

POST-CONVICTION DISCLOSURE IN THE CANADIAN CONTEXT

UBC Innocence Project

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INTRODUCTION

The UBC Innocence Project, (the "**Project**") a clinical program operating through the Peter A. Allard School of Law at the University of British Columbia ("**Allard**"), provides free, accessible, and independent assistance to those who have been convicted of a serious crime in British Columbia and maintain their innocence.

The Project pairs Allard students ("**Caseworkers**") with experienced criminal defence lawyers to review and investigate claims of wrongful conviction with a view to applying to the Minister of Justice (the "**Minister**") under s. 696.1 of the *Criminal Code* ("**696 Application**"). Once submitted, lawyers at the Criminal Conviction Review Group (the "**CCRG**"), an arm of the federal Department of Justice, review the application through a multi-stage process to make recommendations to the Minister as to whether there is a reasonable basis to believe that a miscarriage of justice likely occurred.¹

The demand for assistance far outweighs the Project's resources. Since the Project's formation in September 2007, it has received over 550 applications. Currently, the Project has 22 active cases, with priority given to incarcerated applicants. While the Project considers cases regardless of the availability of DNA evidence, due to budgetary constraints, the Project has strict eligibility guidelines. In addition to geographic restrictions which require the applicant to have been convicted in BC,² the applicant must also:

- i. claim to be innocent of an indictable offence;³
- ii. have been sentenced to a term of imprisonment of two or more years;
- iii. have been convicted of homicide or sexual assault;⁴ and
- iv. have exhausted all avenues of appeal, at least to the provincial appellate level.

¹ Department of Justice (Canada) "The Review Process" (02 November 2023): online: <www.justice.gc.ca/eng/cj-jp/ccr-rc/proc.html>.

² There are currently no other legal clinics in Western Canada that provide pro-bono post-conviction review services. As a result, the Project occasionally accepts cases from Alberta, Manitoba and Saskatchewan.

³ For the purposes of the Project, "innocent" means that the accused applicant is: (i) not the perpetrator of the crime or any included offence; (ii) not a party to any part of the crime; (iii) alleges that the physical act that is considered to be a crime did not in fact occur (i.e. strangulation vs. accidental choking); or (iv) that the applicant had a viable legal defence that was not before the Court.

⁴ The Project does not accept cases involving sexual assault convictions if: (i) the issue at trial was solely credibility; and (ii) there is no new matter of significance to rebut the credibility finding made at trial (i.e., there is a known, independent and reliable recantation by the complainant).

Once accepted, the Project undertakes a comprehensive process to gather as much information as possible about the initial police investigation, the trial process, and any appellate proceedings that occurred (“**File Review**”). To assist in determining whether a case could meet the test for conviction review set out in s. 696 of the *Criminal Code*,⁵ the Project approaches new applications with a robust understanding of the major causes of wrongful conviction⁶ and the latest advances in forensic science.

One of the most important considerations during a File Review is whether any new information or forensic analyses are available to support the claim that a miscarriage of justice occurred. Caseworkers methodically canvass all available resources including, but not limited to, court rulings, trial and appellate records, court exhibits, the Crown file, court registry files, legal aid files, materials from the police investigative file, and, if applicable, police misconduct files (the “**Project File**”) to form an objective and comprehensive understanding of the case. Typically, there is a significant and meaningful difference between the Project File and the relevant portions of the Crown and police investigative files, including information added to those files, but not disclosed, post-conviction (collectively, along with the previously acquired contents of the Project File, the “**Disclosure**”).

The statutory mechanism for post-conviction review in Canada is an application for Ministerial Review on the grounds of miscarriage of justice under Part XXI.1 of the *Criminal Code*.⁷ An application under section 696.1(1) requires the identification of “new matters of significance” not previously considered by the Courts or the Minister⁸ (the “**696**”).

⁵ *Criminal Code*, RSC 1985, c. C-46, s. 696.1(1), [“**Criminal Code**”].

⁶ The systemic factors that contribute to wrongful convictions include mistaken identification, false confessions, tunnel vision, false or unreliable witness testimony (including jailhouse informants), police and official misconduct, faulty forensic science, or errors in forensic science or forensic expert testimony. See: Dianne L Martin, “The Police Role in Wrongful Convictions: An International Comparative Study” in Sandra Westervelt and John Humphreys, eds, *Wrongfully Convicted: When Justice Fails* (New Jersey: Rutgers University Press, 2001); and Canada, Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (Ottawa: Public Prosecution Service of Canada, Fall 2011) [“**Path to Justice**”].

⁷ *Supra*, note 5 at s.696.1(1).

⁸ Section 696.4(a) of the *Criminal Code* requires applicants to possess “new matters of significance”. Usually, this means meeting the fresh evidence standard developed by the Courts under section 683(1)(d) of the *Criminal Code*. However, while classic “fresh” evidence is typically adduced, we note that there is a small subset of cases where new matters of significance may include advances in forensic testing techniques or a change in the law based on behavioural science research, such as the reliability of confessions when certain circumstances are present.

Review Process").⁹ Accordingly, without new information identifying new matters of significance, there is no prospect of a successful application.

The “new matters” requirement creates a classic “Catch-22” situation. Access to Disclosure is typically required to identify or uncover the matter of new significance, but there is no corresponding statutory obligation which compels Crown counsel or police organizations to provide this Disclosure to the individuals who are trying to prove that they have been the victims of a miscarriage of justice or organizations working to help them. Thus, the Project frequently resorts to seeking information (“**Information Requests**”) either through the *Freedom of Information and Personal Privacy Act* (“**FOIPPA**”)¹⁰ or the *Access to Information Act* (“**ATIA**”)¹¹ to access Disclosure which may support the “new matters” requirement. At times it is possible to request specific materials in the Information Request that the Project has identified as relevant based on internal investigations. For example, the Project has previously requested key witness statements, forensic reports, and expert opinions from Crown or police. However, that level of specificity is rarely possible. It sometimes takes several months or years to receive an initial response from a FOIPPA or ATIA request, which typically consists of a denial of full access to the requested materials on the grounds of privacy protection. Appealing these decisions often takes several months or years. At the end of this process, if an applicant is fortunate enough to receive any material, it may be so heavily redacted that it is of no value.

As one of just five organizations in Canada who provide pro-bono post-conviction review services,¹² the Project has an advantage over a self-represented claimant attempting to access Disclosure. It has access to a considerable network of scholars through its association with Allard, a distinguished academic institution, as well as the involvement of prominent and experienced criminal defence counsel who work pro-bono on individual case files. However, even with these advantages, post-conviction review organizations, including the Project, can take over 10 years to complete a review and, where applicable, prepare an application detailing the matters of new significance to

⁹ Per section 696.4 of the *Criminal Code*, *supra* note 5, the Minister of Justice shall take into account all matters that the Minister considers to be relevant, including: (a) whether the application is supported by new matters of significance that were not considered by the Courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV; (b) the relevance and reliability of information that is presented in connection with the application; and (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

¹⁰ *Freedom of Information and Personal Privacy Act*, RSBC 1996, c. 165 [“**FOIPPA**”].

¹¹ *Access to Information Act*, RSC 1985, c. A-1 [“**ATIA**”].

¹² The five organizations in Canada currently providing pro-bono post-conviction review services include: [UBC Innocence Project at the Allard School of Law in Vancouver](#), [Innocence Canada in Toronto](#), [Innocence McGill in Montreal](#), [Innocence Ottawa](#), and [Project Innocence Quebec](#).

ultimately submit to the Minister.¹³ A significant portion of the delay is the result of having to prepare extensive Disclosure requests to try to access material that could support the new matters of significance (i.e., previously non-disclosed material) or could help identify a new matter of significance (i.e., the name of a witness who wasn't interviewed who may have important information to share). It is reasonable to assume that an individual claimant without similar resources may require far more time to prepare and submit as fulsome a 696 Application. It is an unnecessarily slow, bureaucratic process which prevents a timely remedy for wrongful conviction claimants, bringing the overall administration of justice into disrepute.

A new statutory regime of post-conviction disclosure is required based on the premise that barring a powerful public interest reason weighing against full disclosure, the obligation of police and Crown should be one of full disclosure where the applicant is represented by counsel or an innocence organization working with counsel. This position paper provides the rationalization for this argument by exploring the issue of non-disclosure in the post-conviction context where a claim of wrongful conviction is asserted. First, it explores the current post-conviction disclosure pathways, using case examples and statistics from the Project's anonymized case files, with a particular focus on the impacts on Indigenous and racialized applicants. Next, to highlight the human cost of the current legislative regime, it canvasses a selection of Canadian wrongful convictions which include substantiated instances of non-disclosure.¹⁴ Then a comparative analysis of legal reform in the state of Virginia in the United States with the United Kingdom's Criminal Case Review Commission ("CCRC") demonstrates two different approaches to post-conviction disclosure in the common-law context. Finally, the paper sets out recommendations which enumerate the key changes the Project believes are necessary for legislative reform with respect to post-conviction disclosure.

POST- CONVICTION DISCLOSURE IN CANADA

Defining the Problem

No criminal justice system, however good it is or is thought to be, will be immune from error. That, of course, is acknowledged in all developed systems by the process of appeal, but not all errors can be detected at that stage. Evidence may emerge only later, there may be developments in law and practice, there may be later evidence of impropriety, error, or irregularity. Thus, in every system, however

¹³ This information comes from the Project Case Files. Due to the active nature of the Project's work, more specific information cannot be shared with the public. All identifying details have been changed to ensure confidentiality. However, timelines relating to attempts to access post-conviction disclosure are accurate ["Project Case Files"].

¹⁴ Please see section on "The Importance of Post-Conviction Disclosure" at page 25 of this Report.

*good and whatever its trial and appellate arrangements, there will be wrongful convictions or miscarriages of justice.*¹⁵

It is common knowledge that the criminal justice system is fallible and prone to human error. The most egregious of such errors is the conviction of an innocent person. While wrongful convictions have been acknowledged in Canada in the last few decades, they are mostly regarded as rare and extraordinary events.¹⁶ In response to this perception, experts have identified the challenge of determining the number of wrongful convictions and their exact causes.¹⁷ A 2019 study estimates that at least 85 people have been exonerated in Canada.¹⁸ The recent advent of the Canadian Registry of Wrongful Convictions creates a centralized location for documenting identified wrongful convictions in Canada.¹⁹ In the few months it has been operating, the overall number has steadily increased. In the US, wrongful conviction scholars have estimated that wrongful convictions may be as high as 1% of all convictions.²⁰ Even if the number in Canada is half of that estimate, with over 140,000 convictions in Canadian criminal courts in 2019-2020 alone,²¹ one can estimate that only a tiny fraction of wrongful convictions have been identified in Canada. If the error rate for wrongful convictions was an extremely low (such as, 0.05%), this would still result in approximately 70 miscarriages of justice per year.

