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# On Pardons and Miscarriages of Justice: Extracting and Dissecting Institutional Bias from the Conviction Review Framework in Canada

# ON PARDONS AND MISCARRIAGES OF JUSTICE: EXTRACTING AND DISSECTING INSTITUTIONAL BIAS FROM THE CONVICTION REVIEW FRAMEWORK IN CANADA

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> "The same processes which lead to miscarriages of justice, and reforms, also set the conditions for further crisis and reform; *plus ça change, plus c'est la même chose*"[1]

The infamous legal battles of Stephen Truscott, David Milgaard, and Ivan Henry edified members of the criminal bar across Canada about the frailties of our criminal justice system. The stories of the men and women whose fate resulted in a 'miscarriage of justice'[2] prompted the many reforms that ensued, reformulating evidence-gathering methodologies and the rules surrounding the admissibility of evidence. Several inquiries and

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[1] The italicized French statement translates to "the more things change, the more they stay the same". This statement is originally attributed to Alphonse Kerr, the nineteenth century novelist and journalist: Richard Nobles and David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000) at 1.

[2] A miscarriage of justice is a grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite a lack of evidence on an essential element of the crime: *Black's Law Dictionary*, 9th ed, *sub verbo* "miscarriage of justice".

commissions later, Canada is ostensibly better equipped to detect wrongful convictions than it was some twenty years ago. The question is whether it adequately remedies them. Having regard for the challenges associated with remedying a wrongful conviction, whether by acquisition of a pardon, monetary compensation from the state,[3] or a declaration of factual innocence, it is worth probing whether the structural remedies provided by the state through the conviction review process and the record suspension program are fairly engineered.

What follows is a discursive critique of the conviction review process in section 696 of the *Criminal Code*[4] as a "structural remedy"[5] in an attempt to reveal the potential for bias in the institutional framework through which conviction review applications are vetted. The paper scrutinizes the relationship between the Department of Justice (DOJ) and the Criminal Convictions Review Group (CCRG), arguing that it engenders serious concerns for the life, liberty, and security of the person where an enduring wrongful conviction has not been remedied by the state.

The argument proceeds in three parts. Part I offers a cursory glance of the permanent nature of a criminal record and the inadequate effects of a "record suspension", formerly known as a pardon. Part II describes the evolution of the institutional bias argument previously advanced by scholars and elected/non-elected officials since early reforms to the 696 regime in the 1990s. Part III lays the foundation for a legal argument substantiating

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3 The author is mindful of the Supreme Court's decision in *Henry v British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 SCR 213, in which the Court affirmed and framed the test for abuse of process claims alleging Crown liability for the sake of monetary redress. This paper was drafted before the Court rendered its decision, and focuses on a distinct set of structural, rather than common law remedies for wrongful convictions. As such, the author deliberately omits analysis on the Henry decision, notwithstanding its magnitude for those subjected to wrongful convictions.

4 RSC 1985, c C-46, s 696 [*Code*].

5 This term is used to denote remedies made available by the government to rectify wrongful convictions. While the author recognizes that the hierarchical appeal process may also be construed as a structural remedy, the jurisprudence on appellate standards of review is complex and beyond the scope of this paper. As such, it will not be addressed.

the concern for institutional bias and a lack of independence. Relying on principles born out of administrative law and the *Canadian Charter of Rights and Freedoms* (*Charter*),[6] I will expose the indicators of institutional bias and a lack of independence through reliance on an Access to Information Request[7] as the centerpiece for the scholarship emerging in this paper. To conclude, I offer brief suggestions for reform for both the conviction review process and the pardon scheme.[8]

## I. CURING THE INCURABLE—THE PERMANENCE OF A CRIMINAL RECORD

The *sine qua non* of any meaningful, discursive dialogue on the remedies available for the wrongfully convicted requires an understanding of the nature and quality of a criminal record[9] and its debilitating effects in the

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6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

7 Canada, Department of Justice, *Access to Information Request* (Ottawa: 2014) [unpublished] [ATIR]. The fruits of the ATIR respond to the author's request for "any internal, departmental, policy or procedural-based documents used by designated counsel, or otherwise, as guides for the processing of applications filed to the Minister of Justice pursuant to section 696 (and any previous versions of section 696) of the *Criminal Code* of Canada with respect to miscarriages of justice". The contents of the ATIR results are available for inspection. For further information, please contact the author directly at rzaia100@gmail.com.

8 While a plethora of conviction review process models are available for review on an international level, their breadth is wide and difficult to adequately address within the confines of this paper, which predominantly focuses on the domestic context in Canada. For some examples, see Australia's compensation scheme for wrongful convictions: Australia, Institute of Criminology, *Compensation for Wrongful Conviction* (Canberra: Australian Institute of Criminology, 2008) online: <www.aic.gov.au/media_library/publications/tandi_pdf/tandi356.pdf> (accessed 1 February 2015). See also the scheme in the United Kingdom: Criminal Convictions Review Commission, *Guidance for Legal Representatives* (London, UK: Criminal Convictions Review Commission, 2015), online: <www.ccrc.gov.uk/wp-content/uploads/2015/08/CCRC-Guidance-for-Legal-Representatives.pdf> (accessed 1 February 2015).

9 For the purposes of this paper, analysis of the criminal record matrix is focused exclusively on adult offenders, given that the youth offender system is intricately defined

public limelight. This section reveals how the perpetuity of a criminal record, combined with the realities surrounding access to the record suspension scheme in Canada, produce impediments for persons seeking to rectify the stigma attached to a criminal record.

Notably, the scheme is accessible to both wrongfully and rightfully convicted persons following the completion of one's sentence. Whether the practical utility of a record suspension serves an equally remedial purpose for a wrongfully convicted person should be measured against the speed at which it is registered. All in all, the scheme represents a government-driven framework with stringent conditions that benefits from a monopoly on the power to determine the fate of one's public image.

### A. WHAT IS A CRIMINAL RECORD, AND WHAT IS ALL THE FUSS ABOUT?

Convictions entered into the Canadian Police Information Centre (CPIC)[10] are assigned automatic purge dates for entries.[11] According to the John Howard Society, if a record suspension is not requested, records are purged under the following circumstances: (1) when a person turns 80 years old and there has been no criminal activity reported in the previous 10 years except where one receives a life sentence, is declared a dangerous or long-term offender, or has not completed a sentence; (2) when a person makes a request to purge a record from a local police force responsible for the charge following a stay, acquittal, or withdrawn charges;[12] and (3) for violent offences stayed, withdrawn or resulting in acquittals, records of

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by the provisions in the *Youth Criminal Justice Act*. See generally *Youth Criminal Justice Act*, SC 2002, c 1, s 44.1.

[10] The CPIC is a computer-based information system managed by the Royal Canadian Mounted Police. It is comprised of records pertaining to indictable and hybrid offences submitted to the RCMP from local police forces across Canada with criminal record data that may be helpful in the arrest of suspects. See John Howard Society of Alberta, "Understanding Criminal Records" (2000) at 2, online: <www.johnhoward.ab.ca/pub/pdf/A5.pdf>.

[11] *Ibid* at 11.

