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WRONGFUL CONVICTIONS IN CANADA

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Wrongful Convictions in Canada
(HillStudies)

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EXECUTIVE SUMMARY

In Canada's criminal justice system, people are sometimes found guilty of crimes that they did not commit. These errors are known as wrongful convictions.

The number of wrongful convictions in Canada is unknown. This is in part because it is very difficult for a person who is wrongfully convicted to establish their innocence, particularly after they have exhausted their right to appeal to higher courts.

Wrongful convictions appear to affect some groups more than others. For example, women, youth and Indigenous people experience various forms of pressure from authority figures to plead guilty. In addition, the process of reviewing a conviction can take several years, making it less useful to people who are serving shorter sentences.

A series of public inquiries conducted over the past several decades have highlighted some of the factors that contribute to wrongful convictions, including racial bias, unreliable witness testimony and tunnel vision. Each inquiry has also produced recommendations for improving the justice system.

One consistent recommendation has been to consider creating an independent body to review wrongful convictions. In 2024, Parliament enacted legislation establishing the Miscarriage of Justice Review Commission, an independent investigative body tasked with reviewing such cases to determine whether a new trial or new appeal is warranted. This function was previously the responsibility of the Minister of Justice.

WRONGFUL CONVICTIONS IN CANADA

1 INTRODUCTION

To ensure its legitimacy, the criminal justice system must be both fair and effective. When it fails to meet these standards, the human cost can be substantial and public confidence can be shaken.

Though presumed to be rare, wrongful convictions are among the most serious forms of failure within the criminal justice system. At its most basic level, a wrongful conviction occurs when an innocent person is found guilty of a crime.

The term "miscarriage of justice" is used to describe cases in which a wrongful conviction has either been established or is likely, based on the available evidence.[1]

Wrongful convictions often remain undetected, making it impossible to determine the precise number of such cases in Canada.[2] Establishing that a wrongful conviction has occurred often requires extraordinary persistence and chance, such as a development in technology that sheds new light on old evidence, or the discovery of new evidence pointing to a different suspect.

Over the past several decades, high-profile wrongful convictions and miscarriages of justice have resulted in the establishment of multiple public inquiries at the provincial level. They include public inquiries into the wrongful convictions of Donald Marshall Jr., Guy Paul Morin and David Milgaard, as well as those related to the flawed practices of Manitoba Crown prosecutor George Dangerfield and of Ontario forensic child pathologist Dr. Charles Smith. Each inquiry produced a series of recommendations for criminal justice reform, which are discussed in the relevant sections below.

A consistent recommendation in the public inquiry reports was that Canada consider replacing the ministerial review system with an independent body that would investigate alleged wrongful convictions.

Following public consultations, the Honourable Harry LaForme and the Honourable Juanita Westmoreland-Traoré submitted a report (the LaForme report) to the federal Minister of Justice in 2021 that recommended the establishment of a commission on miscarriages of justice and outlined the proposed structure, powers and mandate of such a commission. In response, Parliament enacted 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), in December 2024.

This HillStudy discusses the history of wrongful convictions in Canada and the establishment of the Miscarriage of Justice Review Commission.

2 A LOOK AT WRONGFUL CONVICTIONS IN CANADA

Wrongful convictions have likely always existed in Canada's criminal justice system. An early example is the potential wrongful conviction and execution of Patrick Whelan for the 1868 murder of one of the Fathers of Confederation, Thomas D'Arcy McGee.[3]

Canada also has a long history of processes aimed at rectifying wrongful convictions. Beginning in 1892, the federal Minister of Justice had the explicit power to review potential wrongful convictions and order remedies such as a new trial. In 2024, the newly created Miscarriage of Justice Review Commission was entrusted with the responsibilities that the minister exercised previously under the framework.

The commission's composition, powers and mandate were established in light of the critiques of the ministerial review process and the lessons learned from high-profile wrongful convictions in Canada. Below are some of the cases that have received significant scrutiny over the past several decades and that, to this day, remain central to understanding wrongful convictions.

