

Criminal Injustice

Understanding the Causes, Effects, and Responses to
Wrongful Conviction in Canada

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During the past decade, there has been growing international interest in the topic of wrongful conviction and its serious implications. As in other jurisdictions, Canada has seen several high-profile cases of wrongful conviction that have led to an increased recognition of the fallibility of the criminal justice process. However, despite increased media attention to the issue, corresponding academic literature on the problem has been limited in this country. This article begins by reviewing the literature on the causes of wrongful conviction and uses examples from Canadian cases as illustrations. Following this, through qualitative interviews with five wrongly convicted Canadians, the article examines some long-term effects of a wrongful imprisonment on individuals and their families both during incarceration and following their release. Finally, government responses to the issue are discussed, illustrating their limitations and their relevance for criminal justice policy and practice.

Keywords: *wrongful conviction; Canada; criminal justice*

Not long ago, to claim that an innocent person had been imprisoned was audacious, even risky, a proposition that was close to unprovable. . . . Now the fabric of false guilt is laid bare. . . . Sometimes eyewitnesses make mistakes. Snitches tell lies. Confessions are coerced or fabricated. Racism trumps the truth. Lab tests are rigged. Defense lawyers sleep. Prosecutors lie.

Scheck, Neufeld, and Dwyer, 2000, p. xv

The Canadian justice system is organized in terms of rules and procedures that ostensibly make it difficult to wrongly convict. Those who are convicted are considered by the courts and legal professionals in the justice system to have met strict criteria, and once convicted, it becomes extremely

difficult to make the case that errors occurred. Although the Canadian system of criminal justice is not immune to wrongful convictions, as the names Steven Truscott, Guy Paul Morin, David Milgaard, Donald Marshall, Jr., and Thomas Sophonow attest,¹ there has been little systematic research on wrongful conviction in Canada. The reality of wrongful conviction not only raises concerns regarding the fallibility of due process, human rights violations, and the limitations of the adversarial approach, but it also raises questions about the legitimacy of the justice system and those professionals who work within it. Given the seriousness of wrongful convictions, not only for the wrongly convicted but also for the justice system as a whole, this problem demands further exploration. The objective of this article is to examine the causes and effects of wrongful convictions as well as state responses to the problem.² First, the article uses Canadian case material to explore the major factors that appear to contribute to wrongful convictions. Second, relying on interviews with five wrongly convicted Canadians, we highlight some long-term effects of wrongful imprisonment. Finally, we address the issue of exoneration, particularly the use of Section 696.1 of the *Canadian Criminal Code*, DNA forensic evidence, and the role of commissions of inquiry. We provide an overview of the salient issues concerning wrongful conviction, including its impact on the wrongly convicted, the ways in which Canadian society has sought to deal with the problem, and the limitations of such responses.

THE PREVALENCE OF WRONGFUL CONVICTION

Miscarriages of justice, whereby an innocent individual is wrongly convicted of a crime, were, until relatively recently, thought to occur infrequently (Carrington, 1978). Although the number of wrongful convictions is an unknown dark figure, recent speculation from the United States of the frequency of wrongful convictions range from very few cases each year to up to 20% of all recorded convictions (Holmes, 2001). Radelet, Bedau, and Putnam (1992) ascertained that 416 known miscarriages of justice in capital or potentially capital cases occurred between 1900 and 1990 in the United States, including 23 cases where the accused was executed. A study conducted at Long Lartin maximum-security prison for the National Association of Parole Officers in Great Britain revealed that as many as 6% of the inmates in that prison may have been wrongly convicted, a figure presumed typical of other British prisons (Carvel, 1992). Huff, Rattner, and Sagarin (1986, 1996) reported that prominent justice officials in the United States believed that approximately half of 1% of all felony convictions were wrongful, which translates into 6,000 to 10,000 cases per year. This assortment of estimates makes it difficult to accurately portray the number of wrongly convicted indi-

viduals in a given year or given jurisdiction. However, the study by Huff et al. (1986, 1996) appears to have been the most rigorously conducted, and their finding of .50% of convictions being in error has been cited elsewhere (Martin, 2001; Scheck, Neufeld, & Dwyer, 2000). The fact that wrongful convictions occur at all points to the importance of studying the contributing factors and underlying causes.

Causes of Wrongful Conviction

Research has revealed that wrongful convictions do not occur as a result of a single error by a sole individual. Instead, both individual and systemic factors inherent to the criminal justice system may, either alone or in concert with each other, contribute to wrongful convictions (Castelle & Loftus, 2001). The multitude of factors includes eyewitness error, professional misconduct, false confessions, erroneous forensic science, the use of jailhouse informants, and racial bias.

Eyewitness error. Psychologists have long demonstrated that because of normal deficiencies in the human memory process, eyewitness identification, where witnesses are called on to report their version of events, is inherently unreliable (Sanders, 1984). Research in the United States and the United Kingdom reveals that eyewitness error may be the single most important factor leading to wrongful convictions in those countries. In one study, it was found to have occurred in nearly 60% of cases (Huff et al., 1986). Scheck et al. (2000) found that in all 52 U.S. cases of DNA exonerations they studied, erroneous eyewitness identification was used to convict the innocent defendant.

