[257]

Thus, a variety of considerations, "general and specific, institutional and individual, internal and external to the legal system were all weighted in the balance when a case went before the governor."[258] The Governor balanced, among other things:

> the particular facts of the crime, the apparent character of the offender, the need for deterrence at that moment, and the social and political utility of showing mercy. In most respects therefore the Nova Scotia system does not seem to have operated all that differently from the English one, the formal mechanisms of law and discretion, once imported, not being overtly altered to any great degree. But in one respect at least, in the significance of a military connection for the condemned, there was a notable departure in practice. To say this, of course, is to add to the body of literature that shows us that legal forms do adapt to particular social contexts, that imported systems do not operate in the same way in one culture as in another, for they are not based on the same assumptions and goals.[259]

---

[256] *Ibid.*, 418, 420.

[257] *Ibid.*, 421-422. Of the 121 men and women sentenced to die between 1749 and 1815 in Nova Scotia, "the gross 'pardon rate' for all offences over the entire period was 55 percent (67 of 121; one person's fate could not be determined) of persons condemned, leaving 44 per cent (53 of 121) executed" (p. 423). It is noteworthy that 106 of the 121 men and women in Phillips' sample were employed in the forces and "soldiers and sailors were pardoned at a rate of 72 per cent" while "civilians at a much lower 47 per cent" (p. 439-440). Phillips suggests several factors to explain such a discrepancy, which include: (1) the military required manpower, (2) the Halifax elite was an "eighteenth-century colonial one," comprised of non-residents, (3) decision-makers in the pardon process "shared an appreciation of military factors, and given the social connections with military commanders," such decision-makers "in the pardon process would have looked with favour on members of the military (p. 440-448).

[258] *Ibid.*, 449.

[259] *Ibid.*

In a later study, Swainger examined the extent and nature of Canadian legal authority after 1871, with respect to the royal prerogative of mercy in British Columbia.[260] Following analysis of eight capital trials involving eleven accused, from 1872 to 1880, Swainger offers a number of conclusions. First, prior to Confederation, prerogative decisions were "vested in the colonial governor who, being resident in the colony, was evidently well attuned to the community and its values."[261] However, following British Columbia's Confederation in 1871, these prerogative decisions "shifted east to Ottawa and the [G]overnor-[G]eneral-in-[C]ouncil," so the "royal prerogative remained a federal responsibility."[262] Nevertheless, Swainger argues that "the values of British Columbians, as voiced through the judges of the Supreme Court, continued to shape the royal prerogative in the province."[263]

> The distances and delays associated with communications between the province and Ottawa, the long-held practice of soliciting judicial reports on all capital cases, and the inclination in the Department of Justice to defer to trial judges and jury recommendations ensured that a British Columbian voice would be registered in the [G]overnor-[G]eneral's deliberations.[264]

Secondly, during the 1870s, "there was a lull in the marked overrepresentation of native individuals" who were executed.[265] Finally, although prerogative decisions were vested in the Governor-General-in-Council, local control over the prerogative of mercy was

---

[260] Swainger, "A Distant Edge of Authority," 206.

[261] *Ibid.*, 205.

[262] *Ibid.*

[263] *Ibid.*, 207.

[264] *Ibid.*

[265] *Ibid.*

retained, for reasons mentioned above, and there was a "shift in the proportion of natives sent to the gallows... ."[266] Consequently, during the 1870s there was "a momentary reconsideration of the rationale that underlay capital punishment in British Columbia."[267]

> With two exceptions, the trial reports filed by members of the Supreme Court, the tenor of petitions received in favour of commuting sentences of death passed on native accused, and the influence of individuals such as missionary William Duncan of Metlakatla generally inclined towards mitigating the sentences imposed on native accused. Although some doubted the logic of applying the English criminal law to the native community at all, the judiciary usually opted for a functional paternalism in which native accused were lectured about the terror and mercy of the law, the benefits of white society, and the need to throw off traditional superstitious ways. While native accused were to be tutored in the terror and majesty of the law, they were also beneficiaries of its mercy, in part, because of the difficulties they faced in meeting its demands. It must be noted, however, that this paternalism resulted from pragmatic rather than principled concerns. It was actively shaped by a genuine fear of native unrest and violence in response to what might be perceived by those communities as a heavy judicial hand.[268]

As with the first provinces to join Confederation, debates arose in British Columbia concerning the review of capital cases, particularly arguments surrounding "where the prerogative should reside in the projected federalism."[269] Although the administration of the royal prerogative remained a federal responsibility, Swainger argues that this "worked

---

[266] *Ibid.*

[267] *Ibid.*

[268] *Ibid.*, 207-208.

[269] *Ibid.*, 208. Also see Evans, "The Prerogative of Pardon in Canada," 1-16. As stated *supra*, Sir John A. Macdonald, chief architect of Confederation and Canada's first minister of justice, *initially* wanted the various provincial Lieutenant Governors to retain the responsibility for the prerogative (emphasis added). This view was reflected in Resolution 44, "Report of Resolutions Adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, Held at the City of Quebec, 10th October, 1865, as the Basis of a Proposed Confederation of those Provinces and Colonies." However, a few years later, the task of preparing the federal government's counter-arguments to vesting pardoning authority in the Lieutenant Governors fell to Prime Minister, Sir John A. Macdonald, in his role as Minister of Justice. As Evans argues, "this meant that [Macdonald] had to support a provision directly contrary to Resolution 44 of the Quebec Conference, which he had supported."

tolerably well," at least for the first provinces that joined Confederation.[270] One reason for this is the development of telegraphic communication and railway transportation which facilitated the transfer of information between the Maritimes, Québec, and Ontario.[271] However, telegraph links to the West Coast were indirect and a rail connection to British Columbia did not exist until 1885.[272] Another reason for the "efficacy of the system" was that the information relating to the prerogative was being "shared by a small collection of individuals who, in a philosophical if not a personal sense, knew each other."[273] In British Columbia, however, these connections were lacking between Ottawa and judges in British Columbia.[274] Swainger describes the prerogative process at this time in British Columbia:

> Once an accused had been found guilty of a capital crime and sentenced to death, the presiding judge would forward to the Canadian secretary of state the trial transcript with a specified date of execution, a record of the jury recommendation as to whether the accused deserved mercy, and a personal report outlining the judge's view of the case and the accused. In turn, the secretary of state transferred the material along with any petitions for mercy to the Department of Justice, where the deputy minister reviewed the case and then briefed the minister, who then did likewise to cabinet. This cabinet briefing usually took the form of a recommendation on how the case could be handled, and while discussion might ensue, the cabinet usually adopted the minister's advice. The minister then reported the cabinet's deliberations and recommendation to the governor general, who then decided officially whether the case warranted merciful treatment. In practice, the crucial figures were the presiding judge, the minister of justice, and the governor general.[275]

---

[270] Swainger, "A Distant Edge of Authority," 209.

[271] *Ibid.*, 209. See also Alan Grove, "'Where is the Justice, Mr. Mills?': A Case Study of *R. v. Nantuck*," in *Essays in the History of Canadian Law, British Columbia and the Yukon, Vol. VI*, ed. Hamar Foster and John McLaren (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1995): 103, 87-127. Grove notes that communication problems existed between Ottawa and Dawson and this hindered the administration of justice in the Yukon.

[272] Swainger, "A Distant Edge of Authority, 209.

[273] *Ibid.*, 210.

[274] *Ibid.*

[275] *Ibid.*, 209.

Swainger's analysis of capital trials in British Columbia revealed that "judges applied different standards of responsibility depending on whether the accused was white or native."[276] In one case, a native man murdered another native, a medicine man, because he believed that the victim had 'bewitched' his family. He was found guilty, but some jury members recommended mercy. A petition for mercy was ultimately sent to Ottawa and George-Etienne Cartier, acting Minister of Justice, agreed to commute the death sentence. It was Cartier's view that "[i]t would be too severe to apply criminal law suited to a civilized state of society to parties ignoring them and living in a savage stage."[277] Such mercy was not, however, shown to George Bell, a white man convicted of the murder of his wife's seducer. The jury recommended mercy but Justice Begbie, although acknowledging the element of provocation, felt that Bell must bear responsibility for his crime. Acting Minister of Justice George-Etienne Cartier also recommended that Bell's death sentence be commuted. However, both Prime Minister Macdonald and Governor General, Lord Dufferin, "were averse to granting mercy" and Bell was executed on November 4, 1872.[278] Bell's case attracted great attention in both the native and white communities and "reinforced, for [Justice] Begbie, the necessity of demonstrating to everyone that a white man could be tried and executed for a capital offence in British Columbia."[279] As Swainger notes, after Bell's hanging, "a number of troubling questions

---

[276] *Ibid.*, 210.

[277] *Ibid.*, 213.

[278] *Ibid.*, 216-217.

[279] *Ibid.*, 215.

remained."

> Although not public knowledge, the fact that Cartier had recommended a commutation and had his opinion rejected testified to the uncertainty that plagued the prerogative of mercy. If Bell's case warranted mercy in Cartier's eyes, why did it fail for either Macdonald or Dufferin? Was mercy entirely dependent on who was charged with the fateful decision? Furthermore, the considerable lapse of time between sentencing and hanging undoubtedly troubled a number of people.[280]

Of the 11 accused in the eight capital trials, 'only' two of the nine native accused were hanged, while both of the white accused were executed. In Swainger's view, the hanging of the two native accused "were safe examples of natives who could be hanged without risking the enmity of the Aboriginal population,"[281] due to their bad reputations and the fact that their victims were white. Similar to other analyses of the prerogative of mercy, its administration involved "a number of delicate balancing acts" throughout the 1870s.[282] First, although responsibility for administering the prerogative had shifted to Ottawa and the Governor-General-in-Council, in practice, "operation of the pardon was still effectively directed by the judicial reports authored at the scene of the trial."[283] Swainger's analysis, like others, demonstrates that pardons involved "socially and politically significant decisions, not merely formal legal ones... ."[284] In British Columbia, during the 1870s, "the prerogative of mercy...functioned along these same lines."[285]

---

[280] *Ibid.*, 217.

[281] *Ibid.*, 227.

[282] *Ibid.*

[283] *Ibid.*, 228.

[284] *Ibid.*

[285] *Ibid.*

However, unlike the favouritism accorded to military personnel in Phillips' study,[286] Swainger found that the "fur trade rules of international homicide seem to have shaped the prerogative of mercy on the West Coast."[287]

The politics of royal prerogative decision-making was also apparent in the Yukon at the end of the 19th century. Grove examines the cases *of Regina v. Dawson, Jim and Joe Nantuck* and *Regina v. Frank Nantuck* "in the broader political and social context in which they were set" and argues that:

> [t]his was not simply a murder trial, as many have labelled it, or a justifiable homicide. It was a judicial homicide[288] of two natives who were denied the protection normally afforded individuals tried and convicted and in circumstances that amounted to a clear defect in jurisdiction. The system failed because federal authorities were unwilling to risk the political and personal consequences of applying the rule of law equitably to citizens of Aboriginal ancestry.[289]

During the gold rush to the Yukon between 1896 and 1898, two white prospectors from Alaska were shot, one fatally, and the four Nantuck brothers were charged with murder. Joe and Dawson Nantuck pled guilty and Jim and Frank Nantuck were also tried and convicted of murder; "[h]owever, the jury strongly recommended that [Frank] receive the clemency of the court because of his age and willingness to cooperate with the

---

[286] Phillips, "The Operation of the Royal Pardon."

[287] Swainger, "A Distant Edge of Authority," 228. See also Hamar Foster, "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia," in *Essays in the History of Canadian Law, Vol. 5*, ed. Jim Phillips, Tina Loo and Susan Lewthwaite (Toronto: University of Toronto Press, 1994): 91. Foster defines 'international homicide' as a homicide "in which the deceased and perpetrator...are of different nations, whether European or Aboriginal."

[288] Grove, "'Where is the Justice, Mr. Mills?,'" 111. Grove uses Blackstone's definition of judicial homicide which occurs when "any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void...it being a high misdemeanor in the judges so proceeding and little (if anything) short of murder in them all, in case the person so attained be executed and suffer death."

[289] *Ibid.*, 87-88.

authorities."[290] Justice McGuire sentenced each man to death on 1 November 1898, as mandated by law, and he was also required to send a full report of the case to the Minister of Justice, pursuant to section 70 of the *North-West Territories Act* (1895) and to the Secretary of State under section 937 of the *Criminal Code*.[291] Section 937 required that

> In the case of any prisoner sentenced to the punishment of death, the judge...shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General...and if the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy...he, or any other judge of the same court, or who might have held or sat in such court, may, from time to time,...reprieve such offender for such period...beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown.[292]

There were mixed feelings in the community toward the Nantuck brothers' impending execution but appeals for clemency failed and on 23 September the governor general "ordered that the law be allowed to take its course."[293] Only Frank Nantuck received royal prerogative relief and his sentence was commuted to life imprisonment. Several reprieves were granted to the other Nantuck brothers, largely due to the question of whether the original trial was held in the appropriate jurisdictional court.

Justice Dugas granted these latest reprieves for two reasons; "the fact that a stated case ha[d] been forwarded to the Supreme Court at Ottawa, and an application for the mercy of the Crown or a new trial made."[294] In correspondence to the chief clerk in the

---

[290] *Ibid.*, 94.

[291] *Ibid.*

[292] *Ibid.*, 117. Also see Swainger, "A Distant Edge of Authority," 209. In late 19th-century Yukon, the procedures following a capital sentence appear to have been similar to those followed in British Columbia, 1872-1880.

[293] Grove, "'Where is the Justice, Mr. Mills?,'" 97.

[294] *Ibid.*, 102.

Justice Department, Grove suggests that Justice Dugas, "a member of a supposedly independent judiciary, felt that he was being pressured by an appointed politician, Senator [and Minister of Justice David] Mills, to make a politically expedient decision, and that communication problems between Ottawa and Dawson continued to hinder the administration of justice in the Yukon."[295] This latest reprieve forced the Department of Justice "to consider the argument that the Nantucks had not been tried in a properly constituted court of law" and in April 1899, Deputy Justice Minister Edmund Newcombe "sought an out-of-house opinion on the matter."[296] Newcombe was subsequently informed that "the proceedings [were] a hopeless nullity" but he "chose to ignore th[is]...opinion and "drafted a...memo of authority that validated the Nantucks' conviction."[297] Subsequently, Justice Minister Mills recommended to the governor general that the previous decisions to approve the executions should be adhered to and the governor general approved the executions.[298] Grove questions the propriety of these decisions.

> Why did Newcombe, a career bureaucrat, and Mills, a lifelong politician, ignore a judge's opinion, outside opinion, and precedent to subvert the judicial process and allow the execution of the Nantucks? For the three reasons that most often corrupt the Western legal system: political ambition, money, and racism. Both men participated in the cover-up for career reasons.[299]

Thus, in Grove's view, by "choosing to ignore this consensus of opinion, [Mills and

---

[295] *Ibid.*, 103.

[296] *Ibid.*, 107.

[297] *Ibid.*, 108.

[298] *Ibid.*

[299] *Ibid.*

Newcombe] committed a serious executive malfeasance that caused a judicial homicide."[300] Jim and Dawson Nantuck were hanged on 4 August 1899.

VI. Conclusion

The above literature review demonstrates the social, economic and political rationales underlying the royal prerogative of mercy in England and in pre- and post-Confederation Canada. The pardon, like section 690 today, is not based solely upon principles of strict law and justice. However, this may be one of the few generalizations that can safely be made about the royal prerogative. The historical genesis and exercise of the royal prerogative is complex and, although jurisdictional similarities exist, the various rationales underlying the exercise of the royal prerogative are driven by specific historical and geographical exigencies.

From its inception in the seventh century, the prerogative was a coveted power, as evidenced by the struggle between Church, State and Earls. This struggle was not based solely on the desire to control crime and punishment; it was also clearly a desire to obtain political maneuverability, economic enrichment, and social control objectives. Initially, the pardon power was the sole prerogative of the Sovereign; however, this authority eventually devolved upon specific ministers of the Crown, although as Evans[301] argues, this devolution occurred later in Canada. In England, the pardon authority became the

---

[300] *Ibid.*, 109. For a comparative study of the English-settled maritime colonies of Nova Scotia and New Brunswick and the English-conquered colony of New France between 1760 and 1812, see Louis A. Knafla and Terry L. Chapman, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada 1760-1812," *Osgoode Hall Law Journal* 21, no. 2 (1983): 245-274.

[301] Evans, "The Prerogative of Pardon in Canada."

responsibility of the Home Secretary and his Office, and in Canada, the federal cabinet advises the Governor General. The historical events preceding the devolution of the pardon power, however, were distinct in each country. Furthermore, judges significantly influenced pardon decisions, as did juries.

History demonstrates the variety of rationales that influenced the exercise of the royal prerogative: to mitigate harsh laws; to regulate the level of capital punishment; to develop new forms of punishment, particularly transportation, which was used to ease chronic labour shortages in the colonies; to conscript offenders into the military; and as an acknowledgment of the fallibility of the judicial process. Thus, pardons assumed a central role in the administration of justice.

Other influences on the exercise of the royal prerogative include the characteristics of individual offenders and the nature and circumstances of the crime. However, pardon decisions were often inconsistent and arbitrary and the question of why some individuals were selected for the gallows and others not has spawned substantial debate amongst historians. Some argue that class, rather than claims of humanity, was the most influential factor in pardon decisions.[302] Others suggest that a wide variety of individuals could participate in the legal process and that pardon decisions were more likely influenced by the character and reputation of the offender, the nature and circumstances of the crime, the offender's youth and the destitution of the offender or his family.[303]

---

[302] Hay, "Property, Authority," 44.

[303] King, "Decision-Makers and Decision-Making"; Beattie, *Crime and the Courts*.

Moreover, as Beattie notes, the criminal law would not "have attracted the widespread approval that was clearly bestowed upon it" if it served "only the interests of the propertied classes."[304] Nevertheless, many factors were involved in the pardoning process, not just formal legal ones.

Before and after Confederation, the prerogative power in Canada was entrusted to the first Governors General. During the decade following Confederation, however, it was the Minister of Justice who determined which policy to follow in petitions for early release from imprisonment and in appeals for mercy in capital sentences, although in theory, prerogative advice tendered was a product of cabinet discussion.[305] The Minister of Justice would only forward cases to the Governor General that he felt warranted executive attention. Thus, the Minister of Justice assumed centre stage by advising cabinet in determining not only who should be released from prison but also who should be spared from execution. Following the controversy caused by Ambroise Lépine's pardon, new Letters Patent and Instructions were issued to the Governor General in 1878, which required the Privy Council to advise the Governor General in capital cases, and in other cases, required the advice of at least one minister. However, federal and provincial governments struggled over where the royal prerogative authority should reside during the drafting of the *British North America Act*. Provincial authorities argued that it was impractical that all prerogative requests be forwarded to the central government. Their

---

[304] Beattie, *Crime and the Courts*, 622.

[305] Swainger, "Governing the Law," 174.

complaints, however, came to naught. Nevertheless, Nova Scotia, Ontario and New Brunswick continued to struggle for provincial authority over prerogative powers. Following the court decisions in the *Executive Power Case* and the *Maritimes Bank Case*, Lieutenant Governors were deemed to be as much monarchical representatives for provincial purposes as the Governor General was for federal purposes.[306] These decisions were codified in Canada's first *Criminal Code* in 1892 whereby the Governor in Council was empowered to grant free and conditional pardons and Lieutenants Governor were responsible for pardons arising from provincial statutes. Today in Canada, the pardon authority is vested in the federal cabinet pursuant to section 748 of the *Criminal Code*. Pardon applications can also be made to the Solicitor General for a pardon under the *Criminal Records Act*, and the Minister of Justice receives applications for mercy under section 690 of the *Criminal Code*. Moreover, the traditional historical source of the royal prerogative has been retained in section 749 of the *Criminal Code*.

Although petitions for remission of sentence were considered on their own merits, there is evidence to suggest that even when petitions were based upon similar circumstances and arguments, decisions were neither consistent nor predictable. Typically, the petitioner had to raise a doubt about his original verdict or sentence, demonstrate that further imprisonment would lead directly to death or permanent disability, or perform some extraordinary service while imprisoned, such as preventing an escape.[307] In petitions for mercy in capital sentences, the ultimate decision often depended as much on the

---

[306] Evans, "The Prerogative of Pardon in Canada," ix.

[307] Swainger, "Governing the Law," 197-202.

individual philosophy of the prevailing Minister of Justice as it did upon the merits of a particular case. Possible explanations for such diversity include disparate Ministerial views about the efficacy of capital punishment and the defence of insanity, the nature of the case, and whether or not the jury had recommended mercy.[308] Swainger's study of the Department of Justice in the early Confederation era revealed that the most influential factors in prerogative decisions were the personal philosophies of the Ministers of Justice, the circumstances of the crime, public morality, popular notions about race, perceptions of the relationship between men and women, jury recommendations, and the efficacy of punishment and deterrence.

Phillips[309] found that, in Nova Scotia, the pardon rate was sensitive to a variety of factors, such as the crime rate and the offence committed. However, the strongest evidence is of a correlation between the pardon rate and an individual petitioner's connections to the military establishment. As Phillips suggests, this correlation indicates that the administration of criminal justice in Nova Scotia was adapted to the particular social and political structure of the colony at this time. Nevertheless, Phillips found that the Nova Scotia pardon system did not operate all that differently from the English one. Like their English counterparts, recommendations for and against pardons by Nova Scotian judges were "invariably granted by the executive."[310]

---

[308] *Ibid.*, 208-212.

[309] Phillips, "The Operation of the Royal Pardon," 421-422.

[310] *Ibid.*, 411-412.

In post-Confederation British Columbia, despite the fact that prerogative decisions had shifted east to Ottawa and the Governor-General-in-Council, local Supreme Court judges and, therefore, British Columbian values continued to shape the prerogative in the province because the Department of Justice tended to defer to judge and jury recommendations.[311] Similar to other analyses of the prerogative in early Canada, pardon decisions involved a variety of social and political considerations; however, unlike Nova Scotia, the prerogative of mercy in British Columbia was shaped by the fur trade rules of international homicide.[312] The politics of royal prerogative decision-making was also evident in late 19th-century Yukon. As Grove notes, some prerogative decisions were driven by political ambition, money and racism, not justice or mercy.[313]

In England, by the first decade of the 20th century, it became increasingly apparent that the English Home Secretary was limited when acting in the pursuit of justice, rather than mercy, because he was both the head of an unofficial review body and also responsible for the executive arms of justice.[314] Following the establishment in England of the Court of Criminal Appeal in 1907, the Home Secretary retained authority to exercise mercy, although his role in reviewing the facts of a conviction were substantially reduced, if not eliminated.[315] However, it was now open to the Home Secretary to refer cases back

---

[311] Swainger, "A Distant Edge of Authority," 207.

[312] *Ibid.*, 228.

[313] Grove, "'Where is the Justice, Mr. Mills?'," 108.

[314] Chadwick, *Bureaucratic Mercy*, 179.

[315] *Ibid.*, 216.

to appeal courts under section 19 of the *Criminal Appeal Act* 1907.[316] Unfortunately, successive Home Secretaries adopted a restrictive approach to their powers under the 1968 *Criminal Appeal Act*.[317] Similarly, appeal courts adhered to narrow appeal criteria and their reluctance to overturn jury verdicts and to admit fresh evidence hindered conviction reviews. This deficiency became increasingly apparent, and, over the span of several decades, some high-profile wrongful convictions, combined with recommendations for reform, culminated in the creation of the Criminal Cases Review Commission (CCRC) in 1997. The Home Secretary's power to refer cases to courts of appeal was repealed by section 3 of the *Criminal Appeal Act 1995* and section 9 confers this power to the CCRC.[318] Judging from the number of cases thus far referred back to the courts, the CCRC appears to be a much more efficient conviction review body than the Home Office.[319]

This historical review of the royal prerogative of mercy reveals the contexts within which it functioned and the rationales that drove it. Beyond the legal realm, the exercise of the prerogative was influenced by specific political, economic and social milieus.

---

[316] Section 17, *Criminal Appeal Act 1968*; section 3, *Criminal Appeal Act 1995*.

[317] Kate Malleson, "The Criminal Cases Review Commission," 929.

[318] Leonard Jason-Lloyd, *A Guide to the Criminal Appeal Act 1995*, 9-11. Section 9 concerns cases dealt with on indictment in England and Wales and provides the Commission power to refer convictions to the Court of Appeal. The Commission may also refer any sentence to the Court of Appeal, except where the sentence is fixed by law. Section 10 provisions apply to Northern Ireland, and are "almost identical to those under s. 9." Unlike the Canadian equivalent pursuant to s. 690 of the *Criminal Code*, summary and/or hybrid convictions and sentences can also be referred to the Crown Court (section 11).

[319] The operation of the Criminal Cases Review Commission and the suitability of such a review body in Canada is explored more fully in Chapter 7.

Although analysis of section 690 is significantly hindered by the non-publication of Ministerial decisions and the overall secrecy of the conviction review process, available evidence suggests that, like the royal prerogative, decisions are based upon legal and extra-legal factors. The next chapter examines the historical origins of section 690 and analyzes all available conviction review cases over the past century in order to better understand the nature of the conviction review process and Ministerial decision-making. The goal is not only to assess the efficacy of section 690 in remedying wrongful convictions, but also to understand the rationales underlying the decision-making process.

Chapter 4

SECTION 690 CONVICTION REVIEWS: REMEDY OR RED-TAPE?

I. Introduction

As my literature review demonstrates, section 690 of the *Criminal Code* is rarely the subject of comprehensive analysis, notwithstanding the Justice Department's present examination of this conviction review mechanism. Similarly, the historical record is replete with analyses of the Royal Prerogative of Mercy; however, it is largely silent with respect to analyses of how section 690 has and continues to operate. Thus began the often frustrating and difficult process of not simply locating section 690 cases, but also of obtaining sufficient information on conviction reviews to facilitate analysis of how and why they are investigated and decided. Such data is essential for adjudicating the efficacy of the conviction review process. Despite the often scant and inconsistent information available on many section 690 cases, the data I compiled for this chapter do illuminate some conviction review patterns and themes and facilitate analysis of this study's research question.[1]

With few exceptions, public access to reasons for decision by the Minister of Justice in section 690 conviction reviews is prohibited because "all applications to the Minister are conducted in private and the Minister is bound by the provisions of the *Privacy Act*."[2]

---

[1] This chapter is a revised version of a paper prepared on behalf of AIDWYC and later published. See Patricia Braiden and Joan Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the *Criminal Code*," *Windsor Yearbook of Access to Justice* 17 (1999): 3-34.

[2] R.S.C. 1985, c. P-21. Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (1 February 1999).

This *Act* forbids the disclosure of personal information by a government institution except in accordance with its provisions. Pursuant to section 3 of the *Privacy Act*, an individual's section 690 application is defined as "personal information."[3] Furthermore, the Minister cannot release any personal information concerning an applicant or his or her application--including the final decision of the Minister--"unless the Minister has the consent of the individual to whom the information relates, or in accordance with section 8 of the *Act*."[4] Under this section [8(2)(m)(i)], public disclosure of a section 690 application or final decision may be made if, "in the Minister's opinion, the public interest in releasing the decision clearly outweighs any invasion of privacy that could result from such disclosure."[5] That said, Ministerial decisions under section 690 are rarely made available to the general public. To date, only three such decisions have been made public; Sidney Morrisroe, W. Colin Thatcher and Patrick Kelly.[6] I obtained four additional Reasons for

---

[3] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to Joan Brockman (29 February 2000).

[4] *Ibid.*

[5] *Ibid.*

[6] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (1 February 1999). Ms. McFadyen advised, however, that in September 1997, the Minister of Justice and the Solicitor General announced their response to the Self-Defence Review conducted by Judge Lynn Ratushny. Ms. McFadyen also provided information concerning Clayton Norman Johnson's section 690 conviction review, which was referred to the Nova Scotia Court of Appeal on September 21, 1998. Interestingly, all three of these publicized decisions were rendered by Minister of Justice Allan Rock.

Decision from defence counsel who represented section 690 applicants.[7] I gathered additional information concerning section 690 applications from media reports, available conviction review literature, legal databases, and various other sources, although in most cases, comprehensive details about these conviction reviews are limited.[8] Because of such data access restrictions, I use a variety of investigative strategies. Bedau and Radelet cogently summarize the frustration of researchers who study wrongful convictions:

> This experience taught us that no jurisdiction keeps a public list of its erroneous convictions, even in murder cases. Moreover, most state officials are apparently not eager to assist investigators in identifying such cases from whatever records they might have available. In no state, for example, were we able to obtain a list of defendants who had been pardoned after conviction of homicide or after a sentence of death.... [E]xcept for the most widely publicized cases, each alleged miscarriage required slightly different investigative tactics to obtain documentation for an adequate description and evaluation of the case.[9]

---

[7] The four decisions concern the conviction reviews of Allen Kinsella, Wilfred Beaulieu, David Milgaard, and Clayton Johnson. I obtained permission to use these decisions. I collected additional information about the conviction review process and cases through interviews with defence counsel, a lawyer with the Criminal Conviction Review Group at the Department of Justice and ad hoc counsel for the Justice Department: the subject of Chapter 6. Similarly, I attempt to canvas the views of section 690 applicants themselves (Chapter 5).

[8] In some cases, the only information I had was the applicant's name and province, or simply the applicant's name. When I was unable to locate relevant information on the Quicklaw database, I manually searched Canadian Criminal Cases, but with minimal success.

[9] Bedau and Radelet, "Miscarriages of Justice," 28-29. This observation applies to research concerning section 690 of the *Criminal Code* because most conviction review decisions are not publicized.

If section 690 is repealed or reformed,[10] the importance of understanding how Canada has addressed wrongful convictions historically, and how we will deal with them in the future, remains. Such a groundwork can facilitate a more informed analysis of how Canadian society should deal with alleged wrongful convictions. As the previous chapter demonstrates, the historical evolution of the Royal Prerogative of Mercy was influenced by specific political, economic, and social milieus. Although section 690 is distinct from royal prerogative powers, the factors which influence such Ministerial decisions are, in some instances, comparable. As such, those who claim to be wrongfully convicted, and those who decide their fate, exist within specific political, economic and social milieus, all of which must be considered in an analysis of the conviction review process.

This chapter begins by describing the historical genesis of section 690 of the *Criminal Code* (section II). Section III describes the nature of the section 690 process, the role of the Minister of Justice, and the role of the courts. Applications to, and interventions by the Minister of Justice, and the nature of these section 690 interventions is discussed in Section IV. Section V examines applications rejected by the Minister of Justice, and other known section 690 applications. The next section (VI) analyzes the seven available Reasons for Decision by the Minister of Justice. Finally, a summary of research results is

---

[10] It should be noted that reform or repeal of section 690 is imminent. See Canada, Department of Justice, "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal* Code; A Consultation Paper" (1998), 1-21 [hereinafter DOJ Consultation Paper]. See also Janice Tibbetts and Jim Bronskill, "Justice minister eyes independent board to review convictions," *Times Colonist* (17 January 2000): A4. Justice Minister Anne McLellan is "set to propose major changes to the way Canada handles claims of wrongful conviction," and has "crafted a package of reforms that likely will entail a new regime modelled on Britain's three-year-old Criminal Cases Review Commission, or more power for appeal courts to handle potentially wrongful convictions." The Minister is "expected to announce her plan this winter after seeking approval from cabinet... ."

presented in section VII which identifies some patterns and themes and elucidates some of the merits and problems with the conviction review process as presently constituted.

II. The Historical Genesis of Section 690 of the *Criminal Code*

Section 690[11] is distinct from royal prerogative powers; however, it can be characterized "as an additional mode of attaining the same object."[12] The original version of section 690[13] allowed anyone convicted of an indictable offence to apply to the Minister of Justice for the mercy of the Crown. If the Minister entertained "a doubt whether such a person ought to have been convicted," the Minister could, "after such inquiry as he thinks proper...direct a new trial...before such court as he may think proper." The section clearly stated that this option could be exercised by the Minister "instead of advising Her Majesty to remit or commute the sentence." In 1923, an amendment added what are now subsections (b) and (c), allowing the Minister of Justice to refer a case to a court of appeal as if it were an appeal by the accused, or to seek that court's opinion on a particular

---

[11] The following Table of Concordance, created from Crankshaw's Criminal Code (Vol. 8), summarizes the previous section numbers of the present day section 690. The section numbers marked with asterisks have been taken from respective Criminal Codes (Martin's Annual Criminal Code, 1985-1995 and 1998, and Tremeear's Criminal Code, 1996-1997).

s. 748 (1892-1906)
s. 1022 (1906-1923)
s. 1022(2) (1923-1953)
s. 596 (1953-1970)
s. 617 (1970-1988)*
s. 690 (1989 to present)*

[12] Cole and Manson, *Release From Imprisonment*, 412.

[13] s. 748, R.S.C. 1892, c. 29.

question.[14] Rosen[15] believes that the 1953-54 amendment[16] only "made some technical drafting changes"; however, there was one change of substance. Subsection (2) no longer read "if [the Minister] entertains a doubt whether such a person ought to have been convicted," but rather "if ...he is satisfied that in the circumstances a new trial or hearing...should be directed." The earlier wording favours the applicant more so than the amendment. Finally, the 1969 amendment extended the Minister's powers to those who had been sentenced to preventive detention as dangerous offenders.[17]

Today, section 690 provides the Minister with discretion to deal with applications for mercy from people convicted of indictable offences and those sentenced to preventive detention.[18] It reads as follows:

> s. 690 The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part 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 inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
>
> (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
>
> (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

---

[14] s. 1022(2), R.S.C. 1923, c. 41, s. 9.

[15] Rosen, "Wrongful Convictions," 5.

[16] s. 596, R.S.C. 1953-54, c. 51.

[17] s. 596, R.S.C. 1968-69, c. 38, s. 62.

[18] As section 690 indicates, this mechanism cannot be invoked in cases where the Crown has proceeded summarily. Therefore, those convicted summarily and erroneously have no remedy under this section of the *Criminal Code*.

If the Minister of Justice chooses to exercise this discretion, s/he may do so in one of four ways under section 690: (1) order a new trial, (2) refer the matter to a court of appeal for hearing and determination as if it were an appeal, (3) ask the court of appeal's opinion on any question, (4) make a request under subsection (c), and, depending upon the court's answer, have the court hear an appeal under (b). For example, the Minister could instruct the court of appeal that if the evidence would have been admissible, to then consider the case as if it were an appeal. Since the section refers to the "court of appeal," the Minister of Justice must rely on section 53(2) of the *Supreme Court Act*[19] if s/he chooses to refer a case to the Supreme Court of Canada (a fifth option). Finally, it is also open to the Minister to join with the Solicitor General and recommend to the Governor-General-in-Council that a free pardon be granted under section 748 of the *Criminal Code*.

III. The Nature of the Section 690 Conviction Review Process, the Role of the Minister of Justice, and the Role of the Courts

The Nature of the Section 690 Conviction Review Process

Until recently, there was little information about how the Department of Justice dealt with section 690 applications. Glimpses of how the Department operates can be found in newspaper articles about those who claim to be wrongfully convicted. In addition, a few academic articles have been written about how the section 690 process works.[20] In 1991,

---

[19] R.S.C. 1985, c. S-26.

[20] See Manson, "Answering Claims of Injustice" (1992) 12 C.R. (4th) 305; Cole and Manson, *Release from Imprisonment*; Rosen, "Wrongful Convictions"; Fuerst, "The Section 690 Process."

Rosen[21] interviewed a federal Department of Justice official who described the section 690 process at that time. In 1994, the Department of Justice released a booklet which describes the section 690 process and the application requirements, and which contains forms for Waiver of Solicitor-Client Privilege and Consent to the Release of Personal Information.[22] However, there is no formal application form. In the same year, the Criminal Conviction Review Group (CCRG) was established, whose "sole function is to investigate section 690 applications and report back to the Minister."[23] Moreover, in order to "provide greater independence from the prosecution function of the Department," the CCRG was transferred from the Litigation Section to the Policy Section of the Department.[24] Minister of Justice Allan Rock also outlines the conviction review process in his 1994 decision in the Thatcher application.[25]

The booklet prepared by the Department of Justice tells applicants that they "must raise *new and significant information* which casts doubt on the correctness of [their] conviction." *New* means that the information "was not examined by the courts during [the

---

[21] Rosen, "Wrongful Convictions," 9. For an earlier description, see Avison, "Last Resort," 4-8.

[22] Canada, Department of Justice, "Applications to the Minister of Justice for a Conviction Review Under Section 690 of the Criminal Code" (Ottawa: no date) [hereinafter DOJ Application Booklet]. Date of 1994 was obtained from Eugene Williams, then Senior Counsel with the Criminal Conviction Review Group.

[23] DOJ Consultation Paper, 6.

[24] *Ibid.*

[25] 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), 1-72 [hereinafter *Thatcher Decision*].

applicant's] trial or [that the applicant did not] become aware of it [until] all court proceedings were over."[26] *Significant* means that the information is "reasonably capable of belief,...relevant to the issue of guilt, [and that] the information could have affected the [trial] verdict... ."[27] Applicants are also asked to provide proof of the new information and to explain how this "information might have affected the outcome" of their case.[28] Applicants must also provide trial transcripts, information about all pre-trial and trial motions, a copy of "all the material filed by both the defence and the Crown in support of all pre-trial or trial motions, all factums filed on appeal, and copies of all appeal court judgments."[29]

Although the *Criminal Code* "is silent as to any procedure governing the conduct of a section 690 review,"[30] the Department of Justice has developed a four-step approach to the conviction review process. First, an *initial assessment* is conducted whereby a Department of Justice lawyer "examine[s] the information in the application and compare[s] it [to] the trial and appellate records, to determine whether the application contains new and significant information.[31] Applicants are informed at this stage "whether

---

[26] DOJ Application Booklet, 2.

[27] *Ibid.*, 3.

[28] *Ibid.*

[29] *Ibid.*, 8.

[30] Fuerst, "The Section 690 Process," 4.

[31] DOJ Application Booklet, 4. In some "exceptional cases, such as when the conviction being reviewed was obtained by a federal prosecution, outside counsel may be asked to assess the application or provide advice on it."

the application will be investigated or has been denied," and if "additional information is required, [applicants are] asked to supply it...[within] a specified time period."[32] In 1988, Avison commented that many of the applicants were "simply attempting to re-argue issues that were fully addressed at trial and on appeal."[33] If the application is rejected at this stage, "a report is prepared setting out...the material circumstances, the applicable law, and a recommendation that no...intervention be taken."[34] A substantial number of applications are rejected after the initial assessment stage. As Table 4.1 illustrates, approximately 34.5% of applications were rejected over a four-year period.[35]

---

[32] DOJ Application Booklet, 5. The application is considered "withdrawn" if applicants fail to supply the requested information within a specified time period.

[33] Avison, "Last Resort," 4.

[34] *Ibid.*

[35] Telephone interview by author (8 September 1998) with a lawyer in the federal Department of Justice - Criminal Conviction Review Group (CCRG) [hereinafter DOJ interview]. This respondent is a full-time lawyer with the Criminal Conviction Review Group. He advised that rejected applications are kept on file for specified periods of time, as part of the Minister's correspondence. Chapter 6 provides interview data from this respondent and other legal counsel involved with section 690 conviction reviews.

Table 4.1
Number of Applications Rejected at Initial Assessment Stage[36]

Year	Total No.	No. Rejected	(%)
1995	60	24	40
1996	75	27	36
1997	56	21	38
1998	61	15	25
Total	252	87	34.5

If the application makes it past the initial assessment stage, and the applicants provide all required documentation and information, an investigation is conducted by one of six full-time Department of Justice lawyers, by ad hoc counsel, or a combination of both. For example, when faced with allegations that Department of Justice lawyers were not impartial in the Milgaard case, the Minister of Justice sought the advice of the Honourable William R. McIntyre, Q.C., of Vancouver.[37] Depending on the type of evidence submitted, "the investigation could involve interviewing witnesses to clarify or verify the information in the application, carrying out scientific tests or obtaining other assessments from forensic and social sciences specialists, or consulting police agencies and prosecutors

[36] Statistics for 1995 to 1997 were provided by the DOJ respondent. Statistics for 1998 were provided by Mary McFadyen (Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author, 21 June 1999). Additional statistics for some fiscal years can be found in Canada, Department of Justice, *Annual Reports*, discussed *infra*; however, these reports do not describe the number of applications rejected at the Initial Assessment Stage.

[37] Letter from A.K. Campbell, Minister of Justice, to H.E. Wolch, Q.C. (27 February 1991), 2, 1-12 [hereinafter *Milgaard Decision*]. This letter set out the Minister's reasons for rejecting a section 690 remedy for David Milgaard. Also see Karp and Rosner, *When Justice Fails*, 244-248.

who were involved in the original prosecution."[38]

Third, an *investigation brief* is prepared which summarizes the section 690 application. Applicants are "asked to review and comment on the brief, and [are] given a deadline for doing so."[39] Prior to the Thatcher application in 1994, applicants were not given the opportunity to comment on the Department's investigation brief. Finally, the investigation brief, the applicant's comments, and the Department's recommendations (or recommendations from ad hoc counsel) are sent to the Minister, who has the option of taking action under section 690 or dismissing the application.[40]

Other sources, however, indicate that the process is more complex. Avison[41] and Rosen[42] suggest that a preliminary report by the Department of Justice investigation lawyer makes its way through the Department bureaucracy before it goes to the Minister. Rosen states that "at each of these levels, the report can be accepted, rejected or sent back for more work on the law, the evidence or the investigation."[43]

---

[38] DOJ Application Booklet, 5.

[39] *Ibid.*

[40] *Ibid.*, 6.

[41] Avison, "Last Resort," 4-7.

[42] Rosen, "Wrongful Convictions," 10.

[43] *Ibid.*

The Role of the Minister of Justice

Although section 690(a) states that the Minister of Justice may direct a new trial or hearing if "he is satisfied that...a new trial or hearing...should be directed," the *Code* does "not set out any other criteria to govern the exercise of the Minister's discretion."[44] Minister of Justice Allan Rock commented in the Thatcher decision that Parliament had cast the Minister's discretion "in the widest possible terms," and he did not plan to limit his discretion. Nevertheless, this discretion was "to be exercised [according to] certain governing principles," which he set out as follows:

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 or a result on appeal. Merely because I might take a different view of the same evidence that was before the court does not empower me, 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 the appellate courts. Applicants under section 690 who rely solely on alleged weaknesses 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 that 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 of 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 affected the verdict?"

---

[44] Fuerst, "The Section 690 Process," 2.

> 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.[45]

The Minister outlined very narrow circumstances in which an applicant might be successful. The onus is clearly on the applicant to "demonstrate...that there is a basis to conclude that a miscarriage of justice likely occurred."[46] Applicants are expected to do this within the very limited parameters set out in the first five principles. This appears to be stricter than the criterion set out in the first *Criminal Code*. The present section, introduced in 1953-54, requires that the Minister be "satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed." There is nothing else in the present section that even hints at what the test for intervention should be. Nevertheless, it is not remarkable that Ministers establish a framework for their discretion. The dilemma to ponder, however, concerns the question of how best to maximize the identification and remedy of wrongful convictions without creating an environment of interminable litigation. As enunciated in the above-noted principles, section 690 "does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or a result on appeal," nor is it "intended to create a fourth level of appeal." As such, "applications under section 690 should ordinarily be based on new matters of significance that either were not considered by the courts or that occurred...after the conventional avenues of appeal had been exhausted." Although the finality of the judicial process is critical to the ability of the

---

[45] *Thatcher Decision*, 3-4.

[46] *Ibid.*, 4.

criminal justice process to function, I agree with Lord Atkin who argues that "finality is a good thing, [but] justice is better."[47] The point is that there appears to be a disjunction between the broad discretion afforded to the Minister of Justice under section 690 and the much narrower principles which substantively guide his or her discretion. This is not to argue that the conviction review process should not be subject to some discretionary guidelines. However, it must be borne in mind that wrongful convictions are a product of an adversarial process that, in many cases, either failed to, or, because of statutory limitations on trial and appellate court rules and procedures, was incapable of rectifying the wrongful conviction in the first instance. The principles set out by Minister Rock do not appear to recognize such limitations and, in this sense, represent one example of undue fettering of Ministerial discretion. Furthermore, as discussed *infra* (Section VII), analysis of the section 690 reference options chosen by Justice Ministers provides further support for the supposition that Ministers unduly fetter their discretion.

The Role of the Courts

Under section 690, there are different "procedural, evidentiary and redress implications," depending upon which subsection is utilized.[48] When a new trial is ordered under section 690(a), the "presumption of innocence is resurrected"[49] and the evidentiary burden of proof is borne by the Crown. Under section 690(b), a Ministerial reference to

---

[47] Cited in Malleson, "Appeals Against Conviction," 152.

[48] Rosen, "Wrongful Convictions," 5.

[49] Manson, "Answering Claims," 315.

the court of appeal places the burden on the applicant to "prepar[e] and present[...] the case to prove his...innocence," in what is very much an adversarial setting.[50] Indeed, the Marshall Commission noted that the Nova Scotia Court of Appeal severely chastised the lawyer for the Crown for not taking an adversarial position, even though the lawyer believed that there was a miscarriage of justice in the case.[51] Furthermore, after identifying errors made by the Court of Appeal in the Marshall case, the Commission concluded that:

> The thrust of the Court of Appeal's gratuitous comments in the last two pages of the judgment is to pin the blame on Marshall for his conviction and to ignore any evidence which would suggest fault on the part of the criminal justice system. The decision amounted to a defence of the system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.[52]

The powers of a court of appeal, hearing an ordinary appeal under section 686 of the *Criminal Code*, apply to an appeal under section 690(b). The case will be heard as if it were an appeal and the ultimate decision rests with the court. Furthermore, the court of appeal's decision can be appealed to the Supreme Court of Canada.[53] However, when considering "fresh evidence on an appeal which comes before the Court by a Reference under section 617(b)" [now s. 690], the court should not consider "itself 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."[54] This proposition does not appear to find its

---

[50] *Marshall Commission*, 115.

[51] *Ibid.*, 130.

[52] *Ibid.*, 124.

[53] *Marcotte v. The Queen*, [1965] 3 C.C.C. 285 (S.C.C.).

[54] *Reference re R. v. Gorecki (No. 2)* (1976), 32 C.C.C. (2d) 135 (Ont. C.A.), 146.

way into the six principles outlined by the Minister in the Thatcher reference, as these principles appear to endorse the rules surrounding "fresh evidence" on appeal, as outlined by the Supreme Court of Canada in *Palmer and Palmer v. The Queen*.[55] However, the Alberta Court of Appeal in *R. v. Nepoose*,[56] following *Gorecki (No. 2)*,[57] was prepared to admit evidence which did not strictly meet the *Palmer* requirements because of the "real possibility of injustice or the appearance of injustice." Under section 683(1)(e)(ii) of the *Criminal Code*, the Court of Appeal can appoint a special commissioner to inquire into certain issues and report back to the court. This was done in *Nepoose*,[58] when Justice W.R. Sinclair of the Court of Queen's Bench was asked "to inquire into and report back to [the] court concerning the credibility and weight of any evidence which is proposed to be offered to [the] court as 'new evidence' in relation to the question of the guilt or innocence of the appellant."

The question has also arisen as to whether Ministerial decisions under section 690 can be reviewed by the courts. The Federal Court of Appeal in *Wilson v. Minister of Justice*,[59] following the Supreme Court of Canada's decision in *Operation Dismantle Inc.*

---

[55] (1979), 50 C.C.C. (2d) 193 (S.C.C.). Also see *Kaufman Commission, Vol. 2*, 1172, 1178. The Kaufman Report recommended changes to the approach that appellate courts take in terms of fresh evidence and suggested that consideration be given to enable appeal courts to set aside a conviction "where there exists a lurking doubt as to guilt" (p. 1178).

[56] (1992), 12 C.R. (4th) 296 (Alta. C.A.), 301.

[57] (1976), 32 C.C.C. (2d) 135 (Ont. C.A.).

[58] (1992), 12 C.R. (4th) 296 (Alta. C.A.), 298.

[59] (1985), 20 C.C.C. (3d) 206 (Fed. C.A.). To my knowledge, this is the first time a Justice Minister's decision has been subjected to judicial review.

et al. v. The Queen,[60] stated that the Minister's decision could be reviewed in order to determine if the review was "conducted fairly." Nevertheless, Wilson's appeal was dismissed on the ground that "declaratory relief cannot be sought in the Federal Court by originating notice of motion but only by an action where evidence is taken and the facts tested by examination and cross-examination."[61] In *Thatcher*, the court found that "cabinet decisions made under the authority of the royal prerogative are subject to judicial review for compatibility with the *Charter*."[62] Without referring to *Wilson*, the Québec Court of Appeal, in *Tenorio*, commented that while the exercise of power by the Minister "may now, in light of the *Charter*, be reviewable by the courts, ours is not the court which would undertake such a review."[63] The Court also stated that applications for mercy "may always be renewed -- it is a recourse which is never prescribed,"[64] therefore, it is still open to the applicant to re-apply, even if previous attempts have been unsuccessful.

IV. Section 690 Applications to, and the Nature of Interventions by the Minister of Justice

In large part, information concerning the number of applications and the frequency of Ministerial interventions under section 690 and its antecedents is sporadic and ill-describes

---

[60] (1985), 18 D.L.R. (4th) 481.

[61] *Re Wilson and The Queen* (1987), 35 C.C.C. (3d) 316 (Man. C.A.), 321. It was open to Wilson to "commence a proper action for declaratory relief if he so elected." Leave to appeal the Federal Court's decision was denied by the Supreme Court.

[62] *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289 (F.C.T.D.), 296. The court dismissed Thatcher's application for judicial review on October 3, 1996.

[63] *R. v. Tenorio* (1991), 66 C.C.C. (3d) 429 (Que. CA), 440.

[64] *Ibid.*, 439.

the conviction review process. Nevertheless, available data provide some indication of the exercise of Ministerial discretion.

Table 4.2 illustrates that Ministers of Justice ordered 17 new trials between 1898 and 1953,[65] an average of .3 interventions per year over the 56-year period (or just less than one every three years). Unfortunately, the report does not set out the number of applications during this time period, nor the grounds for the applications.

---

[65] A list of Ministers of Justice and Attorneys General from 1867 to the present can be found in Appendix 1. Correspondence from Sonia Hénard, Library of Parliament (Ottawa, Ont.), Information and Documentation Branch, to author (15 July 1999).

Table 4.2
New Trials Ordered by the Minister of Justice Under Section 1022 Former Criminal Code[66]

Year	Number
1898	1
1912	1
1913	1
1915	2
1918	2
1919	1
1921	2[67]
1922	1
1924	1
1929	2
1933	1
1936	1[68]
1953	1
Total	17

[66] Canada. *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Queen's Printer, 1956), 102. Also referred to as the Fauteux Report, it was published by authority of the Honourable Stuart S. Garson, Minister of Justice and Attorney General of Canada. The Report provides the table without explanation. While the Table refers to "new trials," it also includes interventions by the Minister under subsection (b) and possibly subsection (c), following their addition to section 1022 of the *Criminal Code* in 1923. For example, the Minister referred a case to the Court of Appeal under subsection (b), in *R. v. Jarvis* (1936), 66 C.C.C. (1st) 20 (Ont. C.A.), 22.

[67] In 1921, Minister of Justice Charles Doherty ordered a new trial in *R. v. Peel (No. 2)* (1921), 36 C.C.C. (1st) 221 (N.S.S.C.), discussed *infra*.

[68] In 1936, Minister of Justice Ernest Lapointe referred the *Jarvis* case to the Ontario Court of Appeal pursuant to section 1022(2)(b) of the *Criminal Code*. See *Rex v. Jarvis* (1936), 66 C.C.C. (1st) 20 (Ont. C.A.). Also see *Rex v. Jarvis* (1937), 68 C.C.C. (1st) 188 (Ont. C.A.).

Between 1960 and 1991,[69] the prerogative was used on 18 occasions, less than .6 interventions per year over this 32-year period (or just over one every two years). However, information on both the number of applications and number of interventions is available only for fiscal years 1982-83 to 1986-87 and 1988-89 to 1990-91.[70] As Table 4.3 indicates, between fiscal years 1982-83 to 1986-87, and 1988-89 to 1990-91 (an eight-year period), there were 236[71] applications, and only three interventions. Therefore, less than 2% of section 690 applications resulted in Ministerial intervention.

---

[69] Avison, "Last Resort," 2. Avison states that "*since* 1960, the prerogative has been utilized on 14 occasions;" I assume this figure is inclusive up to the year 1987, the year preceding the publication of his report. Four additional interventions occurred. In the Norman Warwick (Fox) case, the Minister of Justice, the Solicitor General and the Attorney General of British Columbia jointly recommended a free pardon (Avison, p. 27). In the 1988-89 fiscal year, the Minister of Justice ordered a new trial in *R. v. St. Cyr*. St. Cyr was subsequently acquitted (See Canada, Department of Justice, *Annual Report 1988-89* (Ottawa), 20. No other details about the St. Cyr case are provided and subsequent searches of Quicklaw and other reported cases were unsuccessful. In 1966, the Governor-General-in-Council asked the Supreme Court to hear an appeal of Steven Truscott's conviction. Finally, in June 1991, the Minister of Justice referred the Wilson Nepoose case to the Alberta Court of Appeal pursuant to s. 690(b).

[70] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (21 June 1999). According to Ms. McFadyen, due to budgetary cuts, the federal Department of Justice stopped producing *Annual Reports* after fiscal year 1990-91. I was advised that the Department of Justice now produces annual Performance Reports which are available on their website. However, I was able to locate only one Performance Report for 1997-1998, which does not provide statistics concerning section 690 applications and interventions. See *Performance Report*, available from http://www.tbs-sct.gc.ca/tb/key.html and http://canada.justice.gc.ca (accessed 15 July 1999); Internet. Some statistics have been obtained for section 690 applications after 1991 and these are presented in Table 4.4.

[71] Although the number of *applications* submitted totals 342, the 71 applications submitted between 1980 and 1982, and the 35 applications submitted in fiscal year 1987-88 have been subtracted from this calculation because the number of Departmental *interventions* is unknown.

Table 4.3
Applications to, and Interventions by the Minister of Justice (1980-1991)[72]

Fiscal Year	No. of Applications	No. of Interventions
1980-82[73]	71	Not provided
1982-83	30	1[74]
1983-84	35	0
1984-85	35	1[75]
1985-86	34	0
1986-87	30	0
1987-88	35	Not provided
1988-89	20	1[76]
1989-90	27	0
1990-91[77]	25	0
Total[78]	342	3

[72] Data for the years 1982-1990 are taken from Canada, Department of Justice, *Annual Report* (Ottawa).

[73] The data for fiscal years 1980-81 and 1981-82 are cited in *Wilson v. Minister of Justice* (1983), 9 C.C.C. (3d) 31 (F.C. T.D.).

[74] Minister of Justice Jean Chrétien, following a review of Donald Marshall Jr.'s section 690 application, referred the case back to the Nova Scotia Court of Appeal for hearing and determination. Canada, Department of Justice, *Annual Report 1983-1984* (Ottawa), 34.

[75] On October 11, 1984, the Governor-in-Council, "acting on the joint recommendation of the Minister of Justice and the Solicitor General, issued a free pardon to Kenneth Norman Warwick (Norm Fox), in respect of a conviction for rape in 1976." Canada, Department of Justice, *Annual Report 1984-1985* (Ottawa), 32.

[76] In fiscal year 1988-89, the Minister of Justice, in *R. v. H. St. Cyr*, "ordered a new trial and the accused was subsequently acquitted by the courts." Canada, Department of Justice, *Annual Report 1988-1989* (Ottawa), 20.

[77] As noted *supra*, production of *Annual Reports* by the federal Department of Justice ceased after fiscal year 1990-1991. Thus, available statistics are sporadic and often lack sufficient detail.

[78] Rosen, "Wrongful Convictions," 8-9. Rosen cautions that such statistics may be misleading, because "they do not reflect the nature and complexity of applications to the Minister." Moreover, "not all applications are received and investigated to a conclusion in the same fiscal year."

Between 1992 and 1998, the prerogative was utilized on six occasions. Complete data is available only for fiscal years 1995 to 1998. As Table 4.4 indicates, 252 applications were submitted between 1995 and 1998,[79] and, of a total of 28 Ministerial decisions, five interventions were granted; an average of approximately 2%.

---

[79] Mary McFadyen advises that there were no section 690 remedies granted by the Minister of Justice between 1992 and 1995. I have included the Milgaard intervention, however, as his case was referred to the Supreme Court in April of 1992. However, I do not know how many applications were submitted over this period. (Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author, 21 June 1999).

Table 4.4
Applications to, and Interventions Denied / Granted by Justice Minister (1992-1998)

Year	No. of Applications[80]	No. of Interventions Denied[81]	No. of Interventions Granted
1992 - 1994	Unknown	Unknown	1[82]
1995	60	5	0
1996	75	3	2[83]
1997	56	1	1[84]
1998	61	14	2[85]
Total	252	23	6

[80] DOJ interview. This respondent provided the statistics for the number of applications submitted from 1995 to 1997. Based upon previously recorded statistics by the Department of Justice, it is assumed that the statistics apply to the fiscal year. Mary McFadyen provided the statistics for 1998 (*ibid.*).

[81] Letter from Mary McFadyen, Assistant Senior counsel - Criminal Conviction Review Group, federal Department of Justice, to author (21 June 1999).

[82] In 1992, the Governor-in-Council referred the Milgaard case to the Supreme Court.

[83] Canada, Department of Justice, "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Wilfred Beaulieu 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" (25 November 1996), 1-6 [hereinafter *Beaulieu Decision*]. Also see Canada, Department of Justice, "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Patrick Kelly 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" (25 November 1996), 1-11 [hereinafter *Kelly Decision*]. On November 25, 1996, Minister of Justice Allan Rock referred the Wilfred Beaulieu case to the Alberta Court of Appeal, pursuant to section 690(c), and possibly (b). On the same day, Minister Rock referred the Patrick Kelly case to the Ontario Court of Appeal, pursuant to section 690(c), and possibly (b) [both cases are discussed *infra*].

[84] *Reference re: Gruenke* (1998), 131 C.C.C. (3d) 72 (Man. C.A.). On September 26, 1997, Minister of Justice Anne McLellan referred the *Gruenke* case to the Manitoba Court of Appeal, pursuant to section 690(c), and possibly (b) [discussed *infra*].

[85] Canada, Department of Justice, "In the Court of Appeal of Nova Scotia; In the Matter of Section 690 of the *Criminal Code*, R.S.C. 1985, c. C-46; And in the Matter of a Reference Thereof by the Minister of Justice Concerning Whether the Information Which is Advanced in the Section 690 *Criminal Code* Application of Clayton Norman Johnson would be Admissible on Appeal to the Court of Appeal of Nova Scotia in the Said Conviction of Clayton Norman Johnson, who was Convicted of First Degree Murder in Shelburne, Nova Scotia, on May 4, 1993, for the February 20, 1989 Death of Janice Faye Johnson" (21 September 1998), 1-2 [hereinafter *Johnson Decision*]. On September 21, 1998, Minister of Justice Anne McLellan referred the Clayton Johnson case to the Nova Scotia Court of Appeal pursuant to section 690(c), and possibly (b). Mr. Johnson is presently out on bail, pending the hearing of his appeal (discussed *infra*). On April 13, 1999, the Alberta Court of Appeal heard a Ministerial reference pursuant to section 690(c), and possibly (b), in *R. v. McArthur*, [1999] A.J. No. 415, Docket: 98-17622 (Alta. C.A.), Judgment: 13 April 1999 [Quicklaw], para. 1-16 (discussed *infra*).

The data contained in Tables 4.3 and 4.4 result in a total of 594 applications (between 1980 and 1991, and between 1995 and 1998) and only nine Ministerial interventions, an average intervention rate of less than 2%. Assuming that the Department of Justice received approximately 150 additional applications between 1992 and 1994, this intervention rate would decrease further.

The Nature of Interventions by the Minister of Justice

(i) Ordering a New Trial Under Section 690(a)

Between 1898 and 1953, the Minister of Justice exercised his discretion on 17 occasions to return cases to the courts for new trials or to hear cases as if they were appeals. I identified only two cases--*R. v. Peel* and *R. v. Jarvis*--within this time period.[86]

Between 1960 and 1991, the Minister ordered new trials in four of 18 interventions. There were no Ministerial references pursuant to section 690(a) between 1992 and 1998.[87]

---

[86] An additional case may be that of *R. v. Gilbert* (1907), 38 S.C.R. 207 (S.C.C.) 208. Pursuant to what was then s. 1024 (R.S.C. 1906, c. 146) of the *Criminal Code* (now s. 695, R.S.C. 1985), Josiah Gilbert applied for an extension of time to serve a notice of appeal in a reserved Crown case. Gilbert then applied to Minister of Justice Allen Aylesworth for a new trial under what is now section 690 of the *Criminal Code* (s. 748, R.S.C. 1892, c. 29). However, due to the delay associated with correspondence "travelling from Regina to Ottawa, and obtaining a reply from the Minister, more than 15 days elapsed after the date of such affirmance of the conviction, and, in the meantime, no notice of appeal therefrom had been served upon the Attorney-General as required by the provisions of s. 1024 of the *Criminal Code*." The Supreme Court held that the power of extension of time was exercisable, despite the expiration of the prescribed period. See also *Gilbert v. The King (No. 2)* (1907), 12 C.C.C. (1st) 127 (S.C.C.). Gilbert's appeal against his murder conviction was dismissed by the Supreme Court of Canada. The outcome of Gilbert's application to the Minister of Justice is not known.

[87] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (21 June 1999).

In 1921, the Minister of Justice "entertained a doubt as to whether the conviction should have been made," and directed a new trial in an arson case (*R. v. Peel*).[88] The outcome of the new trial is unknown. In *Pelletier*, under what was then section 596(a), the Minister ordered a new trial when an expert later raised doubts whether Joseph Paul Pelletier signed the cheques he was convicted of forging. He was acquitted at his second trial.[89] In 1976, a new trial was ordered by Justice Minister Ron Basford (pursuant to s.617(a)), in *Morgentaler*, after the Québec Court of Appeal "set aside a jury verdict of not guilty and entered a conviction...[for] unlawfully procuring an abortion."[90] Morgentaler was again acquitted by a jury following the Minister's reference.[91] The Minister also ordered a new trial (pursuant to s. 617(a)), for Ronald Shatford, who was convicted of armed robbery, following an earlier conviction of another person for the same offence. He was subsequently acquitted. As Avison notes, "[f]or reasons that are not entirely clear, the Crown proceeded against Shatford despite the fact that they had already convicted [Richard Paul] Anderson for an identical role in the same offence."[92] Finally, in

---

[88] s. 1022, R.S.C. 1906, c. 146. *R. v. Peel (No. 2)*, (1921), 36 C.C.C. (1st) 221 (N.S.S.C.), 222. The Nova Scotia Supreme Court was asked to consider whether Peel could be granted bail, prior to a new trial, ordered by the Minister. The Court held that it had no jurisdiction to grant bail in these circumstances, even though it would have had jurisdiction if it had granted a new trial.

[89] Avison, "Last Resort," 21.

[90] *Ibid.*, 25.

[91] See M. L. Friedland and Kent Roach, *Criminal Law and Procedure: Cases and Materials*, 8th ed. (Toronto: Emond Montgomery Publications, 1997), 308. After the Québec Court of Appeal overturned the jury's verdict of guilty, Parliament amended what is now section 686(4)(b) of the *Criminal Code* so that a court of appeal could no longer enter a verdict of guilty following an acquittal by a jury.

[92] Avison, "Last Resort," 22.

R. v. H. St. Cyr, the Minister ordered a new trial and the accused was subsequently acquitted.[93]

Table 4.5
New Trials Ordered by Minister of Justice Under Section 690(a)

Applicant	Year New Trial Ordered[94]	Outcome
Morgentaler	1976	Acquitted
Peel	1921	Unknown
Pelletier	Unknown[95]	Acquitted
St. Cyr	1988 or 1989[96]	Acquitted
Shatford	Unknown[97]	Acquitted

[93] Canada, Department of Justice, *Annual Report 1988-1989* (Ottawa), 20. This is the only information provided by the Department of Justice about this case. Searches of legal texts were unsuccessful. Quicklaw searches revealed only one potential match; *R. v. St. Cyr*, [1988] A.J. No. 474, Appeal No. 19870 (Alta. C.A.), Judgment: 30 May 1988 [Quicklaw]. In the Quicklaw case, Henry Hector St. Cyr appealed his conviction for robbery; however, the appeal was dismissed. I have included the St. Cyr case under section 690(a); however, it is possible that the case was referred pursuant to section 690(b).

[94] The *Pelletier* and *Shatford* cases are discussed by Avison ("Last Resort") but he does not provide information as to when new trials were ordered in these cases. However, the date range can be determined by the *Criminal Code* section number cited in Avison's report. Therefore, a new trial was ordered in *Pelletier* between 1953 and 1969, and in *Shatford*, between 1970 and 1988. A new trial in *St. Cyr* was probably ordered in 1987 or 1988. Repeated attempts to locate these cases in reported criminal cases and on Quicklaw databases were unsuccessful.

[95] The Ministerial reference was made pursuant to s. 596, so the new trial was ordered between 1953 and 1969.

[96] This case was reported in the 1988-89 annual report produced by the Department of Justice, so a new trial was likely ordered either in 1987 or in 1988.

[97] The Ministerial reference was made under s. 617, so the new trial was ordered between 1970 and 1988.

(ii) Referring a Case to the Court of Appeal to Hear and Determine the Case as if it Were an Appeal, Under Section 690(b)

Only one reference under what is now section 690(b) could be identified prior to 1960. The *Jarvis*[98] case was unusual because Justice Minister Ernest Lapointe referred the case to the Ontario Court of Appeal 11 years after Jarvis had served his sentence and paid a fine. Five men were charged with conspiracy to defraud the government; however, only two were convicted. In October 1924, Jarvis was sentenced to 6 months imprisonment and was ordered, along with another accused, to pay a fine. One of the other men involved, A. H. Pepall, had fled to the United States and, upon his extradition back to Canada, was put on trial and subsequently acquitted. Jarvis sought to adduce new evidence which arose after Pepall's trial. A rehearing of Jarvis' conviction was granted; however, his appeal was dismissed on April 9, 1937.[99]

Of the 18 Ministerial interventions between 1960 and 1991, ten were referred to a Court of Appeal for hearing and determination under section 690(b).[100] Table 4.6 summarizes the nature of these 10 interventions. There were no Ministerial references pursuant to section 690(b) alone between 1992 and 1998.[101]

---

[98] *Rex v. Jarvis* (1936), 66 C.C.C. (1st) 20 (Ont. C.A.).

[99] *Rex v. Jarvis* (1937), 68 C.C.C. (1st) 188 (Ont. C.A.).

[100] In this section of the chapter, I include only Ministerial references pursuant to section 690(b) alone (i.e., not Ministerial references made under a combination of subsections (c) and (b)), discussed *infra*.

[101] All cases between 1992 and 1998 were referred pursuant to subsections (c) and (b). Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (21 June 1999). Quicklaw searches under section 690(b) also failed to reveal any cases during this time frame.

Table 4.6
The Nature of Section 690(b) Interventions Between 1960 and 1998

	Extension of Time	New Evidence	Other	Total
Number	3	5	2	10

As Table 4.6 illustrates, three of the 10 interventions were simply extensions of time, allowing the applicant to appeal. Allan Victor Way, convicted of the unlawful possession of a cheque and sentenced to three years, had abandoned his appeal because he could not afford the appeal books. Following his co-accused's success on appeal, the Alberta Court of Appeal declined to hear Way's appeal because of the lapse of time. The court suggested that the Attorney General of Alberta ask the Minister of Justice for a remedy under section 596(b), so that it could hear the appeal. Justice Minister Louis J. L. Cardin referred Way's case to the appeal court in April 1966, and the court subsequently quashed the conviction.[102] Wayne Douglas Barr (convicted on three charges of trafficking in marijuana and sentenced to three years imprisonment) tried to reopen an appeal he had abandoned after he heard of other appeals, similar to his case, being successful. Following a reference to the court, his sentence was reduced.[103] In March 1974, Minister of Justice Otto Lang also ordered an appeal for Lyle Joseph Hauser, who had been sentenced to 18 months imprisonment for break, enter and theft. As in Way and Barr, the court declined

---

[102] Avison, "Last Resort," 18-19. See also *Way v. The Queen* (1966), 48 C.R. 383 (Alta. S.C.).