[12] *Ibid* at 12.

conviction remain on the CPIC file until the offender turns seventy years old unless a removal is requested in writing.[13] Otherwise, acquittals are visible on CPIC records. Notably, local police forces retain the discretion to remove information from a CPIC file where a convicted person submits a request in writing.[14] Problematically, however, those carrying acquittals, stays, or withdrawals under their name are unlikely aware of the option to write to the local police force that conducted their arrest.

The framework governing the retention and disclosure of criminal records holds major implications for both the innocent and the guilty. For example, a CPIC record documenting an acquittal can still be disclosed to an employer requesting a criminal background check. Employers and other third parties seeking a criminal record must obtain a consent form from the subject prior to obtaining any information from a criminal record held by the CPIC. Once submitted, the response will return "cleared", "no records found", "not cleared", or "record may or may not exist".[15] The record can subsequently be received in full if the employer requests that the person submit fingerprints to the local police station.[16] Some employer agreements contain clauses permitting the employee to proceed with a criminal record check at any time.[17] Record checks are commonplace for positions involving self-employment, those working with children, attending universities, and in the context of promotions.[18]

Unsurprisingly, at issue is whether employers seeking a criminal record check will draw adverse inferences about an individual's character in the

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13 *Ibid* at 10.

14 "Understanding Criminal Records", *supra* note 10.

15 "Understanding Criminal Records", *supra* note 10.7.

16 *Ibid.*

17 John Howard Society of British Columbia, "Fact Sheet: Crime and Employment: A Guide for Job Seekers" (2013) at 1, online: <www.johnhowardbc.ca/images/jhsbc-factsheet-crime-and-employment-job-seekers.pdf>.

18 See *ibid* at 1–2. As the John Howard Society cautions, a self-employed person sub-contracting for an independent contractor may be subject to a record check. For example, an independent contractor who has access to confidential information, or works with vulnerable people such as children, may request a record check.

event a record returns with the notation "not clear" or "record may or may not exist". By virtue of the numerous possibilities either result denotes, this phraseology may prompt the concern of an employer in the hiring process, and in turn effectively thwart the efforts of a wrongfully convicted person to gain meaningful employment.

### B. RECORD SUSPENSIONS ARE OF LITTLE VALUE FOR THE WRONGFULLY CONVICTED

There is a common misconception underlying the view that record suspensions or pardons retroactively expunge criminal records. These two terms are often used interchangeably, but merit distinction as I will show. At present, pardons are creatures of the common law and two statutes in Canada, the *Code* and the *Criminal Records Act*.[19] The common law describes a pardon as an expression of the monarch, deriving from the unilateral and discretionary power of the Royal Prerogative, also referred to as a "free pardon".[20] A free pardon is derived from the powers of the Crown and is statutorily authorized under subsections 748(1) and 748.1(1) of the *Code*, consisting of the remission in whole or in part of a sentence without reviewing the issue of the person's guilt.[21] With a free pardon, an individual is deemed never to have committed the offence.[22] A free pardon is only granted where the innocence of the convicted person is established and the conviction was erroneous.[23]

Distinguishably, the *CRA* provisions and regulations falling under the exclusive jurisdiction of the National Parole Board govern an administrative pardon also known as a record suspension.[24] In 2012, the federal

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19 RSC 1985, c C-47 [*CRA*].

20 *Therrien (Re)*, 2001 SCC 35 at para 113, [2001] 2 SCR 3 [*Therrien*].

21 *Ibid* at paras 113–14.

22 *Ibid* at para 121.

23 *Code*, *supra* note 4, ss 748(3).

24 *R v Bruha*, 2006 NWTCA 1 at para 14, 39 CR (6th) 384; *CRA*, *supra* note 19, s 2.1.

government replaced the term "pardon" with "record suspension".[25] Record suspensions are only available ten years after the expiry of a sentence for an indictable offence and five years in the case of a summary conviction offence.[26] Persons are ineligible for a record suspension if convicted of a sexual offence referred to in Schedule 1[27] of the *CRA*, or if they have received three sentences of two years or more for being convicted of offences prosecuted by indictment, or of service offences subject to a maximum penalty of life imprisonment.[28] Applications for a record suspension cost a whopping $631, closing the gateway for the impecunious and reducing application requests.[29] Recent reforms to the *CRA* deliberately jettison the gravitas of the element of forgiveness in a pardon, signaling the federal government's intent to "suspend" rather than permanently delete a record, to reaffirm the position that a pardon is not a right.[30]

The consequential effects of administrative/statutory pardons are significant for a wrongfully convicted person in light of the fact that: (1) ostensibly, a pardoned conviction should no longer adversely reflect on the

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25 Library of Parliament, "Bill C-10: Legislative Summary" by Laura Barnett et al, Publication No 41-1-C10E (2011) at 2 ["Bill C-10 Summary"]. I use the terms pardon and record suspension interchangeably throughout this paper.

26 *CRA*, *supra* note 19, ss 4(1).

27 Schedule 1 offences include convictions for gross indecency (formerly section 157), indecent acts (subsection 173(1)) and a variety of child-related offences. The convicted person has the onus of proving the existence of any exceptions to the bar on Schedule 1 offences by establishing that (a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her; (b) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and (c) the person was less than five years older than the victim as per subsection 4(3).

28 *CRA*, *supra* note 19, para 4(2)(a)–(b).

29 Bruce Cheadle & Jim Bronskill, "Higher Cost, Longer Wait Times in Store for Pardon Seekers", *The Globe and Mail* (4 March 2012), online: <www.theglobeandmail.com/news/politics/higher-cost-longer-wait-times-in-store-for-pardon-seekers/article550866>.

30 *House of Commons Debates*, 40th Parl, 3rd Sess, No 57 (7 June 2010) at 1530 (Dave MacKenzie).

person's character;[31] (2) the record of the conviction still exists, but must be kept *separate and apart* from other criminal records and not disclosed without the prior approval of the Solicitor General of Canada;[32] and, (3) Canadian courts and police services, save for the RCMP, are not legally obliged to keep records of convictions separate and apart from other criminal records.[33] This type of pardon is an expression of the fact that the record *still exists*, but it is designed to reduce extraneous consequences pertaining to employment.[34] Under the *CRA*, any person or organization to whom an application is made for a paid or volunteer position a responsibility exists in relation to children or vulnerable persons can verify whether one has a Schedule 2 offence noted on a record despite a successful record suspension application. This is particularly stifling for miscarriages of justice involving sexual assaults and indecent acts, which are prevalent in the wrongful convictions domain.[35]

Practically speaking, one wonders whether the provision of a record suspension is meaningful in any event, having noted that record suspensions do not expunge entries on a criminal record. In an age troubled by backlogged CPIC updates,[36] it is not clear that a record suspension would immediately reflect on one's record. Where entries are inputted much later than the pronouncement of a conviction, or alternatively where they are not removed in a timely fashion, a record suspension may not produce the much benefit for the wrongfully convicted. While the intended legal effect of a record suspension is desirable, its execution may not be so promising.

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31 *CRA*, *supra* note 19, subpara 2.3(a)(ii).

32 *Ibid*, ss 6(2).

33 "Bill C-10 Summary", *supra* note 25 at 101.

34 *Therrien*, *supra* note 20 at para 116.