Eyewitness errors may happen for several reasons, including suggestive police interviewing, unconscious transference, and the malleability of confidence (Castelle & Loftus, 2001; Loftus, 1979; Loftus & Doyle, 1997). Suggestive police interviewing may occur if the police communicate information to eyewitnesses that influences and ultimately contaminates their testimony. Unconscious transference is said to occur among witnesses when a person seen in one situation is confused or recalled as a person seen in another situation (Loftus, 1979). The malleability of confidence refers to the pliable nature of a witness's certainty of his or her testimony. Research has demonstrated that witnesses who identify a suspect from a police lineup or group of photos are far more confident of their choice if given positive feedback from authorities, even if this occurs in casual conversation (Wells & Bradfield, 1998). Despite these findings, most jurors are unaware of the unreliability of eyewitness testimony and may place unwarranted faith in its accuracy (Sanders, 1984).

In Canada, the case of Michel Dumont, who was wrongly convicted of sexual assault, illustrates how erroneous eyewitness identification contributes to wrongful convictions. In 1990, in the province of Quebec, a woman came forward to the police alleging that she had been sequestered and sexually assaulted at knifepoint by a White male. A composite sketch of the perpetrator was disseminated to the public, and an anonymous call made to the police claimed that the sketch resembled Michel Dumont. When approached by police, Dumont agreed to be photographed for identification purposes. When his photo was presented to the victim, he was identified as the assailant. During Dumont's trial, no circumstantial or material evidence was presented; the only available evidence in the case was the victim's identification of Dumont. Despite an alibi and continued protestation of his innocence, Dumont was convicted of sexual assault in 1991. It is important that between 1992 and 1998, the victim came forward to provide six statements indicating her doubts concerning her initial identification of Michel Dumont, which were ignored by the authorities. After nearly 4 years in prison, Dumont was exonerated through a 690 application.³

Professional misconduct. Unprofessional conduct on the part of police, the prosecution, and the judiciary is an important contributing factor to convicting the innocent (Huff et al., 1986). The police, who play a crucial role in deciding who to charge and in obtaining evidence to support a charge, are thus a central focus in wrongful conviction cases. In building a case against a suspect, the police may either inadvertently or intentionally suppress, lose, misinterpret, or overlook evidence that supports the defendant's claim of innocence. Such errors may occur through prejudicial lineups, the misuse of informants, soliciting of false confessions, and relying on poor forensic science. Such unprofessional behavior, however, may be well intentioned and motivated by a desire to strengthen the case against a suspect that professionals are convinced is guilty. This process is often referred to as "tunnel vision" on the part of criminal justice professionals. The guilt of one particular suspect is assumed, and evidence is then manipulated by authorities through the use of a number of questionable practices to prove that guilt. Whether tunnel vision occurs among police officers or the prosecution, authorities may become so focused on one particular individual that they may make deliberate attempts to destroy that individual's alibi and eliminate all other potential suspects (Schreck, 2002).

Professional misconduct may also occur in the form of withholding evidence considered favorable to the defense. The Canadian justice system prohibits police and prosecutors from pursuing a prosecution while withholding evidence that supports a claim of innocence. A prosecutor has a duty to learn about evidence favorable to the defense that may be in police possession.

Furthermore, both the police and prosecution are required to follow the procedures and regulations in place to ensure communication of all such information from the police to the prosecution so that the prosecution can, in turn, provide the required information to the defense (Greenspon, 2002). If the prosecution has exclusive possession of information favorable to the defense but withholds it, not only does this raise ethical questions about prosecutorial conduct, but it may also contribute to wrongful convictions (Rosenberg, 2002).

Martin (2001) identifies three predisposing factors that may contribute to convicting the innocent within a professional setting. These include the high profile nature of a case that pressures authorities for a quick resolution, the marginalized status of the accused as an outsider, and that the case rested on evidence that was suspect or inherently unreliable. When all three factors are present, there may be a greater likelihood that authorities pressure a defendant into a false confession, overlook the initial reluctance of an eyewitness, believe an unreliable jailhouse informant, or fail to disclose favorable evidence, all of which may precipitate a wrongful conviction.

The case of David Milgaard, who was wrongly convicted of the rape and murder of Gail Miller in 1970, provides a powerful example of police misconduct as well as tunnel vision. The three predisposing factors were present in this case. First, the brutal nature of the crime and the high level of public anxiety and fear put great pressure on the police to quickly apprehend and charge someone. Second, Milgaard, who was 16 at the time of the murder, was labeled as a restless, impulsive troublemaker and was quickly targeted by police. Finally, the case against Milgaard was based on the questionable evidence of three teenagers, which was obtained through police coercion and intimidation. Milgaard spent 22 years in prison for the murder. Six years following his release, DNA testing established his innocence.