[103] Avison, "Last Resort," 19-20. The Barr reference was made pursuant to either s. 596(b) or s. 617(b).

jurisdiction because of the lapse of time. Following a request from provincial authorities, the Minister referred Hauser's case to the appeal court.[104]

Five of the 10 interventions under section 690(b) involved the introduction of new evidence relating to the merits of the convictions. In the Julien Roux case, evidence at the later trial of an accomplice established that the two had left the house six hours before the fire, which killed the victim of their assault and robbery. The Minister referred the case to the Court of Appeal, which ordered a new trial. Roux was acquitted of non-capital murder and robbery at his second trial, after having served nine years for the murder.[105] On November 29, 1963, Minister of Justice Lionel Chevrier referred the *McNamara* case to the Ontario Court of Appeal, pursuant to s. 596(b), based on a statement by Arsenault (an inmate serving life for 11 other armed robberies) that he had committed the robberies for which McNamara was serving time. The court heard Arsenault's sworn evidence, quashed the convictions and ordered a new trial for McNamara, stating that the truth of Arsenault's statements was "something to be passed upon by the jury."[106] McNamara was convicted again at his second trial.[107] The 1964 reference to the Québec Court of Queen's Bench in *Marcotte* was somewhat broader. In addition to considering fresh evidence in this capital murder case, Minister of Justice Guy Favreau also asked the Court to consider

---

[104] *Ibid.*, 23. The Hauser reference was made under s. 617(b). The outcome of the Minister's referral is not known.

[105] *Ibid.*, 21. The Roux reference was made pursuant to either s. 596(b) or s. 617(b).

[106] *R. v. McNamara*, [1964] 3 C.C.C. 32 (Ont. C.A.), 33.

[107] Avison, "Last Resort," 16.

possible errors in the jury charge, and "all other evidence or argument either on behalf of the accused or by the Crown which the Court shall judge appropriate to admit or take into consideration."[108] However, the Court was not persuaded that the new evidence held sufficient weight and dismissed Marcotte's appeal on September 17, 1964. Marcotte's subsequent appeal to the Supreme Court was also unsuccessful; however, his sentence was commuted to life imprisonment.[109] In June 1991, Minister of Justice Kim Campbell, with the agreement of the Attorney General of Alberta, referred the *Nepoose*[110] case to the Alberta Court of Appeal. Pursuant to s. 683(1)(e)(ii) of the *Criminal Code*, the Court appointed a special commissioner to "inquire into and report back to [the] court concerning the credibility and weight of any evidence which [was] proposed to be offered...as 'new evidence' in relation to the question of the guilt or innocence of the appellant."[111] The Commissioner heard 22 witnesses, and his 253-page report became part of the public record. The Court ordered a new trial because "there was a real

---

[108] *Marcotte v. The Queen*, [1965] 3 C.C.C. 285 (S.C.C.), 287. The Minister's reference was made pursuant to s. 596(b).

[109] Avison, "Last Resort," 18. Avison states that as "a result of the continued legal attack on Marcotte's conviction, the date for the hanging was postponed several times."

[110] *R v. Nepoose* (1992), 12 C.R. (4th) 296 (Alta. C.A.). Also see *R. v. Nepoose* (1992), 71 C.C.C. (3d) 419 (Alta. C.A.). In 1987, Wilson Nepoose was convicted of second-degree murder. The Minister's reference was based upon the recantation of a trial witness, non-disclosure by police to Crown and defence counsel concerning the unreliability of statements made by another key witness at trial, and inadequate police investigation at the victim's residence.

[111] *R v. Nepoose* (1992), 12 C.R. (4th) 296 (Alta. C.A.), 298.

possibility that a miscarriage of justice occurred during the trial."[112] However, the Crown did not recommence proceedings.[113]

In 1971, Donald Marshall Jr. was convicted of second degree murder and sentenced to life imprisonment. New information arose suggesting his innocence, which prompted Justice Minister Jean Chrétien, in 1982, to refer the case to the Nova Scotia Court of Appeal under section 617(b) when, in fact, officials from both the federal Department of Justice and Nova Scotia's Department of the Attorney General thought that section 617(c) "was the preferred option."[114] The decision, which was influenced by the Chief Justice of Nova Scotia, was criticized by the Royal Commission into Marshall's wrongful conviction:

> As a practical matter, 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. Although both governments felt that a full public airing was essential, the section 617(b) appeal effectively confined the public hearing to the facts of the incident, and precluded a complete examination of why the wrongful conviction occurred.
>
> 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 the views of the Chief Justice in determining the final form of the Reference.

---

[112] *Ibid.*, 299.

[113] Association in Defence of the Wrongly Convicted (AIDWYC), *Wrongful Convictions*, 51. In 1998, Wilson Nepoose was found dead on the Hobbema Reserve in Central Alberta, almost four months after he was reported missing. See "Wrongly convicted man dead," *The Globe and Mail* (29 April 1998): A17, no author cited.

[114] *Marshall Commission*, 113-115.

> By using section 617(b), the possibility of a new trial was raised, an outcome which no one wanted; of perhaps more importance, the evidence would be directed solely at guilt or innocence, and not to the factors leading to the wrongful conviction.[115]

In 1988, Avison commented that "generally speaking, where a reasonable basis has been established to return a case to the courts, a reference under section 617(b) [now 690(b)] will be the preferred approach."[116] He does not elaborate on this statement nor does he comment on the option under section 690(c). The disadvantage of an intervention under section 690(b) is discussed by the *Marshall Commission*, and by other commentators. As noted above, "*the convicted or detained person has the procedural and evidentiary burden* of convincing the court of appeal of the wrongful nature of the original conviction or sentence"[117] (emphasis added). Marshall was ultimately exonerated and compensated for the 11 years he spent in prison for a murder he did not commit.

In the "other" category, the Ontario Court of Appeal, in the *Kehoe* intervention (under s.596(b)), dealt with the legality of a sentence imposed for an offence while Kehoe was on parole. The Court dismissed the appeal in May 1969.[118] In 1962, in *R. v. Roberts*,[119] Minister of Justice Donald Fleming referred nine convictions for arson and a 24-year sentence to the Ontario Court of Appeal under what is now section 690(b). The Minister's reference stated that he had:

---

[115] *Ibid.*, 115.

[116] Avison, "Last Resort," 9.

[117] Rosen, "Wrongful Convictions," 6.

[118] *R. v. Kehoe*, [1970] 1 C.C.C. 123 (Ont. C.A.).

[119] (1962), 39 C.R. 1 (Ont. C.A.).

> received numerous and responsible representations on [Roberts'] behalf alleging (a) that he was not given a fair trial; (b) that he was not convicted according to law; (c) that the proceedings as conducted before Magistrate Bigelow contravened the provisions of the Canadian Bill of Rights; and (d) that evidence relative to the fitness of the sentence to be imposed is available, which evidence was not considered by either the Magistrate or the Court of Appeal.[120]

The five-member Court unanimously dismissed the appeal against convictions, and reserved its judgment as to sentence. After hearing the evidence of a number of psychiatric specialists, the Court reduced Roberts' sentence to 12 years. Table 4.7 describes the Ministerial interventions made under section 690(b), and the known outcomes.

Table 4.7
All Known Ministerial References to Court of Appeal Under Section 690(b)

Applicant	Year Appeal Heard	Outcome
Barr	Unknown	Sentence reduced
Hauser	1974[121]	Unknown
Jarvis	1937	Appeal dismissed
Kehoe	1969	Appeal dismissed
Marcotte	1964	Capital sentence commuted
Marshall	1983	Exonerated and compensated
McNamara	1964	Conviction affirmed
Nepoose	1992	New trial ordered; Crown did not re-prosecute
Roberts	1962	Sentence reduced
Roux	Unknown	Acquitted
Way	1966	Conviction quashed

[120] *Ibid.*, 11.

[121] In this case, the Minister referred the case in 1974. Therefore, the appeal was likely heard in 1974 or 1975.

(iii) Asking the Court of Appeal For an Opinion on a Question Under 690(c)

One intervention involved the Minister of Justice asking the Court of Appeal for its opinion under section 617(c).[122] In 1971, Keith Latta was convicted of non-capital murder. His appeal to the Supreme Court of Alberta (Appellate Division) was dismissed in September of 1972, and application for leave to appeal to the Supreme Court was also refused. In *Reference Re R. v. Latta*,[123] the appellant petitioned the Minister of Justice for a new trial, based on further evidence of a new witness which was not known to him until "some time after the appeal had been disposed of." In 1976, Minister of Justice Ron Basford asked the Court of Appeal whether, in its opinion, new evidence from a witness would be admissible at a new trial on the charge of murder. The Court found that the evidence would not have been admissible on two grounds: first, "it had [no] probative value, and secondly, it was hearsay, and did not come within any of the exceptions to the hearsay rule which would allow it to be admitted."[124] Accordingly, the Court advised the Minister of Justice that the evidence would not have been admissible if tendered by the defence at Latta's trial.

---

[122] It should be noted that in *Gorecki (No. 2)* (1976), 32 C.C.C. (2d) 135 (Ont. C.A.), 138-139, the Minister of Justice initially referred the case under what is now section 690(c); however, during the hearing the reference was expanded to a combination of sections 690(c) and (b). Therefore, I have included *Gorecki* in Section (iv).

[123] (1976), 30 C.C.C. (2d) 208 (Alta. C.A.), 210.

[124] *Ibid.*, 220.

(iv) Asking the Court of Appeal a Question Under 690(c), Followed by an Appeal under 690(b)

Only one case pursuant to section 690(c), and possibly (b) was found between 1960 and 1991. In 1973, Zbigniew Gorecki was convicted of the non-capital murder of his wife and sentenced to life imprisonment. His appeal to the Ontario Court of Appeal was dismissed and application for leave to appeal to the Supreme Court was also dismissed.[125] The Minister of Justice asked the Ontario Court of Appeal, under what is now section 690(c), to determine if Gorecki was "incapable on account of insanity of instructing counsel and conducting his defence" at the time of his trial.[126] The court found that Gorecki "was not...incapable of conducting his defence and that he was not unfit to stand trial on account of insanity."[127] While the hearing of the Reference was in progress, however, the scope of the reference was broadened so that the question of the sanity of Dr. Gorecki at the time of the commission of the offence could be considered.[128] Minister of Justice Ron Basford subsequently referred the question of Gorecki's sanity at the time of the commission of the offence to the Court of Appeal under section 690(b).[129] The court set aside the conviction, ordered a new trial, and restricted the defence on the new

---

[125] *Reference Re R. v. Gorecki (No. 1)* (1976), 32 C.C.C. (2d) 129 (Ont. C.A.), 130.

[126] *Ibid.*

[127] *Ibid.*, 135.

[128] *Reference Re R. v. Gorecki (No. 2)* (1976), 32 C.C.C. (2d) 135 (Ont. C.A.), 138-139.

[129] *Ibid.*, 139.

trial to the issue of insanity.[130]

Between 1992 and 1998, there were five references pursuant to section 690(c), and possibly (b). In *McArthur*,[131] the Alberta Court of Appeal was asked to consider the admissibility of evidence under section 690(c), and, if deemed to be admissible as fresh evidence, to determine the matter as if it were an appeal, pursuant to section 690(b). In 1987, Richard Leigh McArthur was convicted of second degree murder in the stabbing death of a fellow inmate. The fresh evidence consisted of:

> McArthur's original statement, an affidavit and a deposition, and affidavits and depositions of four witnesses who supported [his] self-defence theory. These witnesses were interviewed by the R.C.M.P. a few days after the stabbing, but denied having any knowledge of the incident. They subsequently met the appellant in 1989 or 1990, when they were all serving time in the Edmonton Institution. Upon learning of the appellant's conviction, they informed him of what they knew about the stabbing, explaining their earlier denial of knowledge on the basis that they did not want to get involved.[132]

Relying on the principles relating to the admission of fresh evidence on appeal laid out in *Palmer and Palmer v. The Queen*,[133] the Court deemed the evidence admissible. Although the Court was not able to say that the evidence, taken with the other evidence, would be conclusive of the issues in the case so as to render a further trial unnecessary, they found little point in re-trying an accused who had effectively served his sentence. In

---

[130] *Ibid.*, 140. The initial reference to the Ontario Court of Appeal was directed by Minister of Justice Otto Lang on September 11, 1975. The outcome of the Gorecki trial is not known.

[131] *R. v. McArthur*, [1999] A.J. No. 415, Docket: 98-17622 (Alta. C.A.), Judgment: 13 April 1999 [Quicklaw], para. 1-16.

[132] *Ibid.*, para. 8.

[133] (1979), 50 C.C.C. (2d) 193 (S.C.C.).

April of 1999, the appeal was allowed and the Court directed an acquittal.[134]

On September 26, 1997, Minister Anne McLellan referred the *Gruenke*[135] case to the Manitoba Court of Appeal, asking the court whether information obtained by the Self-Defence Review (SDR)[136] "relating to whether the killing of [Phillip Barnett] was planned and deliberate, would be admissible as fresh evidence on appeal to the Court of Appeal."[137] The court, under section 690(c), was to assess the admissibility of evidence, and if it was deemed admissible, to then hear the appeal pursuant to section 690(b) of the *Criminal Code*. Ms. Gruenke was convicted of first-degree murder in 1987 and sentenced to life imprisonment without parole eligibility for 25 years. Her appeal to the Manitoba Court of Appeal was dismissed on January 16, 1989, and a subsequent appeal to the Supreme Court of Canada was dismissed on October 24, 1991.[138] Pursuant to the

---

[134] According to Hersh Wolch, McArthur's lawyer, the section 690 "application took seven years to make its way through the Justice Minister's office." See Sheldon Gordon, "Final appeal: the wrongfully convicted turn to Canada's lawyers of last resort," *National - Canadian Bar Association Journal* 8, no. 5 (August-September 1999): 27-28, 30, 32.

[135] *Reference re: Gruenke* (1998), 131 C.C.C. (3d) 72 (Man. C.A.). The applicant's full name is Adele Rosemarie Breese (Gruenke).

[136] See Canada, Government of, *The Self-Defence Review: Overview and Next Steps* (September 1997), 1-20. Due to the evolving law of self-defence--particularly following the landmark 1990 Supreme Court of Canada decision in *Lavallée*--the Minister of Justice and Solicitor General requested a judge of the Ontario Court of Justice (Provincial Division), Lynn Ratushny, "to conduct a review of the law, to make law reform recommendations, and to provide advice on which women in prison might be considered for the royal prerogative of mercy" (p. 1). Applications were sent to all those women who might have "fit within the Review's terms of reference" (p. 2). The Self-Defence Review received 98 applications and "concluded that seven of the cases passed its standards" (p. 4). Only one case, Adele Rosemarie Breese (Gruenke), was referred to the Court of Appeal under section 690. See also *ibid.*, 79. The SDR was also to assess "the potential impact of battered-woman syndrome... on women convicted and imprisoned *before* the *Lavallée* decision... ."

[137] *Reference re: Gruenke* (1998), 131 C.C.C. (3d) 72 (Man. C.A.), 73.

[138] *Ibid.*, 77-78.

Ministerial reference, the information sought to be placed before the Court as fresh evidence included "evidence available at trial but not adduced; evidence adduced at trial but 'not appreciated'...;" and "evidence that may be 'fresh' in the strict legal sense... ."[139] Referring to *Marshall* and *Nepoose*--with respect to the introduction of new evidence on appeal--Scott, C.J.M. stated that "there is...even more latitude on a reference," and that "the standard to be applied in this case is a relaxed and flexible one because it is in the interests of justice to do so."[140] That said, Justice Scott also noted that "the information... must meet the threshold requirement of legal admissibility," as "mandated by *O'Brien* and the terms of the Reference itself."[141] As such, the Manitoba Court of Appeal responded to the first part of the Reference by advising the Minister that "none of the 'information' before the SDR (nor the subsequent affidavit and report of Dr. Shane) [was] 'new evidence.'"[142] On June 17, 1999, Ms. Gruenke was granted leave to appeal the Court of Appeal's opinion pursuant to section 40(1) of the *Supreme Court of Canada Act*.[143] The fact that appellate courts adopt a less rigid approach to the introduction of fresh evidence on a reference is to be encouraged. In the final analysis, however, when Ministerial interventions and outcomes over the past century are viewed as a whole, this relaxed

---

[139] *Ibid.*, 89.

[140] *Ibid.*, 86-87.

[141] *Ibid.*, 87.

[142] *Ibid.*, 101.

[143] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author (21 June 1999). Also see *Reference re: Gruenke*, [1999] S.C.C.A. No. 138, File No.: 27207 [Quicklaw]. The case has not yet been heard.

standard does not appear to provide substantive benefits to applicants.

In three other cases, *Kelly*,[144] *Beaulieu*,[145] and *Johnson* [146] (discussed *infra*), the Minister of Justice asked appellate courts to consider questions under section 690(c), prior to determining whether the cases should be heard as if they were appeals by the accused, under section 690(b). Table 4.8 describes the known interventions made pursuant to section 690(c), and possibly (b), and their known outcomes, between 1960 and 1998.[147]

Table 4.8
Known Ministerial References Asking the Court of Appeal a Question Under Section 690(c), Followed by an Appeal Under Section 690(b)

Applicant	Year Appeal Heard	Outcome
Beaulieu	1997	Acquitted on one conviction; new trial ordered on second assault conviction; Crown stayed proceedings.
Gorecki	1976	New trial ordered; restricted to defence of insanity.
Gruenke (Breese)	1998	Fresh evidence not admitted; appeal denied; leave to appeal appellate court's opinion to Supreme Court granted.
Johnson	Not yet heard	On-going
Kelly	1998	Fresh evidence ruled inadmissible; decision split 2-1; Goudge, J.A. would order new trial.
McArthur	1999	Fresh evidence admitted; acquitted.

[144] *Kelly Decision.*

[145] *Beaulieu Decision.*

[146] *Johnson Decision.*

[147] The information for the 1992 to 1998 period is likely accurate, as Mary McFadyen (DOJ) did not identify any additional interventions pursuant to sections (c) and (b). Data for the 1960 to 1991 period is as comprehensive as possible, given that available information is often incomplete.

(v) Referring the Case to the Supreme Court of Canada

A reference to the Supreme Court of Canada, *Regina v. Coffin*,[148] was made under section 55[149] [now s. 53][150] of the *Supreme Court Act*.[151] The Québec Court of Appeal had unanimously affirmed the murder conviction and the Supreme Court of Canada refused leave to appeal.[152] The Supreme Court was asked what disposition it would have made had it heard the appeal.[153] On a preliminary objection from the Attorney General of Québec, the Supreme Court decided it had jurisdiction to hear the case.[154] The Court was split 5-2 against Coffin on the issue of whether he had had a fair trial and Coffin was hanged, following a refusal by Cabinet to commute the sentence to life in prison.[155] In 1964, the Québec government ordered a judicial inquiry. Although the Brossard Commission did find "some faults in the handling of the case," they were not "sufficient to throw the correctness of the verdict into jeopardy."[156] Alton Price, a retired Québec

---

[148] (1956), 23 C.R. 1 (S.C.C.).

[149] R.S.C. 1952, c. 259.

[150] R.S.C. 1985, c. S-26.

[151] *Reference Re Regina v. Coffin* (1955), 116 C.C.C. (1st) 215 (S.C.C.).

[152] *Ibid.* In 1954, Wilbert Coffin was convicted of the murder of a young American hunter. Doubts about his guilt still exist, three decades after his execution.

[153] *Regina v. Coffin* (1956), 23 C.R. 1 (S.C.C.).

[154] *Reference Re Regina v. Coffin* (1955), 116 C.C.C. (1st) 215 (S.C.C.).

[155] George Jonas, ed., *The Scales of Justice* (Toronto: CBC Enterprises/ les Entreprises Radio-Canada, 1983), 62.

[156] Williams, *With Malice Aforethought*, 131.

schoolteacher who has written a book about the case, "is pursuing a posthumous pardon for...Coffin."[157]

There have been two references to the Supreme Court of Canada since 1960. In 1959, Steven Truscott, age 14, was convicted of the murder of 12-year-old Lynne Harper.[158] His appeal to the Ontario Court of Appeal was dismissed unanimously, and his application for leave to appeal to the Supreme Court of Canada was also dismissed because it did not meet the narrow criteria set out in the *Code*. His death sentence was commuted to life imprisonment four months after the jury had recommended mercy. The grounds for appeal to the Supreme Court of Canada were broadened in 1961, and in 1966, the Governor-General-in-Council asked the Supreme Court of Canada to hear the appeal and to determine what disposition it would have made "on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider."[159] The Court received additional evidence, and heard the evidence from Truscott, who had not testified at trial. In an 8-1 decision, the Supreme Court of Canada dismissed Truscott's appeal. The dissenting judge would have ordered a new trial. Truscott served ten years in prison, and was paroled in 1969. He also took on a new

---

[157] Jim Bronskill and Janice Tibbetts, "In search of justice: Ottawa reviewing about 65 claims of wrongful conviction - one in 1864," *The Montreal Gazette* (4 Jan 1999): A8.

[158] Truscott applied for leave to appeal to a Supreme Court judge against the decision of a Juvenile Court judge, who ordered the case to be tried in adult court. Leave to appeal was refused. See *Re S.M.T.* (1952), 31 C.R. 76 (Ont. S.C.).

[159] *Reference Re Regina v. Truscott*, [1967] 2 C.C.C. 285 (S.C.C.), 286-287. Pursuant to section 597A of the *Criminal Code* [1960-61, c. 44, s. 11], grounds for appeal to the Supreme Court of Canada were broadened to include "any ground of law or fact or mixed law and fact."

identity.[160] Unfortunately, "potential genetic evidence has disappeared" and, according to some reports, was "probably destroyed."[161]

Six months after David Milgaard's first section 690 application was rejected by Minister of Justice Kim Campbell, he re-applied for conviction review in August 1991.[162] Given the "widespread concern whether there was a miscarriage of justice," the Governor-General-in-Council referred the matter to the Supreme Court of Canada, to review the case and any additional information in order to determine whether Milgaard's conviction "constitutes a miscarriage of justice," and if so, what remedial action would be advisable.[163] The Supreme Court advised the Minister to quash the conviction and to direct a new trial under section 690(a), on the basis of new evidence which was "reasonably capable of belief" and which "could reasonably be expected to have affected the verdict."[164] However, the court also stated that Milgaard had "had the benefit of a fair trial in January 1970," and it was "not satisfied beyond a reasonable doubt" nor "on a preponderance of all the evidence, that...Milgaard [was] innocent."[165] Nevertheless, if a new trial was held and Milgaard was found guilty, the court recommended that the

---

[160] M. Trickey, "Convicted Killer Seeks DNA Test after 38 Years," *Vancouver Sun* (15 September 1997): A5. Also see Gordon, "Final appeal," 30, who notes that AIDWYC is currently working on a section 690 application for Truscott.

[161] John McKay, "Truscott Speaks Out: Infamous murder case surfaces again after four decades," *Times Colonist* (30 March 2000): A3.

[162] *Reference re Milgaard* (1992), 12 C.R. (4th) 289 (S.C.C.), 291.

[163] *Ibid.*

[164] *Ibid.*, 293.

[165] *Ibid.*, 292-293.

Minister grant a conditional pardon.[166] The Minister ordered a new trial; however, the Attorney General of Saskatchewan decided not to re-prosecute and Milgaard was released from prison in 1992.[167] This left Milgaard in "legal limbo;" neither innocent nor guilty.[168]

(vi) Joint Recommendation with the Solicitor General for a Free Pardon

Kenneth Norman Warwick (also known as Norm Fox) was convicted of rape and related offences in 1976, and sentenced to 10 years imprisonment.[169] Following new evidence that he had been mistakenly identified, the Minister of Justice, the Solicitor General, and the Attorney General issued a free pardon under what is now section 748(2) of the *Criminal Code*.[170] As this case illustrates, the Minister does have the option of recommending the exoneration of a wrongfully convicted person.

---

[166] *Ibid.*, 295.

[167] David Roberts and Kirk Makin, "DNA test exonerates Milgaard," *The Globe and Mail* (19 July 1997): A1, A6.

[168] *Ibid.* Milgaard was ultimately exonerated and compensated (discussed in more detail under Section VI *infra*).

[169] Avison, "Last Resort," 27. The matter had been submitted to the Minister of Justice as an application for mercy under what is now section 690 of the *Criminal Code*, but "the unusual circumstances associated with the case resulted in a joint recommendation... ."

[170] Canada, Department of Justice, *Annual Report 1984-1985* (Ottawa), 32.

(V) Section 690 Applications Rejected by the Minister of Justice and Other Known Applications

Section 690 Applications Rejected by the Minister of Justice

In 1980, Robert George Wilson was convicted of two counts of conspiring to import and to traffic in marijuana and sentenced to seven years imprisonment.[171] His appeal to the Court of Appeal was dismissed on May 21, 1981 and leave to appeal to the Supreme Court of Canada was also denied.[172] On February 12, 1982, Wilson applied for relief pursuant to what is now section 690.[173] The application was based upon allegations that members of the jury had been improperly influenced. On April 19, 1983, Minister of Justice Mark MacGuigan refused to intervene, stating that "while there is evidence suggesting that one or two members of the jury were exposed to comments outside the courtroom that were unfavourable to the accused, the occurrences are not in my opinion sufficient to invalidate the trial and verdicts."[174]

On February 13, 1986, Helmuth Buxbaum was convicted of the first degree murder of his wife and sentenced to life imprisonment without parole eligibility for 25 years.[175] His appeal to the Ontario Court of Appeal was unanimously dismissed on April 13, 1989. On

---

[171] *Re Wilson and The Queen* (1987), 35 C.C.C. (3d) 316 (Man. C.A.), 318.

[172] *Ibid.*, 318-319.

[173] *Wilson v. Minister of Justice* (1983), 9 C.C.C. (3d) 20 (F.C.T.D.), 24. Jean Chrétien was the Minister of Justice at the time of Wilson's section 690 application.

[174] *Ibid.*, 35.

[175] Michael Harris, *The Prodigal Husband: The Tragedy of Helmuth and Hanna Buxbaum* (Toronto: McClelland & Stewart, 1994), 383.

appeal, Clayton Ruby raised an insanity defence, amongst other grounds, due to brain damage Buxbaum had suffered as a result of a stroke in 1982. However, the Court found that "the defence of insanity [was] not the primary defence...at trial and it still is not. The appellant's defence is that he was not guilty because he did not do the things he is accused of doing. He seeks to rely on the defence of insanity only if his other defences fail."[176] An appeal to the Supreme Court of Canada was also rejected on October 5, 1989.[177] In 1990, Helmuth Buxbaum applied for a section 690 conviction review.[178] Minister of Justice Kim Campbell rejected Buxbaum's application in December 1991. In a letter to Clayton Ruby, the Minister wrote:

> The written application and books of supporting materials you submitted, transcripts of evidence, and correspondence from your client, have all been carefully reviewed. With a waiver of privilege from Mr. Buxbaum, members of the original defence team were interviewed, to secure a better understanding of why insanity was not raised at trial. Finally, consideration was given to the issue of whether the "organic personality syndrome" caused by Mr. Buxbaum's stroke could have qualified as insanity within the terms of Section 16 of the *Criminal Code*.
>
> Your client has sought the exercise of a very special prerogative, which is granted only in circumstances where there exists a reasonable basis to conclude that a miscarriage of justice has likely occurred. A thorough and detailed examination of this case has satisfied me that it falls short of this standard. Accordingly, I will not intervene.
>
> There was an ample basis in the evidence for the conclusion that Mr. Buxbaum was involved in the scheme to kill his wife. Moreover, I am satisfied that your client did indeed possess the cognitive capacity necessary for conviction.[179]

In October 1978, Rick Sauvé and Gary Comeau were convicted of the first degree murder of a rival motorcycle gang member and sentenced to life imprisonment without

---

[176] *Ibid.*, 431.

[177] *Ibid.*, 432.

[178] *Ibid*, 435.

[179] Letter from A. Kim Campbell, Minister of Justice, to Clayton Ruby (19 December 1991), 2, 1-2.

parole eligibility for 25 years.[180] At trial, Comeau was alleged to be the gunman, "despite forensic evidence that showed that he, too, [had been] shot by one of the bullets that struck the victim, Bill Matiyek."[181] Moreover, Lorne Campbell testified at trial that he had shot and killed Bill Matiyek; however, the jury rejected his account.[182] Their appeals to the Ontario Court of Appeal and leave to appeal to the Supreme Court of Canada were denied.[183] Both Sauvé and Comeau applied to have their convictions reviewed under section 690, but Justice Minister Kim Campbell refused these requests in December of 1990.[184] Minister Campbell said there was "no significant new evidence...to consider in this case," and that she was satisfied no miscarriage of justice had occurred.[185] In 1994, both men applied under section 745 of the *Criminal Code* (faint hope clause), seeking to reduce their parole ineligibility period. The juries considering the men's requests concluded that they should "immediately be eligible to seek parole."[186] Comeau's sentence was reduced, but the National Parole Board denied him "any form of

---

[180] Tracey Tyler, "Lifer calls federal prison system a failure," *The Toronto Star* (27 May 1991): A10. See also Lowe, *Conspiracy of Brothers*. Four other men were also convicted, but of second degree murder.

[181] Boris Nikolovsky, "Jury to weigh ex-biker's parole bid," *The Toronto Star* (5 April 1994): A8.

[182] Thomas Claridge, "After 20 years in prison, man may be innocent of murder," *The Globe and Mail* (13 October 1998): A6.

[183] Lowe, *Conspiracy of Brothers*, 367-370.

[184] Claridge, "After 20 years in prison."

[185] *Ibid.*

[186] *Ibid.*

parole... ."[187] Five years later, the Parole Board granted Comeau day parole. Sauvé was paroled in 1997.[188] Comeau and three others involved in the case are being assisted by four AIDWYC lawyers, who are "reviewing the case and are actively gathering fresh evidence they hope to present to the Justice Department... ."[189]

In 1980, Walter Tenorio was convicted of first degree murder and sentenced to life imprisonment.[190] On May 5, 1982, the Québec Court of Appeal dismissed his appeal and leave to appeal to the Supreme Court of Canada was also refused.[191] Tenorio first applied to the Minister of Justice on June 14, 1983, under what is now section 690, but his application was refused by the Honourable Mark MacGuigan on October 13, 1983.[192] A second application, including newly discovered information, was submitted to Minister Doug Lewis but again refused on October 30, 1989.[193] Minister Lewis found that the evidence submitted was neither credible nor of sufficient weight to invoke intervention.[194]

---

[187] Derek Finkle, "Justice in Ontario, 20 years later," *National Post* (18 September 1999): B6.

[188] *Ibid.*

[189] *Ibid.*

[190] *R. v. Tenorio* (1991), 66 C.C.C. (3d) 429 (QB C.A.), 431.

[191] *Ibid.*

[192] *Ibid.*

[193] *Ibid.*

[194] *Ibid.*, 434.

This decision was confirmed by the new Minister, Kim Campbell.[195] Subsequently, Tenorio petitioned for an "extension of time and revocation of judgment" pursuant to articles 483 and 523[196] of the *Code of Civil Procedure*. Tenorio submitted that if the Court considered the "very facts which he had placed before the Minister in 1989," the Court would conclude that a new trial should be ordered.[197] Kaufman, J.A. found that although article 483 of the *Code of Civil Procedure* "permits the revocation of a judgment," Tenorio's petition should be declined, "for there *is* a useful recourse against the judgment...and that is an application to the Minister of Justice."[198] The motion was, therefore, dismissed.

Janise Marie Gamble's request to the Minister of Justice was also rejected, despite "substantial evidentiary support."[199] In March of 1976, a police officer was killed in Alberta while Gamble and another person were fleeing their commission of a robbery. Both were charged with capital murder. However, instead of being prosecuted under the provisions in force at the time of the offence pursuant to sections 214 [now s. 231] and

---

[195] *Ibid.*, 431.

[196] R.S.Q. 1977, c. C-25, arts. 483 [am. 1979, c. 37, s. 15; 1989, c. 54, s. 134], 523 [am. 1985, c. 29, s. 11].

[197] *R. v. Tenorio* (1991), 66 C.C.C. (3d) 429 (QB C.A.), 431.

[198] *Ibid.*, 440.

[199] Manson, "Answering Claims," 308. The only detail provided by the author is that the Minister rejected Ms. Gamble's request for a reference back to the court. Searches of reported cases and Quicklaw failed to disclose any further information concerning Ms. Gamble's section 690 application and its subsequent rejection.

218 [now s. 235] of the *Criminal Code*,[200] Ms. Gamble was "indicted and convicted under an amended section 214...which was proclaimed in force on 26th July 1976... ."[201] She was also "sentenced under the new sections 218 and section 669 [now s. 742] of the *Criminal Code*, which were enacted and proclaimed into force as part of the same 1976 amendments... ."[202] In December of 1976, Ms. Gamble was convicted as a party to first degree murder and sentenced to life imprisonment without parole eligibility for 25 years.[203] On appeal, the Appellate Division of the Supreme Court of Alberta found that she "had been tried under the wrong law" and would have directed a new trial, "if it had not been for the transitional section 27(2) of the Criminal Law Amendment Act (No. 2), 1976."[204] Because this provision "would have resulted in the new section 214 being applied once again if a new trial were ordered, the court felt that it had no recourse but to find that no substantial wrong or miscarriage of justice had occurred."[205] Leave to appeal to the Supreme Court of Canada was denied. However, in March 1986, after having served 10

---

[200] R.S.C. 1970, c. C-34. See *Gamble v. R.* (1988), 66 C.R. (3d) 193 (S.C.C.), 201-202.

[201] R.S.C. 1976, c. 105.

[202] *Gamble v. R.* (1988), 66 C.R. (3d) 193 (S.C.C.), 202.

[203] *Ibid.*

[204] *Ibid.*, 203. This section reads: (2) Where proceedings in respect of any offence of treason, piracy or murder, whether punishable by death or not, were commenced before the coming into force of this Act, and a new trial of a person for the offence has been ordered and the new trial is commenced after the coming into force of this Act, the new trial shall be commenced by the preferring of a new indictment before the court before which the accused is to be tried, and thereafter the offence shall be dealt with, inquired into, tried and determined, and any punishment in respect of the offence shall be imposed as if it had been committed after the coming into force of this Act.

[205] *Ibid.* At the time that the offence occurred, the punishment for a party to murder was life imprisonment with no parole eligibility for 10 years unless that period was increased by the trial judge.

years imprisonment, Gamble applied to the Supreme Court of Ontario "for habeas corpus and relief pursuant to s. 24(1) of the Canadian *Charter of Rights and Freedoms*" for "relief against her continued detention pursuant to the condition of her sentence that she not be eligible for parole for 25 years."[206] This application and an appeal to the Ontario Court of Appeal were dismissed.[207] She appealed further and the Supreme Court of Canada found that she had not been properly convicted and sentenced, allowed her appeal and declared her immediately eligible for parole.[208]

Jacques Vaudry applied for conviction review under what is now section 690 on April 24, 1985, "asking for a new trial or a referral to the Court of Appeal."[209] On May 14, 1987, Justice Minister Ramon Hnatyshyn dismissed the application "on the ground that it did not reveal any exceptional circumstances that would justify intervention... ."[210] Vaudry was found guilty of second degree murder and sentenced to 14 years imprisonment before eligibility for parole.[211] In 1983, Vaudry had obtained an "investigation by the Québec Police Commission into the conduct of two detective-

---

[206] *Ibid.*, 211.

[207] *Ibid.*, 210.

[208] *Ibid.*, 236. It is presumed that Ms. Gamble had been paroled by 1990, as she was killed in an accident in October of the same year. See "Accident kills woman tied to city cop slaying," *The Calgary Herald* (2 October 1990): A1, A2, no author cited.

[209] *R. v. Vaudry* (1989), 51 C.C.C. (3d) 410 (Que. C.A.), 412.

[210] *Ibid.*

[211] *Ibid.*, 411. Vaudry was originally convicted of first degree murder on December 2, 1977; however, the conviction was subsequently reduced to second degree murder by the Québec Court of Appeal.

sergeants" responsible for the murder investigation in 1975.[212] The investigator for the Commission submitted a report on March 14, 1984 and, on May 16 the "commission decided to proceed with an inquiry without public notice... ."[213] A public inquiry was not held; however, Vaudry's counsel obtained "discovery of the evidence gathered."[214] Following the Minister's rejection of his section 690 application, Vaudry sought leave to file "an application for revocation of a judgment beyond the delays" and for "revocation of a judgment of [the Québec Court of Appeal] dated April 10, 1980,"[215] pursuant to article 483[216] of the *Code of Civil Procedure*. The main issue raised by Vaudry was that "he was the victim of an error in identification and that the true author of the murder was his companion...who died shortly after the incident."[217] Under article 483(6) of the *Code of Civil Procedure*, it is only possible to revoke a judgment if, since the trial, "decisive documentary evidence" is discovered, the "production of which was prevented by 'force majeure' or because of the act of the adverse party."[218] The Court found this not to be the case, due to the absence of new evidence. The Court also found Vaudry's argument failed with respect to article 483(7) of the *Code of Civil Procedure* and concluded that:

---

[212] *Ibid.*, 411-412.

[213] *Ibid.*, 412.

[214] *Ibid.*

[215] *Ibid.*, 411.

[216] R.S.Q. 1977, c. C-25 [am. 1979, c. 37, s. 15; 1989, c. 54, s. 134].

[217] *R. v. Vaudry* (1989), 51 C.C.C. (3d) 410 (Que. C.A.), 413.

[218] *Ibid.*, 414.

> ...the application for revocation must be dismissed. It is not new evidence, but rather evidence which existed at the time of the trial, evidence which was known to the parties. What this application seeks in fact is not for our court to receive new evidence; but rather it attempts to attack the credibility of the evidence that the jury, masters of the facts, heard and on which they based themselves in rendering their verdict. Therefore, for these reasons, although granting the first application for the purposes of filing an application for revocation of a judgment beyond the delays, I would dismiss the application for revocation of the judgment of this court dated April 10, 1980.[219]

Table 4.9 describes the section 690 applications that were rejected by Ministers of Justice. As discussed under Part VI, the Minister of Justice also refused to intervene in the section 690 applications of *Thatcher*, *Kinsella*, *Morrisroe*, and *Milgaard* (his first application).

Table 4.9
Section 690 Applications Rejected by the Minister of Justice[220]

Applicant	Date of Application to Minister	Date Rejected
Buxbaum	1990	Dec. 1991
Comeau	Unknown	Dec. 1990
Gamble	Unknown	Unknown
Kinsella	1981	1989
	1994	Jan. 13, 1999
Milgaard[221]	Dec. 28, 1988	Feb. 27, 1991
Morrisroe	June 11, 1992	Oct. 18, 1995
Sauvé	Unknown	1990
Tenorio	June 14, 1983	Oct. 13, 1983
	Unknown	Oct. 30, 1989
Thatcher	Oct. 11, 1989	Apr. 14, 1994
Vaudry	Apr. 24, 1985	May 14, 1987
Wilson	Feb. 12, 1982	Apr. 19, 1983

[219] *Ibid.*, 414-415.

[220] 'Rejected' applications refer to those cases where there was no Ministerial intervention (as opposed to cases in which the Minister intervened but the applicant did not benefit).

[221] This information refers to Milgaard's first section 690 application.

Other Known Section 690 Applications

In 1991, Donzel Young was convicted of two counts of second degree murder and sentenced to life imprisonment without parole eligibility for 15 years.[222] The Ontario Court of Appeal upheld the guilty verdict and the Supreme Court of Canada refused to hear the case.[223] Young always maintained his innocence and his was the first case taken on by AIDWYC. AIDWYC located witnesses "with evidence implicating another illegal immigrant, Andrew Reid."[224] In October of 1994, Young's lawyer, Elisabeth Widner, filed a section 690 application on his behalf.[225] Sadly, Young was murdered in prison March 6, 1995. According to AIDWYC, Mr. Justice [Fred] Kaufman was appointed by the Minister to review the case; "however, due to witnesses disappearing, [Young's] case is now in limbo."[226]

Derik Lord, along with co-accused Darren Huenemann and David Muir, was convicted in June 1992, of two counts of first degree murder in the deaths of Huenemann's mother and grandmother.[227] His appeal against conviction was dismissed by

---

[222] Donn Downey, "Man to wait 15 years for parole," *The Globe and Mail* (12 March 1991): A13.

[223] Philip Mascoll, "'Peacemaker' inmate slain trying to stop fight," *The Toronto Star* (8 March 1995): A6.

[224] Kirk Makin, "Inmate's killing ends exoneration bid," *The Globe and Mail* (8 March 1995): A5.

[225] Donovan Vincent, "Slain prisoner's supporters vow to clear his name," *The Toronto Star* (19 March 1995): A4.

[226] AIDWYC, "Addressing Miscarriages of Justice," 11.

[227] *R. v. Lord*, [1993] B.C.J. No. 2387, DRS 94-03459, Vancouver Registry: CA015683 (B.C. C.A.), Heard: 2 November 1993 [Quicklaw].

the British Columbia Court of Appeal on November 2, 1993.[228] Lord's appeal to the Supreme Court of Canada was also dismissed, without reasons, in February 1995.[229] Although Lord and Muir were under the age of 18, they were tried in adult court. Due to the heinousness of the crime, both were sentenced to the maximum parole ineligibility term of 10 years.[230] Some time in the mid 1990s, Derik Lord applied for a section 690 conviction review.[231] The status of Lord's application is unknown; however, it is likely that Lord's conviction review application was dismissed.[232]

In 1982, Timothy Charles Findlay was convicted of five counts of rape and is serving an indeterminate sentence following his designation as a dangerous offender.[233] Findlay sought to "reinstate his appeals from conviction and sentence which were dismissed as abandoned by the B.C. Court of Appeal on 4 April 1984."[234] The Court rejected his

---

[228] *Ibid.*

[229] Neal Hall, "Canada's highest court refuses appeal for hitman who killed two women," *The Vancouver Sun* (22 February 1995): C14.

[230] *R. v. Lord*, [1992] B.C.J. No. 1884, DRS 95-08015, New Westminster Registry: X029098 (B.C.S.C.), Judgment: 10 August 1992 [Quicklaw]. Darren Huenemann was the alleged mastermind behind the murder of his mother and grandmother. Huenemann was also the sole heir of his grandmother's substantial estate, and this was believed to be the motive for the crime (see Hall, "Canada's highest court").

[231] Author Unknown. *Response to Draft Brief from Criminal Review Group* (accessed 22 June 1998), available from http://www.injustice.uniserve.com/response.htm; Internet, 1-69. This document analyzes the Department of Justice's Investigation Brief, and refutes many of the Department's conclusions.

[232] This assumption is based upon what was revealed in the Internet document noted above. Searches of Quicklaw and other legal texts for information on the outcome of Lord's section 690 application were unsuccessful.

[233] *R. v. Findlay*, [1996] B.C.J. No. 1754, Vancouver Registry: CA830073 (B.C. C.A.), Judgment: 8 August 1996 [Quicklaw], para. 6-7, para. 1-25.

[234] *Ibid.*, para. 1.

appeal. Findlay applied for review under section 690 and the Legal Services Society of British Columbia assisted him by "obtaining a copy of the trial transcript for presentation to the Department of Justice."[235] In 1996, Findlay's section 690 review was on-going. The outcome (if the application has been completed) of his application is not known.

Andries Van Amerongen applied under what is now section 690 of the *Criminal Code*, for a review of two murder convictions.[236] Van Amerongen had a criminal record which included ten break and enter offences over the period from 1971 to 1977. In October 1977, he was also convicted of two murders and sentenced to life imprisonment. The outcome of his section 690 application is unknown.

In 1990, Pamela Khan was convicted of aggravated assault and sentenced to 10 years imprisonment.[237] Her appeal against conviction to the Ontario Court of Appeal was dismissed in June 1991; however, her sentence was reduced to eight years.[238] In 1996, the Ontario Court of Appeal directed Khan "to apply for mercy to the Minister of Justice pursuant to section 690" because it was "arguable that she should have been found not

---

[235] *Ibid.*, para. 19.

[236] *R. v. Amerongen*, [1987] B.C.J. No. 2017, Vancouver Registry: CA007104 (B.C. C.A.), Judgment: 21 September 1987 [Quicklaw]. According to this citation, Van Amerongen's section 617 application to the Minister was "still being actively considered" in 1987. Therefore, the Minister must have rendered a decision; however, the decision has not been reported.

[237] Gary Oakes, "'Wicked' woman gets 10-year term for knife attack," *The Toronto Star* (6 March 1990): H16. The objectivity of this article, as revealed in the title, is obviously questionable. However, the judge's comments were even more disturbing: he concluded that although Khan was mentally ill or unstable, she was not legally insane, and "there was no conceivable motive for the attack *unless Khan recognized that unlike herself, the victim is attractive*" (emphasis added).

[238] *R. v. Khan*, [1991] O.J. No. 1025, DRS 93-02696, Action No. 254/90, (Ont. C.A.), Heard: 27 May 1991; Judgment: 19 June 1991 [Quicklaw].

criminally responsible by reason of mental disorder."[239] The court noted that if Ms. Khan's section 690 application was unsuccessful, "then [her appeal] application may be renewed and [the] court [would] then have to decide whether or not [it had] jurisdiction to re-hear the appeal, the appeal having been heard on its merits."[240]

In 1984, in Saint John, New Brunswick, Walter Gillespie and Robert Mailman were convicted of second degree murder and sentenced to life imprisonment.[241] In 1988, the New Brunswick Court of Appeal "refused to hear [trial witness, John Loeman's] sworn statement as fresh evidence because it ruled [he] was not credible."[242] The Supreme Court of Canada also refused leave to appeal in 1993.[243] In 1997, Gillespie and Mailman submitted "their most recent application under section 690."[244] Although Allan Ferguson, a Department of Justice lawyer with the Conviction Review Group, "declined to comment on Mailman and Gillespie's first 690 application," the *Telegraph Journal* obtained a copy of the "lawyer's review of the application."[245] With respect to polygraph tests which both

---

[239] *R. v. Khan*, [1996] O.J. No. 2554, DRS 96-17514, Court File No. M17840 (Ont. C.A.), Heard: 15 July 1996; Judgment: 15 July 1996 [Quicklaw], para. 1, para. 1-91.

[240] *Ibid.*, para. 1. It is not known whether Ms. Khan has actually filed a section 690 application. No further information was found on Quicklaw pertaining to a section 690 application and/or decision.

[241] Gary Dimmock, "Justice has not been served," *The Telegraph Journal* (10 March 1998) (page number is unknown as this newspaper article and several others were forwarded to me via electronic mail from John L. Hill, one of the defence counsel I interviewed for this research).

[242] Gary Dimmock, "The justice system's last line of defence," *The Telegraph Journal* (12 March 1998).

[243] Gary Dimmock, "Justice Department refuses to let men see files," *The Telegraph Journal* (12 March 1998).

[244] Dimmock, "The justice system's last line of defence."

[245] *Ibid.*

men passed, Ferguson commented that their "reliability...must be tested."[246]

> In considering the recanted testimony of John Loeman Jr., the government lawyer said he required "credible verification" that the witness is prepared to state, under oath, that he lied at trial. He said he'd be satisfied by a letter from Mr. Loeman himself. The witness wrote the federal lawyer [in the] summer [of 1997] but posed his dilemma as a "hypothetical" scenario. In his review of the application's third category - the conflicting testimony of the two eyewitnesses - Mr. Ferguson explained that arguments based solely on contradictions do not usually meet the threshold of section 690. The weaknesses, he wrote, will be considered "in light of all the evidence at trial, other submissions in the application and any new information brought forward on behalf of the applicants if their applications proceed to the investigation stage." In reviewing the section on potential witnesses, Mr. Ferguson said he required more information. "Where necessary, interviews are conducted to resolve issues raised in an application. As a threshold, applicants must disclose sufficient grounds that could lead to the conclusion that a miscarriage of justice likely occurred. The information and the evidence advanced to support those grounds should have an 'air of reality' thereby warranting a full section 690 investigation."[247]

John Hill, of AIDWYC, notes that the case is slowly attracting media attention in New Brunswick and Québec, which in his view, "is crucial because simply filing papers with the Department of Justice gets us nowhere."[248] In 1998, a more extensive application was being filed by the men's lawyer, Ed Derrah, including new information obtained in a *Telegraph Journal* investigation.[249] According to the case investigator, there was no evidence linking the two men to the murder and police never recovered any murder weapons. Moreover, two witnesses have since retracted their trial testimony and both applicants have passed polygraph examinations.[250] The status of the men's conviction review is unknown.

---

[246] *Ibid.*

[247] *Ibid.*

[248] Gary Dimmock, "Lawyers group adopts Mailman, Gillespie case," *The Telegraph Journal* (13 March 1998).

[249] Dimmock, "The justice system's last line of defence."

[250] Dimmock, "Justice has not been served." Like the key witness in the Patrick Kelly case, the credibility of one of the witnesses, John Loeman Jr., is dubious because he has changed his story on several

In 1989, Scott Ian MacKay was convicted of first degree murder in the death of Marguerite Telesford and sentenced to life imprisonment without parole eligibility for 25 years.[251] Telesford's body was never found.[252] MacKay appealed against his conviction and on September 16, 1992, the B.C. Court of Appeal reduced the conviction to second degree murder, because there was insufficient "evidence before the jury upon which it could conclude that this was a planned and deliberate murder."[253] MacKay's sentence was subsequently reduced to life imprisonment without parole eligibility for 15 years.[254] Without providing reasons, the Supreme Court of Canada refused MacKay's request for leave to appeal in February of 1993.[255] In early 1999, MacKay applied for a section 690 conviction review.[256] MacKay's application will include DNA test results which allegedly "show hair at the murder scene doesn't belong to [MacKay] or the victim."[257]

---

occasions. Both John Loeman Jr. and Janet Shatford have stated that "they caved in to police pressure to lie on the stand." See Don Cayo, "The convictions in question," *The Globe and Mail* (20 April 1998): A13.

[251] Lori Culbert, "Murder conviction faces DNA challenge," *The Vancouver Sun* (27 January 1998): A3.

[252] *R. v. MacKay* (1992), 16 C.R. (4th) 351 (B.C. C.A.).

[253] *Ibid.*, 389.

[254] *R. v. MacKay*, [1993] B.C.J. No. 1403, DRS 93-09615, Victoria Registry: V100947 (B.C. C.A.), Judgment: 14 May 1993 [Quicklaw].

[255] Canadian Press, "Top court refuses appeal in murder case," *The Vancouver Sun* (20 February 1993): A8.

[256] Mel Hunt (Victoria, B.C.), telephone interview with author, 21 December 1998, tape recording. The status of MacKay's conviction review is unknown.

[257] Culbert, "Murder conviction faces DNA challenge."

VI. Ministerial Reasons for Decisions Under Section 690 of the *Criminal Code*[258]

(i) Allen M. Kinsella[259]

In Ontario, on October 26, 1978, Kinsella was convicted of first degree murder, along with co-accused, Edward Sale, in the death of Kenneth Kaplinski, a night clerk at the Continental Inn in Barrie, Ontario. Kinsella and Sale were sentenced to a mandatory term of life imprisonment without parole eligibility for 25 years (p. 1).

The Crown's theory was that Kinsella and Sale robbed the Continental Inn, kidnapped the night clerk and subsequently 'executed' him (p. 4). Both men were placed in the area at the time of the murder, both were in "unexplained possession of large amounts of cash immediately after the...murder," forensic evidence identified a .22 calibre shell casing found near the body "that had been used in Sale's rifle," and "hair fibre evidence established that dog hairs were found on the victim...similar to dog hairs...belonging to Sale's dog" (p. 5). The defence focused on whether the "Crown had provided proof beyond a reasonable doubt," particularly with respect to the Crown's forensic evidence (p. 4).

---

[258] Unless otherwise indicated, the information is taken from Ministerial reasons for decision and page references from these decisions are noted parenthetically in the text so as to avoid the addition of numerous footnotes. Of the seven Ministerial decisions I obtained for this study, five applicants did not benefit, one applicant was acquitted and one case has yet to be heard on appeal. I discuss the unsuccessful cases first, beginning with the most recent Ministerial decisions.

[259] Canada, Department of Justice, "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Allen M. Kinsella 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" (no date), 1-18 [hereinafter *Kinsella Decision*].

On appeal to the Ontario Court of Appeal, Kinsella argued that the trial judge made several errors including the failure to (1) "leave the defence of drunkenness with respect to Kinsella before the jury", (2) failing to "relate the evidence of drunkenness to the issues of planning and deliberation", (3) misdirecting the jury as to the "liability of a party to first degree murder", (4) misdirecting the jury as to the "liability of a party under...sections 21(2) and 212(a) [now s. 229] of the *Criminal Code*", (5) misdirecting the jury as to the "liability of a party under...sections 21(2) and 213(d) [repealed, 1991, c. 4, s. 1] of the *Criminal Code*",[260] (6) misdirecting the jury as to the "liability of a party under...section 21(1) and 212(a) of the *Criminal Code* and (7) "permitting the introduction of a forensic expert's evidence with respect to the identification of human and animal hair [and] alternatively, by failing to direct the jury as to the frailties of such evidence and its tenuous probative value" (p. 5-6).

The Ontario Court of Appeal unanimously dismissed Kinsella's appeal on November 6, 1980. Although the court found "some errors in the trial judge's instructions to the jury," it ruled that no substantial wrong [had] resulted from those errors" (p. 6). Kinsella did not seek leave to appeal to the Supreme Court of Canada.

Without having exhausted the appeals process, Kinsella began "seeking review of his case as early as 1981" (p. 1). His first section 690 application was based principally on a

---

[260] At the time of Kinsella's conviction in 1978, the constructive murder provisions then in force assigned objective liability to a party to an offence pursuant to the combined operation of what was then section 213 [now 230] and section 21. In *Vaillancourt* (1987) and *Martineau* (1990), the Supreme Court of Canada ruled that such 'objective liability' was unconstitutional and struck down section 230. Essentially, the entire section is of no force or effect.

statement obtained from his co-accused, Edward Sale, in which Sale stated that "Kinsella had no responsibility for, nor knowledge of, the abduction and killing of Mr. Kaplinski" (p. 1). In 1989, Minister of Justice Doug Lewis denied section 690 relief to Kinsella.

Kinsella re-applied for section 690 relief in 1994[261] and the Minister of Justice rendered her decision in January 1999.[262] There were two major grounds for Kinsella's renewed conviction review. First, both Sale's trial counsel and law clerk "provided statements concerning [his] pre-trial admissions that he was solely responsible for Kaplinski's death and that Kinsella had absolutely no involvement in it" (p. 1). Kinsella's counsel submitted that Edward Sale stated that "Kinsella was asleep during the robbery and the murder" and that Sale's former lawyer "verified he was advised before trial that Kinsella was not a party to the offence" (p. 7). Following Sale's waiver of solicitor-client privilege, his former trial counsel was "able to divulge this information," which was also confirmed by a law clerk to Sale's former trial counsel (p. 7). In his section 690 application, Kinsella's counsel submitted that this new information and corroboration means that "Kinsella was wrongfully convicted and his continued detention on this charge puts the administration of justice into disrepute" (p. 7). The second ground related to the acceptance that "in the appeal factum,...[Kinsella] was subject[ed] to a taped interview while awaiting trial...and that [s]tress analysis of this tape could corroborate his evidence."

---

[261] John L. Hill, telephone interview by author, 24 July 1998 (chapter 6 describes my data collection method with respect to defence counsel interviewed for this study).

[262] The Minister's reasons for decision is not dated, nor is her letter to Kinsella's lawyer. However, the 'date received' by Mr. John Hill is stamped on the Minister's letter (January 1999).

Kinsella argued that "this material was never raised or disclosed to his trial lawyer" (p. 7).

The Minister stated that Kinsella's trial counsel "knew of the existence of this tape-recorded conversation and actually raised the subject in his cross-examination" of a police officer (p. 7). In addition, the taped conversation was found to be neither inculpatory nor exculpatory. With respect to the "new information" in Kinsella's section 690 application, the Minister of Justice found that:

> all the essentials of Kinsella's claim of innocence were entirely within his own knowledge and available to him at the time of trial...and he made a conscious...choice not to testify and therefore not to put that account before the jury... . Secondly, the corroborative evidence from Sale was potentially available to Kinsella at trial had he sought, through his counsel, a separate trial by way of an application for severance. Thirdly, the information contained in Sale's statement that relates to this application, namely, that Kinsella was asleep or passed out at all material times, is the same information that was potentially available to Kinsella at trial... . Finally, the information provided by Judge [X] and law clerk [Y][263] simply confirms that admissions similar to those contained in Sale's 1981 statement were disclosed to them by Sale prior to trial (p. 8).

In her assessment and determination of the reliability of Kinsella's application, Justice Minister Anne McLellan closely scrutinized four key elements: (1) "whether Kinsella was passed out/asleep at all material times", (2) "when Kinsella had knowledge or awareness of any of the material events", (3) "whether information exists to suggest Kinsella was a participant in any of the material events", and (4) the "credibility of Kinsella and Sale" (p. 9). Both Kinsella and Sale reiterated their position that Kinsella had "nothing whatsoever to do with the robbery, abduction and killing of Kaplinski..." (p. 9). Kinsella's trial counsel confirmed that "prior to the trial, Kinsella had told him that he was asleep in the car, and knew nothing about the shooting of Kaplinski" (p. 10). However, the Minister found that Kinsella "said nothing at all about being drunk, asleep, or passed out" in his

---

[263] I use pseudonyms to protect the privacy of these two individuals.

signed police statement of April 7, 1978, at a time when he "knew he was being questioned regarding a murder" (p. 10). Furthermore, Kinsella "described a specific and incorrect return route which took them well away from the area of the Continental Inn" (p. 10). During subsequent statements to the police by Kinsella and Sale, neither mentioned anything about Kinsella being asleep or passed out in the car, following the murder. Department of Justice officials questioned Kinsella as to why he failed to tell police that he was asleep or passed out. He responded that he did tell police this and his trial lawyer remembered that his client advised that "the statements didn't accurately reflect what he said to the police..." (p. 11). The Minister noted that there were no references in the trial transcripts indicating "that Kinsella was unconscious for the return trip to Toronto" and no "indication of such an obvious theory in defence counsel's cross-examination of...Crown witnesses" (p. 11). There was also evidence that Kinsella possessed coins which had been obtained from two robberies on the night in question.

The Minister relied upon the six principles governing the exercise of the Minister's discretionary powers under section 690 set out by her predecessor, Allan Rock, in the Thatcher application. The Minister reviewed "the entire application, the materials provided on behalf of the applicant, the information gathered during the departmental assessment of this application, and a brief received from the Attorney General of Ontario concerning this section 690 application" (p. 4).

Minister McLellan noted that the case against Sale and Kinsella at trial was compelling and that the trial decision had been "carefully reviewed by the Ontario Court of

Appeal" and, "with respect to Sale, the Supreme Court of Canada" (p. 17). Kinsella's credibility was significantly reduced, in the Minister's view, by his failure to tell police that he was "drunk, asleep, or passed out" at the time of the robbery and murder. Kinsella also "provided specific and false details of their return route" to the police, which the Minister found to be "flagrantly at odds with his submission of not participating in, nor knowing anything of, the events in question" (p. 17).

> During his interview with the Department of Justice, the applicant's attempts to explain this contradictory information did nothing to resolve the issue in his favour. It is clear that Kinsella received coins from the Continental Inn robbery. The evidence is also overwhelming, notwithstanding the applicant's ex-common law wife's recent reconstruction of her earlier statements and testimony, that Kinsella went shopping on January 29, 1978. This was an important and highly damaging part of the Crown's case against Kinsella. It linked Kinsella to the proceeds of the Continental Inn robbery. It strains belief to accept that the applicant's trial counsel would have missed this on two separate occasions had he been instructed by his client that he did not go shopping on that day. It appears that Kinsella's ex-common law spouse has now adopted his explanation for the Sunday shopping incident. I have concluded that her prior statements and trial evidence are more accurate. In accepting that Kinsella did go shopping on Sunday, January 29, 1978, it is also safe to conclude that he did so at the regular fruit market where he paid for the groceries in part with approximately $60.00 in coins from the Continental Inn robbery. Kinsella's long-standing claim that he only knew of Sale's culpability after Sale's unsuccessful appeal application to the Supreme Court of Canada is simply not accurate. The applicant now admits that he knew, and shared his knowledge with his lawyers, prior to his Ontario Court of Appeal hearing (p. 17-18).

The Minister concluded that "in all the circumstances, the new information involving Edward Sale's admissions to his trial counsel...and to [his] former law clerk...is incapable of raising a realistic doubt about the validity of Allen Kinsella's conviction" (p. 18). Therefore, the Minister denied Kinsella a remedy because "neither the arguments nor the new information...[could] lead reasonably to the conclusion that a miscarriage of justice likely occurred..." (p. 18).

Although the Supreme Court has since struck down the constructive murder provisions that allow for objective liability, Kinsella was convicted and sentenced

according to both the substance and procedure of the law at that time. In this sense, the Kinsella case differs from many of the other miscarriages of justice identified in this research in which mistakes or corruption led to the wrongful conviction. That said, according to the Minister's reasons for decision, Kinsella did not challenge the constructive murder provisions; he claimed to be innocent, stating that he had no knowledge of the material events and, therefore, he should not have been convicted as a party to an offence. The Kinsella case is also unique in another sense; even if he was party to an offence, the fact remains that he is serving a 25-year sentence for a *Criminal Code* provision that is no longer of any force or effect. Although Kinsella can re-apply for conviction review, section 690 does not hold much promise, nor is it likely that he will find relief in the *Charter*.[264] The faint hope clause (section 745 of the *Criminal Code*), which allows for a review of parole ineligibility periods, may provide another option for Kinsella. Alternatively, he could seek a pardon through section 748 of the *Criminal Code*.

(ii) Patrick Kelly[265]

In Ontario, on May 31, 1984, Patrick Kelly was convicted of first degree murder in the death of his wife on March 29, 1981. He was sentenced to a mandatory term of life imprisonment without parole eligibility for 25 years.

---

[264] In *Favel* (1988), the Alberta Court of Appeal held that the constitutional argument which resulted in section 230 being struck down does not apply to homicides that took place before the proclamation of the *Charter*.

[265] *Kelly Decision*. Except as otherwise indicated, page references taken from the Minister's Reasons for Decision are parenthetically noted in the text.

At trial, the Crown argued that Kelly planned to kill his wife in order to collect the insurance proceeds "in order to support his extravagant lifestyle," and that Kelly was "in love with another woman" (p. 3).[266] The circumstantial evidence presented at trial consisted of allegations that Mr. Kelly "gave different accounts of his wife's fall to various people" and that police experiments conducted "under the supervision of [a physics expert]...revealed that, based on Mr. Kelly's account of his wife's death, he could not have reached her before she fell to the pavement below" (p. 5). The Crown also led evidence "regarding the deteriorating state of the Kelly's marriage and financial situation" (p. 6). The direct evidence consisted of testimony from [Dawn] Taber, who claimed that "she had been an eyewitness to the killing" (p. 3). Ms. Taber also admitted that she "had an affair with [Mr. Kelly] when she resided at the Kelly's condominium in 1980" (p. 5).[267]

Kelly testified that he did not kill his wife and denied that Ms. Taber was at his condominium on the day of Mrs. Kelly's death (p. 6). He stated that while in the kitchen, he heard a noise and "ran toward the balcony [where] he saw his wife falling" (p. 6). He claims to have attempted to "get his hands around her legs, but could not save her from falling" (p. 6). Apparently, his wife had removed a stool from the kitchen and "said something about [fixing] a rattle on the balcony" (p. 6). When the police arrived at the condominium, immediately after Mrs. Kelly's fall, they "saw a kettle boiling in the kitchen

---

[266] Mr. Kelly had been "having an affair" with Ms. Janice Bradley at the time of his wife's death, and they were subsequently married in 1982.

[267] Approximately one year prior to Jeanette Kelly's death, Patrick Kelly had allegedly planned, with Dawn Taber, to kill his wife by throwing her off the balcony. See also *R. v. Kelly*, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: 25-27 November and 10 December 1998; Judgment: 21 May 1999 [Quicklaw], para. 7, para. 1-323.

and two tea cups on the counter," [and] on the balcony they found a kitchen stool which had "fallen over with its legs pointing toward the railing" (p. 6).

Kelly appealed his conviction arguing that errors were made in the admission of experimental evidence concerning his wife's fall, in the admission of evidence of arson and fraud, and evidence relating to Wayne Humby. Kelly also submitted that Crown counsel and the trial judge erred in their addresses to the jury. The Ontario Court of Appeal dismissed Mr. Kelly's appeal in November 1985.[268] Leave to appeal to the Supreme Court of Canada was also denied in February 1986 (p. 1).

Kelly subsequently applied for section 690 conviction review, through his co-counsel Gary Botting and Clayton Ruby, on December 20, 1993. On November 25, 1996, Minister of Justice Allan Rock referred the case to the Ontario Court of Appeal, pursuant to section 690(c), and possibly (b). The investigation was conducted by both Department of Justice counsel and ad hoc counsel.[269] Three grounds were raised in the Kelly application: (1) Dawn Taber's recantation of her trial testimony that "she actually saw [Patrick Kelly] drop his wife over the balcony," (2) allegations that police "concealed information with respect to Ms. Taber's ability to testify at trial," and (3) "new opinion evidence from scientists challenging the re-enactment evidence offered by the Crown at

---

[268] *R. v. Kelly*, [1985] O.J. No. 237, Action No. 595/84 (Ont. C.A.), Heard: 18 -19 November 1985; Judgment: 4 December 1985 [Quicklaw].

[269] Harris, *The Judas Kiss*, 425, 427. Kelly's section 690 application contained a request from Clayton Ruby that the Minister appoint an "independent counsel to investigate the matter." Initially, the Minister refused this request and the case was assigned to Eugene Williams, an in-house lawyer. However, one week following an appearance on the Phil Donahue television show (on September 26, 1994) by Patrick Kelly, Dawn Taber, and Michael Harris, Minister Allan Rock announced the appointment of independent counsel, Michelle Fuerst (p. 436).

trial" (p. 7).

Kelly provided "two affidavits sworn by Ms. Taber, dated December 17, 1993 and March 11, 1994," in which she recanted her trial testimony of witnessing Mr. Kelly throw his wife off the balcony (p. 7). Ms. Taber maintained, however, that she was present at the condominium on the day of Mrs. Kelly's death but that she "left the apartment while Mrs. Kelly was lying bloodied and unconscious on the floor, after a heated argument with [her husband]" (p. 7). Ms. Taber also alleges that she was pressured by police. However, according to the Department of Justice, during her interview with investigating counsel, she denied that the police had pressured her to provide [an] eyewitness account of the killing," and at one point stated that she was "uncertain whether she had visited the Kellys on March 29, 1981" (p. 7).

> Ms. Taber said that when she told the police, and the trial court, that she was present in the apartment and witnessed [Mr. Kelly] throw his wife over the balcony, she believed that the mental image of this occurrence which had been in her mind, was in fact the truth. When asked by investigating counsel if her present position, as set out in her two affidavits, is that she was in the apartment on March 29, 1981, and saw Mrs. Kelly on the floor, Ms. Taber states that her position is that she believes she was there because she knows things that she wouldn't know if she had not been there.
>
> Apart from the events of March 29, 1981, portions of Ms. Taber's trial evidence were confirmed by other evidence at trial. For instance, the police investigation uncovered a passport bearing Mr. Kelly's photos but issued in a different name, which was compatible with Ms. Taber's testimony on the subject. Ms. Taber has not recanted this information. Similarly, Ms. Taber testified that there was a telephone call while she was in the Kellys' apartment on March 29, 1981. That information was verified (p. 7-8).