The United States has conducted a great deal more investigation and litigation than Canada in the area of wrongful convictions, identifying at least 3420 confirmed exonerations between 1989 and the time this paper was finalized (November 2023).²² Another recent estimate indicates that between 2 and 10% of convicted individuals in the

¹⁵ Graham Zellick, “Facing Up to Miscarriages of Justice” (2006) 31:3 Man LJ 239, at 239–240.

¹⁶ Saskatchewan, Commission of Inquiry into the Wrongful Conviction of David Milgaard, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, Vol. 1, (Saskatoon: Ministry of Justice, 2008) (Commissioner: Edward P MacCallum), at 364 [“**Milgaard Inquiry**”].

¹⁷ Kathryn Campbell, “Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice?” 42:3 Man LJ 250.

¹⁸ *Ibid.*

¹⁹ Canadian Registry of Wrongful Convictions, “*All Wrongful Convictions Cases*,” online: <<https://www.wrongfulconvictions.ca/cases>>

²⁰ Beth Schwartzapfel & Hannah Levintova, “How Many Innocent People are in Prison?” (12 December 2011), online: *Mother Jones* < www.motherjones.com/politics/2011/12/innocent-people-us-prisons/> [“Mother Jones”]

²¹ Statistics Canada, *Adult criminal Courts, number of cases and charges by type of decision*, Table No. 35-10-0027-01 (Ottawa: Statistics Canada, 27 September 2022).

²² “Exonerations in the United States” (5 November 2023), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

US are innocent, up from one percent in 2012.²³ The US also has 71 non-profit organizations providing post-conviction advocacy services to incarcerated individuals, serving all 50 states, compared to five organizations in Canada.²⁴ As a result, significantly more legal reform and advocacy work has been done across the US. Despite the obvious differences between criminal justice systems in Canada and the US, the US statistics lend further credence to the hypothesis that the number of wrongful convictions in Canada is likely far higher than currently identified.

Across jurisdictions internationally, a lack of access to police investigative materials and officers' misconduct files is one of the most significant challenges that innocence organizations face in their efforts to advocate for wrongful conviction claimants.²⁵ The importance of access to post-appeal disclosure has been underscored in US research showing that post-conviction access to police records is crucial to addressing and preventing wrongful convictions.²⁶ While Canadian research does not seem to have *systematically* addressed the detrimental impact of the lack of access to police investigative and misconduct records and exhibits in the post-conviction review process, the issue has been recognized in Commissions of Inquiry and individual cases for decades and will be canvassed in more detail in the "*Canadian Case + Commissions of Inquiry*" section of this paper.²⁷

²³ Andriana Moskovska, "33 Startling Wrongful Convictions Statistics [2021 Update]" (13 October 2021), online (blog): *The High Court* <www.thehighcourt.co/wrongful-convictions-statistics/>; Mother Jones, *supra* note 24.

²⁴ "Network Member Organization Locator and Directory", online: *The Innocence Network* <www.innocencenetwork.org/directory>.

²⁵ Joanne McLean et al, "Session 2B: The Role of Defence Counsel in Preventing Wrongful Convictions" (Panel discussion at the 2022 Nexus Conference on Wrongful Convictions, online, 27 September 2022) [unpublished].

²⁶ A recent study by the US National Registry of Exonerations reviewed 2,400 exonerations logged between 1989 and 2019, nearly 80% of which involved violent felonies. Concealing exculpatory evidence - the most common type of official misconduct, occurred in 44% of exonerations. These patterns of misconduct can be heightened in cases involving indigenous and racialized accused. No comparable Canadian research exists; however, recent high-profile exonerations show the human cost of continuing to enforce disclosure policies that were never intended to address the unique investigative process of post-conviction review. This is another Catch-22 situation: without regular and broad access to investigative records, miscarriages of justice cannot be identified and remedied, nor can experts gain a broader understanding of the scope of this issue in Canada. See Samuel R Gross et al, "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement" (1 September 2020), online (pdf): *National Registry of Exonerations*, online: <www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf> ["**NRE Report**"].

²⁷ Please see section on "The Importance of Post-Conviction Disclosure" at page 25 of this Report for more details.

Despite continued recognition of this issue, the lack of a robust and consistent process for accessing Disclosure exacts a grave toll on the wrongly convicted, their families, and society. There are egregious examples of wrongful conviction where non-disclosure occurred both at trial and following conviction.²⁸ When the police lack transparency in their investigations, in the face of the most heinous miscarriages of justice, the public cannot view them as accountable. Cases of wrongful conviction involving non-disclosure and official misconduct erode public confidence in the criminal justice system.

The Wrongful Conviction of Indigenous and Black Persons in Canada

The problem of non-disclosure is compounded in the context of the wrongful conviction of Indigenous and Black persons in Canada. The ongoing consequences of colonialism and systemic racism in the Canadian criminal justice system continue to have devastating consequences for Black and Indigenous people along with other racialized groups.²⁹ We know that Black and Indigenous persons have a “higher risk of being *wrongly* arrested, *wrongly* convicted, and *wrongly* imprisoned.”[sic]³⁰

Research shows that Indigenous persons continue to have additional vulnerabilities with respect to wrongful convictions including mistrust of the legal system, language barriers, increased disadvantages during police interviews, racist stereotyping, and inadequate and discriminatory defence counsel.³¹ It follows that the risk of non-disclosure is also heightened for Indigenous persons, as shown in the Donald Marshall Jr. case highlighted below. There is also research indicating that Indigenous people are more likely to plead guilty when they are factually innocent.³² As noted by former Supreme Court Justice the Honorable Frank Iacobucci:

Many [First Nations] persons accused of crimes plead guilty to their offences, rather than electing trial, to have their charge resolved quickly but without appreciating the consequences of their decision. In fact, many First Nations

²⁸ *R. v. Assoun*, 2019 NSSC 220 (CanLII) [“**Assoun, 2019**”].

²⁹ Department of Justice Canada, *Rooting out systemic racism is key to a fair and effective justice system* (Ottawa: Department of Justice Canada, 7 December 2021).

³⁰ Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada” (2018) 51:1 UBC L Rev 161.

³¹ Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” (2015) 17:2 Flinders LJ 203; Tim Fontaine, “Justice Denied: 5 times Indigenous people were wrongfully convicted in Canada”, *CBC News* (30 April 2016), online: <www.cbc.ca/news/indigenous/justice-denied-5-times-indigenous-people-wrongfully-convicted-canada-1.3559644>.

³² Department of Justice Canada, *Guilty pleas among Indigenous People in Canada*, by Angela Bressan and Kyle Coady (Ottawa: Department of Justice Canada, 2017), at 9.

*individuals explained that they have never known a friend or family member who, when charged, proceeded to trial. Many of these accused persons believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members.*³³

Indigenous incarceration rates in Canada are currently at a historic high. Indigenous people make up approximately 32% of the federal prison population despite accounting for less than 5% of Canada's total population. Indigenous women now account for almost 50% of female prison populations.³⁴ The gross over-representation of Indigenous persons in Canada's criminal justice system also contributes to the heightened risk of wrongful convictions. This is particularly concerning as research indicates that Indigenous people are also less likely to get legal assistance after they have been wrongly convicted.³⁵ The higher risk of the wrongful conviction of Indigenous persons stems from the disproportionate impact of the risk factors causing wrongful convictions, including non-disclosure.

These systemic issues are amply demonstrated in the case of Donald Marshall Jr., a Mi'kmaq leader and Indigenous activist. In 1971, 17-year-old Marshall was convicted of homicide and sentenced to life imprisonment for the murder of an acquaintance, Sandy Seale. Just 10 days after Marshall's conviction, a witness came forward to police, claiming to have been present at the time of the murder. The witness explained that Roy Ebsary had killed Seale – not Marshall.³⁶ The RCMP dismissed the information and neglected to disclose it to Crown or defence counsel. As years passed, several key witnesses recanted their original statements. Despite growing suspicion about Mr. Marshall's conviction, it stood for 11 years before it was challenged.

Mr. Marshall was one of the first high-profile exonerations in Canada, resulting in the "Royal Commission on the Donald Marshall, Jr., Prosecution" (the "**Marshall Commission**").³⁷ The Marshall Commission found that the Crown's failure to disclose inconsistent witness statements was a key factor in the wrongful conviction. Additionally,

³³ Ontario, Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci*, (Toronto: Ministry of the Attorney General, February 2013), at para 215.

³⁴ Canada, Office of the Correctional Investigator, *Proportion of Indigenous Women in Federal Custody nears 50%: Correctional Investigator Issues Statement* (Ottawa: Office of the Correctional Investigator, 17 December 2021).

³⁵ Fontaine, *supra* note 31.

³⁶ Kent Roach, "*Wrongfully Convicted*" (Simon & Schuster, 2023), at xviii.

³⁷ *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations*, (Halifax: Province of Nova Scotia, December 1989) ["**Marshall Commission**"].

it recognized that police failed to disclose the information they received shortly after the conviction that Mr. Marshall was innocent. Amongst other issues, the Commission found that the police investigation was fraught with tunnel vision due in large part to the racism and bias of the lead investigator, Sgt. John Macintyre. Macintyre, without evidence that supported his conclusion, and in the face of evidence to the contrary, identified Mr. Marshall as the prime suspect and rejected evidence that discounted that conclusion, inevitably impacting disclosure decisions leading to Mr. Marshall's incarceration.³⁸ Although the Marshall Commission recommended codifying disclosure obligations in the *Criminal Code*, this protective measure was never implemented.

Post-Conviction Review in Canada: The 696 Review Process

The 696 Review Process is the main pathway available to wrongly convicted persons wishing to remedy a miscarriage of justice. Enacted in 2002, the most recent iteration of the statutory scheme was codified in sections 696.1 to 696.6 of the *Criminal Code*.³⁹ These sections vest the Minister with powers to review 696 Applications and determine whether a miscarriage of justice has likely occurred.

Notably, to advance an application, an Applicant must have exhausted all available rights of appeal and have presented new matters of significance that were not considered by the Courts or previously considered by the Minister to establish, on a reasonable basis, that a miscarriage of justice likely occurred. This evidentiary burden imposes a higher standard than would be applied by a Court of Appeal.⁴⁰ On appeal, the test for the admission of fresh evidence is known as the *Palmer* criteria and includes:

1. The evidence should generally not be admitted, if by due diligence, it could have been adduced at trial;
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;

³⁸ *Marshall Commission*, *supra* note 37, at p. 3.

³⁹ In 2002, following a public consultation, section 690 of the *Criminal Code* was repealed and replaced by sections 696.1 to 696.6.