False confessions. A confession is often viewed as the most powerful piece of evidence that the prosecution can bring against an accused. Juries are said to believe a defendant who confesses to a crime, regardless of other available evidence pointing to the contrary (Leo & Ofshe, 1998). Although most find it difficult to believe that anyone would confess to a crime they have not committed, research indicates that this may not be a rare phenomenon. For example, of 62 wrongly convicted individuals who were exonerated by DNA evidence in the United States, Scheck et al. (2000) found that 15 of these individuals originally confessed to the crime. To appreciate how this can occur, it is important to understand police interrogation techniques. Studies have documented that contemporary methods of psychological interrogation may cause cognitively and intellectually normal individuals to provide false confessions to serious crimes of which they are entirely innocent

(Kassin, 1997; Leo & Ofshe, 1998). In particular, techniques are frequently used to convince suspects that their situation is hopeless and that their only recourse is to confess to the crime. False confessions appear to take place during the early and emotionally charged days following a crime and appear to be facilitated by the ability of law enforcement officials in the United States to lie and confront suspects with fabricated evidence, such as false fingerprints and fake eyewitnesses during an interrogation (Leo, 2001).

Examples of false confessions can be found in numerous Canadian cases, including that of Romeo Phillion. Prior to his arrest in 1972, Phillion had been charged with several petty crimes. While being questioned on an unrelated robbery, Phillion agreed to confess to the 1967 murder of Ottawa firefighter Leopold Roy in exchange for the charges against his coaccused to be dropped. Although Phillion recanted his statement within hours, he was imprisoned for 31 years. Evidence, which was never disclosed to Phillion's defense counsel at trial, recently emerged that supported Phillion's claim that he was innocent. A police report uncovered in 1998 confirmed that Phillion was in Trenton, Ontario, on the night Roy was killed in an Ottawa, Ontario, apartment building more than 200 km away. In July 2003, with the help of a lobby group, the Association in Defence of the Wrongly Convicted, Phillion was finally released from prison on bail. As of January 2005, Phillion was awaiting a response to his application for ministerial review.

Erroneous forensic science. The use of erroneous forensic science or junk science as evidence at trial has also been linked to wrongful convictions. In some cases, evidence becomes contaminated through inadvertent human error, exaggeration, misinterpretation, and bias, whether in the forensic laboratory or at the crime scene (Castelle & Loftus, 2001). Even more disturbing, however, are those cases where forensic scientists deliberately tamper with evidence. Tarlow (1995) cites several cases of evidence tampering by forensic experts who were acting on behalf of the prosecution. For example, a series of wrongful convictions resulted from the fraudulent forensic science of State Trooper Fred Zain, who fabricated serology results and falsely reported blood and semen characteristics in sexual assault and murder cases during a 16-year career in West Virginia and Texas. Between 1992 and 1995, five state troopers in the United States pled guilty and were sentenced to prison for repeatedly planting fingerprints in criminal cases in New York (Goldin, 1995). In 1997, a medical examiner was convicted of witness tampering for providing a false autopsy report (Hanley, 1997).

The case of Guy Paul Morin, who was wrongly convicted of the murder of Christine Jessop in Ontario in 1992, provides a telling example of how forensic science can be misused and misinterpreted to create a false impression of guilt. In Morin's case, both hair and fiber evidence were used to demonstrate

physical contact between Guy Paul Morin and the victim, as well as evidence that the victim had been in his car. Scientists from the Centre for Forensic Sciences in Ontario, who analyzed the physical evidence, testified regarding the hair and fiber comparisons but failed to underscore the glaring limitations of that evidence. In particular, the fiber similarities were not probative demonstrating direct contact between the victim and the accused. Additionally, these professionals used misleading language and failed to disclose that the fiber evidence had been contaminated. Commissioner Kaufman (1998), who chaired the *Commission on Proceedings Involving Guy Paul Morin* (2001), noted inconsistencies in the way in which the analysts used such terms such as *match* and *consistent with*, which proved to be misleading and contributed to a misunderstanding of the forensic evidence. As to the overall effect of the misuse of forensic evidence in this case, Commissioner Kaufman notes the following:

Hair and fibre evidence elevated Guy Paul Morin to prime suspect status; formed the justification in large measure, for his arrest and for the searches of his car and home; was cited by the Crown to support his detention pending trial; was cited by the Ontario Court of Appeal and the Supreme Court of Canada as evidence relevant to their consideration of whether his acquittal should be overturned; formed a substantial part of the case against Guy Paul Morin at his first and second trials and undoubtedly was relied upon by the jury at his second trial to convict him. (p. 8)

There has been a recent and significant expansion of the field of forensic science and the use of forensic experts in criminal cases. Accompanying this expansion has been the widespread presumption that science may be able to provide answers to previously unknown and unknowable criminal facts. Although science has continually advanced our knowledge in this area, the above evidence indicates that it may not be the panacea it has been conveyed as. Despite the claim of scientific objectivity, human error in interpreting forensic science, whether deliberate or unintentional, may contribute to wrongful convictions.