2.1 THE WRONGFUL CONVICTION OF DONALD MARSHALL JR.: THE ROLE OF RACIAL BIAS

In 1971, Donald Marshall Jr. – a 17-year-old Mi'kmaw boy – was wrongfully accused of murder. He was subsequently convicted and incarcerated for more than a decade before his release and exoneration. While several systemic failures contributed to Marshall's wrongful conviction, his story represents a clear and precedent-setting acknowledgement of how racial bias and systemic discrimination contributed to a wrongful conviction.[4]

In 1986, the Government of Nova Scotia appointed a royal commission to investigate the errors that had occurred in Marshall's case (the Marshall Inquiry) and to make recommendations for avoiding similar injustices in the future. The Marshall Inquiry report identified errors at virtually every stage of the process, including the following:

- The responding police officers failed to search the area and question witnesses.
- The investigating officer showed racial bias against Marshall (sharing the view "that Indians were not 'worth' as much as Whites").[5] This bias led the officer to focus disproportionately on evidence that supported his narrow theory of Marshall's guilt.
- The Crown prosecutor failed to interview witnesses who gave contradictory statements and to disclose these inconsistencies to the defence.
- Marshall's defence counsel did not interview any Crown witnesses and failed to ask for disclosure of the Crown's case.

- The officers assigned to the reinvestigation of the case in 1982 improperly pressured Marshall to falsely admit to attempted robbery, and the Court of Appeal used this statement to suggest that Marshall was partly to blame for his wrongful conviction.[6]

Moreover, as noted in the LaForme report:

> Donald Marshall Jr. was disbelieved by a jury in 1971 and by the Nova Scotia Court of Appeal in 1983 when he testified in English. He was only believed when a subsequent commission of inquiry into his wrongful conviction allowed him to testify in his first language – Mi'kmaq.[7]

The Marshall Inquiry report contained 82 recommendations. Many have been adopted, such as the establishment of the Nova Scotia Public Prosecution Service in 1990,[8] a Race Relations Division within the Nova Scotia Human Rights Commission in 1991 (currently Race Relations, Equity and Inclusion),[9] and a tripartite forum in 1997 to resolve outstanding issues – including justice issues – between the Mi'kmaq, the Province of Nova Scotia and the federal government.[10]

Other recommendations have been dealt with indirectly, including those related to Crown disclosure obligations. These issues were largely addressed in the judgment by the Supreme Court of Canada in *R. v. Stinchcombe*,[11] which recognized that the Crown has a broad legal obligation to disclose all relevant information to the defence.

The Marshall Inquiry report also recommended the establishment of an independent review mechanism with investigative powers to review alleged wrongful convictions.[12]

2.2 THE WRONGFUL CONVICTION OF GUY PAUL MORIN: THE ROLE OF TUNNEL VISION

In October 1984, a nine-year-old girl was murdered in Queensville, Ontario. Police quickly focused their investigation on a single neighbour with no criminal record – Guy Paul Morin. They initially did so for no clear reason other than the fact that Morin had been described as a "'weird-type guy' and a clarinet player."[13] This singular focus on Morin was a leading factor in his wrongful conviction for murder. He was acquitted in 1995 after new DNA evidence established his innocence.

In 1996, the Government of Ontario directed that a public inquiry be held to identify the errors that had contributed to Morin's wrongful conviction and to make recommendations.

The report of the Commission on Proceedings Involving Guy Paul Morin (the Kaufman Commission) pointed to several flawed practices that had contributed to Morin's wrongful conviction, such as the misuse of scientific evidence.[14]

Specifically, the hair comparison analysis that the prosecution relied upon was of little value, and these limitations were not adequately or accurately explained during the trial.