35 CRA, supra note 19, ss 6.3(3). This provision is also commonly referred to as "vulnerable persons check".

36 Tim Naumetz, "Courts Grapple with Old CPIC Data", *Law Times* (18 April 2010) online: <www.lawtimesnews.com/20100419754/headline-news/courts-grapple-with-old-cpic-data>.

## II. UNVEILING INSTITUTIONAL BIASES IN THE 696 APPARATUS

Pardons and record suspensions are no panacea for diminishing the debilitating effects of a wrongful conviction, particularly in cases involving offences against the person such as sexual assaults. Their availability is circumscribed and their legal effects not entirely free from third-party scrutiny. If the option to obtain a pardon is unavailable for a wrongfully convicted person and an acquittal follows on appeal, the only avenue for recourse is the conviction review process in section 696 of the *Code*.

There is an oft-cited concern that the 696 framework is imbued with an institutional bias because lawyers remunerated by the DOJ screen the applications. In other words, when the DOJ reviews a file derived from the consequences of codified offences drafted by DOJ lawyers, the optics are suggestive. Recognizing that this argument is not novel in academic literature, I intend to expound upon this thinking by focusing instead on the institutional framework itself as a machine that is bound to induce the perception of bias. To be clear, I do not purport that counsel at the CCRG are responsible for propagating biased decisions. Instead, I focus on the apparatus of the process involving the dual role of the Minister of Justice as the Attorney General of Canada and the issue with solicitor-client privilege shrouding the relationship between the CCRG and the Attorney General.

Part II begins with a review of the 696 process broken down into its constituent elements. It concludes with a synopsis of the concerns for institutional bias imbued early on by legislators who played a role in reforming these provisions, along with scholars who have voiced their concerns about bias for over a decade.

### A. BREAKING DOWN THE 696 PROCESS INTO ITS CONSTITUENT ELEMENTS

Sections 696.1 to 696.6 of the *Code* sketch the criminal conviction review procedure, triggered when a convicted person initiates a written application.[37] The terms "miscarriage of justice" and "wrongful conviction"

[37] *Code*, *supra* note 4, ss 696.1(1).

are often used interchangeably in the foregoing provisions, but their contextual meanings are distinct.[38] The terminology is used synonymously in the *Code*, labeling a wrongful conviction a miscarriage of justice reserved for those who are factually innocent and who have suffered violations of due process or other miscarriages of justice.[39] The result is that the legislation frames the prospect of a recognized miscarriage of justice as a feasible outcome, rather than providing a finding of *factual innocence*. This interpretative reality distorts public perception of what this application process entails and what it is tailored to remedy.[40]

To begin, it is worth paraphrasing the effect of the miscarriage of justice provisions in the *Code*:

> **Subsection 696.1(1):** An individual may submit an application for Ministerial review for any conviction under an Act of Parliament, or regulation, including designated dangerous and long term offenders, so long as their judicial review or appeal routes are exhausted.
>
> **Subsection 696.2(3):** The Minister can delegate to any member of good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience as the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation.
>
> **Subsection 696.3(2) and (3):** The Minister may, if satisfied that a miscarriage of justice occurred on a reasonable basis, direct a new trial or hearing, refer the matter to the Court of Appeal for a hearing and determination as if the case were an appeal, refer it in the form of a question, or dismiss the application. This is the case where, for example, the Minister cannot reach an unambiguous conclusion as to whether the

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38 See Kimberly A Clow & Rosemary Ricciardelli, "Public Perceptions of Wrongful Conviction" (2014) 18:2 Can Crim L Rev 183 at 185.

39 *Ibid* at 185–86.

40 *Ibid* at 186. See also Patricia Braiden & Joan Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice under Section 690 of the Criminal Code" (1999) 17 Windsor YB Access Just 3 at 21 (efficacy of s 690).

proffered evidence is new or significant, or whether there has likely been a miscarriage of justice.[41]

**Subsection 696.3(4):** The Minister's decision is final and not subject to appeal.

**Section 696.4**: The Minister must assess (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 concerning 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.

**Section 696.5:** The Minister must file an annual report to Parliament in relation to applications under this part within 6 months after the end of each financial year.

Procedurally, the four stages in a conviction review process unfold as follows:

**The preliminary assessment:** This is a flexible stage wherein CCRG lawyers assess the claims for an air of reality. This involves determining whether the applicant has described grounds, both legal and factual, which might lead to the conclusion that a miscarriage of justice has occurred. A brief, objective summary of the facts gleaned during the preliminary assessment is produced. The summary, along with reasons, is disclosed to the applicant in accordance with *Bonamy v Canada (Attorney General)*[42] if the application is rejected.[43]

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41 See Ursula Boltz, "Addressing Allegations of Wrongful Convictions: The Role of the Court of Appeal" (Paper prepared for the Continuing Legal Education Society of British Columbia's seminar on Preventing Wrongful Convictions, 16 October 2010) at 6.1.25. See also *Re Truscott*, 2007 ONCA 575, 225 CCC (3d) 321 (Minister proceeded under subparagraph 696(3)(a)(ii)); *Re Mullins-Johnson*, 2007 ONCA 720, 87 OR (3d) 425 (Ontario Court of Appeal rules that it does not have the jurisdiction to make a declaration of factual innocence).

42 (2001), 201 DLR (4th) 761, 156 CCC (3d) 110 (FCTD) [*Bonamy* cited to DLR].

43 ATIR, *supra* note 7 at 1–2.

**The investigation:** Where there is a reasonable basis to conclude that a miscarriage of justice occurred, the CCRG proceeds to this stage.[44] They interview witnesses, study the scientific/forensic analysis used in the case, consult with police, prosecutors and defence lawyers, and obtain all relevant personal information and documents.[45]

**The investigation report:** This report details the findings made at the investigative stage and is subsequently provided to the applicant, who is granted the opportunity to review and make comments on the report. While the applicant can review the report, he or she is not privy to the advice provided by CCRG lawyers to the Minister due to solicitor-client privilege.[46]

**The Minister's decision**: Based on the investigation report and any other independent advice provided by the CCRG, the Minister renders the final decision on the application.

Part of the CCRG's role involves providing objective and independent legal advice to the Minister on the disposition of applications for ministerial review before the fourth stage of the review.[47] A special advisor[48], appointed by Order-In-Council, may also make recommendations once the investigation is complete.[49] Equally important, however, is the independent

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[44] *Ibid* at 10.

[45] Kathryn M Campbell, "The Fallibility of Justice in Canada: A Critical Examination of Conviction Review" in C Ronald Huff & Martin Killias, eds, *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008) 117 at 119.

[46] *Ibid.*

[47] Department of Justice Canada, *Annual Report of the Applications for Ministerial Review—Miscarriages of Justice* (Ottawa: Attorney General of Canada, 2014) at 3 [*Annual Report*].

[48] The special advisor's position is independent and not a part of the Public Service of Canada, nor is it a position within the Department. The advisor's main role is to make recommendations to the Minister once an investigation is complete and provide independent advice at all stages of the review process where applications may be screened out. See *ibid* at 4.