⁴⁰ Department of Justice Canada, *Applications for Ministerial Review—Miscarriages of Justice: Annual Report 2020* (Ottawa: Communications Branch, Department of Justice Canada, 2020) at p. 1.

4. The evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.⁴¹

However, as astutely summarized by Perrell, J. in *Albon v. Ontario (Attorney General)*:

*The nub of the problem is that the applicant may have made need an investigation to determine whether there is [sic] new matters of significance that were not considered by the Courts or previously considered by the Minister, but there is no provision in the Criminal Code that provides a mechanism for the convicted person to compel disclosure from the police or the Crown of new matters of significance that were not considered by the Courts or previously considered by the Minister.*⁴²

In addition to setting out in detail, with supporting evidence, the new matters of significance, the regulatory requirements for 696 Applications are onerous and must be accompanied by:

- the Applicant's signed consent authorizing the Minister (i) to have access to the applicant's personal information that is required for reviewing the application, and (ii) to disclose to any person or body the applicant's personal information obtained in the course of reviewing the application in order for the Minister to obtain from that person or body any information that is required for reviewing the application;
- a true copy of the information or indictment;
- a true copy of the trial transcript, including any preliminary hearings;
- a true copy of all material filed by the defence counsel and Crown counsel in support of any pre-trial and trial motions;
- a true copy of all factums filed on appeal;
- a true copy of all court decisions; and

⁴¹ *R. v. Palmer*, [1979 CanLII 8 \(SCC\)](#), [1980] 1 SCR 759, per [McIntyre J](#) (9:0), at p. 775 [cited to SCR]]

⁴² *Albon v. Ontario (Attorney General)*, 2019 ONSC 3372 at para 111, Perrell J [“*Albon*”].

- any other document that the applicant considers necessary for the review of the application.⁴³

Most 696 Applications are denied at the Preliminary Assessment stage, the first step in the conviction review process,⁴⁴ despite the Minister having the discretion to conduct ad hoc investigation at this stage. However, if the Minister is persuaded that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred,⁴⁵ there is a discretionary power to proceed to the Investigation Stage where CCRG legal counsel carry out an in-depth investigation of the legal and factual issues raised by applicants.

Where the Investigation is ordered, the Minister has the powers of a commissioner under Part 1 and section 11 of the *Inquiries Act*⁴⁶ including the ability to subpoena witnesses and documents where necessary.⁴⁷ Notably, the CCRG is not vested with this power during the Preliminary Assessment stage. Restricting such powers thus creates another Catch-22 situation. If the CCRG had more flexibility in their powers to investigate at an earlier stage, it may prevent many applications from failing at the initial stage due only to a lack of information to support their miscarriage of justice claims.

Investigations can be wide-ranging. They may include interviewing witnesses, carrying out forensic and scientific testing, obtaining assessments from experts, and consulting police agencies, prosecutors, and defence lawyers. At the end of the investigation, CCRG counsel prepare an Investigation Report, and both the applicant and prosecuting agency are given opportunities to provide submissions that are then provided to the Minister along with the Investigation Report.⁴⁸

Before deciding whether the application should be dismissed or allowed, the Minister reviews the Investigation Report and any supporting material, which generally includes the submissions provided by the applicant or Crown counsel, the legal advice, and recommendations from the CCRG or outside agents, and the legal advice and recommendations of the Special Advisor on Wrongful Convictions. Where an application

⁴³ *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR 2002-416.

⁴⁴ Department of Justice Canada, *A Miscarriages of Justice Commission*, by Hon. Harry LaForme & Hon. Juanita Westmoreland-Traoré (Ottawa: Department of Justice Canada, November 2021) [**Miscarriage of Justice Commission**].

⁴⁵ See *Criminal Code*, *supra* note 7, s. 696.3.

⁴⁶ *Inquiries Act*, RSC 1985, c. I-11.

⁴⁷ Department of Justice Canada, *The Review Process* (Ottawa: Department of Justice Canada, 7 July 2021).

⁴⁸ *Ibid.*

is allowed, the Minister may refer a question of law to the relevant Court of Appeal, order a new trial, or order a new appeal. Where a new trial is ordered, Crown counsel may conduct a new trial, enter a stay of proceedings, withdraw the charges, or offer no evidence, which results in an acquittal.⁴⁹

Critiques of the Current 696 Review Process

Despite ongoing amendments, the 696 Review Process receives continuous criticism for failing to provide a reasonable standard of independence, externality,⁵⁰ fairness, efficiency, and transparency. As discussed, the evidentiary burden on applicants is simply too high, creating barriers of access and unconscionable delays.⁵¹

These critiques are echoed in Canadian jurisprudence. In 2019, the Ontario Superior Court of Justice recognized three main problems with the Crown’s post-conviction disclosure obligations under the current Ministerial Review process:

1. The Minister’s powers to order an investigation are highly discretionary. There is no obligation to investigate or order disclosure during the initial assessment. As noted by the Court, “while a Ministerial Review may spontaneously energize the Minister to order an investigation that could yield new matters of significance, a Ministerial Review is not a means to request a disclosure order”.⁵²
2. New matters of significance must be found prior to the Investigation Stage. This point was also noted by Commissioner LeSage in the Driskell Inquiry while raising concerns about the adversarial nature of the post-conviction review process.⁵³
3. The CCRG has no duty to share information it uncovers through its Investigation with the applicant.⁵⁴

These concerns are borne out in the statistical data reported by the Minister each year which show how rarely applications are successful within the 696 Review Process.

⁴⁹ *Ibid.*

⁵⁰ Campbell, *supra* note 17, at 42-3.

⁵¹ Andrea Anderson, *Wrongful Convictions, and the Avenues of Redress: Post-Conviction Review in Canada*, (2015) 20 Appeal 5; Miscarriage of Justice Commission, *supra* note 44.

⁵² *Albon*, *supra* note 42, at para 108.

⁵³ Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Manitoba Justice, 15 February 2007) (Commissioner: Hon. Patrick LeSage) [“**Driskell Inquiry**”].

⁵⁴ *Albon*, *supra* note 42, at para 113.

Between 2003 and 2019, the CCRG received 186 complete applications.⁵⁵ Only 20 applicants were ultimately referred back to the Courts. All identified as male. One applicant identified as Indigenous and another identified as Black.⁵⁶ Of the 166 unsuccessful applications, 80% were unrepresented by counsel.

In their recent report examining the creation of an independent commission to consider wrongful conviction applications Hon. Harry LaForme and Hon. Juanita Westmorland-Traoré noted:

*... although it is impossible to know how many miscarriages have and continue to occur, we believe that there are more miscarriages of justice than the 20 complete applications the Minister receives a year, or the 20 cases that the Minister has referred back to the Courts since 2002.*⁵⁷

The report also noted that the combination of the matters of new significance requirement and resulting Catch-22 situation was a heavy burden on applicants and was likely a significant contributing factor to the low rates of Ministerial remedies.⁵⁸ This conclusion is in line with the Project's experience.

Current Disclosure Obligations of Crown and Police

The importance of robust police and prosecutorial disclosure in preventing wrongful convictions has long been recognized in Canada,⁵⁹ and abroad.⁶⁰ While a common law duty to disclose all relevant evidence to the defence, whether favorable or unfavorable, existed prior to 1991,⁶¹ the Marshall Commission recognized that a more robust disclosure obligation was required and recommended statutory changes to ensure that complete and continuing disclosure is provided to the defence in criminal contexts.

⁵⁵ A complete application is where an applicant has submitted the forms, information and supporting documents required by the Regulations. See Criminal Conviction Review Group, *Applications for Ministerial Review – Miscarriages of Justice Annual Report 2021* (Ottawa: Department of Justice Canada, 2021) [**“CCRG Annual Report 2021”**].

⁵⁶ Miscarriage of Justice Commission, *supra* note 44 at. 6.

⁵⁷ *Ibid.*, at 32.

⁵⁸ *Ibid.*, at 52

⁵⁹ Kent Roach, “Wrongful Convictions in Canada” (2012) 80:4 U Cin L Rev 1465.

⁶⁰ NRE Report, *supra* note 26.

⁶¹ *R. v. C (MH)* (1991), 63 CCC (3rd) 385.

In 1991, the Supreme Court of Canada implemented that recommendation into a new constitutional rule in *R. v. Stinchcombe*.⁶²

The foundational principles of disclosure at a criminal trial laid out in *Stinchcombe* are based on the following tenets:

1. The presumption of innocence;
2. The right of an accused to make full answer and defence as protected by s.7 of the *Canadian Charter of Rights and Freedoms*;⁶³ and
3. The principle that any investigative materials “which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”⁶⁴

The police also have a well-established duty to disclose to Crown counsel all relevant information uncovered during an investigation, including exculpatory information.⁶⁵

The Crown is obligated to make timely disclosure to the accused of all relevant information in its possession, exculpatory or inculpatory, regardless of whether it will be used by the Crown at trial. Relevance, in this context, refers to any information for which there is a reasonable possibility that it may assist the accused in any aspect of making full answer and defence.⁶⁶ This disclosure obligation is a continuing one and must be met whenever the Crown receives new information unless it can establish a privilege claim which precludes disclosure. Alongside the duty of disclosure, the Supreme Court of Canada also recognized a duty to preserve relevant evidence post-conviction.⁶⁷

The Crown’s disclosure obligations continue throughout the appellate process and include “*any information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of their appeal*”.⁶⁸ The exercise of this ongoing disclosure duty during the appellate process has led to the identification of

⁶² *R. v. Stinchcombe*, 1991 CanLII 45 (SCC) [“**Stinchcombe**”].

⁶³ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

⁶⁴ *Stinchcombe*, *supra* note 62.

⁶⁵ *R. v. McNeil*, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, at para 14.

⁶⁶ *R. v. Chaplin*, 1995 CanLII 126 (SCC), at para 30 [“**Chaplin**”]; *R. v. Dixon*, 1998 CanLII 895 (SCC), at paras 20-21 [“**Dixon**”].

⁶⁷ *R. v. Egger*, 1993 CanLII 98 (SCC); *R. v. La*, 1997 CanLII 309 (SCC).