More broadly, Morin's case illustrates the problem of tunnel vision. Though tunnel vision was raised as a factor in the Marshall case and many other wrongful convictions, it was a particular focus of the Kaufman Commission. The Kaufman Commission report defines tunnel vision as a "single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received."[15] The singular focus on Morin as a suspect contributed to his wrongful conviction, and may also have hampered the search for the real murderer, who remained unidentified until 2020.[16] Tunnel vision was so extreme in this case that some of the people involved in the investigation and prosecution continued to believe that Morin was guilty even after being presented with DNA evidence establishing his innocence.[17]

The Kaufman Commission's 119 recommendations included requiring that juries be provided with better explanations of the limitations of forensic evidence, and (in an echo of the Marshall Inquiry a decade earlier) studying the possible establishment of an independent criminal case review board to examine wrongful convictions. The report also emphasized the need for a shift in police culture to avoid systemic problems such as tunnel vision. While acknowledging that "techniques and thought processes are, at times, deeply ingrained and difficult to change,"[18] the report recommended an introspective examination of police culture and further training for police and Crown counsel on the identification and avoidance of tunnel vision.

2.3 THE WRONGFUL CONVICTION OF DAVID MILGAARD: THE ROLE OF YOUTH VULNERABILITY

In January 1969, 16-year-old David Milgaard set out to travel from Regina to Vancouver with a group of young people. Passing through Saskatoon to pick up a friend, Milgaard stopped within blocks of where a woman was sexually assaulted and murdered. Milgaard was charged with the murder, largely based on conflicting testimony from his friends, who ultimately changed their stories to match the police theory of the case. The inspector who took these incriminating statements failed to prepare a report, keep notes, produce polygraph charts or provide a list of the questions that were put to the witnesses. Milgaard was wrongfully convicted and incarcerated for almost 23 years before being released in April 1992.

Milgaard's path to exoneration was long and difficult. It only began to gain traction in 1991 when his lawyer became aware of a new suspect in the case and one of the original witnesses recanted his testimony.[19] Amid a media campaign led by Milgaard's mother, the Minister of Justice referred the case to the Supreme Court of Canada for an opinion. The Court noted that a stay of proceedings might be appropriate,

though that decision rested with the Attorney General for Saskatchewan. The Court advised the minister to quash Milgaard's conviction, order a new trial and consider granting a conditional pardon if a new sentence was imposed.[20] Milgaard was released from custody after the Crown attorney entered a stay of proceedings.

Following the stay of proceedings, Milgaard was free but not yet fully exonerated. Five years later, in 1997, DNA evidence matched with the new suspect in the case, resulting in an official apology from the Government of Saskatchewan.[21] In 2004, the Government of Saskatchewan formally acknowledged that Milgaard was factually innocent. Milgaard received $10 million in negotiated compensation and a public inquiry was held.[22]

The Commission of Inquiry into the Wrongful Conviction of David Milgaard (the Milgaard Inquiry) identified several problems with the tactics used by police and the prosecution, including the exertion of pressure on vulnerable young people in a way that led to unreliable and misleading evidence against Milgaard. The report emphasized that "[y]oung witnesses and young accused should be handled with great care. An extra person should be present when taking a statement from a young person, and video or audio recording is needed."[23]

In addition to problematic questioning and the possibility that witnesses were induced to lie, the report indicated that Milgaard's young age also made him vulnerable to the effects of bias. It noted that societal bias against young people – and "hippies" in particular – at the time of the investigation and trial created a "real possibility that [Milgaard] would be viewed as a degenerate," including by the jury.[24] This bias may have contributed to Milgaard's wrongful conviction.

Finally, the Milgaard Inquiry added to the calls to replace the ministerial review system with an independent conviction review agency, noting that if such an agency had been in place to proactively identify wrongful convictions, Milgaard's wrongful conviction may have been recognized sooner. Such an agency could help to ensure that the review of convictions is not only factually independent of political considerations but also seen to be independent by the general public, convicted individuals and other key stakeholders.

2.4 THE GEORGE DANGERFIELD CASES: THE ROLE OF PROSECUTORIAL ETHICS AND JAILHOUSE INFORMANTS

Several high-profile wrongful convictions have been linked to the flawed practices of former Manitoba Crown Attorney George Dangerfield, including the wrongful convictions of Thomas Sophonow, James Driskell, Kyle Unger and Frank Ostrowski. Although Dangerfield was the common thread among these cases, his flawed practices serve as an example of broader issues within the criminal justice system.