[49] *Ibid.* See also *Ross v Canada*, 2014 FC 338 at paras 67, 72, 453 FTR 56 [*Ross*] (prosecutor's involvement as a witness in the review process and an advocate in the case

advice that is provided at any other stages of the review process during which applications may be screened out from disclosure.[50] In some circumstances the Minister may retain an agent external to the DOJ for reviews of the application where a conflict of interest arises.[51]

### B. CRITIQUES BORN OUT OF THE INCEPTION OF THE 696 PROCESS

The opportunity to request a conviction review from the Minister of Justice finds its genesis in 1892.[52] In 1923, the Minster was granted the power to "refer a case to a court of appeal . . . or to seek the court's opinion on a particular question."[53] By 1954, the threshold for review changed from the Minister "entertain[ing] a doubt as to whether such persons ought to have been convicted"[54] to *satisfaction* that "in the circumstances a new trial should be directed".[55] By 1968, the provisions were re-numbered as section 690, providing for the review of dangerous and long-term offender applications, as well as those involving persons subject to preventative detention.[56] Of particular interest in the chronology of events is the legislative intent that drove the 2002 reforms in the *Criminal Law Amendment Act*, which enacted the 696 provisions, and constitute the nub of my contention of institutional bias.

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resulted in the appointment of a special delegate to avert the potential of a conflict of interest).

50 *Annual Report*, *supra* note 53 at 4.

51 *Ibid.* Note that the *Annual Report* provides no indication as to what type of conflict of interest would render this option appropriate for the Minister.

52 Braiden & Brockman, *supra* note 40 at 5.

53 *Ibid.*

54 *Criminal Code,* SC 1927, c 36, s 1022(2)(a).

55 Braiden & Brockman, *supra* note 40 at 5; *Criminal Code*, SC 1953–54, c 51, para 596(a).

56 Braiden & Brockman, *supra* note 40 at 5.

### 1. LEGISLATIVE QUARRELS WITH THE CURRENT CONVICTION REVIEW PROCESS

The rationale underpinning the 2002 reforms under Bill C-15A was to improve the extrajudicial process, with the justification that the Minister of Justice is ideally suited to the "task of effective gate-keeping and returning appropriate cases back to the judicial system".[57] Then–Minister of Justice for the Liberal government, Martin Cauchon, noted that the preceding provisions in section 690 perpetuated a host of concerns including vague wording, and the absence of principled criteria for how a remedy is granted.[58] At the time, critics were also concerned with the bureaucratic inertia that resulted in long wait times for such applications.[59]

Among many reforms, amendments included alterations to the conviction review process in the regulations, expanding the availability of a review from indictable offences to include summary offences, adding powers of investigation, appointing a special adviser to advise the Minister with recommendations, and allowing witnesses to be compelled to provide documents.[60] They also placed the CCRG in a building separate and apart from the DOJ,[61] although counsel working for the group remained employees remunerated by the DOJ.

Hansard reports reveal Parliamentarians' concerns with the lack of independence and bias in the conviction review process. Some expressed the desire to implement a model similar to the United Kingdom using an

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57 *Debates of the Senate*, 37th Parl, 1st Sess, No 66 (1 November 2001) at 1612 (Hon Landon Pearson) [*Senate Debates*].

58 Senate, Proceedings of the *Standing Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess, No 24 (7 February 2002) (Hon Lorna Milne) [*Senate Committee I*].

59 *Senate Debates*, *supra* note 57. See also Braiden & Brockman, supra note 40 at 22; Campbell, supra note 45 at 121 (noting that both David Milgaard and Clayton Johnson's 696 applications were addressed by then–Justice Minister Kim Campbell some three to three and a half years following the filing of the applications).

60 *Senate Debates*, *supra* note 57.

61 *Ibid* at 126.

independent tribunal.[62] Ironically, then–opposition member and later Minister of Justice Peter Mackay noted that the

> [P]roposed amendments do not accomplish much. They still leave the power of overturning the conviction in the hands of the minister .... Many lawyers, including a very eminent lawyer, James Lockyer who works with the [Association in Defence of the Wrongfully Convicted ("AIDWYC")], maintain that it is much better to put this power in the hands of an impartial arbitrator or adjudicator.[63]

Concerns about the lack of independence surfaced long before the debates on Bill C-15A. The independence argument constituted the crux of the consultation process between the federal government and the provinces, initiated before the introduction of the Bill in the late 1990s by then–Justice Minister Anne McLellan. The consultation process incited the publication of a pivotal report published in October of 1998 by the DOJ, which coloured the 2002 reforms.

Highlights from the 1998 report suggested that an independent process separate from the DOJ was undesirable because, among many things: (1) "persons who claim that they were wrongfully convicted had the *full benefit of the presumption of innocence*, a trial in which their guilt had been established beyond a reasonable doubt, and appeal procedures"; (2) "a review mechanism would create another level of appeal that would *detract from the notion of judicial finality*"; (3) establishing an independent mechanism as proposed by the Donald Marshall Jr. inquiry "would likely *result in many requests for reviews*"; (4) reviewing the cases "would *incur significant costs* that would divert resources from cases deserving review"; and (5) "the *section 690 process is independent from the prosecutions conducted by the provincial Attorneys General*".[64]

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62 *House of Commons Debates*, 37th Parl, 1st Sess, No 97 (18 October 2001) at 1335 (Michelle Bellehumeur).

63 *Ibid* at 1510 (Peter MacKay) [emphasis added].

64 Minister of Justice and Attorney General of Canada, *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the* Criminal Code*: A Consultation Paper* (1998) at 5 [*Reform Possibilities Report*] [emphasis added].

At the time, the Minister of Justice cited differences justifying the rejection of the UK model. She highlighted: (1) that contrary to the UK, the Minister in Canada does not supervise policing and prisons and that Canada does not have allegations of misconduct as the UK does; (2) that the majority of criminal prosecutions are conducted by the Attorney General; (3) the costs and backlogs of the UK system, and (4) that a formal separate body would not necessarily lead to quicker reviews.[65]

Nevertheless, during the committee review stage of Bill C-15A, the Canadian Bar Association and the Barreau du Québec emphasized the need for independent review, citing disapproval of the amendments and the government's disregard for numerous inquiries that recommended independent review structures.[66]

Concerns of institutional bias continued throughout the legislative process into dialogue among Senators at the committee level. Senator Anne Cools's contention with the bill aptly encapsulates these concerns:

> This legislation makes an enormous mistake in confusing the two roles. . . . The Minister of Justice shall be *ex officio* of the Attorney General and vice versa. *Reviewing prosecutions is the role of the Attorney General. Handling administrative matters before Parliament is in the capacity of the Minister of Justice* . . . . I suggest this drafting confuses the roles.[67]

At the time, Senator Jerry Grafstein echoed Senator Cools's comments with a legal critique. He advanced the position that by reviewing miscarriage of justice applications, the Minister was engaging in a miscarriage of justice as the senior law officer of the Crown and thus ought to be held responsible in some way.[68] He characterized the process permitting the Minister to delegate files under the new section 696 as an abuse of power on the premise that the Minister was already responsible for maintaining the

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65 *Senate Committee I*, *supra* note 58.

66 *Senate Standing Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess, No 22 (12 December 2001) [*Senate Committee II*].

67 *Ibid* [emphasis added].