The use of jailhouse informants. The use of jailhouse informants, although strongly embedded in the culture of the criminal justice system as a means of securing a conviction, may play an important role in the conviction of the innocent. In such cases, prisoners provide information to law enforcement officials in exchange for money, property, or leniency in sentencing, which calls into question their reliability (Zimmerman, 2001). In one study of the 13 Illinois death row inmates found to be wrongfully convicted, nearly 40% were prosecuted using the testimony of jailhouse informants (Armstrong

& Mills, 2000). Similarly, Scheck et al. (2000) found that of 62 cases in which DNA evidence exonerated an innocent defendant, 15 (24%) relied at least in part on informants to secure the original conviction. American studies indicate that to the average juror, there is little difference between the manner in which they receive and weigh a confession obtained by a police officer and a confession attained through a jailhouse informant (Cory, 2001).

The wrongful conviction of Thomas Sophonow in Manitoba and the subsequent commission of inquiry that followed illustrated the dangers of relying on jailhouse informants. Sophonow endured three trials for the murder of Barbara Stoppel in 1981 and had his conviction quashed by the Court of Appeals in 1985. One of three jailhouse informants used to convict Sophonow was a frequent informant, having testified in nine other cases and had a conviction for perjury. Before the third trial, no less than 11 jailhouse informants had volunteered to give evidence. The unreliability of these witnesses was never disclosed to Sophonow's defense. During the commission of inquiry into the Sophonow case, Justice Cory (2001) declared the following:

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable.

Justice Cory made recommendations curtailing the use of informants in future cases and suggested that strong cautionary instructions be given to the jury regarding their testimony.⁴ The extent to which courts will implement these recommendations remains to be seen. This relatively common practice within the justice system should be subject to limited use.

Racial and class bias. An abundance of criminological research points to racial disparities in arrests, pretrial detention, and sentencing among African Americans in the United States and Aboriginal peoples in Canada. It is important to note that recent research has begun to suggest that an overrepresentation of visible minorities is also found among the wrongly convicted (Parker, Dewees, & Radelet, 2001; Royal Commission on the Donald Marshall Jr. Prosecution, 1989). Studies have shown that in the United States, African Americans compose between 40% (Bedau & Radelet, 1987) and 57% (Scheck et al., 2000) of the known wrongful convictions. Because these estimates are derived from cases in which miscarriages of justice are eventually discovered, it is likely that the proportion of African Americans and

other minorities among the wrongly convicted is even higher (Parker et al., 2001).

Although minimal Canadian research has addressed the link between race and wrongful conviction, the prominent case of Donald Marshall, Jr., a Mi'kmaw Aboriginal who was wrongly convicted of the murder of Sandy Seale, illuminates the ways in which racial prejudice and other forms of prejudice are embedded in the Canadian criminal justice system. The Royal Commission on the Donald Marshall Jr. Prosecution (1989) on the prosecution of Donald Marshall, Jr., acknowledged that Marshall had been wrongly convicted and imprisoned because, *inter alia*, he is Mi'kmaw:

The tragedy of the failure is compounded by the evidence that this miscarriage of justice could and should have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall Jr. is a Native. (p. 1)

The Royal Commissioners' principal finding in their report was that a two-tier system of justice existed in Nova Scotia—a system that responds differently depending on the race of the person investigated (Royal Commission on the Donald Marshall Jr. Prosecution, 1989, Vol. 1, p. 220). Donald Marshall, Jr., as a Mi'kmaw, was on the bottom of the second tier (Turpel-Aki-Kwe, 1992). Besides the issue of race, the commission also highlighted the way in which the socioeconomic status of the accused may contribute to the conviction of the innocent. In particular, socioeconomic status may affect the ability of an accused to afford satisfactory defense counsel. In fact, the commissioners concluded that Marshall's defense counsel failed to provide an adequate standard of professional representation to their client (Royal Commission on the Donald Marshall Jr. Prosecution, 1989). His lawyers conducted no independent investigation, interviewed no Crown witnesses, and failed to ask for disclosure of the Crown's case against their client. The Marshall case demonstrates how, within the Canadian context, institutionalized racism and social disadvantage may indeed contribute to miscarriages of justice.

The Effects of Wrongful Imprisonment

The negative effects of incarceration on those serving long terms of imprisonment have been well documented (cf. Flanagan, 1995; Roberts & Jackson, 1991). According to Sykes (1958), all prisoners are subject to the deprivation of liberty, goods and services, heterosexual relationships, autonomy, and security. However, not all prisoners experience these deprivations in the same

way. In the case of the wrongly convicted, these negative effects are likely exacerbated by their victimization at the hands of the criminal justice system.