The Sophonow and Driskell cases led to two separate public inquiries: the Sophonow Inquiry (launched in 2000) and the Driskell Inquiry (launched in 2005). Each implicated Dangerfield in practices that contributed to wrongful convictions and highlighted the importance of prosecutorial ethics. The Driskell Inquiry specifically found that the conduct of Crown counsel in the case – including Dangerfield – "fell below then existing professional standards."[25] These breaches were primarily related to the non-disclosure of evidence.

One particularly concerning practice that was identified during these inquiries was Dangerfield's use of jailhouse informants. Jailhouse informants are people awaiting trial or sentencing who testify against another accused person, often in exchange for leniency in their own case. While jailhouse informants may in some cases serve a legitimate purpose, their testimony often lacks credibility due to possible incentives to lie. These concerns were amplified by the fact that Dangerfield often did not disclose to the defence that he had made these types of deals with witnesses.

In Sophonow's case, 11 jailhouse informants volunteered to provide testimony against him, and his defence counsel was not told of their credibility issues.[26] The Sophonow Inquiry report emphasized the dangers presented by these types of witnesses, stating:

> They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.[27]

The report recommended that the use of jailhouse informants be strictly limited and proposed that, as a general rule, "jailhouse informants should be prohibited from testifying."[28] Since the Sophonow Inquiry, several provinces have adopted new policies on the use of jailhouse informants that have significantly diminished their role in Canada's criminal justice system.[29]

2.5 DR. CHARLES SMITH: THE ROLE OF EXPERT WITNESSES

Dr. Charles Smith worked as a pediatric pathologist at the Hospital for Sick Children in Toronto for more than two decades. Despite having no formal training in forensic pathology, he was recognized as a leading expert in that field in Ontario in the 1980s and 1990s, and was involved in more than 40 autopsies of children whose deaths were considered suspicious.[30] Dr. Smith made serious errors as an expert witness that contributed to several wrongful accusations and convictions, often against people grieving the loss of a child in their family.

Many of these serious errors were identified during a public inquiry ordered by the Government of Ontario. According to Dr. Smith, he never received any formal instruction on the role of an expert witness – a role that requires objectivity and impartiality.[31] Perhaps most fundamentally, Dr. Smith failed to understand that his role as an expert witness was not to simply support the Crown and "make a case look good."[32] This misunderstanding of his role contributed to other significant errors, including overstating his knowledge, using language that was unscientific and lacking in candour, and making "false and misleading statements to the court."[33]

Dr. Smith's pattern of misidentifying accidental child deaths as non-accidental – his "think dirty" approach[34] – called into question many convictions that arose from suspected shaken baby syndrome or pediatric head injuries that turned out to be the result of natural or accidental causes.[35] In many of these cases, Dr. Smith's flawed conclusions pressured innocent people to accept a plea agreement in order to avoid a more serious sentence or out of fear that they would lose custody of their other children.[36] Several of these potential wrongful convictions have now been overturned or set aside, including the cases of William Mullins-Johnson, Tammy Marquardt, Dinesh Kumar, Brenda Waudby and Maria Shepherd.[37]

The example of Dr. Smith illustrates many of the risks associated with expert evidence, including that purported expertise can be difficult for non-experts to challenge, or even to understand. The public inquiry emphasized the importance of expert witnesses understanding their role in the criminal justice system. In particular, in order to reduce the risk of wrongful convictions, expert witnesses need to avoid advocating for one side, and must ensure that their evidence is understandable, reasonable, balanced and not speculative.[38] The inquiry also led to significant changes to the practice and oversight of forensic pathology in Ontario.

3 THE LAFORME REPORT: TOWARD A CRIMINAL CASE REVIEW COMMISSION

In theory, when an innocent person is accused of a crime, there should be insufficient evidence to prove their guilt beyond a reasonable doubt. However, as the cases discussed above demonstrate, there are exceptions to this assumption, including cases in which innocent people are pressured into pleading guilty.

For these reasons, after all other avenues for judicial review and appeal have been exhausted, a person who alleges that they have been wrongfully convicted has been able to apply to the federal Minister of Justice to have their conviction reviewed.