Kelly submitted, however, that "the fact that Ms. Taber's present recantation does not support his trial evidence should not lessen the impact of her recantation... ." (p. 8).

Once again relying upon the six principles he set out in *Thatcher* (*supra*), Justice Minister Rock noted that witness recantations "will not always be sufficient to justify a

remedy under section 690" (p. 8). He also noted the "unique features" of Ms. Taber's new information, including various versions of her trial testimony and the difficulty faced by Department of Justice counsel in completing their interview with Ms. Taber (p. 8).[270] However, others charge that responsibility for bureaucratic delays falls on the Department of Justice because "it took two months [for the Department] to respond to Clayton Ruby's initial letter,"[271] and Dawn Taber had still not been interviewed by Department of Justice officials 18 months after she had publicly recanted her testimony.[272] Further delays ensued while Clayton Ruby and the Justice Department wrangled over access to police files that neither Kelly nor his counsel had seen.[273]

---

[270] *Kelly Decision*, 2-3. According to the federal Department of Justice, in October 1994, "investigating counsel began their attempts at scheduling an interview with Ms. Taber. In 1995, there were protracted discussions between investigating counsel and counsel for Ms. Taber which resulted in an interview on May 18-19, 1995, in Bangor, Maine. At the close of the May 19, 1995 session, counsel agreed that the interview would continue on June 12, 1995. Due to the tragic death of Ms. Taber's counsel in the interim, the continuation was postponed to October 7, 1995. Shortly before that date, however, Ms. Taber's new counsel requested that Michael Harris (an author who had been preparing a book on Mr. Kelly's case) be permitted to be present for the continuation. This request was refused, in light of Mr. Harris's previous and public involvement in the case. This led to the cancellation of the October 7, 1995 continuation. It became apparent in the weeks that followed that investigating counsel would have difficulty obtaining a future interview with Ms. Taber and none has taken place." Consequently, the Minister believed that the Court of Appeal was the appropriate body to determine the admissibility of Ms. Taber's recantations (see *R. v. Kelly*, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: 25-27 November and 10 December 1998; Judgment: 21 May 1999 [Quicklaw], para. 170, para. 1-323).

[271] Harris, *The Judas Kiss*, 426.

[272] *Ibid.*, 443.

[273] *Ibid.*, 427. See also House of Commons, *Debates*, 133, no. 269, 1st Session, 35th Parliament (1 December 1995): 17087-17088. The issue of access to police files was raised in the House of Commons by Bill Gilmour (Comox-Alberni, Ref.), who stated that the Minister had promised to "release relevant files to Clayton Ruby," yet the "Justice Minister has been stalling for two years and refuses to provide the files required for Mr. Kelly's defence." Minister Allan Rock responded that he advised Kelly's counsel that he would "allow...access to [the files] we've been given but on certain conditions." These conditions, however, were not acceptable to Mr. Ruby.

As for Kelly's submission that police "concealed evidence relevant to his case," the Minister disagreed, stating that there was "no reasonable basis" for such a conclusion (p. 9). According to the Department of Justice, Crown counsel and both defence counsel who represented Kelly at trial agreed that there were no problems associated with disclosure prior to trial (p. 9).

With respect to the third ground upon which Kelly's application was based--new opinion evidence--the Minister believed that the appeal court should also assess this scientific information (p. 9).[274] Therefore, the Ontario Court of Appeal, pursuant to section 690(c) of the *Criminal Code*, was asked to assess "whether or not it is likely that a miscarriage of justice...occurred in this case" (p. 8-9). The Minister's reference states:

> If the Court of Appeal for Ontario concludes, in answer to the questions I have referred to the Court, that the new information from either Dawn Taber or the scientific experts would be admissible on appeal, I am satisfied that in those circumstances it would be an appropriate exercise of my discretion under [section] 690(b) of the *Criminal Code* to refer the matter to the Court of Appeal for Ontario for hearing and determination by that Court as if it were an appeal by [Mr. Kelly]. In the event the Court of Appeal for Ontario were to conclude that neither the new information from Dawn Taber nor the information from the scientific experts would be admissible on appeal, I would consider that opinion in assessing the appropriate action to be taken in response to the application.
>
> Accordingly, pursuant to [section] 690(c) of the *Criminal Code*, I do hereby respectfully refer to the Court of Appeal for Ontario for its opinion, based on consideration of the existing record herein, the said application and such further evidence as the Court in its discretion may receive and consider, the following questions:
>
> 1. In the circumstances of this case, would the new information from Dawn Taber be admissible on appeal to the Court of Appeal?
> 2. In the circumstances of this case, would the new information from the scientific experts be admissible on appeal to the Court of Appeal? (p. 10).

---

[274] *Kelly Decision*, 9. The scientific material submitted by Mr. Kelly consists of reports and letters from psychology and kinesiology professionals, which "comment on the re-enactment evidence presented at trial." Kelly argues that this material challenges the "scientific validity of the re-enactment evidence and the conclusions drawn from it," with respect to the contention that "Mrs. Kelly's fall could not have occurred as Mr. Kelly claimed."

In its judgment of May 21, 1999, the Ontario Court of Appeal (Goudge, J., dissenting in part), found that there had been "no fresh factual or scientific evidence put forward on this reference which would in any way support the bona fides of Ms. Taber's last alleged recantation."[275] The court stated that "a number of unusual features" pertaining to Ms. Taber's recantations "call for special scrutiny and ineluctably lead to the conclusion that it is her testimony at trial, not her subsequent recantations, that must be preferred as the most accurate and truthful account of the events surrounding the murder of Mrs. Kelly."[276]

> First, the recantation comes in two distinct segments. The earliest recantation is contained in two affidavits sworn by Ms. Taber on December 17, 1993 and March 11, 1994 that were relied upon by the Minister of Justice in ordering this reference under s. 690 of the Code. Her last recantation was proffered without advance warning before this court in her oral testimony given in October of 1997. Second, Ms. Taber has given no credible explanation as to why she changed her testimony from that given at trial to the first version of her recantation submitted to the Minister, and, much more significantly, she can give no account as to why she changed this earlier recantation to the Minister in favour of the one presented to this court. Third, the length of time covered by this recantation process is extraordinary by any standard, covering as it does the time frame from her initial testimony before O'Driscoll J. and the jury in April 1984, through her first recantation in December of 1993 and March 1994, to her latest recantation in October of 1997: a period of 13 years. During this time, there is ample evidence emanating from Ms. Taber herself, as well as other sources, that in fact confirms her testimony at trial. Fourth, the Crown has been able to develop evidence of the tainting of Ms. Taber's evidence before this court that seriously undermines the entire recantation process. Fifth, the mental process Ms. Taber went through subsequent to her trial testimony did not constitute a recantation in any usual sense of the word. It was not a re-examination of her conscience that led her to disavow her detailed trial testimony, but a re-examination of certain external factors which she now says, for the first time, led her to believe that she must have dreamed up her detailed eyewitness account of the brutal murder of Jeanette Kelly.[277]

---

[275] *R. v. Kelly*, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: 25-27 November and 10 December 1998; Judgment: 21 May 1999 [Quicklaw], para. 158, para. 1-323.

[276] *Ibid.*, para. 46.

[277] *Ibid.*

The court found many reasons to disbelieve the veracity of Ms. Taber's information, and expressed significant concern that Ms. Taber "still did not know what she was going to say" as late as September 25, 1997, which was revealed in her conversations with Clayton Ruby.[278] Furthermore, the court believed that this was "a recantation by committee,"[279] and was "the product of tainting at an unacceptable level, tainting by the applicant and those who seek to serve his interests."[280] Therefore, the court concluded "that the review of this information by Ms. Taber prior to her giving evidence in this matter fundamentally taints her evidence, particularly in light of the significant--and largely unexplained--change in her purported recantation from the first version contained in the two affidavits of December 17, 1993, and March 11, 1994, to the final version given in her testimony before this court."[281]

---

[278] *Ibid.*, para. 149.

[279] *Ibid.*, para. 163. For example, the involvement of author Michael Harris in the case was said to have created the impression in Ms. Taber's mind that Mr. Harris was "an agent or conduit for [Patrick Kelly] and that Mr. Harris was attempting to pressure [Ms. Taber] to recant her evidence" (para. 127) The court went on to say that it was evident "that by 1991, the interventions of Mr. Harris, wittingly or otherwise, had the effect of scaring Ms. Taber into believing that she might yet be charged as an accessory" (para. 130).

[280] *Ibid.*, para. 163. One example of this 'tainting' concerns the fact that Ms. Taber was provided with a copy of a "significant portion of Patrick Kelly's written submissions to the Minister of Justice," by a producer of a CTV program. These submissions contained a "detailed review of Ms. Taber's testimony and analyzed how her credibility fit in with other evidence, including the evidence tendered by [Patrick Kelly] concerning Ms. Taber's psychological state and evidence which was gathered from other sources during the course of the investigation conducted by counsel retained by the Minister of Justice. Specifically, it reviewed the affidavit evidence of Dr. Rubenstein and his theory of false memory to explain what was then a partial recantation" (para. 147). Dr. Rubenstein had concluded that Ms. Taber "must have been hypnotised during the session with Dr. Rowsell" (para. 148).

[281] *Ibid.*, para. 153.

Clayton Ruby submitted that the court "need only be satisfied that it has not been established that [Ms. Taber's] recantation is false," and that this should be left to the trier of fact. Mr. Ruby also noted that the appeal court "was not designed nor was it ever intended to become a fact-finding court making decisions based upon the credibility of witnesses."[282] However, the court found that these "submissions must fail," noting that the Minister of Justice directed the reference to the court, rather than ordering a new trial pursuant to section 690(a).[283] The court was specifically asked to consider the admissibility of Ms. Taber's new information; therefore, it was "evident that this court need not and indeed should not explore any new approach to the admissibility of fresh evidence relevant to the exercise by the Minister of Justice of the prerogative of mercy under either s. 690(b) or (c)... ."[284] As such, the court was "bound to treat this application as [they] would any application to admit fresh evidence in a criminal appeal under section 683(1)(d) of the *Code*."[285] Relying on the principles governing the acceptance of fresh evidence as stated in *Palmer and Palmer v. The Queen*,[286] the court found that Ms.

---

[282] *Ibid.*, para. 165-166.

[283] *Ibid.*, para. 169.

[284] *Ibid.*, para. 169-170. Clayton Ruby submitted that "there should be a flexible test regarding the admissibility of fresh evidence in the case of recantations" (para. 167).

[285] *Ibid.*, para. 171.

[286] (1979), 50 C.C.C. (2d) 193. The four principles are that: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases, (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must be such that if believed it could reasonably be expected to have affected the result at trial, when considered with the other evidence adduced at trial.

Taber's recantation failed to meet the third and fourth tests in *Palmer*: the information was not credible in that it was not reasonably capable of belief, and the fresh evidence could not be expected to have affected the trial result.[287]

With respect to the "new" scientific evidence from kinesiology experts, the court found this information to be credible, in the sense that it was reasonably capable of belief, and that it had bearing upon a "decisive, or potentially decisive, issue at trial."[288] However, the court found that the evidence did not meet the first and fourth principles set out in *Palmer*: "the proposed fresh evidence was available at trial (therefore, it was not 'new')[289] and "if believed, when taken with the other evidence, could not, [in the court's] opinion, reasonably be expected to have affected the verdict."[290] Finlayson, J.A. and Osborne, J. A., concluded that the new information from Dawn Taber and from the scientific experts would not be admissible on appeal, and the judges were satisfied "that there was no miscarriage of justice in this case."[291]

Goudge, J. A. agreed that the new information from the scientific experts would not be admissible on appeal; however, he found the fresh evidence from Dawn Taber to be admissible and would order a new trial. Although Goudge, J.A., "stop[ped] short of being

---

[287] *R. v. Kelly*, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: 25-27 November and 10 December 1998; Judgment: 21 May 1999 [Quicklaw], para. 183-184, para. 1-323.

[288] *Ibid.*, para. 221.

[289] *Ibid.*, para. 222.

[290] *Ibid.*, para. 225.

[291] *Ibid.*, para. 233.

able to find [Ms. Taber's] fresh evidence credible," he did believe that the evidence was sufficiently plausible and had "considerable power to impeach the credibility of [her] trial testimony."[292] In this judge's view, Ms. Taber's fresh evidence met the fourth *Palmer* requirement. In his concluding remarks, Goudge, J.A. found

> it troubling that someone could be convicted of the most serious of criminal offences based in significant measure on eyewitness evidence that if the trial were held today, the Crown might well elect not to call because of its unreliability, and yet the conviction remain beyond scrutiny. There is no doubt that the Crown must take its witnesses as it finds them and that it could have done nothing but what it did. Nonetheless, in the strange circumstances of this case, the interests of justice require a new trial.[293]

According to defence counsel Clayton Ruby, "this is the first time there [has] been a dissent in a section 690 reference case and he will ask Justice Minister Anne McLellan to order a new trial."[294] However, on March 17, 2000, Minister McLellan announced that she was not prepared to grant Mr. Kelly a new trial "on the basis of...information which was so comprehensively assessed by the Ontario Court of Appeal."[295] Mr. Kelly can seek leave to appeal to the Supreme Court because of the appeal court's split decision and he may also re-apply for conviction review under section 690 of the *Criminal Code*.

---

[292] *Ibid.*, para. 312.

[293] *Ibid.*, para. 323.

[294] Elizabeth Raymer, "Ont. Appeal Court Divided on *Kelly* Fresh Evidence," *Lawyers Weekly* (4 June 1999), 1, 6.

[295] Canadian Press, "Justice minister denies new trial for murderer," *Times Colonist* (18 March 2000): A3.

(iii) Sidney Vincent Morrisroe[296]

Sidney Morrisroe was convicted in British Columbia, on June 13, 1984, along with co-accused Scott Ogilvie Forsyth, of first degree murder for the September 18, 1983, killing of Joseph Phillipoui (p. 1). Both Morrisroe and Forsyth were sentenced to the mandatory term of life imprisonment without parole eligibility for 25 years. Mr. Forsyth "fired the shot that killed Mr. Phillipoui," and although Morrisroe was "not present at the scene of the crime, he was convicted pursuant to section 21 of the *Criminal Code*, on the basis that he planned the murder with Mr. Forsyth and committed one or more acts that aided and abetted Mr. Forsyth in carrying out the murder" (p. 1).

The Crown's theory was that Morrisroe had planned the robbery and murder, had provided his co-accused with a handgun, and had arranged entry for Mr. Forsyth into Mr. Phillipoui's apartment (p. 5). Although Forsyth did not testify as a Crown witness, the evidence described his plan with Morrisroe and their subsequent meeting at a hotel in Burnaby on the night of the murder. Morrisroe's presence at the hotel restaurant was "established by other Crown witnesses" (p. 7). Moreover, two Crown witnesses testified that Morrisroe had either admitted to the killing or discussed a plan to rob and kill the victim (p. 7-8). Forsyth assisted the police in "gathering evidence" against Morrisroe by making a tape-recorded telephone call to him in which some incriminating statements were

---

[296] Canada, Department of Justice, "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Sidney Vincent Morrisroe to the Minister of Justice of Canada for Certain Discretionary Relief under Section 690 of the *Criminal Code* of Canada" (18 October 1995), 1-62 [hereinafter *Morrisroe Decision*]. Page references are taken from the Minister's Reasons for Decision and are parenthetically noted in the text.

made (p. 8).

There was "virtually no physical evidence linking [Morrisroe] directly to the crime"; therefore, the defence focused on "attacking the credibility of Crown witnesses and Scott Forsyth" (p. 10). Two witnesses were called by the defence. Tami Morrisroe, the applicant's 13-year-old daughter, testified that her half-sister Denise MacKinnon had told her that "she was going to arrange to have [Morrisroe] convicted and that she would lie on a stack of Bibles if she had to" (p. 10). The second witness was a prisoner "who had been transported to the courthouse with [Morrisroe] and...[Forsyth] at the time of trial" (p. 10). This witness testified that "he had overheard Mr. Forsyth say to [Mr. Morrisroe] that, even though [Morrisroe] had nothing to do with the murder, Mr. Forsyth would make sure that he 'was going down anyway'" (p. 10).

Morrisroe appealed his conviction to the British Columbia Court of Appeal, which dismissed the appeal on December 2, 1986. The only ground raised on appeal was that "the trial judge erred by refusing to grant an order to sever the trials" (p. 12). Morrisroe did not seek leave to appeal to the Supreme Court of Canada.

Morrisroe applied for section 690 conviction review on June 11, 1992 and the Minister rendered his decision on October 18, 1995. There were five major grounds upon which Morrisroe's section 690 application was based: (1) challenges to Denise MacKinnon's trial testimony, (2) "allegations that the testimony of Scott Forsyth at trial [was] untrustworthy," (3) challenges to the "accuracy of the testimony of Valerie Matson at trial," (4) submissions related to Morrisroe's "alternative version of events on the

night of the murder," and (5) "miscellaneous submissions" (p. 14). The last ground included allegations that the Vancouver Police Department "had a vendetta against [Morrisroe]," that he was "inadequately represented by his trial counsel," that the "trial judge's address to the jury was flawed," and that the time of death of Mr. Philliponi was not properly established" (p. 14).

Morrisroe submitted that his step-daughter, Denise MacKinnon, lied at trial but then recanted her trial testimony. The applicant obtained a "photocopy of a statement by Ms. MacKinnon dated April 11, 1991," which was "unsworn but witnessed by" a former inmate with Morrisroe at Kent Institution (p. 16). The Department of Justice, however, did not receive this statement until June 5, 1995. Morrisroe submitted another affidavit signed by Ms. MacKinnon and dated March 18, 1992, in which she recanted "several material factual assertions contained in her trial testimony" (p. 16). However, Department of Justice officials maintain that, in their interview with Ms. MacKinnon, she "reaffirmed her trial testimony consistently and absolutely on each of the three occasions that she was interviewed" (p. 17). Ms. MacKinnon advised Department of Justice officials that she signed the 1992 affidavit "because of repeated, very emotional pleas by various parties, including family members and [Morrisroe] himself, to have her change her testimony" (p. 18). Furthermore, the Department of Justice did not accept statements from Sidney Morrisroe's son and daughter, Kevin and Tami Morrisroe, that Ms. MacKinnon had admitted to them that she lied at trial. In the Department's view, interviews with Kevin and Tami Morrisroe revealed discrepancies that cast doubt on accepting their information

as evidence that their step-sister had admitted lying at trial (p. 24). Allegations that Ms. MacKinnon had been coerced by police to testify against Morrisroe, and had been supplied with cocaine by a police officer "in exchange for her testimony," were also discounted by the Department of Justice (p. 24-28). The Minister also noted that Ms. MacKinnon's trial testimony, in any event, was not "critical to the outcome of [the] case at trial" (p. 28).

Morrisroe's claim that Scott Forsyth's trial testimony was untrustworthy was also not considered credible by the Department of Justice. A letter was allegedly signed by Scott Forsyth and sent to Tami Morrisroe which stated his plans to recant portions of his trial testimony. However, when departmental counsel interviewed Mr. Forsyth, he denied writing the letter and it was determined that the handwriting was "markedly different" from Forsyth's handwriting (p. 32). Forsyth initially denied any role in Philliponi's murder, and after police informed Forsyth that his fingerprints had been found at the scene, he "made a number of incriminating statements to [an] undercover officer who had been lodged in his cell" and he was charged with second degree murder (p. 32-33). Following Forsyth's discovery of the undercover officer, he admitted his role in the murder and "implicated [Morrisroe]" (p. 33). Forsyth then "agreed to take part in a telephone conversation with [Morrisroe]" and also "to tell [Morrisroe] that he (Mr. Forsyth) would tell the truth to the police" (p. 33). Mr. Forsyth was subsequently recharged with first degree murder. Although the trial judge ruled that several statements made by Forsyth to police within a specified period of time were inadmissible, "Forsyth had provided information which implicated [Morrisroe] in the robbery and murder of Mr.

Philliponi" prior to the period of time his statements were ruled inadmissible (p. 33). In his decision, Minister of Justice Allan Rock argued that although the trial judge "concluded that some of Mr. Forsyth's early statements to police were unreliable because of a promise of benefit which Mr. Forsyth perceived that he had been given," he "made other statements implicating Morrisroe prior to those excluded at trial which were not motivated by any desire to take advantage of a reduction in the charge against him" (p. 34). Morrisroe also argued that there were several discrepancies between Mr. Forsyth's trial testimony and his 1993 interview with departmental counsel; however, the Minister did not feel these discrepancies amounted to credible proof that Forsyth had lied at trial (p. 37-38).

Morrisroe's counsel also provided the Department of Justice with an affidavit sworn by a "John Doe," who stated that while in prison with Forsyth, the latter told him that "Morrisroe had nothing to do with [the murder]" (p. 39). When interviewed by departmental counsel, Forsyth recalled "that a person of the affiant's last name, but with a different first name, was in prison briefly with him before being paroled," but he denied making the statements attributed to him by "John Doe" (p. 39). The Minister noted that the "jury had the opportunity of hearing and seeing Mr. Forsyth testify" and "in cross-examination by [Morrisroe's] counsel, Mr. Forsyth admitted to a list of untruths, including giving false information to the police" (p. 40). However, the Minister believed that the "jury had an opportunity to assess his credibility" and "they must have accepted his evidence concerning his activities and conversations with [Morrisroe]" (p. 40).

> Mr. Forsyth's credibility has not been seriously impaired by the information advanced by [Morrisroe]. This information, when taken together with the evidence at trial and new information, does not provide a reasonable basis to conclude that a miscarriage of justice has likely occurred. Mr. Forsyth has not altered his trial testimony in any material respect. I find that...[Morrisroe], by seeking a retrial, is asking the Minister of Justice to reach a different conclusion from that arrived at by the courts based on the same facts. This is not a proper basis for granting relief under section 690 of the *Criminal Code* (p. 40).

Morrisroe's section 690 submission also included an affidavit from Ms. Valerie Matson who stated that she lied at trial because of fears of retaliation by Philliponi's brothers and pressure from police (p. 41). However, according to departmental counsel, in a telephone interview with Ms. Matson, she stated that she did not lie at trial. Ms. Matson also stated that the affidavit read to her by departmental counsel was not the same affidavit she signed when she visited Morrisroe in prison (p. 42). The Minister also noted that Morrisroe "could have sought leave of the appeal court to introduce this new evidence" and that it was "unclear why this was not done" (p. 44). Therefore, the Minister concluded that the affidavit "attributed to Valerie Matson...failed to provide a reasonable basis to conclude" that there had been a miscarriage of justice (p. 44).

Although Morrisroe did not testify at trial, he provided the Department of Justice with detailed written and oral accounts of his "whereabouts and activities shortly before and after the time of the murder" and claims that he was not involved whatsoever with this crime (p. 45). The Minister stated that:

> Since the applicant's submission with respect to this "alibi" rests almost solely on his personal account of the relevant events, I consider it appropriate to include an assessment of his own statements and the plausibility of his entire version of these events in my analysis of this submission (p. 45).

The Minister found that some of Morrisroe's submissions contradicted earlier statements he had made and that the trial testimony of Ed Moses was put to the jury to

assess (p. 48). After examining departmental counsel's interviews with Ed Moses and John Sliman, and Morrisroe's version of events, the Minister concluded that:

> I have reviewed the applicant's version of the events around the time of the murder of Mr. Philliponi. I note that the applicant's version is contradicted by those given under oath by Mr. Forsyth, Mr. Moses and the doorman of the Villa Hotel restaurant. The applicant's account of his own activities on the night of the murder are only partially supported by the information of Mr. Sliman, who states that he did collect some blue jeans from the applicant on the night of the murder. However, Mr. Sliman also states that the applicant told him that the material taken from Mr. Philliponi's safe had been destroyed. I note that the applicant submits that he had nothing whatsoever to do with the murder or the disposal of evidence. For the most part, the applicant's narrative rests entirely on his own word. However, in addition to being contradicted by other evidence, the applicant's account is internally inconsistent and implausible. I cannot rely on the applicant's version of the relevant events, and I do not accept it (p. 54).

Morrisroe's section 690 submission also included anecdotal incidents that the Vancouver Police Force "had formed a vendetta against him" (p. 54). In one incident, Morrisroe said that he had "surprised two Vancouver Police officers beating up a young woman" and when he "intervened and assaulted the officers," they "told him that they would not forget him" (p. 54). Morrisroe stated that he was "99% sure that one of the officers was the investigating officer in the murder of Mr. Philliponi" (p. 54).[297] The Minister noted that this accusation "was not the subject of cross-examination of this officer at trial, nor [was] it described in any written account of that night's events" (p. 55). Not surprisingly, the officer denied the accusation and apparently supplied the Minister with information that convinced him that Mr. Morrisroe was "mistaken in his identification of him" (p. 55). Further inquiries with the Vancouver Police Department convinced the Minister that Morrisroe's allegation of a police vendetta against him was "without merit"; nor did the Minister believe that the police investigation was biased against Mr. Morrisroe

---

[297] Sidney Morrisroe (Mission, B.C.), telephone interview with author, 4 November 1998, tape recording. This allegation was reiterated by Mr. Morrisroe.

(p. 56-57).

Morrisroe's submission concerning the inadequate defence put forward by his trial counsel was also discounted by the Minister who stated that Morrisroe "steadfastly refused to waive solicitor-client privilege to enable departmental counsel to explore these issues with his former counsel" (p. 58). Therefore, the Minister stated that "in the absence of any evidence to support these accusations, [he found] that the applicant's submissions in this regard [were] groundless" (p. 58). Similarly, the Minister also discounted Morrisroe's claim that the judge erred in his instructions to the jury concerning aiding and abetting (p. 59). Finally, Morrisroe's submission discounting the "time of death" evidence was found to be "without foundation" (p. 59). The Minister's decision revealed only that "the time of death was thoroughly discussed" at trial (p. 59). According to Morrisroe, however, the Medical Examiner discovered an 8-hour error in the calculation of Philliponi's time of death, which was indicative of a "botched death scene investigation" by the coroner, Vancouver City Police, and the Medical Examiner.[298]

In his summary, Minister Rock stated that "challenges to the jury's findings on issues such as credibility, which were reviewed by a Court of Appeal, will not provide a basis for a section 690 remedy unless there are new matters of substance which are capable of belief and which provide a reasonable basis to conclude that a miscarriage of justice likely occurred" (p. 60). The Minister did not believe that Morrisroe "provided any new information of significance that [was] reasonably capable of belief" and found that "much

---

[298] Fax from Sidney Morrisroe (Mission, B.C.), to author, 4 November 1998.

of the new information [was] expressly refuted by the very people who [were] said to be its source" (p. 60).

> I have examined this case bearing in mind the governing principles that are set forth in Part II of this decision. Having done so, and having considered the submissions made by the applicant, I have come to the conclusion that neither the arguments nor the new evidence are such that they lead reasonably to the conclusion that a miscarriage of justice likely occurred in this case. Accordingly, I am not prepared to grant any discretionary remedies contemplated by section 690 of the *Criminal Code* in this case.
>
> During a section 690 review, the Minister of Justice may recommend that the Governor in Council seek the opinion of the Supreme Court of Canada on any relevant question of law or fact pursuant to subsection 53(2) of the *Supreme Court of Canada Act*, R.S.C., 1985, c. S-26. The applicant has requested a reference to the Supreme Court of Canada. Such a reference should be made only in exceptional circumstances. It is appropriate when there is a matter in the public interest requiring the attention of the Supreme Court of Canada to maintain the integrity of the judicial system. I have found the new information provided by the applicant to be unreliable and without merit. It would be inappropriate to ask the Supreme Court of Canada to review a case in such circumstances (p. 61).

Morrisroe's section 690 application was dismissed on October 18, 1995.

Three days later, Morrisroe applied for clemency or, in the alternative, a respite of his life sentence, under section 749(2) [now s. 748(2)] of the *Criminal Code*, which states that the "Governor in Council may grant a free or conditional pardon to any person who has been convicted of an offence." This application was based upon Mr. Morrisroe's deteriorating health and positive institutional record. However, Morrisroe's appeal for mercy was unsuccessful.[299]

On November 15, 1995, Morrisroe applied to the Federal Court of Canada for

---

[299] Canada, *In the Matter of an Application for an Exercise of the Royal Prerogative of Mercy Between Sidney Vincent Morrisroe (Applicant) and the Solicitor General of Canada, the Honourable Herb Gray, P.C., M.P. (Respondent), 21 October 1995* (accessed 27 March 1997), available from http://WWW.WEBHAVEN.COM/surf101/sid/clem; Internet, 1-7. Mr. Morrisroe remains incarcerated, so his clemency application has not been successful thus far.

judicial review of the Minister's dismissal of his section 690 application. A news release[300] describes Morrisroe's submissions to the Federal Court of Canada as follows:

> The Minister based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him and that he failed to act by reason of fraud or perjured evidence, and upon the fruits of an investigation that was neither thorough, disclosive, nor independent, but instead was poisoned by corrupt investigative practices. Court documents also cite intimidation and threatening of witnesses by the Minister's investigators.[301]

Morrisroe's application for judicial review was dismissed by the Federal Court of Canada, without reasons, on April 25, 1997.[302] Morrisroe has re-applied for section 690 conviction review.[303]

(iv) W. Colin Thatcher[304]

In November 1984, Colin Thatcher was convicted of first degree murder in the death of his ex-wife, JoAnn Wilson, in Saskatchewan on January 21, 1983. He was sentenced to a mandatory term of life imprisonment without parole eligibility for 25 years.[305]

The Crown's theory of the murder was that Thatcher had either hired someone to kill

---

[300] Sidney Morrisroe, News Release (FCTD-02, FCTD-03), "Minister's Decision First Ever to be Reviewed by Federal Court: Review Could See Entire s. 690 Process Rewritten" (15 November 1995).

[301] Contrary to the claim made in the news release, this was not the "first ever judicial review application of a section 690 *Criminal Code* decision by a Minister of Justice." As noted above, *Wilson* was the first person to seek review of the Minister's decision.

[302] Federal Court of Canada, Vancouver, B.C., telephone confirmation by author, 3 July 1998.

[303] Morrisroe re-applied some time in 1996 or 1997. See Neal Hall, "Morrisroe decides to stay in protection program," *The Vancouver Sun* (21 November 1997): A6.

[304] *Thatcher Decision*. Except as otherwise indicated, page references taken from the Minister's Reasons for Decision are parenthetically noted in the text.

[305] *R. v. Thatcher* (1986), 24 C.C.C. (3d) 449 (Sask. C.A.), 454-455.

his ex-wife, or had committed the crime himself. The circumstantial evidence adduced at trial included the "apparent surveillance of [JoAnn] Wilson's residence for a number of days preceding the...murder, by a person identified in a car as one checked out of the government's central vehicle agency by the Honourable Mr. Thatcher"; the purchase of a ".357 Ruger Magnum revolver at Palm Springs, California, on January 29, 1982, and...the subsequent purchase...of a holster and two boxes of Winchester-Western .38 Special Plus P Silvertip, Hollow Point ammunition"; the discovery, "approximately three months before the murder, of a gun holster in another car checked out to [Mr. Thatcher] by the government's central vehicle agency"; the "finding of the gas credit card receipt in the appellant's name at the scene of the crime"; the "acrimonious litigation which had ensued" following the Thatchers' separation; and the "finding and seizure of a toy shower box and Los Angeles Times Newspaper at [Mr. Thatcher's] residence in Moose Jaw... ."[306] The direct evidence concerned statements Thatcher made "to Ms. Lynn Mendell during an intimate association with her," statements he made "to his friend Richard Collver," statements he made "to an acquaintance, Mr. Gary Anderson, including discussion of a contract to kill Mrs. Wilson, as well as a tape-recording of a meeting between [Thatcher] and Anderson," and "statements and payment of money to Charles Wilde in furtherance of a contract to kill JoAnn Wilson."[307] Gary Anderson was granted immunity from

---

[306] *Ibid.*, 462.

[307] *Ibid.*, 468-469.

prosecution for murder and attempted murder.[308]

The defence presented alibi evidence that Mr. Thatcher was at home with members of his family on both occasions--when his wife was wounded in 1981, and when JoAnn Wilson was ultimately murdered in 1983. Thatcher's friend and legal counsel (for matters concerning custody and matrimonial property) also testified that he had "telephoned Mr. Thatcher in Moose Jaw around 6:15 p.m." on the night of the murder (p. 25), although telephone bill records only showed the hour in which the call was placed.[309] At trial, Mr. Thatcher denied telling Ms. Mendell that he had killed his ex-wife, and argued that Gary Anderson's testimony concerning arrangements to have Ms. Wilson killed were "pure fabrication."[310] As to Richard Collver's testimony that Thatcher had raised the subject of finding someone to kill his ex-wife, Thatcher countered that Collver was "half drunk" during their discussion... [and] that it was Collver who suggested a 'hit' man -- albeit in a joking fashion."[311] However, Thatcher "had no explanation for the presence of the gas invoice in his name at the scene of the crime."[312] When asked to explain the incriminating statements he made during his tape-recorded conversation with Gary Anderson, Thatcher stated that he was "talking in Caron slang," and that he left $500 at a pre-arranged location for Anderson because he "did not want a person of that temperament on his

---

[308] *Ibid.*, 474.

[309] *Ibid.*, 501-503.

[310] *Ibid.*, 493.

[311] *Ibid.*, 495.

[312] *Ibid.*, 496.

neck."[313]

Thatcher appealed his conviction, arguing that the trial judge made several errors of law, that Crown counsel "deliberately withheld material evidence," and that the verdict was "unreasonable or [could] not be supported by the evidence."[314] The Saskatchewan Court of Appeal, with one dissent, denied Thatcher's appeal on January 17, 1986. On May 14, 1987, the Supreme Court of Canada dismissed the appeal and was unanimous in its finding that there was ample evidence for the jury to find Mr. Thatcher guilty beyond a reasonable doubt.[315]

Having exhausted all conventional avenues of appeal, Thatcher applied to the Minister of Justice under section 690 of the *Criminal Code* on October 11, 1989. The Minister rendered his decision on April 14, 1994.[316] Thatcher's application was based upon three major grounds: (1) "new evidence relating to the credibility of witnesses and the authenticity of trial exhibits" (p. 45), (2) "submissions concerning the existence of 'fresh evidence' that was not before the jury" (p. 62), and (3) submissions concerning alleged *Charter* infringements (p. 68).

Thatcher's counsel submitted that Calvin Smoker's "evidence...contradict[ed] the trial evidence of Gary Anderson" (p. 45). Mr. Smoker had not been a witness at trial, but when questioned by Edmonton police concerning another murder investigation, he stated

---

[313] *Ibid.*, 497-498.

[314] *Ibid.*, 505.

[315] *Thatcher v. The Queen* (1987), 32 C.C.C. (3d) 481 (S.C.C.).

[316] See Appendix 2 for a chronology of events in Mr. Thatcher's section 690 application.

that "he may have been involved in disposing of the getaway car used" in JoAnn Wilson's murder (p. 45). Thatcher argued that Smoker's statement might have impugned Gary Anderson's testimony, which may "have resulted in a different verdict to Mr. Thatcher" (p. 45). However, the Minister concluded that "there [was] no factual support" for Mr. Smoker's statements (p. 46).

Thatcher's counsel also argued that statements made by two other witnesses were either inconsistent or contradictory to Gary Anderson's trial testimony and he challenged the credibility of a third witness based on his addiction to drugs and prior criminal record. Moreover, this witness "was rewarded for his testimony after Mr. Thatcher's trial" when break and enter charges against him were stayed (p. 51). In the Minister's view, however, statements attributed to two witnesses were not "reasonably capable of belief," nor were they "consistent with facts established by reliable evidence" (p. 47). Statements from a third witness were found to be hearsay and despite the "unsavoury character" of another witness's trial testimony, it "was before the jury for its assessment" (p. 51).

The authenticity of the credit card receipt found near Ms. Wilson's body was also challenged by Thatcher's counsel. However, when questioned by police four days after the gasoline purchase, Thatcher "admitted that it was his" (p. 52). Although the gas station employee later recanted his trial testimony that the handwriting on the receipt was his, the Minister concluded that:

> In light of Mr. Thatcher's admissions both during the police investigation and at trial, whether Jack Janzen prepared the credit card receipt or not is clearly less relevant. The fact that the receipt was Mr. Thatcher's was established through other means. In these circumstances, Mr. Janzen's retreat from his trial testimony does not significantly affect the weight of the receipt as a piece of evidence implicating Mr. Thatcher in the crime (p. 54).

Thatcher's counsel also submitted that there was evidence "which contradict[ed] the Crown's theory that Mr. Thatcher purchased the murder weapon in Palm Springs, California" (p. 56). The main issue, according to Thatcher, was that the .357 Ruger revolver bought in Palm Springs had a stainless steel barrel, yet Gary Anderson said that the gun he received from Thatcher was a blue-barrelled .357 revolver (p.56). Therefore, the Crown allegedly "advanced a theory that it knew could not be true and glossed over the colour of the firearm with Mr. Anderson, hoping that the jury would miss the subtleties of the difference in colour if it was not discussed" (p. 58). The Minister disagreed and stated that "careful attention was devoted to the closing addresses of both counsel" at trial (p. 59).

> In convicting Mr. Thatcher, the jury obviously did not entertain a reasonable doubt about Mr. Thatcher's guilt despite his denials of any direct or indirect participation in Ms. Wilson's death. However, the verdict does not signal which theory the jurors accepted. Therefore, the jury, in convicting Mr. Thatcher, could have rejected the evidence that Mr. Thatcher killed JoAnn Wilson with the gun he purchased in Palm Springs. Considering the alternate theory advanced, the evidence of Mr. Anderson and the fact that the murder weapon was not found, the colour of the gun is of less significance because it was open to the jury to find that Mr. Thatcher arranged for someone to kill JoAnn Wilson and may not have provided the murder weapon (p. 62).

The 'fresh evidence' submitted by Thatcher's counsel consisted of police receipt of an anonymous package containing a letter, a hatchet and a photograph of a nude woman, which apparently depicted the body of JoAnn Wilson (p. 62). The letter's author "claimed responsibility for her death... " (p. 62). The contents of this package were not disclosed to Thatcher's counsel before the hearing of the appeal, and therefore, "Mr. Thatcher's right to make full answer and defence" was limited (p. 62). However, the police and the Minister determined the letter to be a hoax. Second, it was alleged that the Crown "advanced a theory that Thatcher killed his wife when it possessed alibi evidence that

contradicted that theory" (63). This evidence consisted of alibi evidence that Thatcher was at home at the time of the murder and that several witnesses either saw him there or nearby, or spoke to him on the telephone. In addition, the police re-enactment of the travel time between Ms. Wilson's home and Mr. Thatcher's residence was also challenged (p. 64). If these factors were true, Thatcher argued, the "Crown clearly knew that the theory that [he] killed his wife could not be true," yet the Crown "advanced it as the main theory of the case" (p. 64). After examining "the facts supporting counsel's submissions," however, the Minister found no indication "that the Crown withheld information from the defence," and that this evidence had been placed before the jury (p. 67-68).

Finally, Thatcher's application submitted that the Crown's failure to disclose witness statements infringed his Charter rights of full and fair disclosure as required by *R. v. Stinchcombe*,[317] and that the police recruitment of Gary Anderson "to engage and record Mr. Thatcher's conversation" infringed his right to be secure against unreasonable seizure, and therefore, violated section 8 of the *Charter* (p. 68). In the Minister's opinion, "the evidence of neither...[witness]...could reasonably be expected to have affected the verdict" (p. 70). With respect to Gary Anderson's cooperation with police to tape-record his conversation with Thatcher, the Minister noted that the Supreme Court decision in *R. v. Duarte*[318] "established that electronic surveillance of [an] individual by the state can be an unreasonable search and seizure" (p. 70). However, he concluded that the

---

[317] [1991] 3 S.C.R. 326.

[318] [1990] 1 S.C.R. 30.

"introduction of the taped conversation at trial complied with the law as it stood when the tape was made, when it was introduced at trial, and when the case was reviewed on appeal" (p. 70).

Minister Allan Rock described his role with respect to the statutory power under section 690 as follows:

> In creating the role of the Minister of Justice under section 690 of the *Code*, Parliament used very broad language, and the discretion of the Minister has been cast in the widest possible terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being "satisfied that in the circumstances a new trial or hearing... should be directed.
>
> In interpreting and applying section 690, I do not intend to limit or to restrict the wide discretion given to the Minister. It is impossible to predict the nature of the cases in which such applications might be brought in the future, and it is in the public interest, in my view, to leave the Minister's discretion in the broadest possible terms. Nevertheless, that discretion is to be exercised in accordance with certain governing principles... .[319]

The Minister found that the applicant's challenges to the jury's findings on credibility, which were also reviewed by a Court of Appeal, did "not provide a basis for a section 690 remedy" (p. 71). The 'new evidence' also failed to meet the threshold required "for a reference to an appellate court or for a new trial" (p. 71). As for the alleged *Charter* infringements, the Minister stated that they did "not undermine the reliability or the relevance of the trial evidence" and "[d]isclosure was provided in accordance with the prevailing practice at that time" (p. 72). Admission of the tape-recorded evidence was also found to be lawful. Thatcher's application was denied on April 14, 1994.

Thatcher subsequently applied for judicial review of the Minister's decision.[320] He

---

[319] *Thatcher Decision*, 2. The six governing principles laid out by Minister Allan Rock were discussed earlier in this chapter.

[320] *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289 (F.C.T.D.).

argued that the Minister failed to provide full disclosure of information in police and Crown files and that the Minister based his decision on new information that was not disclosed to him. In a judgment rendered October 3, 1996, the Federal Court of Canada dismissed Thatcher's request for judicial review. The Court found that the Minister "amply met his duty of fairness to the applicant," and that "there was no indication that the Minister's decision was based on information that was not available to the applicant."[321] The court also found that

> [e]xcept in so far as the Charter requires, proceedings under section 690 are not the subject of legal rights. An application for mercy is made after a convicted person has exhausted his legal rights. Therefore, although the Minister is under a duty of fairness under the Charter the duty must be considered with regard to the fact that there is no continuing *lis* between the Crown and the applicant. There are no statutory provisions directing the Minister of Justice as to the manner in which the discretion should be exercised or as to the type of investigation to be carried out. No rules of procedure have been laid down.
>
> The Minister must act in good faith and conduct a meaningful review. The convicted person should have a reasonable opportunity to state his case and adequate disclosure of new relevant information revealed by the Minister's investigation. Where the Minister deems it necessary to consider material in police or prosecution files, the material or at least the gist of it, if not already known, must be disclosed. But there is no general obligation on the Minister to review police and prosecution files or to disclose those files merely because of a request by a convicted person.[322]

Mr. Thatcher subsequently applied for early parole pursuant to section 745 of the *Criminal Code*. On August 6, 1999, a federal court judge in Regina approved Thatcher's application.[323] It may be several months before a jury hears the review.

---

[321] *Ibid.*, 303.

[322] *Ibid.*, 291.

[323] CBC Radio News, 6 August 1999.

(v) David Milgaard[324]

David Milgaard was convicted on January, 31, 1970, for the January 31, 1969 sexual assault and murder of Gail Miller, and sentenced to life imprisonment. His appeal to the Saskatchewan Court of Appeal was dismissed on January 5, 1971, as was his application for leave to appeal to the Supreme Court of Canada (on November 15, 1971).[325]

At trial, the statements from three key witnesses proved to be fatal to Milgaard's case.[326] Ronald Wilson and Nichol John had traveled with Milgaard, arriving in Saskatoon between 5:30 and 6:30 a.m. on the day of the murder. Gail Miller's time of death was estimated to have been between 6:45 and 7:30 a.m. Their destination was the home of another friend, Albert Cadrain,[327] who lived close to the murder scene. Initially, all three emphatically denied their involvement and Milgaard's, in the murder.[328] However, by the time of Milgaard's trial, following extensive and intimidating police interviews, all three had completely changed their version of events. Moreover, two additional witnesses testified that Milgaard had confessed to the crime.[329] The defence challenged the credibility of the witnesses, questioned the blood alleged to have been seen on Milgaard's

---

[324] *Milgaard Decision.*

[325] *Reference Re Milgaard* (1992), 12 C.R. (4th) 289 (S.C.C.), 290.

[326] *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.).

[327] Karp and Rosner, *When Justice Fails*, 51. Albert Cadrain collected a $2000 reward for information he provided to police concerning the Miller murder.

[328] *Ibid.*, 50-56.

[329] *Ibid.*, 88-89.

clothes and the absence of blood in Wilson's car, and the impossible time sequence between the murder and Milgaard's actions on that day.[330] However, the damning nature of the circumstantial evidence coupled with dubious forensic evidence[331] ultimately led to Milgaard's conviction.

Milgaard first applied to the Minister of Justice under section 617 (now s. 690) on December 28, 1988, and the Minister rendered her decision on February 27, 1991.[332] His application was based upon five major grounds: (1) new evidence from Deborah Hall and Ute Frank, who had not testified at trial, (2) advances in scientific technology allowed Milgaard to "discredit the forensic evidence called at...trial and to provide evidence that exculpates him as the perpetrator...," (3) new evidence in the form of a "statement provided by Ronald Dale Wilson...and the request to re-examine the evidence" of two key trial witnesses, (4) an allegation that one "Larry Fisher may have committed the crime and the impact that unsolved rapes in Saskatoon could have had on the jury's deliberations," and (5) submissions that Milgaard "could not have killed Gail Miller because she was killed at another location and her body deposited in the alley; or, if the offence had been committed in the alley, David Milgaard had insufficient time to commit it, or was not near the scene of the crime at the time it was committed."[333]

---

[330] *Ibid.*, 95.

[331] *Ibid.*, 83-86.

[332] *Ibid.*, 290-291. Milgaard submitted a second section 690 application in August 1991.

[333] *Milgaard Decision*, 3.

In May of 1969, David Milgaard, Deborah Hall, Ute Frank, Craig Melnyk and George Lapchuk, were partying in a hotel room. At trial, both Melnyk and Lapchuk testified that when an 11:00 p.m. television news report concerning the Miller murder came on, Milgaard "responded to the report by re-enacting the killing, pretending to stab at a pillow."[334] Both men also testified that Milgaard had repeatedly stated, "I killed her, I stabbed her."[335] In his section 690 application, Milgaard submitted a statement from Frank and an affidavit from Deborah Hall, neither of whom had been called to testify at trial.[336] Hall stated that Melnyk and Lapchuk "mis-stated the truth when they testified that...Milgaard re-enacted the stabbing in a Regina Hotel room in May 1969."[337] Although Deborah Hall "confirm[ed] the testimony of the Crown witnesses concerning what David Milgaard did and said," she "disagree[d] with the interpretation that...Melnyk and Lapchuk place[d] on those words and actions."[338] Hall believed that Milgaard was

---

[334] Karp and Rosner, *When Justice Fails*, 87.

[335] *Ibid.*, 88-90.

[336] *Ibid.*, 91-92. Karp and Rosner note that the Crown "saw no point in having [Hall] testify, as she didn't corroborate Lapchuk and Melnyk's story." Defence counsel did not call her to the stand because he "realized that the lack of consistency in testimony might be offset by Frank's description of the events...which he thought might prejudice the jury even more against his client."

[337] *Milgaard Decision*, 5.

[338] *Ibid.*

"making a 'sick' remark and was not serious."[339] The Minister of Justice found that "whether [Hall's] opinion of Milgaard's sincerity would have been shared by a jury is, at best, debatable."[340] With respect to Ute Frank's statement, the Minister observed that her "statement neither refer[red] to nor refute[d] the conversation between Lapchuk and Milgaard and relate[d] to a separate conversation."[341] Ms. Frank also conceded that "her powers of observation were dulled by the effects of the drugs she had ingested that evening."[342] The Minister was not persuaded:

---

[339] Karp and Rosner, *When Justice Fails*, 170. These authors state that Hall's sworn affidavit "left no room for doubt about what she had seen: I remember seeing news pictures of the Gail Miller murder on the television set but could not hear what was being said. As I previously indicated, everyone in the room was chattering back and forth. At one point, Craig Melnyk said to David Milgaard, 'You did it, didn't you?' As Craig Melnyk was saying this, David Milgaard was punching the pillow, trying to fluff it up. I remember him saying, in response to Craig Melnyk, 'Oh yeah, right,' in a sarcastic or joking manner. David Milgaard then put the pillow back against his chest. I believe his response to the comment made by Craig Melnyk was in a joking manner. At no time did David Milgaard use the pillow to re-enact the murder. My interpretation of David Milgaard's response was that it was a completely innocent and perhaps crudely comical comment... . Craig Melnyk and George Lapchuk both lied when they stated in their evidence at trial that David Milgaard re-enacted the murder by going through a series of stabbing motions against the pillow." Although Deborah Hall had been contacted by Joyce Milgaard in 1981, David Milgaard's counsel did not, at the time, "realize the importance of taking a sworn statement from Hall."

[340] *Milgaard Decision*, 5. It should be noted that both Craig Melnyk and George Lapchuk, at the time of their testimony, were both out on bail; "Melnyk for armed robbery and Lapchuk for forgery and uttering-passing bad cheques." Both men also admitted to being regular drug users. And, as Karp and Rosner (*When Justice Fails*, 90-91) note, "they both testified that police had approached them in the past about acting as paid informers to catch drug dealers." Contrary to the Minister's view, the impact of Deborah Hall's statements, if tendered at trial, could have had more impact than she believed.

[341] *Milgaard Decision*, 5.

[342] *Ibid.*

> It is significant that Ms. Frank's statement was disclosed to Mr. Milgaard's trial counsel, who later interviewed Ms. Frank during the trial, but chose not to call her as a witness. Your client's counsel was, as I'm sure you are aware, particularly experienced in criminal matters, and his decision not to call this witness was based upon his understanding of what she could say in court. Even assuming that Ms. Frank had testified at Mr. Milgaard's trial in a manner which was consistent with her statement, there is no reasonable basis to believe that the trial result would have been different. The statements of Ms. Frank and Ms. Hall would not have detracted from the evidence of Messrs. Melnyk and Lapchuk; indeed, *Ms. Hall not only confirmed what Milgaard had said but attributed to him a further admission detailing a sexual assault perpetrated by him upon the victim at the time of the murder* (emphasis added).[343]

Contrary to the Minister's interpretation, Ms. Hall's verification of what was stated is not the issue; the issue falls upon Hall's *interpretation* of Milgaard's statements. Furthermore, given the backgrounds of Melnyk and Lapchuk, Hall and Frank should have been considered more credible.

At the request of Milgaard's counsel, "an internationally recognized expert in forensic biology," Dr. James Ferris, agreed to review the original trial exhibits "at no charge."[344] Dr. Ferris was unable to obtain "sufficient DNA to carry out a genetic typing test"; however, he had "no reasonable doubt that serological evidence presented at the trial failed to link David Milgaard with the offence and that, in fact, could be reasonably considered to exclude him from being the perpetrator... ."[345] Dr. Ferris identified several problems with the sample itself. First, in view of the "extensive disturbance of the scene and the obvious potential for contamination," he found it "quite remarkable that two small

---

[343] *Ibid.*, 5-6. There is no mention of such an admission by Debra Hall in Karp and Rosner's (*When Justice Fails*) investigation of the case.

[344] Karp and Rosner, *When Justice Fails*, 172.

[345] *Ibid.*

pools of semen were identified four days after the initial examination."[346] Although Dr. Ferris conceded that there was "no doubt that semen [had been] recovered and described," he also believed that "it would be most unusual for this semen not to have been contaminated by all of the tampering which had gone on with the evidence around the scene."[347] Laboratory testing of the semen at the time also "showed that it contained type A antigens," which suggested "that it came from a person with type A blood who secretes his antigens into other bodily fluids, such as semen and saliva."[348] While "Milgaard was identified as having type A blood, he was also one of the 20[%] of people classified as non-secretors; in other words, he could not have transferred the antigens into the semen." However, at trial, the Crown argued that "type A antigens would also be present in the semen if some of Milgaard's blood had actually mixed with it... ."[349] Dr. Ferris argued that if blood was contained in the sample, it most likely came from the victim. He also noted that there is "no positive proof that blood was ever found in the semen" nor any evidence "whatsoever that Milgaard had an injury or infection, thereby contaminating his semen with blood."[350] In discussions with several other people in forensic science laboratories, Dr. Ferris noted that none "were familiar with a single case where seminal fluid or stains ha[d] been found to be contaminated by blood from the alleged assailant."

---

[346] *Ibid.*, 173.

[347] *Ibid.*

[348] *Ibid.*

[349] *Ibid.*

[350] *Ibid.*, 174.

Dr. Ferris concluded that "either the semen sample had been contaminated and was therefore useless as evidence, or it was valid and should have been reasonably used to exonerate him."[351] The Minister, however, was unconvinced:

> ...the forensic evidence presented at trial proved nothing. With the benefit of hindsight, it may have been preferable had the evidence simply not been tendered. Nevertheless, the case against Milgaard was a strong one. The suggestion that the forensic evidence exonerates Milgaard misstates the value of that evidence. The forensic evidence tendered at trial, when elevated to its highest probative value, is neutral, establishing neither guilt nor innocence. The recent opinions do not establish that evidence should now be viewed any differently.[352]

Milgaard's section 690 application also included new information from Ronald Dale Wilson, a key trial witness who had provided damning testimony at trial. Wilson was tracked down by an investigator and, while being interviewed, "recanted every single element of incriminating evidence he had offered at Milgaard's trial."[353] Wilson also claimed that he had been manipulated by the police. Nevertheless, the Minister of Justice, "on the whole of the evidence..., [found] no basis for confidence in Mr. Wilson's allegations that his statement incriminating Milgaard was obtained by the manipulation or coercion of police investigators."[354] The Minister was unconvinced that the "retraction by Mr. Wilson of much of his trial evidence" was sufficiently persuasive.[355] Another key trial witness, Albert Cadrain, refused to speak to Milgaard's investigator. His brother, however, described Albert's paranoid schizophrenia, and stated that he "would not

---

[351] *Ibid.*

[352] *Milgaard Decision*, 8.

[353] Karp and Rosner, *When Justice Fails*, 193.

[354] *Milgaard Decision*, 10.

[355] *Ibid.*

consider [his] brother to [have been] a reliable witness at that time... ."[356] According to the Minister of Justice, however:

> Little if any weight can be given to suggestions that Albert Cadrain's trial testimony was unreliable. While Mr. Cadrain experienced personal and emotional difficulties *after* the trial, his trial evidence was confirmed by other witnesses and has since been confirmed by inquiries conducted during this application. It should be noted that he withstood a vigorous cross-examination by experienced counsel. Mr. Cadrain's personal difficulties since the trial do not detract from the credibility of the evidence he provided during the trial.[357]

At the time Milgaard was being investigated, and following his murder conviction, a serial rapist had been victimizing women in Saskatoon, and later in Winnipeg. Most significantly, Larry Fisher lived in a basement suite in Albert Cadrain's home at the time of Milgaard's arrival there on the day of the murder. When Fisher was arrested in Winnipeg, he admitted to rapes in Winnipeg and four others in Saskatoon.[358] Although two Saskatoon detectives were sent to Winnipeg following Fisher's confessions to the Saskatoon rapes, they did not make any connections between Miller's murder and Fisher.[359] As to Milgaard's submission concerning the "impact that Larry Fisher's criminal behaviour could have had on the jury deliberations," the Minister of Justice stated:

---

[356] Karp and Rosner, *When Justice Fails*, 191.

[357] *Milgaard Decision*, 10.

[358] Karp and Rosner, *When Justice Fails*, 113-115.

[359] *Ibid.*, 114.

> The observation of Linda Fisher, his former wife, that her paring knife was missing at the time of the murder was fully investigated, in addition to other assertions. Neither Ms. Fisher's suspicions, which were conveyed to the police in 1980, nor other well publicized assertions by her, provide any evidence to link Larry Fisher to Gail Miller's death. Ms. Fisher noted that the photo of the knife similar to the murder weapon indicated a different handle type, colour and blade from her missing knife. However serious Mr. Fisher's criminal record may be, the entire record at trial and in this application reveals no evidence to connect him with the killing of Gail Miller. Although it was, as you have conceded, quite coincidental that Mr. Fisher resided at the Cadrain residence during Mr. Milgaard's visit, no guilt or suspicion of guilt can be attributed to Fisher in the absence of some form of evidence linking him to the crime.[360]

The Minister's interpretation strains one's credulity. As Karp and Rosner note, "[t]he Minister didn't seem convinced that evidence about a serial rapist who had attacked women in the same neighbourhood, who had a similar *modus operandi* to the Miller murderer, who apparently took the same bus to work every morning as Miller, and who lived in the Cadrain house would have had any impact on the jury's decision that Milgaard was the real killer."[361] It is also significant that when Larry Fisher was convicted of the two Winnipeg rapes, he "was not sent [back] to Saskatoon to stand trial for his prior offences," but was "transferred to Regina where he pleaded guilty to the four Saskatoon crimes."[362] Appearing for the Crown in Regina was Serge Kujawa, "the same prosecutor who had argued against Milgaard's appeal less than a year before."[363] Despite his familiarity with the cases against both Fisher and Milgaard, "Kujawa did not connect the two."[364] Thus, the case went virtually unnoticed in Saskatchewan, as there was no press

---

[360] *Milgaard Decision*, 10.

[361] Karp and Rosner, *When Justice Fails*, 247.

[362] *Ibid.*, 117.

[363] *Ibid.*

[364] *Ibid.*

coverage of Fisher's sentencing. Karp and Rosner note that "[t]here has never been a satisfactory explanation as to why Fisher was tried in Regina, rather than Saskatoon."[365]

The final ground upon which Milgaard's application was based concerned the claim that Milgaard could not have committed the crime. This too was rejected by the Minister. On February 27, 1991, Minister of Justice Kim Campbell refused a remedy for Milgaard and summarized his application as follows:

> The information provided by Deborah Hall does not detract from the evidence led at trial, and Mr. Wilson's present recollection of events in question is palpably unreliable. The suggestion that the forensic evidence exculpates David Milgaard overstates the value of that evidence, which established neither guilt nor innocence. Further, there is no reliable basis to believe that Larry Fisher was connected in any manner with Gail Miller's death. The submissions concerning the location of the offence and Mr. Milgaard's opportunity to commit the offence were fully canvassed by trial counsel and by the judge who properly charged them on that point. There is no body of new evidence which constitutes a reasonable basis for concluding that a miscarriage of justice likely occurred in this case, or, to adopt the test suggested by you during submissions, there is no basis to conclude that a miscarriage of justice may have occurred here. Accordingly I am not prepared to refer this case back to the courts.[366]

Despite this decision, Milgaard's mother and counsel continued their efforts to get David out of prison, which culminated in a second section 690 application on August 14, 1991. On April 14, 1992, the Governor-General-in-Council referred the matter to the Supreme Court of Canada.[367]

---

[365] *Ibid.*

[366] *Milgaard Decision*, 12.

[367] Discussed *supra*, under section (v), Referring the Case to the Supreme Court of Canada.

In July of 1997,[368] DNA analysis proved that the semen found on the victim in 1969 was not Milgaard's; this provided compelling evidence that he did not rape and kill Gail Miller. The same DNA evidence "implicated Larry Earl Fisher."[369] In August of 1997, the Saskatchewan government announced that it would hold a public inquiry into Milgaard's conviction; however, the inquiry could not proceed until Larry Fisher had been tried.[370] Following a six-week trial, Fisher was found guilty--on November 23, 1999--of the first-degree murder of Gail Miller.[371] Milgaard had received interim compensation payments of $500,000; however, in May of 1999, he was awarded a compensation package of $10 million.[372] As a condition of the settlement, the Saskatchewan government reiterated its promise to hold a public inquiry into the police investigation and trial.[373] The trauma caused by Milgaard's 23-year ordeal continues; he was committed for psychiatric treatment against his will on April 26, 1999.[374]

---

[368] Roberts and Makin, "DNA test exonerates Milgaard," A1.

[369] David Roberts, "DNA implicates Fisher, Milgaard lawyers say," *The Globe and Mail* (19 July 1997): A6.

[370] Dan Lett, "Milgaard, Morin rock system," *Winnipeg Free Press* (21 August 1997): A8. See also Martin O'Hanlon, "Milgaard signs deal to get $10M in compensation," *The Vancouver Sun* (17 May 1999): A2.

[371] Martin O'Hanlon, "Serial rapist guilty of 1969 murder," *Times-Colonist* (23 November 1999): A1. Fisher's lawyer intends "to appeal all the way to the Supreme Court if necessary... ."

[372] Lori Culbert, "Milgaard avoids spotlight over $10 million settlement," *The Vancouver Sun* (18 May 1999): A6.

[373] Adam Killick, "Milgaard's $10M award ends a 30-year saga," *National Post* (18 May 1999): A4. Now that Fisher has been tried and convicted, I assume that a public inquiry into Milgaard's wrongful conviction can proceed.

[374] Canadian Press, "Milgaard committed."

(vi) Wilfred Beaulieu[375]

Wilfred Beaulieu was convicted in Alberta, on May 7, 1992, of two counts of sexual assault, contrary to s. 271(1)(a) of the *Criminal Code*. He was sentenced to three and one-half years imprisonment for one assault and six months imprisonment, to be served concurrently, for the second assault (p.1).

Beaulieu's appeal to the Alberta Court of Appeal was dismissed on January 4, 1993 and he did not seek leave to appeal the court's decision (p. 1). The Court of Appeal, while "admitting that there were errors in the use of the pre-trial statement of C.H., and other errors in the trial procedure," found that "those errors were insufficient to induce the Court to vacate the convictions" (p. 5).

On August 31, 1994, Beaulieu applied for a section 690 review of his convictions. Minister of Justice Allan Rock rendered his decision on November 25, 1996.[376] The conviction review was based on two principal grounds: new information, "including medical records, relating to [one of] the complainants," and a "recantation by [the second complainant] of certain portions of her trial testimony" (p. 1).

The evidence against Beaulieu "rested primarily on the trial testimony of the [two] complainants,...and that of N.C., a visitor to [one of the complainant's] residence" (p. 3). Alcohol was consumed by Mr. Beaulieu and the complainants, who also had

---

[375] *Beaulieu Decision*. Page references are taken from the Minister's Reasons for Decision and are parenthetically noted in the text.

[376] According to Beaulieu's lawyer, "Mr. Rock dithered for 16 months; [i]t was a travesty that he took so long." See Davis Sheremata, "The rape that wasn't," *Alberta Report* 24, no. 25 (2 June 1997): 29. See Appendix 3 for a chronology of events in Mr. Beaulieu's section 690 application.

"contradictory recollections of the sequence of events which culminated in the alleged sexual assault[s]" (p. 4). However, the trial judge "expressly rejected [Beaulieu's] evidence" and "accepted L.C.'s version of events" (p. 4).

Due to the "unusual circumstances of this case,"[377] Minister of Justice Allan Rock referred the case to the Alberta Court of Appeal, pursuant to s.690(c), and possibly (b) of the *Criminal Code*. The Minister found that the "police investigation of the case...was minimal," noting that "the investigators did not collect samples of hair, fibres or other potential evidence from the scene for forensic testing" (p. 4). The investigators also took "statements from the two complainants in the presence of each other," failed to take "statements from other[s] who could have provided relevant information," and neglected to "investigate the upstairs bedroom where the alleged violent assault had taken place" (p. 4). In the Minister's view, the fact that the Court was "deprived of [this] information" could certainly "have been relevant to [Beaulieu's] guilt or innocence" (p. 4).

Once again relying on the six principles he set out in *Thatcher*, Minister Rock concluded that:

> Two of the three issues now raised by [Beaulieu], namely, the recanted evidence of C.H. and the conduct of the police and Crown, neither individually nor collectively, signal that a miscarriage of justice likely occurred. However, a court may reconsider the reliability of the testimony of L.C., which is central to the conviction of Mr. Beaulieu, on both counts, in view of new information that is now available. The testimony of L.C. was instrumental to Mr. Beaulieu's conviction for assaulting C.H. C.H.'s recantation of portions of her trial testimony does not necessarily disturb the evidence of L.C., which essentially provided the grounds for convicting Mr. Beaulieu of assaulting C.H. Her testimony is also the principal basis for the conviction of Mr. Beaulieu concerning the incident that took place in the upstairs bedroom, where only Mr. Beaulieu and L.C. were present.

---

[377] Letter from Allan Rock, Minister of Justice, to Thomas Engel (25 November 1996), 1.

> During the investigation of this application new information relating to the complainant, L.C., was discovered. It was collected after the final disposition of the applicant's case by the Court of Appeal of Alberta. The information assembled, which includes the medical records of the complainant, revealed that she had been receiving treatment for a mental illness for several years. In my view, this new information bears significantly upon the issue of [Beaulieu's] guilt. In the event that a court determines this new information to be admissible, the nature of her psychiatric condition could be expected to have affected the verdict in relation to both convictions. Under the circumstances, I am satisfied that this information is such that it should be considered by an appellate court in accordance with the reference below.
>
> Accordingly, pursuant to [section] 690(c) of the *Criminal Code*, I do hereby respectfully refer to the Court of Appeal of Alberta, for its opinion, based on a consideration of the existing record herein, the said application, and such further evidence as the Court in its discretion may receive and consider, the following question:
>
> > In the circumstances of this case, would the new information concerning the complainants L.C. and C.H. be admissible as fresh evidence on appeal to the Court of Appeal? (p. 5-6).

If the Court deemed the new information admissible on appeal, the Court was then to determine the case as if it were an appeal on the issue of fresh evidence (p. 6).

On May 5, 1997, "after a hearing that lasted only minutes, Beaulieu was acquitted of assaulting [C. H.] and a new trial was ordered on the charge of assaulting [L. C]." However, "the Crown stayed that charge, leaving Beaulieu a free man."[378]

At the time of the alleged sexual assaults, Wilfred Beaulieu, a native Canadian, was an "ex-con living in a north Edmonton halfway house after doing most of an 8-year sentence for sexual assault causing bodily harm."[379] When the Alberta Court of Appeal refused Beaulieu's appeal, his lawyer "pressed a civil suit against the two women for making false

---

[378] Sheremata, "The rape that wasn't," 29.

[379] *Ibid.*, 28.

accusations"[380] and "[i]n discovery questioning in May 1994, [C. H.] admitted that she lied on the stand at the prompting of [L. C]."[381] It was also discovered that "psychiatric records pertaining to [L. C.]...showed that the woman had a history of delusional behaviour and a heavy reliance on antidepressants."[382]

The federal government rejected Beaulieu's bid for compensation, arguing that it was a "provincial matter" and his lawyer is awaiting a response from the Alberta government.[383]

(vii) Clayton N. Johnson[384]

Clayton Johnson was convicted in Nova Scotia, on May 4,1993, of first degree murder in the death of his wife, which occurred on February 20, 1989. He was sentenced to life imprisonment without parole eligibility for 25 years (p. 1).

On appeal, Johnson argued that the trial judge erred in "declaring the appellant's daughter, who testified for the Crown, to be an adverse witness so as to permit the Crown

---

[380] *Ibid.*, 29. Beaulieu's lawyer "dropped the suit against the two women because, he says, they are broke. But he is going after the federal and provincial governments to get compensation for his client."

[381] *Ibid.*, 29.

[382] *Ibid.*, 29.

[383] Paul Fraser, "Ottawa brushes off Beaulieu," *Alberta Report* 24, no. 28 (23 June 1997): 45.