To understand the effects of a wrongful imprisonment, in-depth interviews were conducted with five Canadians who came to be recognized as wrongly convicted.⁵ All of the respondents were Caucasian males and ranged in age from 31 to 65. The respondents spent an average of 5 years in federal prisons for crimes they did not commit, ranging from 3 to 8 years. At the time of interview, all were living in the community. To date, four of the five respondents have been fully exonerated by the courts. Ralph was wrongly convicted of murdering his wife, who had accidentally choked to death.⁶ He served more than 8 years in a maximum-security prison before being freed on appeal; he was later exonerated. Darryl was wrongly convicted of the murder of a shopkeeper and served 5.5 years in prison. While on appeal, and fearful of further judicial error, Darryl pled guilty to a lesser charge and is currently attempting to overturn that guilty plea. Robby was convicted of sexual assault and served more than 3 years in prison, a great deal of it in solitary confinement. He was later acquitted on appeal. Nate was wrongly convicted of sexual assault and served 3.5 years in prison. His 690 application was successful,⁷ and he was subsequently acquitted of this crime. George was wrongly convicted of robbery and assault. He served 5 years in prison, with 10 additional years on parole in the community. He was acquitted on appeal many years later. At the time of the interview, all of the participants were seeking some form of compensation and/or acknowledgement of error from the Canadian government.

Four participants were recruited for the study with the help of an association that provides legal counsel and support to the wrongly convicted and assists such individuals in the process of exoneration. The remaining respondent was contacted following media attention to his case and expressed an interest in participating in the study. During interviews, participants responded to questions on the circumstances leading up to their wrongful conviction and imprisonment, their perceptions and experiences with the Canadian criminal justice system, the way in which they coped with their wrongful incarceration, and the long-term effects of the wrongful conviction on themselves and their families. For example, to gain insight into the long-term effects of the wrongful conviction, respondents were asked, "How has the wrongful conviction affected your life?" Interview probes were then used to ascertain the areas of participants' lives most affected by the wrongful conviction. The interviews, which lasted 2 to 3 hr, were audiotaped and transcribed.

To analyze the interviews, transcripts were read and annotated according to themes and categories identified by the researchers. Following this, it was necessary to consider the range of participants' perspectives and experiences for each theme. In examining the accounts given by the wrongly convicted,

assumptions were not made that they represented the objective truth of all persons wrongly convicted. However, the information conveyed during the interviews was taken as evidence of their own interpretation of their experience, which was then further interpreted by the researchers. It is important to note that as a result of the selection process of participants, as well as the small sample size, the findings of the research cannot be generalized to the larger Canadian population of wrongly convicted individuals. They do, however, provide greater insight into the overall Canadian experience of wrongful conviction and imprisonment.

The following section explores the effects of a wrongful imprisonment as identified by the respondents. These effects include issues of loss, intense anger and aggression, and the feeling of being imprisoned long after their official release. The section also traces the impact of a wrongful imprisonment on the families of respondents.

Loss. The losses experienced by the wrongly convicted were profound and touched many areas of their lives. However, at the most basic level, the wrongful imprisonment gave rise to their loss of freedom, dignity, and, more important, their credibility:

The hardest part is losing your freedom, your dignity, to be treated like shit. . . . [In prison] you're counted as if you were jewels . . . but you're treated as though you were shit. (Nate)

I lost my credibility with just about everybody that I knew. No matter how much you think you know somebody, if something like that happens, you kinda . . . ooh. So I lost that. (Robby)

Respondents revealed that their incarceration also precipitated a sense of loss concerning their preprison identity and sense of self:

[As a result of the experience] I lost me, is what I lost . . . my identity, who I am . . . the way I viewed life. . . . I had to build up that extra protection in prison. The other layer of Robby wasn't there. . . . I couldn't be Robby. I had to be someone that I'm not, somebody that will fight, somebody that will push, somebody that doesn't give a fuck. I had to wear certain hats to survive. (Robby)

The loss of family, which accompanied a wrongful imprisonment, was continually emphasized by the respondents as significantly affecting their lives. For all respondents, being unfairly separated from loved ones proved to be devastating:

I guess without a doubt, being separated from your family, would be the toughest part. I've often referred to that throughout the years as the worst part—being separated. I was used to being home with the kids in a day-in and day-out basis. (Ralph)

For other participants, the loss of family occurred because family members failed to believe in their innocence. In Nate's case, his nuclear family rejected and abandoned him following his (wrongful) conviction for sexual assault:

[My family] saw that I had been convicted and that I was on my way to prison. They all withdrew themselves from me because . . . everyone around me thought well, if he's been convicted, it's because he probably did it . . . so they drifted. . . . My mom didn't believe in me, and she didn't help me. . . . My dad . . . he said, "No, you're leaving," and refused to allow me to live at his house. (Nate)

Ultimately, the losses suffered by the wrongly convicted fuelled their sense of injustice, as these were often losses that were difficult to salvage once they were released from prison.