68 *Ibid*.

accountability of the process.[69] Stakeholders testifying at the Senate Committee for Legal and Constitutional Affairs concurred. For example, both the AIDWYC and the Canadian Council of Criminal Defence Lawyers expressed hope that the process would be revamped to account for the lack of independence permeating the conviction review process.[70]

Despite widespread contention with the revised framework, the DOJ remained adamant that the apparatus was independent. According to then–Senior Counsel for the CCRG, Mary McFadyen, there was no evidence to substantiate the position that the absence of independence from the Minister created institutional bias. The CCRG's position was that "when the Minister reviews these cases, it is in the capacity of Minister of Justice, not as the Attorney General".[71] Respectfully, I find this argument flawed, as the role is hybrid in nature. While some may suggest that the current conviction review framework is impartial insofar as the CCRG provides independent legal advice to the Minister, and the Minister is capable of hiring an external agent where a conflict of interest is flagged, the problem remains that the decision in the fourth and final stage in the conviction review process ultimately rests with the Minister. The Minister acts as both Attorney General of Canada, and a member of Cabinet—a highly politicized entity with agendas driven by party politics. In other words, at the zenith of the food chain is a political actor with the final say. Purporting to act as the Minister of Justice and not as the Attorney General in respect of conviction review applications is a fiction at best.

### 2. SCHOLARS AND INDEPENDENT STAKEHOLDERS ECHO CONCERNS FOR THE LACK OF INSTITUTIONAL INDEPENDENCE

The concern for the lack of independence patently observable in the Hansard transcripts is corroborated by a vast array of scholarship. For

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[69] *Ibid.*

[70] See AIDWYC's testimony: *Senate Standing Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess, No 20 (5 December 2011); Testimony of William Trudell, Chair of the Canadian Council of Criminal Defence Lawyers: *Standing Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess, No 21 (6 December 2001).

[71] *Senate Committee II*, *supra* note 66.

example, Kathryn Campbell espouses the view that as the chief prosecutor, the Minister of Justice is essentially asked to review his department's practices as well as those of his or her provincial counterparts.[72] She considers the 696 process an adversarial one, akin to the adversarial system responsible for the error in the initial case.[73] Undergirding her critique is the notion that the determination of a miscarriage of justice is a policy, rather than a legislative-based decision, which makes it a subjective assessment.[74]

Scholars Patricia Braiden and Joan Brockman advance parallel concerns noting that most interventions by the Minister involve returning the applicant to the adversarial system. They call for an independent review tribunal with full investigative powers.[75] They also provide an overview of the many attempted, but unsuccessful amendments to the 696 regime found in the likes of Bill C-239 and Bill C-330, both Private Member's Bills drafted by former member of parliament Chris Axworthy, which attempted to establish an independent, nine-person review commission comprised of judges or lawyers with no previous involvement in the case.[76]

In 1989, the Donald Marshall Royal Commission also called for a well-publicized, independent review mechanism to ensure that individuals are willing to come forward when wrongfully convicted.[77] It recommended that the Attorney General establish "a review mechanism with . . . Federal and Provincial counterparts."[78] Similarly, the inquiry into the conviction of Thomas Sophonow recommended, "in the future, there should be a

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72 Campbell, *supra* note 45 at 123.

73 Campbell, *supra* note 45 at 124.

74 *Ibid* at 126.

75 Braiden & Brockman, *supra* note 40 at 29.

76 *Ibid* at 30.

77 *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* (Nova Scotia: Lieutenant Governor in Council, 1989) at 9 [*Donald Marshall*].

78 *Ibid.*

completely independent entity established which can effectively, efficiently, and quickly review cases in which [a] wrongful conviction is alleged".[79]

Justice Peter H Howden of the Superior Court of Ontario writes that the summary dismissal of the Marshall Inquiry recommendations following the independent review by the inter-ministerial working group, and the resulting rejection of an independent process was the working group's "final coup de grace".[80] He adds that the working group cited no evaluation on the cost of prison time, compensation paid, and of public inquiries for a cost-benefit analysis,[81] while noting that the Special Advisor to whom the Minister delegates powers cannot be perceived as independent.[82] Correspondingly, Paul Saguil comments on the makeup of the bureaucratic order in the review process. A glimpse into his argument suggests that the optics of using the policy sector of the DOJ for conviction reviews, rather than the litigation sector, is still questionable.[83] Like many others, he characterizes it as an inherent institutional conflict.[84]

Concerns about a lack of independence and the propensity for institutional bias have long permeated discussions about the conviction review process in Canada. They set the stage for the argument that follows.

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79 Manitoba, *Inquiry Regarding Thomas Sophonow: The Investigation Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Attorney General, 2001) at 101.

80 "Judging Errors of Judgment: Accountability, Independence & Vulnerability in a Post-Appellate Conviction Review Process" (2002) 21 Windsor YB Access Just 569 at 588.

81 *Ibid.*

82 *Ibid* at 18.

83 Paul J Saguil, "Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure" (2007) 45:1 Alta L Rev 117 at 129. Note that in the past conviction reviews were reviewed by the litigation section of the Department of Justice. See *Reform Possibilities Report*, *supra* note 64 at 6.

84 *Ibid.*

## III. THE CASE FOR INSTITUTIONAL BIAS

The foregoing review was intended to showcase the panoply of concerns from representatives on Parliament Hill and in the literature that were present even at the genesis of the current conviction review process. Turning these concerns substantively, I propose three positions that support an allegation of institutional bias: (1) the multi-faceted role of the Minister; (2) the influence of extraneous factors on the final disposition in a 696 application; and (3) the nature of solicitor-client privilege between government officials and the Minister of Justice. I will use these three prongs as constituent elements for my underlying position that the institutional framework of the conviction review process is imbued with institutional bias and a lack of independence, triggering section 7 *Charter* interests for those who have been wrongfully convicted.

This argument is constructed with a view to meeting the test for institutional bias as articulated by Gonthier J in *2747-3174 Québec Inc c Québec (Régie des permis d'alcool)*[85] which reads: "determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically—and having thought the matter through—would have a reasonable apprehension of bias in a substantial number of cases".[86]

### A. SNAPSHOT #1: THE INSTITUTIONAL BIAS ARGUMENT IS GROUNDED IN THE MULTI-FACETED ROLE OF THE MINISTER OF JUSTICE AS THE ATTORNEY GENERAL

The role of the federal Minister of Justice denotes a dual responsibility as chief law officer of the Crown, and Attorney General of Canada. According to the Public Prosecution Service of Canada (["PPSC"]), the federal Attorney General retains the jurisdiction to prosecute all non–*Criminal Code* federal offences in the provinces and both federal and

[85] [1996] 3 SCR 919, 140 DLR (4th) 577 [cited to SCR].

[86] *Ibid* at para 44 [emphasis in original].

provincial offences in the territories.[87] The Attorney General is directly accountable to Parliament.[88] By extension of logic, if the full title of the position reads is Minister of Justice and Attorney General of Canada,[89] the Minister is accountable to Parliament for both sets of responsibilities attaching to each role.