⁶⁸ *R. v. Trotta*, 2004 CanLII 60014 (ONCA), at para 20 [“**Trotta**”].

miscarriages of justice.⁶⁹ In the words of Doherty J.A. “*the protection of the innocent is as important on appeal as it is prior to conviction*”.⁷⁰ However, the foundational principles underlying the duty of disclosure on appeal are different than at trial. On appeal, the presumption of innocence has been rebutted and the right of an accused to make full answer and defence has been exhausted. While the Crown has a continuing obligation of disclosure, practically speaking, additional disclosure at the appellate level typically relates to the narrow issues on appeal or the appellant pointing to specific instances of non-disclosure during the trial. The appellant has broad rights of appeal under the *Criminal Code*, including the right to adduce fresh evidence where the interests of justice so require.⁷¹

It is telling that where an application for the admission of fresh evidence on appeal arises out of the Crown’s failure to provide disclosure, the test is less onerous than the “matters of new significance requirement” under s. 696.1.⁷² The Supreme Court of Canada (“**SCC**”) first established four criteria for appellate Courts to consider when admitting fresh evidence on appeal in the decision of *R. v. Palmer*.⁷³ The *Palmer* test requires that an appellate Court consider that the evidence: (i) could not have been obtained by due diligence at trial; (ii) is relevant on a decisive or potentially decisive issue; (iii) is credible; and (iv) could have affected the result at trial. More recently, the SCC held that the *Palmer* criteria applies to the admission of entirely new evidence (i.e., evidence that did not exist at trial) on appeal, albeit in the family law context.⁷⁴

Where the appellant can show that the right to make full answer and defence was violated by showing *either* that there is a *reasonable possibility* the non-disclosure affected the outcome at trial *or* that it affected “the overall fairness of the trial process”, ordering a new trial is the appropriate remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*.⁷⁵

⁶⁹ *R. v. Henry*, 2010 BCCA 462, at para 27 [**Henry**] and *R. v. Dhillon*, 2014 BCCA 480, at para 10 [**Dhillon**].

⁷⁰ *Ibid*, at para 22.

⁷¹ See s. 683.1 *Criminal Code*, *supra* note 7; *R. v. Palmer*, 1979 CanLII 8 (SCC) for the admissibility of fresh evidence test.

⁷² On appeal, the test for fresh evidence is, if believed, could the evidence have reasonably, when taken with other evidence introduced, be expected to have affected the result. See: <https://courtofappealbc.ca/civil-family-law/guidebook-appellants/introducing-fresh-or-new>

⁷³ *Ibid*.

⁷⁴ *Barendregt v. Grebulinas*, 2022 SCC 22.

⁷⁵ *Dixon*, *supra* note 66, Cory J. at 34; *R. v. Taillefer*, 2003 SCC 70 (CanLII), [2003] 3 SCR 307 [**Taillefer**]; *R. v. Illes*, 2008 SCC 57 (CanLII), [2008] 3 SCR 134, LeBel and Fish JJ. at para 24.

The SCC's approach to constitutional disclosure obligations has continued to evolve in response to miscarriages of justice. In a 2003 appeal from convictions of first-degree murder and manslaughter, the SCC once again underscored the importance of disclosure observing that the idea that disclosure was simply "an act of goodwill" and not a right, "played a significant part in catastrophic judicial errors" that resulted in the wrongful conviction.⁷⁶ In 2009, the Court affirmed the long-standing duty of the police to participate in the disclosure process by providing the Crown with all material pertaining to its investigation of an accused, including relevant misconduct and disciplinary records of police officers. This duty is triggered upon request by the accused and may require the Crown to obtain relevant information from other state agencies.⁷⁷ When the Crown refuses to disclose, and has no obligation to do so, defence counsel is often forced to litigate. The ability to submit such applications to the Court, to request support in resolving disclosure disputes was established by the seminal disclosure cases of *Stinchcombe* and *McNeil*. Since then, countless applications have been submitted to resolve disclosure questions, which require additional time and expense for counsel and the Court. The establishment of clear disclosure requirements, set out in legislation would sidestep this growing issue.

It must be noted that defence counsel also has a duty to carefully review what has been disclosed by the Crown. Defence counsel's diligence in pursuing disclosure from the Crown is a significant factor considered by the Court when determining the impact of non-disclosure on the fairness of the trial process.⁷⁸

Even once the Crown has rebutted the presumption of innocence at trial and the defence has exercised its broad rights of appeal under the *Criminal Code*, Courts have recognized that the duty to disclose continues as an ongoing and essential aspect of post-conviction review:

*While the obligation to disclose extends through the appellate litigation that follows a conviction, **it is not tied to the currency of any appeal periods.** In a number of recent cases, the disclosure of evidence, whether **fresh or otherwise [emphasis added]**, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered or convictions quashed outright.*⁷⁹

⁷⁶ *Taillefer*, *supra* note 75.

⁷⁷ *McNeil*, *supra* note 65 at paras 23-25; NRE Report, *supra* note 26.

⁷⁸ *Dixon*, *supra* note 66 at para 37.

⁷⁹ Ontario, Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure*

Despite this long-standing recognition, the prosecution and police are not subject to any statutory obligation to respond to disclosure or investigative requests by wrongful conviction claimants' post-conviction.⁸⁰ This legislative lacuna creates significant challenges and lengthy delays in assembling a persuasive argument and collecting evidence of "matters of new significance" to put forward for Ministerial Review. As noted in the Milgaard Inquiry "a convicted person does not have the coercive power to gain access to documents such as police or Crown files, nor does a convicted person have any right to compel witnesses to be interviewed".⁸¹

In the precedent-setting decision of *Roberts v. British Columbia (Attorney General)*, 2021 BCCA 346, the Court held that in certain circumstances the Crown has an obligation to produce whatever evidence may be reasonably required by an applicant in support of an application for Ministerial Review, beyond the disclosure of exculpatory evidence. The onus is on the applicant to establish that:

1. The preconditions for Ministerial Review have been satisfied;
2. The information or evidence sought may establish that there exists a new matter of significance not considered by the Courts or previously considered by the Minister; and
3. The new matter of significance will be material to the Minister's assessment of whether there may be a reasonable basis to conclude that a miscarriage of justice likely occurred.⁸² (the "**Roberts Criteria**")

It is still too early to assess the impact of the *Roberts* decision on post-conviction disclosure practices in Canada. Unfortunately, until there is significant change in the statutory framework regarding post-conviction disclosure, if the Crown refuses to disclose relevant materials upon request, obtaining the necessary files could involve a time-consuming and expensive *Roberts* application to the Court. The practical realities of the disclosure obligations of the Crown and police will be explored in detail in the next section.

and Resolution Discussions, (Toronto: Ontario Ministry of the Attorney General, 1993) (Chair: Hon. G Arthur Martin) at p. 207 [**"Martin Report"**].

⁸⁰ *Roberts v. British Columbia (Attorney General)*, 2021 BCCA 346 at para 65(d) [**"Roberts"**].

⁸¹ Milgaard Inquiry, *supra* note 16 at p. 373.

⁸² *Roberts*, *supra* note 80 at para 104.

The Reality of Post-Conviction Disclosure Requests in the Wrongful Conviction Context

To determine whether any new matters of significance may exist for a given applicant, the Project generally begins its file review by contacting trial and appellate counsel to request full access to their files if they still have them in their possession. Given the age of some of the cases, counsel's records have often been destroyed pursuant to the Law Society of British Columbia's retention rules or are incomplete or otherwise unavailable (e.g. records that have been lost, damaged/corrupted, or are illegible etc.).⁸³ The Project has also found that a review of the complete police investigative file, including any exhibits collected during the initial investigation, is essential. This review could include, but is not limited to, material not disclosed to defence at trial, any additions made to the police investigative file post-conviction, and access to exhibits for testing.

Some real examples of evidence the Project has discovered over the course of its investigations that the police or Crown deemed not relevant to disclosure at trial, but the Project found to be highly relevant include:

1. Witnesses with relevant information who provided an initial interview to police but whom the police failed to contact again to provide a formal statement;
2. Police exhibits collected that were not tested for DNA; and
3. Experts that the Crown seemed to have consulted but for whom no report is in the file.⁸⁴

Each of the above examples have become integral pieces of 696 Applications or an application to the Court.

Given the lack of statutory obligation for the Crown to provide post-conviction disclosure, the Project has two main options to obtain Disclosure: 1) request the Disclosure directly from the Crown and/or RCMP to gain access to the police investigative file, or 2) initiate a request for information under *FOIPPA* or *ATIA*.⁸⁵

Requesting Disclosure Directly from Crown Counsel

⁸³ The Law Society of British Columbia's Rules regarding the retention of client files depends largely upon the type of document in question. Mandatory retention periods can span anywhere from 30 days to over 10 years. See:

<<https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/closedfiles.pdf>>

⁸⁴ Project Case Files, *supra* note 13.

⁸⁵ *ATIA*, *supra* note 11.

Crown counsel and police organizations act as one entity during the trial and appeal proper for the purposes of providing disclosure to the defence: defence counsel applies to the Crown for disclosure which usually comes from files or information in the hands of the investigating police agency. However, in the post-conviction context the Crown and RCMP appear to operate as separate entities.

The Project has had mixed results when applying directly to the Crown to request post-conviction Disclosure. On some occasions, particularly during the first few years after the Project's inception, the Crown could be responsive and used its discretion to allow the Project to review case files in its possession with obvious privilege exceptions. The Crown now requests extensive written submissions from the Project setting out the basis for the claim that there was a miscarriage of justice, the new information that supports the claim, and the sources of that information. Such requests would not be unreasonable if coming from the CCRG as it reviews the 696 Application but coming from the Crown at the Disclosure request stage is putting the cart before the horse. As has been discussed above, often some of the information necessary to support the claim will be found in the materials the Project is requesting.

Similarly, there is no transparent protocol dictating when the RCMP will release Disclosure in the post-conviction context. While the RCMP has occasionally released documents to the Project, it appears to be on a completely discretionary basis. The RCMP consistently takes the position that Disclosure to counsel in the post-conviction period can only occur where the RCMP have been directed to do so by the Minister of Justice once a 696 Application has been made, or, by Court order. The position taken by the RCMP puts post-conviction review organizations in the frustrating catch 22 situation of needing to review the subject of their request in order to make the request.

While the Project is appreciative of the efforts made by Crown and RCMP to sometimes assist in its post-conviction review efforts, the discretionary nature of the assistance has resulted in the Project being placed an untenable position often resulting in expensive applications to the Court to have materials released, which leads to significant delays, and, in certain cases, the degradation of possibly exculpatory DNA evidence.⁸⁶

When the Project began in 2007, senior Crown Counsel asked the Project for its input on a post-conviction disclosure protocol it was considering for the BC Crown. The Project provided its input and has continued to ask the Crown to develop a post-conviction disclosure policy to ensure clarity and consistency when wrongful conviction claimants request disclosure from the Crown in the post-conviction context. Despite several

⁸⁶ Project Case Files, *supra* note 13.

requests, the BC Crown has yet to develop a publicly available post-conviction disclosure policy.

Privacy Act Requests

The inconsistent and unclear position taken by the Crown and RCMP has forced the Project to attempt to access information through the only other means available when the Disclosure is no longer in the hands of the applicants or their counsel: making a *FOIPPA* or *ATIA* Information Request. Unfortunately, neither statutory scheme appears to have been drafted with the post-conviction review process in mind. In principle, *FOIPPA* and *ATIA* should support broad and timely access to information while at the same time respecting privacy rights, however, in the Information Request process in the post-conviction context, significant delay seems to be the rule rather than the exception.