In *Reference re Milgaard (Can.)*, the Supreme Court of Canada suggested that assessing whether a miscarriage of justice has occurred requires re-examining the judicial record as well as any new evidence that is relevant to the issue of guilt that "is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict."[39]

Longstanding criticisms of ministerial review as the final recourse for alleged wrongful convictions led to a 2021 report (the LaForme report) by two retired judges, which was commissioned by the federal Minister of Justice. The LaForme report was prepared following consultations with stakeholders and wrongfully convicted individuals – including David Milgaard, Tammy Marquardt, Maria Shepherd and Dinesh Kumar – as well as representatives from the existing miscarriage of justice commissions in England, Scotland, Norway, North Carolina and New Zealand that served as potential models for a Canadian commission.

The LaForme report's 51 recommendations were anchored by three fundamental policy choices: that the Miscarriage of Justice Review Commission must be proactive and systemic; that it must be adequately funded and as independent from government as possible; and that it should be concerned with all miscarriages of justice, not just cases in which factual innocence can be established.[40]

The LaForme report addressed longstanding concerns about the lack of access to justice in wrongful conviction cases, failures to alleviate disproportionate impacts on certain groups, and barriers to compensation. These concerns were central to the context for the Miscarriage of Justice Review Commission's creation and will remain critical to evaluating its effectiveness over time.

3.1 ACCESS TO JUSTICE

For wrongfully convicted individuals, there are both practical and structural barriers to obtaining a conviction review.

For example, poverty can constitute a barrier to accessing adequate counsel, which can increase the likelihood of a wrongful conviction while decreasing the likelihood of obtaining a remedy for it. Once an individual is incarcerated, this financial disadvantage is unlikely to be alleviated, since a federally incarcerated individual can earn a maximum of $6.90 per day if employed.[41]

At the structural level, critics argued that under the ministerial review system, the bar was set too high by requiring applicants to provide new and significant information establishing that a wrongful conviction "likely occurred."[42] The LaForme report recommended that the standard for referring a case back to the courts be lowered to whether a miscarriage of justice *may have* occurred, noting that this

> should help ensure that the [Miscarriage of Justice Review Commission], unlike the Minister, does not have a risk averse practice of only referring cases that are almost always overturned by appellate courts or not prosecuted.[43]

This echoed concerns raised in the Milgaard Inquiry report about the limitations of such decisions being made by an elected politician.[44]

The LaForme report envisioned a commission with a broad mandate to both correct and prevent wrongful convictions, arguing that it should be empowered to reach out to potential applicants and provide various forms of support.[45]

3.2 DISPROPORTIONATE IMPACTS

Although the nature of wrongful convictions makes them inherently difficult to measure, many experts contend that particular groups may be overrepresented among the wrongfully convicted or may be less likely to have their cases reviewed. These groups include Indigenous people, racialized Canadians, women, youth and people with disabilities. Individuals who belong to more than one of these groups may face additional or compounding challenges.

Highlighting the likelihood of inequality in this respect, the LaForme report noted that

> [t]he 20 referrals made by the Minister since 2002 have all been men. Only one remedy (William Mullins-Johnson) was provided to an Indigenous man and one (Rodney Cain) was received by a Black man.[46]

These figures contrast starkly with the fact that Indigenous individuals account for about 28% of all federally sentenced people, despite representing only about 5% of the adult population in Canada, while Black individuals represent approximately 9.2% of the federally incarcerated population, despite representing only about 3.5% of the Canadian population.[47]

Vulnerability to wrongful conviction arises from several factors. Some groups are more likely to be wrongfully convicted for the same reasons that they are overrepresented throughout the criminal justice system. For example, the Public Prosecution Service of Canada acknowledges that Indigenous people "are more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned."[48]

The reasons for this overrepresentation are complex, but include "[i]nter-generational trauma, systemic racism and discrimination."[49] Some of the same factors that lead to overrepresentation in the justice system in general also contribute to wrongful convictions in particular. These factors include "language and translation difficulties, inadequate and insensitive defence representation, pressures to plead guilty and racist stereotypes that associate [Indigenous] people with crime."[50] This was illustrated by the case of Donald Marshall Jr. discussed above.