Volatility: Anger and aggression. All of the respondents noted that their experiences with criminal injustice have fuelled a generalized anger and feelings of aggression toward society as well as a more specific hatred of the justice system. George, who was wrongly convicted of robbery notes the following:

I am full of HATE [shouting]. Full of hate and this has lasted for years. I am full of hate against the administration of justice in this province. I also hate a society that accepts injustices as normal. (George)

All of the respondents reported that their wrongful incarcerations have had an important impact on their level of aggression and overall temperament. In all cases, participants reported being more angry, aggressive, and impulsive than they were prior to their imprisonment:

There's no question that I had to learn to be tougher, harder. Without a doubt, I became more aggressive, more angry. It doesn't take much for me to blow up. . . . [Before my incarceration] I was more patient, and it would take me a lot more to get angry. But now, it doesn't take anything. (Robby)

Darryl explains that his family is forced to endure the brunt of his anger:

I still have a lot of anger. I have shitloads of anger for what happened . . . it comes out on the ones closest to me. (Darryl)

In a similar vein, George notes that his change in personality and increased anger has been most difficult for his children, who were, in many respects, forced to live with a man whose values and outlook on life had changed dramatically:

[After my release] I spent my time putting down society, always being angry about injustices. . . . My kids had a hard time because . . . my old values, especially my belief in God, were completely and totally gone. I absolutely didn't want to have anything to do with that. . . . So it was a matter of coping with a different set of beliefs. (George)

Continued sense of imprisonment on release. Being wrongfully incarcerated has had a profound effect on the respondent's behavior, perspectives, and circumstances. However, in spite of being released from prison, many respondents do not feel that they are truly "free," and continue to feel constrained by a sense of imprisonment that prevents them from leading a normal or productive life:

When I'm asked how much time I did . . . I believe that I've been in prison for decades psychologically. (George)

For Nate, seemingly simple daily tasks appear to take on enormous significance, often inciting panic and a self-consciousness concerning his former status as a prisoner. He explains an incident buying groceries:

My wife wasn't feeling well that day, and she asked me to go run an errand. I took the car and I went to [the city] to run an errand. I was panicking. I was there with the [grocery] basket, and I felt like everyone was staring at me. I hadn't yet been officially pardoned. I was only freed [from prison]. I still had to report to a probation officer. . . . I still felt like a prisoner. (Nate)

One of the greatest burdens that respondents reportedly faced on release was the fear of being retargeted by the criminal justice system. Following their release, several participants altered their physical appearance to ensure physical uniqueness or to avoid being recognized. For example, George grew a beard to ensure that he would never again be mistaken for someone else, and Nate deliberately changed his appearance to assure that he was unrecognizable:

In prison at that time, you weren't allowed to have a beard. . . . Of those who were really responsible for having committed the robbery [that I was wrongly convicted of], no one had a beard. When I was released from prison, I kept telling myself, yeah, I'm going to grow a beard. It will be a way not to be mistaken for someone else again. (George)

There were some people that recognized me [on my release], and they'd say "Hey, that's that goddamned rapist" . . . I said to myself, I'll change my appearance, my identity. I shaved my moustache and changed the color of my hair to try to be less recognizable. (Nate)

The respondents used other techniques to ensure that they would not be re-targeted. For example, following his release, George worked incessantly as a construction worker. His main motivation for working so extensively was to ensure that he always had a solid alibi:

I was working unending hours, because I was telling myself, you know, I had an alibi, but the judge didn't necessarily believe my alibi. So I thought to myself, the best way, the best alibi, is work. (George)

A further means to avoid prejudice and discrimination, despite their innocence, involved keeping their past involvement with the criminal justice system a secret. Several respondents expressed a fear of revealing their former identity as a prisoner to others:

I wasn't open with a lot of people, I didn't tell a lot of people. I protected my privacy. I was aware of everybody's preconceived ideas of what an inmate is, what a con is. . . . "Oh, he's on parole. He's this, he's that. Watch your back." So I only told the people that I knew I had to trust, and yet trusted me. (Robby)

However, in spite of efforts to hide their pasts, many were unable to do so and were forced to live with the negative consequences. Nate, for example, was unable to escape the label and vilification associated with being a sex offender:

The label of *rapist* follows you, even if you dye your hair black and have darker skin when you get out. Whether you like it or not, the label *rapist* always comes out. . . . There's always someone, somewhere, whether it be a guard or a prisoner, who has seen you and who passes along the message. (Nate)

Regardless of their newfound freedom through exoneration, respondents continue to suffer on release. Moreover, they assert that it will take a long time to readjust to life outside:

When I would go out for a short walk . . . I'd get scared when [my family] locked the doors on me. When I hear the click of a door that shuts loudly, like a prison door, I turn around and jump. It has lessened somewhat, but it's still there. I can be in the middle of shaving and I get a flash of something that happened inside [prison] . . . it comes back to me. So you have flashes every now and then. Sometimes when I'm sleeping, I'd dream that I was in prison. I'd wake up in a panic. (Nate)

The experience of a wrongful imprisonment is not only devastating for the individual, but the families of the wrongly convicted experience these hardships as well. The families are deprived of the emotional support of their loved ones, are forced to deal with the reality of having a family member in prison, and may be deprived of an essential source of income (Ferraro, Johnson, Jorgensen, & Bolton, 1983). As Robby notes,

[My wife] was left living with the reality of being single, with four children, a mortgage, hydro, the groceries and other accoutrements that go with having four young children: one in school, needing to work, needing to deal with baby-sitters and, oh yeah, my husband's in prison. (Robby)