Typically, the first response to an Information Request under *FOIPPA* or *ATIA* is a full denial based on statutory protections related to the personal information of third parties or ongoing police investigations, as well as the general position taken by *FOIPPA* or *ATIA* branches that they do not respond to “fishing expeditions.” While the Project acknowledges the importance of these statutory protections, and the resources required to respond to broad Information Requests, these legislative schemes do not contemplate the extraordinary circumstances and significant consequences that arise in the post-conviction review context. The Information Requests are routinely denied without regard to the involvement of counsel, the potential harms to the administration of justice in the event a wrongful conviction has occurred, or the potential impacts on an individual applicant.⁸⁷ Applicants remained incarcerated for years waiting on the initial outcome of an Information Request only to be told that the information cannot be released as it is part of an “ongoing” police investigation, even though the individual has been incarcerated for the crime for decades.⁸⁸ When the Project appeals these requests, it must justify why the requested information should be released and is caught in the same Catch-22 situation: without reviewing the requested information, the Project sometimes has no way to narrow its request or explain the significance of the release of the information

“Successful” applications where **some** materials are received through the request process are rare, taking on average between 18 months and 4 years, however responses can take much longer. Information received is typically heavily redacted and is therefore

⁸⁷ Project Case Files, *supra* note 13. While it is not an official requirement for parole eligibility that a convicted individual take responsibility for their crimes, expressing remorse and taking responsibility is a major factor in determining release. Thus, many Project clients remain incarcerated for years, or decades, past their parole eligibility period, simply for maintaining their innocence as they wait for information on their case to be released.

⁸⁸ *Ibid.*

of little use in the post-conviction review process. In the next section, two cases taken from the Project's files demonstrate the significant challenges wrongful conviction claimants face when attempting to access disclosure through these statutory schemes. In each case, the applicant remained incarcerated for years waiting for their Information Request to wind its way through the onerous complexity of the bureaucratic red tape underscoring these statutory regimes. This slow and inefficient system delays the ability of wrongful conviction claimants to meet the 'new matters of significance' requirement for Ministerial Review, compounding the potential miscarriage of justice and raising significant access to justice concerns.

Case "A"

The difficulties associated with freedom of information requests in the post-conviction context are aptly demonstrated in the Case of A, an Indigenous applicant who pled guilty to murder in the late 1980s. The Project has reason to believe that this case may involve false guilty pleas. On November 1, 2013, an Information Request was made for disclosure of the police investigative file through the *ATIA* Branch of the RCMP. On April 24, 2014, the Project was informally advised by the RCMP that 47 boxes of police investigative materials had been retained, however, it would take at least two years before any material could be released and would cost thousands of dollars. The RCMP further advised:

- The Project could not receive any information that would make it possible to identify a third party, thus removing witness statements or police notes from the possible disclosure - a key aspect of post-conviction review;
- The time and cost would remain the same whether the Project requested the entirety of the file, or specific materials; and
- The time and cost would remain the same whether the Project requested the material be reproduced and sent to us or if we went into the RCMP offices to review the materials ourselves.

On May 28, 2014, the Information Request was formally denied pursuant to sections 16(1)(a)(i) and 16(1)(c) of *ATIA* which give the RCMP discretion to refuse any requests for information obtained or prepared by the RCMP during lawful investigations pertaining to the detection and suppression of crime, and any information that could reasonably be expected to be injurious to the enforcement of any law in Canada or the conduct of lawful investigations.⁸⁹ In the denial, the RCMP stated "the files are all part of an active investigation in British Columbia and cannot be released at this time. You can re-apply for this information in the future once the investigation is completed." It failed to

⁸⁹ *ATIA*, *supra* note 11, s. 16(1).

acknowledge that A had been convicted for the crimes and had already been incarcerated for over thirty years, nor did it indicate when any “lawful investigation” would be completed.

On March 20, 2020, the Project re-submitted the Information Request and received an initial response on August 31, 2020, advising that the RCMP were undertaking the necessary search of their records. On January 8, 2022, the RCMP provided the Project with two hundred pages of a small portion of the requested material. However, the material relating to the RCMP’s investigation was so heavily redacted that it was of little use. The remainder of the material included newspaper clippings and other publicly available information that was unhelpful in investigating A’s innocence claim. In January 2022, the Project appealed the decision and made additional requests for documents. In November 2022, the RCMP’s Access to Information and Privacy Branch determined that it had met its obligations under the statute and that no more materials would be disclosed.

Case “B”

B is another Project client who experienced significant barriers in attempting to access Disclosure in relation to his second-degree murder conviction. In February 2014, the Project made an initial Information Request for B’s “case management” file to the Correctional Services of Canada (“**CSC**”). In July 2021, 7 years later, the CSC sent confirmation of receipt and inquired whether the Project was still interested in pursuing the Information Request.

The cases of A and B are indicative of the typical experience of Project applicants when attempting to access Disclosure through Information Requests. Currently, 92% of the Project’s open cases have access to Disclosure issues. These bureaucratic barriers have significant impacts on real people, sometimes compounding and lengthening devastating miscarriages of justice.

The Project is a strong proponent of privacy rights. They are fundamental to a free and democratic society. However, when the state withholds information that might support a claim of wrongful conviction, it is our position that it must provide compelling reasons as to why the information should be withheld in the circumstances. To do otherwise brings the administration of justice into disrepute.

THE IMPORTANCE OF POST-CONVICTION DISCLOSURE

To fully understand the barriers that non-disclosure poses for wrongful conviction applicants, it is instructive to review identified wrongful convictions where lack of disclosure played a significant role. The following section explores Commissions of

Inquiry and identified cases of wrongful convictions where lack of disclosure has been a determining factor in a finding of miscarriage of justice.

The Marshall Commission

In December 1989, the Marshall Commission (discussed above) recommended the mandatory disclosure of any exculpatory evidence which raises a doubt about the guilt of a convicted individual, no matter when the evidence comes to the attention of the Crown, and it stressed the need for police compliance.⁹⁰ The Commissioners concluded that had certain evidence, which came to light only after Mr. Marshall's conviction in 1971, been brought to the attention of the Crown counsel responding to the conviction appeal, and through Crown counsel to the defence and the Court of Appeal, a new trial would have been "all but inevitable".⁹¹ This recommendation, along with the *Stinchcombe* case (also discussed above), significantly changed the disclosure practices in criminal cases across the country but not in the post-conviction context.

The Wilson Nepoose Case

Wilson Nepoose was a member of the Samson Cree Nation.⁹² In May 1987 he was convicted of the second-degree murder of Rose Marie Desjarlais. No physical evidence tied Mr. Nepoose to the crime. The conviction relied on the testimony of two women who stated that they witnessed the murder.

In June 1991, the Minister referred the matter back to the Alberta Court of Appeal ("**ABCA**") pursuant to the then-current s. 690 Review Process. In July 1991, the ABCA appointed a Special Commissioner to inquire into the new evidence that was offered in support of Nepoose's exoneration. The key Crown witness had given 11 statements to police investigators over a two-and-a-half-month period. The Commission discovered that the police had failed to disclose four or five statements to the Crown or defence where, in addition to other inconsistencies, the witness spoke of Nepoose "stabbing" the deceased. There was no evidence of any knife or stab wounds on the victim. The Court held that if the statements had been made available, the jury would have concluded that the witness was not credible and "perhaps delusionary."⁹³ Additional evidence that was not disclosed by police severely damaged the credibility of the other key witness at trial. The Court

⁹⁰ Marshall Commission, *supra* note 37.

⁹¹ Marshall Commission, *supra* note 37, Vol. 1 at p. 87.

⁹² *R v. Nepoose*, 1992 ABCA 77 (CanLII).

⁹³ *R v. Nepoose*, *supra* note 92, at para 29.

concluded that the fresh evidence disclosed deficiencies which could constitute a miscarriage of justice or at least a real possibility of a miscarriage of justice.⁹⁴

The Guy Paul Morin Case

On February 7, 1986, Guy Paul Morin was acquitted on a charge of first-degree murder of nine-year old Christine Jessop.⁹⁵ He was found guilty at a retrial in 1992 before being cleared by DNA evidence in 1995.

In 1998, the Kaufman Report on the Guy Paul Morin case concluded that the Morin investigation and prosecution featured “tunnel vision of the most staggering proportions” which ultimately led to inadequate disclosure of key evidence by the Crown. The Kaufman Report recommended the creation of a committee dedicated to reviewing and discussing disclosure issues noting that “disclosure is obviously a critical issue ... related to the issue of miscarriages of justice.”⁹⁶

Mr. Morin received \$1.25 million in compensation and a public apology. In 2020, DNA evidence identified Calvin Hoover as the real killer. Mr. Hoover, who had died in 2015, was a friend and neighbour of the victim’s family.⁹⁷

The Felix Michaud Case

In May 1993, Felix Michaud was convicted of the first-degree murder of Rose Gagné.⁹⁸ The Crown’s key witness was Marco Albert, who testified that he and Mr. Michaud traveled together on the night of the murder for the purpose of robbing Ms. Gagné, that Mr. Michaud had raped and killed Ms. Gagné in her home during the break-in, and that they set fire to the home before departing.

Mr. Michaud appealed and was granted a new trial. Between the first and second trial, Mr. Albert committed suicide. At the second trial, Mr. Michaud was again convicted,

⁹⁴ *Ibid.*, at para 9.

⁹⁵ Ontario, Kaufman Commission, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, (Toronto: Ministry of the Attorney General, 31 March 1998) (Chair: Hon. Fred Kaufman) [“**Kaufman Inquiry**”].

⁹⁶ *Ibid.*

⁹⁷ Yvette Brend, “Sister of Guy Paul Morin ecstatic cold case solved, wishes her father was alive to hear”, *CBC News* (16 October 2020), online: <www.cbc.ca/news/canada/british-columbia/guy-paul-morin-sister-christine-jessop-1.5765192>.

⁹⁸ *Michaud v. the Queen*, [2000] NBJ. No. 75 (QL) (NBCA). See also Deborah Nobes “Free at Last”, *MacLean’s* (9 July 2001), online: <archive.macleans.ca/article/2001/7/9/free-at-last>; CBC News “Judge rules evidence inadmissible, New Brunswick man freed”, *CBC News* (29 May 2001), online: <cbc.ca/news/canada/judge-rules-evidence-inadmissible-new-brunswick-man-freed-1.287113>.

but was granted a new trial after he appealed. Before the third trial was set to begin, Mr. Michaud's counsel requested new disclosure from the Crown and received 2500 documents - ten times the number that had previously been disclosed. The new disclosure included a police report which stated that the police had reviewed transcripts of wiretap evidence that showed inconsistencies with Albert's testimony. Eventually, defence found a tape on which Mr. Albert said that Michaud was innocent and not the kind of man who would murder Ms. Gagne.