The *Director of Public Prosecutions Act*[90] contains notable provisions implicating the Attorney General, and therefore the Minister of Justice, in the prosecution process. Pursuant to paragraph 3(3)(c), "the Director, under and on behalf of the Attorney General, issues guidelines to persons acting as federal prosecutors respecting the conduct of prosecutions generally" while subsection 10(2) provides that "[t]he Attorney General may, after consulting the Director, issue directives respecting the initiation or conduct of prosecutions generally."[91]

Together, these provisions suggest that the Attorney General is responsible for issuing directives trickling down to provincially prosecuted offences. For the purposes of the *DPPA*, a prosecution is any matter proceeding under the jurisdiction of the Attorney General.[92] Notably, the Attorney General retains the role of chief legal advisor to Cabinet and the Government of Canada, with powers relating to the development of all aspects of the criminal law including matters that fall under the *Code* and corollary federal penal statutes.[93] The ambit of these powers includes the right to intervene at appellate level courts in both provincial and federal prosecutions. Inevitably, cases later found to constitute miscarriages of justice are captured by the Minister's wide net of jurisdictional power to intervene on appeal.

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87 Public Prosecutions Service of Canada. *Deskbook* (Ottawa: Attorney General of Canada, 2014) at 1.1 [*PPSC Deskbook*].

88 *Ibid* at 15.

89 Parliament of Canada, "The Ministry (Cabinet)", online: <www.parl.gc.ca/parliamentarians/en/ministries>.

90 SC 2006, c 9 [*DPPA*].

91 *DPPA*, *supra* note 90, paragraph 3(3)(c), 10(2).

92 *Ibid*, s 2.

93 *PPSC Deskbook*, *supra* note 87 at 1.1(2).

The advisory capacity of the Attorney General is also enmeshed with the role of provincial Attorneys General. For example, the provincial and federal Attorneys General hold concurrent jurisdiction to prosecute crimes such as certain terrorism and national security–related offences, extraterritorial offences in relation to cultural property, and fraud under sections 380, 382.1, and 400 of the *Code*.[94] In other words, the federal Attorney General holds advisory jurisdiction in respect of some provincial prosecutions, particularly where consultation is exchanged between federal and provincial prosecutors.

Consultation is not foreign to the daily activities of the Minister of Justice. The PPSC highlights that it is appropriate for the Attorney General to consult with Cabinet colleagues before exercising his or her powers under the *DPPA* in respect of any criminal proceedings.[95] Moreover, consultation between Crown counsel and the department is encouraged specifically to harness awareness of national policies and objectives, as well as specialized expertise.[96]

ATIR disclosure reveals that consultation with external sources during the 696 process, such as those involved in the original prosecution and appeals, can also be advantageous for obtaining background information in a conviction review.[97] Such consultations could include both federal and provincial Crown Attorneys depending on the nature and circumstances of the case.

The counter-argument to this position is that the federal Attorney General's role involves oversight of prosecutions and prosecutorial discretion, whereas the role of the Minister of Justice is to enhance the portfolio by developing legislation, policies, and regulations with a view to improving the criminal justice system.

Problematically, however, the responsibility to oversee matters in the justice portfolio is inevitably enmeshed with the daily role and

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94 *Ibid* at 5.9(2).

95 *PPSC Deskbook*, *supra* note 87 at 5.9(2).

96 *Ibid* at 1.3.

97 ATIR, *supra* note 7 at 33–34.

responsibilities of provincial prosecutors administering the *Code*, a federally codified statute to which the Minister is beholden, thereby influencing how prosecutorial discretion is implemented provincially. In light of this "trickle-down" relationship, one cannot help but wonder how the Minister's jurisdiction over conviction review files does not conflict with his or her omnipresence in the day-to-day workings of criminal prosecution. How is it that the person whose job it is to sculpt the criminal law at the heart of every criminal trial can also be the final arbiter of its failures?

### B. SNAPSHOT #2: INSTITUTIONAL BIAS IS EVIDENCED BY THE MANNER IN WHICH PREVIOUS 696 APPLICATIONS WERE DECIDED

Concerns over institutional bias are also supported by an examination of how former Ministers have decided miscarriage of justice applications.

In his commentary on the 696 process, Justice Howden argues that the regime is essentially one where "departmental forces are statutorily required to act as respondent, judge, and investigator" which presents "an inherent appearance of potential bias which must be implicitly excused by the statutory arrangement".[98] His argument frames the portrait I wish to paint analyzing the timing and manner in which the Minister has previously decided 696 applications.

At first blush, institutional bias is apparent in the apparatus of the CCRG's relationship to the DOJ. Meanwhile, proof of *actual* bias is difficult to substantiate, and may be considered far-fetched given the optics of a separate office, and the availability of a Special Advisor. Simply put, it is difficult to establish, using concrete evidence, that a substantial number of cases are tainted by institutional bias, despite a situation where an informed person observing the machinery of the conviction review structure could identify its fallibilities.

This segment reviews two cases in which the 696 process reflected elements of institutional bias. Surfacing in these cases are factors such as the influence of exposure to political influence, the absence of justification for

[98] *Supra* note 80 at 593–94.

rejecting applications, and external consultations in miscarriage of justice applications.

First, the Royal Commission on the Donald Marshall Prosecution found that the Minister was influenced by the opinion of the Chief Justice of the Nova Scotia Court of Appeal in terms of the manner in which he ought to have proceeded with the review process. The report generated by the Commission emphasized that it was "regrettable that the federal Justice Minister was influenced in this decision by the views of the Chief Justice of Nova Scotia, Mr. Justice Ian MacKeigan, who expressed 'real concern over whether [a reference under subsection 617(b)] would work'".[99] These are the concerns that grounded the recommendation in the report calling for the creation of an independent review mechanism.[100]

Second, in the case of David Milgaard, both his appeal to the Saskatchewan Court of Appeal and his application for leave to appeal to the Supreme Court of Canada were dismissed.[101] Following a 696 application, the DOJ faced allegations of partiality when the Minister of Justice sought the advice of the Honourable William R. McIntyre, QC of Vancouver.[102] Milgaard requested a conviction review twice from the Minister, with no avail in his first attempt despite new evidence indicating that there was a serial rapist in the vicinity contemporaneous to the time of his arrest. It took Justice Minister Kim Campbell nearly three years after the first application submitted in 1988 to reject Milgaard's application in 1991 despite significant political and public pressure.[103] It was only after the request for a second review, a recommendation to the Minister from the Supreme Court of Canada to issue a new trial,[104] and "much lobbying from Milgaard's family and political advocacy groups, that his case was

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99 *Donald Marshall*, *supra* note 77 at 6. Note that paragraph 617(b) is the predecessor to section 690.

100 Braiden & Brockman, *supra* note 40 at 5.

101 *Ibid* at 20.

102 *Ibid* at 8.

103 Braiden & Brockman, *supra* note 40 at 22.

104 See *Reference re Milgaard*, [1992] 1 SCR 866, 90 DLR (4th) 1.

reconsidered".[105] Before the 696 process was successfully deployed, it appeared as though the decision was stymied until media pressure was both invoked and sustained.[106]

### C. SNAPSHOT #3: THE BLANKET OF SOLICITOR-CLIENT PRIVILEGE PERPETUATES BIAS

In *Ross*, the Federal Court dealt with extraneous factors influencing a 696 refusal.[107] The court specifically concluded that the Minister's decision was unreasonable because it lacked justification, transparency, and intelligibility.[108] Justice Mosley recognized that 696 decisions are highly discretionary, permitting "all matters that the Minister considers relevant",[109] with the caveat that Ministerial review must be exercised in tandem with existing Supreme Court jurisprudence on appellate review.[110]

The *Ross* decision is salient to future judicial reviews because it insists that when disclosure is at issue in a conviction review, the question is "whether the applicant received a fair trial as a result of the non-disclosure, not whether the outcome would have been affected".[111] The decision should be lauded because it enforces a legal check on the Minister by ensuring that existing jurisprudence is employed in the review.