Similarly, Nate's wife (Diana) went through great financial hardship to single handedly prove the innocence of her husband:

In the past, I was in school, and [Nate] looked after the kids. But when they arrested him, I had no salary, nothing, and no one to look after the kids. I went back on welfare to be able to take care of Nate and get him acquitted, to put together all the paperwork. It took me 3 years to put everything together and to get him acquitted. (Nate's wife, Diana)

The financial hardship on Nate's family was exacerbated by his status as a sex offender. Nate was targeted by the other inmates and ultimately assaulted in prison. Consequently, he was fearful of mixing with the general prison population. To ensure her husband's safety, Diana was forced to provide monetary compensation to another prisoner who worked in the prison canteen, via the prisoner's wife. Once these payments were made, Nate was provided with food within the confines of his cell. As Diana explains, the financial and psychological burden of making these payments was significant:

So, [the other prisoner would say to me] “Well, if you want me to give your husband some food, you have to pay me.” I had to take money out of my account, and I didn’t have any money at that time. . . . I paid someone I didn’t know, another prisoner’s wife. . . . I’d put 50 dollars and 18 cents in her account, this woman that I didn’t know. . . . The 18 cents was a code, I put in 50 dollars and 18 cents. So now, the woman would tell her husband, well Nate’s wife paid, you can give him something to eat. So he’d go give Nate some food in his cell. It’s the only way that Nate could eat and be safe. (Nate’s wife, Diana)

The loss of a key breadwinner and other economic hardships were further exacerbated by seemingly endless fees paid to legal professionals:

I had to sell everything I owned, car, everything, to scrape together some money to pay a lawyer. Because before picking up a file and saying “Yes, I’ll take care of your file,” he was asking for \$2,000, \$3,000. . . . Today, we owe him \$128,000 for courts fees to acquit Nate. (Nate’s wife, Diana)

Undoubtedly, the respondents’ children were also victims of the criminal justice system and suffered greatly as a result of their fathers’ wrongful conviction. During their incarceration, the children of both Robby and Nate were removed from their homes by social services and placed into care. Since his exoneration, Robby has been unable to regain custody of three of his children. Sadly, two of Nate’s children suffered sexual abuse while they were under state care. Respondents have to live with the reality that the justice system not only failed to protect them but also failed to protect their children:

If the system would have affected only me, OK. As long as it was only me who suffered. But that’s not the case. There were my children, two kids. These two kids, they paid the price of a deceptive police officer and a really deceptive Crown. . . . My two kids were placed in a foster home for 3 years [during my incarceration]. They were sexually abused while they were there. . . . They’ve really suffered. . . . Our kids need psychological help, but we can’t all see the psychologist every day. (Nate)

Although Ralph’s children were able to live with their aunt during his wrongful incarceration, the separation from their father had long-term consequences for both Ralph and his children:

It affected my life and the rest of my family, my children’s lives. I went from being a married person with a stable career and family to a convicted murderer not long thereafter, quite a world of difference. Being apart from your

family of course had affected me and has affected them. The children . . . they were orphaned and that leaves everybody with some anger. (Ralph)

The effects of a wrongful conviction and imprisonment are clearly devastating for the individual and their families. As the above testimonies denote, the hardships continue following release from prison and even following exoneration. In Canada, there are several methods of redress, each with its own difficulties, which will be outlined in the next section.

RESPONSES TO WRONGFUL CONVICTION: POSTCONVICTION EXONERATION

When a wrongful conviction has occurred, the wrongly convicted have little recourse available to rectify the miscarriage of justice. The avenues of redress accessible to them all involve, to some degree, the very government that originally perpetrated the wrongful arrest and conviction. Three issues related to redress will be examined in this section: reliance on Section 696.1 of the Canadian *Criminal Code*, the use of DNA evidence in postconviction exonerations, and the role of various Canadian Commissions of Inquiry.

Section 696.1 of the Criminal Code. Currently, Section 696.1 of the Canadian *Criminal Code* allows individuals who maintain that they have been wrongly convicted to apply for a review of the circumstances of their case and conviction. Unlike the United Kingdom, in which an independent conviction review board assesses each case, Canada relies on the Criminal Conviction Review Group of the Department of Justice to undertake such reviews. The criteria of eligibility regarding application for a conviction review are quite narrow. First, individuals who are eligible must have been convicted of a criminal offence or be sentenced under the dangerous or long-term offender provisions of the *Criminal Code*. Second, these individuals must also have exercised all of their rights of appeal through the various courts, which can take many years. Finally, there must be new matters of significance that were not previously considered by the courts or arose after the conventional avenues of appeal had been exhausted (McFadyen, 2002).