[384] *Johnson Decision.* Unless otherwise indicated, page references are taken from the Minister's Reasons for Decision and are noted parenthetically in the text.

to cross-examine her, that the trial judge erred in his instructions to the jury as to "what constitutes planning and deliberation, and that the jury's verdict "was perverse and against the weight of evidence."[385] The Nova Scotia Court of Appeal unanimously dismissed Johnson's appeal on March 8, 1994, and on February 2, 1995, the Supreme Court of Canada refused to hear his case (p. 1).

On March 31, 1998,[386] two lawyers from The Association in Defence of the Wrongly Convicted (AIDWYC), James Lockyer and Phil Campbell, submitted a 250-page report to the federal Department of Justice under section 690 of the *Criminal Code*, which cast doubt on Johnson's conviction.[387] Mr. Johnson's application is based upon two major grounds: new forensic evidence and the improbability of the alleged crime.[388] According to two U.S. pathologists who examined the forensic evidence, "the forensic assessments that lay at the heart of the case were dead wrong."[389] Herbert McDonell, director of the Laboratory of Forensic Science in Corning, N.Y., constructed an "identical stairwell and employed a model, in safety straps, to re-enact the incident" and "there [was] no question in [his] mind that the death of Mrs. Johnson was the result of an accident."[390] In James

---

[385] *R. v. Johnson*, [1994] N.S.J. No. 89, DRS: 94-09378, Action C. A. No. 02885 (N.S. C.A.), Heard: 8 March 1994; Oral Judgment: 8 March 1994), [Quicklaw], para. 8, para. 1-11.

[386] James Lockyer, telephone interview by author, 19 June 1998 [hereinafter Lockyer Interview].

[387] Erin Anderssen, "Murder case to be reviewed," *The Globe and Mail* (22 September 1998): A3.

[388] Kirk Makin, "Did Clayton Johnson kill his wife?" *The Globe and Mail* (31 March 1998): A1, A4.

[389] *Ibid.*, A1.

[390] *Ibid.*

Locker's view, Johnson's conviction was based on "junk pathology."[391]

On April 3, 1998, John Briggs of Halifax was appointed as ad hoc counsel to assist departmental counsel's investigation of Johnson's application on behalf of the Minister of Justice. The investigation of Johnson's section 690 application was completed on July 30, 1998.[392]

Janice Johnson's death in 1989 was initially ruled an accident. However, in April 1992, police charged Clayton Johnson with the first degree murder of his wife. Nova Scotia's chief coroner, Roland Perry, "had little problem concluding that Mrs. Johnson had accidentally fallen forward as she went down the stairs...[and] that her head had wedged briefly in a 14-centimetre gap between the stairs and the wall before she flipped over and came to a stop."[393]

---

[391] Lockyer Interview. Also see Elizabeth Raymer, "Judge-Alone Murder Trial Ruled Out," *The Lawyer's Weekly* 19, no. 1 (May 7, 1999): 1, 20. This article discusses the Ronald Dalton case. Mr. Dalton was convicted of the second degree murder of his wife in 1989. He has always proclaimed his innocence and that his wife died as a result of choking on food. However, at trial, Newfoundland's chief forensic pathologist, Dr. Charles Hutton, concluded "after an autopsy that Mrs. Dalton had died from right-handed manual strangulation" (p. 1). Dr. Charles Hutton was also the pathologist involved in the Clayton Johnson case. James Lockyer notes that "bad pathology is not an unusual feature of wrongful convictions, turning non-homicides into homicides... ; [t]hat's what *Dalton* is and that's what *Clayton Johnson* is, and it's the same pathologist, which is very troubling (p. 20)."

[392] Canada, Department of Justice, *The Section 690 Application of Clayton Johnson: Background Information, Section 690 and the Minister's Decision* (Ottawa, Ont., 22 September 1998), (accessed 1 February 1999); available from http://canada.justice.gc.ca/News/Communiques/1998/johnsonNote_en.html; Internet, 1, 1-2.

[393] Makin, "Did Clayton Johnson kill his wife?," A4.

> Three months after Mrs. Johnson's death, however, the community of Shelburne stopped seeing it that way. Mr. Johnson had begun dating a member of the Pentecostal congregation, 22-year-old Tina Weybret, and tongues wagged at high speed. A year later, the couple married. Sgt. Oldford, stationed in nearby Yarmouth, heard the gossip and became suspicious. He seized upon Ms. Weybret as a motive for murder.[394]

Sgt. Oldford also suspected that Clayton Johnson's purchase of life insurance suggested another motive for his alleged crime. However, this 'motive' was "equally tenuous," as a school trustee later confirmed "urging Mr. Johnson to join the insurance plan, just as 80% of the province's teachers had."[395] Testifying at his trial, Mr. Johnson said "he did not even realize until after his wife died that her life was covered."[396]

AIDWYC's submission prompted Minister of Justice Anne McLellan, on September 21, 1998, to refer Johnson's case to the Nova Scotia Court of Appeal, under section 690(c), and possibly (b), to decide two questions:

> In the circumstances of this case, would the information provided by or on behalf of Clayton Norman Johnson or obtained during the review of his section 690 *Criminal Code* application for the mercy of the Crown be admissible as fresh evidence on appeal to the Court of Appeal?
>
> If this Honourable Court concludes that the information would be admissible on appeal, I do hereby respectfully refer to this Honourable Court, pursuant to paragraph 690(b) of the *Criminal Code*, based on a consideration of the existing record herein, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Clayton Norman Johnson.

Mr. Johnson was freed on bail pursuant to s. 679(7) of the *Criminal Code* on

---

[394] *Ibid.*

[395] *Ibid.*

[396] *Ibid.*

September 25, 1998, pending his appeal.[397] It could take up to two years before the appeal court hears the case.[398]

Like many previous decisions, in the Johnson case, the Minister reiterated that her discretion under section 690 was to be exercised according to [the six] governing principles set out in *Thatcher*.[399]

VII. Summary of Research Results: Analysis of the Efficacy of Section 690

As I note in this chapter's introduction, I have collected section 690 cases and material from as many sources as possible: media reports, legal databases, reported case law, interviews with legal counsel involved with conviction reviews and questionnaires distributed to section 690 applicants. In many cases, however, available information is insufficient for informed analyses of the entire section 690 process--beginning with submission of applications and the grounds upon which they are based--through to the investigation and decision-making processes involved in particular reviews. Nevertheless, I provide whatever information is available on specific section 690 cases. These data are incorporated throughout the chapter and this section begins with a summary of some of the patterns that emerged in these cases. However, the seven Ministerial decisions I obtained provide more comprehensive details about the conviction review process, which

---

[397] *R. v. Johnson* (1998), 131 C.C.C. (3d) 343 (N.S. C.A.), 345. Although it is "uncommon...for a person under conviction for murder to be released on bail," the Court found that Johnson's release would not be against the public interest.

[398] Tracey Tyler, "Man jailed for killing wife tastes freedom after 5 years," *The Toronto Star* (26 September 1998): A2.

[399] Canada, Department of Justice, *The Section 690 Application of Clayton Johnson*, 2 (see note 392).

allows for more informed analysis of the factors that influence the Minister's discretion under section 690 of the *Criminal Code*.

It is possible to extrapolate--in part--some demographic statistics about conviction review applicants. Not surprisingly, the overwhelming majority of section 690 applicants in this study whose gender was identified are male (41/45 = 91%). Information on race[400] is available for only 19 applicants: 14 are White, four are First Nations, and one is Black. With respect to regional distinctions, Ontario applicants submitted the largest number of conviction review applications (see Table 4.10).

Table 4.10
Distribution of Section 690 Applications By Province

Province	No. of Applications	%
Alberta	5	11
British Columbia	6	14
Manitoba	3	7
New Brunswick	2	4
Nova Scotia	2	4
Ontario	13	29
Québec	5	11
Saskatchewan	2	4
Unknown	7	16
Total	45	100

Over the past century --1898 to 1998-- there have been 42 known Ministerial

[400] The ethnicity of section 690 applicants is known in only five cases and, therefore, is not provided.

interventions, although 15 of these individuals could not be identified.[401] Even accounting for non-meritorious applications that fail to move beyond the initial assessment stage, this is a very low number of interventions.[402] Moreover, there is little doubt that criminal prosecutions spanning the past 100 years have resulted in many more than 42 wrongful convictions. Research conducted in the United States and England bears this out. It is equally true that some convicted innocents have benefited from section 690 of the *Criminal Code*. In this study, 13 applicants received some benefit following Ministerial intervention, ranging from a reduction in sentence to exoneration and compensation. However, in nine cases, applicants did not benefit. In these cases, appeals were dismissed, new evidence was ruled inadmissible, or the individual was reconvicted at a second trial.[403] Even if the outcomes of Ministerial interventions were known for the 15 unidentified cases, it appears, *prima facie*, that the conviction review process is not fulfilling its purpose: to identify and rectify most, if not all, wrongful convictions. As noted by the Runciman Commission in England, the principal reason to establish a new review body was that "successive Home Secretaries had adopted a restrictive approach to their powers

---

[401] See Table 4.2. I could identify the individuals in only two of the 17 new trials that were ordered by the Minister of Justice between 1898 and 1953. All known section 690 applications, interventions and their outcomes are listed in Appendix 4. As noted, of a total of 42 Ministerial interventions between 1898 and 1998, 27 have been identified. Appendix 4 includes: identifiable interventions (N = 27); interventions that were denied (N = 10); applications whose status is unknown (N = 4); and applications that are currently in progress (N = 4).

[402] Data access restrictions and the sporadic reporting of section 690 cases makes it difficult to determine the "true" number of interventions. Nevertheless, based upon all available data, these 42 cases probably represent the majority of Ministerial interventions over this 100-year time period.

[403] In four cases, the outcome of Ministerial intervention is unknown, and the Court of Appeal has not yet commenced proceedings to hear the *Johnson* case.

under section 17 [now s. 3] of the 1968 *Criminal Appeal Act* to refer back cases."[404] Not only is section 690 (Canada's equivalent to the English legislation) utilized infrequently, but it appears that Ministers of Justice also take a restrictive approach to such reviews for a variety of reasons noted *infra* and explored further in Chapter 6.

Between 1983 and January 1999, I could identify 11 section 690 applicants whose conviction reviews were denied by the Minister of Justice.[405] With respect to estimating the "intervention rate," sufficient data[406] are available only for fiscal years 1982-1987, 1988-1991, and 1995-1998. During this 11-year period, the Department of Justice received a total of 488 section 690 applications and, of these, the Minister intervened in only eight cases: a rate of less than 2%.

Section 690 conviction reviews can also span lengthy periods of time. In 15 cases, application submission dates and Ministerial decision dates are known. The mean time between application submissions and Ministerial decisions (to intervene or to reject) in these 15 cases is 23 months. The *McArthur*, *Thatcher*, *Kinsella*, *Morrisroe* and *Kelly* applications and investigations spanned periods of 84 months, 54 months, 48 months, 40 months, and 35 months respectively. However, these investigations represent the lengthiest conviction reviews in this study; several others were completed in less than one

---

[404] Malleson, "The Criminal Cases Review Commission," 929.

[405] In fact, the Minister rejected two individuals' (Walter Tenorio and Allen Kinsella) applications twice, so the actual number of rejections is 13.

[406] In order to estimate the Ministerial intervention rate, it is necessary to know, at least, both the number of applications submitted, and the number of interventions in a given fiscal year. However, not all applications and interventions are completed in a single fiscal year, so intervention rates for any given year can only be approximated.

year. Nevertheless, Department of Justice investigations often take several years to complete, and while some investigations are complex, such delays could and should be minimized.

Of the 27 identified interventions, the reference option preferred by Ministers of Justice has been to refer the case to the Court of Appeal "for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention...," pursuant to section 690(b) (N=11).[407] Asking the Court of Appeal for its opinion (section 690(c)), and, depending upon the court's response, to then hear the case as if it were an appeal (section 690(b)), represents the next most frequent reference option in the applications identified in this research (N=6). In five cases, the Minister ordered new trials pursuant to section 690(a). Only one case was referred to the Court of Appeal under section 690(c) alone. Finally, four cases were handled somewhat differently; the Governor-in-Council referred three cases to the Supreme Court of Canada, and in another case, a free pardon was granted. Between 1960 and 1991, ten of the 18 Ministerial interventions were referred under section 690(b). Between 1992 and 1998, all five Ministerial references have been referred to appeal courts under the combined operation of subsections (c) and (b), asking the court's opinion as to whether new information would be admissible as fresh evidence on appeal and, if so, to hear the case as if it were an appeal under section 690(b).

---

[407] This finding is consistent with Avison's observation, made in 1987, that "generally speaking, where a reasonable basis has been established to return a case to the courts, a reference under section [690(b)] will be the preferred approach." Unfortunately, Avison fails to explain *why* this reference option is the 'preferred approach.' See Avison, "Last Resort," 9.

To facilitate understanding of the Ministerial decision-making process, it is best to begin by noting the distinctions between the various options available to the Minister of Justice pursuant to section 690. Under subsection (a), the burden on the applicant is less onerous because the presumption of innocence "is resurrected"[408] and the evidentiary burden of proof is borne by the Crown. Under subsection (b), the burden of proof is on the applicant to prepare and present the case to prove his or her innocence and appellate courts are charged with the task to hear and decide such cases. The powers of the court of appeal, hearing an ordinary appeal under section 686 of the *Criminal Code*, apply to appeals under this subsection. The appeal court may also receive fresh evidence pursuant to section 683 of the *Code* and the exercise of the court's discretion to admit such evidence is controlled by the four criteria set out in *Palmer*. However, in *Nepoose*, the Alberta Court of Appeal was prepared to admit and consider some evidence that did "not strictly meet all of the criteria set out in *Palmer*," because it was of the view that there was a real possibility of a miscarriage of justice.[409] Similarly, in *Gorecki*,[410] the Ontario Court of Appeal agreed with Donovan, J., in *Sparkes*,[411] that

---

[408] Manson, "Answering Claims," 315.

[409] *R. v. Nepoose* (1992), 71 C.C.C. (3d) 419 (Alta. C.A.), 422-423.

[410] *Reference Re R. v. Gorecki (No. 2)* (1976) 32 C.C.C. (2d) 135 (Ont. C.A.).

[411] *R. v. Sparkes*, [1956] 1 W.L.R. 505.

> on the one hand it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the matter by him to the court. Each case must, therefore, be decided upon its merits, although the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to an injustice or the appearance of injustice.[412]

With respect to references pursuant to subsections (a) and (b), an Executive decision has already been made to have the matter decided in the context of a new trial or to have the matter decided judicially as an appeal. However, under combined references pursuant to subsections (c) and (b)--or subsection (c) alone--it is the Minister who directs the scope of the court's inquiry by referring specific questions to the court for its opinion in order to assist the Minister in making an Executive decision.

That said, the more important tasks are to try to gain insights into the *reasons why* Ministers prefer particular reference options and to understand what factors influence their decisions to intervene (or not to intervene) in particular cases. This is a difficult task. Researchers are not privy to official departmental investigations, nor to communications between Criminal Conviction Review Group (and/or ad hoc) counsel and the Minister of Justice. Moreover, most reasons for decision by the Minister are not made public, which significantly hinders our understanding of the factors that might influence the decision-making process. Even when Ministerial decisions are publicized, it is important to bear in mind that such reports are a condensed and selective version of what the Department of

---

[412] *Reference Re R. v. Gorecki (No. 2)* (1976) 32 C.C.C. (2d) 135 (Ont. C.A.), 146.

Justice deems to be relevant in particular cases.[413] Omissions and/or potential errors made by the Department of Justice--or others involved in such investigations--cannot be determined, short of extensive investigation of each individual case by interested researchers. This is not to imply that departmental investigations are inherently biased; however, because conviction reviews are conducted by the agency responsible for such convictions in the first place--or by their provincial counterparts--the potential for bias must be conceded.[414] Conviction review data found elsewhere are also often incomplete, making it impossible to conduct informed analyses of the legal and extra-legal factors that may influence Ministerial decisions. Nevertheless, it is possible--particularly with respect to the seven decisions that I obtained--to identify some of the rationales that underly Ministerial decisions and to make some observations as to whether Ministers of Justice unduly fetter their discretion under section 690 of the *Criminal Code*.

With respect to the rationales that might influence Ministerial reference choices, the fact that the State must bear the burden of proof in section 690(a) references may explain, in part, why new trials are rarely ordered. Indeed, only four such references have been

---

[413] See McBarnet, *Conviction*, 16-17. McBarnet notes that adversary advocacy is "not by definition about 'truth' or 'reality' or a quest for them, but about arguing a case. ...The good advocate grasps at complex confused reality and constructs a simple clear-cut account of it. A case is thus very much an edited version. But it is not just edited into a minimal account--a microcosm of the incident--it is an account edited with vested interests in mind." ...Far from being 'the truth, the whole truth and nothing but the truth,' a case is a biased construct, manipulating and editing the raw material of the witnesses' perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side." As such, 'both in its concepts and its form the legal system copes with the problems of proof and truth by redefining them" (p. 25). Perhaps similar dynamics occur between section 690 applicants and their defence counsel and the Department of Justice, such that the Minister's Reasons for Decision contain a condensed version of 'constructed facts,' rather than reality, although in some very old cases, one may never know the 'reality' of such a case.

[414] Some people dispute this position, which is discussed more fully in chapter 6.

made by Ministers of Justice since 1960, and in all four cases, the applicants were acquitted. It is not known whether or not these applicants presented more compelling evidence than those who did not receive a new trial as I was unable to locate sufficient information. Another possible rationale--which is closely related to the burden of proof issue--is that reference decisions to order new trials affords Ministers less control over the outcome of the conviction review process. Once an Executive decision is made to order a new trial, it is the trial judge and/or jury who decides the case outcome. Alternatively, perhaps Ministers are concerned not to be seen to interfere with the judicial process, which may result if too many orders for new trials are made. In contrast, references pursuant to subsections (b) and/or (c) facilitate greater Ministerial control over the conviction review process because the scope of judicial review of alleged wrongful convictions is narrower. With respect to subsection (b) references, in many cases, the issues that might be canvassed by courts are limited in terms of the statutory guidelines (i.e., sections 683 and 686 of the Criminal Code) which govern the appellate process, particularly with respect to the admissibility of fresh evidence. Although in *Nepoose*,[415] the court was willing to admit some evidence that did not meet all the criteria set out in *Palmer*, the issues that can be addressed before appellate courts are, nevertheless, more limited than they would be if a new trial were ordered under subsection (a). Similarly, subsection (c) references also limit the issues to be examined by appellate courts because the Minister directs the scope of review by referring specific, and often narrow, questions

---

[415] *R. v. Nepoose* (1992), 71 C.C.C. (3d) 419 (Alta. C.A.).

to the court. Such questions usually request the court's assistance with respect to the admissibility of fresh evidence. Although the Minister has discretion to broaden the scope of issues to be examined by appellate courts, many references under subsection (c) preclude a complete examination of the factors that contributed to the alleged wrongful conviction. For example, with one exception, in all of the cases identified in this study for which Ministers referred questions to courts under subsection (c), appellate courts were limited to an examination of whether or not fresh evidence would be admissible on appeal. Furthermore, the *Marshall Commission* noted that, under section 690(c), "the Minister can ask the Court to examine certain questions relating to the case, which might have opened the door...to a complete examination of police behaviour in obtaining Marshall's conviction."[416] Minister Jean Chrétien had initially decided to refer Marshall's case under section 690(c), but was subsequently influenced by "the views of the Chief Justice in deciding the final form of the reference."[417] Therefore, by utilizing section 690(b), "the possibility of a new trial was raised, an outcome which no one wanted; of perhaps more importance, the evidence would be directed solely at guilt or innocence, and not to the factors leading to the wrongful conviction."[418] In their exercise of section 690 powers, Ministers of Justice must weigh a variety of interests. Nevertheless, when the reference options chosen by Ministers are juxtaposed with the broad discretionary powers afforded

---

[416] *Marshall Commission*, 114.

[417] *Ibid.*

[418] *Ibid.*, 115.

them under section 690, further evidence emerges to suggest that Ministers may be unduly fettering their discretion under this last-resort mechanism. It may be the case that if Ministers broaden the scope of judicial reviews, they risk professional and political credibility by creating opportunities through which criminal justice mistakes and/or corruption can be exposed. Thus, perhaps section 690(b) and (c) references are a reflection of the political importance which is placed upon protecting the legitimacy of the criminal justice system, as compared to the individual interests of a wrongfully convicted individual. Alternatively, the greater frequency by which Ministers refer cases pursuant to subsections (b) and (c) could also indicate, to some degree, judicial deference.

With respect to the factors that influence Ministerial decisions to intervene in a section 690 application, the most significant influence is the compellability of the fresh evidence adduced. Section 683(1)(d) of the *Criminal Code* permits an appellate court to receive fresh evidence where the court considers it to be in the interests of justice to receive the evidence. As noted, the exercise of the court's discretion to admit fresh evidence is set out in *Palmer*,[419] although the standard is more relaxed on a reference if the court believes it is in the interests of justice to do so. If the fresh evidence is reasonably capable of belief, relevant to the issue of guilt, and when "taken together with the evidence

---

[419] *R. v. Kelly*, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: 25-27 November and 10 December 1998; Judgment: 21 May 1999 [Quicklaw], para. 220, para. 1-323. These four principles were described *supra* (see note 273).

adduced at trial, could reasonably be expected to have affected the verdict,"[420] the Minister is more likely to intervene. In *Beaulieu*, for example, the Minister was persuaded that a court should consider the admissibility of new information, which included a recantation from one trial witness and new medical information concerning the other complainant. In *Nepoose*, the court stated that the recantation of a key trial witness "was undoubtedly the most important factor in the decision of the Attorney General of Alberta and the Minister of Justice to refer the matter."[421] However, as Minister of Justice Allan Rock commented in the *Kelly Decision*, "witness recantations will not always be sufficient to justify a remedy under section 690."[422] Indeed, the difficulty of determining the "truth" of Dawn Taber's numerous versions of events ultimately resulted in a judicial split decision. In other cases, however, the compellability of fresh evidence does not guarantee Ministerial intervention. This was evidenced in David Milgaard's first application for conviction review, when arguments put forward on his behalf failed to convince Minister Kim Campbell that a miscarriage of justice had occurred. However, as revealed in Chapter 6, others argue that section 690 decisions are not based simply on the compellability and/or significance of new information presented by conviction review applicants. According to one defence lawyer interviewed for this research, the eventual intervention of Prime Minister Brian Mulroney in the Milgaard case demonstrates that

---

[420] *Thatcher Decision*, 3.

[421] *R. v. Nepoose* (1992), 12 C.R. (4th) 301.

[422] *Kelly Decision*, 8.

section 690 decisions have "interests to serve other than the interests of justice; interests to serve of opinion polls and personal and governmental popularity."

As noted in chapter 3, the nature and circumstances of a crime could influence Ministerial pardon decisions. However, no clear links can be discerned between the nature and circumstances of an offence and subsequent Ministerial conviction review decisions, although such factors will likely influence sentence reviews involving an offender's dangerousness. Of the 27 identifiable interventions, the offences for which applicants requested conviction reviews are known in 25 cases. Most Ministerial interventions involved convictions for murder (N = 13 / 52%). Of these murder cases, the Minister intervened on five occasions, providing applicants with some benefit.[423] In six others, the applicant did not benefit from Ministerial intervention (e.g., Wilbert Coffin was executed). Finally, in two murder conviction reviews, the case outcomes are unknown. The remaining interventions concerned convictions for robbery (N = 2), arson (N = 2), unlawful possession of, and/or forgery of cheques (N =2), sexual assault (N = 2), conspiracy to defraud the government (N = 1), marijuana trafficking (N = 1), unlawful procurement of abortions (N = 1), and break, enter and theft (N = 1). Of these interventions, seven applicants obtained some benefit, two did not benefit, and case outcomes for three applicants are not known.

The grounds upon which the section 690 applications were based is known for 20 of the 27 interventions. Not surprisingly, the overwhelming majority of applications are

---

[423] David Milgaard is included in this total, although his first conviction review was denied by the Minister of Justice.

based, at least in part, on fresh evidence (N=19 / 95%). As the Department of Justice Application Booklet states, applicants "must raise *new* and *significant information* which casts doubt on [their] conviction."[424] Five applications were also based upon recantations from trial witnesses (25%). In one case (5%), the court was simply asked to review a sentence imposed while the applicant was on parole. Other grounds included a challenge to a murder conviction which was incorrectly deemed "planned and deliberate," and whether the applicant was fit to instruct counsel at trial and was suffering from a disease of the mind at the time of the offence.

As noted *supra*, the Department of Justice advises that reasons for decisions in section 690 applications are not publicized unless, in the Minister's opinion, the public interest in releasing such information "clearly outweighs any invasion of privacy that could result from such disclosure" [pursuant to section 8(2)(m)(i) of the *Privacy Act*]. Applicants must also consent to the disclosure of such information.[425] Thus, to date, only the *Thatcher*, *Kelly* and *Morrisroe* decisions have been made available to the public. Of course, what constitutes the "public interest" will vary depending upon one's personal and professional position. Nevertheless, it is useful to examine the common elements in these three cases: (1) all three men were convicted of first degree murder, (2) all are white

---

[424] DOJ Application Booklet, 2. However, as noted *supra*, there are no statutory provisions guiding the exercise of section 690, including the requirement that conviction review applicants must "raise new and significant information." The absence of statutory guidelines is an issue raised by some defence counsel interviewed for this study and is explored further in Chapter 6.

[425] Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to Joan Brockman (29 February 2000).

males, two of whom held positions of public trust,[426] (3) all three cases figured prominently in the media, (4) all three men had submitted new evidence, (5) none of these applicants obtained a remedy, (6) Minister of Justice Allan Rock decided all three cases and (7) the Minister relied upon the six principles he set out in *Thatcher* to govern the exercise of his discretion under section 690. The third point noted above may explain, in part, why these particular decisions have been publicized. Information concerning these convictions was largely already prominent in the public domain because of widespread media coverage; therefore, they were no longer private. Second, other than family members and friends, these section 690 applicants do not appear to have aroused great public sympathy or support and, following lengthy departmental investigations which revealed substantial inculpatory evidence against them, none obtained a remedy. As such, the Justice Department may have decided to publicize the details of these conviction reviews because they could be considered 'safe' examples of the exercise of Ministerial discretion under section 690. Given the nature of these particular conviction reviews, publicizing these decisions poses little political risk for the Minister of Justice because they demonstrate that this last-resort mechanism is an extraordinary one: a remedy that is exercised only if an applicant can demonstrate, after all conventional avenues of appeal have been exhausted, that a miscarriage of justice has likely occurred. That said, the Minister's refusal to intervene in *Thatcher* appears to be a proper decision in view of the evidence against him, and his reference of the *Kelly* case to the appeal court is also

---

[426] Colin Thatcher was a Member of Parliament and Patrick Kelly was an RCMP officer.

defensible given the bizarre nature of Ms. Taber's recantations.[427] Thus, access to these decisions is unlikely to generate a public outcry and, in any event, most Canadians are probably unaware of section 690 because it is a process that is not open to the general public.

Despite the often minimal information available for particular conviction reviews, a variety of themes emerge from a collective analysis of the preceding section 690 cases. The most obvious theme confirms one of the principles set out by Minister of Justice Allan Rock in *Thatcher*: "the remedy contemplated by section 690 is extraordinary." Section 690 is available only after all conventional avenues of appeal have been exhausted and the principles which guide Ministerial discretion provide a narrow set of circumstances in which an applicant might be successful. As such, "something more [i.e., new matters of significance] will ordinarily be required than simply a repetition of the same evidence and arguments that were before the trial and...appellate courts."[428] However, remedies pursuant to section 690 are also 'extraordinary' in a non-legal sense--that is, they are rare. Over the past century, there have been only 42 interventions by Ministers of Justice.

A second theme is that Ministers are held accountable for their section 690 decisions *only in so far* as they "act in good faith" and "conduct a meaningful review."[429] Neither are Ministers obligated to disclose to applicants all information that comes to their

---

[427] Unlike *Thatcher* and *Kelly*, I am less convinced of Morrisroe's culpability.

[428] *Thatcher Decision*, 3.

[429] *Thatcher v. Canada*, [1997] 1 C.F. 289 [F.C.T.D.], 298.

attention during the course of a conviction review investigation and, as noted, reasons for decision are rarely disclosed to the public. Furthermore, although the Minister of Justice is accountable to Parliament for his or her decisions under section 690, the extent of such accountability is far from clear (e.g., whether or not Ministers table their discretionary activities in a given year). The result is a lack of transparency and accountability in the conviction review process. In recent years, the Department of Justice has endeavoured to open up the review process by providing applicants with procedural guidelines and making application requirements more accessible. Applicants are also now provided the opportunity to comment on the department's final investigation brief, prior to its submission to the Minister. These are welcome developments; however, they are not enough. Although I concede that privacy issues are valid concerns, the lack of access to Ministerial decisions, upon request, is unacceptable in a democratic State. Provided that applicants consent to publication of their case, steps could be taken to protect the privacy of participants who desire anonymity by obscuring their identities in decisions that are requested by the public at large. Notwithstanding the fact that Ministers are not legally obligated to disclose information, the secrecy of this discretionary process does not serve the public interest because it precludes scrutiny of how section 690 applications are adjudicated and the competence and comprehensiveness by which such investigations are conducted.

Third, the requirement to produce fresh evidence in section 690 applications constitutes another readily apparent theme. Although there are exceptions, conviction

review applicants are extremely unlikely to obtain a remedy unless they meet this fresh evidence requirement, and even then, it is far from certain that they will succeed in convincing the Minister that a miscarriage of justice has occurred. Of the seven Ministerial decisions I obtained, all applicants had submitted fresh evidence: four applications were rejected (Thatcher, Morrisroe, Kinsella, Milgaard[430]), one Ministerial intervention did not benefit the applicant, and one intervention has yet to be heard by the court of appeal. Only one of these applicants--Wilfred Beaulieu--obtained a remedy.

As the above analysis demonstrates, Ministers of Justice are influenced by both legal and extra-legal factors and conviction review decisions must be viewed through this wide-angled lens. However, I have sacrificed in-depth detail of particular cases by opting to compile as many cases as possible. For example, media and political analyses of individual cases can facilitate a more holistic view of extra-legal influences upon Ministerial decision-making. Moreover, historical records are available for the Royal Prerogative of Mercy in Canada, which facilitates analysis of the factors that influence its exercise. It is more difficult to understand the rationales which prompt Ministerial action under section 690. Nevertheless, some evidence has been proffered which suggests that section 690 decisions are influenced by both legal and extra-legal factors.

Conviction review investigations and Ministerial discretion are guided by narrow legal principles, which I argue unduly fetters Ministerial discretion. It also appears that Ministers can maintain greater control over the conviction review process by choosing particular reference options; this too represents an undue fettering of their discretion.

---

[430] This applies to David Milgaard's first section 690 application.

Such control allows Ministers to protect the legitimacy of the criminal justice system. Furthermore, the secrecy under which conviction review investigations are conducted and by which decisions are rendered provides further evidence to suggest that the section 690 decision-making process involves political considerations as well.

The preceding analysis is based upon what the available data reveal about the section 690 conviction review process. The next two chapters explore the conviction review process from the perspectives of section 690 applicants themselves, as well as defence counsel, an official with the federal Department of Justice, and ad hoc counsel who, on occasion, are hired by the department to assist with such reviews.

Chapter 5

CONVICTION REVIEW APPLICANTS: A SURVEY

I. Introduction

Section 690 of the *Criminal Code* is a last-resort remedy for those who claim to be wrongfully convicted: thus, it is initiated by, and most significantly impacts, prisoners. As such, it is important to understand how the conviction review process is perceived by those who utilize this section of the *Criminal Code*. To facilitate this understanding, I designed a questionnaire and mailed it to all federal institutions across Canada.

Section II describes this chapter's research method. The following sections chart the research process involved in the collection of questionnaire data from federally-incarcerated prisoners and the data analysis method used. Finally, section V summarizes the research results. The low response rate to the questionnaire prohibits generalizations; however, the responses received do provide some understanding of how a small number of applicants perceive the conviction review process.[1]

II. Research Method

I designed an anonymous, mail-out questionnaire with two major objectives in mind: to allow prisoners the opportunity to record and share their experiences about the conviction review process, and to collect empirical data about the section 690 process from the perspective of federally-incarcerated prisoners across Canada. Thus, research

[1] Considerable time and effort was devoted to the collection of questionnaire data, particularly with respect to the Corrections Canada approval process. The response rate, therefore, is extremely disappointing. Nevertheless, I feel it is important to relate my experiences with this aspect of the research process.

objectives were directed by both empirical and phenomenological[2] rationales.

Although some individuals are known to have utilized section 690 of the *Criminal Code*,[3] in general, the identity of potential research participants is unknown. Therefore, for several reasons, I believe that an anonymous, mail-out questionnaire is the most useful method to collect information from section 690 applicants. First, this type of questionnaire allowed me to target federally-incarcerated inmates across Canada.[4] Second, a mail-out questionnaire is cost-effective, can provide greater anonymity for participants and minimizes intrusion into the lives of research participants and Corrections Canada personnel. Another advantage to a questionnaire is that it allows participants time to consider and respond to the questions. Most importantly, a questionnaire has the potential to reveal another set of "truths" about how the conviction review process is perceived, from the perspective of prisoners themselves. As Ryan and Ferrell point out, "the greater the power of an individual within the legal system, the greater the likelihood that his version of the facts will be accepted in the resolution of the case."[5] The questionnaire, therefore, represents an attempt to understand another version of 'facts'

---

[2] Palys, *Research Decisions*, 374.

[3] For example, Ministerial decisions for Patrick Kelly, Sidney Morrisroe, and Colin Thatcher are public documents, and all three men remain incarcerated.

[4] To increase the potential response rate, questionnaires were sent to all federal institutions across Canada, rather than chosen randomly. Three federal institutions were felt to be inappropriate for research purposes and were excluded; the Regional Treatment Centre (Ontario Region), the Regional Health Centre (Pacific Region) and the Federal Training Centre (Québec Region). Matsqui was also excluded for reasons described *infra*.

[5] Kevin Ryan and Jeff Ferrell, "Knowledge, Power, and the Process of Justice," *Crime and Social Justice*, no. 25 (1986): 190, 178-195.

and 'knowledge' from those most affected by conviction reviews.

Conversely, a mail-out questionnaire has several limitations. One limitation concerns the potential literacy problems amongst some of the prisoner population. Another related disadvantage is the possibility that questions might be misinterpreted. If questions were misunderstood, they could not be clarified to participants.[6] The third--and arguably the most significant--limitation is that dissemination of questionnaires within correctional institutions is entirely dependent upon the cooperation of correctional personnel and, as this involved federal institutions across Canada, national approval is required from the Director General of Research in Ottawa.

The questionnaire consists of 25 questions, 18 of which are substantive questions pertaining to section 690 of the *Criminal Code*.[7] Of the remainder, six ask for demographic information, and the final question allows participants the opportunity to provide further comments if desired. Most questions are open-ended to allow respondents the opportunity to relate their experiences as freely as possible.

Ultimately, a variety of obstacles arose throughout the questionnaire process and the aforementioned research objectives were not met. Although response rates for mail-out questionnaires are often quite low,[8] the few responses received in this study are lower than anticipated. Nevertheless, I made a concerted effort to understand the conviction review

---

[6] Palys, *Research Decisions*, 162. This was the case with one of the respondents who indicated that he "needed more comprehension of the questions."

[7] See Appendix 5.

[8] Response rates to mail-out questionnaires can range from 10 to 40%. See Ted Palys, *Research Decisions*, 162.

process from the prisoners' perspective and the research *process* was instructive.

III. The Research Process

In December 1997, I directed initial inquiries concerning questionnaire distribution to Doug Boer, Pacific Region's Regional Advisor, Psychology, Research and Program Evaluation, at Matsqui Institution.[9] On two further occasions, I requested a copy of Pacific Region's research guidelines. These were finally received in March 1998. The research proposal to Pacific Region, explaining the study and my desire to distribute a national questionnaire to federally-incarcerated prisoners, was sent on April 16, 1998. By May 29, 1998, Matsqui had not responded, and Mr. Boer subsequently informed me that he was unable to find my research application. Consequently, another research application was faxed to Mr. Boer on the same day (May 29, 1998). In order to obtain a more definitive timeline for the approval process, Mr. Boer was contacted again on July 3, 1998. At that time, he advised that my research application had been sent to Dr. Larry Motiuk, Director General of Research at national headquarters in Ottawa. On July 17, 1998, the research was approved, but for the Pacific Region only.[10] In August, I contacted Dr. Motiuk's office to request national approval and this was granted soon

---

[9] Each of the five correctional regions develop specific guidelines which researchers are asked to follow when submitting proposals for research.

[10] Letter from Ralph Serin, Assistant Director General - Research, Correctional Service Canada, to author (17 July 1998). The letter cites approval for the Pacific Region only. Applications for national research involving prisoners requires approval from Research Committees in each of the five Corrections Regions. The five regions are Pacific (British Columbia), Atlantic (New Brunswick, Nova Scotia), Québec, Ontario, and Prairie (Alberta, Saskatchewan, Manitoba).

thereafter.[11] However, attempts to obtain a letter specifying national approval were unsuccessful.[12] Therefore, although national approval was granted in August 1998, it was approved only verbally.[13] Unfortunately, the approval letter from Corrections Canada headquarters, identifying only the Pacific Region, had to be distributed with the questionnaires, to all of the Corrections Regions.[14] Thus, the approval process was frustrating and unnecessarily delayed.[15]

A list of all federal institutions across Canada was supplied by Regional Headquarters (Pacific Region), Correctional Service of Canada.[16] The questionnaire was then translated into French, with each question presented in both official languages.[17] The number of section 690 applicants incarcerated at a given time cannot be determined. However,

---

[11] On August 11, 1998, I received a voice mail message from Dr. Motiuk's office advising that he would like to see the results of the Pacific Region research prior to providing approval for national distribution of the questionnaires. On the same day I spoke to Kim Vance at Dr. Motiuk's office to explain that this was not feasible given the nature (i.e., time constraints) of graduate research. Ms. Vance advised that I could appeal further to Dr. Motiuk, explaining my position.

[12] On August 13, 1998, my thesis supervisor (Professor Joan Brockman) spoke to Ms. Kim Vance at Dr. Motiuk's office, asking for an updated letter specifying *national* approval. Professor Brockman was advised, however, that I had already received a research approval letter. Professor Brockman subsequently emailed another request for an updated letter, but this was also unsuccessful. I should have pursued this matter more diligently as it appears that Ms. Vance misunderstood the request.

[13] National approval was granted on condition that the questionnaires be bilingual.

[14] My concern that institutions outside the Pacific Region might not accept that national approval had been granted, did prove to be the case and caused further confusion and delay.

[15] The approval process spanned a period of seven months, which is problematic in view of the timelines involved in completing a Master's thesis.

[16] Fortunately, I received this list in the mail the following day, from Paula Moore, Central Records. There are 48 institutions in Canada which fall under federal jurisdiction (as noted *supra*, four were excluded from this research). Appendix 6 provides a list of institutions which received questionnaires.

[17] Translation assistance was provided by a staff member in the French Department at Simon Fraser University.

annual section 690 applications submitted to the Department of Justice range from 35 to 70. In addition, section 690 applications submitted in previous years also had to be considered in deciding upon the number of questionnaires to distribute. Thus, distribution of 150 questionnaires seemed reasonable: five each to maximum security institutions, four to multi security institutions, three to medium security institutions and two each to minimum security institutions.[18] Moreover, wardens were advised to request additional questionnaires if required.[19] On October 1, 1998, the questionnaires were mailed to all 45 federal institutions.[20] The research package contained: (1) bilingual cover letters to wardens explaining the research and requesting a response as to how questionnaires were distributed (Appendix 7), (2) a copy of the research approval letter from Corrections Canada in Ottawa (Appendix 8), (3) a bilingual cover letter to inmates explaining the research and protection of confidentiality (Appendix 9), and (4) questionnaires and return, self-addressed envelopes.[21]

---

[18] More questionnaires were sent to maximum and multi-security institutions because I assumed that there may be larger numbers of section 690 applicants in these institutions. In a few instances, the number of questionnaires sent to each institution varied by one, in order to total 150.

[19] Only one institution (William Head) in British Columbia requested additional questionnaires. Another institution could not locate the questionnaire package, so another package was forwarded on February 22, 1999.

[20] Four institutions were excluded (see note 4); therefore, 44 of 48 institutions were involved in this study.

[21] Return envelopes were not stamped due to uncertainties about the number of potential respondents and because of the expenses already incurred in translating, photocopying and mailing the questionnaire packages.

Only eight individuals responded to the questionnaire,[22] two of which were incomplete.[23] It is difficult to determine why so few questionnaires were completed and returned. The questionnaire design itself (e.g., length, clarity of questions, double-sided pages) may have played some role in the low response rate.[24] Moreover, some prisoners may choose not to participate in the research due to lack of interest or knowledge about section 690.[25] The warden at Pittsburgh Institution advised that it is a "releasing" institution and, therefore, this "may have impacted [the inmates'] decision not to be part of the research."[26] Moreover, I do not know how many questionnaires reached inmates, so it is not possible to evaluate a "response rate."[27]

Wardens were requested to advise me as to how they disseminated questionnaires

---

[22] The seven written questionnaire responses were received from Edmonton, Kingston, Leclerc, Mission (x 2), Stony Mountain and William Head Institutions. As requested by one respondent, the questionnaire was answered via telephone interview on November 4, 1998. Four questionnaires were received in early November 1998; the remaining three were received in February, April and May of 1999. One of the questionnaire envelopes had been opened and taped closed some time prior to my receipt of it.

[23] These two questionnaires were incomplete; therefore, they are excluded from the ensuing analysis. See Schloss and Smith, *Conducting Research*, 66, who note that "[u]nfortunately, it is common for researchers to receive a number of incomplete or improperly scored responses that are of little use."

[24] The non-stamped return envelopes may have dissuaded some participants from responding; however, this was probably not a critical factor.

[25] For example, William Head Institution identified (not by name) six individuals who had applied for conviction review; however, only one of the six chose to participate in this study. Similarly, Bowden Institution advised that they had two inmates who applied for section 690 review, but no responses were received from this institution either.

[26] Letter from Therese Gascon - Warden, Pittsburgh Institution, to Professor Joan Brockman (11 February 1999). 'Releasing' institutions refers to those in which "offenders are granted day parole, parole or leave on statutory release, sometimes within a matter of a few weeks or months from their initial arrival."

[27] As one participant stated, he "hope[d] I had been receiving replies [to the questionnaire] as in the Prairie Region, C.S.C. generally tries to prevent almost all information from getting out." Letter from respondent to author (24 March 1999).

and informed prisoners about the research.[28] Distribution can be presumed to have occurred with respect to 26 (59%) of the 44 institutions; the remaining 18 (41%) did not advise as to the action taken upon receipt of the questionnaires. Table 5.1 describes the nature of the institutional responses received.

---

[28] Of the 44 institutions involved in this study, 22 responded (nine of which were received following a January 1999 reminder letter, which was sent to 28 institutions), advising how the questionnaires were disseminated or that there were no section 690 inmates in their institutions. Nine institutions (Bath, Collins Bay, Edmonton Institution for Women, Fenbrook, Grande Cache, Hobbema Healing Lodge, Millhaven, Montée Saint-Francois, Nova Institution for Women) advised that none of their inmates had submitted section 690 applications. Nine others (Atlantic, Beaver Creek, Bowden, Joyceville, Kent, Pittsburgh, Riverbend, Saint-Anne-des Plaines, Westmorland) reported that they had disseminated the questionnaires to Inmate Committees, but no one had come forward to participate. William Head and Edmonton (for Men) Institutions advised that they had distributed the questionnaires, and one questionnaire from each institution was ultimately completed and returned. One individual requested a telephone interview to respond to the questionnaire. Finally, Donnacona Institution advised that they had provided a list of potential section 690 applicants to Ralph Serin (Assistant Director General - Research, Ottawa), suggesting that Mr. Serin provide me with this information if he deemed it appropriate. No response was received from Mr. Serin. Although I did not receive responses from the wardens at Kingston, Leclerc, Mission and Stony Mountain, questionnaires were received (one each from Kingston, Leclerc and Stony Mountain, and two from Mission), so their distribution can be confirmed.

Table 5.1
Institutional Responses To Survey Request

Response	Freq.	%
1. No section 690 inmates.	9	35
2. No inmates came forward to participate.	9	35
3. Questionnaires distributed to inmates and completed and returned.	2	8
4. No response from Institutions but questionnaires were completed and returned.	4	16
5. Institution responded to author and advised C.S.C. to take appropriate action; however, no response was received from C.S.C.	1	3
6. Questionnaire completed via telephone interview.	1	3
	26	100

Therefore, the questionnaires received (and the telephone interview) represent only seven of the 44 federal institutions (16%).[29] As noted, however, not all institutions house individuals who have applied for section 690 conviction review.[30]

[29] However, both questionnaires received from Mission Institution had to be excluded; therefore, the questionnaires discussed actually represent only six of the 44 federal institutions.

[30] There may be more than nine institutions that do not contain section 690 inmates, but this cannot be confirmed with respect to the 18 institutions that did not respond.

Beyond a few notable exceptions,[31] many institutions did provide assistance and advised as to how the questionnaires were distributed. Despite the known potential for low response rates to mail-out questionnaires and modest expectations, the results in this study are lower than expected, most probably due to a combination of the above limitations.

IV. Data Analysis

I use an analytic inductive method to analyze both quantitative and qualitative research data. Such an approach to the questionnaire analysis is appropriate because most survey questions were open-ended and because so few responses were received.

---

[31] *Following* the mail-out of the questionnaire package to Matsqui Institution, I was informed by Doug Boer that I must complete a Personnel Screening Request and Authorization Form and that "unless I had a skeleton in my closet," this should not pose any problems for me. The information required included a criminal record check, credit check, reliability, and loyalty (the last two terms are not explained on the form). In view of the fact that I did not request access to the institutions nor access to inmate records, this requirement was deemed more intrusive than warranted (none of the other institutions made such a request). Consequently, Matsqui was excluded from the study. Moreover, given that it was this institution which most contributed to the delay in the initial approval process, this post-hoc request was frustrating. Research requests for Pacific Region must be directed to the Research Section at Matsqui and it became increasingly apparent that the approval process would take longer than expected. In addition, Dr. M. Kuriychuk, Senior Clinician, Department of Psychology at Joyceville Institution, voiced several concerns with the proposed research. He advised that "first, there is no indication that this project has been vetted through the Regional Research Committee of CSC. Second, my department does not have the mandate or the resources to collect data for students... . In short, Joyceville will NOT be proceeding with data collection. Enclosed please find your questionnaires" (Letter from Dr. M. Kuriychuk, Senior Clinician, Department of Psychology, Joyceville Institution, to Professor Joan Brockman, 14 October 1998). As mentioned *supra*, this problem could have been avoided had I been provided with an updated approval letter, specifying approval for all five corrections regions from National Headquarters in Ottawa. I was then referred to Mr. Dennis Kerr, Chair of the Research Committee at Collins Bay, who advised that he would distribute electronic memoranda to all Ontario institutions confirming that the research had been approved by CSC Ottawa. Subsequently, another letter of explanation, and the questionnaires, was forwarded to Dr. Kuriychuk at Joyceville in November 1998. In a January 1999 memorandum (Letter from Dr. M. Kuriychuk, Senior Clinician, Joyceville Institution, to Professor Joan Brockman, 26 January 1999), Dr. Kuriychuk advised that "Joyceville Institution had forwarded the questionnaires to the Chairman of the Inmate Committee in September 1998 (sic)" (the questionnaire packages were not mailed until October 1, 1998, and had to be re-sent in November of 1998).

Although the questionnaire responses are too few in number to provide comprehensive insights about inmates' conviction review experiences, they do provide valuable information about the experiences of a small number of conviction review applicants.

Four of the six respondents were convicted of first degree murder, three of whom were sentenced to life without parole eligibility for 25 years; the other was given a life sentence without parole eligibility for 20 years. The remaining two respondents were convicted of four counts of sexual assault[32] and qualified theft,[33] and the sentences imposed were indeterminate and 18 years respectively. Table 5.2 describes the demographic distribution of the respondents.

Table 5.2
Demographic Distribution of Respondents

Gender	Age	Race/Ethnicity
M	31	white / French Canadian
M	43	aboriginal / Metis
M	51	white / French Canadian
M	56	white / Anglo-Saxon
M	60	white / Anglo-Saxon
M	65	white / Anglo-Saxon

[32] This respondent was declared a dangerous offender in 1985 and states that he has "served close to 15 years in prison on these false charges and convictions."

[33] When asked to describe the offence for which this respondent was seeking conviction review, he replied, "Vol qualifié," which translates into "qualified theft." I assume that the theft is 'qualified' because the respondent allegedly discharged a firearm at police while being pursued (see Appendix 11).

The section 690 applicants[34] learned about the conviction review process in a variety of ways: through the *Criminal Code*, by speaking to lawyers, friends, and other inmates, and from information obtained from politicians. One respondent also cited his awareness of the Donald Marshall Jr. and David Milgaard cases and their subsequent conviction reviews through section 690. The dates of the respondents' section 690 applications and the status of their conviction reviews are described in Table 5.3.

[34] One respondent is currently at the pre-filing stage of a section 690 application; nevertheless, his questionnaire is included because his observations are instructive with respect to some of the problems encountered at this stage of the conviction review process.

Table 5.3
Status of Applicants' Section 690 Conviction Reviews

Date Applied	Status
June 1992 and 1997	- A section 690 remedy was rejected in October 1995. However, in 1997, the respondent's daughter met with Justice Minister Allan Rock asking him to reopen the case. The file remains open and the Department of Justice say that they are still investigating.
April 1995	- Awaiting Minister's decision.
1996	- Respondent has asked the Department of Justice to delay the review until he has obtained counsel.[35]
June 1998	- Respondent is reviewing transcripts and exhibit books and preparing a factum for the Department of Justice.
September 1998	- Department of Justice rejects applicant's request for conviction review, because the appeal process has not yet been exhausted.[36] - Awaiting authorization of appeal from the Supreme Court of Canada.[37]
1999	- Respondent is at the pre-filing stage of a s.690 application.

[35] Letter from Michael Dale, Counsel - Criminal Conviction Review Group - federal Department of Justice, to respondent (20 April 1999).

[36] Letter from Giacoma Vigna, Special Counsel for the federal Minister of Justice, to Pierre Cloutier and André Tremblay (applicant's counsel) (1 October 1998). Mr. Vigna advised counsel that they had "two recourses pending simultaneously; that is, a petition for retraction of a judgment before the Court of Appeal of Quebec, and a request for authorization of appeal before the Supreme Court of Canada. Therefore, as there exists a recourse of appeal before the conventional tribunals, it would be inappropriate for the Minister of Justice to examine the condemnation by virtue of section 690." However, the Québec Court of Appeal had also rejected the respondent's request for retraction of judgment because he had applied for conviction review under section 690. In a letter sent to the Minister of Justice in November of 1998, the respondent's counsel states: "We want you to know of our astonishment and confusion at a situation at the least very strange: according to you, our client is premature because he has not exhausted all the judicial courses at the Québec Court of Appeal, and the recourse of our client is premature because he has presented, amongst others, a request for clemency. One must acknowledge that there is reason here to ask some questions!" (Letter from Pierre Cloutier and André Tremblay, counsel for applicant, to Minister of Justice Anne McLellan - 16 November 1998). The respondent provided me with a copy of his lawyers' application submission to the Minister pursuant to section 690 and is presented in Appendix 11.

[37] Letter from applicant to author (16 February 1999). The applicant advises that he "expects a response to the request for authorization of appeal from the Supreme Court very soon." If the respondent's appeal is rejected, he will then pursue a conviction review pursuant to section 690 of the *Criminal Code*.

Only one of the six respondents has completed the section 690 conviction review process, and a remedy was ultimately denied.[38] The remaining respondents are first-time applicants, and none of the respondents has abandoned their applications. Three respondents received financial assistance to complete and file their section 690 applications. Of these, one was assisted by Legal Aid, another is awaiting a decision from Legal Aid to assist with a section 690 application,[39] and one respondent received financial assistance from a friend to pay for legal counsel.[40]

In order to determine whether provincial Legal Aid Plans provide assistance to section 690 applicants, inquiry letters were sent to the ten provincial Legal Aid Societies in October of 1998.[41] All provinces responded, advising that Legal Aid assistance is

---

[38] In this case, a section 690 remedy was denied in 1995; however, the Department of Justice has kept the file open and is still examining the case. Although this respondent provided a brief statement about why his conviction review was rejected, it has not been included here because it would not be meaningful to readers unfamiliar with the details of this case. The reasons this conviction review failed, from the Department of Justice's point of view, are discussed in the previous chapter.

[39] Legal Aid funding for this respondent's section 690 application has not yet been approved. The respondent advised that his "original application to Alberta Legal Aid for funding for a section 690 application was denied, [and Legal Aid] informed [him] to file the application [himself]." However, "after some persistence," Alberta Legal Aid did agree to pay for one of two DNA tests; the respondent's family is providing financial assistance for the remaining DNA test.

[40] During analysis of the questionnaire responses, it became apparent that the wording of Question #8 was poorly constructed. I asked respondents if they had received financial assistance to complete and file their section 690 applications and, if yes, to check the boxes that applied to their situations. The four boxes were (1) to retain legal counsel to assist with their section 690 applications, (2) Legal Aid, (3) to pay for all required court transcripts and appeal factums, and (4) other. The issue of Legal Aid should have been queried in the box concerning the retention of legal counsel (i.e., to distinguish whether or not financial assistance was provided by Legal Aid).

[41] At a later time, addresses were located for Legal Aid Societies in the Yukon and Northwest Territories (and the new territory of Nunavut) and inquiry letters were forwarded in July 1999.

available to section 690 applicants, contingent upon certain criteria, including the financial and legal merit of each case.[42] In July of 1999, the Yukon Legal Services Society advised that their "current coverage does not provide for financial and legal assistance to individuals seeking section 690 conviction reviews."[43] Similarly, the Legal Services Board of the Northwest Territories and Nunavut do "not have a specific provision in the governing tariff relating to section 690 applications"; however, the Board is "prepared to fund this type of litigation where warranted."[44] Appendix 10 provides a complete description of the responses received from provincial and territorial Legal Aid Societies concerning the availability of legal assistance to section 690 applicants.

Five respondents received assistance to complete and file their section 690

---

[42] These criteria may differ from province to province. For example, the B.C. Legal Services Society advises that "due to limited resources, [they] can only fund section 690 requests that have a *reasonable chance* of success" [emphasis added]. (Letter from Rod Holloway, Barrister & Solicitor, Appeals Division, Legal Services Society of B.C., to author, 10 November 1998). In Ontario, the criteria appears to be more stringent because, although legal aid assistance is available, "it is subject to a strict merit test and only where an opinion letter is provided demonstrating a *high probability* of success" (emphasis added). In addition, the Ontario Legal Aid Plan provides coverage only to applicants who are "unable to obtain assistance from other organizations," and that "in view of the assistance of AIDWYC (the Association in Defence of the Wrongly Convicted), few of these [legal aid] certificates have been issued in Ontario." (Letter from George Biggar, Deputy Director - Legal, Ontario Legal Aid Plan, to author, 2 November 1998). These conditions are problematic for section 690 applicants because AIDWYC currently assists only those convicted of murder and manslaughter. This was confirmed by AIDWYC in a letter to one respondent, who advised that "at present, our organization deals only with cases of first degree murder, second degree murder and manslaughter" (Letter from Rubin "Hurricane" Carter, Executive Director, Association in Defence of the Wrongly Convicted, to respondent, 26 August 1998).

[43] Letter from Karen Ruddy, Executive Director - Yukon Legal Services Society, to author (29 July 1999). Ms. Ruddy also noted that "we have not, to my knowledge, ever had any requests for assistance in this regard."

[44] Electronic mail from Gregory C. Nearing, Executive Director - Legal Services Board of Northwest Territories and Nunavut, to author (10 August 1999).

applications: two received assistance and advice from other inmates,[45] one received assistance from Ministers of Parliament,[46] and two were assisted by legal counsel. The remaining respondent is at the pre-filing stage; however, he advises that he will be assisted by legal counsel to complete and file his application.

I also asked respondents to describe why they believe they were wrongly convicted:

> I was denied full disclosure by the Crown, inhibiting my opportunity for full answer and defence.
>
> Well I had nothing to do with anything at all. You see I wasn't the Vancouver Police Department's favourite person. And the detective actually that arrested me, I used to own a big fire sprinkler company and we were doing a job in the Afton Rooms on Hastings near Main in Vancouver. I heard this screaming down the hall and I went down the hall and they were, you know those undercover clothes they wear?, one of these guys had the little girl by the throat and the other was punching her in the stomach. Well I jumped on them both and knocked them flying eh? And they got up and identified themselves. Well one of the arresting detectives, in my case, he was the one that coerced all this case together. So that was just one detail. I was no saint. I paid off city officials for big jobs and I had jobs passed, you know, piecing this off and piecing that off. So I mean I did do some underhanded dealings but nothing like robbery or murder. [Author's question to respondent: So the police knew who you were and that played a role in your wrongful conviction? Is that what you're saying? Respondent's reply: Yes].[47]
>
> I believe there were numerous reasons, from the media to inexperienced trial lawyer, misgiving by the Crown and Calgary Police, etc.
>
> The main reason in my estimation was we didn't employ an expert witness to rebut Crown experts, who in reality were not experts in the context of my case. Also, counsel relied heavily on psychological experts and they were prohibited from testifying effectively, even though they were recognized experts. Discrepancies in statements, though numerous, were not effectively presented by counsel.

---

[45] Although these respondents received advice from other inmates, they completed and filed their own section 690 applications (i.e., without legal assistance). As to why they completed and filed their applications by themselves, one respondent advises that it was the "only recourse open to [him] at the time." The other respondent states that he "wasn't going to pay a lawyer for something that [he] could do" (Letter from respondent to author, 28 October 1998).

[46] The respondent did not describe what kind of help he received from Members of Parliament.

[47] Following questionnaire distribution, one respondent contacted my supervisor, requesting a telephone interview. On October 28, 1998, I contacted the participant and advised him about the research and that interview questions would adhere to those contained in the questionnaire. I also informed the respondent that his anonymity would be protected; however, he stated that he "didn't care if I used his name." He consented to a tape-recorded interview, which took place on November 4, 1998.

> Because I was innocent and fresh evidence since the trial proves I was falsely charged and falsely convicted. If a dishonest prosecutor and dishonest police officers and [illegible] by my lawyer who dumped me and went along with the injustice the police and prosecutor was doing to me.
>
> Perversion of justice by the substitute prosecutor general in the case.

Respondents provide various reasons for submitting section 690 conviction reviews, which are set out in Table 5.4.

Table 5.4
Reasons for Conviction Reviews

	Inmate Responses
Respondent #1	- The Crown withheld the names of three witnesses. - Suspect identification procedure. - Inconsistent statement related to the identification of the assailant. - DNA testing of hair and blood stains.
Respondent #2	- The trial judge, jury and Court of Appeal erred. - Crown withheld details of a deal made with a paid informer, the chief prosecution witness.[48]
Respondent #3	- Witness perjury at trial. - Editing of audio-tapes by a Vancouver City Police detective. - The jury did not hear all of the evidence.
Respondent #4	- Awaiting forensic analysis by Helix-Biotech of Abbotsford. This testing will be the main reason set out as the most conclusive.
Respondent #5	- Media bias. - Jurors admitted they watched television and read about the case. - Disclosure. - Several important things learned after conviction. - There were section 10(b) *Charter* violations.
Respondent #6	- My [section] 690 application review is based on fresh evidence that the appellate court disregarded. - Challenge to dangerous offender designation.

When asked to describe their prison experiences in light of their section 690

[48] This respondent forwarded two documents in addition to his questionnaire. The first document is a copy of the respondent's Request for Retraction of Judgment to the Québec Court of Appeal (dated 26 August 1998) by virtue of articles 675 and 683 of the *Criminal Code*, articles 483 and 488 of the *Code of Civil Procedure* and article 59 of the Rules of Procedure of the Court of Appeal of Québec in criminal matters. This request document is, with the exception of several paragraphs, identical to the second document, which is a Request from the respondent to Her Majesty the Queen, Laws of Canada, by virtue of section 690 of the *Criminal Code* (dated 28 August 1998). The details of the respondent's reasons for appeal and section 690 application are described in Appendix 11.

applications, the responses were quite diverse.[49] One respondent describes his experience as "favourable, and that case management cooperated and desisted from forcing [him] to take unnecessary programs." Another states that "everybody was 100% behind [him]."

> I don't hold any animosity towards these people, they are just doing their job. When I came into prison, at first I went to a max at Kent Institution. I got along fabulous because I had no grudge against any of the guards and I got along fine with all the inmates and guards. I had no trouble whatsoever. And it has been that way all the way down the line... . A lot of them felt bad when the 690 was turned down, the staff and inmates both.
>
> Very little difference than when in the Canadian Armed Forces.

More negative experiences are reflected in the following responses:

> Violent and degrading.
>
> Relatively negative. Correctional officials are, it seems, insulted by a person who maintains their innocence. I've been to three institutions in the last decade and there are unfortunately a number of the offenders who tend to tell you to simply admit your guilt and do your time. They seem to take your claim of wrongful conviction personally.

In addition to difficulties obtaining legal assistance for their conviction reviews,[50] other problems faced by respondents in the conviction review process include "difficulty in accessing photocopiers and computer or word-processing equipment," "lack of printed materials," and "the run-around by the Criminal Conviction Review Group." In an interview with another respondent, the following exchange took place:

> Author: Could you describe the problems you have experienced in attempting to have your conviction reviewed?
>
> Respondent: Well the procedure was not fair and I think what it is, is somebody in higher places in Parliament or somewhere, doesn't want me out of prison and, did you read Daniel Woods' article in the Vancouver Magazine?
>
> Author: No.

---

[49] One respondent did not understand this question, which he indicated by responding with a question mark.

[50] One respondent states that "the biggest problem to date was finding a lawyer that was willing to give me the time and listen and consider the evidence. I finally found that person... ."

Respondent: Well he done a big article on the 50th-year celebration of the Penthouse Cabaret? It's called the Naked and the Dead... . But the first two or three pages were full pages and then it went on and on. And he did an excellent job of the whole thing. He came out to interview me as a convicted killer you know? And then when he started reading some of the stuff I had, he says, "you have nothing to do with this at all." And I said, "well that's what I'm trying to tell everybody but nobody believes me." And he said, "well I sure believe you because of the evidence I read." They never did put a proper time of death on the murder for one thing. The pathologist, and this is in the trial transcripts, he said at the preliminary hearing - Ross Tweedale was the prosecutor - and the prosecutor said, "when did you realize your error Dr. Burton?" Burton replied, "when I started doing my calculations, I realized that I had taken the body temperature from the room temperature," or vice versa, "and the time of death, rather than between 8:00 and 9:00 o'clock at night, the time of death would be roughly 3:40 a.m.," so then they haggled back and forth in court and then it went to trial, then it all came up again. And the prosecutor said "we have to believe Mr. [X] as to time of death because he's the admitted killer, so we have to believe the time he says he went there and shot him."

Author: And what time was that?

Respondent: He says he shot him between 7:50 and 8:00 p.m. but the body temperature was 91.4 at 7:00 a.m. so there was no way. They are out to lunch.

Author: So the defence and the Crown differed on the time of death?

Respondent: Oh there was a big hullabaloo but that's how the prosecutor got around it. He said we have to believe Mr. [X] because he is the admitted killer.

Author: Are there other problems you have found in your experiences with the Department of Justice and your conviction review?

Respondent: The other problems, like when they went to interview my stepdaughter, who had recanted her testimony, they took an RCMP officer along, and a man named Ron Fainstein from the Department of Justice, to interview my stepdaughter, and took along an RCMP officer who had them under suspicion for arson - her and her live-in boyfriend - so right away it was panic-ville. And he told her mother, my ex-wife, that she could be charged for perjury because of giving this testimony at trial and then recanting. So they scared them into recanting their recantation. I look at it this way. There is no justice, it is just strictly a legal system, not a justice system.

Although most respondents are first-time applicants for section 690 conviction review, several responses indicate some knowledge of the process. When asked whether they believe that section 690 is an effective means of conviction review, the respondents offered the following observations:

No, it should be placed into the hands of an independent party.

Frankly no. You are asking, in essence, the people who convicted you to admit a mistake. After the Marshall inquiry, recommendations were made but not acted upon.

It may be for me, as fresh evidence proves malicious prosecution.

From all I've read and learned from others who have made applications in the past, and recent past, I would have to say no. A [section] 690 application is laborious and very time consuming. Once at the Department of Justice, it could take anywhere from six months to five years or even more. From responses I've read of other prisoners,[51] it appears that although there is no need to make the Minister believe you're innocent, just show a possibility of wrongful conviction - the trend appears to be to deny instead of looking at the possibilities.

Too soon to pass judgment.

When I asked the interviewee for his perspective on the effectiveness of the section 690 conviction review process, the following exchange took place:

Respondent: I figure what they should do with the 690 process, is they should have independent chair persons. They could have their lawyers come out here, or investigators, come out here but then it should be turned over to independent chairpersons after that. And let them do it.

Author: Someone independent from the government and justice system, is that what you're saying?

Respondent: That's correct. They'd have to be lawyers more or less and you know how they have a jury in court? Well, have a six-man or six-man/woman jury and take all the evidence and let them go through it all and let them make a decision on it. If I admitted my guilt, I'd win my 15-year review hands down. But I'm not going to ever admit to the guilt, even if I have to die in prison. Why should I admit to anything when I had nothing to do with it?

Author: It's a difficult situation isn't it. You won't get parole unless you admit guilt.

Respondent: You've got to admit guilt and show remorse. Well how can you show remorse for something you never done?

The respondents also recommend a number of improvements to the section 690 conviction review process. The two most frequently cited recommendations are the

---

[51] It is unclear what the respondent means by the statement, "responses I've read of other prisoners." If he is referring to questionnaire responses, I did not receive any other questionnaires from this particular institution. Alternatively, the respondent may have obtained such information through other means, such as newspapers or books.

establishment of an independent body to investigate conviction reviews, and time limits on such investigations:

> Separate the review mechanism completely from the prosecutorial department.
>
> I figure what they should do with the 690 process, is they should have independent chair persons... . And let them do it.
>
> Time frames for the investigation. If only a summary is completed on a section 690 review, restrict the time frame to a year.
>
> I think they should have a limitation or time constraints - like say, six weeks - and the review should be done by an independent group. If they can't make a decision in six weeks, then something's wrong. Not three and four and five years later, you know?

The remaining responses were as follows:

> Too soon to pass judgment.
>
> I have not given a lot of thought to this question, although it would seem to me that some form of a Board of Review, with five to seven lawyers from across the country, so regional differences which exist are examined. Different circumstances are more readily accepted due to regional beliefs and prejudices.
>
> Note newspaper clipping of AIDWYC's comments about 690 applications. [This respondent included a copy of this newspaper article with his questionnaire and other documentation. AIDWYC's recommendations are (1) investigations of section 690 cases "are conducted in an adversarial way, defensive of the status quo and premised on an assumption of guilt..., they are not conducted in an impartial manner," (2) "legal aid funding is frequently unavailable to those pursuing a review," (3) [the reviews] "are conducted largely in secret...[and] the applicant is rarely aware of the progress in the review, and is not invited to participate in interviews of witnesses," (4) "lengthy delays in the processing of applications are the norm, [t]hey can take years to complete, and (5) "a new commission [should be established], which it would call the Wrongful Conviction Board, [should] be composed of former and current judges as well as lawyers and lay members. It should be given unhindered access to all documents and transcripts and be authorized to compel witnesses to testify"].[52]

In addition to the questionnaires, respondents were given the opportunity to provide additional comments if they so desired. Four respondents sent personal letters and other documents describing their experiences and convictions. In relating his experience with the conviction review process, one respondent states that:

---

[52] See Kirk Makin, "Wrongful-conviction appeal process called hollow remedy," *The Globe and Mail* (18 February 1999): A12.