The firewall provided by solicitor-client privilege[112] is difficult for applicants to overcome, protected by a deferential standard of review that

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105 Campbell, *supra* note 45 at 129.

106 Braiden & Brockman, *supra* note 40 at 23–24.

107 *Supra* note 49.

108 *Ibid* at para 80.

109 Braiden & Brockman, *supra* note 40 at paras 32–34.

110 *Ibid* at para 79.

111 *Ibid* at para 63.

112 Solicitor-client privilege is the right to communicate in confidence with one's lawyer. This right comprises the protection against the voluntary or compelled disclosure by one's lawyer absent the client's consent or court order. It also includes protection against the client being compelled to disclose information covered by privilege: See generally Adam Dodek, *Solicitor-Client Privilege* (Markham: Lexis Nexis, 2014).

analyzes whether the Minister's decision fell within a "range of acceptable outcomes",[113] rather than the correct outcome.

ATIR documents reveal that the following elements are not disclosed to the applicant in a conviction review application: (1) timelines for the investigative stage;[114] (2) persons interviewed at the investigation stage;[115] and (3) the separate report with a recommendation to the Minister of Justice, and any other recommendations previously made to the Minister.[116] Most troubling is the second prong, which may or may not involve players who contributed to the miscarriage of justice.

My contention is that there is no way of discerning what counsel's recommendations to the Minister are, and whether they influenced the Minister's decision in respect of the three items enumerated above. The ATIR submitted does not suggest that there are any guidelines as to which components of the process are subsumed within solicitor-client privilege. Consequently, it is not a far stretch to presume that any advice provided to the Minister by counsel at the CCRG, political or otherwise, is subject to privilege. Notwithstanding this power imbalance, applicants must still waive solicitor client privilege with their own lawyer as part of their application requirements, while privilege remains intact between the CCRG and the Minister.[117]

On the subject of solicitor-client privilege, Professor Adam Dodek highlights that instructions from the director of a government department as to the manner in which proceedings should be conducted are subjected to privilege if they are based on legal advice received by counsel.[118] This seems entirely applicable to the CCRG. While privilege technically only applies to legal advice, and not policy directives, Professor Dodek notes that

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[113] *Ross*, *supra* note 49 at para 57.

[114] ATIR, *supra* note 7 at 5.

[115] *Ibid* at 6.

[116] *Ibid* at 35, 38–39.

[117] Canada, Department of Justice, *Application for A Conviction Review Form No. 3: Waiver of Solicitor-Client Privilege* (Ottawa: Department of Justice, 7 January 2015), online: <www.justice.gc.ca/eng/cj-jp/ccr-rc/form3.html> (accessed 5 February 2016).

[118] *Supra* note 112 at 429.

government may display a tendency to overreach its privilege claims over policy-related documents.[119] These realities suggest that any policy advice documented by a written record or otherwise in a conviction review application is likely shielded by at least a claim of solicitor-client privilege.

While Professor Dodek's argument is not predicated on the 696 regime, it is germane to this inquiry. For example, he opines on the manner in which the "innocence at stake" exception could be employed in cases where a person has been wrongfully convicted in order to justify disclosure. He writes that this is akin to an exception in which a clear, serious, and imminent threat of public safety may open the gates to disclosure. He analogizes the threat of continued incarceration for a wrongly convicted individual with the "public safety" exception by arguing that if one's wrongful imprisonment is construed as a serious psychological harm, the imminence requirement for disclosure is likely met.[120]

Critically, he adds that the logic of recognizing such an exception to prevent a wrongful conviction should also apply to remedy a wrongful conviction, with some caveats subject to the confines of jurisprudence. I adopt this position as an apposite legal analysis to my inquiry. In fact, the Public Prosecution Service of Canada publicly acknowledges its position on the innocence at stake exception in respect of disclosure, which arguably supports the viability of Professor Dodek's position. The PPSC Deskbook states "Crown counsel may not release a legal opinion, refer to it, or describe it in any fashion to defence counsel or the public unless the privilege has been waived or it meets the 'innocence at stake' threshold".[121] To date, I have not stumbled upon any research suggesting that the innocence at stake exception is available to obtain documents in the possession of the CCRG where there is information relating to or directly involving advice to the Minister. The important question is, however, whether the innocence at stake principle is limited to the trial period, or continues to apply to the post-conviction phase. To my knowledge and research, this theory has not been tested in a court of law.

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[119] *Ibid* at 430.

[120] *Ibid* at 274–75.

[121] *Supra* note 87 at 2.2(4.1).

Having regard for the foregoing analysis, it comes as no surprise that policy documents used by the CCRG governing the internal review and investigatory procedures in the 696 process are often subject to privilege. While the test for reviewing 696 applications is published in the regulations,[122] the reality is that the applicant is not privy to internal guidelines illuminating the contours of what it means to find a "reasonable basis" for a miscarriage of justice, or what the parameters of "new" or "significant" evidence are, shrouding the application process with uncertainty. Moreover, it becomes difficult to reconcile the standard of review given that internal ATIR reports reveal that the "role of counsel in examining and analyzing court records is in some ways analogous to that of an appellate court",[123] despite the fact that the process is not a substitute for or an alternative to a judicial review or an appeal of a conviction.[124]

If, however, the solicitor-client relationship exists between CCRG lawyers and the Crown, then as Professor Dodek notes, "the client in its broadest sense is the executive branch of the government of Canada".[125] Put simply, each time a CCRG member exchanges information or advice about a file to the DOJ in a 696 review, a shield is raised in the name of solicitor-client privilege.

The result of this quagmire is that the nature of the relationship between departmental staff and the Minister inevitably creates a thick layer of privilege that the Minister is not precluded from using to justify withholding his or her rationale behind the finality of a conviction review

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[122] The Minister will not conduct an investigation if he is (i) satisfied that there is a reasonable basis to conclude that a miscarriage of justice occurred and there is an urgent need for a decision to be made under paragraph 696.3(3)(a) of the Criminal Code for humanitarian reasons or to avoid a blatant continual prejudice to the applicant, or (ii) is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred. See *Regulations Respecting Applications for Ministerial Review—Miscarriages of Justice*, SOR/2002-416, s 4(b).

[123] ATIR, *supra* note 7 at 30.

[124] *Annual Report*, *supra* note 47 at 4.

[125] *Supra* note 112 at 435, citing *Canada (Attorney General) v Central Cartage Co*, 10 FTR 225 at 237, [1987] FCJ No 345 (QL), Reed J.

case. The *Access to Information Act*[126] framework provides another layer of protection to the veil of privilege by also preventing disclosure that is not in accordance with the safeguards of the *Privacy Act*,[127] should an applicant file a request for documents pertaining to his or her conviction review.