Considering this evidence, defence asked the judge to exclude Mr. Albert's testimony because crucial evidence that would have been used in his cross examination had been suppressed. The judge accepted this submission and the Crown's case collapsed. The charges against Mr. Michaud were stayed. The Crown was found to be grossly negligent due to its failure to disclose. Mr. Michaud had been imprisoned for 9 years through the course of his trials and appeals.

The Sophonow Inquiry

In March 1982, Thomas Sophonow was arrested for the murder of Barbara Stoppel in Winnipeg.⁹⁹ Between 1982 and 1986, Mr. Sophonow underwent three trials, maintaining an alibi defence throughout. The first trial was declared a mistrial. He successfully appealed his second and third trials on the basis that the trial judge had not fairly and adequately put his defence of alibi to the jury. On his final appeal, the Court found that there were grounds for a new trial but noted that Mr. Sophonow had already spent 45 months in custody and that another new trial would be his fourth, determining that justice would be best served through an acquittal. Post-acquittal, Mr. Sophonow continued to suffer significant social consequences arising from the public perception that he had committed the murder and he continued to work tirelessly to prove his innocence.

The Sophonow Inquiry was established following a re-investigation of Ms. Stoppel's murder. It concluded that Sophonow was not involved. The Inquiry report was released on November 5, 2001. Its investigation had found that several pieces of material evidence had not been disclosed to defence at the time of trial including police statements undermining the credibility of jailhouse informants, comments made by police to Crown counsel regarding physical evidence, multiple witness statements supporting Mr. Sophonow's alibi, and information regarding an unfair photo line-up. The Crown had failed

⁹⁹ Manitoba, Commission of Inquiry Regarding Thomas Sophonow, *The Inquiry Regarding Thomas Sophonow: the investigation, prosecution and consideration of entitlement to compensation*, (Winnipeg: Manitoba Justice, 5 November 2001) (Commissioner: Hon. Peter Cory) [**Sophonow Inquiry**]. See also *R v. Sophonow*, 1986 CanLII 104 (MB CA); *R v. Sophonow*, [1984] 2 SCR 524 [**Sophonow**].

in its disclosure obligations. The Sophonow Inquiry ultimately found that Mr. Sophonow was owed substantial compensation for his wrongful imprisonment.

The Stephen Truscott Case

On September 30, 1959, 14-year-old Stephen Truscott was found guilty of murdering of his classmate, Lynne Harper.¹⁰⁰ Mr. Truscott was tried as an adult and was sentenced to death prior to his sentence being commuted to life imprisonment. On June 9, 1959, Mr. Truscott gave Ms. Harper a ride on his bike. She was reported missing later that evening, and her body was found in a nearby wooded area. At trial, the Crown theorized that Mr. Truscott had murdered Ms. Harper between 7:00 and 7:45 p.m. Ms. Harper's stomach contents at autopsy led the coroner to opine that she had died prior to 8 p.m.

Unsuccessful on appeal, Mr. Truscott was incarcerated for over a decade before being released on parole. In 1997, Innocence Canada became involved with Mr. Truscott's case. Four years later, it submitted a s. 690 (now s.696.1) application to the Minister. In its investigation, the (retired) Justice Fred Kaufman, acting as an agent for the Minister, discovered that the Crown failed to disclose:

1. The coroner's unofficial versions of the victim's autopsy report at trial which provided a different estimated time of death that was irreconcilable with the Crown's theory, and matched Mr. Truscott's unchallenged alibi.
2. That the coroner had submitted a new report in 1966, seven years after Truscott had been convicted, changing his time of death estimate after an "agonizing reappraisal" of his initial report. This new report had not been disclosed at the time or in the years following.

The Minister referred the case back to the Ontario Court of Appeal. The Court held that the ambivalent nature of the coroner's opinions left his evidence "reasonably open to the allegation that his opinion shifted to coincide with the Crown's case against the appellant" and would have allowed the defence to challenge evidence on the state of the victim's body. Most importantly, the change in time of death meant that Mr. Truscott could not have been her killer. The Court held that this fresh evidence could reasonably have been expected to affect the jury's verdict and that, as a result, Mr. Truscott's conviction was a clear miscarriage of justice. Mr. Truscott spent close to 50 years seeking justice before he was acquitted by the Ontario Court of Appeal in 2007.

¹⁰⁰ *Truscott (Re)*, 2007 ONCA 575, 225 CCC (3d) 321 at paras 231-33.

The Driskell Inquiry

On October 22, 1990, James Driskell was arrested and charged with the first-degree murder of his friend Perry Harder.¹⁰¹ He was convicted on June 14, 1991, and given the mandatory sentence of life imprisonment without eligibility of parole for 25 years. Mr. Driskell spent over thirteen years in prison before being released on bail in November 2003, pending a Ministerial Review of his convictions. The Commission eventually determined that a series of continuing failures by the Winnipeg Police Services and Crown counsel had resulted in significant exculpatory evidence not being disclosed to Mr. Driskell before, during, and after his trial including that two key unsavoury witnesses had been paid significant amounts of money to testify against Mr. Driskell and received witness protection services. In 2007, the Driskell Inquiry concluded that the Crown and police had failed in their disclosure obligations numerous times. LeSage particularly noted that the failure of Crown counsel to disclose those materials “fell below then existing professional standards expected of lawyers and agents of the Attorney General.” The inquiry also noted that the “new matters of significance” requirement of the 696 Review Process creates a “catch-22” situation for the defence:

*Driskell could not launch an application until he had sufficient disclosure to satisfy the Department of Justice standard for launching a section 696.2 review. However, Winnipeg Police Services would not make disclosure for the purposes of a section 696.2 review until Driskell’s application was made.*¹⁰²

Commissioner LeSage ultimately recommended that Manitoba Justice incorporate a procedure by which disclosure is obtained from the police and provided to the accused or counsel in the post-conviction setting.¹⁰³

The Erin Walsh Case

In August 1975, Melvin Peters was shot while in the back seat of Erin Walsh’s car.¹⁰⁴ Mr. Walsh was convicted of the second-degree murder of Peters. Mr. Walsh maintained his innocence throughout the 29 years between his conviction and the 2008 New Brunswick Court of Appeal (NBCA) decision which acquitted him.

In 2003, while still imprisoned, with the help of the Innocence Canada, Mr. Walsh gained access to Crown and police records regarding his case. The records contained

¹⁰¹ Driskell Inquiry, *supra* note 53.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, at p. 118.

¹⁰⁴ *Walsh (Re)*, 2008 NBCA 33 (CanLII).

substantial and significant information which had not been previously disclosed to him, including multiple eyewitness statements which corroborated Walsh's version of events. The records also contained police reports of jailhouse conversations between two other individuals who were in Mr. Walsh's car when Peters was shot, which tended to exculpate Walsh and indicated that the two individuals were concocting a story designed to exculpate themselves and inculpate Walsh.

Walsh applied to the Minister of Justice for a review of his conviction. The ensuing report stated that a miscarriage of justice had occurred, and the matter was referred to the NBCA. In 2006 Mr. Walsh was diagnosed with terminal cancer, and the NBCA proceedings were accordingly accelerated by way of the appeal being conducted by reference. On appeal, Crown agreed that the fresh evidence should be admitted and that a miscarriage of justice had occurred but argued for a stay of proceedings instead of the acquittal sought by Walsh.

The Court found that, considering the now "complete record", including the fresh evidence, "no reasonable jury properly instructed could convict Mr. Walsh". The Court quashed the conviction and acquitted Mr. Walsh.

The Ivan Henry Case

In 1983, Ivan Henry was convicted on ten counts of sexual assault. Identification was the "only issue" at trial.¹⁰⁵ Henry was self-represented at trial and Crown failed to disclose significant information to him, including complainant statements and forensic and police reports, which pertained to the issue of identification.

In 2002, police began re-investigating a series of sexual assaults which occurred while Mr. Henry was incarcerated. The investigation was called Project Smallman. Senior prosecutors became aware of similarities between the offences at issue in Project Smallman and the offences for which Mr. Henry was convicted and brought their concerns to the Ministry of the Attorney General. This led to the production of a report which recommended that Crown disclose all information regarding Project Smallman to Mr. Henry as well as all previously undisclosed information with respect to the offences for which he was convicted. Crown followed these recommendations and Mr. Henry, now with the assistance of counsel and the newly disclosed evidence, applied to re-open his appeal. In 2009, the BCCA ordered that Mr. Henry's appeal be reopened and heard on the merits (the first time an appeal on the merits would be heard in this case). In 2010, the BCCA heard the appeal and acquitted Mr. Henry on all counts. The Court found that

¹⁰⁵ *Henry*, *supra* note 69. See: *R v. Henry*, 2009 BCCA 12 (CanLII) and *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 (CanLII), [2015] 2 SCR 214 ["**Ivan Henry Cases**"].

the evidence was incapable of proving the element of identification on any of the ten counts and that the verdicts were unreasonable.

Following his acquittal, Mr. Henry successfully sued the Attorney General of BC for damages arising from charter violations relating to the non-disclosure that occurred in the context of his wrongful conviction. The Crown appealed the damages order to the Supreme Court of Canada. The SCC ruled that, even absent malice, the Crown is liable for damages arising from wrongful non-disclosure of material information, and that Mr. Henry was therefore entitled to seek *Charter* damages against the Crown. In 2016, the BCSC awarded Mr. Henry \$8,000,000 for his wrongful conviction.

The Andre Tremblay Case

In February 1984, Andre Tremblay was convicted of first-degree murder.¹⁰⁶ Mr. Tremblay's appeals were dismissed at both the Quebec Court of Appeal ("QCCA") and the Supreme Court of Canada.

In 1992, Mr. Tremblay applied for Ministerial Review of his conviction pursuant to section 690 of the *Criminal Code*, which has since been reformed. The basis for Mr. Tremblay's application was the recantation of statements by a jailhouse informant who had testified that Tremblay had confessed to him. Mr. Tremblay was granted parole in 2004. He had been imprisoned for 20 years.

In 2005, thirteen years after Mr. Tremblay's Ministerial Review application was submitted, the Minister of Justice referred this matter to the QCCA. The Minister had found that Mr. Tremblay and his counsel were never told that the jailhouse informant had received certain advantages in exchange for his trial testimony, and that the evidence of recantation and non-disclosure provided a reasonable basis to conclude that a miscarriage of justice likely occurred in his case.

The QCCA acquitted Mr. Tremblay in 2010 and ordered a new trial on a reduced charge of manslaughter. On the second trial, the Crown called no evidence and Mr. Tremblay was acquitted.