> It has been a long and frustrating process. I did all the research and gathering of evidence. I then contacted AIDWYC and the Inmate Advocacy Program, run from the N.D.P. Justice Critic's office. The reason why I did my own research and filing of my section 690 [application is that] I have a few years of law and I knew what points of law I wished to argue, and I wasn't going to pay a lawyer to do something that I could do. I've used the ingenious and personal experiences of those who are currently under a section 690 [review] or those whose cases have been dismissed. Since you played such an instrumental role in my case,[53] I believe you are well aware of the frustration and lengthy delays and bureaucracy run-arounds that occur."[54]

Another respondent, who is currently at the pre-filing stage of a section 690 application, states:

> I wish to explain why I chose to participate in the absence of an application. Often a problem in actually getting to the point of filing such an application is finding a lawyer who will take the time to consider your case, as an offender who files his own application is at a serious disadvantage in that access to proper legal material is not generally available in a Federal Penitentiary and the education level of the majority of prisoners is far from adequate. I considered whether my information contained on this questionnaire would be of any assistance to you and concluded that the process of actually getting to the point of filing should be considered, as many prisoners would give up this avenue as it's difficult to make progress enough to reap the benefits of such an application, should you receive an unbiased review of the information."[55]

In September of 1996, this respondent requested assistance from the Legal Aid Society of Alberta; however, the Appeals Committee of the Board of Directors denied his request for assistance with a section 690 application because the "Committee was of the opinion that the client [could] make the application on his own behalf."[56] In April of 1997, the respondent sent additional correspondence to the Legal Aid Society of Alberta, but again, the response was the same:

---

[53] I had simply made some inquiries concerning the respondent's section 690 application while completing a co-op placement with the Inmate Advocacy Program at the N.D.P. Justice Critic's Office [then MP Chris Axworthy] in Ottawa in 1994 and 1995.

[54] Letter from respondent to author (28 October 1998).

[55] Letter from respondent to author (23 March 1999).

[56] Letter from O. Dobrowney, Barrister & Solicitor - Legal Aid Society of Alberta, to Mr. T. Glancy, Barristers & Solicitors - Royal, McCrum, Duckett & Glancy (10 January 1997).

> We must advise that the Committee was of the opinion that you can make the application to the Minister of Justice on your own behalf and if the application is successful, it can be determined at that time if the Federal Crown will pay for the DNA testing. If they are not prepared to do so, you can reapply for Legal Aid and the matter will be referred back to the Appeals Committee for their further consideration.[57]

This respondent had also "petitioned both the federal Department of Justice and the Department of the Solicitor General, requesting that their departments fund the DNA analysis, with both departments informing [him] that as the conviction was affirmed in the Supreme Court of Canada, they are no longer responsible for supplying the avenue of redress."[58]

In another case, the respondent submitted his section 690 application in 1996; however, due to his inability to pay $600.00 for a Legal Aid Certificate in Ontario, he has asked that the Department of Justice review be delayed[59] until he has obtained legal counsel:

> Legal Aid has refused to give me a Legal Aid certificate unless I come up with $600.00. It is my respectful opinion that the Ontario Government has violated my right to get a fair hearing on my 690 application, all because I have no money to pay the $600.00 for a Legal Aid certificate. Corrections Canada refuses to send me to another province where a Legal Aid certificate would be supplied to me free of charge.[60]

This respondent also states that "our justice system must be fair, but Legal Aid is not interested in the innocent in Ontario. If I had money I would have had my conviction and

---

[57] Letter from O. Dobrowney, Barrister & Solicitor - Legal Aid Society of Alberta, to respondent (9 June 1997).

[58] Letter from respondent to author (23 March 1999). However, as noted *supra*, after "some persistence, Legal Aid did agree to pay for one of two DNA tests."

[59] Letter from counsel, Criminal Conviction Review Group - federal Department of Justice, to respondent (20 April 1999).

[60] Letter from respondent to author (22 June 1999). The respondent enclosed a copy of the Ontario Legal Aid Plan Payment Agreement, dated 29 April 1997, which states that "the Law Society agrees to issue a Legal Aid Certificate for $600.00;" however, as noted, he cannot afford this fee.

sentence overturned two years ago."[61]

V. Summary of Research Results

Despite the poor response rate and non-representativeness of section 690 applicants, the aforementioned respondent observations are informative. Interestingly, the two most frequently cited recommendations to improve the section 690 conviction review process are consistent with recommendations made by many others outside the penal system (i.e., the establishment of an independent review body, and time limits for such reviews). Moreover, although the 'evidence' presented here with respect to the effectiveness of the current conviction review mechanism is minimal, the problems experienced by the respondents deserve to be appreciated and considered. The responses represent the reality of a few inmates who have experienced the conviction review process and, as such, are important. Of particular concern to respondents are the difficulties of obtaining legal assistance for section 690 applications. Furthermore, the requirement of fresh evidence for a section 690 conviction review necessitates legal counsel, or advocates outside the prison environment, to investigate such claims and to gather sufficient evidence to justify a departmental investigation, let alone a section 690 remedy. There is little point (or justice) in a last-resort remedy if it is not equally accessible to all those who require it.

The next chapter analyzes the conviction review process from the perspectives of defence counsel, Department of Justice counsel, and ad hoc counsel.

---

[61] Letter from respondent to author (6 May 1999).

Chapter 6

THE CONVICTION REVIEW PROCESS: LEGAL COUNSEL PERSPECTIVES

I. Introduction

The process set in motion by a section 690 application subsequently involves the participation of a variety of actors. Lawyers with the Criminal Conviction Review Group (CCRG) at the federal Department of Justice receive and investigate section 690 applications and, on occasion, ad hoc counsel are hired to conduct such reviews. Defence counsel and other advocates, such as The Association in Defence of the Wrongly Convicted (AIDWYC), also participate in the conviction review process. As such, it is important to understand how these individuals perceive the section 690 process. To achieve such insights, I interviewed defence counsel, a lawyer with the Criminal Conviction Review Group, ad hoc counsel who assist the Department of Justice and the Executive Secretary of AIDWYC.

This chapter opens with a description of the qualitative method used. The research process is explained in Section III and Section IV provides a descriptive narrative of interview responses. In the final section (V) I analyze the empirical data, using an analytic inductive approach.[1] This section attempts not only to identify response patterns and themes within and between interview groups but also to understand how such perceptions might be linked to broader social and political contexts.

---

[1] Schloss and Smith, *Conducting Research*, 190. These authors argue that an analytic inductive approach is appropriate when researchers "have a specific problem, question, or issue in mind and want to develop a theory or hypothesis about it."

II. Research Method

One of the objectives of this study is to "understand meaning in a given context"[2]--hence my use of a triangulated methodology. It is equally important, however, to link the various participant responses to broader social and political structures, as this may foster additional insights about the function and rationales underlying the exercise of this last-resort remedy.[3] To facilitate these goals, I use a critical ethnographic approach. Whenever possible, participants are quoted verbatim so as to minimize the imposition of my own biases, and to reflect participant perspectives as accurately as possible. Moreover, an analytic inductive approach to data analysis is useful with respect to the generation of theoretical explanations.

The two predominant interview groups are comprised of those who represent section 690 clients--currently, or in the past--or those who investigate conviction reviews. Given the exploratory nature of this study, I "strategically"[4] selected participants using both purposive and snowball sampling methods.[5] Although caution must be used in generalizing results obtained from such non-probabilistic sampling, those involved with

---

[2] Davidson and Layder, *Methods*, 197.

[3] For example, see Thomas, "Doing Critical Ethnography," 6.

[4] Palys, *Research Decisions*, 83.

[5] In September of 1998, I contacted the Law Society of B.C. to inquire if they possessed a list of lawyers involved with section 690 cases. I was subsequently referred to a Lawyer Referral Service, but was advised that such a list did not exist. Therefore, I identified potential interview participants through Ministerial decisions, AIDWYC materials, newspaper articles, and reported cases. In addition, during the interviews, I asked defence counsel if they knew of other lawyers who had represented section 690 clients.

section 690 conviction reviews are a relatively small, specialized group.[6] That said, the intent is not to generalize the research results to a larger population, but rather to understand how the conviction review process is perceived by those with direct experience.[7] Thus, 'representativeness' is of less concern than revealing the perceptions and experiences of this specialized participant population about the conviction review process. The intent, therefore, is to illuminate the social and political contexts within which participants express themselves, and to analyze how such world views might impact the substantive effectiveness of this last-resort remedy.

The analytical process continued through my development of interview questions which focus on the collection of empirical data most relevant to my study's research question. I developed a standardized set of interview questions for each participant group in order to address specific areas of research interest; however, some questions are the same for each of the four interview groups.[8] Most interview questions are open-ended and fall under five analytic categories: (1) the section 690 conviction review process,

---

[6] There are five full-time lawyers with the federal Justice Department's Criminal Conviction Review Group. In addition, ad hoc counsel are, on occasion, hired by the Department of Justice to conduct conviction reviews. The total number of defence counsel in Canada who have assisted section 690 clients is unknown; however, it is not likely to be a large number. Section 690 conviction reviews often require significant time and resources and most applicants are likely to be indigent. Moreover, when I asked defence counsel to identify other lawyers who had experience representing section 690 clients, in many instances, the same defence counsel were identified.

[7] Schloss and Smith, *Conducting Research*, 86.

[8] In my interview with the AIDWYC representative, however, I did not ask many of the proposed questions due to time spent discussing AIDWYC's mandate, their criteria for assisting individuals they believe to be innocent, and additional issues that arose during our conversation.

including the section's merits and deficiencies, (2) the prevalence and causes of wrongful conviction, (3) the appellate court system, (4) the adversarial legal system, and (5) career experience. Moreover, as each interview closed, I asked participants what additional questions might be asked about the section 690 process and to provide further comments if desired. Each participant received a copy of the proposed interview questions prior to interviews so they could consider the questions in advance.[9] Although this may promote prepared answers to some extent, it can be defended on the basis that the interviews provided only 'one-shot' opportunities to address specific areas of interest, thus engendering the desire for considered and focused responses.[10] Given the time constraints of many of the respondents, I felt it prudent to allow participants time to consider interview questions at their own convenience. I also encouraged participants to articulate any other issues or concerns they feel should be raised with respect to the section 690 conviction review process.

---

[9] During the interviews, I reminded participants who had not returned a signed consent form to do so. Eleven of the 14 defence counsel returned consent forms agreeing to be identified by name and to have interviews tape-recorded. The remaining three provided verbal consent to have the interviews tape-recorded. All four ad hoc counsel returned consent forms and agreed to tape-recorded interviews; however, three asked to be identified by pseudonym only. Finally, the AIDWYC respondent provided verbal consent to a tape-recorded interview.

[10] Of course, this does not guarantee participant preparation prior to interviews. Indeed, as the interviews progressed it became apparent that many respondents did not appear to have spent significant time preparing responses prior to the interviews. This can most likely be attributed to time constraints and more urgent obligations incumbent upon respondents.

III. The Research Process

Through case law and media sources, I initially identified 17 defence counsel who have represented section 690 clients. In May 1998, letters were distributed to defence counsel advising them of the research and requesting their participation through telephone interviews.[11] These letters were accompanied by a copy of the proposed interview questions[12] and a participant consent form.[13] Ultimately, I interviewed eight of these 17 defence counsel.[14] Using the snowball sampling method, I identified an additional ten defence counsel and of these, six participated in interviews.

I located the identities of Criminal Conviction Review Group lawyers in the 1999 Law Directory[15] and, in June of 1998, letters were distributed to five counsel at the Department of Justice explaining the research.[16] Mail-outs included consent forms and a copy of the proposed interview questions.[17] In July of 1998, Mary McFadyen (Assistant Senior Counsel with the Criminal Conviction Review Group) advised that one of the

---

[11] See Appendix 12.

[12] See Appendix 13. Question #17 was ultimately omitted from interviews for two reasons: interviews took longer than I had initially estimated, and I did not believe this question was critical to the overall thesis objectives.

[13] See Appendix 14. The consent forms sent to each interview group are identical.

[14] Of the remaining nine defence counsel, three declined to participate, three could not be located, one had died, one was not contacted for an interview because his legal firm partner had agreed to be interviewed, and one was unavailable at the scheduled interview time. The latter counsel was contacted on two further occasions but did not return my telephone calls.

[15] Judy Antoniadis, ed., *Canadian Law List* (Aurora, Ont.: Canada Law Book, 1999).

[16] See Appendix 15.

[17] See Appendix 16.

department's counsel had been assigned the task of answering the interview questions for the Department of Justice.[18]

A list of ad hoc counsel to the Department of Justice was also provided by Mary McFadyen.[19] Letters explaining the research,[20] the proposed interview questions[21] and consent forms were distributed on March 10, 1999. In May of 1998 an explanatory letter was also sent to Rubin Carter,[22] Executive Director of AIDWYC, requesting an interview (copies of the proposed interview questions[23] and a consent form were enclosed). Due to other commitments, Mr. Carter was not available for an interview; however, the Executive

---

[18] In a telephone conversation with Ms. McFadyen (13 August 1998), she advised that following my research request, all of the Criminal Conviction Review Group lawyers convened and it was decided that one counsel would provide a general overview of conviction reviews, in addition to statistical information. Some of the interview questions are of a statistical nature (questions 9, 12, 13, and 14) or could otherwise be answered by one Department of Justice (DOJ) lawyer (questions 1, 2, 3, 7, 11, 15 and 17); therefore, it would have been redundant to ask these questions of all Department of Justice counsel. Unfortunately, during my interview with the DOJ respondent, he advised that "he could not answer" questions 4 to 6 and declined to answer questions 19 to 26. When I inquired about speaking with other departmental counsel, Ms. McFadyen suggested that I complete my interview with the DOJ representative before the Department of Justice considered participating in additional interviews. I did not conduct further interviews with Department of Justice counsel.

[19] Letter from Mary McFadyen, Assistant Senior Counsel - federal Department of Justice, to author (26 February 1999). This list contains the names of nine ad hoc counsel; one from British Columbia, one from New Brunswick, one from Ontario, one from Nova Scotia, and five from Québec. I selected five potential participants (one from each province) for interviews. Of these five counsel, only one declined an interview.

[20] See Appendix 17.

[21] See Appendix 18.

[22] See Appendix 19. Mr. Carter was wrongfully convicted of murder and sentenced to death in New Jersey in 1967. New evidence emerged eight years later and his conviction was overturned. However, at a second trial in 1976, Carter was re-convicted. In 1985, the United States District Court overturned the second trial conviction and Mr. Carter was released, after serving 19 years in prison. See Brad Daisley, "B.C. Crown Grew Up in New York's Meanest Ghetto," *The Lawyer's Weekly* (20 August 1999): 9.

[23] See Appendix 20. As noted *supra* (note 8), due to time constraints and coverage of other issues, I did not ask several of the proposed questions during my interview with the AIDWYC respondent.

Secretary of AIDWYC agreed to participate. With the exception of the Department of Justice respondent, all participants consented to tape-recorded telephone interviews. Over a 10-month period I conducted 20 interviews;[24] with 14 defence counsel,[25] one Criminal Conviction Review Group lawyer, four ad hoc counsel, and one member of AIDWYC.

The qualitative aspect of my research does not attempt to represent the universe of individuals involved with the conviction review process. Nevertheless, many of the major players in the section 690 process are represented. Moreover, many interview responses reflect views consistent with the literature and, therefore, are useful in terms of linking the pieces of the conviction review puzzle.

IV. Legal Counsel Perspectives - A Narrative

This section provides a descriptive narrative of interview responses from defence counsel, ad hoc lawyers, a counsel with the Criminal Conviction Review Group and the Executive Secretary of AIDWYC.[26] For ease of analysis, responses from each interview group are discussed in distinct sections except in cases where interview questions are the same for each group. Such integration will more effectively illuminate patterns, if any, between respondent perceptions.

---

[24] I conducted interviews between May 26, 1998 and April 15, 1999.

[25] I interviewed a larger number of defence counsel because they comprise the largest sub-group of individuals most closely involved with conviction reviews (with the exception of section 690 applicants themselves).

[26] Although most interviewees did not request anonymity, I do not identify individual responses. A list of interview participants who consented to be identified is provided in Appendix 21.

Of the 14 defence counsel I interviewed, 13 (93%) are male; years of experience range from seven to 36 (see Table 6.1) and the mean interview time was 52 minutes.[27]

TABLE 6.1
Years Worked as Defence Counsel

Years Worked	*f*	%
6-10 years	4	28.50
11-15 years	0	0
16-20 years	4	28.50
21-25 years	3	21.25
26-30 years	2	14.50
31-35 years	0	0
36-40 years	1	7.25
Total	14	100.00

With one exception, all defence counsel have encountered convicted clients who they believe are factually innocent of the crime for which they were convicted. This is not surprising given that I selected interviewees based upon their experience with individuals seeking conviction review through section 690 of the *Criminal Code*. I subsequently asked defence counsel whether any of these individuals were ultimately acquitted by appellate courts (see Table 6.2).

[27] See Appendix 22. Four lawyers have performed both Crown and defence work and defence counsel participants reside in five provinces.

Table 6.2
Acquittals on Appeal of Clients Believed to be Factually Innocent

Response	Freq.	%
Yes	5	35
No	4	29
Sometimes	4	29
N/A[28]	1	7
Total	14	100

Although the "dark figure of innocence"[29] is impossible to determine, some attempts have been made to estimate the extent of the problem by researchers in the United States and England.[30] In Canada, however, no such estimates have been attempted. As such, I wanted to determine defence counsel perceptions of the number of wrongful convictions in Canada in a given year. Five respondents estimate an annual wrongful conviction rate of 10 percent. Two others suggest that many wrongful convictions are related to sexual assault allegations. One respondent believes that the largest body of wrongful convictions are related to sexual assault allegations, "particularly with [respect to] false memory syndrome." Another commented:

[28] This defence lawyer did not provide a definitive answer to this question.

[29] See Bedau and Radelet, "Miscarriages of Justice," 83, who define the 'dark figure of innocence,' as "the number of cases per year or per jurisdiction in which undetected substantive (as opposed to 'due process') error occurs in potentially capital cases."

[30] See Huff et al., *Convicted But Innocent*; Report by Justice, *Miscarriages of Justice*.

> There has been a real swing...in cases like sexual assault where once upon a time it was very difficult to have a sexual assault charge go forward. You know, skepticism, lack of proof, need for corroboration... . The pendulum has swung dramatically to the other side such that at the drop of a hat, a person in authority will lay a charge based on a complaint no matter how half-assed it is. As a result of that, many charges go forward that in perhaps more pragmatic and reflective times, a prosecutor or a police officer might sit back and say, this is a crock, or there just isn't the basis for this kind of thing. And we really have to decide whether we should be pursuing this or not but that doesn't happen now. What happens is that the complaint is made, the cops get on their horses and they charge and it is a real uphill battle to convince someone that, no, this was not an appropriate case for charge. And a lot of those cases go forward and unfortunately, a number of those cases result in what I would suggest are improper convictions and a lot of them have to do with things like historic sexual assault, recovered memory syndrome. So yes, those are the kind of things that lead to improper convictions. They may not be as dramatic as somebody being convicted of first degree murder but the impact on them and their lives and their families' lives is truly dramatic.

Three others state that wrongful convictions occur more often than we want to believe, and two respondents suggest that "there are a great many wrongful convictions," perhaps "hundreds." In some cases, defence counsel did not estimate the extent of wrongful convictions in Canada; however, they noted that quantification of such miscarriages in other countries may be comparable to the Canadian context.

> No. I wouldn't have any authoritative basis. I think there have been some numbers that have been mentioned both in the United States and also in Britain. I think that we can probably safely assume that our numbers would be comparable, taking demographic differences into account but I would not have any independent basis for trying to put a number on it. I think it's more than people realize.

* * * *

> I don't know that I'd venture an opinion. I have heard about studies done in the United States in which they've tried to design surveys to come up with approximations and I would think that those would apply just as well in Canada - at least as much in Canada. I saw one study of, I think it was 67 murder cases, and there was reason to believe there were wrongful convictions in something like 20 of them, which is pretty shocking.

Although wrongful convictions for indictable offences--such as murder--tend to be the most highly publicized cases, one defence lawyer draws attention to the fact that wrongful convictions often occur at the provincial level.

> I'm not just talking about murders but about all convictions, right down to provincial courts. That's where I see the real injustices carried out. This is where you see the bulk of...people getting up and pleading guilty and you can sit in a court on any day and just hear from the facts read out that people are agreeing to things that they didn't do. They'll charge two people and one of them will take the rap, saying, "I just did it because my buddy has got a record, things would go harder on him." And then there are people who just plead guilty because they can't afford a lawyer and so forth, so that's where I come up with a much higher percentage number and again, it's not the big crimes, it's the less serious ones. But my argument is that if we allow injustices to occur at this level then we're going to lose all faith in the ability of our system.

Only one defence counsel believes that there are very few wrongful convictions and suggests that such "convictions are not running rampant in our justice system."

Ad hoc counsel[31] do not provide specific estimates of the extent of wrongful convictions in Canada. Nevertheless, two respondents do not believe that there are a large number of wrongful convictions in this country, and another states that there are "very, very, few." However, one lawyer cautions that focusing on the quantification of wrongful convictions may "lead us down the wrong path."

> Numbers, no. My guess is that they are probably not huge numbers. It's not the numbers that matter. My guess is that probably 90% or more of people brought before the courts either plead guilty or are legitimately found guilty of something. I just don't think that we should be looking at all of this based on numbers because if we do, in a time when society places so much importance on the value for your dollar, then it's going to lead to the kind of argument that, "well, if there are only two or three [wrongful convictions] per year, should we be putting this kind of money into," and I just think that is really going down the wrong path. [Wrongful convictions] are probably not very numerous in a given year but one is too many and collectively, over time, we have people whose convictions go back years and some are settled and some are not, so collectively they are more numerous. But it's not the sheer number that is the issue. The issue is, how do we perceive ourselves as a society. I've often said, and I'm not the first one to say it, that the criminal justice system is so often a mirror of what we are as a society. What do we find reprehensible, who do we punish, why and how do we punish, how do we treat them when we do punish them, how do we treat victims of crime, and what importance do we place on only punishing those who are truly guilty?[32]

The lawyer with the Criminal Conviction Review Group at the federal Department of Justice declined to answer this question.

As the literature review demonstrates, a substantial body of wrongful conviction

---

[31] With respect to his request for anonymity, one ad hoc counsel states: "I can't imagine that attributing comments to me would make a whit of difference in terms of what you're doing. If I was going on the public record as it were, I would probably want to be careful to qualify remarks I made; I'll probably try to be pretty careful anyway because I want to respond to your questions as accurately and as helpfully as possible. But whenever you are speaking on the public record about something that invokes a number of sensitivities in different quarters, it's very important to be precise and to be clear."

[32] If this respondent is correct in her estimate that at least 90% of people brought before the courts either plead guilty or are legitimately found guilty, this may still result in a high number of wrongful convictions in Canada each year. As the Huff et al. research suggests, even if 99.5% of all annual convictions for index crimes in the United States are proper, wrongful convictions would still total approximately 10,000 each year in that country alone.

research identifies the major causes of such injustices. The causes cited by defence[33] and ad hoc counsel in this study confirm those identified in the literature.[34] The most frequently cited causes identified by defence counsel are judicial error (N = 5),[35] defence counsel errors and/or incompetence (N = 5), lack of resources for defence counsel to do a proper job (N = 5), police tunnel vision (N = 3), misleading and/or inaccurate forensic evidence (N = 3),[36] eyewitness misidentification (N = 3), incompetent police investigation (N = 3), Crown error or overzealousness (N = 3),[37] the use of jailhouse informants (N = 3), and unequal resources between the prosecution and defence (N = 3).[38] Similarly, ad

---

[33] As the interviews progressed, it became apparent that some defence counsel considered this question more comprehensively prior to interviews than did others. For example, one respondent drafted notes prior to our interview. Conversely, many interviewees appeared to cite causes that came to mind at the time of the interview and, therefore, do not reflect the full panoply of causal factors. Furthermore, the types of errors identified by some respondents do not specify the conditions under which such errors are made (e.g., eyewitness misidentification can occur because of honest perceptual errors, police coercion or inappropriate identification procedures).

[34] The DOJ lawyer did not answer this question and I did not direct this question to the AIDWYC respondent.

[35] One lawyer suggests that in some cases, judges are narrow-minded and lack insight. Another respondent identifies insufficiently trained judges as an additional causal factor in wrongful convictions.

[36] Two of these defence counsel use the phrase 'junk science' to describe such evidence.

[37] One respondent suggests that lack of Crown disclosure is one possible causal factor. Two others cite 'Crown error' but do not specify the nature of such errors.

[38] Additional causal factors cited by defence counsel include public pressure to solve cases, witness perjury, false confessions, restrictive appellate court rules, community prejudice against an accused, and false accusations.

hoc counsel identify defence counsel errors and/or incompetence (N = 1),[39] judicial error (N = 1),[40] police tunnel vision (N = 1), misleading forensic evidence (N = 1), eyewitness misidentification (N = 1),[41] incompetent police investigations (N = 1), and Crown error and/or overzealousness (N = 1) as possible causes of wrongful conviction. However, as suggested by two defence counsel respondents--and confirmed by the literature--wrongful convictions involve a complex interplay of factors.

> I think there are a range of causes, some or all of which may operate in any given case. In terms of wrongful convictions, I think one very good survey of this is the [Donald] Marshall case where the Royal Commission found that basically every aspect of the criminal justice system and process had failed. So those examples in the Marshall [wrongful conviction] of how the police conducted themselves, how the Crown did, how the defence did, how the jury did, all of those things would contribute to wrongful conviction but then I think that there are factors that may operate in advance of even getting to the point where the Crown...and defence are involved. [Author: The social position of the particular accused?]. In the community, yes. There may be community pressures for conviction and then you perhaps factor into that community prejudices or assumptions about a particular accused. If you go through the range of actual factors that contribute [to wrongful convictions] people come forward with false accusations that are then either incompetently or malevolently investigated by the police. The lying witness who may then either be encouraged in that lying or not dissuaded from or challenged on those lies by police. Inadequate or corrupt police investigation. Lack of disclosure, as in the Marshall case, where there were prior inconsistent statements given by purported eyewitnesses...statements that were never disclosed to the defence. Poor defence, where the defence may have been lazy or inept or cynical towards their own client or have some prejudice.

* * * *

---

[39] As argued by one ad hoc lawyer, "there are hundreds of incompetent defence counsel running around."

[40] According to this respondent, some judges "fail to understand or appreciate the nature or quality of the evidence."

[41] This respondent believes that the "frailties of identification evidence" is a dominant factor in many wrongful convictions.

> I don't know that I can give you a complete list but [the causes of wrongful conviction] range from [mis]identification, racism, junk science, junk evidence, junk theories, the lack of the presumption of innocence, the cost factors weighing so heavily in favour of the prosecution, poor defence, jailhouse informants, perjury, police tunnel vision. [And these causes would] be the same in every country in the world I should think. And generally they are mistakes, or generally they are matters which are classically not the subject of appellate review. The appeal courts bear a huge responsibility, in my view, for wrongful convictions, probably greater than trial courts. At least the trial courts purport to try to determine guilt or innocence. The appeal courts wash their hands of it. They do so blatantly, openly and without compunction and without any desire to change it and I think the appeal courts, from provincial courts of appeal ranging up to the Supreme Court of Canada, bear an enormous responsibility for wrongful convictions. The wrongful conviction doesn't just stop the day it is entered. A wrongful conviction continues every day until it is remedied and the appeal courts are the first line of defence, you would hope, against wrongful conviction. The reality is very different.

As one ad hoc counsel explains, in some cases, it is difficult to comprehend the myriad errors that combine to cause a particular miscarriage.

> When you work on these files for the Justice Department, you see things that make you think, "this is not possible." It is not possible that this is how the trial occurred. It is not possible that that counsel didn't do this or did do that. It's scary and it happens easily. One of the reasons we agree with a strong defence Bar in our country is that we believe that standing up for the rights of the accused means standing up for everybody's rights in the long run. If it can happen to a David Milgaard, it could happen to your son or mine.

Not surprisingly, defence counsel most frequently point to insufficient resources to mount a proper defence as a contributing factor in wrongful convictions. As one respondent notes: "lawyers who are experienced in the bar will tell you honestly that you are entitled to as much justice as you can afford." Another defence lawyer argues that "had they not had the resources to spend nearly $18,000 challenging [a particular] piece of evidence, it would certainly have led to a conviction."

> Experts come vested in science and authority and you have to be really careful to see that it is really a recognized science and a valid test because it's really easy to fool us lawyers. We're just lawyers after all. It was a very scary lesson for me because it surely was the most powerful piece of evidence in the case and, but for having the very good fortune of being able to convince the Director of the Ontario Legal Aid Plan that there was merit in fighting this, we couldn't have. And I can tell you that if this case was in Saskatchewan or in Nova Scotia, you would never get that kind of money to bring an expert up from New South Wales to testify about experimental design.

* * * *

> In many cases you dearly wish you had the resources to conduct a proper investigation. Instead, you've got an articling student or you are doing it yourself and probably in many cases, in an inadequate way insofar as you can't do it nearly as thoroughly as you'd like. And so the lack of resources makes it extremely difficult. Often you get the same old problem that your client doesn't qualify for Legal Aid but he also can't afford things [like scientific testing] that ideally, one would do, particularly in very serious cases.

One defence counsel also points out how difficult it is to remedy a conviction which results from an incompetent trial defence. In his view, "the system tries to protect itself" and he asks: "if incompetent defence counsel became a ground for setting aside convictions, my God, how many might we set aside?"

Appellate courts are supposed to ensure the integrity of lower courts and provide safeguards against wrongful convictions. Moreover, conviction review applicants must first exhaust all avenues of appeal[42] before they can utilize section 690 of the *Criminal Code*. Given the odds against obtaining a section 690 remedy, the importance of an effective[43] appellate court system cannot be overstated. Therefore, it is important to assess participant perceptions of whether or not appeal courts provide sufficient protection

---

[42] However, as discussed in chapter 4, some section 690 applicants have not exhausted their avenues of appeal. For example, one defence counsel advises that if an applicant's appeal periods have expired, they are still entitled to apply for section 690 conviction review. According to another respondent, "you will have some people going forward in the section 690 process who have exhausted their 'as of right' appeal option, but they may not necessarily have made a leave application to the higher court."

[43] In this context, 'effective' refers to an appellate court system that has sufficient flexibility to examine both factual and legal issues so as to maximize the discovery of conviction errors.

against wrongful convictions.[44] The majority (N = 12 / 85.5%) of defence counsel respondents do not believe that the appellate court system provides sufficient protection against wrongful conviction (Table 6.3).

TABLE 6.3
Do appellate courts provide sufficient protection against wrongful conviction?

Response	Freq.	%
Yes	0	0
No	12	85.50
Sometimes	1	7.25
N/A[45]	1	7.25
Total	14	100.00

[44] This question was directed to defence counsel, ad hoc counsel and the DOJ representative. The latter declined to answer this question. During one of my interviews with ad hoc counsel, I was asked what I meant by "sufficient protection," which alerted me to the fact that this phrase is not self-evident. The intent of this question is to determine legal counsel perceptions of whether the appellate system, as presently constituted, maximizes discovery of conviction errors, and this is what I tried to convey by using the phrase 'sufficient protection.' "Wrongful convictions," as intended here, refers to convictions resulting from both *factual* and *legal* errors.

[45] One defence lawyer states that "it's a test. It's like democracy. Do I think there could be a better test? Well, I'm not sure, I'd need to see the proposals first." However, this respondent did identify one problem he has experienced with appellate courts: "they look at things like, your client could have testified. Why didn't he say at trial that he didn't do it? Why are you asking us now to overturn a conviction where your client didn't testify? Well the fact of the matter is, he's presumed innocent, he doesn't have to testify and that's not a fair thing for an appellate court to look to in deciding what it should do. That's an example of one of the things wrong with the appellate court system."

Only one of four ad hoc counsel believes that the appellate court system provides sufficient protection against wrongful conviction. Another ad hoc respondent argues that our appellate court system "compares reasonably well with other systems"; however, he concedes that "none of these systems are perfect."

> I think perhaps our system would be better served if the appellate courts relaxed the rules a bit for the admissibility of fresh evidence. Evidence which could have been presented by due diligence...is often not admitted as fresh evidence. I realize there has to be a cut-off, but I think that in certain cases the court should relax that a little bit because it could provide a better forum, or a more immediate forum certainly, than the 690 review.

According to another ad hoc respondent, however, attention must also be directed towards pre-appellate rules and procedures in order to provide sufficient protection against wrongful convictions.

> It's not just the appellate court system; it's the rules of evidence at trial, it's the rules of evidence in a jury matter. You have a right of appeal but it's more than that. It's whether our rules of evidence at the trial level sometimes do not provide sufficient protection. For example, I was at a Conference last night given by Fred Kaufman and he was talking about how, in Guy Paul Morin's second trial, the judge--because the rules of evidence seemingly said so-- would not allow the defence, while the accused was testifying, to bring evidence of the fact that his first statement made to the police was, "I don't know what you're talking about" and after four or five hours of questions, systematically denied. Because when intercepted by police, [Morin] thought it was a joke when they said, "we're intercepting you for murder." The judge wouldn't allow that statement to go before the jury because it was self-serving. The Crown then stated in front of the jury, "well if you were innocent, wouldn't you scream it from the rooftops!" This was exactly what [Morin] had done but the rules of evidence, as they are now interpreted, would not allow that statement to be put before the jury. Well that's just not fair. Therefore, it is more than appellate courts in that sometimes the rules of evidence in first instance don't provide sufficient protection. Yes, the appellate procedure is a good one in that you usually have at least one, if not two levels of appeal. But does it provide sufficient protection? I don't know.[46]

---

[46] This respondent also notes that there is a "scary trend in the appellate court system towards limiting the number of cases that can actually get to appeal." She adds that "the mandate should perhaps be broadened when it comes to reviewing evidence and the quality of evidence."

Defence counsel most frequently (N = 11 / 79%) criticize appellate review criteria as too narrow and inflexible with respect to fresh evidence rules and the fact that appeal courts focus on legal, rather than factual issues. Thus, if trial proceedings are legally proper it is difficult to challenge convictions, particularly when factual issues, such as witness credibility, constitute the heart of an appeal. Some defence counsel concerns about the appellate court process are articulated below.

> All of the issues are legal or combine fact and law and can pose real difficulties for someone who was indeed telling the truth at trial but for one reason or another, an alternative version was believed. And there's no mechanism for correcting that. Rules often work against justice. There has to be more flexibility, especially in the federal court system.

* * * *

> Appeal courts are courts of process, not courts of guilt or innocence and they work on process only. So that means that in cases where there is, in fact, a perfectly obvious lurking doubt as to guilt, they just put on their blinkers and say, that's too bad. They are more concerned with legal issues than factual ones. Courts of appeal are courts of process, not courts of justice - it's that simple.

* * * *

> It's hard because every case is different, but if I was going to pick out one thing, it's because the Court of Appeal generally does not get involved in resolution of factual issues. And a lot of my clients claim that they are disbelieved on findings of credibility made out against them, which is something the Court of Appeal just doesn't get involved in.

* * * *

> Absolutely not. There are also limitations that operate with respect to what appellate courts can do: limitations with respect to the rules of fresh evidence, for example. Limitations with respect to the role of the appellate court. All of those, established by law, and as a consequence, I think that the role of appellate courts is both too narrowly construed by the courts themselves and also too limited and needs to be seriously expanded. If you want to consider it as part of the appellate court structure, the Supreme Court of Canada, which is the ultimate appellate court, that court would describe itself as not in the business of examining the safety of convictions. They look at particular legal principles, they're trying to establish or confirm or clarify legal principles and so if you go before the Supreme Court of Canada with a wrongful conviction, trying to get an appeal, but your legal grounds for seeking an appeal are legal issues that the court has already considered, you may well not get your appeal, in which event, you have no forum for having fresh evidence heard. So there are very serious limitations at the highest court level and I have direct experience with what I just described.

* * * *

> When you appeal to the Court of Appeal, essentially what you are appealing are errors in law made by the trial judge during the course of the trial. If you are not able to show an error in law and then you make a general argument that the verdict is unreasonable, very rarely will you ever see a Court of Appeal usurp the function of a jury. As long as there is evidence there, they will not, in fact, intercede. So, they do not have the powers right now, as things stand, to really examine so-called allegations of wrongful conviction, including factual or credibility issues.
>
> * * * *
>
> The difficulty with the appellate courts is twofold. One, if you want to appeal on the basis of fresh evidence, I think this is still the law, you have to establish that the evidence was not available at the time of trial. And number two, you have to establish that had it been available and presented to the jury, it would have likely resulted in a different result. And the problem with that is that it doesn't account for bad lawyering.... In the Milgaard case, the first thing we did before we had any fresh evidence, was we looked at the facts of the case and we reconstructed all of the evidence and it became pretty clear on the face of the evidence presented at the trial, that if it had been presented in a different, or more complete way, leaving aside any fresh evidence, that in our opinion, David Milgaard could not have been convicted on the evidence as presented at trial. But there was no way to go to the court of appeal with that argument.[47]

As the Donald Marshall Jr. case demonstrates, the "criminal justice system failed [him] at virtually every turn," including the appeal court's failure to identify "critical errors of law."[48] Similarly, at the Guy Paul Morin inquiry, Commissioner Kaufman recommended that:

> In the context of recanted evidence, the requirements that evidence must reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness' original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.

---

[47] This respondent is no longer practising law, which was unknown prior to my request for an interview. However, he was intimately involved with the David Milgaard case and has knowledge of the conviction review process.

[48] *Marshall Commission, Vol. 1*, 15-16.

> Consideration should be given to further change the 'due diligence' requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.[49]

Commissioner Kaufman also recommends that "consideration...be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt."[50]

> If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this -- sometimes indirectly -- through their determination of whether there was legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly. It recognizes the most important, though not the exclusive, function of a criminal appellate court: to ensure that no person is convicted of a crime he or she did not commit.[51]

Among the submissions considered by the Kaufman Commission was a survey of defence counsel on the subject of wrongful conviction.[52] The survey was sent to over 1000 criminal defence lawyers and 219 (22% response rate) responses were received.[53] Of these respondents, 99 (45 %) "identified one or more wrongful convictions" and 45 percent of these 99 respondents, in turn, "identified more than one wrongful conviction."[54]

---

[49] *Kaufman Commission, Vol. 2*, 1177.

[50] *Ibid.*, 1178.

[51] *Ibid.*, 1189-1190.

[52] *Ibid.*, 1109. The survey was conducted by The Association in Defence of the Wrongly Convicted (AIDWYC), but prepared and administered by Professor Anthony Doob at the University of Toronto. 'Wrongful conviction' was defined as "a case where you are satisfied that a factually innocent person has been convicted at trial for any of a number of reasons."

[53] *Ibid.* It is not stated whether the survey was conducted nationally.

[54] *Ibid.*, 1111.

> Information respecting the appellate proceedings which followed conviction was available for 91 of the 99 wrongful conviction cases. Fifty-five were appealed to a higher court. Nineteen of these appeals were successful (in that a new trial was ordered or an acquittal entered), mostly based on traditional legal errors in process. Fresh evidence was cited in four appeals. Only one conviction was reversed based on the ground that it was an unreasonable verdict. Six of the 36 unsuccessful appeals were then taken to the Minister of Justice for review. Only one was successful. In the result, 71 of 91 alleged wrongful convictions were left intact.[55]

When asked to provide opinions on possible reforms to address wrongful convictions, 84.8 percent of the respondents in the AIDWYC survey "either moderately or strongly supported the option of relaxing the rules concerning the admissibility of fresh evidence on appeal," and "94.9 percent moderately or strongly supported the option of broadening the powers of courts of appeal to order new trials in cases where there are doubts about the integrity of a conviction."[56] These perceptions are consistent with those identified by defence counsel interviewed for this research.

Similar critiques of the appellate court system are also evident in other justice systems. In their study of wrongful convictions in the United States, Bedau and Radelet dispute a 1983 Senate Judiciary Committee report which found that "the procedural safeguards for criminal defendants mandated by the Supreme Court in recent years...have all but reduced the danger of error in...[capital] cases to that of a mere theoretical possibility."[57] According to Bedau and Radelet, the "'procedural safeguards' to which the Committee alludes are not addressed to the problems of factual error that occurred in

---

[55] *Ibid.*, 1113.

[56] *Ibid.*

[57] Bedau and Radelet, "Miscarriages of Justice," 84.

most of the cases in our catalogue."[58] With respect to the English criminal justice system, Thornton believes "that the Court of Appeal has often proved to be an adequate forum for correcting errors of law"; however, "it has been notably less successful in identifying miscarriages of justice."[59] Moreover, as McBarnet argues:

> The problem is that judges are exercising a dual function in reaching their decision. They must not just ensure that justice is done in the sense of the accused getting his deserts; they must also ensure that the technical checks on *how* criminal justice is executed are upheld. They must not just uphold the substantive criminal law but the procedures of legality. They must think not only of the apparently guilty man before them but of the protection of the innocent in the future. But this duality of function sets up an impossible contradiction. The decision is a finding for *either* one party *or* the other. It has *either* to declare the methods illegitimate, the evidence inadmissible and quash the defendant's conviction, *or* uphold the conviction, but in doing so, inevitably legitimize the questionable methods--inevitably because of a second duality in the function of decisions. The judicial decision does not just resolve the particular case but sets a precedent for future cases. Rejecting a technical defence may be quite understandable in the context of the black-and-white cases constructed through advocacy and procedure, but with every rejection of a technical defence case comes an extension of police and prosecution powers. Civil liberties cease to be legal rights and the control of crime is safeguarded at the expense of legality.[60]

According to one defence lawyer, clients "often don't have the funds to proceed with an appeal and they don't qualify for Legal Aid." Another defence counsel notes that "appellate courts provide no means for someone to appeal a wrongful conviction on the basis that they had a lousy lawyer." The reluctance of appellate courts to overturn convictions because of the principle of finality is also identified as problematic by two defence counsel. As one observes, "there is a systemic bias in favour of the finality

---

[58] *Ibid.*

[59] Thornton, "Miscarriages of Justice." 930.

[60] McBarnet, *Conviction*, 158.

of convictions" and "appellate courts are very reluctant to overturn convictions." Another defence lawyer expresses concern "with the growth in Ontario of the idea that there has to be finality in legal proceedings, above the concept that there should be justice... ." In his opinion, "the principle that finality must rule seems to take its place ahead of the right of an accused person to go free." When I asked defence counsel whether they believe that the issue of finality hinders Ministerial action under section 690, nine (64 %) responded affirmatively.

> Yes, there's no doubt about it, the notion of finality...is more powerful than any other area I could think of. They hate to reopen a conviction; they hate to say that anything was wrong. It's so much easier to say no, we're not going to grant the review.
>
> * * * *
>
> Of course it does. It's an issue that hinders appellate court review; it's all based on this notion of finality. Finality is better than justice.
>
> * * * *
>
> I'm sure it does because once you get to the 690 stage, it becomes a political question as well. If one Minister of Justice starts granting a lot of applications, politically, I think there is a loss of credibility in the justice system or the Minister himself or herself could lose a lot of credibility that they are not getting tough on crime, that they're being too light on criminals. So I think that these things have to be handled quite delicately. I forget whether it was the Birmingham Six or the Guildford Four case, [but] the House of Lords were willing to let these men rot rather than have the judicial system criticized. And I think there's just too much of the idea that the system must be valued above the individual.
>
> * * * *
>
> There is a prosecutorial mindset which is that if the guy was charged and convicted, and the court of appeal upheld the conviction, then he must be guilty. And it may be changing, I don't believe it, and I think anybody who does believe it is naive, but there's a suggestion that there may be a kind of melting of the icy kind of prosecutorial mindset at the Department of Justice in that regard. My experience was that they had a tremendous amount of difficulty believing that somebody could be wrongfully convicted - generally.
>
> * * * *

> That has certainly been my experience based on observation and direct experience. You see appellate courts and the 690 process, it would seem, working to find ways to have the conviction confirmed as opposed to ways to have it undone.

Prior to the establishment of the Criminal Cases Review Commission (CCRC) in the United Kingdom, Malleson identified the need to "understand the approach of...appeal judges to the review process" because the effectiveness of the CCRC "would be dependent on the performance of the judges and their approach to the cases which the Court hears."[61] She argues that "one of the main reasons...[Appeal Court] judges so consistently take a restrictive approach to their roles in reviewing convictions is their concern not to undermine the principle of finality in the criminal justice process."[62]

> The history of the Court of Appeal therefore shows a clear reluctance to exercise those powers to review convictions and overturn the decision of a jury, particularly where the review concerns facts rather than law and procedure. The explanations given by the judges are consistent and comprehensible. One reason is pragmatic - the fear of being swamped and the lack of resources; the other is based on a belief that appeals undermine the purpose of the criminal justice process, in particular, the idea of finality. Throughout this consistent resistance to the review of convictions, the principle of finality is a critical factor in the Court's approach to the review process and helps to explain why, when judges exercising their powers of appeal balance the competing considerations set out above, they have so consistently adopted such a restrained and cautious approach.[63]

Malleson's observations about how appeal court judges approach the task of conviction review are applicable to the Canadian appellate system and, if an independent review tribunal is established in Canada, its effectiveness will also depend upon the flexibility of appellate court rules and judicial attitudes. Citing Lord Atkin's comment that 'finality is a

---

[61] Malleson, "Appeals Against Conviction," 151.

[62] *Ibid.*

[63] *Ibid.*, 158.

good thing, but justice is better,' Malleson suggests that if "the judiciary were to follow this principle and accept the Commission's[64] recommendations, it could substantially improve the record of the review process for identifying and correcting miscarriages of justice."[65] Moreover, as Thornton argues, the decision-making process "remains in the hands of the Court of Appeal, the very forum which for many years has failed to deal effectively and consistently with miscarriages of justice."[66] This observation is important, particularly in view of the Justice Department's current analysis of potential reforms to the conviction review process in Canada. If the federal government does decide to establish an independent review tribunal, its effectiveness will depend, at least in part, on appellate court attitudes, rules and procedures. Ideally, appellate courts should identify and correct wrongful convictions *before* individuals have to resort to conviction review through section 690 of the *Criminal Code*. Nevertheless, the appellate process is a human endeavour and, therefore, mistakes do occur. Consequently, some mechanism for conviction review must remain available. As one defence counsel respondent argues,

---

[64] *Ibid.*, 152. The Commission referred to by Malleson is the *Runciman Commission*. This Commission's "terms of reference required it to review the roles of the Court of Appeal and the Home Office in identifying and correcting miscarriages of justice." It was asked to consider (1) "the role of the Court of Appeal in considering new evidence on appeal including directing the investigation of the allegations" and (2) "the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted."

[65] *Ibid.*, 163-164.

[66] Thornton, "Miscarriages of Justice," 930.

> Appeal courts are the first line of defence, you would hope, against wrongful conviction. The reality is very different; they are not a line of defence against wrongful conviction. If you were fortunate enough to have been tried where the process got screwed up, then guilty or innocent, you will win a new trial. But if you were unfortunate enough to be convicted as an innocent person but the process was proper, then too bad. Enjoy your next 20 years in jail. A client who comes to me who has been convicted of something he says he didn't do, and says he wants to appeal? If I examine his record, it doesn't matter if I think the record shows he's factually innocent. That doesn't give you a ground of appeal. So I might well say to him listen, I happen to believe that you are innocent but the Court of Appeal is not going to do anything about it. They don't care about your innocence. They only care about whether you got processed. And the U.S. Supreme Court has literally said the same thing; that there is nothing wrong with executing a factually innocent person. What is important is, did the person receive due process and if they did, then they can be executed. Factual innocence is irrelevant. The court said this in Herrera v. the State of Texas. We're talking about the Supreme Court of the United States.[67]

Although the interview sample is small, defence counsel's apparent lack of faith in the ability of appellate courts to 'discover' and/or 'rectify' wrongful convictions is consistent with some of the wrongful conviction literature.[68] Such perceptions illuminate the deficiencies of existing appellate court rules and procedures to remedy wrongful convictions. Furthermore, it is important to note that Ministers of Justice most often direct appeal courts to hear a case as if it were an appeal [section 690(b)] or direct specific questions to the court [section 690(c)] prior to taking further action [i.e., directing the court to then hear the case as if it were an appeal under section 690(b)]. In both instances, judicial attitudes and the flexibility--or lack thereof--of appellate court rules and procedures will influence both Ministerial decisions and conviction review outcomes.

Prior to the establishment of the Criminal Cases Review Commission in the United Kingdom in 1997, responsibility for investigating allegations of wrongful conviction fell to the Home Office's C3 Division. If warranted, the Home Office would refer appropriate

---

[67] I discuss the Herrera case in Chapter 2 (note 183).

[68] See, for example, Bob Woffinden, *Miscarriages of Justice*; DuCann, *Miscarriages of Justice*; The Association in Defence of the Wrongly Convicted (AIDWYC), "Addressing Miscarriages of Justice."

cases on to the Court of Appeal. As Nobles and Schiff argue:

> This has produced further complications in the relationship between the two institutions. If the Home Office carries out its functions in a vigorous manner, looking to all forms of proof which can be utilized to decide the innocence of a convicted person, it may reach conclusions which the Court of Appeal cannot duplicate. A good example of this is C3 Division's investigation into the lives of the Guildford 4, in which they concluded that the persons concerned, in the light of their individual biographies, were highly unlikely to have undertaken the bombings for which they were convicted. But biography is not a form of evidence open to trial courts in anything but the most rudimentary form and not, therefore, open to the Court of Appeal unless it wants to constitute itself as a second trial court. In the knowledge that the Court would not entertain such evidence..., C3 Division and the Home Secretary felt unable to use this evidence to justify a (further) referral to the Court of Appeal.[69]

The establishment of the Criminal Cases Review Commission does not alter the fact that conviction review references are still decided by appellate courts. Moreover, the Runciman Commission noted

> the Home Office's constitutional deference to the Court of Appeal and sought to remove this by abolishing C3 Division in favour of a new Criminal Cases Review Authority. However, this Authority seems destined to reproduce the same sort of relationship to the Court of Appeal as C3 Division, since it is to have no power to quash convictions itself but must refer cases on to the Court of Appeal. So long as the Court continues to deal with the problems of finality by a constitutional deference to the jury, the new Authority will have no prospect of a successful referral unless its investigations and determinations exhibit a similar deference.[70]

Eleven of the 14 defence counsel (79%) interviewed for this study have represented a section 690 client from the initial application stage right through to Ministerial decision. Table 6.4 describes the completion time for this process for those applicants identified by defence counsel.

---

[69] Nobles and Schiff, "Miscarriages of Justice," 309-310.

[70] *Ibid.*, 315.

Table 6.4
Time Span from Application Submission to Ministerial Decision[71]

Client	Time Span
Wilfred Beaulieu	1 year, 5 months[72]
Helmuth Buxbaum	N/A[73]
Gary Comeau	N/A[74]
Patrick Kelly	4 years[75]
Allen Kinsella	4 years
David Milgaard	6 years[76]
Sidney Morrisroe	N/A[77]
Wilson Nepoose	6-9 months
Glen Ryzner	3 years, 6 months
N/A[78]	6 years, 9 months

[71] The time spans described in Table 6.4 are those cited by defence counsel. However, in some cases, these time periods do not match the data presented in chapter 4 (i.e., time length for completion of reviews indicated in Ministerial reasons for decision). When such discrepancies occur, they are footnoted.

[72] The Minister's decision states that Beaulieu applied for conviction review on August 31, 1994 and a decision was rendered on November 25, 1996 (15 months). However, according to his lawyer, Mr. Beaulieu applied for conviction review in June of 1994 (17 months).

[73] Defence counsel did not specify the time span from application submission to Ministerial decision. However, Mr. Buxbaum applied for section 690 review in December of 1990 and his application was denied by Justice Minister A. Kim Campbell in December of the following year (see Harris, *The Prodigal Husband*, 435).

[74] Defence counsel did not specify the time span from application submission to Ministerial decision. It is not known when Mr. Comeau applied for conviction review; however, Justice Minister A. Kim Campbell rejected his application in December of 1990 (see Claridge, "After 20 years in prison").

[75] One of Patrick Kelly's defence counsel advised that the conviction review process spanned a period of four years. However, according to the Minister's decision, the actual conviction review process--from initial application (20 December 1993) to Ministerial decision (25 November 1996)-- spanned a period of 35 months.

[76] See *Reference re Milgaard* (1992), 90 D.L.R. (4th) 3. Milgaard's first section 690 application was submitted on December 28, 1988, and rejected on February 27, 1991 (26 months). He re-applied for conviction review in August of 1991 and was released from prison in 1992. One of Milgaard's defence counsel states that "we started [this case] in 1986 and it took until 1992" for Milgaard to gain his freedom.

[77] Defence counsel notes that Morrisroe's application was submitted in 1992, but could not specify when a decision was rendered. According to the Minister's decision, Morrisroe applied for conviction review on June 11, 1992, and the application was rejected on October 18, 1995 (40 months).

[78] This applicant was not identified by defence counsel.

At the time of the interviews, only seven (50%) defence counsel were representing a total of 14 conviction review applicants, eight of whom were identified.[79] In six of these cases, section 690 applications are being prepared for submission to the Department of Justice.[80] The remaining applicants are at various stages of the conviction review process: initial assessment stage (N = 1), investigation stage (N = 3), awaiting Ministerial decision (N = 2),[81] and in two cases, this information is unknown.

Most Ministerial interventions return the applicant to the adversarial process. A section 690(b) reference, for example, places the onus of proof on the applicant, in what is very much an adversarial setting.[82] As such, I wanted to assess defence counsel perceptions of whether the adversarial legal system hinders section 690 conviction reviews. Eight (57%) defence counsel believe that the adversarial legal system does hinder section 690 conviction reviews.

> Yes it does. I think we've fallen head over heels in believing that only the adversarial system will seek out the truth. The flaw to that kind of reasoning is that the adversarial system is fine if all things are equal. But when it gets out of balance, then it's really worse than the inquisitorial system because it doesn't get at the truth, there are many distortions. So yes, the adversarial system is a hindrance.

* * * *

---

[79] All of the section 690 cases identified by defence counsel are discussed in chapter 4.

[80] Five of these cases have been identified; Steven Truscott, Gary Comeau, Rick Sauve, Scott MacKay and the Robert Mailman/Walter Gillespie case. In the latter case, John Hill advises that he will represent one of these two section 690 applicants.

[81] When interviewed, defence counsel representing Allen Kinsella and Patrick Kelly advised that they were awaiting Ministerial decisions. Both conviction reviews have now been decided and neither applicant was granted a remedy.

[82] *Marshall Commission, Vol. 1*, 115.

> In terms of the efficacy of using the inquisitorial system for conviction reviews, the C.C.R.C. [Criminal Cases Review Commission in the U.K.) essentially works on an inquisitorial basis where they go in without prejudice, because they have no reason for prejudice, and examine the case upside down and sideways and then draw their conclusions. So yes, I think the inquisitorial system plays an important role. The adversarial system is just bad news because the person who is the adversary, to wit, the person doing the 690 for the Minister, approaches it from an adversarial point of view. That means that they start out with the premise that the person is guilty and then proceed to prove it. And they are bound to succeed.
>
> * * * *
>
> At [the section 690] stage, it ought to be investigative. The adversarial system is fine when evidence is fresh at hand and you have a speedy trial guaranteed by the Constitution and all that. But once you're years and years later, which by definition you are in these cases, the adversarial system really operates against the person who needs the evidence. And that's the accused in 99% of the cases.
>
> * * * *
>
> I think it does and again, I'm going by my experience with the provincial government's intervention in Kinsella. I liked the investigation by [Mr. X - ad hoc counsel] - it was totally fact-finding. But when the Ontario government intervened, their interventions were that this evidence should not be accepted because of these legal principles and I thought, we're getting back into the very reasons why people can be convicted in the first place. Let the person who has to make the final decision decide on all the facts. The time for court and the admissibility or inadmissibility of evidence has passed. Let's take a look at the whole picture to see whether or not a miscarriage of justice has occurred and if it has and a new trial should be ordered, then we're back into the rigid legal system again. To make it very rigid and legalistic at this point in time, I think defeats the purpose.

However, other defence counsel (N = 5 / 35%)[83] disagree. For example, two respondents perceive the conviction review process as "more inquisitorial" than adversarial.

In order to obtain a Department of Justice conviction review, applicants must raise "*new and significant information* which casts doubt on the correctness of [their]

---

[83] One respondent did not provide a specific answer to this question.

convictions."[84] Therefore, I asked defence counsel[85] to describe the grounds upon which their clients' section 690 applications were based (see Table 6.5).[86]

---

[84] DOJ Application Booklet, 2.

[85] I directed this question to all interview groups, with the exception of the AIDWYC respondent. This interviewee advised that to date, AIDWYC has only completed one section 690 application--for Clayton Johnson--and the grounds upon which his application is based are discussed in Chapter 4.

[86] Although defence counsel *currently* represent 14 clients, Table 6.5 also includes information concerning *past* conviction reviews.

TABLE 6.5
Defence Counsel - Major Grounds of Clients' Section 690 Applications

Major Ground	Freq. Cited
1. Fresh evidence.[87]	17
2. Lack of disclosure given to the defence.	1
3. Junk pathology.	1
4. Challenge to the law.[88]	1
5. Change in the law.[89]	1

[87] Some defence counsel cite "fresh evidence" but do not specify the exact nature of such evidence. In other interviews, defence counsel identify the fresh evidence as follows: witness recantation (N = 6); new witness (N = 2); actual perpetrator admits to crime (N = 1); new evidence identifies true perpetrator (N = 1); co-accused admits sole responsibility for the crime (N = 1); and DNA evidence (N = 1). In the Clayton Johnson case, the new witnesses consist of a forensic pathologist and a blood spatter expert. However, according to defence counsel, at Johnson's trial, the RCMP gave blood spatter "evidence to the fact that [the death] could have been accidental. ...That was before the jury. But these other two experts were not. In fact, the pathologist from Texas is saying that the injuries were consistent with a fall down the stairs backwards. Dr. Charles Hutton, who was one of the Crown's two forensic pathologists, had ruled that out, as did Dr. King, who is a forensic pathologist at Queen's University in Kingston. So those were ruled out and of course, we had their experts' reports checked out and the expert that I chose, who was the Chief pathologist for Ontario, concurred with the decision of Dr. Charles Hutton and Dr. David King. So it's a question of whether or not you go fishing for experts to try to find someone who, in fact, is going to agree with your theory." This is an unusual case because this evidence is not, strictly speaking, 'new.' The jury heard evidence that the death could have been accidental; they simply did not believe it. Only the experts' opinions are new, which does not appear to meet the conviction review criteria set out by the Department of Justice.

[88] In this case, the individual was convicted and imprisoned in Thailand in relation to a drug offence. His application for transfer to Canada was granted. According to defence counsel, however, "the moment he signed the transfer papers, he was doomed as far as any appeal process back in Canada. It specifically says that section 690 cannot be applied for nor can an appeal if you agree to a transfer under that particular treaty." Thus, defence counsel plans to challenge this and "one part of the process of challenging it incorporates a section 690 application."

[89] As this respondent advised, the major ground underlying this section 690 application was that the "law changed from the time my client was convicted and the Minister decided in the end that the evidence called at trial could have allowed for the same verdict, even with the change in the law. The Minister did not pay any attention to my assertion that I would have called evidence in a different way."

The major grounds for section 690 applications described by ad hoc lawyers to the Department of Justice are similar to those cited by defence counsel. Section 690 applications must be based upon information or evidence that is new (i.e., information or evidence that was not available at the time of trial). Under this umbrella, such grounds include "anything ranging from mistaken identity, witness and/or co-accused recantations, to new forensic evidence." Another ad hoc counsel advises that in his experience with conviction reviews, the applications were based upon new information concerning the "testimony of a jailhouse informant," the "competency of trial defence counsel," and "an argument that the police may have manufactured evidence."[90] In another conviction review investigation, new information--in the form of psychiatric records--was disclosed. Counsel describes the major ground in this case as a "recantation, [which amounted to] unintentional perjury" because the individual "believed what she was saying." Although witness recantations can produce positive outcomes for section 690 applicants, this is not always the case (e.g., the Patrick Kelly case). As one ad hoc lawyer advises, "you have to measure credibility the best you can" and "the grounds are never closed; the Minister insists that every reasonable and, sometimes unreasonable step be taken to ensure that the investigation is thorough and fair." In her experience with conviction reviews, another respondent explains the grounds upon which the applications were based:

---

[90] This respondent states that the section 690 investigation involving allegations of incompetent trial defence counsel and of police wrongdoing (i.e., manufacturing evidence) were "both disproven during the investigation."

> The first one - two people were convicted in criminal court because they were not believed. There was a parallel civil action: the civil court believed them even though they'd been convicted in criminal court, so they invoked this difference between the two courts. They also invoked failure of Crown counsel to disclose information prior to Stinchcombe, years prior to Stinchcombe. But Crown counsel maintained that disclosure had been carried out and the files seemed to show that the defence was aware of the statements that are being alleged to have not been disclosed. But none the less, disclosure is one. Police wrongdoing. New evidence by an alleged victim; making post-trial statements that would exonerate the accused. Again, police wrongdoing in terms of improper police lineup procedures. Crown failure to transmit information. I'm sure there's more, but it often comes down to one of about three things: either the Crown has acted in some way that hindered the ability to bring exculpatory evidence before the courts, or the police acted in some way that amounted to either hiding, fabricating or altering evidence, or that one of the key actors who is neither the Crown nor police, has subsequently been discovered to have lied.

According to the Department of Justice respondent, the most common grounds upon which section 690 applications are based are new evidence, allegations of police or Crown misconduct, allegations of witness perjury, breach of Charter rights, incompetent defence counsel, changes in the law, and challenges to jury composition or the selection process.

Defence counsel respondents find very few merits in the section 690 conviction review process.[91] In seven interviews (50%), the most positive comment about section 690 is that a last-resort remedy exists for those who have exhausted all other avenues of appeal. Examples of such perceptions are expressed as follows:

> Well, there has to be something because of the scandal that occurs when occasionally you pick up cases of people who are clearly innocent and the advent of DNA has been very helpful in this because it can show innocence in a small category of cases that we couldn't do before. It's a safety valve for government but they operate it in such a way that it is designedly ineffective. It is designed, as far as I can see, and staffed by people who really have only one goal, and that's to turn down every application. They don't have the mindset, they don't have the attitude, they don't have the resources, and they are not interested in finding mistakes. They're interested in covering up.

* * * *

[91] I directed this question to all interview groups, with the exception of the AIDWYC participant.

> The merit is that there's a process in existence where a person can have their conviction reviewed: for example, DNA analysis proves the person did not commit the crime for which he was convicted. Where are you supposed to go if you've exhausted all your appeals...and then five or ten years later, somebody discovers a process where they can grow DNA from minuscule amounts of secretion which would clearly identify the perpetrator of this crime. It's an important last resort remedy that can be invoked at any time, well after the normal appeal processes have been completed.

* * * *

> I'm not sure I think there are any, but it's the only game in town. I feel it's a pretty hopeless process. I knew it was a difficult process [from which] to obtain a remedy. I now feel so discouraged by it, I'd have a hard time recommending it to a client. But of course one would because for someone who is serving a long prison sentence, perhaps a life sentence, what's to be lost. But if I had a client who was serving a short prison sentence and was struggling with, "do I invest my resources, my effort, my emotional energy into trying to get out or do I invest in submitting a section 690?" I'd tell him to "concentrate on the parole process, put your energies into that because section 690 is going to let you down unless you have an extraordinarily lucky case and perhaps if there was absolutely unassailable forensic evidence." But even then, I don't know whether I could say with confidence that [section 690] applications just sail through.

Some defence counsel (N = 4 / 29%), however, argue that there are no merits to the present conviction review process and one describes the conviction review process as "absolutely appalling."

> The process itself is not a process, it's a travesty of justice. It's shocking to me as a lawyer. Anything that comes to light that is a serious challenge to [a person's] incarceration, then that should be looked at immediately and under the Charter, it should be prompt. There is absolutely no excuse for these kinds of delays.

Other defence counsel note that:

> In theory [the conviction review process] should be fine. In practice, we were stonewalled and [Department of Justice officials] were adversaries. So, in practice, it didn't work. In fact, it was worse than that. Corbett said some things publicly that were just unbelievable. He compared the people who believed in Milgaard's innocence to those who believe that Elvis is still alive. Forget about the pejorative nature of it, but that quote is the best example of what we were up against.

* * * *

> Well I think there are some people who are on the street who wouldn't be there were it not for section 690. The Gorecki case would not have proceeded to a new trial if it wasn't for section 690. Milgaard and Morin and Marshall, there's lots of people who have succeeded with 690 applications.[92]

Clearly, many defence counsel are dissatisfied with the current conviction review process.

Ad hoc counsel perceive section 690 as an additional safeguard which is "relatively simple, straightforward, and cost-effective." In their view, this conviction review mechanism "provides some kind of insurance against something that has gone awry at the trial or appeal court level." Another lawyer believes that section 690:

> makes finality a bit flexible. There has to be some kind of escape hatch or recourse for those who were let down by the system along the line. I think that is essential to the process because in those situations where people feel--and of course it's harder than presenting a case before the Court of Appeal or the Supreme Court--but in cases where people feel they truly are victims of injustice, at least [section 690] gives them a chance to have an ear that will listen and look into it and say, "look, these things were not done properly so we're going to look into it to see if this actually might be valid." ... At least the person has this escape hatch which I think is terribly important. And it's also psychologically important because the wording of this section of the code, if my memory serves me, speaks of mercy and psychologically, it's important to know that as a society, we're willing to acknowledge, admit and try to remedy what may well be human error. And to show mercy in appropriate cases where there may not have been human error, but for some reason the conviction shouldn't have gone as far as it went. [Author: I have difficulty with the use of the word 'mercy' in section 690 because it ought not to be applied to someone who is, in fact, factually innocent]. You're absolutely right. However, I think the use of the term 'mercy' is probably a vestige from way back that we should get rid of. But it should be replaced with something that also reflects the same kind of idea; that there is always going to be someone who is willing to listen if you believe you are a victim of the system.

In stark contrast to descriptions of the merits of section 690, defence counsel relate a litany of problems with the conviction review process.[93] The major problems are

---

[92] Later in the interview, however, this respondent expresses his distaste and skepticism of the conviction review process. It should also be noted that Guy Paul Morin did not apply under section 690 of the *Criminal Code*.

[93] I directed this question to all interview groups. This finding is demonstrated most blatantly when I compare interview transcripts describing the *merits* and *problems* of the section 690 conviction review process. The combined transcripts describing the merits of the conviction review process are contained on two pages. Conversely, the major problems identified by defence counsel comprise 18.5 pages (8.5 x 11) of text.

identified as: (1) delay (N = 10 / 71%), (2) secrecy (N = 10 / 71%), (3) lack of independence from the political arena / Department of Justice has vested interest in validating convictions (N = 9 / 64%), (4) section 690 remedies are too difficult to obtain (N = 6 / 43%),[94] (5) an absence of procedural guidelines for the conviction review process (N = 5 / 35%),[95] (6) Department of Justice skepticism that someone might be wrongfully convicted (N = 4 / 29%), and (7) Department of Justice investigations lack objectivity (N = 4 / 29%).[96] Additional problems identified by defence counsel are that applicants are penalized by parole boards because of claims of innocence (N =3); that there are insufficient legal and financial resources for applicants (N = 3); that the Department of Justice lacks sufficient resources (N = 3);[97] that Department of Justice investigations are inadequate (N = 2); and that section 690 is misleading (N = 2) because, although it is

---

[94] For example, three of these respondents advise that the standard of proof to succeed in a section 690 application is too high. Furthermore, the ALDWYC respondent states that "it takes a lot more for the Department of Justice to look at a section 690 case than people think. It has to have all the criteria that they're looking for because the last thing the Department of Justice wants to do is give a person a new trial: it's all politics."