In fact, this very issue concerning access to information requests came to life in *Fitzgerald v Nova Scotia (Public Prosecution Services)*,[128] wherein a convicted person filed applications under the *Freedom of Information and Protection of Privacy Act* of Nova Scotia for disclosure from federal prosecutors concerning his criminal prosecution and mercy application involving a conviction under the rape provisions of the 1980s. The purpose was to garner new material of significance that might justify a 696 application.[129] The court concluded that it was not clear that the 696 process provided for full disclosure.[130] To the benefit of future applicants, however, the court remarked that the 696 process was a statutory right,[131] but foreclosed disclosure that the applicant would have been entitled to receive under the *Charter* or in the criminal law, concluding that PPSC was entitled to withhold documents on the basis of solicitor-client and work-product privilege.[132] The verdict addressed various documents, but did not order the disclosure of analytical notes, communications, or prosecutorial advice related to the Crown.[133]

In light of the case law and the evidence of the institutional matrix, a well-informed person considering the conviction review process would have a reasonable apprehension of bias about the 696 regime.

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126 RSC 1985, c A-1.

127 RSC 1985, c P-21.

128 2014 NSSC 183, 345 NSR (2d) 149 [*Fitzgerald*].

129 *Ibid* at para 101.

130 *Ibid* at para 25.

131 *Ibid* at para 85.

132 *Ibid* at paras 119, 121.

133 *Ibid* at para 25.

### D. TURNING THE PAGE TO SECTION 7 AND THE RIGHT TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

Should the foregoing institutional bias arguments fail, there is some merit in resorting to the Supreme Court's expansion of constitutional interests in post-conviction challenges which includes fundamental rights under the *Charter*[134] to argue that the practical implications of the 696 review process do not pass constitutional muster. According to the aforementioned ATIR documents, one is not barred from using section 7 of the *Charter* to demonstrate an infringement on life, liberty, or security of the person in the context of a wrongful conviction, so long as the individual is still in the judicial system.[135] I propose that if an individual submits a 696 application to the Minister, he or she is still engaged with the justice system because their fate rests with the decision-maker at the zenith of the judicial system itself, despite having exhausted all appeal routes.

In *Bonamy*, however, the Federal Court ruled that the review process does not trigger legal rights. Citing *Thatcher v Canada*[136] and noting that the Minister's perfunctory role requires acting in a manner consistent with the *Charter*,[137] *Bonamy* nevertheless confirms that the conviction review process must ensure the right not to be deprived of liberty except in accordance with the "principles of fundamental justice".[138]

While I recognize that the 696 provisions passed constitutional muster in *Bonamy*,[139] the merits on which that case was decided are distinguishable

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134 ATIR, *supra* note 7 at 22.

135 *Ibid*, citing *Charter* supra note 6, s 7. To be in the judicial system, the accused must either have launched an appeal, made an application for leave to appeal, or been granted an extension of the time to appeal. See *ibid.*

136 (1996), [1997] 1 FC 289, 120 FTR 116.

137 *Bonamy*, *supra* note 42.

138 The principles of fundamental justice are not limited to procedural fairness, and also embrace the basic tenets and principles, not only of our judicial process, but also of other components of our legal system. See JM Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29:1 Osgoode Hall LJ 51 at 55.

139 *Bonamy*, *supra* note 42 at para 23.

from the section 7 argument postulated here. At issue in *Bonamy* was the procedural fairness of the powers of delegation from the Minister to the staff involved in the conviction review process. That is separate from an application for the judicial review of an unsuccessful 696 application predicated on a section 7 argument in light of a *continuing* miscarriage of justice.

One can glean some insight from *Reference re Milgaard*,[140] wherein the Supreme Court found that a continued conviction would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider fresh evidence.[141] In other words, a wrongful conviction continues to threaten both the liberty of an individual who is confined to a penitentiary, or alternatively, impinges on the right to life safeguarded by section 7. If a sustained conviction following a 696 refusal constitutes a miscarriage of justice caused by a grossly disproportionate outcome, then *ipso facto*, a section 7 argument is possible. This may present another avenue to challenge the 696 scheme as an alternative to the institutional bias argument.

## IV. RECOMMENDATIONS

In light of this analysis, I present two potential reforms: (1) a separate pardon stream for those who are wrongfully convicted; and (2) overhauling the conviction review institutional matrix. If neither is feasible, legislators must consider devising a task force responsible for reintegrating wrongfully convicted persons back into their respective communities to mitigate the debilitating impediments to pardons and miscarriage of justice declarations. While recommendations for reform on this topic could easily constitute a doctoral dissertation, these suggestions are intended to provide a cursory glance into the potential for a revised process and methodology.

My first recommendation is that a revised pardon stream exclusive to those deemed factually innocent or whose 696 application succeed should be established. To reiterate, a record suspension does not permanently

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[140] [1992] 1 SCR 866, 90 DLR (4th) 1 [cited to SCR].

[141] *Ibid* at 873.

expunge one's record. As such, records for these individuals should be expunged entirely, rather than being kept separate and apart from other records. Akin to a free pardon, this stream should operate like the historical Royal Prerogative of mercy, permanently expunging the entries on one's CPIC record. If a pardon is granted due to a miscarriage of justice, no agency should have the ability to request the convictions underlying the pardon, regardless of whether the agency has authorization from the Minister of Public Safety or the Minister of Justice.

Second, it is imperative that the conviction review process be entirely separate from the auspices of the Minister of Justice. Those reviewing the applications should neither be DOJ officials, nor should they be remunerated by the DOJ. The CCRG rather than the Minister should investigate, assess, and make recommendations to a selected group of judges independently tasked to consider matters on a case-by-case basis. The Canadian Judicial Council, or an independent commission of retired jurists would be apposite bodies to select judges who render decisions in 696 reviews.

If neither of these options is feasible, at the very least the DOJ, alongside provincial counterparts in the offices of the Attorneys General, should initiate and oversee an office specifically geared towards reintegrating the wrongfully convicted back into the community. Collaboration with human resource departments and organizations should be tailored to assist the individual with, *inter alia*, job displacement, lapses in educational advancement, and psychiatric/psychological services.

While these solutions are by no means hermetic, nor a complete response to the plethora of concerns associated with the pardon system or the 696 review process, they are intended to incite dialogue around the amelioration of how the state remedies wrongful convictions.

Critiques challenging the institutional biases of the conviction review process and the amorphous pardon/record suspension scheme are not new. They are the byproducts of decades of concern. While the government maintains that the role of the Attorney General and the Minister is bifurcated, the hybrid role, with a decision-making process veiled by solicitor-client privilege, prompts serious administrative and constitutional

law concerns.[142] While judicial review is a worthwhile mechanism to assess the *Charter* compliance of the Minister's decision, the fate of victims of the criminal justice system remains in the hands of Canada's Chief Prosecutor whose legislative hands effectively drive the policies that shape criminal courts. This reality reaffirms the quotation from the beginning of this paper: although much has changed, regrettably, much remains the same.

[142] The author is mindful that the first party disclosure regime requires the disclosure of any information that is not clearly irrelevant or subject to privilege: see generally *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1. While *Stinchcombe* is intended to capture the fruits of an investigation, the disclosure regime does not apply to the conviction review process, and cannot be applied retroactively. This is particularly troublesome for wrongful convictions that predate the *Stinchcombe* decision and the conventional disclosure reforms that followed. In light of these considerations, the protection of solicitor-client privilege further insulates the applicant from being provided with a full and frank account of the evidence that resulted in a wrongful conviction.