¹⁰⁶ *Tremblay c. R.*, 2010 QCCA 1054 (CanLII); *Tremblay c. Attorney General of Quebec*, 2018 QCCS 2818 (CanLII). See: Minister of Justice, *Minister of Justice Finds Miscarriage of Justice: Refers Murder Case to Quebec Court of Appeal* (Ottawa: Department of Justice Canada, 12 July 2005).

The Romeo Phillion Case

In November 1972, Romeo Phillion was convicted of the 1967 murder of Roy Leopold.¹⁰⁷ His appeals were unsuccessful.

Mr. Leopold's wife saw the assailant and her description to police led to Phillion and his twin brother being placed in a photo and live line-up. However, Mr. Leopold's wife was unable to confidently identify Mr. Phillion and he was released as police also believed he had an alibi. After an unrelated arrest in 1972, Mr. Phillion confessed to the murder. At trial, defence raised personality issues of Phillion's which may have prompted him to falsely confess.

In 1998, Mr. Phillion's parole officer provided him an envelope containing police reports that were in his Corrections Canada file. One of these reports contained notes regarding witness statements which appeared to corroborate the alibi that Mr. Phillion had maintained and diminished the credibility of witness testimony that had placed him near the location of the murder on the night it occurred.

In 2003, Mr. Phillion applied for Ministerial Review of his conviction. It was granted, and in 2009 the Ontario Court of Appeal overturned his conviction and ordered a new trial. The Court based its ruling in part on the fact that if the 1968 police report was available at trial, it could reasonably be expected to have changed the result, even set against Mr. Phillion's confession. There was no new trial. The Crown withdrew the charges in 2010. Following the Crown's withdrawal of the charges, Mr. Phillion unsuccessfully attempted through court application to be formally acquitted. Mr. Phillion had been granted parole pending Ministerial Review in 2003. He spent 31 years in prison.

The Glen Assoun Case

In 1993, Mr. Assoun's ex-partner, Brenda Way, was brutally murdered in Dartmouth, Nova Scotia.¹⁰⁸ Three years later, Assoun surrendered himself to police immediately upon learning that a warrant was issued for his arrest. Mr. Assoun was certain that his innocence would be obvious to the officers, telling his loved ones that he would be back in just a few days. It would be 23 years before Mr. Assoun returned home.

¹⁰⁷ *R v. Phillion*, 2009 ONCA 202 (CanLII).

¹⁰⁸ *Assoun* 2019, *supra* note 28. See: *R v. Assoun*, 1999 CanLII 2819 (NS SC); *R v. Assoun*, 2002 NSCA 50 (CanLII); *R v. Assoun*, 2005 NSCA 140 (CanLII); *R v. Assoun*, 2006 NSCA 47 (CanLII); *R v. Assoun*, 2014 NSSC 419 (CanLII).

Mr. Assoun defended himself during the five-month murder trial, wielding a grade six education against two experienced Crown counsel. Despite no physical evidence tying him to the crime, and an alibi confirmed by three separate witnesses, Mr. Assoun was convicted of second-degree murder on September 17, 1999, and sentenced to life imprisonment with no possibility of parole for 18 and a half years.

On appeal, Mr. Assoun retained a lawyer who, between 2004 and 2006, made direct and specific disclosure requests to the Crown seeking information about a possible alternate suspect in Way's murder, a man named Michael McGray who had recently been exposed as a prolific serial killer in the area.¹⁰⁹ Nothing of use came from these Disclosure requests and ultimately the appeal was dismissed with the SCC declining to hear a further appeal. With all appeals exhausted, Mr. Assoun's appellate lawyer sent his files to Innocence Canada which,¹¹⁰ over the next several years, uncovered new evidence that pointed to McGray as Way's murderer, thus fulfilling the "matters of new significance" requirement of a 696.1 application. It applied for Ministerial Review of Mr. Assoun's conviction.

In August 2014, Mr. Assoun was released from custody on stringent bail conditions while the CCRG investigated his claim. Over their multi-year investigation, the CCRG discovered that three years after Mr. Assoun's conviction, Constable Dave Moore, a criminal profiling specialist had identified several alternate suspects in Ms. Way's murder. McGray was the prime suspect. At the time of the murder, McGray knew Ms. Way, and lived in her neighborhood.¹¹¹ Internal discussions between the RCMP and Halifax Regional Police indicated that neither institution considered sharing this information with Mr. Assoun, the Crown, or the Courts, despite intense pressure to do so from Cst. Moore.

On February 28, 2019, the Minister of Justice, David Lametti, signed a brief order quashing Mr. Assoun's 1999 conviction and ordered a new trial. The Minister noted that "*there are new matters of significance as well as relevant and reliable information that was not disclosed to Mr. Glen Assoun during his criminal proceedings.*" In March 2019,

¹⁰⁹ Upon his arrest for the murders of a woman and her 11-year-old daughter in 1997, McGray confessed to 16 additional killings. He was convicted of seven and is currently serving life in prison in Nova Scotia. See: Jackson Weaver, "Who is serial killer Michael Wayne McGray?", *CBC News* (12 July 2019), online: <www.cbc.ca/news/canada/nova-scotia/michael-mcgray-serial-killer-brenda-way-glen-assoun-1.5209623>.

¹¹⁰ "Innocence Canada (formerly AIDWYC) is a Canadian, non-profit organization dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit." For more information, See: <www.innocencecanada.com>.

¹¹¹ Blair Rhodes, "N.S. police watchdog to probe RCMP actions in wrongful conviction case", *CBC News* (15 October 15, 2020), online: <<https://www.cbc.ca/news/canada/nova-scotia/sirt-investigation-glen-assoun-wrongful-conviction-1.5763794>>.

Mr. Assoun stood trial for the second time and pled not guilty to Ms. Way's murder. The prosecutor declined to call any evidence, and the judge dismissed the case, acquitting Mr. Assoun.

The Court also ordered the RCMP to explain what had occurred in Mr. Assoun's case. The evidence strongly indicated that the RCMP had deleted and destroyed Cst. Moore's work in uncovering new and significant evidence pointing to Mr. Assoun's innocence. The RCMP strongly denied a cover up.^{112 113}

The Frank Ostrowski Case

In May 1987, Frank Ostrowski was convicted of the murder of Robert Nieman.¹¹⁴ The main evidence against Mr. Ostrowski was the testimony of Matthew Lovelace, to whom Mr. Ostrowski had supplied cocaine for further trafficking. Mr. Lovelace testified that Mr. Ostrowski had told him that he had ordered Mr. Nieman's murder. Mr. Lovelace also testified that he had called police the night before the murder to warn that Mr. Nieman's life was in danger.

A few weeks before Mr. Nieman's murder, Mr. Lovelace was arrested and charged with trafficking. After the murder, an arrangement was made by which Mr. Lovelace would testify against Mr. Ostrowski and in exchange the Crown would drop his charges. This arrangement was never disclosed to Mr. Ostrowski nor to his counsel. This non-disclosure, as well as the non-disclosure of other information related to Mr. Lovelace's call to police and an alternate suspect, was discovered in 2004, through work done by the Association in Defence of the Wrongly Convicted (now Innocence Canada). Mr. Ostrowski subsequently applied for a Ministerial Review of his conviction.

¹¹² Jon Tattrie and Tim Bousquet. "Dead wrong", *CBC News* (29 July 2020), online: <newsinteractives.cbc.ca/longform/glen-assoun-murder-wrongful-conviction>.

¹¹³ On March 8, 2020, an Order in Council endorsed an inquiry to be conducted by the Independent Investigations Office of BC into allegations that the RCMP in Nova Scotia inappropriately destroyed evidence from Mr. Assoun's 1999 wrongful murder conviction. As of December 4, 2023, reports indicated that the BC Independent Investigations Office was unable to proceed with their investigation and a federal inquiry may be required. Mr. Assoun passed away in June 2023. See : Michael MacDonald, "Inquiry could probe police role in Nova Scotia wrongful conviction: justice advocate", *CTV News* (4 Dec 2023), online: <atlantic.ctvnews.ca/inquiry-could-probe-police-role-in-nova-scotia-wrongful-conviction-justice-advocate-1.6673293>.

¹¹⁴ *Ostrowski v. The Queen et al*, 2009 MBQB 327; *R v. Ostrowski*, 2018 MBCA 125.

In 2009, the Court of Queen's Bench of Manitoba granted Mr. Ostrowski bail pending his Ministerial Review. He had been imprisoned for 23 years. The Court found that the new information regarding the Lovelace arrangement was of great significance.

In 2018, the Manitoba Court of Appeal (MBCA) quashed Ostrowski's conviction and entered a judicial stay of any further proceedings. The MBCA stated, "that the failure to disclose ... impaired the accused's ability to make full answer and defence."

The Dean Roberts Case

Dean Christopher Roberts was convicted of the murder of his wife and two children in 1994.¹¹⁵ Beginning in 2009, with the help of the UBC Innocence Project and pro bono counsel, Mr. Roberts sought the release of physical evidence for DNA testing in support of his application to the Minister of Justice for post-conviction review.

The trial judge did not permit Mr. Roberts's initial application on the basis that he found that the scheme set out in Criminal Code section 696.1 for post-appeal conviction review is the appropriate route when seeking disclosure. He concluded that the Minister of Justice may compel the release and testing of such evidence if they find that there may be reason to believe that a miscarriage of justice likely occurred in the case. As such, the trial Court found that the Crown and police had no duty of disclosure to Mr. Roberts directly for the purpose of preparing his ministerial application.

Mr. Roberts appealed, and the BC Court of Appeal overturned the trial Court's decision, finding that the ability to urge the Minister to order DNA testing is not equivalent to a right to have access to the evidence. The BCCA identified the inherent contradiction in the *Criminal Code* scheme – that the Minister is unlikely to order an investigation and seek post-conviction disclosure unless the application identifies new matters of significance, but the applicant may need to investigate – and seek disclosure - to uncover such matters. Without some right to post-conviction disclosure, the applicant is unduly limited in their ability to discharge their right to post-appeal review.

The BCCA found that the preconditions for Ministerial Review were met because Mr. Roberts's appeals had been exhausted. The new DNA testing he sought to perform was not available at the time of his trial and the results may establish new matters of significance. The third question of whether potential results of such testing would be sufficiently material to the Minister's assessment was described as "borderline" by the BCCA, given the body of evidence and conclusions reached in support of Mr. Roberts' conviction but it also considered the compelling interest in permitting Mr. Roberts' to make use of the evidence if it existed. Ultimately, the BCCA allowed Mr. Roberts's appeal and

¹¹⁵ *Roberts*, *supra* note 80.

ordered the release of the evidence to him “to ensure effective access to the Ministerial Review process established by Parliament.”