[95] If I understand defence counsel respondents correctly, when they talk about an absence of *procedural* guidelines (as opposed to the absence of *statutory* guidelines), they are referring to the fact that very few people, including the legal community, are aware of the procedures to be followed for submitting a section 690 application, nor what happens to such applications when they are received by the Department of Justice. In 1994, the Department of Justice produced an information booklet which describes application requirements and the stages of review in the section 690 process. Nevertheless, these guidelines do not appear to be widely known. One of these counsel, however, also challenges the "arbitrary" nature of the six guiding principles set out by Minister of Justice Allan Rock.

[96] One lawyer states that Department of Justice "counsel was not sufficiently objective, so [he] requested outside counsel to investigate." Another defence lawyer suggests that "there is bound to be some institutional bias" within the Department of Justice, "even though there may be well-meaning people within that Department whose duty it is to look at these things carefully and to make proper recommendations."

[97] As one defence counsel advised, "Justice confessed to not having the investigative resources, both in terms of staff and authority."

"held out as a safety valve," the section "has no [substantive] remedy." Some defence counsel (N = 2) also consider the section 690 process a disincentive because of the expense and time involved in such reviews.[98] Interestingly, one defence lawyer charges that the Department of Justice "abdicates responsibility to the courts,"[99] and another observes that "one part of the system was very ready to pass off the problem on to another...":

> I represented a person on an application, first to the Supreme Court of Canada, seeking leave to appeal and making a motion for fresh evidence to be heard. That was a very interesting and depressing experience because the court turned down the leave application, with a dissent, and one of the reasons would have been that the legal issue we were seeking to get the appeal on was something they had already adjudicated upon a few years before. But it was interesting because it was a motion for the adducement of fresh evidence; it was heard orally, so I actually made a submission before the court. One of the judges immediately said to me, "why are you bringing this to us?" Essentially, that there is an executive remedy route to the Minister of Justice, which suggests that the court thinks, "we don't have to be bothered with this shit, just let it go to the Minister of Justice. That's what section 690 is there for." But then you get into the 690 process and that doesn't provide much relief. I just found it interesting that one part of the system was very ready to pass off the problem on to another part of the system which then, of course, doesn't adequately deal with it.

Another defence lawyer laments the Justice Department's lack of accountability and

---

[98] As one respondent notes: "in a small firm--and a lot of criminal defence lawyers work in small firms--they are not in the big, well-resourced firms who perhaps have banks, insurance companies and God knows what other institutional clients, that keep them bankrolled. Criminal defence lawyers work in small firms or on their own; how do they even carry the disbursement? If you have to do first-instance investigation, which I had to do in my case, how do you do that unless someone pays for the airline ticket, or for hotels and gas? So I would certainly have to be very circumspect about any other section 690 application I took on because of the tremendous resource strain."

[99] With respect to one section 690 case, defence counsel advised that Minister of Justice Allan Rock "abdicated his responsibility under section 690 because once he had the [final] report, he just referred it all to the Court of Appeal; passed the buck. [Minister Rock] asked the Court of Appeal a very stupid question--'is this new evidence admissible?'--when it was patently obvious to anyone that the new evidence was admissible. Allan Rock should have made the decision himself but, I would say, didn't have the political guts to make it because it was a sexual assault. That's my opinion."

criticizes them for "making their own rules"[100] and conducting investigations "in an adversarial manner."[101] Others argue that section 690 criteria is too narrow under certain circumstances (N = 1),[102] that Department of Justice lawyers are not trained investigators and/or interviewers (N = 1), and that the Department of Justice lacks expertise with respect to DNA analysis (N = 1). As one defence counsel suggests, the section 690 conviction review mechanism "is designed not to investigate miscarriages, but to conceal them." Similar disillusionment with the conviction review process is expressed below:

> I'm not very enamoured with this section as you can probably tell. I tend to put it out of my mind. Now that I think about it, I've done even more section 690's than I thought. It's hard to get up much gusto for an application you know is next to doomed from the start, no matter how righteous and proper it is. [Author: Were any of your 690s successful?] None. Not one. Did I ever take one on just to please my client? No. Did I ever take one on that I thought shouldn't win? No. Did I think that every one of them I took on would be successful? No. Did I think it should be successful? Yes. And maybe that's why I have the mental block because the longer we talk, the more I think of. 690s take an awfully long time to put together and to know that you are doing it to no avail, or next to no avail, and to the detriment of your client is disheartening. After a while you say, maybe somebody else should do it and I'll just guide the guy along.

---

[100] This respondent states that "the rules set out by the Minister of Justice [in the Thatcher case] for section 690 applications are purely arbitrary rules. Since when does the Minister of Justice make law? The Minister cannot make law. It requires that government and the legislature do that through regulations. So the Thatcher judgment of Minister Allan Rock, which sets out the procedures for 690 reviews, is simply his edict which has no power in law. The only legal power under which he acts is section 690. For example, the Department of Justice decided that there is a prerequisite that there must be fresh evidence. Well, that's not in the *Criminal Code*."

[101] In this lawyer's view, the section 690 process "is conducted by the Department of Justice in a purely adversarial manner, without exception, so that Crown witnesses are treated in the most friendly manner and defence witnesses are treated aggressively and confrontationally."

[102] This respondent cites Lynn Ratushny's *Self-Defence Review* and suggests that the Department of Justice should conduct a similar inquiry into sexual assault convictions based on recovered memory syndrome. Moreover, following the Supreme Court decision in *Vaillancourt*-- which removed the constructive murder provisions from the *Criminal Code*--counsel notes that "there are many people in prison serving second degree murder sentences who fall within *Vaillancourt*." Therefore, "you've got a bunch of people sitting in jail who are convicted of second degree murder for an offence that the Supreme Court of Canada now says doesn't exist. What do you do? What is the alternative? Well, the alternative was that a bunch of these people filed section 690 applications because that was the recourse available to them. My recollection is that none of those 690 reviews were successful. However, it was surprising how quickly many of these people were given parole."

Although one defence counsel respondent has represented only one section 690 client, he advises that it is "probably the only one [he] will ever do" because the process is "torture from start to finish; it is so difficult to convince the authorities that a mistake has been made."

With respect to insufficient financial and legal assistance for section 690 applicants, two defence lawyers observe that:

> The image I have in my mind from my own direct experience is of people in prison, often functionally illiterate, in some cases actual cognitive impairment--this is not true of the clients I have represented--but with no resources in a system that now requires out-going calls to be made on a collect basis. How many lawyers are going to accept collect calls from somebody they've never heard of who's in some prison cell? I remember asking my client why he picked me. And I think he picked me in part because of the Donald Marshall case: I was involved with the Royal Commission. He answered, "because you answered my phone call." ...but there would be some lawyers who would not have taken the call and there might be other calls that I wouldn't take for some reason and maybe the person calling had been wrongfully convicted.

* * * *

> I'm more concerned that if Legal Aid is not properly funded, people are going to get the best defences put forward by lawyers who are taking on these cases in the face of funding cuts or inadequate funding. I'm more concerned that had we had proper funding to Legal Aid, we would have more aggressive defences and more prepared defence lawyers. You can control how people are represented by controlling the purse-strings and the government does that.

Other defence counsel respondents (N = 2) advise that Legal Aid typically does not fund section 690 applications.[103] However, I contacted all provincial and territorial legal aid plans[104] who advised me that they consider each case on its merits, including requests for assistance in section 690 applications. According to one ad hoc respondent, "legal representation [for section 690 reviews] is, generally speaking, a plus point"; however, an

---

[103] See also AIDWYC, "Addressing Miscarriages of Justice," 19, who assert that "[i]n most provinces, no publicly funded assistance is provided" to section 690 applicants.

[104] See Appendix 10.

application will be dealt with even if the applicant is not represented by legal counsel.[105] Nevertheless, given the financial limitations of legal aid funding and the fact that so few section 690 applications succeed, obtaining funding for conviction review applications is bound to be difficult. Indeed, the Ontario Legal Aid Plan advises that section 690 applicants "are able to obtain assistance...subject to a strict merit test and only where an opinion letter is provided demonstrating a high probability of success."[106] In addition, "a certificate for such a review is subject to the applicant being unable to obtain assistance from other organizations," such as The Association in Defence of the Wrongly Convicted. However, as the AIDWYC respondent advises, their organization also lacks resources; therefore, they currently restrict their assistance to individuals convicted of first or second degree murder and manslaughter.[107]

Like their defence counsel colleagues, some ad hoc counsel (N = 2) identify delay as

---

[105] I believe that legal representation for section 690 applications is more than "a plus point" unless applicants are able to obtain other forms of outside assistance to gather new evidence, speak to potential witnesses, conduct DNA testing, etc.

[106] Letter from George Biggar, Deputy Director - Legal, Ontario Legal Aid Plan, to author (2 November 1998).

[107] These offence criteria weed out many appeals for assistance from AIDWYC. If the offence criteria are met, an individual seeking assistance from AIDWYC must then complete an Intake Information Sheet (see Appendix 23). If the case fits all relevant criteria, AIDWYC then seeks a lawyer to review the case, which includes an examination of trial and appeal transcripts, and contacting witnesses. The lawyer then completes a case summary and forwards it to AIDWYC, along with all the files s/he has collected. Once AIDWYC has made duplicates of all case materials, the information is returned to the lawyer who then drafts a case conclusion/summary. An AIDWYC review committee subsequently convenes and decides the appropriate course of action (e.g., preparation of a section 690 application). Individuals who receive AIDWYC assistance "have to be totally innocent of the crime that they've been accused and convicted of. They cannot have had any culpability whatsoever. They cannot have been there, they cannot have watched, they cannot have driven the car. They have to be totally innocent."

one problem with the section 690 conviction review process. As one of these respondents advises, "institutional inefficiency" may, to some extent, contribute to delays; however, in some cases, delays can be attributed to the applicants themselves (N = 2).[108] Another respondent states that "one cannot forecast with any accuracy how long it's going to take to close a case... . Some [reviews] can be done in months, some can be done in years."[109] Thus, the nature of a particular application will affect the length of time required to complete a conviction review:

> When you receive, in 1990 for example, an application that concerns a case that occurred in 1961, before you trace down who is dead and who is alive, who is available and who is not, who wants to talk and who does not, and what court records existed then and what did not, it's going to be a very long process. There has been a lot of public criticism by various lawyers' groups about the time [these reviews] take. I think there has got to be a bit of caution around that because whether it's in the Justice Department or whether it's in an outside organization, there may always be a risk of institutional inefficiency. Any office has it. So that is going to be a part of it and that is going to depend a lot on internal policies and ways of proceeding and priorities. And there is also going to be a certain amount of delay that may well be inherent in some of these cases. In some cases, the applicants themselves delay the process. It happened to me with one investigative report when the Department of Justice said, "do it fast, do it now, meet all these people, get it done," and it was done within 8 months--which I think is quite reasonable for the kind of brief that it was. However, it took almost as long for the applicant to respond to the Brief as it did to conduct the entire investigation. So that happens... .

---

[108] As one ad hoc counsel advises, "to put [delay] in its proper context, it is important to understand that from the beginning of an application to the point of time when a decision is actually communicated to the applicant, it may well be that a significant part of the delay is attributable to the applicant."

[109] Another interviewee argues that "in an ideal world where resources are plentiful, conviction reviews could move a lot faster if you had the personnel. In reality, it's a lot of work and if you have a caseload, either in private practice or in the Department of Justice, by necessity they are going to take some time. I think people have to realize that: that the process, even the court process, takes quite a while, and sometimes for good reason, and in doing these [section 690] assessments, you want to be rather meticulous. I think that's important. As a result, there is going to be some time involved."

Ad hoc counsel also advise that the absence of subpoena power (N = 3) and the inability to take evidence under oath (N = 1) can be problematic. Only one ad hoc lawyer believes that "there are no major problems associated with the section 690 process...that can't be overcome by the use of common sense and a diligent and fair approach to [conviction] review." In his experience with section 690 investigations, one respondent advises that Ministers of Justice Allan Rock and Anne McLellan "have been totally objective in their approaches" to conviction reviews. He concedes, however, that "in terms of the law, the Criminal Conviction Review Group is a relatively young organization that is groping forward to deal with the ever-increasing number of applications, with a statute that needs improvement."[110] In contrast to many defence counsel opinions, one ad hoc respondent is not convinced that the section 690 "bar is as high and as difficult" as "AIDWYC and others suggest." He also argues that the criticism that the conviction review process is not independent is more "perceived than real." Another lawyer rejects criticisms that Department of Justice conviction reviews are not impartial.

> One of the things that I totally disagree with are people who make blanket statements in public, saying that because [conviction reviews] are connected to the Justice Department, it is connected to the Crown and, therefore, there is no impartiality. This is absolutely false. It may have been the case that that was more often the perception than the reality--and I don't know because I wasn't working with the Department of Justice in the 1970s and 1980s when it was part of the Crown arm of government--maybe that happened, I don't know. Since 1995, when I've been involved with the Department of Justice, on the contrary, there has been a real concern to distance itself from the whole prosecutorial branch of government. And I feel very badly for the people I know in the Criminal Conviction Review Group when I hear these blanket statements being made, because they are just not today's reality. There are other problems but that's not one of them.

---

[110] Later in the interview, this counsel stated that in terms of resources, he would like to see the central core in Ottawa maintained and, if necessary, enlarged such that people like himself "can be responsible, either geographically or nationally, for cases that [the Criminal Conviction Review Group] can't handle."

Unfortunately, the Department of Justice respondent did not answer my questions concerning the merits and major problems with section 690 nor did he suggest recommendations for reform (questions #19-21), all of which are of particular import to this research. Instead, I was advised to "consult the Department's Consultation Paper."[111]

Not surprisingly, defence counsel provide numerous suggestions to improve the section 690 conviction review process.[112] Most (N = 13 / 93%) recommend the establishment of an independent review tribunal to review claims of wrongful conviction.[113] As one respondent argues,

> A section 690 decision is a political decision, that's what it boils down to: is it politically helpful for the government. Milgaard is a classic example. Does the government think it is politically helpful for them to allow a section 690 review. Kim Campbell decided it was not. And then Brian Mulroney decided that it did. It's disgusting. This kind of decision should not be anywhere near a politician who has interests to serve other than the interests of justice. It has interests to serve of opinion polls and personal popularity and government popularity and everything else.

Another defence lawyer also perceives conviction reviews as "a political process" and states that "anybody who thinks it's a legal process is fooling themselves."

> Well you know and I know that 690 is a section that is only utilized when there's enough political pressure put on the Minister. The fact that somebody is wrongfully convicted means nothing. You need (a) somebody wrongfully convicted, and (b) a ground-swell of public opinion to force the Minister's hand. The Minister is not going to reopen cases just because someone says, "oh, the case would have been different had this been known," or "the case would have been resolved in a different way had that witness been called." It's a political thing.

---

[111] See DOJ Consultation paper.

[112] This question was also asked of all interview groups, with the exception of the AIDWYC respondent.

[113] One defence lawyer expressed his astonishment that "they haven't initiated structural changes to section 690, like setting up an independent review body and an investigative arm of that body with full investigative powers. Until they do that, everybody is going to have their own fun and games with justice." Another respondent suggests that the standard of proof be lowered (i.e., the test should be whether or not it is possible that a miscarriage of justice occurred, rather than having to prove this beyond a reasonable doubt).

Conversely, two ad hoc counsel do not recommend the creation of a new review tribunal to replace the Criminal Conviction Review Group at the federal Department of Justice.[114] As one respondent argues, "conviction review should remain with the Minister of Justice in order to maintain Ministerial accountability"; however, he also believes that continuing efforts should be made to "enhance post-conviction methodologies."

> That is not to say that ameliorations to the present procedures ought to be rejected merely because they represent departures from the status quo. On the contrary, continuing efforts to enhance post-conviction methodology should be encouraged and, when practical, implemented after careful testing and consideration. When all is said and done, the [section 690] process is quite clearly evolutionary. Furthermore, it is flexible. An independent body not accountable to the Minister or to Parliament would likely result in the production of a plethora of inflexible rules and regulations, hamstringing its ability to fully investigate allegations of alleged miscarriages of justice. Clamour for representation on an independent body would be persistent. Lawyers, social workers, criminologists and psychologists, not to mention former inmates, would all claim membership.

Although the creation of an alternative review tribunal "would eliminate the criticism that the current system is not independent," one ad hoc respondent does not believe this would "change the nature of what needs to be done and the kind of investigation and analysis that whoever undertakes this kind of work is going to have to engage in." In his view:

> The figures relating to the new Commission in England are something to be carefully examined in terms of their context: for example, how many applications do they get? How quickly are they actually able to process those? What resources are they allocating to it, etc. I think those sorts of things need to be explored further to understand what those figures mean. ...Unless they're put in context, it's difficult to know exactly what significance you can draw from those. I don't think there is any great panacea to this problem. Certainly I'm not suggesting that reforming the current system is something that doesn't need to be done... . [However], I think that the creation of some new agency and rearranging the chairs, so to speak, in and of itself doesn't impress me.

---

[114] The other two ad hoc lawyers declined to comment on the issue of a different review tribunal. In her positions as Vice Chair of the Canadian Council of Criminal Defence Lawyers and President of the Canadian Bar Association (C.B.A. - Criminal Law Section), one of these respondents "specifically withdrew herself from consideration of the Department of Justice Consultation Paper ("Addressing Miscarriages,") at the C.B.A. because [she also] performs ad hoc work" for the Department of Justice. As such, she declined to make specific recommendations concerning the establishment of an alternative review body.

If such a review body is established, some defence counsel (N = 3) advise that it must possess adequate resources to carry out its mandate. In the absence of such a review tribunal, defence counsel recommend the following improvements to the conviction review process:

TABLE 6.6
Defence Counsel Recommendations to Improve the Conviction Review Process

Recommendations	Freq. Cited
1. Compel the Minister of Justice to decide cases within reasonable time.	5
2. Initiate procedural guidelines for the section 690 process.[115]	2
3. An independent review body should be empowered to both investigate and decide upon conviction review outcomes.	1
4. Increase Department of Justice resources.	1
5. Make the conviction review process more transparent.	1
6. Increase resources for section 690 applicants.	1
7. Hire competent Department of Justice staff.	1
8. Broaden eligibility criteria for section 690 conviction reviews.	1
9. Allow defence lawyers to be present when witnesses are being interviewed by DOJ counsel.	1
10. Allow full access to materials upon which Department of Justice opinions are based.	1

[115] One defence lawyer suggests that the section 690 process "would be much more user friendly if there was a system and checkpoints along the system that, once [a particular] stage has been completed, then the client would be sent a letter saying that the Department of Justice has received this, the next step is to do this, and what the expected time frames ought to be." He also suggests that it would be useful to construct a formal application form for those seeking conviction review. The other respondent argues that the conviction review process requires "formalized procedures and rules."

Ad hoc counsel recommend: (1) that they be provided with subpoena power (N = 3)[116] and the power to depose (N = 2), (2) that completion times for reviews be reduced (N = 1), (3) that Department of Justice resources be increased (N = 1), (4) that police agencies not lead section 690 investigations (N = 1), (5) that the conviction review process be made more transparent (N = 1), and (6) that conviction reviews not be limited to "new matters" (N = 1). For example:

> [One of] the Minister's [Consultation Paper] questions was: should the review process be available only when new matters are raised or should it also include matters that were not raised as a result of strategic decisions by the accused, acting on the advice of competent counsel? I'll read you my answer. The review process should not be limited to new matters. The question would seem to eliminate convicted persons (a) who were unrepresented and (b) persons acting on the advice of incompetent counsel, of which there are too many. I may be misinterpreting the sense of the [Minister's] query but the Minister must not be confined by semantics. Any apparent circumstances giving rise to the demonstrable view that a miscarriage of justice likely occurred should suffice to bring an applicant within the section. Options available to the Minister should never be foreclosed by narrow legalisms.[117]

The secrecy which surrounds conviction reviews is a frequent critique of the section 690 investigation and decision-making processes. As one ad hoc counsel suggests, "the Minister of Justice [should] take steps to increase both Parliamentary and public exposure

---

[116] One respondent qualifies her response, however, by stating that it may be preferable to "create a process whereby, in appropriate cases--where a witness is key and will not cooperate--then an application could be made to a court to allow for [subpoena power]." Therefore, "a subpoena power, perhaps not being exercised by the person running the investigation, but being exercised by a Justice of the Peace on the application of that person, in appropriate cases," would be sufficient. Another ad hoc respondent recommends that "amendments to the section 690 process should provide for the power to subpoena persons and papers, public and private. In addition, there is no use issuing a subpoena to a reluctant person unless you have the power to swear or affirm that person. A subpoena does not carry that power by itself. It may do so when you're subpoenaed to go to court; in fact it does so, but they can still refuse to be sworn and affirmed in a courtroom. So, number one, flexibility must be maintained. Number two, power to subpoena and the power to depose."

[117] This is his response to one of 15 consultation questions contained in the DOJ Consultation paper (19-20).

to the section 690 conviction review process: to "bring it out of the closet, so to speak." For example, "without breaching the *Privacy Act*," the Minister could "table in Parliament a summary of all the cases considered during the previous 12 months, the cases that resulted in a court reference, the cases that did not, statistically, and the number of cases on hand." This respondent also suggests that "we take waivers from [section 690] applicants in the event that their appeals are successful, but only in that event would we be permitted to make it public. If it was not successful, then it may or may not be an embarrassment to [the government] to have it made public."

In terms of resources, one ad hoc lawyer argues that it is necessary to ensure that "if you need extra counsel to move a file a lot faster, that the resources should be there."

> That applies whether it be inside Justice or in an independent body. What I've heard--which may be just rumour--in England, they did a few high-profile cases very quickly and everybody got very excited, but the backlog is just staggering. And that's not going to get us any further. So whether it's an independent organization or whether it's Justice, you need resources. Maybe, if [the review mechanism] is inside the Justice department and it is as independent as it is, maybe those resources are more likely to be there. Because the one thing you do have when it's connected to the government is the fact that it is the same government that people are going to appeal to for compensation. So the government is acutely aware of the fact that it has got to move and the resources have got to be put into it. So there might be an advantage there as opposed to an independent body. You'd have to be sure what their level of accountability is and to whom. It's all well and good to say, well you've created this [body] to deal with miscarriages of justice but who are they going to be accountable to? What are they going to do when they are overworked and underpaid, if they are; when the backlog creeps up and they don't have enough resources and they go to whoever is funding them. And what's the difference between an independent organization that's going to be funded by government and keeping it in the structure, but away from the Crown branch, I'm not sure. Those are the only things I've really thought about.

When I asked this respondent if she has experienced problems obtaining complete police files for conviction review investigations, she responded that she had not. Nevertheless, she does not "presume that what has been handed over is complete": it is important "not to overlook the possibility of wrongdoing inside the police force. However, not every

application involves wrongdoing by the police."

> I don't think that a police force should do the investigation. I don't think that substituting one police force for another will ever gain public confidence or the confidence of the applicants. If I looked at the problems in Québec, for example, if the initial investigation was done by the RCMP and you substituted the Québec provincial police, I can't see any applicant feeling particularly at ease or vice versa. I think it's very important that it not be police who head up the 690 investigation. I disagree with those who say that lawyers are inappropriate persons--so long as they're lawyers with enough experience to have examined and cross-examined in courtrooms, to know what should be done, to be able to evaluate what was done to see where the possible prejudice might have crept in. ...Lawyers may not be the only appropriate people but I really have a serious problem with the investigators being a police force. I think in the long run, it will cause more public perception problems than anything else.

Ideally, resort to section 690 could be minimized if emphasis is placed upon the prevention of wrongful convictions in the first place. Table 6.7 describes the most frequently cited defence counsel suggestions about how best to minimize wrongful convictions.

Table 6.7
Defence Counsel Recommendations to Minimize Wrongful Convictions

Recommendations	Freq. Cited
1. Increase education and training for judges.[118]	6
2. Increase access to legal counsel and funding to Legal Aid.[119]	6
3. Increase education and training for police.[120]	5
4. Increase education and training for defence counsel.	4
5. Increase education and training for Crown counsel.	3
6. Ensure complete disclosure between police and the Crown, and between the Crown and defence.	3

[118] For example, one lawyer suggests that "judges need more sharply focused training with respect to wrongful convictions."

[119] As one respondent suggests, many more people are pleading guilty because of their inability to obtain legal aid funding.

[120] For example, "police require enhanced training in the area of interviewing techniques," and police investigations should be "more objective, open-minded and competent." Another respondent argues that police should "rely less on confessions and more on scientific evidence."

Additional defence counsel recommendations to minimize wrongful convictions include an expansion and enhancement of the role of appeal courts (N = 2),[121] initiating safeguards for police interrogation techniques (e.g., videotaping suspect interviews) (N = 1), more cautious use of jailhouse informant testimony by the Crown (N = 1), an increase in Crown discretion (N = 1)[122] and police resources (N = 1), and an invigoration of the media so they are more rigorous in their coverage of wrongful convictions. One defence counsel respondent also raises the issue of political correctness:

> I was in the courtroom during a spousal assault case, a case called ahead of mine. The judge said that he would not oppose a dismissal because the complainant did not show up. The judge said to the accused, "you're lucky the complainant didn't show up." Now that statement speaks volumes about that judge's notions of what reasonable doubt is and what the process is. All the complainant had to do, in that judge's mind, was to show up. That is part of the problem, at least in British Columbia, because of political correctness.

All defence counsel respondents believe that media coverage of wrongful convictions has some influence on conviction reviews. For example, one lawyer argues that 'evidence' influences conviction review outcomes, but that media coverage "affects the seriousness with which the Justice Department examines a case."

> We were going nowhere with Milgaard until we constructed an entire media strategy. And equally frustrating, it was very difficult for us to get the story out of Winnipeg. It was a big story in Winnipeg for a long time before the *Toronto Star* and *The Globe and Mail* picked it up. Once they picked it up, the whole thing caught big momentum. But it was essential to our case. We would not have been successful with the 690 without the media. No question.

---

[121] As one defence counsel notes, "there are two levels of wrongful conviction. There are wrongful convictions which are corrected in the Court of Appeal, and we have a mechanism for dealing with those. But once the Court of Appeal has cast its lot, so to speak, then it becomes impossible to reverse it. That implies, then, that everywhere along the line, we've got to be looking at a mechanism for dealing with the underlying fact situations."

[122] As this respondent suggests, the Crown may proceed with cases that ought not to proceed because of specific policy directives.

The necessity of media coverage to pressure the Minister of Justice to take action is echoed by ten (71%) other defence counsel. However, only eight (57%) respondents believe that media coverage influences the actual *outcomes* of section 690 conviction reviews.[123] Others (N = 3) suggest that media coverage speeds up the conviction review process. However, as the following observations suggest, media exposure can be a double-edged sword:

> I think the right case would benefit from good, intelligent, well-researched media interest and coverage, but not every case lends itself to that. The media play an interesting role in the issue of wrongful conviction in that they have been instrumental in contributing to wrongful convictions being exposed and reversed. I also think they've probably contributed to some wrongful convictions. The idea of vigorous, diligent, independent media is a very important concept. I'm not sure we really have that kind of media; not because of the failings of individually committed journalists, but because of how our corporate media is structured. But if I had the right kind of case, I would certainly expose it to public attention, often and loudly, and I would hope that that would remind the Department of Justice that the public are watching; that this is of public interest and that scrutiny will be brought to bear on decisions that are made.

* * * *

> I didn't [try to garner as much media attention as possible] because the victim in one of my 690 cases was a particularly popular person, so the media attention would be negative. It would be sympathetic and, as a result, not helpful. Unless you can focus on something--for example, some glaring error in the trial--forget about the media. The purpose of the media is not to chest-pound and aggrandize the guy who's making the application. The idea of the media is to get the public on-side to pressure the government to do something. If all you're going to do by calling the media is to get the victim's family to mount a counter-defensive, you're going to defeat your purpose.

As interviews concluded, I asked defence counsel whether there are additional questions they feel should be asked about the conviction review process. They asked why the government wants section 690 (N = 1), why the section 690 process is so secretive (N = 2), and why no one has questioned the section 690 process before now (N =1). When one respondent met with Minister of Justice Anne McLellan, he asked: "why on earth do

---

[123] One defence counsel notes that "as long as such decisions are left in the hands of a politician, media coverage will influence [section 690 conviction reviews]."

you want section 690?"

> I said that a Minister should not be mucking around with individuals. It's not necessary for you to be mucking around with individuals; making judgments that of course, really, you aren't making, but rather they are being made for you. Give it to a body that is quite capable of doing it on its own. The other thing that AIDWYC is pushing for is an expansion of appellate courts so that in cases of lurking doubt, they can set aside a conviction. And the CCRC in England has taken upon itself that jurisdiction. It doesn't require fresh evidence for a case to be referred to the court of appeal. They have explicitly made that decision. We had one [CCRC member] here at the Morin inquiry and he specifically said that they have decided that even in the absence of fresh evidence, if there is a lurking doubt on the face of the case, they would refer to the court of appeal. And in their first year they made 12 referrals.

Another defence lawyer suggests that more people should "continue to exert pressure because the system is truly incomplete unless it can unravel its mistakes." It is also important to examine the conviction review process from the point of view of the consumer, as one respondent observed:

> One of the most significant indictments that can be leveled at the process we currently have is how generally inaccessible it is. As I've said before, there is no 1-800 number that a prisoner can use and, as a society, we just shouldn't be satisfied with people languishing in prison by virtue of the fact that they can't read or write, or they can't contact anybody by phone. I think one other area that might be of interest if you're generally looking at the issue of wrongful conviction is how it impacts on issues of parole and release. [Author: the denial of guilt you mean?]. Yes, and that is referred to in the Marshall Commission Report. It's a vicious cycle. You don't confess because you didn't do it but if you don't confess, you are seen as not acknowledging your crime and, therefore, you're not rehabilitated and, therefore, still dangerous. I think that's an important aspect of this.

Adhoc Counsel

The first four interview questions[124] to ad hoc counsel were intended to clarify their

---

[124] Question #1 inappropriately refers to "ad hoc *Crown*" counsel (see Appendix 18). One ad hoc respondent advised that "when we talk about Crown counsel, normally one thinks of the prosecution side. I think certainly that the Criminal Convictions Review Group in the Department of Justice would eschew that kind of terminology and I think any outside counsel would as well because whenever an outside counsel is engaged, I think they would approach their work with a fairly independent state of mind. So when you describe them in that way, to some extent it's misleading." In subsequent interviews, I rephrased question #1 by deleting the word "Crown."

experience with section 690 conviction reviews (i.e., how often and how much time they have invested in particular conviction reviews) and to determine the nature of their involvement (e.g., full-time or part-time services). Ad hoc counsel (N = 3) advise that both full- and part-time services may be required to investigate section 690 applications.

> I was not spending all of my time on this; it went in stages. For example, in the second case I was involved in, I began in April of 1998 and most of my work--the investigation brief, in any event--was completed by the end of July 1998, but it was a very intense four-month period where I was devoting my time almost exclusively to that case... . On the other hand, the earlier case which I began in October 1995 went in various stages; periods of some intense activity and then the ball would be over in the applicant's court. So you wouldn't do anything perhaps for several months, not because you were being inattentive to the file, but simply because you had done your part and it was up to the other side to do something. Then you would pick up the ball and run with it when it came back to your court.
>
> * * * *
>
> When you receive these things, each one of them is vastly different in terms of what stage it's already at, whether or not other lawyers have already seen it, and whether or not it can actually be processed very quickly. For example, the first that I received was in the summer of 1995 and for some very valid reasons, it is still not ready to be completed. In fact, there is a proceeding going on today at the Court of Appeal that may or may not influence some part of this file. So that one couldn't be taken in and processed and put out in a short period of time. There were all kinds of complications with it and all kinds of intricacies, if you will, not the least of which are directly related to the study that we're doing. So that one, which dated back to 1984, and I don't know when the application was made, probably in the late 1980s, still wouldn't be ready to be wrapped up right now and it may not be after today's proceedings at the Court of Appeal. However, last fall, I received one and the purpose of the mandate was, "get this in and done and out as fast as we can, there's a real urgency here." And so I took the file in September 1997 and produced the investigative report, which was hundreds of pages of annexes and interviews and everything else, in July, because the applicant wanted it very quickly. So it was less than one year to do the entire investigation brief and send it off to the applicant. The applicant then held on to it for seven months. If I were him, I would have sent it back within a two-week turn-around time. But you see, there was a certain urgency there because it was a sexual assault situation and the victim had started making public statements on television, stating that she had convicted the wrong man. So when I received it, it had been in the Justice Department for a little while, but the victim had just made these statements. She had made one statement on television in May, and she was about to give another television interview in September. I received the file several days before she gave that interview and those interviews became an important part of the investigative brief. So in something like that, [the case] came in and went out about as fast as was humanly possible in the circumstances.[125]

---

[125] When I asked whether the urgency placed on completing this conviction review was due to public statements made by the victim, this lawyer responded that "yes, the television interview brought a certain amount of publicity that would have made a difference...," but that "someone in the Criminal Conviction Review Group would be better able to tell [me] whether [the urgency] was due solely to publicity... ."

As "a busy civil litigator" another respondent advises that when he does section 690 reviews, he also has to maintain the rest of his work. However, once the investigation has been completed, he "takes a week off and brings the material into [his] office at home and focuses on doing the brief." Therefore, although he "dedicates big blocks of time, [he] doesn't focus solely on a review case for two or three months at a time or the rest of [his] practice would die."

All four ad hoc respondents have been involved with at least two conviction reviews; however, only one could specify how much time, in total, he had devoted to section 690 investigations.[126] Furthermore, only one respondent has assisted the Department of Justice in *both* conviction reviews and other matters: the remaining three have been involved with section 690 reviews only.[127] Two of the four respondents have practiced as Crown prosecutors, and another has participated in several private prosecutions. Years of experience as defence counsel are available for only two respondents; 25 years and 15 years.[128]

The Department of Justice hires ad hoc counsel to review section 690 cases for a variety of reasons. First, as there are only five full-time lawyers in the Criminal Conviction Review Group, workload pressures (N = 4) sometimes necessitate the assistance of ad hoc

---

[126] This respondent has devoted a total of approximately 25 months to section 690 conviction reviews.

[127] Only one ad hoc lawyer identified the section 690 applicants he conducted investigations for; however, due to counsel's request for anonymity, I do not identify these applicants.

[128] One lawyer advised that he has worked as both Crown prosecutor and defence counsel for 25 years. I neglected to clarify the breakdown of experience in each role. The other respondent spent three years as a Crown prosecutor for a provincial Department of Justice and has acted as defence counsel since 1988.

counsel to investigate section 690 applications.[129] Second, a conflict of interest (N = 4) may arise which will prompt the Department of Justice to hire outside counsel.[130] For example, a conflict of interest arose in one case because "one of the key witnesses had formerly been a prosecutor with the federal Department of Justice. [As such], it was felt that, given the relationship, it would be best to retain an independent, outside counsel." Third, special expertise may be required which is best dealt with by ad hoc counsel (N = 1). Finally, "ad hoc counsel may facilitate the necessary image of independence to outsiders" (N = 1).

> I think that in-house [Department of Justice] counsel have the independence, but I think the image may be that they don't. And I think the Department of Justice may be somewhat aware of that but the question really should be addressed to them because I'm really just guessing. I think there may be a feeling that independent counsel somehow will enhance the image, the perception of the process as being an independent one. But I would stress that my experience with in-house counsel is that they are all endowed with that same independence. It's a perception problem more than it is, I think, an actual problem with the approach taken by the people who work there.

According to ad hoc counsel (N = 4), their role in section 690 conviction reviews is to assist the Minister of Justice by conducting an investigation and preparing an Investigation Brief--which includes counsel's recommendations--for the Minister's

---

[129] As noted by one respondent, the Department of Justice "is increasing the use of ad hoc counsel purely as a matter of expediency in getting rid of the [conviction review]." He also advises that the Department of Justice "needs more support staff." Another lawyer believes that ad hoc counsel are sometimes hired because "of resources. On some occasions, someone [at the Department of Justice] who had a file has fallen ill and something had to be done and it required someone who is perfectly bilingual and who knows the province of Québec and who is able to interview and write in English and in French. But if it is just resources, the Department of Justice does not have to go to outside counsel; they could go to counsel in some other federal Crown office. But they don't because they are acutely aware, ever since the restructuring a few years ago, that the perception of independence is a very important one."

[130] One lawyer advises that "in some cases, allegations are made which involve the federal Department of Justice and, therefore, they would prefer having somebody totally independent to take the investigation so as to show, at least, that there should be no reasonable apprehension of bias."

consideration. As interviews progressed, I asked some ad hoc lawyers whether completed section 690 analyses and reports go directly to the Minister, or whether they are forwarded to Criminal Conviction Review Group lawyers to comment upon. The intent of this question is to determine whether outside counsel perceive their investigations and analyses as independent of departmental influence. Although one respondent could not recall whether there was an intermediary in a case he had completed a few years previously, he believes that his "Brief went to the Minister directly." As another lawyer advises:

> It is entirely my analysis. I can be quite strong about this. I've never had anybody suggest to me that somehow my thinking ought to change or, "we don't like this, you'd better rewrite this." What happened in one case, however, is that the analysis was reviewed within the Criminal Conviction Review Group by the then chief of that group, who has since moved on to other things. He reviewed it and then raised a few questions with me and provided some comments, all of which were germane and helpful. And this prompted me to follow up on a few of these questions and indeed, expand on some of the information contained in the analysis. There is nothing particularly unusual about that, it's the sort of thing you'd do when you write up a paper; you might want to vet it with somebody.

All ad hoc counsel advise that they "have sufficient resources and authority" to conduct section 690 investigations, but that the investigation process could be improved by "providing investigating counsel with the power to subpoena."[131]

> I haven't had any problem that way. Generally speaking, I've found that even people who aren't obliged to speak with us, sometimes we've had some trouble, someone will say yes, then no, then yes. Obviously, there are circumstances where a subpoena power would be preferable by far. We had one situation that I can think of where someone almost chose not to meet us and it would have been unfortunate because there would have been nothing that could have been done about it and it's only after the interview that certain elements became very, very clear. So I think that a subpoena power may well be a good thing but, to date, I've not run into situations where I found myself unable to speak with a key person and unable to do anything about it.

---

[131] According to one respondent, the inability to subpoena witnesses "can be crippling if people don't want to cooperate." Section 690 legislation does not confer subpoena power upon departmental or ad hoc counsel who conduct conviction reviews.

Although another lawyer recommends that investigating counsel be empowered to subpoena witnesses, he notes that "we have the power of ingenuity and if you use that, you can usually find out what you want to find out." He also advises that:

> I have on two occasions used members of various police forces who simply delight, generally, in pointing out mistakes their colleagues have made. I don't use any member of the police force who was involved with the original investigation. For example, on this tragic murder case that I'm completing, the Metropolitan Toronto Police force was the investigating agency, but I'm using the Ontario Provincial Police force to help me. And they take great delight in it. They're pretty selective about who they appoint to help me. They appoint the very best they've got and the gentlemen I worked with on this case were superb police officers. I also have access to other resources, the legal profession for example. If I want to know something about somebody, I will phone my colleagues somewhere in Canada and ask, "what can you tell me about so and so" and I usually get a candid answer. You're aware of the fact, of course, that the Minister may consider information other than information which would be admissible as evidence.
>
> * * * *
>
> There is no subpoena power under the current legislation so you have no powers to compel people to testify. You've asked me if I had sufficient resources; I think the answer is yes. I didn't find that to be a difficulty at all. The question of subpoena power is an interesting one and is something you should put to the people in the CCRG because their perspective is a much broader one because they handle many more cases than I would or probably any outside counsel. I think there has been an occasion or two where it would have been helpful to have subpoena power. They should answer that, I'd just be speculating. It hasn't been a problem for me in terms of attempting to interview people. I've never had anyone refuse to do that.

In most of the cases investigated by ad hoc counsel interviewed for this research, section 690 reviews were conducted without assistance from other lawyers, either ad hoc or Department of Justice staff.[132] On occasion, however, the Department of Justice has "more than one lawyer--in the Criminal Conviction Review Group anyway--involved on a particular case." One ad hoc lawyer describes her experience with conviction reviews as follows:

---

[132] However, one respondent advises that he was provided "some assistance by one of the departmental lawyers, but not in terms of interviewing anybody; rather, [the assistance] was of an administrative nature."

> When I've received them, someone else has done something prior. In each of my cases, there has always been at least one lawyer who had done something prior to my involvement. That can be because someone makes an application and then lawyer A writes back and says, "in support of your application we need A-Z documents." So, six months later--because it can take a while--the person has collected A-Z documents and then they send them in. By this time, lawyer A has moved on to something else. So lawyer B receives the A-Z documents and begins the study and then says, "we must interview Mrs. X." Mrs. X can't be found or doesn't want to be interviewed, but then changes her mind. For example, let's say that all of this takes a year. Well in the space of one year, lawyer B may have moved on, so that's how it can happen; why more than one lawyer touches it. Especially when it's in the Department, people do move around, so there is always great care, as I've seen anyway, to have detailed memos in the file by whoever is working on it at a certain point in time, so that when you do receive it, you don't have trouble following who did what, and I find that very helpful. I think if you have a lawyer along the chain who doesn't put the information into [the file completely] or properly, you could have a real problem. And by the very nature of the way these things come about, sometimes things take longer than one would hope. Sometimes they don't but it's a reality and if it is taking longer, there may be situations where the person who started [the investigation] can't continue it. I've received files where the person who started it was sick and on leave, so the file had to go to somebody because it couldn't sit around for six months with nothing being done.

Thus, conviction reviews may involve more than one investigating counsel. This is not problematic if two or more lawyers work on a particular case simultaneously. It becomes more of a concern, however, if cases are passed from one counsel to another because additional time must be spent familiarizing oneself with all relevant case and file materials. As noted by one of the ad hoc respondents, her section 690 investigations invariably involved other counsel prior to her receipt of the file. This may contribute to conviction review delays, although myriad factors can increase the time required to complete reviews. Since lengthy completion times often characterize section 690 investigations and constitute one of the dominant criticisms of the conviction review process, sufficient financial and personnel resources for the Department of Justice are important. However, ad hoc counsel advise that they have "sufficient resources and authority" to conduct conviction reviews.

In order to better understand the nature of section 690 investigations, I asked ad hoc

counsel to describe the actions they take to investigate conviction reviews, from Initial Assessment to the final Investigation Brief (which they forward to the Minister of Justice). The first step is to examine the application--"which may be just a letter, or contain voluminous material"-- to ensure that all required information has been submitted. Second, all preliminary hearing, trial and Court of Appeal or Supreme Court (if applicable) transcripts and/or factums are examined. Police and Crown files may also be examined.[133] Moreover, relevant witnesses are sought and interviewed, including the applicant. As ad hoc counsel explain:

> As a general way of proceeding, I make a list of those people I believe I would like to speak to because their versions of certain facts may be key to the applicant's request. It doesn't matter to me whether these people were interviewed at trial or not. ...You don't necessarily need a stenographic record of everybody interviewed, depending on what information you're looking for. Once the interviews are finished, I draft...an Investigation Brief, which may be quite long because it will include all of the transcribed interviews, all of the police reports, or whatever I refer to in the Investigation Brief. Then I send it to the applicant and his or her counsel, but always with a written undertaking on their part not to communicate any part of it to anybody else for the protection of anyone who may be quoted in it. I would imagine--although it hasn't happened with me--that in situations where there is a real fear that someone could be in jeopardy by information going out, that either the information goes out without the names or the information is treated differently.[134]
>
> * * * *
>
> You would review the Crown files, anything in the Department of Justice itself federally, but also the provincial Crown files. I would, and have reviewed police files and anything else that you become aware of that has any relevance in the way of documentation. And then there is the business of interviewing witnesses. There may be a cast of many characters that you feel need to be interviewed. I've always interviewed the applicant and the witness parade. In both the X and Y cases, there were a number of witnesses and those [interviews] were done under oath with a court stenographer and transcripts of the interviews were prepared. It may be that you interview some people and gather information, but it is not formalized in the sense of a recorded, transcribed, under-oath interview. That's a judgment call, depending on the nature of the information and its significance and the importance of creating a record of that information.

---

[133] In his experience examining Crown and police files, one respondent advised that he "received excellent cooperation from the authorities involved."

[134] This respondent advises that "some interviews are stenographically recorded, particularly when interviewees have said many different things on many different occasions."

* * * *

> I certainly interview the applicant, at least once, preferably twice. And as a public relations exercise, if the applicant has a wife [or other family member], I will speak with [them] and reassure [them] that we are doing our best to find out what can be done to assist [the applicant]. It truly is an exercise in common sense and decency. A bit of sensitivity is involved here because people don't understand why we take so long to get to the root of some of these problems. I also liaise with police forces. I have to have access to criminal records. Criminal records go to credibility. DNA testing? Haven't had the need for it so far but I wouldn't hesitate. I know where to get it done and get it done fast.

Once their Investigation Briefs are completed, ad hoc counsel advise that they forward them to the applicant and his or her lawyer to review and comment on. If there "are any further issues to be explored, that is the job of ad hoc counsel." One ad hoc lawyer also advised that, on many occasions, she sends the "investigation brief to the Crown authority at trial, particularly if there are allegations involving the Crown." Alternatively, ad hoc counsel may "just want to know if the Crown has any final comments before [they] write an opinion" for the Minister. The final task for ad hoc counsel is to "complete an analysis of the investigation, including one's opinion about what it all means," which is then submitted to the Minister of Justice. However, each investigation requires a variety of strategies and procedures. For example, one respondent states that "sometimes, you won't go through all of these steps": if counsel has information in the file that, on its face, "blatantly indicates the need for Ministerial intervention, and conducting interviews and writing an investigative report will prejudice the applicant (e.g., cause delay when an applicant is very ill), then some of the usual procedural steps are omitted to expedite the matter." Another ad hoc lawyer advises that the Department of Justice drafted "more

expansive" guidelines following the Thatcher decision[135] and that [investigating] counsel "live and die by" the six principles set out by the Minister in this case.[136] Moreover, "the avenues of exploration or investigation never close"; ad hoc counsel "will follow any lead that will assist in the discovery of the truth, whether it favours the Crown or favours the applicant."

The issue of funding DNA tests for section 690 applicants arose during my interviews with ad hoc counsel; therefore, I asked if the Department of Justice funds DNA testing for applicants in applicable circumstances. I was advised by one respondent to "raise this with the Department"; however, he speculated that "if there was a case to be made for DNA testing, then somewhere between the federal and provincial Crown, the applicant could probably expect to have it paid for." When I asked another ad hoc lawyer whether the Department of Justice could be persuaded to fund DNA testing for section 690 applicants, he stated that the "Department of Justice wouldn't have to be persuaded to pay; they would do it of their own motion."[137] He also observes that "Legal Aid will pay for some of this stuff." Another respondent advises that to date, she has not made requests for

---

[135] When I asked counsel what 'guidelines' he was referring to, he advised that they are not those cited in the Thatcher decision itself, but rather are guidelines contained in a "little booklet, about 50 pages long." I have a copy of the Thatcher decision (discussed in Chapter 4); however, I do not have a copy of the guidelines referred to by counsel. According to this respondent, one of the issues contained in these departmental guidelines concerns the assessment of witness credibility.

[136] It appears that, in addition to the principles set out in Thatcher, the Department of Justice has drafted a more comprehensive document which provides conviction review guidelines for investigating counsel.

[137] He added that "they [may] have done it in the case of Mr. Morin and have done it in the cases of other people we most know about, Mr. Milgaard, for example. In fact, the Crown did DNA testing on Milgaard 10 or 12 years before he was eventually found not guilty, but the type of DNA testing available then was not sophisticated enough to give them the answer they wanted."

DNA testing because in the cases she investigated, "applicant's counsel provided [her] with completed tests."

> If I were to see a file where it appears necessary, I wouldn't hesitate to ask for the appropriate authorization to incur the expense and I'm sure that that would be authorized. [Author: Most applicants would not have sufficient resources]. That's right. And if the applicant doesn't have the resources and maintains that it's [an important] part of the review, I would find it difficult to believe that the Department wouldn't say "go ahead and do it." Because there is a provision in the contracts that we sign, concerning lawyers' fees. There is also a provision related to expenses and authorization for expenses, so certain expenses can be authorized. I have never had to ask for authorization for DNA. But I have requested authorization for rather expensive stenographic notes because hours of interviews sometimes go into the $700 to $900 range and that didn't seem to pose a problem. So I would think that if DNA testing is a $1000 or $2000 proposition, I'd find it hard to believe that it would pose a problem. My instinct would be to say to the applicant's counsel, "have you done the DNA testing? If not, why not? Is the applicant interested in having it done? Was it because the applicant said he wanted it done but the police didn't take samples? Was it because samples were taken and they were told they were inadequate?" And someone has to find a lab that is able to do more sophisticated testing. "Is it because they don't have the money?" The applicant's counsel may well say, "fine, I'll do it," because they don't necessarily want you to have access to the results and that may or may not happen. There are situations where people who maintain a miscarriage of justice will say, "just do it. I don't care what the result is, you know?" That being said, with DNA, you obviously have an issue around the consent and cooperation of the applicant - you can't just go testing their DNA - so they may prefer to have control over it, which is probably why it is most often done by the applicant and then submitted.... I can think of situations where an applicant who's alone, who doesn't have counsel or money, who asks, "please do this and you'll see it's not me." I can see a situation where Justice would most likely authorize that.

Clearly, it is the Minister of Justice who decides whether or not a section 690 intervention is warranted; however, it is less clear whether the Minister always heeds investigating counsels' recommendations. Therefore, I asked ad hoc counsel whether the Minister usually follows their conviction review recommendations. Only one respondent provided a definitive answer and stated that in his experience with one section 690 investigation, "the Minister did follow [his] recommendations." Another ad hoc lawyer advised "that it would not be appropriate for [him] to answer a question that may reveal the advice that [he] has or has not given to the Minister because that is privileged." One ad hoc lawyer stated that she "does not know" whether the Minister follows her

recommendations and another advised that "I would have to ask the Minister." In their submission to Minister of Justice Anne McLellan, AIDWYC argues that "outside counsel's recommendations to the Minister are not necessarily followed; indeed, AIDWYC has it on reliable authority that, in at least one recent case, outside counsel's recommendation was not followed."[138] Given the Minister's portfolio and responsibilities, however, it is reasonable to posit that s/he places considerable weight upon investigating counsel's--both ad hoc and departmental--conviction review recommendations. Unfortunately, this observation remains speculative because the decision-making process is not open to public scrutiny.

Ad hoc counsel also raise additional questions to be asked about the section 690 conviction review process. As one lawyer observes, it is important to examine the "larger questions that [I am] thinking about, [including] how to set up a [review] mechanism which would attempt to prevent innocent people from falling through the cracks of our present legal system and what [such a mechanism] should look like." Another respondent asks how we "can reconcile section 690 with the role of the courts" and observes that:

[138] AIDWYC, "Addressing Miscarriages of Justice," 18.

> We live in a system where, when there is a dispute between individuals or between individuals and the state, we have a court that makes a finding. To overturn a decision of the court should be rather rare. But I think with section 690, the government has recognized that there is a necessity to put such a process in place. But on the other hand, I'm not sure that an independent tribunal, you know, it might just end up being another level in the appeal process. And as I think about it here, and I'm just going off the top of my head because I haven't given it much thought, I would be afraid that that would happen. I think there have to be screening mechanisms within the section 690 process or whichever process is put in place, to ensure that this is not something that's going to be automatic every time somebody says, "look, it wasn't me, I didn't do it," despite perhaps overwhelming evidence that it was. We put faith in our judges and in our jury system to make findings of credibility in many cases where peoples' positions are diametrically opposed and at some point, you have to say, "well the jury didn't believe you." But that's not to say that when there is new evidence, compelling evidence, that there shouldn't be a process; there is and it should continue. But I'd be very reluctant to open it too broadly and make it simply just another step [in the appeal process].

Another question raised by an ad hoc lawyer concerns whether or not Ministerial powers are sufficient under section 690, with respect to references to courts. The Minister "can only refer to a court, she cannot quash. To permit [the Minister] to quash, the conventional lawyers will tell you that she'd be taking the place of a court and thereby creating another level of appeal. I guess they're probably right. But it would be nice if she could quash." When I informed this respondent that most of the recent section 690 interventions have been referred through a combination of subsections 690(c) and (b), rather than subsection (a), he advised that:

> the Minister uses (b) and (c) because they are considered more potent legally than (a).[139] I don't know that I agree with that or not but that's the position Eugene Williams[140] took and that's the position that [the Minister] takes. My underlying thought is that this process is relatively new. It seems to be working fairly well and if it ain't broke, don't fix it. It needs some changes, we both can see that.

Department of Justice Respondent

As noted, one lawyer from the Criminal Conviction Review Group (CCRG) was assigned the task of answering interview questions for the Department of Justice.[141] Therefore, answers to the first three questions include information about all five of the full-time lawyers in the Criminal Conviction Review Group. Years of experience as Department of Justice counsel range from two to 11 years. Cumulative Crown counsel experience is 16 years (1.5, 4, 5, 5)[142] and all five CCRG lawyers have acted as defence counsel with experience ranging from two to nine years (2, 3, 4, 8, 9). Unfortunately, this

---

[139] I failed to clarify this point with the interviewee. However, as I discuss in Chapter 4, section 690(a) places the least onerous burden of proof on the applicant. If a case is referred under section 690(b), however, the applicant must prove his or her innocence beyond a reasonable doubt. Furthermore, subsection 690(c) allows the Minister to ask Courts of Appeal to determine, for example, the admissibility of new evidence. Thus, in many cases, it is the courts, not the Minister of Justice who decide the success or failure of section 690 conviction reviews.

[140] Although no longer employed in the Criminal Conviction Review Group, Eugene Williams was formerly a Senior Counsel with this investigative body.

[141] To avoid redundancy, some statistical information obtained from the DOJ representative has been incorporated into Chapter 4, and is not reproduced in this chapter.

[142] One Department of Justice lawyer has never worked as Crown counsel.

respondent could not answer many of my interview questions.[143]

Criminal Conviction Review Group counsel conduct the majority of section 690 investigations; therefore, I asked the respondent to describe the actions taken when the Department of Justice first receives a section 690 application. His response, however, is identical to the four-step process explained in the Department's information booklet (described in Chapter 4) and therefore, is not reproduced here.[144]

I was informed that the Department of Justice does not keep statistical records[145] of the most common reasons section 690 applications are rejected after the Initial Assessment stage; however, he did provide a few observations. In some cases, applications are rejected because "the application does not fall within the requirements of the *Criminal Code*." For example, some applicants seek conviction reviews for summary conviction offences which do not fall within the section. In other cases, the applicant has not exhausted his or her rights of appeal. Finally, some applicants fail to provide evidence

---

[143] This respondent did not answer questions 4-6, 16 and 19-22 (see Appendix 16). With respect to questions 17 and 18, he advises that "they deal with the *Privacy Act*." When I advised him of the importance of obtaining additional Ministerial decisions, he stated that he would "have to check with Eugene Williams [former Director, Criminal Conviction Review Group]." I did not hear back from the DOJ respondent and did not pursue this matter further as I was subsequently informed that only three decisions have been made public, all of which I had already obtained. (Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, federal Department of Justice, to author, 1 February 1999).

[144] See DOJ application booklet, 4-6. The four stages are Initial Assessment, Investigation, Preparation of Investigation Brief, and Recommendations to the Minister.

[145] It is Mary McFadyen's understanding that "it was not until the Criminal Conviction Review Group was established [in 1994] that better statistics have been kept." (Letter from Mary McFadyen, Assistant Senior Counsel - Criminal Conviction Review Group, Department of Justice, to author, 21 June 1999).

and/or sufficient explanation as to why they feel they have been wrongfully convicted.[146] These rejected applications are kept on file as part of the Minister's correspondence and are retained for a number of years, depending upon how the file is classified.[147]

I also wanted to determine how many section 690 applications progress to the active investigation stage in a given year. Although the Department of Justice "does not keep statistical records in this fashion," counsel advised that it is possible to determine the number of section 690 reviews that are open on a given day. Thus, on the day of the interview (8 September 1998), the Criminal Conviction Review Group had a total caseload of 90 conviction review applications; 43 of which were under *active* investigation[148] and 47 *pending*.[149]

The caseload carried by the five full-time CCRG lawyers varies considerably. At the time of the interview, one lawyer was responsible for 22 conviction review files, while another carried nine cases. However, as the DOJ respondent advises, some cases are more complex than others. Although the Department of Justice "does not have statistics about how often ad hoc counsel are hired," the factors which prompt the Department to

---

[146] There may be a variety of reasons that some section 690 applications lack sufficient evidence or explanation. Prisoners may be illiterate and in most cases are indigent. Moreover, if they are not represented by legal counsel or assisted by individuals outside the prison setting, it is extremely difficult to gather evidence or to make investigative inquiries pertinent to their conviction review application.

[147] The respondent estimates that such files are "traceable for eight years."

[148] *Active investigation* is described as those cases in which the Department of Justice is trying to locate witnesses or requesting reports of various kinds.

[149] *Pending investigations* refer to those applications awaiting an event (e.g., cases in which the Department of Justice is awaiting further information from the applicant or others). *Pending* cases may also refer to section 690 applications awaiting Ministerial decision, although the respondent could not state with certainty whether these final-stage cases are included in departmental statistics.

hire outside counsel are the same as those cited by ad hoc counsel: case load pressures, conflict of interest and the need for special expertise. Moreover, the respondent advised that selection of ad hoc counsel also depends upon where the original crime occurred because counsel must be a member of the local Bar. The Department of Justice also keeps a reference list of ad hoc counsel.

In view of the lengthy delays associated with many section 690 conviction reviews, I wanted to know, from a Criminal Conviction Review Group perspective, whether counsel believe they have sufficient personnel and resources to investigate section 690 applications in a timely and comprehensive fashion. The respondent would only state that following the Marshall Inquiry, senior management within the Department of Justice reacted by initiating changes to improve the timeliness of conviction reviews (e.g., more counsel were hired[150] and a Case Management System was implemented), by making the process more open[151] and accountable, and by providing greater independence from the prosecution function of the Department by transferring the Criminal Conviction Review Group, upon its creation, from the Litigation sector to the Policy Sector.[152] According to the DOJ

---

[150] The respondent also advises that the Department of Justice "made sure to require that the lawyers working [in the CCRG] have criminal law backgrounds as both prosecutors and defence counsel if possible."

[151] Later in the interview, the DOJ representative advised that some cases are *pending* because the Department of Justice is awaiting further information from the applicant, such as trial transcripts. The DOJ Booklet explicitly states that section 690 applications must be accompanied by all trial and appeal transcripts. Therefore, either some applicants do not have sufficient funds to obtain such transcripts or they are unaware of this application requirement (although if applicants have legal counsel, this is probably not the case).

[152] The same recommendations to "enhance the efficiency of the section 690 process" can be found in the DOJ Consultation Paper, 5-6.

lawyer, the CCRG tries "to do cases as fast as [they] can" and "in the past 19 months, the Minister of Justice has rendered 19 section 690 decisions."[153]

The respondent reports that the section 690 process is now more open because the Department of Justice has produced an information booklet.[154] This is true, but only in the sense that applicants and their counsel are now provided *essential* information about the requirements of a section 690 application. As some interviews with defence counsel demonstrate, many lawyers are not familiar with section 690 procedures and lament what they perceive to be an absence of procedural guidelines. However, it is the investigation process[155] and Ministerial decision-making that requires greater openness and scrutiny. The DOJ lawyer also suggests that the section 690 process is now more accountable because applicants and their counsel can review and comment upon the Investigation Brief prior to its submission to the Minister. In addition, applicants and their counsel are provided copies of the Minister's decision. For the most part, however, conviction review and Ministerial decision-making processes remain secret and, therefore, are unaccountable. At the risk of stating the obvious, withholding such knowledge from the public not only insulates the conviction review process from scrutiny but also the investigation, arrest and conviction processes being challenged by section 690

---

[153] Information obtained from the Department of Justice indicates that over a four-year period (1995 and 1998), the Minister of Justice made a total of 28 section 690 decisions and in 23 of these cases, the Minister refused to intervene (see Table 4.4).

[154] He also advises that the same information is available on the Internet.

[155] However, as I note in Chapter 4, during the investigation process, applicants and their counsel ought to be apprised of the status of the conviction review at regular intervals. Although I advocate much greater public access to Ministerial decisions, I am not suggesting that the investigation process be opened up to the public.

applications.

V. Data Analysis

Like any aspect of the human condition--including the research process--the conviction review process is perceived through a variety of experiential and ideological lenses. Data analysis, therefore, attempts not only to identify response patterns within and between interview groups, but also to understand how such perceptions might be linked to broader social and political contexts. As noted *supra*, analytical units are subsumed under five categories: (1) the causes and extent of wrongful convictions, (2) the section 690 conviction review process, (3) the appellate court system, (4) the adversarial legal system and (5) career experience.

Defence, ad hoc and Criminal Conviction Review Group counsel all play integral roles in the conviction review process and each participant has vested interests in its operation and outcomes. Nevertheless, some perceptions about wrongful convictions and the conviction review process are shared by all legal counsel respondents.[156]

Defence and ad hoc counsel all identify similar causal factors in the genesis of

---

[156] With the exception of the DOJ respondent. He did not comment on the appellate court system or the extent and causes of wrongful conviction. Neither did he answer my questions concerning whether or not the Department of Justice has sufficient personnel and resources, the merits and problems with section 690 and recommendations for reform. As the Department of Justice is currently examining possible reforms to section 690, it is possible that CCRG counsel are not authorized at this time (or perhaps at any time) to espouse their perceptions about the conviction review process. Consequently, my ability to gain insights about the conviction review process from a Department of Justice perspective is significantly hindered. Although this respondent provided useful statistical information about section 690 applications, much of the additional information I obtained is readily available in the public domain (e.g., Internet, DOJ Information Booklet).

wrongful convictions; however, defence counsel estimate a larger number of miscarriages than do their ad hoc counterparts. Similarly, most defence (85%) and ad hoc (75%) counsel do not believe that our appellate court system provides sufficient protection against wrongful convictions. In their view, appellate review criteria are too narrow and inflexible with respect to fresh evidence rules and the courts' focus on legal, rather than factual, error hinders comprehensive examination of alleged wrongful convictions. Some defence lawyers also note that appeal courts are reluctant to overturn convictions because of the principle of finality. This apparent lack of faith in appellate courts to identify and rectify wrongful convictions is not simply an indictment against appeal court rules and procedures but also reflects defence counsel pessimism about the section 690 conviction review process. Given that so few succeed in obtaining a remedy through this last-resort mechanism, it is clearly preferable to identify and remedy wrongful convictions at the appellate stage of the criminal justice process. Although more reticent in their critiques of section 690, ad hoc respondents also question the ability of appellate courts to identify and rectify wrongful convictions, the very forum through which such errors are supposed to be captured. One ad hoc lawyer also acknowledges that the section 690 process "is harder than presenting a case before the Court of Appeal or the Supreme Court of Canada."

Perceptions of the merits and problems with section 690 conviction reviews elicit more divergent views from defence and ad hoc counsel. Although ad hoc lawyers acknowledge that section 690 needs reform, they believe that conviction reviews make

"finality flexible" and provide an "additional safeguard" or "escape hatch." One ad hoc counsel also describes section 690 conviction reviews as "relatively straightforward and cost-effective." At best, however, fifty percent of defence counsel respondents believe that the only merit to section 690 is the fact that it exists. At worst, defence lawyers find no merits to section 690 at all and characterize conviction reviews as a "torturous" and "hopeless process" that is "doomed to fail" because it is "designed to conceal, rather than remedy mistakes."

From a defence counsel perspective, the section 690 conviction review process is too slow, is overly secretive and is not independent from the political arena. These respondents also believe that it is too difficult to obtain a remedy through section 690 and that this mechanism lacks procedural guidelines. Defence counsel also lament what they perceive to be a general departmental skepticism towards claims of wrongful conviction which results in efforts to affirm rather than to objectively examine the convictions in question. Insufficient resources for section 690 applicants and for the Department of Justice are also identified as problematic by defence counsel. Although ad hoc lawyers concede that conviction reviews can be a slow process, they are less likely to attribute such delays to institutional factors alone (e.g., insufficient departmental personnel). In their view, applicants may also contribute to delays and the nature of some applications (e.g., a 25-year-old conviction) can result in lengthier investigation and completion times. Furthermore, criticisms that Department of Justice investigations are not impartial is

argued to be "absolutely false" by one ad hoc lawyer and another is "not so sure that the section 690 bar is as high and difficult as AIDWYC and others suggest." Neither do ad hoc counsel refer to section 690 conviction reviews as a 'political' process, unlike many of their defence counsel colleagues.

Nevertheless, all defence and ad hoc counsel agree that section 690 needs reform; however, recommendations about the nature of such reforms differ. With one exception, all defence counsel respondents recommend the establishment of an alternative review tribunal, independent of the Department of Justice. As one defence lawyer argues, conviction review decisions should not be made by a "politician who has interests to serve other than the interests of justice." Furthermore, such a tribunal should be adequately resourced and empowered to investigate alleged wrongful convictions and to decide upon the appropriate course of action (e.g., refer the case to appeal courts or make specific recommendations to the Minister of Justice). Some ad hoc respondents disagree, however, arguing that an alternative conviction review body would "eliminate Ministerial and Parliamentary accountability" and, rather than substantively impact the efficacy of conviction reviews, would do nothing more than ameliorate the criticism that the existing review process lacks independence. Accountability for the conviction review process is essential; however, the establishment of a new review tribunal does not preclude such accountability.[157] Nevertheless, in the absence of a new review body, many defence and ad hoc respondents agree that the conviction review process would be enhanced by

[157] As discussed in Chapter 7, the Home Secretary is answerable to Parliament for the work of the newly-established Criminal Conviction Review Commission in the United Kingdom.

increasing Department of Justice resources, decreasing completion times for reviews and making the review process more transparent. The remaining reform suggestions appear to be more institutionally-specific such that defence counsel recommend procedural guidelines for section 690 and increased resources for conviction review applicants, while ad hoc lawyers recommend the addition of subpoena and deposition powers to enhance their ability to interview and depose witnesses.

Despite defence counsel's evident lack of confidence in the current conviction review process, they resort to section 690 because it is, as one respondent argues, the "only game in town" for clients who have exhausted all other avenues of appeal. This is essential for convicted innocents. Defence counsel also believe that a section 690 applicant is not likely to succeed without garnering public and media support. As such, an application can provide a vehicle for defence counsel not only to direct public and media attention to the conviction review process, but also to increase pressure on the Minister of Justice to act. Defence counsel may also use section 690 to challenge a particular law or to direct attention to post-conviction changes to a law under which their client was convicted. That said, given defence counsel's pessimism of obtaining a remedy for their clients through section 690 and the considerable time and cost commitments such applications require, they have vested interests in lobbying for an alternative and independent conviction review mechanism.

There is no evidence to suggest that ad hoc counsel are less committed to an expedient and fair conviction review mechanism. Moreover, their responses about the

conviction review process are as insightful and candid as possible, given the institutional constraints within which they express themselves. Ad hoc counsel acknowledge that some aspects of the conviction review process are problematic and can be improved. It is more difficult, however, to determine whether their greater caution in espousing the desirability of an alternative review body can more aptly be attributed to personal beliefs or to institutional constraints. As ad hoc employees to the Department of Justice, their interests lie in conducting sufficiently comprehensive conviction review investigations to ensure that the Minister of Justice can properly evaluate an appropriate course of action. They must also conduct their investigations within the confines of an institutional bureaucracy, with all its concomitant policies and procedures, including adherence to *Privacy Act* provisions. Such constraints, therefore, influence what can and cannot be publicly divulged about the conviction review process and is reflected in their more reticent responses.