Aspects of the criminal justice system that create pressures to plead guilty may have greater effects on certain groups, including Indigenous people, women, youth and people with disabilities. For example, some scholars note that police sometimes use "a mother's sense of responsibility for the welfare of her children to elicit confessions to criminal acts," such as in cases where mothers plead guilty in order to avoid a custodial sentence that would separate them from their children.[51] Illustrating this vulnerability, Maria Shepherd, who was wrongfully convicted of killing her daughter, explained why she pleaded guilty to a crime she did not commit, stating:

> I was also pregnant at the time. I had to consider keeping my family together. And the only way to do that when offered a shorter sentence with a false guilty plea would be the only way that I could keep my family together and I'll still hopefully deliver my child out of custody…
>
> So the crown had offered a guilty plea earlier to the trial phase, and I would receive a sentence of two years less a day with three years of probation and in a minimum security prison where I would be able to touch my children during the visits versus five years at the Kingston Penitentiary. And I certainly could not be that far away from my children or my family. It was just not an option for me. I needed to be close to them.[52]

Similarly, young people are considered to be more susceptible to pressure from authority figures to waive their rights or to accept a guilty plea.[53] This was made very clear in a 2013 report that identified the problem of "inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas."[54]

Moreover, false guilty pleas tend to lead to relatively short sentences and can reduce the chance of exoneration for wrongfully convicted individuals. As previously noted, the amount of time required to carry out the conviction review process can render it less useful for people serving shorter sentences.

In addition, the focus of the conviction review process on new and significant evidence – such as evidence pointing to a different suspect – has often placed the emphasis on demonstrable factual innocence and thus excluded many people already disproportionately affected by wrongful conviction. This focus tends to exclude cases in which an available defence was denied or a breach of constitutional rights within the investigative process was not remedied. For example, someone who kills an abusive partner may be pressured into pleading guilty to manslaughter rather than going to trial for murder and pleading self-defence. Legal scholars Debra Parkes and Emma Cunliffe suggest that these types of wrongful convictions disproportionately affect women, and Indigenous women in particular.[55]

The LaForme report noted that the ministerial review system "failed to provide remedies for women, Indigenous or Black people in the same proportion as they are represented in Canada's prisons," arguing that the Miscarriage of Justice Review Commission should be proactive in reaching out to such applicants, that it should have jurisdiction to do systemic reform work related to the prevention of miscarriages of justices, that it be required to report demographic data, and that there should be at least one Indigenous and one Black commissioner.[56]

3.3 BARRIERS TO COMPENSATION

Under international law, wrongfully convicted individuals are entitled to compensation in certain circumstances. Article 14(6) of the *International Covenant on Civil and Political Rights* – to which Canada is a party – provides for the following:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[57]

Canada currently has no legislative provisions implementing this obligation to provide compensation. Instead, it relies on the 1988 federal–provincial guidelines on compensation for wrongfully convicted and imprisoned persons. Under these guidelines, wrongfully convicted individuals are eligible for compensation only if they meet certain conditions, including that they were actually convicted and imprisoned and that there is a finding that they "did not commit the offence."[58]

These prerequisites for eligibility for compensation have been criticized for presenting an unduly high barrier to compensation, since courts are responsible for determining whether an accused person is "guilty" or "not guilty" in law, and do not normally make findings of factual innocence. Individuals who have been acquitted or whose charges have been withdrawn or stayed are ineligible for compensation under this framework.

The Milgaard Inquiry report criticized this high standard for compensation, arguing that proof of factual innocence should not be an essential condition for compensation and that compensation should be available for a broader range of official wrongdoing, including "egregious error leading to wrongful conviction."[59] The report argued that the issue of compensation should remain a question for governments to decide, but that in some cases compensation should be available even to people who are not factually innocent – for example, if there have been obvious breaches of proper standards by the police, the prosecution, or the courts.[60]

Similarly, the LaForme report recommended that there should be a separate legislative scheme for compensation that moves beyond the 1988 guidelines, arguing that compensation should not require proof of factual innocence, in part because of the difficulty of establishing factual innocence in non-DNA cases.[61]

4 MISCARRIAGE OF JUSTICE REVIEW COMMISSION

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), was enacted in December 2024. It establishes an independent commission to review and investigate alleged miscarriages of justice and, where appropriate, order a new trial or refer cases to a court of appeal.[62] The Act replaces the previous ministerial review system with a new process administered by the Miscarriage of Justice Review Commission (the commission).