Most recently, the issue of post-conviction disclosure was highlighted in the 2021 Report, “A Miscarriages of Justice Commission”. It noted that any contemplated Canadian commission investigating claims of miscarriages of justice should have the power to:

- Require all persons to retain, catalogue and where possible copy material that it deems relevant to its investigation. This power would be exercisable at any time.¹¹⁶
- Compel people with relevant information to answer questions under oath¹¹⁷; and
- Obtain relevant material regardless of any claim of legal privilege.¹¹⁸

It also noted “the commission should be deemed an “investigative body” for the purpose of privacy legislation. Privacy law claims should not defeat the ability of the commission to obtain and examine relevant information in a confidential manner.¹¹⁹ This is a laudable recommendation. In the current scheme, as is set out above, individuals maintaining innocence consistently face this barrier. As set out above, relying on privacy legislation to access one’s case files, wrongful conviction claimants receive responses which include highly redacted and vetted materials. The RCMP apply sections of privacy legislation by rote to withhold materials. However, on close read, none of these sections are applicable to situations in which convicted individuals are attempting to gain access to case files.

Each of the Commissions of Inquiry and cases reviewed above found a lack of disclosure as a significant contributing factor to wrongful convictions. This problem is not new; however, the issue has continued to persist for decades causing significant harm to the wrongly convicted. It follows that non-disclosure in other cases has resulted in many wrongful convictions which remain undiscovered. The only way to identify these wrongful convictions is to allow wrongful conviction claimants access to the Crown file and police investigation materials. Immediate and robust statutory changes are required. Other jurisdictions have made such changes and Canada should follow suit.

¹¹⁶ “A Miscarriages of Justice Commission”, <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/report-rapport.html>, at p. 12.

¹¹⁷ *Ibid.*, at p. 13.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

CROSS-JURISDICTIONAL EXAMPLES

Virginia, United States of America

In March 2021, the Governor of Virginia signed a new Act into law that allows public access to government records regarding closed police investigations. This is a substantial expansion of Virginia's Freedom of Information Act.¹²⁰ This was a significant victory for innocence projects in the state which now have access to critical information that could help exonerate the wrongfully convicted.

However, in March 2022, Virginia lawmakers significantly narrowed the scope of the public's access to this information. Citing the need for protection for victims of crime and their families, the amended legislation now allows access to government records on closed police investigations only to (i) victims' immediate families and (ii) lawyers doing post-conviction work. This amendment is a clear recognition by the legislature and senate of the importance of access to these records for post-conviction review work.

United Kingdom's Criminal Case Review Commission ("CCRC")

The CCRC's own experience of reviewing cases demonstrates that the most common underlying feature of unsafe convictions generally... is disclosure failure coupled with failure to pursue lines of enquiry which should have been pursued by investigators and prosecutors, but which were left undone.¹²¹

Prior to the establishment of the CCRC in 1997, the conviction review system in the United Kingdom faced similar challenges to the Canadian 696 Review Process. It was a reactive, political system where the only mechanism to have a case of potential wrongful conviction reviewed was by direct appeal to the Home Secretary or the Secretary of State for Northern Ireland who had the power to refer a case to the Court of Appeal. Only cases that had been tried by indictment were eligible for review. The Home Secretary was only able to review issues raised by the applicant and could not investigate or seek new grounds for appeal. Less than 1% of applications received were referred to the Home Secretary.

A series of high-profile wrongful convictions led to the establishment of a Royal Commission on Criminal Justice in 1991 with a mandate of exploring possible changes in

¹²⁰ Va. Code Ann., sections 2.2-3704, 2.2-3706, 2.2-3706.1, 2.2-3711, 2.2-3714, 19.2-174.1, and 19.2-368.3 (2022).

¹²¹ England, Wales, and Northern Ireland, Criminal Cases Review Commission, *Report on Phase 2 of the CCRC Disclosure Review*, (Birmingham: Ministry of Justice, April 2021) at p. 2.

the wrongful conviction scheme. The recommendations of the Royal Commission ultimately led to the Criminal Appeal Act of 1995 which, in turn, established the CCRC in 1997.

The CCRC was established to “consider allegations of miscarriages of justice, to arrange for their investigation where appropriate, and, where that investigation reveals matters that ought to be considered further by the Courts, to refer the cases concerned to the Court of Appeal”¹²² After an in-depth review of the conviction review process under the Home Secretary revealed a restrictive and reactive approach characterized by the absence of investigative initiative, the CCRC took over the responsibility of conviction review. The CCRC is a completely independent, arms-length body. The role of the Home Secretary in reviewing claims of wrongful conviction was deemed to be incompatible with the constitutional separation of powers between the Courts and the executive branch of government.

The key question the CCRC considers is whether a person is rightly or wrongfully convicted. This consideration is objective, and evidence based. Importantly, the CCRC recognizes that the state should bear the responsibility to facilitate the investigation of wrongful convictions, noting that it is not appropriate nor expedient to leave it up to the convicted person. Accordingly, one of the mandates of the CCRC is to investigate an alleged wrongful conviction based solely upon the application of a convicted person and, it takes a proactive approach to this work.

The CCRC does not require a convicted person to identify grounds on which to challenge their conviction. Instead, it has an obligation, and the statutory ability, to obtain whatever information may be required to undertake a full review of the case in question. This includes obtaining documents and records from the government and those serving in public bodies¹²³ as well as obtaining documents from those not serving in public bodies.¹²⁴ The Commission may also appoint an individual from within the public body in question to act as an investigating officer to carry out the inquiry. There is also a catch-all provision in the Act which gives the Commission the ability to take any steps they consider appropriate to assist them in the exercise of any of their functions, including

¹²² The Runciman Report on the Royal Commission on Criminal Justice was presented to Parliament in 1993. See: Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice*, (London: HMSO, 6 July 1993); David Kyle, “Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission” (2004) 52:4 Drake L Rev 657 at p. 661.

¹²³ *Criminal Appeal Act 1995* (UK), ss. 17–18 [**“Criminal Appeal Act”**].

¹²⁴ *Ibid.*, at s. 18(a).

undertaking, or arranging for others to undertake inquiries, and obtaining or arranging for others to obtain statements, opinions, and reports.¹²⁵

Importantly, the CCRC takes the position that “as a general rule, all material which supports the decision for referral or non-referral together with any further information that may assist the applicant in making his best case will be disclosed.”¹²⁶ There are some exceptions around sensitive materials that may only be disclosed to the appeal Court.¹²⁷ Professional undertakings may also be used in some circumstances in which legal representatives are involved.¹²⁸

Virginia and the UK are two examples of how different post-conviction disclosure regimes can look. However, each has been rightly criticized for a lack of robustness and effectiveness. While important lessons can be gleaned from cross-jurisdictional analysis, the ultimate solution must be implemented based on Canadian reality and the current status of Canadian law. To that end, the next section sets out the Project’s recommendations to reform the current post-conviction disclosure regime.

RECOMMENDATIONS

*However, because it is idle to pretend that things will not go wrong in even the best regulated criminal justice system, there is a question of critical cultural importance. Will whatever mechanism that is adopted to address the cries of those who claim to have been wrongly convicted have at its heart the will to own up to mistakes and learn lessons, or will it strive to preserve the status quo?*¹²⁹

Commissions of Inquiry and individual cases of wrongful conviction have continuously revealed a significant problem with the current post-conviction disclosure regime. Those lessons have been learned at a terrible human cost for the wrongly convicted. The Project urges the Minister of Justice and the criminal justice system to make swift and impactful changes to enshrine pathways for wrongful conviction claimants to gain access to the very information that could set them free. True justice demands no less. To that end, the Project has several recommendations aimed at improving disclosure availability in the post-conviction context:

¹²⁵ *Ibid.*, at s. 21.

¹²⁶ England, Wales, and Northern Ireland, Criminal Cases Review Commission, *Disclosure by the CCRC*, (Birmingham: Ministry of Justice, 15 July 2021) at section 6.3.1.

¹²⁷ *Ibid.*, at s. 11.1.

¹²⁸ England, Wales, and Northern Ireland, Criminal Cases Review Commission, *supra* note 126, at s. 17.1.

¹²⁹ Kyle, *supra* note 122.

1. **Recommendation 1:** Amendments be made to *FOIPPA* and *ATIP* that recognize the unique nature of post-conviction review where miscarriage of justice is being claimed to allow wrongful conviction review organizations with counsel involved to have full access to relevant police investigative files and discipline records.
2. **Recommendation 2:** Where miscarriage of justice is being claimed, and the conviction rested on one or more of the classic hallmarks of wrongful conviction (a designated list could be agreed upon), the CCRG should order full disclosure of the Crown and police investigative files without the requirement that the applicant first identify new matters of significance.
3. **Recommendation 3:** Creation of a new independent accountability or “devil’s advocate” (also referred to as a “contrarian”) position in every police organization where external counsel, separate from those in charge of the prosecution, reviews the master police investigative file in homicide cases for case relevant information before the material is sent to the Crown. The police organization would then be required to attest that it has reviewed all its applicable files and everything relevant to the case has been disclosed.¹³⁰
4. **Recommendation 4:** Whistleblower legislation should be in place where members of police organizations, with statutory protections, can report non-disclosure of significant information to an independent, objective body outside of their institution.
5. **Recommendation 5:** There should be regular nationwide police training on the causes of wrongful conviction using specific Canadian examples involving non-disclosure by the police.
6. **Recommendation 6:** More research should be conducted to determine how current statutory and common-law disclosure obligations are handled by Crown counsel and police organizations across the country. Given the investigative powers of the CCRG, we recommend that the CCRG undertake a comprehensive internal study of all 696.1 Applications to determine the response rate and any problems with the release of information from prosecution and police agencies.

¹³⁰ For further discussion on the role of the “contrarian.” See: Inquiry into Pediatric Forensic Pathology in Ontario, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* by Bruce A MacFarlane, (Toronto: Ontario Ministry of the Attorney General, 2008); Canada, Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, (Ottawa: Public Prosecution Service of Canada, 2018).

7. **Recommendation 7:** Crown counsel organizations should develop a post-conviction disclosure policy focused on the wrongful conviction context that favours full disclosure when counsel is involved in assisting the applicant.
8. **Recommendation 8:** Establishment of an independent entity to review and investigate claims of wrongful conviction. The Project supports recommendations 33-38 of the 2021 report titled “A Miscarriages of Justice Commission” and would add that any recognized wrongful conviction organization or counsel involved in an application to that independent entity would also receive full access to all relevant disclosure.¹³¹

¹³¹ Miscarriage of Justice Commission, *supra* note 44. Please note that Bill C-40, *An Act to amend the Criminal Code, to make consequential amendments to other Acts, and to repeal a regulation (miscarriage of justice reviews)* passed second reading on June 21, 2023, and is currently before committee. If passed, this Bill will be a significant development in making this recommendation a reality.