With respect to the Criminal Conviction Review Group, perhaps more can be inferred about section 690 by analyzing what is not said. Although the department's current examination of this legislation may partly explain the respondent's inability to answer interview questions, it is not at all certain that individual perceptions of the conviction review process by Criminal Conviction Review Group lawyers would--or could--otherwise be more openly articulated to outsiders. The Department of Justice has a vested interest to protect the perceived integrity of the criminal justice process and this is facilitated by institutional secrecy and political control of the conviction review process,

through the Criminal Conviction Review Group apparatus. Regardless of the dedication and integrity of individual departmental counsel, they are only conduits to what is ultimately a political decision by an individual who plays a dual role as Minister of Justice and, as the principal prosecutor of all federal statutes except the *Criminal Code*, in her capacity as Attorney General of Canada.[158] Such a dual role maintains the opportunity for Ministerial discretion under section 690 to be exercised according to considerations *beyond* the individual injustices inflicted upon an incarcerated innocent. In other words, Ministerial discretion involves a consideration of legal and extra-legal factors. This is problematic: on the one hand, Ministerial discretion is guided--and I think, fettered--by narrow legal principles. On the other hand, Ministers occupy a highly visible political position and will be sensitive to a variety of interests, including their own. The Justice Department's consultation process indicates some recognition that section 690 needs reform. However, the establishment of an independent review tribunal is to be encouraged.

Perceptual similarities and differences about the conviction review process by defence and ad hoc counsel can be attributed not simply to a variety of vested interests, but also to individual experience and ideological viewpoints. However, regardless of one's position on the experiential and ideological scale, it is perhaps most compelling that all respondents agree that section 690 needs reform.

---

[158] See "Canada's Department of Justice," (accessed 18 November 1999); available from http://www.canada.justice.gc.ca/presentation/AboutUs/index_en.html; Internet, 1-2, 1-6.

Chapter 7

CONCLUSION

The imperfections of the criminal justice process are reflected not only by convicted innocents, but also by appellate and post-conviction mechanisms that fail to identify and remedy such miscarriages. A comprehensive body of research and literature identifies the causal genesis of wrongful convictions and facilitates the development of preventive reforms. In contrast, little is known about the post-conviction review process in Canada pursuant to section 690 of the *Criminal Code*. As such, I have tried to fill substantial gaps in existing knowledge about section 690, to provide some theoretical explanations of the exercise and rationales underlying the decision-making process, and most importantly, to assess the efficacy of section 690. Despite this last-resort 'safeguard' against wrongful convictions, the identification of a variety of systemic problems casts doubt on the section's capacity to effectively identify and remedy wrongful convictions. Why?

There is little doubt that the 42 Ministerial interventions identified in this study over the past 100 years (1898-1998) do not reflect the actual number of wrongful convictions. Neither do Ministerial references guarantee relief to applicants. Although it is unrealistic to expect the section 690 conviction review process--or any post-conviction review mechanism--to remedy all miscarriages of justice, we should expect a less restrictive approach to their review when applicants raise sufficient doubt about the propriety of their convictions. Even if one surmounts the panoply of social and bureaucratic hurdles inherent to the section 690 review process, the odds of obtaining any form of relief are

extremely low. Available data indicate that Justice Ministers intervene in less than two percent of applications for conviction review. Indeed, this research suggests that many conviction review applicants succeed *in spite of* this last-resort mechanism.

Applicants face significant obstacles in their quest for conviction reviews. Although they can file section 690 applications on their own behalf, they have little chance of succeeding without legal or other assistance. As one applicant advises, "an offender who files his own application is at a serious disadvantage because access to proper legal material is not generally available in a Federal Penitentiary and the education level of the majority of prisoners is far from adequate." All required trial and appeal transcripts and factums must be compiled and paid for by the applicant--who is often indigent--or those assisting the applicant. Outside assistance (i.e., legal counsel, AIDWYC, family, friends) is also needed because the requisite evidence to demonstrate a miscarriage of justice, whatever its nature, cannot be obtained from within the confines of a prison cell. Moreover, despite claims that assistance is available to section 690 applicants, provincial and territorial Legal Aid Plans are financially constrained and, therefore, such requests are subject to strict merit tests. Section 690 applications also require thorough investigation which may well exceed the financial boundaries of a particular Legal Aid Plan and disparate financial resources between these various Plans may unfairly disadvantage some applicants. Although some lawyers provide *pro bono* assistance, there are few incentives for legal counsel given the time and cost commitments required by the conviction review process. Indeed, defence counsel respondents express significant dissatisfaction and in

some cases, hostility, when relating their experiences with the existing conviction review process. Section 690 applicants who claim innocence may also be penalized by parole boards because their refusal to admit guilt 'demonstrates' that they are not rehabilitated. Surmounting these initial hurdles is only the beginning. Applicants then face the toughest obstacle of all; convincing the Minister of Justice that a wrongful conviction has likely occurred.

Section 690 is also a secret process which precludes public scrutiny and Ministerial accountability. The Minister is bound by provisions of the *Privacy Act*, but only to a degree. Efforts could and should be made to increase public access to conviction review decisions. It is difficult to understand how the public interest is served by a conviction review process that is conducted and decided behind closed doors. Indeed, rather than serving the public interest, such secrecy suggests a paramountcy of governmental interests over the rights of an individual who can demonstrate a miscarriage of justice. In other words, section 690 provides an effective shield against threats to the perceived integrity of the criminal justice process. In a world of competing economic, social and political interests, the applicant/prisoner is at an obvious disadvantage. It is true that some applicants benefit from section 690, including exoneration and compensation. However, as *Milgaard* demonstrates, the criminal justice system is very reluctant to admit mistakes. Indeed, the highest court in the land found that he had received a fair trial and was "not satisfied beyond a reasonable doubt" nor "on a preponderance of all the evidence," that he was innocent. It was not until DNA evidence forced the government's hand that Milgaard

was compensated and promised a public inquiry. This reluctance to admit mistakes--and thereby expose the frailties of the criminal justice process--was also blatantly demonstrated by the Nova Scotia Court of Appeal when it blamed Donald Marshall Jr. for his own wrongful conviction.

The current conviction review process is also plagued by inordinate delays. Although some reviews are completed in less than one year, many others span periods ranging from three to seven years. Even accounting for complex and dated convictions, four- or five-year completion times are not acceptable, particularly for those who must continue to languish in prison for crimes they did not commit. However, like most governmental bureaucracies, the Criminal Conviction Review Group face an increasing number of section 690 applications, with finite personnel and financial resources. In some cases, applicants themselves contribute to delays. Nevertheless, the lengthy completion times associated with many conviction reviews could be decreased by reducing institutional inefficiencies and increasing departmental resources. Such expenditures may be a hard sell to Canadians, however, given the myriad demands for government funding.

The lack of independence--whether real or perceived--however, is arguably the most troubling aspect of the section 690 process. Conviction review applicants are forced to request that departmental officials review their own practices or those of their provincial counterparts. Even if one accepts that Criminal Conviction Review Group and adhoc counsel perform their tasks with diligence and fairness, it is the Minister of Justice who

ultimately decides the outcome of such reviews. Furthermore, Ministers occupy a position of high visibility and their political responsibilities require them to weigh a variety of interests. As such, they are susceptible to social and political influences, including, but not confined to, the interests of a convicted innocent. As some interview respondents argue, unless public and media scrutiny can be garnered and sustained, an applicant's chance of obtaining relief drops accordingly. These lawyers also suggest that Ministers are not likely to intervene unless sufficient political pressure is brought to bear upon them. Thus, the exercise of Ministerial discretion appears to be influenced by both legal and extra-legal factors.

Ministers of Justice possess broad discretionary powers under section 690 as there are no statutory guidelines to govern the exercise of their discretion. This is reflected by Minister of Justice Allan Rock's statement that Parliament had cast the Minister's discretion "in the widest possible terms," and that he "did not plan to limit his discretion." Minister Rock also commented, however, that this discretion was to be exercised according to certain governing principles, as he set out in Thatcher. It is neither surprising nor inherently wrong that Ministers establish guidelines for their discretion under section 690. Nevertheless, there appears to be a disjunction between the broad discretionary powers afforded to Ministers under section 690 and the much narrower principles which substantively guide their discretion. These principles set out narrow circumstances in which an applicant might succeed in the conviction review process. The problem is that

these discretionary guidelines do not appear to recognize the limitations--both statutory and otherwise--inherent to the adversarial process which contribute to wrongful convictions in the first instance. In this sense, Ministers unduly fetter their discretion under section 690. This study also indicates that Ministers prefer some reference options over others. The least frequently used option is subsection (a), whereby the presumption of innocence is resurrected and the evidentiary burden of proof is borne by the Crown. Most Ministerial references are directed pursuant to subsections (b) and/or a combination of subsections (c) and (b). These options tend to limit the issues that can be canvassed by appellate courts because they narrow the scope of judicial review. This need not be the case, but it often is. For example, in many section 690(c) references, the Minister directs the scope of judicial review by referring specific (and often narrow) questions to the court which preclude a complete examination of the factors that contributed to the alleged wrongful conviction. These reference options permit greater Ministerial control over the conviction review process and, therefore, may be perceived as further examples of undue fettering of discretion. Of course this raises one of the more difficult questions: how broad should such guidelines be? Put another way, how can we maximize the identification and remedy of wrongful convictions without creating interminable litigation? Such considerations provide rich fodder for debate and will not be resolved here. Nevertheless, some suggestions to increase the efficacy of Canada's last resort remedy can contribute something to this debate.

The federal Department of Justice has endeavoured to enhance the section 690 conviction review process, although in 1991, a federal-provincial-territorial working group concluded that "establishing an independent review body was undesirable."[1] Application requirements are now more readily available and applicants can comment on departmental investigation briefs prior to their submission to the Minister and are provided copies of the Minister's decision. In 1994, the Criminal Conviction Review Group was established whose sole function is to investigate section 690 applications and report back to the Minister. In an effort to provide "greater independence from the prosecution function of the Justice Department," this review group was transferred from the Litigation section to the Policy section. Furthermore, to avoid perceptions of conflict of interest, it is now standard practice for the Department of Justice to hire ad hoc counsel to investigate applications involving federal prosecutions. Ad hoc counsel are also hired to relieve departmental workload pressures and when special expertise is required. These are welcome developments; however, they are not enough. The deficiencies in our current conviction review process are due to a multiplicity of systemic problems. As such, blaming individual departmental or ad hoc counsel for the section's ineffectiveness misses the point because they are simply cogs in a much larger political and bureaucratic machine. Systemic problems require systemic change; namely, an alternative and independent

[1] Canada, Department of Justice, "Addressing Miscarriages," 4-5. Following the *Marshall Commission*, this working group was established "to examine the Marshall Inquiry recommendations and to report to the next meeting of Ministers. The working group was satisfied with the existing section 690 procedures but recommended that compulsory powers to compel witnesses and documents would be desirable."

review body similar to the Criminal Cases Review Commission (CCRC) in the United Kingdom.

The CCRC is an executive non-Departmental public body established by statute (*Criminal Appeal Act* 1995). Its members are appointed by the Queen on the recommendation of the Prime Minister, one of whom is appointed by the Queen as Chair. The Commission's role is to review and investigate cases of suspected wrongful conviction and/or sentence--for both indictable and summary offences--and to refer cases to the appropriate court of appeal whenever it considers that there is a *real possibility* that the conviction, verdict, finding or sentence would not be upheld.[2] It may also refer cases to the Secretary of State with a view to his recommending to the Queen the exercise of the Royal Prerogative of Mercy. The Secretary of State is "responsible for setting the overall policy framework within which the CCRC operates" and "CCRC member remuneration is directed by the Home Secretary." The Home Secretary is also "answerable to Parliament for the work of the CCRC, [including its effectiveness, efficiency, and economic performance], and is responsible for making financial provision to meet its business

---

[2] See "Select Committee on Home Affairs First Report: The Work of the Criminal Cases Review Commission," (accessed 25 January 2000), available from http://www.publications.parliament.uk/pa/cm199899/cmselect/cmhaff/106/10604.htm; Internet, 1-2, 1-5. The Select Committee notes that some "difficulties arise from these tests." One concerns the "meaning of the words 'real possibility', which could mean something different to the ordinary public from how it might be understood by a court." Two additional issues were raised about the statutory test for referral. First, it was argued that "it was undesirable for the test to be based on requiring the CCRC to predict what the court of appeal would do." Secondly, it was suggested that "there was still a danger that too much emphasis was placed on identifying 'new' evidence which the court of appeal could recognize." These and other issues are under constant review by the Home Office and the Commission as it continues its work.

needs." Neither the Home Secretary nor the Secretary of State for Northern Ireland can "intervene in the CCRC's determination of individual cases."[3]

The 14 Commission members are primarily from the legal profession; however, they possess a wide range of backgrounds. Members include lawyers "with defence and prosecution experience as well as the corporate and academic; senior business and public sector executives; a former chief constable, senior accountants and a forensic psychiatrist."[4] In addition, there are more than 29 Case Review Managers who are appointed on three-year contracts with, "at present, the possibility of one renewal." This proposed limitation on the length of time a Case Review Manager might stay in post is designed "to help prevent [the] danger of...a 'culture of disbelief' [developing] among caseworkers who ha[ve] been in post for a long time."[5] According to many defence counsel respondents, such a 'culture of disbelief' also exists within the Department of Justice and is demonstrated by a general departmental skepticism that someone has been wrongfully convicted.

To be eligible for conviction review, applicants must submit "an argument or evidence which [w]as not...raised during the trial or at appeal," or demonstrate "exceptional circumstances." Those seeking sentence reviews must provide a "legal argument or

---

[3] *Ibid.*, 4.

[4] See "Criminal Cases Review Commission: Commission Responds to Organizers of Campaign Action," (accessed 14 January 2000), available from http://www.ccrc.gov.uk/latestnews/latestnews_271197.html; Internet, 1.

[5] See "Select Committee on Home Affairs First Report: The Work of the Criminal Cases Review Commission," (accessed 25 January 2000), available from http://www.publications.parliament.uk/pa/cm199899/cmselect/cmhaff/106/10603.htm; Internet, 4, 1-5.

information about [themselves] or the offence, which was not raised in court during the trial or at appeal."[6] The decision-making role now falls to Commission members and the *Criminal Appeal Act* "specifies that a decision to refer a case to the relevant court of appeal can only be made by a committee of at least three members, although it allows a decision not to refer to be made by a single member or employee of the Commission."[7] Due to the transfer of outstanding cases from the Criminal Cases Unit at the Home Office and from the Northern Ireland Office, the Commission began its work with a substantial caseload and they receive approximately 5 new cases per working day.[8] Personnel and other resources are monitored to establish present and future needs and to ensure that the Commission can fulfill its mandate as an efficient and fair review mechanism. Between March 1997--when it began operations--and September 30, 1999, the CCRC had received a total of 2,826 applications for conviction and sentence review. Of these, 1200 have been completed, including those deemed to be ineligible, 61 referrals to appeal courts and 147 refusals. As of September 30, 1999, 15 convictions have been quashed and seven upheld. Of the remaining cases, 1158 files are open and 468 are being actively investigated.[9]

---

[6] See "Criminal Cases Review Commission: Commission Refers Patrick David Nicholls Conviction to the Court of Appeal," (accessed 14 January 2000), available from http://www.ccrc.gov.uk/latestnews/latestnews_181197.html; Internet, 1.

[7] See "Criminal Cases Review Commission: Commission Chairman Reports to Home Affairs Committee," (accessed 26 October 1998), available from http://www.coi.gov.uk/coi/depts/GRC/coi3579d.ok; Internet, 4, 1-9.

[8] *Ibid.*

[9] See "Criminal Cases Review Commission: Recent Case Statistics," (accessed 13 November 1999), available from http://www.ccrc.gov.uk/latestnews/latestnews_case.html; Internet, 1-3.

Within a 31-month period, the CCRC referred 61 cases to appeal courts. Contrast this with the 42 Ministerial referrals in Canada over a 100-year time span. Even accounting for demographic differences between Canada and the United Kingdom vis-à-vis the number of applications and existing backlogs, these referral figures are compelling nonetheless. The Criminal Case Review Commission appears to be much better equipped for the task of conviction review. The review process is also more inquisitorial than adversarial, which some suggest is a better approach to the conviction review process, particularly for applicants themselves. Since wrongful convictions in Canada are a product of the adversarial system, it would be wise to consider alternate approaches to the conviction review process. One of the principle rationales leading to the establishment of the CCRC is that successive Home Secretaries had adopted a restrictive approach to their powers under section 17 of the 1968 *Criminal Appeal Act* to refer back cases. Similarly, Canadian Ministers of Justice exercise their section 690 discretionary powers very conservatively (i.e., they unduly fetter such discretion). Of course, the efficiency of any review body will depend upon sufficient resources which remains to be determined if the Canadian government decides to establish such a tribunal. It is also important to scrutinize appellate court approaches to conviction and sentence referrals to ensure that rules of evidence and procedure are not so inflexible as to thwart the tribunal's ability to remedy what it deems to be a miscarriage of justice. As noted earlier, judicial adherence to the principle of finality is an important factor in courts' consistently restrictive

approaches to their roles in reviewing wrongful convictions.[10] Furthermore, despite the establishment of the CCRC, the decision-making process "remains in the hands of the Court of Appeal, the very forum which for many years has failed to deal effectively and consistently with miscarriages of justice."[11] As this study reveals, most defence and ad hoc respondents argue that appellate courts do not provide sufficient protection against wrongful conviction because review criteria are too narrow, too inflexible and focus on legal, rather than factual issues. In some cases, appeal courts are described as "courts of process, not courts of justice." As recommended by both the *Marshall* and *Kaufman Commissions*, appellate court powers should be expanded to enhance examination of factual issues and the ability to set aside convictions where there exists a lurking doubt as to guilt. Such an expansion of appellate court powers should be implemented regardless of whether or not an alternative review body is established in Canada. It is also important for a review mechanism to encompass both summary and indictable offences. Wrongful convictions are not confined to the most serious offences. However, given the delays that characterize our existing conviction review mechanism, summary offenders are likely to have completed their sentences before a review decision is rendered.

Historical analyses of the Royal Prerogative of Mercy demonstrate its broad-ranging social, economic and political utility, not simply for remedying miscarriages of justice but also as a regular component of the administration of criminal law. The pardon system

---

[10] Malleson, "Appeals Against Conviction," 151.

[11] Thornton, "Miscarriages of Justice," 930.

"involved socially and politically significant decisions, not merely formal legal ones and a vast array of considerations went into deciding who should be hanged and who spared."[12] Such considerations include the prevailing crime rate, the offender's social and political connections, gender, age, the offender's character and reputation, the circumstances of the crime and prevailing philosophies of crime and punishment. Although section 690 is distinct from Royal Prerogative powers, the rationales underlying the Minister's discretion are, in some instances, comparable. Like the pardon power, conviction review decisions are influenced by both legal and extra-legal factors.

With respect to the influence of legal factors on the decision-making process, the compellability of new evidence is of particular import in both pardon and conviction review decisions. In order to persuade the Minister to intervene, however, such evidence must be "relevant to the issue of guilt,... reasonably capable of belief and [when] taken together with the evidence adduced at trial,...could reasonably be expected to have affected the verdict."[13] These review criteria reflect the importance placed upon the principles of finality and the sacrosanctity of jury verdicts. As Minister of Justice Allan Rock set out in *Thatcher*, section 690 "does not exist simply to permit the Minister to substitute a Ministerial opinion for a jury's verdict or a result on appeal," nor is it "intended to create a fourth level of appeal. Something more will ordinarily be

---

[12] Phillips, "The Operation of the Royal Pardon," 409-410.

[13] *Thatcher Decision*, 3.

required... ."[14] Similarly, as noted of the Home Secretary, the "overriding factor governing the exercise of...[his] powers...is a proper concern to avoid even the appearance of interfering with the independence of the judiciary."[15] The infrequency of Ministerial section 690 references also suggests a similar concern. If Ministers refer too many cases back to the courts, they risk judicial enmity and their political credibility if they are seen to be abusing their discretionary powers or pandering to particular interest groups. Moreover, as they have over the centuries, judges play integral roles and have significant influence upon both pardon and conviction review decisions.

The longevity of section 690 is not due solely to a recognition of system fallibility, but also because it effectively maintains governmental control over the conviction review process. Section 690 is also a vestige of the ancient pardoning power which allows individuals to apply for the mercy of the Crown. However, there is something inherently distasteful about the concept of a convicted innocent applying for the "mercy" of the Crown, notwithstanding the fact that "proceedings under section 690 are not the subject of legal rights."[16] Section 690 also acts as a "pressure valve" such that the occasional remedy serves to defuse social and political tensions by demonstrating the government's willingness to correct an injustice. In this way, the government can preserve the integrity of the criminal justice process and foster confidence in its ability to admit its mistakes. However, the secrecy of the conviction review process and the apparent non-

---

[14] *Ibid.*, 3-4.

[15] Report by Justice, *Home Office Reviews*, 7.

[16] *Thatcher v. Canada*, [1997] 1 C.F. 289 (F.C.T.D.) 297.

accountability of Ministerial decisions suggests the section's inability to provide substantive relief for those seeking reviews of their convictions. Increased scrutiny of the problems plaguing the conviction review process has prompted a consultation process by the Department of Justice and reform proposals are imminent. At the very least, the federal government must recognize, but more importantly, substantively enhance, the existing section 690 process. At best, one hopes that the Department of Justice will relinquish its stranglehold on the conviction review process. In the final analysis, section 690 is perhaps best described as a safety valve for government, rather than a safety net for convicted innocents.

Ministers of Justice and Attorneys General (1867 - 1999)

These portfolios were established by Order in Council on July 1, 1867. They were given statutory basis by Statute 31 Victoria, c. 39, assented to May 22, 1868. By this Act the Minister of Justice was to be ex-officio the Attorney General.

The office of Solicitor General of Canada was created by Statute 50-51 Victoria, c. 14, assented to June 23, 1887 and proclaimed in force December 3, 1892. By this Act the Solicitor General was designated an officer to assist the Minister of Justice.

By Order in Council dated August 7, 1950, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, the powers, duties and functions of the Solicitor General of Canada were transferred to the Minister of Justice and Attorney General, and were exercised by him until October 14, 1952.

Hon. Sir John Alexander Macdonald	01.07.1867 - 05.11.1873
Vacant	06.11.1873
Hon. Antoine-Aimé Dorion	07.11.1873 - 31.05.1874
Hon. Sir Albert James Smith (acting)	01.06.1874 - 07.07.1874
Hon. Télesphore Fournier	08.07.1874 - 18.05.1875
Hon. Dominick Edward Blake	19.05.1875 - 07.06.1877
Hon. Toussaint-Antoine-Rodolphe Laflamme	08.06.1877 - 08.10.1878
Vacant	09.10.1878 - 16.10.1878
Hon. James McDonald	17.10.1878 - 19.05.1881
Hon. Sir Alexander Campbell, Senator	20.05.1881 - 24.09.1885
Vacant	25.09.1885
Hon. Sir John Sparrow David Thompson	26.09.1885 - 06.06.1891
Vacant	07.06.1891 - 15.06.1891
Hon. Sir John Sparrow David Thompson	16.06.1891 - 24.11.1892
Vacant	25.11.1892 - 04.12.1892
David Thompson	05.12.1892 - 12.12.1894
Vacant	13.12.1894 - 20.12.1894
Hon. Sir Charles Hibbert Tupper	21.12.1894 - 05.01.1896
Hon. Thomas Mayne Daly (acting)	06.01.1896 - 14.01.1896
Hon. Arthur Rupert Dickey	15.01.1896 - 27.04.1896
Vacant	28.04.1896 - 30.04.1896
Hon. Arthur Rupert Dickey	01.05.1896 - 08.07.1896
Vacant	09.07.1896 - 12.07.1896
Hon. Sir Oliver Mowat, Senator	13.07.1896 - 17.11.1897
Hon. David Mills, Senator	18.11.1897 - 07.02.1902
Vacant	08.02.1902 - 10.02.1902
Hon. Charles Fitzpatrick	11.02.1902 - 03.06.1906
Hon. Sir Allen Bristol Aylesworth	04.06.1906 - 06.10.1911
Vacant	07.10.1911 - 09.10.1911
Hon. Charles Joseph Doherty	10.10.1911 - 20.09.1921
Vacant	21.09.1921 - 03.10.1921
Hon. Richard Bedford Bennett	04.10.1921 - 28.12.1921

Ministers of Justice and Attorneys General (1867 - 1999)

Hon. Sir Jean-Lomer Gouin	29.12.1921 - 03.01.1924
Hon. Ernest Lapointe (acting)	04.01.1924 - 29.01.1924
Hon. Ernest Lapointe	30.01.1924 - 28.06.1926
Hon. Hugh Guthrie (acting)	29.06.1926 - 12.07.1926
Hon. Esioff-Léon Patenaude	13.07.1926 - 24.09.1926
Hon. Ernest Lapointe	25.09.1926 - 06.08.1930
Hon. Hugh Guthrie	07.08.1930 - 11.08.1935
Vacant	12.08.1935 - 13.08.1935
Hon. George Reginald Geary	14.08.1935 - 22.10.1935
Rt. Hon. Ernest Lapointe	23.10.1935 - 26.11.1941
Hon. Joseph-Enoil Michaud (acting)	27.11.1941 - 09.12.1941
Rt. Hon. Louis Stephen St-Laurent	10.12.1941 - 09.12.1946
Rt. Hon. James Lorimer Ilsley	10.12.1946 - 30.06.1948
Rt. Hon. Louis Stephen St-Laurent (acting)	01.07.1948 - 09.09.1948
Rt. Hon. Louis Stephen St-Laurent	10.09.1948 - 14.11.1948
Hon. Stuart Sinclair Garson	15.11.1948 - 20.06.1957
Hon. Edmund Davie Fulton	21.06.1957 - 08.08.1962
Hon. Donald Methuen Fleming	09.08.1962 - 21.04.1963
Hon. Lionel Chevrier	22.04.1963 - 02.02.1964
Hon. Guy Favreau	03.02.1964 - 29.06.1965
Hon. Georges James McIlraith (acting)	30.06.1965 - 06.07.1965
Hon. Louis Joseph Lucien Cardin	07.07.1965 - 03.04.1967
Hon. Pierre Elliott Trudeau	04.04.1967 - 19.04.1968
Rt. Hon. Pierre Elliott Trudeau	20.04.1968 - 05.07.1968
Hon. John Napier Turner	06.07.1968 - 27.01.1972
Hon. Otto Emil Lang	28.01.1972 - 25.09.1975
Hon. Stanley Ronald Basford	26.09.1975 - 02.08.1978
Hon. Jean-Jacques Blais (acting)	03.08.1978 - 08.08.1978
Hon. Otto Emil Lang	09.08.1978 - 23.11.1978
Hon. Marc Lalonde	24.11.1978 - 03.06.1979
Hon. Jacques Flynn, Senator	04.06.1979 - 02.03.1980
Hon. Joseph Jacques Jean Chrétien	03.03.1980 - 09.09.1982
Hon. Mark MacGuigan	10.09.1982 - 29.06.1984
Hon. Donald Johnston	30.06.1984 - 16.09.1984
Hon. John Carnell Crosbie	17.09.1984 - 29.06.1986
Hon. Ramon John Hnatyshyn	30.06.1986 - 07.12.1988
Rt. Hon. Charles Joseph Clark (acting)	08.12.1988 - 29.01.1989
Hon. Douglas Grinsdale Lewis	30.01.1989 - 22.02.1990
Hon. Kim Campbell	23.02.1990 - 03.01.1993
Hon. Pierre Blais	04.01.1993 - 03.11.1993
Hon. Allan Rock	04.11.1993 - 10.06.1997
Hon. Anne McLellan	11.06.1997 -

Chronology of Events in the Section 690 Application of W. Colin Thatcher to the Minister of Justice[1]

Oct. 11, 1989: Colin Thatcher submitted a section 690 application to the Minister of Justice. The primary ground for relief was the new evidence from a person who did not testify at trial and whose evidence, it was submitted, contradicted the trial testimony of a key trial witness.

Nov. 7, 1989: The Minister requested Mr. Thatcher's counsel to complete the application by sending portions of the trial transcripts, the appellate records, the complete transcript of the new witness' testimony in another trial and a waiver of solicitor-client privilege.

June 14, 1990: Counsel for Mr. Thatcher provided the Department with a waiver of solicitor-client privilege, the transcript of the evidence of named trial witnesses, the appellate records, the transcript of the testimony of the witness who might provide fresh evidence, the Judge's charge to the jury and counsels' addresses to the jury in response to Departmental requests.

July 12, 1990: Counsel for Mr. Thatcher supplied the Department with additional information concerning the application.

July 14 and 18, 1990: Departmental counsel interviewed counsel for Mr. Thatcher and trial prosecutor. Mr. Thatcher's counsel clarified the application letter and the materials, and provided departmental counsel with additional materials.

July - Nov. 1990: Departmental counsel collected information with the cooperation of the RCMP and the Regina Police Service.

Dec. 4, 1990: Departmental counsel reviewed the prosecution file in Regina, Sask., and interviewed civilian and police witnesses, some of whom had testified at trial; counsel viewed the crime scene and locations where significant events had occurred.

Dec. 24, 1990: Counsel for Mr. Thatcher added a new submission, including an unsigned 12-page letter describing how and why the writer had killed JoAnn Wilson. (This led to a new branch of inquiry).

Jan. and Feb, 1991: Departmental counsel requested clarification of information from Mr. Thatcher's counsel, Regina Police Service, a forensic scientist and the Saskatchewan Department of Justice.

May 1991: Another forensic expert was engaged.

June and July, 1991: Experts submitted their reports.

---

[1] See *Thatcher Decision*, Appendix 1, 1-3.

Chronology of Events in the Section 690 Application of W. Colin Thatcher to the Minister of Justice

July 12, 1991: Counsel for Mr. Thatcher submitted additional materials, reports and comments concerning the application. (This led to a new branch of inquiry concerning a named suspect, and alleged police misconduct).

Sept. 5, 1991: Counsel for Mr. Thatcher wrote to the Department advising that he had uncovered further new material.

Sept. 18, 1991: Departmental counsel provided Mr. Thatcher's counsel with information gathered during the assessment.

Oct. 1991: Departmental counsel met with Mr. Thatcher's representative and received further submissions, which were investigated.

Dec. 24, 1991 and Jan. 27, 1992: Departmental counsel obtained additional information from police sources concerning the authenticity of the credit card receipt and an expert analysis of handwriting.

Feb. 14, 1992: Counsel for Mr. Thatcher requested and obtained on Feb. 18, 1992, a copy of the credit card receipts that were subjected to handwriting analysis.

March 27, 1992: Counsel for Mr. Thatcher supplemented his legal submissions and challenged the authenticity of the credit card receipt found near Ms. Wilson's body.

April and May 1992: Information was exchanged between department and Mr. Thatcher's counsel on credit card and witnesses.

May 29, 1992: Departmental counsel interviewed additional witness. Mr. Thatcher's counsel provided new submissions concerning two suspects who had not previously been associated with Ms. Wilson's death. (This led to a new branch of inquiry).

July 6, 1992: The representative for Mr. Thatcher made further submissions concerning the authenticity of the credit card receipt.

Aug. 10, 1992: Mr. Thatcher's representative made submissions concerning allegations of police misconduct, the authenticity of the credit card receipt, and a possible suspect in the death of Ms. Wilson.

Aug. 21, 1992: Departmental counsel provided information to Mr. Thatcher's counsel.

Aug. 28, 1992: Counsel for Mr. Thatcher wrote to express his views about the handwriting analyst's report, to amplify his submissions concerning the authenticity of the credit card receipt, and to describe investigative steps he intended to pursue.

Sept. 1992: Witnesses were interviewed and information gathered by the RCMP was analyzed.

Chronology of Events in the Section 690 Application of W. Colin Thatcher to the Minister of Justice

Oct. 7-19, 1992: Handwriting analyst provided further report to the Department.

Nov. 5, 1992: Departmental counsel requested Mr. Thatcher's counsel to provide handwriting samples.

Nov. 18, 1992: Further legal submission made by Mr. Thatcher's counsel, and counsel advised that the information requested on November 5, 1992, could not be supplied.

Nov. 24, 1992: Counsel for Mr. Thatcher made further submissions.

Dec. 15, 1992: Mr. Thatcher's counsel provided the Department with additional materials, as requested.

Dec. 20, 1992: Department received further witness information.

Jan. - Feb, 1993: Preparation of investigative summary began and additional materials were collected.

March 2, 1993: Mr. Thatcher's representative provided additional information to the Department.

April 29, 1993: Departmental counsel provided an investigative summary to counsel for Mr. Thatcher; counsel was requested to provide his comments within a specified time frame which was later extended at the request of counsel.

July 9, 1993: Mr. Thatcher's counsel and a representative of Mr. Thatcher provided the Department with their submissions and comments regarding the investigative summary.

July - Dec, 1993: Preparation of the departmental advice and its review by senior departmental officials.

Dec. 1993 - April 14, 1994: Minister reviews entire record and prepares reasons for decision

Chronology of Events in the Section 690 Application of Wilfred Beaulieu to the Minister of Justice[1]

June 13, 1994: Wilfred Beaulieu submitted an application to the Minister of Justice.

June 17, 1994: Departmental counsel advised counsel for the applicant of the information needed to complete the application.

Oct. 7, 1994: Counsel for the applicant provided the Department with additional submissions, a signed waiver of solicitor-client privilege, and a signed consent to release personal information in response to Departmental requests.

Oct. 24, 1994: The Department of Justice appointed [ad hoc counsel] to assess the application.

Nov. 1994 - June 1995: Investigating counsel reviewed the materials submitted on the application; interviewed counsel for the applicant, the applicant, and several witnesses; retained the services of a psychiatrist to assist in the analysis of medical and psychiatric files and provide an opinion; and obtained the investigative assistance of the R.C.M.P.

Mar. 14, 1995: Investigating counsel provided a draft Investigation Brief to the Department for comment.

Mar. 27, 1995: The Department provided comments on the Investigation Brief to the investigating counsel.

June 8, 1995: Counsel for the applicant provided additional files to the investigating counsel for his consideration in preparation of the Investigative Brief.

July 18, 1995: The investigating counsel finalized the Investigation Brief and submitted it, together with all appendices, to the applicant's counsel for comment.

July 20, 1995: Applicant's counsel provided the investigating counsel with submissions and comments regarding the Investigation Brief.

Aug. 15, 1995: Investigating counsel provided his opinion and legal advice to the Department.

Aug. 1995 - Jan. 1996: Departmental officials reviewed the Investigation brief and legal advice, and prepared its report.

Feb. 1996 - Oct. 1996: The Minister reviewed the entire record, including the application, the Investigation Brief, comments from applicant's counsel, and legal advice from both the investigating counsel and the Department, and prepared his reasons for decision.

---

[1] See *Beaulieu Decision*, Appendix 1, 1-2.

Appendix 4
All Known Section 690 Applications, Interventions and Outcomes

Applicant	Section	Application Date	Reference Date	Application Outcome
1. Barr, Wayne D.	596(b) or 617(b)	unknown	unknown	- sentence reduced.
2. Beaulieu, Wilfred	690(c) + (b)	Aug. 31/94	Nov. 25/96	- acquittal on one conviction; new trial ordered on second assault conviction; Crown stayed proceedings.
3. Buxbaum, Helmuth		1990		- intervention denied Dec. 1991.
4. Coffin, Wilbert	SCC	unknown	1955	- reference to SCC under s. 55 [now s. 53] of the *Supreme Court Act*. Court split 5-2 against Coffin on the issue of whether he had a fair trial and he was hanged.
5. Comeau, Gary		unknown		- intervention denied Dec. 1990.
6. Findlay, Timothy C.		unknown	unknown	- status of review unknown.
7. Fox, Norman (aka Kenneth Warwick)	748(2)	unknown	unknown	- on Oct. 11/84, the Governor-in-Council, acting on a joint recommendation of the Minister of Justice and the Solicitor General, issued a free pardon.
8. Gamble, Janise M.		unknown		- intervention denied.
9. Gillespie, Walter		1997/98		- conviction review in progress.
10. Gorecki, Zbignieu	617(c) + (b)	unknown	1976	- CA ordered new trial, restricting the defence to the issue of insanity. Outcome of trial unknown.
11. Gruenke (Breese), Adele R.	690(c) + (b)	unknown	Sep. 26/97	- CA dismissed appeal; on June 17/99, leave to appeal CA judgment was granted pursuant to s.40(1) of the *Supreme Court of Canada Act*.
12. Hauser, Lyle J.	617(b)	unknown	March 1974	- outcome of appeal unknown.

Appendix 4

All Known Section 690 Applications, Interventions and Outcomes

Applicant	Section	Application Date	Reference Date	Application Outcome
13. Jarvis, Aemilius	1022(2)(b)	unknown	1936	- appeal dismissed Apr. 9, 1937.
14. Johnson, Clayton N.	690(c) + (b)	Mar.31/98	Sep. 21/98	- reference to CA not yet heard.
15. Kehoe, Ronald A.	596(b)	unknown	unknown	- CA dismissed appeal (May 1969).
16. Kelly, Patrick	690(c) + (b)	Dec. 20/93	Nov. 25/96	- CA decision (May 21/99) split 2-1 against granting appeal.
17. Khan, Pamela		unknown	unknown	- outcome of review unknown.
18. Kinsella, Allen M. (#1)		1981		- intervention denied 1989.
(#2)		1994		- intervention denied 1999.
19. Latta, Keith	617(c)	unknown	1976	- CA found that evidence would not have been admissible.
20. Lord, Derik		mid 1990s	unknown	- outcome of review unknown.
21. MacKay, Scott I.		1999	unknown	- conviction review in progress.
22. Mailman, Robert		1997/98	unknown	- conviction review in progress.
23. Marcotte, George	596(b)	unknown	1964	- CA dismissed appeal (Sept. 17, 1964); appeal to SCC also unsuccessful; however, sentence was commuted.
24. Marshall, Donald	617(b)	1982	June 16/82	- CA quashed conviction and verdict of acquittal entered (May 10, 1983); inquiry held and compensation was awarded.
25. McArthur, Richard	690(c) + (b)	1992/93	1998	- in April 1999, the appeal was allowed and CA directed an acquittal.
26. McNamara, John W.	596(b)	unknown	Nov. 29/63	- CA quashed convictions; new trial ordered; convictions affirmed.
27. Milgaard, David (#1)		Dec. 28/88		- intervention denied Feb. 27/91.
(#2)	SCC	Aug. 14/91	Apr. 14/92	- Governor-in-Council referred to SCC. Court advised Minister to quash conviction and to direct a new trial. If new trial held and Milgaard found guilty, SCC recommended conditional pardon.

Appendix 4
All Known Section 690 Applications, Interventions and Outcomes

Applicant	Section	Application Date	Reference Date	Application Outcome
28. Morgentaler, Henry	617(a)	unknown	1976	- acquitted.
29. Morrisroe, Sidney V.		June 11/92		- intervention denied Oct. 18/95.
30. Nepoose, Wilson	690(b)	unknown	June 1991	- CA ordered new trial; Crown stayed proceedings.
31. Peel	1022	unknown	1921	- outcome of new trial unknown.
32. Pelletier, Joseph P.	596(a)	unknown	unknown	- acquitted at second trial.
33. Roberts, Robert	596(b)	unknown	1962	- CA dismissed appeal against convictions; sentence reduced.
34. Roux, Julien	596 or 617(b)	unknown	unknown	- CA ordered new trial; acquitted.
35. St. Cyr, H.	617 or 690(a)	unknown	1988/89	- acquitted.
36. Sauve, Rick		unknown		- intervention denied Dec. 1990.
37. Shatford, Ronald	617(a)	unknown	unknown	- acquitted.
38. Tenorio, Walter (# 1)		June 14/83		- intervention denied Oct. 13/83.
(# 2)		unknown		- intervention denied Oct. 30/89.
39. Thatcher, W. Colin		Oct. 11/89		- intervention denied Apr. 14/94.
40. Truscott, Steven	SCC		1966	- Governor-in-Council asked SCC to determine what disposition it would have made on a consideration of the existing and other evidence. In 8-1 decision, the appeal was dismissed.
41. Van Amerongen, Andries		unknown	unknown	- outcome of review unknown.
42. Vaudry, Jacques		Apr. 24/85		- intervention denied May 14/87.
43. Way, Allan V.	596(b)	unknown	April 1966	- conviction quashed.
44. Wilson, Robert G.		Feb. 12/82		- intervention denied Apr. 19/83.
45. Young, Donzel		Oct. 1994		- status of review unknown.

Total Interventions = 27

Questionnaire for Incarcerated Section 690 Applicants

(To protect confidentiality, PLEASE DO NOT IDENTIFY YOURSELF)
NB: If there is insufficient space for your responses, please use additional paper (and note the appropriate question number).

Questionnaire pour les personnes incarcérées requérant une procédure en vertu de l'article 690

(Pour conserver la confidentialité, VEUILLEZ NE PAS VOUS IDENTIFIER)
NB: Si vous n'avez pas assez de place pour répondre, veuillez utiliser des feuilles supplémentaires (et indiquer le numéro de la question correspondante).

1. How did you learn about the section 690 conviction review process ?
   Comment avez-vous entendu parler de la procédure de révision de condamnation en vertu de l'article 690 ?

2. When did you ***LAST*** apply for a section 690 conviction review ?
   Quand avez-vous fait une demande de révision de condamnation en vertu de l'article 690 pour la **DERNIÈRE FOIS** ?

   Year/Année: _____ Month/Mois: _____

3. What stage is your section 690 application at ? (For example: you have just submitted your application; the Department of Justice is investigating; you are waiting for Minister's decision).
   Où en est votre demande faite en vertu de l'article 690 ? (Par exemple: vous venez juste de déposer votre demande; Le Ministère de la Justice est en cours d'enquête; Vous attendez la réponse du Ministre).

4. If your last section 690 application was rejected by Department of Justice officials, ***WHEN*** was it rejected ?
   Si votre dernière demande faite en vertu de l'article 690 a été rejetée par les responsables du Ministère de la Justice, **QUAND** a-t-elle été rejetée ?

   Year/Année: _____ Month/Mois: _____

5. If your last section 690 application was rejected by Department of Justice officials, ***WHY*** was it rejected ? (For example: information submitted was not considered *new* and/or *significant*, etc.). Please explain.
   Si votre dernière demande faite en vertu de l'article 690 a été rejetée par les responsables du Ministère de la Justice, **POURQUOI** a-t-elle été rejetée ? (Par exemple: les informations soumises n'ont pas été considérées comme nouvelles, ou pertinentes, etc.) Veuillez expliquer.

6. Is this your first section 690 application for this conviction ?
S'agit-il de votre première demande faite en vertu de l'article 690 pour cette condamnation ?

Yes/Oui: ____ No/Non: ___ **If NO**, when did you previously apply for this section 690 conviction review? Year: _____ Month: _____

Si NON, quand avez-vous pour la dernière fois fait une demande de révision en vertu de l'article 690 pour cette condamnation ?
Année: _____ Mois: _____

7. Did you abandon your latest section 690 application ? If YES, please explain why.
Avez-vous laissé tomber votre dernière demande faite en vertu de l'article 690 ? Si OUI, veuillez expliquer pourquoi.

8. Did you receive financial assistance to complete and file your section 690 application ?
Avez-vous reçu de l'aide financière pour remplir et déposer votre demande en vertu de l'article 690 ?

Yes/Oui: _____ No/Non: _____ **IF YES**, please check the boxes below which apply to your situation.

SI OUI, merci de cocher ci-dessous les cases qui correspondent à votre situation.

☐ To retain legal counsel to assist with your section 690 application.
Pour obtenir les services d'un conseiller juridique afin qu'il vous aide dans votre demande faite en vertu de l'article 690.

☐ Legal Aid.
Aide légale.

☐ To pay for all required court transcripts and appeal factums.
Pour payer les diverses transcriptions de Cour et procédures d'appel.

☐ Other (please explain).
Autre (Veuillez expliquer).

9. Did anyone assist you to complete and file your section 690 application ?
Quelqu'un vous a-t-il aidé à remplir et déposer votre demande faite en vertu de l'article 690 ?

Yes/Oui: _____ No/Non: _____ **If YES**, who? (For example: legal counsel, friends, family, advocacy group)

Si OUI, qui? (Par exemple: conseiller juridique, amis, famille, groupe de soutien)

10. (a) **If you answered YES to question #9**, what kind of help did you receive to complete and file your section 690 application ?
Si vous avez répondu OUI à la question 9, quel type d'aide avez-vous reçue pour remplir et déposer votre demande en vertu de l'article 690 ?

(b) **If you answered NO to question #9**, why did you complete and file the section 690 application by yourself ?
Si vous avez répondu NON à la question 9, pourquoi avez-vous rempli et déposé votre demande en vertu de l'article 690 tout(e) seul(e) ?

11. Why do you think you were wrongly convicted ?
Pourquoi pensez-vous que vous avez été condamné(e) à tort ?

12. What reasons for conviction review did you set out in your section 690 application ?
Quelles raisons avez-vous invoquées dans votre demande pour justifier une révision de condamnation en vertu de l'article 690 ?

13. How would you describe your prison experiences in light of your section 690 application ?
Comment décririez-vous vos expériences de la prison à la lumière de votre demande faite en vertu de l'article 690 ?

14. Please describe any problems you may have experienced in attempting to have your conviction reviewed.
Veuillez décrire tout problème que vous avez pu rencontrer dans vos tentatives pour faire réviser votre condamnation.

15. Overall, do you believe that section 690 is an effective means of conviction review ?
Globalement, pensez-vous que l'article 690 soit un moyen efficace pour faire réviser une condamnation ?

16. What changes, if any, would you recommend to improve the section 690 conviction review process ?
Quels changements recommanderiez-vous, le cas échéant, pour améliorer la procédure de révision de condamnation en vertu de l'article 690 ?

17. If you retained legal counsel, please indicate the lawyer's name, telephone number and/or address (optional).
Si vous avez obtenu les services d'un conseiller juridique, veuillez indiquer le nom du conseiller, son numéro de téléphone et/ou son adresse (facultatif).

18. (a) What was the offence(s) for which you are now seeking section 690 conviction review ?
Pour quel(s) délit(s) cherchez-vous actuellement à faire réviser votre condamnation en vertu de l'article 690 ?

_____

(b) What sentence(s) did you receive?
Quelles peines vous ont été infligées ?

_____

19. Have you filed other section 690 applications for any other convictions ?
Avez-vous déposé d'autres demandes en vertu de l'article 690 pour d'autres condamnations ?

Yes/Oui: ____ No/Non: ____ **If YES**, when? Year: _____ Month: _____
Si OUI, quand? Année: _____ Mois: _____

20. **If you answered YES to question #19,** what was the outcome of that section 690 application ?
Si vous avez répondu OUI à la question 19, quel a été le résultat de ces demandes faites en vertu de l'article 690 ?

21. Gender / Sexe: ☐ Male/H ☐ Female/F

22. Year of Birth / Année de naissance: _____

23. Ethnicity (Groupe ethnique) / Race: _____

24. Correctional Institution / Institution correctionnelle: _____

25. If you would like to make further comments, please do so on separate page.
Si vous souhaitez ajouter des commentaires, merci de le faire sur une page à part.

Thank you for your participation !
Merci pour votre participation !

Return Address/Adresse de retour: Patricia Braiden, C/O School of Criminology,
Simon Fraser University,
8888 University Drive,
Burnaby, B.C. V5A 1S6

Federal Institutions - Questionnaire Distribution

Atlantic Region (5)

1. Atlantic Institution (Maximum) - Renous, NB
2. Dorchester Institution (Medium) - Dorchester, NB
3. Nova Institution for Women (Multi) - Truro, NS
4. Springhill Institution (Medium) - Springhill, NS
5. Westmorland Institution (Minimum) - Dorchester, NB

Ontario Region (12)

1. Bath Institution (Medium) - Bath, ON
2. Beaver Creek Institution (Minimum) - Gravenhurst, ON
3. Collins Bay Institution (Medium) - Kingston, ON
4. Grand Valley Institution for Women (Multi) - Kitchener, ON
5. Frontenac Institution (Minimum) - Kingston, ON
6. Joyceville Institution (Medium) - Kingston, ON
7. Kingston Penitentiary (Maximum) - Kingston, ON
8. Kingston Prison for Women (Multi) - Kingston, ON
9. Millhaven Institution (Maximum) - Bath, Ontario
10. Pittsburgh Institution (Minimum) - Kingston, ON
11. Fenbrook Institution (Medium) - Gravenhurst, ON
12. Warkworth Institution (Medium) - Campbellford, ON

Pacific Region (7)*

1. Elbow Lake Institution (Minimum) - Harrison Mills, BC
2. Ferndale Institution (Minimum) - Mission, BC
3. Kent Institution (Maximum) - Agassiz, BC
4. Matsqui Institution (Medium) - Abbotsford, BC
   * Although questionnaires were sent to Matsqui Institution, this facility was ultimately excluded from this study.
5. Mission Institution (Medium) - Mission, BC
6. Mountain Institution (Medium) - Agassiz, BC
7. William Head Institution (Medium) - Victoria, BC

Federal Institutions - Questionnaire Distribution

Prairie Region (11)

1. Bowden Institution (Medium) - Innisfail, AB
2. Drumheller Institution (Medium) - Drumheller, AB
3. Edmonton Institution (Maximum) - Edmonton, AB
4. Rockwood Institution (Minimum) - Stony Mountain, AB
5. Riverbend Institution (Minimum) - Prince Albert, SK
6. Stony Mountain Institution (Medium) - Winnipeg, MN
7. Edmonton Institution for Women (Multi) - Edmonton, AB
8. Grande Cache Institution (Medium) - Grande Cache, AB
9. Saskatchewan Penitentiary (Medium / Maximum) - Prince Albert, SK
10. Okimaw Ohci Healing Lodge for Women (classification unknown) - Maple Creek SK
11. Hobbema Healing Lodge for Men (classification unknown) - Hobbema, AB

Quebec Region (10)

1. Archambault Institution (Medium) - Sainte-Anne-des-Plaines, QB
2. Cowansville Institution (Medium) - Cowansville, QB
3. Donnacona Institution (Maximum) - Donnacona, QB
4. Drummond Institution (Medium) - Drummondville, QB
5. Joliette Institution for Women (Multi) - Joliette, QB
6. La Macaza Institution (Medium) - La Macaza, QB
7. Leclerc Institution (Medium) - Laval, QB
8. Montée Saint-Francois Institution (Minimum) - Laval, QB
9. Port-Cartier Institution (Maximum) - Port-Cartier, QB
10. Sainte-Annes-des-Plaines Institution (Minimum) - Sainte-Annes-des-Plaines, QB

Explanatory Letter Sent to Wardens

SIMON FRASER UNIVERSITY

(Letterhead)

JOAN BROCKMAN
PROFESSOR
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Warden:

Mr. Ralph Serin, Correctional Service Canada in Ottawa, has approved the research of one of my graduate students, Patricia Braiden, who is writing her M.A. thesis on the use of section 690 of the *Criminal Code* (see enclosed copy of approval). The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to obtain information from those who have direct experience with section 690 reviews.

Could you please inform the inmates of this research, and provide those who have made section 690 applications with a copy of the enclosed questionnaire, attached letter, and return envelope. If you run out of copies of the questionnaire, please contact me immediately so that we can send you more copies. **Could you also let me know how you distributed the questionnaire so that Ms. Braiden can record this information for her thesis.**

If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University and with the research branch in Ottawa.

Thank you for your consideration.

Sincerely,

Joan Brockman

Research Approval Letter from Corrections Canada - Ottawa

Correctional Service
Canada

July 17, 1998

Ms. Patricia Braiden
School of Criminology
Simon Fraser University
8888 University Drive
Burnaby, B.C.
V5A 1S6

Dear Ms. Braiden:

Re: Proposed research on Section 690 of the *Criminal Code*

I received your request from Dr. Doug Boer of the Pacific Region for review and approval. I note that you have ethics clearance from your university, that the involvement by offenders is voluntary, and that those who participate will not be identified. From the appendices you provided it appears the questions are quite straightforward. Also I note you are not requesting access to offender files, entry to the prisons, or funding assistance.

Your request to conduct this research is approved. I wish you every success in this endeavour and would ask that you kindly provide a copy of your finished thesis to the Research Branch.

Ralph Serin
A/Director General, Research

Explanatory Letter Sent to Inmates

SIMON FRASER UNIVERSITY

(Letterhead)

JOAN BROCKMAN
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Sir or Madam:

I am a Professor in the School of Criminology at Simon Fraser University. One of my graduate students, Patricia Braiden, is writing her M.A. thesis on the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada. Section 690 involves an application to the Minister of Justice after all appeals have been exhausted. The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to obtain information from those who have direct experience with section 690 reviews.

If you have applied for a section 690 conviction review, I would appreciate your participation in Ms. Braiden's research, through the completion of the enclosed anonymous questionnaire. Could you please complete the questionnaire and return it to Ms. Braiden (School of Criminology, Simon Fraser University, Burnaby, B.C. V5A 1S6) in the enclosed envelope. Should you agree to this research, you may withdraw from the study at any time.

If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University.

Thank you for your consideration.

Sincerely,

Joan Brockman

Availability of Legal Aid Services to Section 690 Applicants

Province	Response
AB	- The issue of section 690 was dealt with by the Board of Directors of the Legal Aid Society (LAS) at its meeting held on April 1, 1998. The Board's unanimous decision was that Legal Aid coverage for section 690 reviews be approved, subject to merit and financial eligibility. Applications for legal aid coverage for section 690 reviews are to be accepted and considered in accordance with the Legal Aid rules and policies. [Letter from Nancy Brown Medwid, Executive Director - Legal Aid Society of Alberta, to author (26 October 1998)].
B.C.	- This office reviews all section 690 funding requests. The Society's resources are limited, and the Legal Services Society of B.C. can only fund section 690 requests that have a reasonable chance of success. The Society appoints counsel in cases that meet this test. [Letter from Rod Holloway, Barrister & Solicitor, Appeals Department - Legal Services Society of British Columbia, to author (10 November 1998)].
MN	- Legal Aid Manitoba will pay for proceedings under section 690 as we would for all other matters appropriately before the criminal court where the client met the financial and coverage requirements of our plan. [Letter from Ronald Klassen - Legal Aid Manitoba, to author (28 October 1998)].
NB	- Since my arrival at Legal Aid in New Brunswick in 1993, I don't recall this issue ever arising. Should we have occasion to face such an issue, I expect it would be covered under the scope of Legal Aid New Brunswick. [Letter from David M. Potter, Provincial Director (Interim) - Legal Aid New Brunswick, to author (28 October 1998)].
Nfld	- The Newfoundland Legal Aid Commission has never had a request for assistance with regards to an application under section 690. However, we would certainly review any such application, considering the financial and legal merits of the application and would undertake to provide service in the appropriate cases. [Letter from Dennis C. MacKay, Barrister & Solicitor - Newfoundland Legal Aid Commission, to author (5 November 1998)].
NWT / Nunavut	- The Legal Services Board of the Northwest Territories and Nunavut does not have a specific provision in the governing tariff relating to section 690 applications. As you note, however, all applications for Legal Aid are reviewed on the basis of merit. And as you also suggest, this Legal Aid Plan is prepared to fund this type of litigation where warranted. [Electronic mail letter from Gregory C. Nearing, Executive Director - Legal Services Board of the Northwest Territories and Nunavut, to author (10 August 1999).

Availability of Legal Aid Services to Section 690 Applicants

Province	Response
NS	- An individual seeking a conviction review under section 690 of the *Criminal Code* may apply for Legal Aid. If the application meets our eligibility requirements, then legal services would be provided to the individual seeking review. At the present time I can confirm that one of our staff lawyers is now handling a section 690 review. [Letter from T. Gerard Lukeman, Executive Director - Nova Scotia Legal Aid Commission, to author (23 July 1999)].
ON	- Section 690 applicants are able to obtain assistance through Ontario's Legal Aid Plan. It is subject to a strict merit test and only where an opinion letter is provided demonstrating a high probability of success. Receiving a certificate for such a review is also subject to the applicant being unable to obtain assistance from other organizations. In view of the assistance of the Association in Defence of the Wrongly Convicted, few of these certificates have been issued in Ontario. [Letter from George Biggar, Deputy Director, Legal - Ontario Legal Aid Plan, to author (2 November 1998)].
PEI	- There is no specific Legal Aid legislation in Prince Edward Island, hence, there is no specific provision for section 690. There have been no applications under section 690. Your assumption that each case is dealt with on its own merits is correct and it would apply in the event of a s. 690 application. [Electronic mail letter from Judy Smethurst, Legal Aid of P.E.I., to author (16 November 1998)].
QB	- Legal Aid in Québec does cover proceedings under section 690 only if the remedy sought by the applicant is considered by the administration of Legal Aid as reasonably founded. Section 4.6(2) of the Legal Aid Act states that "in criminal or penal matters, legal aid shall be granted...where the appeal is filed or the extraordinary remedy exercised by the accused in any matter referred to in section 4.5 if the appeal or extraordinary remedy is reasonably founded." To date, just one decision has been rendered by our Revision Committee concerning this matter. The decision confirms the granting of legal aid under section 690 in cases where it is reasonably founded but in this case, legal aid services were refused. [Letter from Diane Trudeau, Lawyer, Legal Aid Québec, to author (27 October 1998)].
SK	- We have not had any applications under this section. If one was to arise, we would consider representing the person using criteria of eligibility and professional merit [Letter from Jane Lancaster, Q.C., Chairperson - Saskatchewan Legal Aid Commission, to author (19 November 1998)].
YK	- Our current coverage does not provide for financial and legal assistance to individuals seeking section 690 conviction reviews. However, it should also be noted that we have not, to my knowledge, ever had any requests for assistance in this regard. [Letter from Karen Ruddy, Executor Director - Yukon Legal Services Society, to author (29 July 1999)].

Respondent Application to the Department of Justice Under Section 690 of the *Criminal Code*

1. On June 13, 1995, the respondent was found guilty by judge and jury, of having committed a theft utilizing a firearm during this theft and of having fired at policemen who were in pursuit of he and his presumed accomplices.
2. The proof of the case rests principally on the witness of an informer, a certain Marcel Talon, and a substitute of the prosecutor-general on the file, Jacques Dagenais, who admits in his final summary before the jury that, without a capital witness, "there is not serious proof against the two accused."
3. The informer witness entered a written agreement on the 14th of February 1994, with a control committee of four members set up by the Minister of Justice of Québec conforming to a directive concerning the use by the Crown of informer witnesses; the contract allows for the obligation of payment to the informer for him and his family in return for testimony, as well as for reciprocal obligations for the parties to respect their agreements.
4. The directive expects, amongst others, that the control committee, formed of four members (a representative of the Minister of Justice, two representatives of public security and a representative of the urban community police force of Montreal) has the mandate to negotiate and conclude a written agreement with the informer and to watch over the agreement at each step.
5. In the informer contract, the informer Marcel Talon, declares to have vowed to police authorities the criminal infractions reproduced in Annex D of the said contract, for which he has never been accused and under promise that these avowals would not be used against him in any eventual judicial procedure.
6. He declares also that he has not committed or participated in...any other criminal infractions in Canada and to have received the promise that the declarations made relative to the infractions mentioned would not be used as proof against him in any Canadian procedure.
7. At the beginning of the preliminary inquest, following the revelations...by counsel of the accused and without forewarning by the authorities, the substitute of the prosecutor general learns that the informer witness has committed two murders which he has voluntarily and knowingly omitted to reveal in the informer contract.
8. The substitute of the prosecutor general in this dossier, Jacques Dagenais, and the substitute in chief assistant for the District of Montreal, Andre Vincent, then decide, by themselves, to not convene the control committee and to profit the informer - for these two murders - the same advantages and immunities as those offered by the informer contract.
9. On June 1, 1994, the substitute of the prosecutor general, Jacques Dagenais, makes the official announcement of this decision before the Justice of the Peace President of the preliminary inquest. The informer witness and the [applicant] are cited in the process.
10. On November 17, 1994, the control committee and the informer conclude another agreement which arranges for an additional amount for the costs of protection and of relocation for the family of the informer.
11. At the opening of the process, on the 28th of April 1995, the [applicant's counsel] deposes a request for suspension of the present case (stoppage of the procedures) alleging that the behaviour of the representatives of the Crown constituted a manifest case of abuse and faulty consideration of justice. Judge Kevin Downs rejects the request and the informer testimony.
12. During the process, three members of the control committee sign together a project of agreement which is, however, not countersigned by the informer, because of the objection of the substitute of the dossier, Jacques Dagenais: "Myself, I called for the stop because it was not a question that he is paid for the testimony, that he had a financial advantage"; this project of the agreement allowed for the handing over of other sums of money to the informer (around $24,000).
13. On May 30, 1995, the informer witness, Marcel Talon, in reply to the prosecutor who wishes to know if the new contract "is coming along," affirms that the authorities have indicated to him that everything was going along and that he had stopped "hounding" the police on this subject.

Respondent Application to the Department of Justice Under Section 690 of the *Criminal Code*

14. In his plea before the jury on June 7, 1995, Jacques Dagenais snubs the lawyer of the accused who would have let it be heard that the witness informer would receive his money after the process; he explains in these terms his opposition to the conclusion of the project of a new informer agreement:
    "My colleague has told you: "don't worry, implying, they are going to pay him once this process is over, they are going to pay his $12,000 up to the month of November." I would like to tell you, that there is no proof whatever. I am not permitted to make you any payments which are not approved. But I just want to tell you that that contract was stopped, it was not signed since that would really have been a perversion of justice of which the Minister, of which I am a part, tells you: "It has been stopped, but that's not very serious, once it is finished, this process, it will be given him but you will not know about it."
15. Another motive, very important, for the objection of Mr. Dagenais to the signature of the project of agreement of May 1995, concerns the credibility of the informer witness; to hand over money foreseen for the project would destroy totally, according to the substitute, the credibility of the informer witness, as well as the report of policeman Gilles Bergeron at the process, at the time of his testimony on May 23, 1995.
    "Yes, there is an addendum which should have been signed, but the addendum has not been signed because Mr. Dagenais said: "one should not sign because there are sums of money involved and then there will be no more credibility in court if one hands over amounts of money."
16. Nevertheless, after the proceedings, on July 3, 1995, the project will be effectively signed by the control committee - of which three of the four members will be replacements - and the informer. The control foresees the payment of a sum of $400.00 retroactive to the 17th of January just at the proceeding's end, that is June 13, 1995, and a weekly sum of $500.00 for an additional period of six months, that is a sum total of about $24,000, the total which he attaches to the said agreement that the undersigners received from the Québec Justice Minister, August 12, 1998, following a demand for access of information.
17. Declared guilty June 13, 1995, the applicant takes his case in appeal to the Supreme Court against the verdict of culpability and also against the judgment of Judge Downs who had refused to order cessation of proceedings; on June 16, 1998, the Court of Appeal rejects his appeal... .
18. On August 21, 1998, the applicant notifies the Queen that he will address himself to the Supreme Court in order to obtain an order authorizing him to take himself in appeal before the Supreme Court against the judgment proclaimed by the Court of Appeal... .
19. During the preparation of the request to appear before the Supreme Court of Canada, the undersigned [counsel for the applicant, Pierre Cloutier and André Tremblay] have, on or towards August 8, 1998, presented to Mr. Pierre Dion, in charge of the access to information of the Office of the Deputy Minister of Justice or of the Deputy Prosecutor General, the following demand in the name of [the applicant]:
    1. All the agreements concluded with the informer Marcel Talon to which the representative of the prosecutor general is party.
    2. Every project of agreement with Marcel Talon to which the representative of the prosecutor general is a party.
    3. The sums of money, advantages or other considerations which were handed out by virtue of the said concluded agreements and the projects of agreement, either for Marcel Talon, or to or for the family of Marcel Talon.
    4. Whatever agreements which provided for handing out sums of money or advantages or the grants of any consideration to or for Marcel Talon, or to or for the family of Marcel Talon.
    5. The sums of money, advantages and other considerations which have been handed out in any way to or for Marcel Talon or to or for the family of Marcel Talon.
20. The documents obtained August 12, 1998, reply to points 1, 2, and 4 of the above request.

Respondent Application to the Department of Justice Under Section 690 of the *Criminal Code*

21. The applicant has not yet obtained any reply to points 3 and 5 of his demand for access to information and discussion of the reasonable motives of belief that other sums of money, advantages, considerations or gratifications have been granted or consented to Marcel Talon or for his family.
22. The documents received August 12 constitute a new proof which was hidden at the court of appeal and that the Public Minister has strategically and deliberately withheld to avoid to reveal during the proceedings.
23. This new proof fills the criteria of paragraph 483(7) of the *Code of Civil Procedure* and gives opening to the retraction of judgment of the court of appeal.

    483 - In the same way, the judgment against which no other useful recourse is open, can be retracted by the tribunal which rendered it, to the demand of a party, in the following cases:

    483(7) - when, since the judgment, it has been discovered a new proof and that:
    (a) if it had been brought forward in time, the decision would probably have been different;
    (b) that it was not known either by the party, nor by his counsel;
    (c) that it was not possible, with all reasonable diligence, to be discovered in useful time.
24. This proof fulfills equally the criteria of jurisprudence of this court by Judge Beaudoin in *R. v. Vaudry*, (1989), 51 C.C.C. (3d) 410, p. 413.

    In order to be able to revoke the appeal decision, the applicant has the burden of proof and must demonstrate that he comes within one of the seven situations provided for in article 483 of the *Code of Civil Procedure*, or, according to the jurisprudence of our court, in order to remedy a serious injustice not due to the gross negligence of the affected party.
25. The applicant has then undertaken procedures in retraction of the judgment of the Court of Appeal.
26. The proof of payment of $24,000 made to the witness informer, Marcel Talon, after the process, existed during the whole proceedings of appeal. Known by the Crown, it should have been divulged to the court of Appeal as in *R. v. V. (W.J.)* (1992), 72 C.C.C. (3d) 97, 109... .
27. Besides, one cannot reproach the applicant for having believed the solemn declaration of the representative of the Minister of Justice to the effect that the Ministry, of which he was party, would not hide from the jury the grant of such sums of money to the informer witness Talon, would not pay the witness after the process and would not engage in such a perversion of justice.
28. If the jury and judge had known that the proposals and promises of the substitute were inexact and deceiving and that the prosecutor was going to hand over $24,000 to the informer witness just after the trial, the verdict of the jury as well as the judgment of Judge Downs concerning the stoppage of the proceedings probably would have been different. If the Court of Appeal had not been held in ignorance of this troubling fact, its judgment would probably have been different.
29. The request for retraction of judgment is the most useful or appropriate recourse under the circumstances "since the judgment, documents, or new evidence, has been discovered and if it had been brought forward in time, the decision would probably have been different" (the Honourable Judge Lamer, J.C.A as he then was, in *R. v. Mitchell*). But it does not prevent, in any way, her gracious Majesty the Queen, to exercise her prerogative of clemency through the intermediation of the federal Minister of Justice who, under the circumstances, ought to order a new procedure.
30. The Honourable Judge Nichols writes for the Court of Appeal in *Watier vs. Watier* [1990] R.D.J. 364, p. 369, that the appeal to the Supreme court does not permit to "look backwards" and to "remedy the obstacle and apply its means before our court; even if the appeal is open to him, this means of taking his case against the judgment will have no usefulness since he will not always have the means of defence that he would wish to invoke."