The commission consists of a chief commissioner and four to eight additional commissioners. When making recommendations for commissioner appointments, the Minister of Justice is required to "take into account considerations such as gender equality and the overrepresentation of certain groups in the criminal justice system, including Indigenous peoples and Black persons."[63]

Upon receiving an application that alleges a wrongful conviction, the commission may conduct an investigation if it has "reasonable grounds to believe that a miscarriage of justice may have occurred or considers that it is in the interests of justice to do so."[64] Based on factors such as the length of time that has passed and the availability of new evidence, the commission may consider receiving applications in cases that were never appealed, unlike under the previous system.

Following its investigation, if the commission "has reasonable grounds to conclude that a miscarriage of justice may have occurred and considers that it is in the interests of justice to do so," it must direct a new trial or new hearing, or refer the matter to the appropriate court of appeal.[65] This lowers the "likely occurred" threshold required under the previous system.

The commission is required to take into account several factors when deciding whether to grant a remedy, including any new evidence that was not considered by the courts, and "the distinct challenges that applicants who belong to certain populations face in obtaining a remedy for a miscarriage of justice, with particular attention to the circumstances of Indigenous or Black applicants."[66] Unlike under the previous system, the commission has the explicit power to grant a remedy even if the evidence does not positively establish the person's innocence.

In addition to reviewing applications on the grounds of miscarriage of justice, the commission is empowered to make recommendations to relevant public authorities on systemic issues that could lead to wrongful convictions.

The commission also has the power to provide supports to applicants in need. This includes directing them to and helping them access community services; supplying translation and interpretation services; assisting them with necessities such as food and housing; and, if they do not have the means, helping them obtain legal assistance in relation to their application.

The commission must submit an annual report to the Minister of Justice at the end of each fiscal year, who then tables it in Parliament. The report must include

> statistics on applicants that, to the extent possible, are disaggregated by gender identity, age, race, ethnic origin, language, disability, income and any other identity factor that is considered in the course of a gender-based analysis.[67]

4.1 OUTSTANDING CONCERNS

In its 2024 report on Bill C-40, the Standing Senate Committee on Legal and Constitutional Affairs made several concluding observations based on the expert testimony that it received. The committee emphasized the importance of redressing systemic inequalities, particularly for Indigenous women. It urged the current and future governments to ensure that there is always representation on the commission of groups that are overrepresented in the justice system (including Indigenous Peoples and Black people), that some commissioners be fluent in both official languages, and that Indigenous languages be accommodated. It recommended two future changes to the commission: expanding its scope of review to include sentencing and parole decisions; and removing the possibility of reappointing commissioners.[68]

Finally, as previously noted, the LaForme report called for separate legislation relating to compensation for wrongful convictions. Compensation was not addressed in Bill C-40.

5 CONCLUSION

Wrongful convictions are profoundly harmful to the individuals, families and communities affected by them. When they occur, wrongful convictions can also undermine confidence in the justice system more broadly. Canada's Miscarriage of Justice Review Commission was created in response to decades of reports and recommendations highlighting the importance of an independent investigative body to address such cases. However, because the number of unidentified wrongful

convictions is unknowable, measuring the success of this new body could prove challenging. Further proposals to prevent, detect and remedy wrongful convictions will likely remain a subject of academic and political discussion.

NOTES

1. Definitions of "wrongful conviction" and "miscarriage of justice" vary. Arguably, wrongful convictions include cases in which the convicted person is not factually innocent but procedural or evidentiary issues led to an improper finding of guilt or an improper sentence. For more information on these distinctions, see Commission of Inquiry into the Wrongful Conviction of David Milgaard, "Chapter 6: Canada's Conviction Review Process," *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, Vol. 1, 2008, pp. 365–366.
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