Respondent Application to the Department of Justice Under Section 690 of the *Criminal Code*

31. The appeal foreseen in article 690 of the *Criminal Code* by which the applicant asks you to exercise clemency of the Crown and to order a new procedure does not represent, in the circumstances, the preferred appeal by the applicant. This person does not search first of all, for the clemency of the Crown; he is looking, above all, for procedure equity, the regular application of the law, the respect of principles of fundamental justice, the right to a full defence, the respect of the rules of a fair game and of decency by the Crown, the honesty in its behaviour, attachment to the integrity of the courts and the consideration of justice.
32. The applicant aims to obtain, as quickly as possible, at the Court of Appeal level, the judgment or the repair of the denial of justice that the superior and appeal courts have been prevented from considering or rendering by reasons of the dissimulation of the proof: that is the stopping of the procedures, or acquittal. The privileged objective of the applicant does not consist, therefore, in obtaining a new process but to assure that justice follows its normal course, without hindrance, and that the parties be, conforming to article 488 of the *Code of Civil Procedure* "going back to the state where they were earlier."
33. However, your subject will welcome with joy and gratitude the measure of clemency that Her Majesty will wish to pronounce, confident that the order of a new process will lead either to the stoppage of procedures or to an acquittal.
34. The applicant maintains that the general prosecutor or his substitutes are not acquitted of their role and of their functions, in conformity with the norms and exigencies prescribed by the Supreme Court. On the one hand, they have not played the role that the decision in R. v. Power (1991) 1 R.C.S. 601, p. 616, defined and they have not reflected the interests of the collectivity to see that justice be adequately rendered and do not seem to have understood that the "role of the general prosecutor consists not only to protect the public, but equally to honour and to express the sense of justice of the collectivity." On the other hand, the prosecutor of the Crown does not correspond to the traditional description which has been given as "representing justice, who ought to be considered more as an employee of the court than as a lawyer" (*Nelles v. Ontario* [1989] 2 R.C.S. 170, p. 191).
35. The behaviour of the substitute is reprehensible and illegal even in the face of the trial and constitutes a manifest case of wrong consideration of the administration of justice in that the substitute:
    - wronged and manipulated the jury and the judge of the process.
    - knowingly led the jury into error proclaiming, in response to the allegations of the informer witness and of applicant's counsel to the effect that the witness would be paid very shortly or after the process, that the Minister of Justice would not commit such a perversion of justice by refusing to engage in a contract during the process to pay the informer witness, Marcel Talon, but in paying it at the end of the process, after having hidden that from the jury.
    - thwarting or hindering the normal course of justice.
    - frustrating the Court of Appeal of its right to be acquainted with all the facts.
36. In itself, and in the face of the same case, this shocking behaviour undermines the honour, dignity and integrity of the courts and suffices, independent of other allegations, to justify:
    - either a stop to the procedures conforming to the decisions in *R. v. Jewitt* [1985] 2 R.C.S. 128, *R. v. Keyowski* [1988] 1 R.C.S. 657, *R. v. Scott* [1990] 3 R.C.S. 979 and *R. v. Power* [1994] 1 R.C.S. 601.
    - or to order, as the courts have done in cases almost the same, acquittal.
    - or to order a new trial.

Respondent Application to the Department of Justice Under Section 690 of the *Criminal Code*

37. The jurisprudence is clear: on the one hand, the promise of payment to an informer as a function of the result of a prosecution is absolutely unacceptable and gives an opening for a new procedure, (*R. v. Xenos* (1992) 70 C.C.C. 362. On the other hand, to hold in ignorance the jury (or the court) of an essential fact (the promises to the informer) without which the jury does not have the benefit of appreciating the credibility of an essential witness, menaces the integrity of the judicial process and justifies this honourable court to break the verdict of guilt and to order a verdict of acquittal (*R. v. Roy* (1990) 73 C.R. (3d) 291).
38. The federal Minister of Justice can count on an attentive, honest, and complete participation of the applicant and his counsel in the investigation which will lead into the present file.
39. The request of your applicant is well founded on facts and in law, the whole without prejudice to the remedies, orders, measures or judgments that the Supreme Court of Canada or the Court of Appeal of Québec could take or decree.
40. The applicant is convinced that, in the circumstances, a new procedure ought to be ordered by the federal Minister of Justice. As a consequence:

    May it please Her Majesty to exercise her prerogative of clemency and to order, through the intermediary of the federal Minister of Justice, the holding of a new procedure in this case.

Dated August 28, 1998

Explanatory Letter Sent to Defence Counsel

SIMON FRASER UNIVERSITY
(Letterhead)

JOAN BROCKMAN
PROFESSOR
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Sir or Madam:

I am a Professor in the School of Criminology at Simon Fraser University, and a non-practising member of the Law Societies of British Columbia and Alberta. One of my graduate students, Patricia Braiden, is writing her M.A. thesis on the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada. The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to interview those who have direct experience with section 690 reviews.

Your participation in this research project through a telephone interview would be greatly appreciated. Enclosed are the questions Ms. Braiden would like to cover. She will be contacting you in the next few weeks to request an interview on this topic.

Should you agree to this research, you may withdraw your consent at any time. If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University.

Thank you for your consideration.

Sincerely,

Joan Brockman

Proposed Interview Questions for Defence Counsel

1. How long have you worked as defence counsel? _____

2. Have you ever worked as Crown counsel?

   Yes _____ No _____ If yes, for how long? _____

3. In your experience, have you encountered convicted clients who you believe were factually innocent of the crime for which they were convicted?

   Yes _____ No _____ If yes, do you know if any of these people were acquitted by appellate courts?

4. Do you think the appellate court system provides sufficient protection against wrongful convictions?

5. Do you have an opinion as to the extent of wrongful convictions of the factually innocent in Canada in a given year?

6. In your opinion, what are the major causes of wrongful convictions of the factually innocent in Canada?

7. Have you represented a section 690 client from the initial stage of submitting the application right through to a Ministerial decision?

   Yes _____ No _____ (a) If yes, how long did this process take?

   (b) Are you able to identify the client(s)? (i.e., those clients whose cases are in the public domain).

8. Do you currently have client(s) who are seeking section 690 conviction reviews?

   Yes _____ No _____ (a) If yes, how many? _____

   (b) Are you able to identify the client(s)? (i.e., those clients whose cases are in the public domain).

9. At what stage is your client's section 690 application and/or investigation?

   1. Initial Assessment stage?
   2. Application was rejected by Department of Justice officials after initial assessment?
   3. Department of Justice Investigation stage?
   4. Preparation of the Investigation Brief?
   5. Awaiting Ministerial decision?

Proposed Interview Questions for Defence Counsel

10. What were the major grounds upon which your client(s)' section 690 application was based?

11. In your experience, what do you think are the merits of the section 690 conviction review process?

12. In your experience, what do you think are the major problems with the section 690 conviction review process?

13. What recommendations, if any, would you suggest to improve the section 690 conviction review process?

14. Do you think the adversarial legal system hinders section 690 conviction reviews in any way?

    Yes _____ No _____ If yes, are there elements of the inquisitorial legal system that may help to either minimize wrongful convictions or improve the efficacy of conviction reviews for those claiming to be wrongfully convicted?

15. Do you think that the issue of finality hinders Ministerial action under section 690?

16. Do you have any suggestions about how best to minimize wrongful convictions?

17. Is the elimination of wrongful convictions of the factually innocent possible in Canada? Why or why not?

18. In your experience, does media coverage of wrongful conviction cases influence section 690 case outcomes?

19. Do you know of any other defence counsel who have been involved in a section 690 application? If yes, can you provide their names and telephone numbers?

20. Are there any additional questions that you think should be asked?

21. Do you have any questions about this research and/or myself?

22. Is there anything you would like to add before closing?

Consent Form - Interview Participants

SIMON FRASER UNIVERSITY
CONSENT BY RESPONDENTS TO PARTICIPATE IN A RESEARCH PROJECT

The interviewer subscribes to the ethical conduct of research at Simon Fraser University and to the protection at all times of the interests, comfort, and safety of the respondents. The purpose of this research is to gather and publish information about the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada.

I hereby agree to participate in this research under the following terms:

☐ I agree that the researcher may quote me by name when publishing the results of her research, OR

☐ I request that the researcher identify me by pseudonym only, so as to maintain anonymity. However, given the limited number of individuals who work in this area, I realize that I may be identifiable to some individuals despite the researcher's best efforts to protect my anonymity.

☐ I consent to have this interview tape-recorded, and I understand that the tapes will be erased upon completion of this research. I realize that I can withdraw from the research at any time during the interview.

Respondent's Name: _____

Signature: _____ Date: _____

Interviewer: _____ Date: _____

Please return this form to **Patricia Braiden** (the researcher), School of Criminology, 8888 University Drive, Simon Fraser University, Burnaby, B.C., V5A 1S6. Her supervisor, Professor Joan Brockman, can be contacted at the same address or by phone (604-291-4036), fax (604-291-4140), or email (brockman@sfu.ca).

The Director of the School of Criminology (phone: 604-291-4305 or fax: 604-291-4140) may be contacted should you have any questions or concerns beyond those which can be addressed by the researcher or her supervisor.

Explanatory Letter Sent to Department of Justice Counsel

SIMON FRASER UNIVERSITY
(Letterhead)

JOAN BROCKMAN
PROFESSOR
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Sir or Madam:

I am a Professor in the School of Criminology at Simon Fraser University, and a non-practising member of the Law Societies of British Columbia and Alberta. One of my graduate students, Patricia Braiden, is writing her M.A. thesis on the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada. The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to interview those who have direct experience with section 690 reviews.

Your participation in this research project through a telephone interview would be greatly appreciated. Enclosed are the questions Ms. Braiden would like to cover. She will be contacting you in the next few weeks to request an interview on this topic.

Should you agree to this research, you may withdraw your consent at any time. If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University.

Thank you for your consideration.

Sincerely,

Joan Brockman

Proposed Interview Questions for Department of Justice Counsel

1. How long have you worked as Department of Justice counsel? _____

2. How long have you worked as Crown counsel? _____

3. Have you ever worked as defence counsel?

   Yes _____ No _____ If yes, for how long?

4. Do you think the appellate court system provides sufficient protection against wrongful convictions?

5. Do you have an opinion as to the extent of wrongful convictions of the factually innocent in Canada in a given year?

6. In your experience, what are the major causes of wrongful convictions of the factually innocent in Canada?

7. Please describe the action taken, in chronological order, when the Department of Justice first receives a section 690 application?

8. What are the most common grounds upon which section 690 applications are based?

9. What percentage of the total number of section 690 applications in a given year are rejected after the Initial Assessment stage?

10. Can you describe the most common reasons why these applications are rejected after the Initial Assessment stage?

11. Are the section 690 applications that are rejected after the Initial Assessment stage kept on file?

    Yes _____ No _____ If yes, for how long?

    If no, what happens to these rejected applications?

12. In a given year, how many section 690 applications pass the Initial Assessment stage and progress to active investigation?

13. Can you estimate the caseload carried by full-time Department of Justice counsel in a given year?

14. How often is the Department of Justice required to seek the assistance of ad hoc counsel to investigate section 690 applications?

Proposed Interview Questions for Department of Justice Counsel

15. Are you able to identify the ad hoc counsel who assist with Department of Justice section 690 applications?

16. In your opinion, do you think the Department of Justice has sufficient personnel and resources to investigate section 690 applications in a timely and comprehensive fashion?

17. To my knowledge, only 3 *Reasons for Decision of the Minister of Justice* are available to the public (Sidney Morrisroe, Patrick Kelly and W. Colin Thatcher). Are any other Reasons for Decision available to the public? If not, why not?

18. Is it now standard practice for the Minister to draft these *Reasons for Decision* and will they be available to the public upon request?

19. In your experience, what do you think are the merits of the section 690 conviction review process?

20. In your experience, what do you think are the major problems with the section 690 conviction review process?

21. What recommendations, if any, would you suggest to improve the section 690 conviction review process?

22. In your experience investigating section 690 conviction reviews, can you make any suggestions about how best to minimize wrongful convictions?

23. Is the elimination of wrongful convictions of the factually innocent possible in Canada? Why or why not?

24. Are there any additional questions that you think should be asked?

25. Do you have any questions about this research and/or myself?

26. Is there anything you would like to add before closing?

Explanatory Letter Sent to Ad Hoc Counsel

SIMON FRASER UNIVERSITY
(Letterhead)

JOAN BROCKMAN
PROFESSOR
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Sir or Madam:

I am a Professor in the School of Criminology at Simon Fraser University, and a non-practising member of the Law Societies of British Columbia and Alberta. One of my graduate students, Patricia Braiden, is writing her M.A. thesis on the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada. The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to interview those who have direct experience with section 690 reviews.

Ms. Mary McFadyen, A/Senior Counsel at the Department of Justice, has suggested that you might be willing to be interviewed, and your participation in this research project through a telephone interview would be greatly appreciated. Enclosed are the questions Ms. Braiden would like to cover. She will be contacting you in the next few weeks to request an interview on this topic. If you agree to be interviewed, could you please return the enclosed consent form to Ms. Braiden, c/o the School of Criminology.

Should you agree to this research, you may withdraw your consent at any time. If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University.

Thank you for your consideration.

Sincerely,

Joan Brockman

Proposed Interview Questions for Ad Hoc Counsel - Department of Justice

1. In total, how much time (i.e. months, years) have you spent acting as ad hoc Crown counsel for the federal Department of Justice ? _____

2. How many times have you acted as ad hoc counsel to the federal Department of Justice with respect to section 690 conviction reviews ? _____

3. How many times have you acted as ad hoc counsel to the federal Department of Justice for work other than section 690 conviction reviews (Please describe the nature of this work) ?

4. For each occasion that you acted as ad hoc counsel for the Department of Justice, how long were you employed with respect to 690 conviction reviews ? _____

5. How long have you worked as Crown counsel, over and above your ad hoc work for the Department of Justice ? _____

6. How many years, if any, have you worked as defence counsel ? _____

7. Why do you think ad hoc counsel are hired by the federal Department of Justice to investigate section 690 conviction reviews ?

8. What was your role as ad hoc counsel to the Department of Justice with respect to section 690 conviction reviews ?

9. If your role as ad hoc counsel was an investigative role, did you have sufficient resources and authority (e.g., subpoenaing witnesses) to investigate section 690 conviction reviews ?

10. Generally speaking, is the investigation of specific section 690 conviction reviews conducted by a single lawyer (either ad hoc or staff) ?

11. Can you identify which section 690 investigations you were involved with ?

12. Can you describe the actions taken to investigate section 690 conviction reviews from the Initial Assessment stage to the final Investigation Brief that goes to the Minister (e.g., witness interviews, examination of police files, DNA testing, etc.) ?

13. Generally speaking, when conviction reviews are completed, does the Minister of Justice usually follow the recommendations made by ad hoc or staff counsel ?

14. If you acted as ad hoc counsel for the federal Department of Justice to investigate section 690 conviction reviews, can you describe the major grounds upon which the conviction review was based ?

15. Do you think the appellate court system provides sufficient protection against wrongful convictions ?

Proposed Interview Questions for Ad Hoc Counsel - Department of Justice

16. Do you have an opinion as to the extent of wrongful convictions of the factually innocent in Canada in a given year ?

17. In your opinion, what are the major causes of wrongful conviction of the factually innocent in Canada ?

18. What do you think are the merits of the section 690 conviction review process ?

19. What do you think are the major problems with the section 690 conviction review process ?

20. What recommendations, if any, would you suggest to improve the section 690 conviction review process ?

21. Are there any additional questions that you think should be asked ?

22. Do you have any questions about this research and/or myself ?

23. Is there anything you would like to add before closing ?

Explanatory Letter Sent to Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC)

SIMON FRASER UNIVERSITY
(Letterhead)

JOAN BROCKMAN
PROFESSOR
SCHOOL OF CRIMINOLOGY
8888 UNIVERSITY DRIVE
BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6

Telephone: (604) 291-4036
Fax: (604) 291-4140
Email: brockman@sfu.ca

Dear Sir:

I am a Professor in the School of Criminology at Simon Fraser University, and a non-practising member of the Law Societies of British Columbia and Alberta. One of my graduate students, Patricia Braiden, is writing her M.A. thesis on the use of section 690 of the *Criminal Code* to review wrongful convictions in Canada. The purpose of her thesis is to examine how this conviction review process works and how it might be improved. In order to accomplish this task, it is important to interview those who have direct experience with section 690 reviews.

Your participation in this research project through a telephone interview would be greatly appreciated. Enclosed are the questions Ms. Braiden would like to cover. She will be contacting you in the next few weeks to request an interview on this topic.

Should you agree to this research, you may withdraw your consent at any time. If you have any questions or concerns about this research, please give me a call. You may also call the Director of the School of Criminology at 291-4305. The results of Ms. Braiden's research will be available in the library at Simon Fraser University.

Thank you for your consideration.

Sincerely,

Joan Brockman

Proposed Interview Questions for the Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC)

1. When was AIDWYC initiated?

2. What is AIDWYC's major mandate?

3. Can you describe how AIDWYC is administrated/organized and the individuals who administer your Association? (e.g., organizational funding, volunteers, salaried employees, or combination thereof?).

4. Can you provide the names and telephone numbers of legal counsel who currently participate in AIDWYC activities and/or provide legal representation to clients seeking help from your Association?

5. What are the most common obstacles your Association faces?

6. To your knowledge, are there any plans for AIDWYC to be initiated in provinces other than Alberta and Ontario?

7. What criteria do you use to select cases to investigate?

8. Are you asked to assist individuals who apply for section 690 conviction reviews?

   Yes ____ No ____ If yes, how many individuals do you presently assist with section 690 conviction reviews?

9. If you do provide assistance to individuals seeking section 690 conviction reviews, what is the nature of this support (e.g., financial, legal, emotional, or combination thereof)?

10. Are you able to identify the individual(s) you currently assist in section 690 conviction review(s)? (i.e., those cases which are in the public domain).

11. If AIDWYC has initiated section 690 conviction reviews, when were the applications submitted to the Department of Justice?

    Applicant _____ Year _____ Month _____

12. If AIDWYC is currently assisting section 690 applicant(s), at what stage are the section 690 applications and/or investigations?

    1. Initial Assessment stage?
    2. Application was rejected by Department of Justice officials after initial assessment?
    3. Department of Justice Investigation stage?
    4. Preparation of the Investigation Brief?
    5. Awaiting Ministerial decision?

Proposed Interview Questions for the Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC)

13. Has AIDWYC (or a representative thereof) represented a section 690 applicant from the initial stage of submitting an application right through to a Ministerial decision?

    Yes ____ No ____ (a) If yes, how long did this process take?

    (b) Are you able to identify the individual(s)? (i.e., those cases which are in the public domain)

14. Have any of the section 690 applications for conviction review that AIDWYC has initiated and/or provided assistance been rejected by the Department of Justice?

    Yes ____ No ____ If yes, why?

15. If you have assisted clients whose section 690 applications have been rejected, did you subsequently re-submit section 690 applications concerning the same conviction(s)?

16. In cases where you have assisted a section 690 applicant to obtain conviction review, what were the major grounds upon which the application was based?

17. In view of your lengthy incarceration for a crime you did not commit, how would you describe your experiences?

18. In your experience, what do you think are the merits of the section 690 conviction review process?

19. In your experience, what do you think are the major problems with the section 690 conviction review process?

20. What recommendations, if any, would you suggest to improve the section 690 conviction review process?

21. Do you have an opinion as to the extent of wrongful convictions of the factually innocent in Canada in a given year?

22. In your opinion, what are the major causes of wrongful convictions of the factually innocent in Canada?

23. Do you have any suggestions about how best to minimize wrongful convictions?

24. Is the elimination of wrongful convictions of the factually innocent possible in Canada? Why or why not?

Proposed Interview Questions for the Executive Director of The Association in Defence of the Wrongly Convicted (AIDWYC)

25. Are there any additional questions that you think should be asked?

26. Do you have any questions about this research and/or myself?

27. Is there anything you would like to add before closing?

Interview Participants (Consented to be Identified by Name)

> David Asper (Winnipeg, Man.), telephone interview by author, 26 May 1998, tape recording.

> Gary Botting (Victoria, B.C.), telephone interview by author, 3 June 1998, tape recording.

> Dan Brodsky (Toronto, Ont.), telephone interview by author, 23 November 1998, tape recording.

> Greg Brodsky, Q.C. (Winnipeg, Man.), telephone interview by author, 26 September 1998, tape recording.

> Tom Engel (Edmonton, Alta.), telephone interview by author, 19 October 1998, tape recording.

> John L. Hill (Toronto, Ont.), telephone interview by author, 24 July 1998, tape recording.

> Irwin Koziebrocki (Toronto, Ont.), telephone interview by author, 17 June 1998, tape recording.

> James Lockyer (Toronto, Ont.), telephone interview by author, 19 June 1998, tape recording.

> Joel Pink (Halifax, N.S.), telephone interview by author, 5 June 1998, tape recording.

> Clayton Ruby (Toronto, Ont.), telephone interview by author, 1 June 1998, tape recording.

> Robert Sachs (Edmonton, Alta.), telephone interview by author, 25 September 1998, tape recording.

> Isabel Schurman (Montreal, Que.), telephone interview by author, 15 April 1999, tape recording.

> Win Wahrer (Toronto, Ont.), telephone interview by author, 22 July 1998, tape recording.

> George Wool (Surrey, B.C.), telephone interview by author, 27 May 1998, tape recording.

(i) Distribution of Defence Counsel Experience as Defence and Crown Counsel

Crown/Defence	*f*	%
Defence only	9	64.25
Crown and Defence	4	28.50
Unknown	1	7.25
Total	14	100.00

(ii) Distribution of Defence Counsel by Province

Province	*f*	%
Alberta	2	14.25
British Columbia	3	21.50
Manitoba	2	14.25
Nova Scotia	2	14.25
Ontario	5	35.75
Total	14	100.00

Association in Defence of the Wrongly Convicted
438 University Ave., 19th Floor,
Toronto, Ontario
(905) 430-6717

INTAKE INFORMATION SHEET (AIDWYC)

Your Name: _____
Your Date of Birth: _____
Your Address: _____

What offence were you convicted of?: _____
On what date did the offence occur?: _____
Where did the offence occur?: _____

When were you accused?: _____
Was anyone else charged with the crime? If so, who?: _____
Where was your trial held?: _____
When did your trial take place?: _____
What was the evidence against you at your trial?: _____

On what date were you convicted?: _____
What was your sentence?: _____
On what date were you sentenced?: _____
What is your parole eligibility date?: _____

Who was your lawyer at trial?: _____
Has your appeal been heard yet?: _____ Yes _____ No
What is the status of your appeal?: _____
The name of your lawyer on appeal: _____

Do you have access to transcripts of your trial?: _____ Yes _____ No
Do you have a copy of the appeal judgment?: _____ Yes _____ No
(Note: Please do not send transcripts to us at this time)

Please provide a detailed summary, in your own words, as to why you feel you were wrongly convicted.

The above information will help us to determine whether or not your case fits within AIDWYC's criteria for assistance. We will be in touch with you as soon as possible to let you know what help, if any, AIDWYC can offer in your case.

BIBLIOGRAPHY

Anderson, Barrie, with Dawn Anderson. *Manufacturing Guilt: Wrongful Convictions in Canada*. Halifax: Fernwood, 1998.

Anderson, Tim. "What is the Problem?" *Current Issues in Criminal Justice* 5, no. 1 (July 1993): 72-84.

Antoniadis, Judy, ed. *Canadian Law List*. Aurora, Ont.: Canada Law Book, 1999.

Association in Defence of the Wrongly Convicted (AIDWYC). "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code." Submissions to the Minister of Justice and Attorney General of Canada, the Honourable Anne McLellan, no date: 1-50.

_____. Association in Defence of the Wrongly Convicted (AIDWYC). "Wrongful Convictions: An International Comparative Study." Unpublished Report Submitted to the Inquiry Into Proceedings Against Guy Paul Morin (17 November 1997): 1-182.

Avison, D. J. "Last Resort - The Exercise of Discretionary Powers Under s. 617 of the Criminal Code." Address to the Halifax Prosecutors' Seminar (June 1988): 1-27.

Backhouse, Constance. *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada*. Toronto: Women's Press for The Osgoode Society, 1991.

Bazelon, David L. "The Defective Assistance of Counsel." *Cincinnatti Law Review* 42, no. 1 (1973): 1-46.

Beattie, J. M. "The Royal Pardon and Criminal Procedure in Early Modern England." *Historical Papers* (1987): 9-22.

_____. *Crime and the Courts in England 1660-1800*. Oxford: Clarendon Press, 1986.

Bedau, Hugo A. (1982). "Miscarriages of Justice and the Death Penalty." In *The Death Penalty in America*, 3d ed., ed. Hugo A. Bedau, 234-246. New York: Oxford University Press, 1982.

Bedau, Hugo A. and Michael L. Radelet. "The Myth of Infallibility: A Reply to Markman and Cassell." *Stanford Law Review* 41, no. 1 (November 1988): 161-170.

_____. "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review* 40, no. 1 (November 1987): 21-179.

BIBLIOGRAPHY

Bell, John. "The French Pre-Trial System." In *Justice in Error*, ed. Clive Walker and Keir Starmer, 226-247. London, Eng.: Blackstone Press, 1993.

Bentley, Iris, with Penelope Dening. *Let Him Have Justice*. Pan Books ed. London, Eng.: Sidgwick & Jackson, 1995; Pan Books, 1996.

Bersoff, Donald N. "Psychologists and the Judicial System." *Law and Human Behavior* 10, nos. 1-2 (June 1986): 151-165.

Bessner, Ronda. "Eyewitness Identification in Canada." *The Criminal Law Quarterly* 25 (1982-83): 313-347.

Block, Eugene B. *The Vindicators*. London, Eng.: Alvin Redman, 1964.

Borchard, Edwin M. *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*. Garden City, NY: Garden City Publishing, 1932.

Bowers, William J. and Glenn L. Pierce. "Racial Discrimination and Criminal Homicide Under Post-*Furman*." In *The Death Penalty in America*, 3d ed., ed. Hugo A. Bedau, 206-224. New York: Oxford University Press, 1982.

Boyd, Neil and Kim Rossmo. "David Milgaard, The Supreme Court and Section 690: A Wrongful Conviction Revisited." *Canadian Lawyer* 18, no. 1 (1994): 28-32.

Braiden, Patricia and Joan Brockman. "Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the *Criminal Code*. *Windsor Yearbook of Access to Justice* 17 (1999): 3-34.

Brandon, Ruth and Christie Davies. *Wrongful Imprisonment: Mistaken Convictions and Their Consequences*. London, Eng.: George Allen and Unwin, 1973.

Bridges, Lee. "Normalizing Injustice: The Royal Commission on Criminal Justice." *Journal of Law and Society* 21, no. 1 (March 1994): 20-38.

Brigham, John C. and Roy S. Malpass. "The Role of Experience and Contact in the Recognition of Faces of Own- and Other-Race Persons." *Journal of Social Issues* 41, no. 3 (1985): 139-155.

Buckhout, Robert. "Eyewitness Testimony." *Scientific American* 231, no. 6 (December 1974): 23-31.

BIBLIOGRAPHY

Bugliosi, Vincent. *Outrage: The Five Reasons Why O.J. Got Away With Murder*. New York: W. W. Norton & Co, 1996.

Burtch, Brian E. "Reflections on the Steven Truscott Case." *Canadian Criminology Forum* 3 (Spring 1981): 131-145.

Campbell, A. Kim. Letter from A. K. Campbell to Hersh E. Wolch, Q.C. (27 February 1991): 1-12.

Canada. Department of Justice. "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Allen M. Kinsella to the Minister of Justice for Certain Discretionary Relief Under Section 690 of the *Criminal Code* of Canada; Reasons for Decision of the Minister of Justice" (13 January 1999): 1-18.

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

Canada. Department of Justice. "In the Court of Appeal of Nova Scotia; In the Matter of Section 690 of the *Criminal Code*, R.S.C. 1985, c. C-46; And in the Matter of a Reference Thereof by the Minister of Justice Concerning Whether the Information Which is Advanced in the Section 690 *Criminal Code* Application of Clayton Norman Johnson Would be Admissible on Appeal to the Court of Appeal of Nova Scotia in the Said Conviction of Clayton Norman Johnson, who was Convicted of First Degree Murder in Shelburne, Nova Scotia on May 4, 1993, for the February 20, 1989 Death of Janice Faye Johnson" (21 September 1998): 1-2

Canada. Department of Justice. "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Patrick Kelly to the Minister of Justice for Certain Discretionary Relief Under Section 690 of the *Criminal Code* of Canada; Reasons for Decision of the Minister of Justice" (25 November 1996): 1-11.

Canada. Department of Justice. "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Wilfred Beaulieu 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" (25 November 1996): 1-6.

Canada. Department of Justice. "In the Matter of Section 690 of the *Criminal Code* of Canada; And in the Matter of an Application by Sidney Vincent Morrisroe 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" (18 October 1995): 1-66.

BIBLIOGRAPHY

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): 1-72.

Canada. Department of Justice. "Applications to the Minister of Justice for a Conviction Review: Under Section 690 of the *Criminal Code*, [1994].

Canada. Department of Justice. "Annual Report" (1990-1991).

_____. "Annual Report" (1989-1990).

_____. "Annual Report" (1988-1989).

_____. "Annual Report" (1987-1988).

_____. "Annual Report" (1986-1987).

_____. "Annual Report" (1985-1986).

_____. "Annual Report" (1984-1985).

_____. "Annual Report" (1983-1984).

_____. "Annual Report" (1982-1983).

Canada. Government of. "The Self-Defence Review: Overview and Next Steps." (September 1997): 1-20.

Canada. *House of Commons Debates* 133, no. 269, 1st Session, 35th Parliament (1 December 1995): 17087-17088.

Canada. *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (Fauteux Report)*. Ottawa: Queen's Printer, 1956.

Canada. Solicitor General. "Annual Report." (1990-1991).

Cassell, Paul. "Protecting the Innocent From False Confessions and Lost Confessions--And From *Miranda*." *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 497-556.

BIBLIOGRAPHY

Chadwick, Roger. *Bureaucratic Mercy: The Home Office and the Treatment of Capital Cases in Victorian Britain.* New York: Garland Publishing, 1992.

Chaiton, Sam and Terry Swinton. *Lazarus and the Hurricane: The Untold Story of the Freeing of Rubin "Hurricane" Carter.* Toronto: Penguin Books, 1991.

Chamberlain, Lindy. *An Autobiography: Through My Eyes.* Mandarin Paperback ed. London, Eng.: William Heinemann, 1991; Mandarin Paperbacks, 1991.

Chance, June, Alvin G. Goldstein and Loren McBride. "Differential Experience and Recognition Memory for Faces." *The Journal of Social Psychology* 97 (1995): 243-253.

Chesterman, Michael. "OJ an the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America." *American Journal of Comparative Law* 45, no. 1 (Winter 1997): 109-147.

Chipeur, Gerald. "The Royal Prerogative and Equality Rights: Can Medieval Classism Coexist with Section 15 of the Charter?" *Alberta Law Review* 30, no. 2 (1992): 625-668.

Clark, Marcia, with Teresa Carpenter. *Without a Doubt.* New York: Penguin, 1997.

Cockburn, J. S. *A History of English Assizes 1558-1714.* Cambridge, Eng.: Cambridge University Press, 1972.

Cole, David P. and Allan Manson. *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review.* Toronto: Carswell, 1990.

Connors, Edward, Thomas Lundregan, Neal Miller and Tom McEwen. "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial. U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (June 1996): i-xxxi, 1-85.

Cooper, Cynthia L. and Sam Reese Sheppard. *Mockery of Justice: The True Story of the Sheppard Murder Case.* Boston: Northeastern University Press, 1995.

Crankshaw's Criminal Code. *History of Offences, Vol. 8.* 8th ed. Toronto: Carswell, 1983.

Daisley, Brad. "B.C. Crown Grew Up in New York's Meanest Ghetto." *Lawyers Weekly* (20 August 1999): 9.

BIBLIOGRAPHY

Dennis, Ian. "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions." *Public Law* (Summer 1993): 291-313.

Dershowitz, Alan M. *Reasonable Doubts: The O. J. Simpson Case and the Criminal Justice System*. New York: Simon & Schuster, 1996.

Deutscher, David and Heather Leonoff. *Identification Evidence*. Canada (no city): Thomson Professional Publishing, 1991.

Dinnerstein, L. *The Leo Frank Case*. New York: Columbia University Press, 1968.

Donnelly, Richard. "Unconvicting the Innocent." *Vanderbilt Law Review* 6 (1952): 20-40.

DuCann, C. G. L. *Miscarriages of Justice*. London, Eng.: Frederick Muller, 1960.

Duker, William F. "The President's Power to Pardon: A Constitutional History." *William and Mary Law Review* 18, no. 3 (Spring 1977): 475-538.

Ehrmann, Sarah R. "For Whom the Chair Waits." *Federal Probation* 26, no. 1 (March 1962): 14-25.

Evans, M. Keith. "The Prerogative of Pardon in Canada: Its Development 1864-1894." M.A. thesis, Carleton University, 1971.

Falk, Gerhard. "The Blind Moloch: In the Criminal Justice Industry, Guilt is Our Most Important Product." *International Review of History and Political Science* 19, no. 2 (1982): 59-72.

Felix, David. *Protest: Sacco-Vanzetti and the Intellectuals*. Bloomington, Ind.: Indiana University Press, 1965.

Field, Stewart and Philip A. Thomas. "Justice and Efficiency?: The Royal Commission on Criminal Justice." *Journal of Law and Society* 21, no. 1 (March 1994): 1-19.

Finer, Joel J. "Ineffective Assistance of Counsel." *Cornell Law Review* 58, no. 6 (July 1973): 1077-1120.

Foote, Caleb. "Pardon Policy in a Modern State." *Prison Journal* 39, no. 1 (1959): 3-32.

BIBLIOGRAPHY

Foster, Hamar. "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia." In *Essays in the History of Canadian Law, Vol. V*, ed. Jim Phillips, Tina Loo and Susan Lewthwaite, 41-111. Toronto: University of Toronto Press, 1994.

Frank, Jerome and Barbara Frank. *Not Guilty*. Garden City, NY: Doubleday & Co., 1957.

Frankfurter, Felix. *The Trial of Sacco and Vanzetti*. New York: University Library, 1961.

Fraser, Paul. "Ottawa brushes off Beaulieu" *Alberta Report* 24, no. 28 (23 June 1997): 45.

Friedland, M. L. *Cases and Materials on Criminal Law and Procedure*, 4th ed. Toronto: University of Toronto Press, 1974.

Friedland, M. L. and Kent Roach. *Criminal Law and Procedure: Cases and Materials*. 8th ed. Toronto: Emond Montgomery Publications Limited, 1997.

Fuerst, Michelle. "The Section 690 Process." National Criminal Law Program, University of Victoria, Victoria, B.C. (July 1998).

Gane, Christopher H. W. "The Effect of a Pardon in Scots Law." *Juridical Review* (1980): 18-46.

Gardner, Erle S. *The Court of Last Resort*. New York: William Sloan Associates, 1952.

Gianelli, Paul C. "'Junk Science': The Criminal Cases." *The Journal of Criminal Law & Criminology* 84, no. 1 (Spring 1993): 105-128.

Gordon, Sheldon. "Final appeal: the wrongfully convicted turn to Canada's lawyers of last resort." *National - Canadian Bar Association Journal* 8, no. 5 (August - September 1999): 27-28, 30, 32.

Gross, Samuel R. "The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases." *Buffalo Law Review* 44 (1996): 469-500.

_____. "Loss of Innocence: Eyewitness Identification and Proof of Guilt." *The Journal of Legal Studies* 16, no. 2 (June 1987): 395-453.

Grove, Alan. "'Where is the Justice, Mr. Mills?': A Case Study of R. *v. Nantuck*." In *Essays in the History of Canadian Law, British Columbia and the Yukon, Vol. VI*, ed. Hamar Foster and John McLaren, 87-127. Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1995.

BIBLIOGRAPHY

Grupp, Stanley. "Some Historical Aspects of the Pardon in England." *The American Journal of Legal History* 7 (1963): 51-62.

Handberg, Roger B. "Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury." *American Criminal Law Review* 32, no. 4 (Summer 1995): 1013-1064.

Harris, Michael. *The Judas Kiss*. M & S Paperback ed. Toronto: McClelland & Stewart, 1996.

_____. *The Prodigal Husband: The Tragedy of Helmuth and Hanna Buxbaum*. Toronto: McClelland & Stewart, 1994.

_____. *Justice Denied: The Law Versus Donald Marshall*. Toronto: Macmillan, 1986. Reprint, Toronto: HarperCollins, 1990.

Harvey, Lee. *Critical Social Research*. London, Eng.: Unwin Hyman, 1990.

Hay, Douglas. "Property, Authority and the Criminal Law." In *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow, 17-63. London, Eng.: Allen Lane, 1975.

Hebert, Jacques. *The Coffin Affair*. Montreal: Editions du Jour, 1964. Reprint, Montreal: Editions du Jour, 1982.

Herman, E. S. and Noam Chomsky. *Manufacturing Consent: The Political Economy of the Mass Media*. New York: Pantheon Books, 1988.

Howe, Adrian. "Chamberlain Revisited: The Case Against the Media." In *Criminal Law & Procedure: Proof, Defences, and Beyond*, ed. Jennie Abell and Elizabeth Sheehy. North York, Ont.: Captus Press, 1995.

Huff, C. Ronald. "Wrongful Conviction: Societal Tolerance of Injustice." *Research in Social Problems and Public Policy* 4 (1987): 99-115.

Huff, C. Ronald, Arye Rattner and Edward Sagarin. *Convicted But Innocent: Wrongful Conviction and Public Policy*. Thousand Oaks, Cal.: Sage, 1996.

_____. "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy." *Crime & Delinquency* 32, no. 4 (October 1986): 518-544.

BIBLIOGRAPHY

Humes, Edward. *Mean Justice: A Town's Terror, A Prosecutor's Power, A Betrayal of Innocence*. New York: Simon & Schuster, 1999.

Hurnard, Naomi D. *The King's Pardon for Homicide Before A.D. 1307*. Oxford, Eng.: Clarendon Press, 1969.

Jason-Lloyd, Leonard. *A Guide to the Criminal Appeal Act 1995*. London, Eng.: Frank Cass, 1997.

Jobb, Dean. *Shades of Justice: Seven Nova Scotia Murder Cases*. Halifax: Nimbus Publishing, 1988.

Jonas, George, ed. *The Scales of Justice*. Toronto: CBC Enterprises/les Entreprises Radio-Canada, 1983.

Jones, Carol A. G. *Expert Witnesses: Science, Medicine and the Practice of Law*. Oxford, Eng.: Clarendon Press, 1994.

Justice, British Section of the International Commission of Jurists. *Remedying Miscarriages of Justice*. England: Joseph Rowntree Charitable Trust, 1994.

_____. *Miscarriages of Justice*. By Sir George Waller, chair. London, Eng.: Justice Educational and Research Trust, 1989.

_____. *Home Office Reviews of Criminal Convictions*. By A. E. Cox, chair. London, Eng.: Stevens & Sons, 1968.

Kaiser, H. Archibald. "Legitimation and Relative Autonomy: The Donald Marshall, Jr., Case in Retrospect." *Windsor Yearbook of Access to Justice* 10 (1990): 171-193.

_____. "The Aftermath of the Marshall Commission: A Preliminary Opinion." *Dalhousie Law Journal* 13, no. 1 (May 1990): 364-375.

_____. "Wrongful Conviction and Imprisonment: Toward an End to the Compensatory Obstacle Course." *Windsor Yearbook of Access to Justice* 9 (1989): 96-153.

Karp, Carl and Cecil Rosner. *When Justice Fails: The David Milgaard Story*. Toronto: McClelland & Stewart, 1991.

Kennedy, Ludovic. *The Airman and the Carpenter: The Lindbergh Kidnapping and the Framing of Richard Kauptmann*. New York: Viking Penguin, 1985.

BIBLIOGRAPHY

_____. *10 Rillington Place*. London, Eng.: Victor Golanz, 1961.

King, Peter. "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800." *The Historical Journal*, 27, no. 1 (1984): 25-58.

Knafla, Louis A. and Terry L. Chapman. "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada 1760-1812." *Osgoode Hall Law Journal* 21, no. 2 (1983): 245-274.

Langbein, John H. "Albion's Fatal Flaws." *Past & Present*, no. 98 (February 1983): 96-120.

Lassers, Willard J. *Scapegoat Justice: Lloyd Miller and the Failure of the American Legal System*. Bloomington, Ind.: Indiana University Press, 1973.

LeBourdais, Isabel. *The Trial of Steven Truscott*. Philadelphia, Penn.: J. B. Lippincott, 1966.

Leippe, Michael R. and Gary L. Wells. "Should We Be Partial to Partial Identification." *Criminal Justice and Behavior* 22, no. 4 (December 1995): 373-385.

Leo, Richard A. and Richard J. Ofshe. "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation." *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 429-496.

_____. "Using the Innocent To Scapegoat *Miranda*: Another Reply to Paul Cassell." *The Journal of Criminal Law & Criminology* 88, no. 2 (1998): 557-577.

Levi, A. M. and Noam Jungman. "The Police Lineup: Basic Weaknesses, Radical Solutions." *Criminal Justice and Behavior* 22, no. 4 (December 1995): 347-372.

Levine, Felice J. and June Louin Tapp. "The Psychology of Criminal Identification: The Gap from *Wade* to *Kirby*." *University of Pennsylvania Law Review* 121 (1973): 1079-1131.

Lofton, John. *Justice and the Press*. Toronto: Saunders, 1966.

Loftus, Elizabeth F. *Eyewitness Testimony*. Cambridge, Mass.: Harvard University Press, 1979.

Logan, Alistair. "What Causes a Miscarriage of Justice?" *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995): 6-9.

BIBLIOGRAPHY

Lowe, Mick. *Conspiracy of Brothers*. Seal ed. Toronto: Bantam-Seal, 1989.

Luus, C. A. Elizabeth and Gary L. Wells. "Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups." *Personality and Social Psychology Bulletin* 16 (1990): 106-117.

MacKinnon, Peter. "Costs and Compensation for the Innocent Accused." *The Canadian Bar Review* 67 (1988): 489-505.

MacNamara, Donal E. J. "Convicting the Innocent." *Crime and Delinquency* 15, no. 1 (January 1969): 57-61.

Makin, Kirk. *Redrum the Innocent*. Toronto: Penguin Books, 1993.

Malleson, Kate. "The Criminal Cases Review Commission: How Will it Work?" *Criminal Law Review* (December 1995): 929-937.

Malleson, Kate. "Appeals Against Conviction and the Principle of Finality." *Journal of Law and Society* 21, no. 1 (March 1994): 151-164.

_____. "Miscarriages of Justice and the Accessibility of the Court of Appeal." *The Criminal Law Review* (May 1991): 323-332.

Mannette, Joy. *Elusive Justice: Beyond the Marshall Inquiry*. Halifax: Fernwood, 1992.

_____. "'Not Being a Part of the Way Things Work': Tribal Culture and Systemic Exclusion in the Donald Marshall Inquiry." *The Canadian Review of Sociology and Anthropology* 27, no. 5 (November 1990): 505-530.

_____. "A Trial in Which No One Goes to Jail: The Donald Marshall Inquiry as Hegemonic Renegotiation." *Canadian Ethnic Studies* 20, no 3 (1988): 166-180.

Manson, Allan. "Answering Claims of Injustice." (1992) 12 C.R. (4th) 305.

Markman, Stephen J. and Paul G. Cassell. "Protecting the Innocent: A Response to the Bedau-Radelet Study." *Stanford Law Review* 41, no. 1 (November 1988): 121-160.

Marshall, Lawrence. "Justice USA." *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995): 8-10.

Martin's Annual Criminal Code 1995. Aurora, On.: Canada Law Book, 1994

_____ Criminal Code 1994. Aurora, Ont.: Canada Law Book, 1993.

_____ Criminal Code 1993. Aurora, Ont.: Canada Law Book, 1991.

_____ Criminal Code 1992. Aurora, Ont.: Canada Law Book, 1991.

_____ Criminal Code 1991. Aurora, Ont.: Canada Law Book, 1990.

_____ Criminal Code 1990. Aurora, Ont.: Canada Law Book, 1989.

_____ Criminal Code 1989. Aurora, Ont.: Canada Law Book, 1988.

_____ Criminal Code 1988. Aurora, Ont.: Canada Law Book, 1987.

_____ Criminal Code 1986-87. Aurora, Ont.: Canada Law Book, 1986.

McBarnet, Doreen. *Conviction: Law, the State and the Construction of Justice*. London, Eng.: Macmillan Press, 1981.

McCloskey, James. "Convicting the Innocent." *Criminal Justice Ethics* (Winter/Spring 1989): 53-59.

McCloskey, Michael and Howard E. Egeth. "Eyewitness Identification: What Can a Psychologist Tell a Jury?" *American Psychologist* 38, nos. 1-6 (May 1983): 550-563.

Moore, Kathleen Dean. *Pardons: Justice, Mercy, and the Public Interest*. New York: Oxford University Press, 1989.

Morrison, Toni and Claudia Brodsky Lacour, ed. *Birth of a Nation 'hood: Gaze, Script and Spectacle in the O.J. Simpson Case*. New York: Pantheon Books, 1997.

Neufeld, Peter J. "Have You No Sense of Decency?" *The Journal of Criminal Law & Criminology* 84, no. 1 (Spring 1993): 189-202.

New Zealand. *Report of the Royal Commission to Inquire Into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe*. By The Honourable R. L. Taylor, chair. Wellington, N.Z.: P. D. Hasselbert, Government Printer, 1980.

Nobles, Richard and David Schiff. "Miscarriages of Justice: A Systems Approach." *The Modern Law Review* 58, no. 3 (May 1995): 299-320.

Nova Scotia. Government of. *Royal Commission on the Donald Marshall, Jr., Prosecution, Volume I: Findings and Recommendations*. (1989). By Chief Justice T. Alexander Hickman, chair. Halifax, Nova Scotia. December 1989.

BIBLIOGRAPHY

O'Connell Davidson, Julia and Derek Layder. *Methods, Sex and Madness*. London, Eng.: Routledge, 1994.

O'Connor, Frank. "'That's the Man': A Sobering Study of Eyewitness Identification and the Polygraph." *St. John's Law Review* 49, no. 1 (Fall 1974): 1-30.

O'Connor, Patrick. "Prosecution Disclosure: Principle, Practice and Justice." *The Criminal Law Review* (July 1992): 464-477.

Ontario. Government of. *Commission on Proceedings Involving Guy Paul Morin, Volumes 1-2*. By The Honourable Fred Kaufman, chair. Toronto: Queen's Printer, 1998.

Pachella, Robert G. "Personal Values and Expert Testimony." *Law and Human Behavior* 10, nos. 1-2 (June 1986): 145-150.

Packer, Herbert. *The Limits of the Criminal Sanction*. Stanford, Cal.: Stanford University Press, 1968.

Palys, Ted. *Research Decisions: Quantitative and Qualitative Perspectives*. Toronto: Harcourt Brace Jovanovich Canada, 1992.

Phillips, Jim. "The Operation of the Royal Pardon in Nova Scotia, 1749-1815." *University of Toronto Law Journal* 42, no. 4 (Fall 1992): 401-449.

_____. "The History of Canadian Criminal Justice 1750-1920." In *Criminology: A Reader's Guide*, ed. Jane Gladstone, Richard Ericson, and Clifford Shearing, 65-124. Toronto: Centre of Criminology, University of Toronto, 1991.

Radelet, Michael L., Hugo A. Bedau and Constance Putnam. *In Spite of Innocence: Erroneous Convictions in Capital Cases*. Boston: Northeastern University Press, 1992.

Radelet, Michael L., William S. Lofquist and Hugo A. Bedau. "Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt." *Thomas M. Cooley Law Review* 13 (1996): 907-966.

Radelet, Michael L. and Glenn L. Pierce. "Choosing Those Who Will Die: Race and the Death Penalty in Florida." *Florida Law Review* 43, no. 1 (January 1991): 1-34.

Radelet, Michael L. and Margaret Vandiver. *Capital Punishment in America: An Annotated Bibliography*. New York: Garland Publishing, 1988.

BIBLIOGRAPHY

_____. "Race and Capital Punishment: An Overview of the Issues." *Crime and Social Justice*, no. 25 (1986): 94-113.

Radin, Edward D. *The Innocents*. New York: William Morrow & Co., 1964.

Radzinowicz, Leon and Roger Hood. *A History of English Criminal Law and its Administration from 1750: The Emergence of Penal Policy, Vol. 5*, London, Eng.: Stevens & Sons, 1986.

Radzinowicz, Leon. *A History of English Criminal Law and its Administration from 1750: Grappling for Control, Vol. 4*, London, Eng.: Stevens & Sons, 1968.

_____. *A History of English Criminal Law and its Administration from 1750: The Movement for Reform, Vol. 1*, London, Eng.: Stevens & Sons, 1948.

Ratner, R. S., John L. McMullan and Brian E. Burtch. "The Problem of Relative Autonomy and Criminal Justice in the Canadian State." In *State Control: Criminal Justice Politics in Canada*, ed. R. S. Ratner and John L. McMullan, 85-125. Vancouver, B.C.: University of British Columbia Press, 1987.

Rattner, Arye. "Social Science v. The Judicial System: The Impact of the Accumulated Knowledge of Eyewitness Identification on Criminal Procedures." *International Journal of the Sociology of Law* 23, no. 2 (June 1995): 97-105.

_____. "Convicted But Innocent: Wrongful Conviction and the Criminal Justice System." *Law and Human Behavior* 12, no. 3 (1988): 283-293.

Rattner, Arye, Gabriel Weimann and Gideon Fishman. "Cross-Ethnic Identifications and Misidentifications by Israelis." *Sociology & Social Research* 74, no. 2 (January 1990): 73-79.

Ratushny, Lynn. *Self-Defence Review: Final Report*. Report submitted to the Minister of Justice of Canada and to the Solicitor General of Canada (11 July 1997).

Raymer, Elizabeth. "Ont. Appeal Court Devided on *Kelly* Fresh Evidence." *Lawyers Weekly* (4 June 1999): 1, 6.

_____. "Judge-Alone Murder Trial Ruled Out." *Lawyers Weekly* 19, no. 1 (7 May 1999): 1, 20.

Roberts, Paul. "Forensic Science Evidence After Runciman." *The Criminal Law Review* (November 1994): 780-792.

BIBLIOGRAPHY

Rolph, C. H. *The Queen's Pardon*. London, Eng.: Cassell, 1978.

Rose, David. *In the Name of the Law: The Collapse of Criminal Justice*. London, Eng.: Jonathan Cape, 1996.

Rosen, Philip. "Wrongful Convictions in the Criminal Justice System." Ottawa: Library of Parliament. Research Branch. Background Paper 285-E (January 1992): 1-16.

Rosenn, Keith S. "Compensating the Innocent Accused." *Ohio State Law Journal* 37 (1976): 705-726.

Rubin, Sol. *The Law of Criminal Correction*. 2nd ed. St. Paul, Minn.: West Publishing, 1973.

Ryan, Kevin and Jeff Ferrell. "Knowledge, Power, and the Process of Justice." *Crime and Social Justice*, no. 25 (1986): 178-195.

Saskatchewan. Law Reform Commission of Saskatchewan. *Tentative Proposals for Compensation of Accused on Acquittal*. Saskatoon: Law Reform Commission of Saskatchewan (July 1987).

Schur, Edwin. *The Politics of Deviance: Stigma Contests and the Uses of Power*. Englewood Cliffs, N.J.: Prentice-Hall, 1980.

Schloss, Patrick J. and Maureen A. Smith. *Conducting Research*. Upper Saddle River, New Jersey: Prentice-Hall, 1999.

Sebba, Leslie. "Clemency in Perspective." In *Criminology in Perspective: Essays in Honor of Israel Drapkin*, ed. Simha F. Landau and Leslie Sebba, 221-240. Lexington, Mass.: Lexington Books, D.C. Heath & Co., 1977a.

_____. "The Pardoning Power - A World Survey." *The Journal of Criminal Law & Criminology* 68, no. 1 (March 1977b): 83-121.

Shapiro, Peter N. and Steven Penrod. "Meta-Analysis of Facial Identification Studies." *Psychological Bulletin* 100, no. 2 (1986): 139-156.

Sheremata, Davis. "The Rape That Wasn't." *Alberta Report* 24, no. 25 (2 June 1997): 29.

Sinclair, Malcolm. *The Imprisonment of the Innocent*. London, Eng.: Frederick Muller, 1983.

BIBLIOGRAPHY

Smith, Abbot Emerson. *Colonists in Bondage: White Servitude and Convict Labor in America 1607-1776*. University of North Carolina Press, 1947. Reprint, Gloucester, Mass.: Peter Smith, 1965.

Smith, A. T. H. "The Prerogative of Mercy, The Power of Pardon and Criminal Justice." *Public Law* (Autumn 1983): 398-439.

Sobel, Nathan R. *Eyewitness Identification: Legal and Practical Problems*. 2d ed. Deerfield, Ill.: Clark, Boardman & Callaghan, 1994.

Steiker, Jordan. "Innocence and Federal Habeas." *UCLA Law Review* 41, no. 2 (December 1993): 303-389.

Swainger, Jonathan. "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880." In *Essays in the History of Canadian Law, British Columbia and the Yukon, Vol. VI*, ed. Hamar Foster and John McLaren, 204-241. Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1995.

_____. "Governing the Law: The Canadian Department of Justice in the Early Confederation Era." Ph.D. diss., University of Western Ontario, 1992.

Tarlow, Barry. "The Truth May Set You Free." *Journal of the Association in Defence of the Wrongly Convicted* 1, no. 1 (May 1995): 16-19.

Thomas, Jim. *Doing Critical Ethnography*. Newbury Park, Cal: Sage, 1993.

Thornton, Peter. "Miscarriages of Justice: A Lost Opportunity. *Criminal Law Review* (1993): 926-935.

Tremeear's Criminal Code 1996, Annotated, ed. David Watt and Michelle Fuerst. Scarborough, Ont.: Carswell-Thomson Professional Publishing, 1995.

_____ Criminal Code 1997, ed. David Watt and Michelle Fuerst. Scarborough, Ont.: Carswell-Thomson Professional Publishing, 1996.

Truscott, Steven. *The Steven Truscott Story*. Pocket Book ed. Montreal: Montreal Standard, 1971.

United Kingdom. *Report of the Royal Commission on Criminal Justice*. By Lord Runciman, chair (1993).

BIBLIOGRAPHY

United States. House Judiciary Committee, Subcommittee on Civil and Constitutional Rights. "Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions." Staff report prepared by Don Edwards, chair, 103d Cong., 1st sess., 21 October 1993, 344-360. In *The Death Penalty in America: Current Controversies*, ed. H. A. Bedau. New York: Oxford University Press, 1997.

Walker, Clive and Keir Starmer, ed. *Justice in Error*. London, Eng.: Blackstone Press, 1993.

Wall, Bob. "Analyzing the Marshall Commission: Why It Was Established and How It Functioned." In *Elusive Justice: Beyond the Marshall Inquiry*, ed. Joy Mannette, 13-33. Halifax: Fernwood, 1992.

Weinstock, David and Gary E. Schwartz. "Executing the Innocent: Preventing the Ultimate Injustice." *Criminal Law Bulletin* 34, no. 4 (1998): 328-347.

Wells, Gary L. "What Do We Know About Eyewitness Identification?" *American Psychologist* 48, no. 5 (May 1993): 553-571.

_____. *Eyewitness Identification: A System Handbook*. Toronto: Carswell, 1988.

_____. "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables." *Journal of Personality and Social Psychology* 36, no. 12 (1978): 1546-1557.

Wildsmith, Bruce H. "Getting at Racism: The Marshall Inquiry." *Saskatchewan Law Review* 55, no. 1 (1991): 97-126.

Williams, David R. *With Malice Aforethought: Six Spectacular Canadian Trials*. Victoria, B.C.: Sono Nis Press, 1993.

Williston, Samuel. "Does a Pardon Blot out Guilt?" *Harvard Law Review* 28, no. 7 (May 1915): 647-663.

Wilson, Paul R. "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia." *Australian Journal of Social Issues* 24, no. 1 (February 1989): 3-22.

Woffinden, Bob. *Miscarriages of Justice*. London, Eng.: Hodder and Stoughton, 1987.

BIBLIOGRAPHY

Woocher, F. C. "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification." *Stanford Law Review* 29 (May 1977): 969-1030.

Yallop, David A. *Beyond Reasonable Doubt?* Auckland, N.Z.: Hodder and Stoughton, 1978.

Yant, Martin. *Presumed Guilty: When Innocent People are Wrongly Convicted.* Buffalo, NY: Prometheus Books, 1991.

Yarmey, A. Daniel. "Ethical Responsibilities Governing the Statements Experimental Psychologists Make in Expert Testimony." *Law and Human Behavior* 10, nos. 1-2 (June 1986): 101-115.

Zdenkowski, George. "Remedies for Miscarriage of Justice: Wrongful Imprisonment." *Current Issues in Criminal Justice* 5, no. 1 (July 1993): 105-110.

Zuckerman, A. A. S. "A Strategy for Reducing the Incidence of Miscarriage of Justice." *Northern Ireland Legal Quarterly* 44, no. 1 (Spring 1993): 3-11.

_____. "Miscarriage of Justice - A Root Treatment." *The Criminal Law Review* (May 1992): 323-345.

List of Cases

Gamble v. R. (1988), 66 C.R. (3d) 193 (S.C.C.).

Gilbert v. The King (No. 2) (1907), 12 C.C.C. (1st) 127 (S.C.C.).

Marcotte v. The Queen, [1965] 3 C.C.C. 285 (S.C.C.).

Operation Dismantle Inc. et al. v. The Queen (1985), 18 D.L.R. (4th) 481.

Palmer and Palmer v. The Queen (1979), 50 C.C.C. (2d) 193 (S.C.C.).

R. v. Amerongen, [1987] B.C.J. No. 2017, Vancouver Registry: CA007104 (B.C. C.A.), Judgment: September 21, 1987 [Quicklaw].

R. v. Duarte, [1990] 1 S.C.R. 30 (S.C.C.).

BIBLIOGRAPHY

R. v. Findlay, [1996] B.C.J. No. 1754, Vancouver Registry: CA 830073 (B.C. C.A.), Judgment: August 8, 1996 [Quicklaw].

R. v. Forsyth, [1986] B.C.J. No. 1407, Vancouver Registry: CA002563/CA002649 (B.C. C.A.), Judgment: December 2, 1986 [Quicklaw].

R. v. Gilbert (1907), 38 S.C.R. 207 (S.C.C.).

R. v. Jarvis (1937), 68 C.C.C. (1st) 188 (Ont. C.A.).

R. v. Jarvis (1936), 66 C.C.C. (1st) 20 (Ont. C.A.).

R. v. Johnson (1998), 131 C.C.C. (3d) 343 (N.S. C.A.).

R. v. Johnson, [1994] N.S.J. No. 89, DRS: 94-09378, Action No. 02885 (N.S. C.A.), Judgment: March 8, 1994 [Quicklaw].

R. v. Kehoe, [1970] 1 C.C.C. 123 (Ont. C.A.).

R. v. Kelly, [1999] O. J. No. 1781, Docket No. C26144 (Ont. C.A.), Heard: November 25-27 and December 10, 1998; Judgment: May 21, 1999 [Quicklaw].

R. v. Kelly, [1995] O.J. No. 237, Action No. 595/84 (Ont. C.A.), Judgment: December 4, 1985 [Quicklaw].

R. v. Khan, [1996] O.J. No. 2554, DRS 96-17514, Court File No. M17840 (Ont. C.A.), July 15, 1996.

R. v. Khan, [1991] O.J. No. 1025, DRS 93-02696, Action No. 254/90 (Ont. C.A.), Judgment: June 19, 1991 [Quicklaw].

R. v. Lord, [1993] B.C.J. No. 2387, DRS 94-03459, Vancouver Registry: CA:015683, (B.C. C.A.), Heard: November 2, 1993.

R. v. Lord, [1992] B.C.J. No. 1884, DRS 95-08015, New Westminister Registry No: X029098 (B.C. S.C.), Judgment: August 10, 1992.

R. v. MacKay, [1993] B.C.J. No. 1403, DRS 93-09615, Victoria Registry: V100947 (B.C. C.A.), Judgment: May 14, 1993 [Quicklaw].

R. v. MacKay (1992), 16 C.R. (4th) 351 (B.C. C.A.).

BIBLIOGRAPHY

R. v. McArthur, [1999] A.J. No. 415, Docket: 98-17622 (Alta. C.A.), Judgment: April 13, 1999 [Quicklaw].

R. v. McNamara, [1964] 3 C.C.C. 32 (Ont. C.A.).

R. v. Milgaard (1971), 2 C.C.C. (2d) 206 (Sask. C.A.).

R. v. Nepoose (1992), 12 C.R. (4th) 296 (Alta. C.A.).

R. v. Nepoose (1992), 71 C.C.C. (3d) 419 (Alta. C.A.).

R. v. Peel (No. 2) (1921), 36 C.C.C. (1st) 221 (N.S. S.C.).

R. v. Roberts (1962), 39 C.R. 1 (Ont. C.A.).

R. v. St. Cyr, [1988] A.J. No. 474, Appeal No. 19870 (Alta. C.A.), Judgment: May 30, 1988 [Quicklaw].

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

R. v. Tenorio (1991), 66 C.C.C. (3d) 429 (Que. C.A.).

R. v. Thatcher (1986), 24 C.C.C. (3d) 449 (Sask. C.A.).

R. v. Vaudry (1989), 51 C.C.C. (3d) 410 (Que. C.A.).

Re S.M.T. (1952), 31 C.R. 76 (Ont. S.C.).

Re Wilson and The Queen (1987), 35 C.C.C. (3d) 316 (Man. C.A.).

Reference Re Milgaard (1992), 12 C.R. (4th) 289 (S.C.C.).

Reference Re Milgaard (1992), 90 D.L.R. (4th) 1 (S.C.C.).

Referemce Re R. v. Coffin (1956), 23 C.R. 1 (S.C.C.).

Reference Re R. v. Gorecki (No. 2) (1976), 32 C.C.C. (2d) 135 (Ont. C.A.).

Reference Re R. v. Gorecki (No. 1) (1976), 32 C.C.C. (2d) 129 (Ont. C.A.).

Reference Re Gruenke (1998), 131 C.C.C. (3d) 72 (Man. C.A.).

BIBLIOGRAPHY

Reference Re R. v. Latta (1976), 30 C.C.C. (2d) 208 (Alta. C.A.).

Reference Re Regina v. Coffin (1955), 116 C.C.C. (1st) 215 (S.C.C.).

Reference Re Regina v. Truscott, [1967] 2 C.C.C. 285 (S.C.C.).

Thatcher v. Canada (Attorney General), [1997] 1 F.C. 289 (F.C. T.D.).

Thatcher v. The Queen (1987), 32 C.C.C. (3d) 481 (S.C.C.).

Way v. The Queen (1966), 48 C.R. 383 (Alta. S.C.).

Wilson v. Minister of Justice (1985), 20 C.C.C. (3d) 206 (Fed. C.A.).

Wilson v. Minister of Justice (1983), 9 C.C.C. (3d) 31 (F.C. T.D.).

Newspaper Articles

Anderssen, Erin. "Murder case to be reviewed." *The Globe and Mail* (22 September 1998): A3.

Broniskill, Jim & Janice Tibbetts. "In search of justice: Ottawa reviewing about 65 claims of wrongful conviction - one in 1864." *The Montreal Gazette* (4 January 1999): A8.

Canadian Press. "Justice minister denies new trial for murderer." *Times Colonist* (18 March 2000): A3.

Canadian Press. "Milgaard committed for psychiatric care" *The Vancouver Sun* (29 April 1999):A5.

Canadian Press. "Saskatchewan pays more in interim compensation." *The Vancouver Sun* (27 April 1999): A11.

Canadian Press. "Milgaard gets $250,000 payment for wrongful conviction" *The Globe and Mail* (23 August 1997): A4.

Canadian Press. "Top court refuses appeal in murder case." *The Vancouver Sun* (20 February 1993): A8.

Cayo, Don. "The convictions in question." *The Globe and Mail* (20 April 1998): A13.

BIBLIOGRAPHY

Claridge, Thomas. "After 20 years in prison, man may be innocent of murder." *The Globe and Mail* (13 October 1998): A6.

Culbert, Lori. "Milgaard avoids spotlight over $10-million settlement." *The Vancouver Sun* (18 May 1999): A6.

_____. "Murder conviction faces DNA challenge." *The Vancouver Sun* (27 January 1998): A3.

Dimmock, Gary. "Lawyers group adopts Mailman, Gillespie case." *The Telegraph Journal* (13 March 1998): n.p.

_____. "Justice Department refuses to let men see files." *The Telegraph Journal* (12 March 1998): n.p.

_____. "The justice system's last line of defence." *The Telegraph Journal* (12 March 1998): n.p.

_____. "Justice has not been served." *The Telegraph Journal* (10 March 1998): n.p.

Downey, Donn. "Man to wait 15 years for parole." *The Globe and Mail* (12 March 1991): A13.

Finkle, Derek. "Justice in Ontario, 20 years later." *National Post* (18 September 1999): B6.

Hall, Neal. "Morrisroe decides to stay in protection program." *The Vancouver Sun* (21 November 1997): A6.

_____. "Canada's highest court refuses appeal for hitman who killed two women." *The Vancouver Sun* (22 February 1995): C14.

Killick, Adam. "Milgaard's $10M award ends a 30-year saga." *National Post* (18 May 1999): A4.

Lett, Dan. "Milgaard, Morin rock system." *The Winnipeg Free Press* (21 August 1997): A8.

Makin, Kirk. "Wrongful-conviction appeal process called hollow remedy." *The Globe and Mail* (18 February 1999): A12.

BIBLIOGRAPHY

Makin, Kirk. "Did Clayton Johnson kill his wife?" *The Globe and Mail* (31 March 1998): A1, A4.

Makin, Kirk. "Inmate's killing ends exoneration bid." *The Globe and Mail* (8 March 1995): A5.

Mascoll, Philip. "'Peacemaker' inmate slain trying to stop fight." *The Toronto Star* (8 March 1995): A6.

McKay, John. "Truscott speaks out: Infamous murder case surfaces again after four decades." *Times Colonist* (30 March 2000): A3.

Nikolovsky, Boris. "Jury to weigh ex-biker's parole bid." *The Toronto Star* (5 April 1994): A8.

Oakes, Gary. "'Wicked' woman gets 10-year term for knife attack." *The Toronto Star* (6 March 1990): H16.

O'Hanlon, Martin. "Serial rapist guilty of 1969 murder." *Times-Colonist* (23 November 1999): A1.

O'Hanlon, Martin. "Milgaard signs deal to get $10 million in compensation." *The Vancouver Sun* (17 May 1999): A1, A2.

Pook, Sally. "Conviction quashed 45 years after hanging." *The Vancouver Sun* (31 July 1998): A14.

Roberts, David. "DNA implicates Fisher, Milgaard lawyers say." *The Globe and Mail* (19 July 1997): A6.

Roberts, David & Kirk Makin. "DNA test exonerates Milgaard." *The Globe and Mail* (19 July 1997): A1, A6.

Sheremata, Davis. "The rape that wasn't" *Alberta Report* 24, no. 25 (2 June 1997): 29.

Tibbetts, Janice and Jim Bronskill. "Justice minister eyes independent board to review convictions." *Times Colonist* (17 January 2000): A4.

Trickey, M. "Convicted killer seeks DNA test after 38 years." *The Vancouver Sun* (15 September 1997): A5.

BIBLIOGRAPHY

Tyler, Tracey. "Man jailed for killing wife tasts freedom after 5 years." *The Toronto Star* (26 September 1998): A2.

_____. "Lifer calls federal prison system a failure." *The Toronto Star* (27 May 1991): A10.

Unknown author. "Wrongly convicted man dead." *The Globe and Mail* (29 April 1998): A17.

Unknown author. "Accident kills woman tied to city copy slaying." *The Calgary Herald* (2 October 1990): A1, A2.

Vincent, Donovan. "Slain prisoner's supporters vow to clear his name." *The Toronto Star* (19 March 1995): A4.