The review process itself consists of four stages.⁸ The first stage is the preliminary assessment, where it is decided whether the case warrants further investigation. The second stage involves a thorough examination of all information to assess reliability and relevance and formulate a recommendation on the case. The investigation could involve interviewing witnesses, carrying out forensic tests, as well as consulting police and prosecutors involved in the original case. The third stage consists of organizing the results of the investigation into an investigative brief, which is then shared with the applicant and

TABLE 1
696.1 Applications to the Minister of Justice

<i>Year</i>	<i>Number of Applications</i>	<i>Number of Decisions^a</i>	<i>Outcome of Applications^b</i>
1995	60	5	5 declined
1996	75	5	2 referrals to Court of Appeal 3 declined
1997	56	2	1 referral to Court of Appeal 1 declined
1998	60	15	2 referrals to Court of Appeal 13 declined
1999	50	5	5 declined
2000	50	8	2 referrals to Court of Appeal 6 declined
2001	32	11	11 declined
2002	27	3	3 declined

a. Given the complexity of the cases and the time and detail required to investigate them, few applications received in a given year are completed in that same year. Decisions are usually made in subsequent years.

b. These refer to decisions made by the Minister of Justice following a thorough analysis of the file.

his or her lawyer for review and comment. Finally, legal advice is prepared for the Minister of Justice. This includes a brief of the applicable law and the recommendation, which forms the basis for the Minister's decision. Although the Minister does not make decisions regarding guilt or innocence, if he or she is satisfied that a miscarriage of justice likely occurred, a recommendation is made with respect to one of the following remedies:

1. Ordering a new trial or hearing
2. Ordering a new appeal proceeding
3. Referring any question to the court of appeal for its opinion

In cases where the Minister offers a remedy, the applicant can apply for bail. If there are questions regarding law or fact, the opinion of the Supreme Court of Canada may be sought. Additionally, under the Canadian *Criminal Code*, the Cabinet may grant a free pardon or conditional pardon, or the Governor General may grant a pardon or respite of the execution of a sentence (McFadyen, 2002).

As Table 1 illustrates, each year only a few applications are made for a review under Section 696.1. The small numbers may be a reflection of the arduous application process involved as applicants and their counsel must supply volumes of information, including trial and appellate factums. Rosen (1992) points out that there are a variety of difficulties with this section and

its practice.⁹ Given the many impediments to filing an application, it is not surprising that the federal government has recently responded with amendments to this provision. There has been extensive lobbying for the establishment of an independent body to undertake conviction review, in particular by the Association in Defence of the Wrongly Convicted and the Canadian Bar Association, as well as recommendations stemming from commissions of inquiry. In response, the federal government recently enacted Bill C-15A in an attempt to make the conviction review process more open and accountable (Canada Gazette, 2002).

These amendments to the *Criminal Code* (Sections 696.1 to 696.6) seek to

- clearly state when a person is eligible for a review,
- specify the criteria under which a remedy may be granted,
- explain in regulations the process of review and how one applies for a review,
- expand the Minister's power to include the review of summary convictions, and
- provide investigative powers to those investigating cases on behalf of the Minister, allowing investigators to compel witnesses to testify and documents to be produced.

In an attempt to enhance openness and impartiality, a senior person from outside the department, Bernard Grenier, a retired Quebec provincial court judge, has been appointed to oversee the review process and advise the minister (Department of Justice, Canada, 2000).

Although these amendments may address some flaws in the system with regard to whom is eligible for review and criteria under which a remedy is granted, it remains to be seen whether conviction reviews will attain the degree of transparency and public accountability the government is seeking. In reality, the state response to wrongful convictions through a Section 696.1 review may be both inaccessible to many and limited in its application.

DNA evidence. In recent years, forensic analyses have advanced to the degree that in some cases an individual's DNA can be extracted from minute biological evidence (e.g., semen, saliva, hair, or blood) collected at a crime scene. This type of evidence provides a genetic blueprint of an individual that can be used with greater certainty than other forms of evidence in ensuring a conviction or excluding a suspect. Although not a state response per se, DNA evidence has been used successfully in securing postconviction exonerations on behalf of the convicted and has facilitated the process of compensation.

Cases of wrongful convictions are often subject to much debate and controversy as a result of witness recantations, the appearance of new witnesses, or the discovery of some persuasive exculpatory evidence suppressed by law enforcement (Scheck & Neufeld, 2001). In contrast, DNA evidence can be

extracted many years after a crime has been committed, and there is much less debate about reliability, particularly as the technology has greatly improved in recent years (Lincoln, 1997; Werrett, 1997). As of October 2000, six postconviction exonerations had occurred in Canada as a result of DNA evidence (Scheck & Neufeld, 2001).¹⁰

The DNA Identification Act of 1998, the first legislation in Canada to govern the use of DNA, was intended to establish a national DNA data bank and further amended the *Criminal Code* to allow judges to make a postconviction DNA data bank order. This order grants judges the authority to remove bodily substances from a person found guilty of designated *Criminal Code* offences and include the offender's DNA profile in the national data bank (Department of Justice, Canada, 2002). Amendments to the act that occurred in 2000, among other changes, granted military judges the authority to make postconviction DNA orders.

The DNA bank, which is administered by the Royal Canadian Mounted Police, officially opened in 2000 and consists of two indices of DNA profiles. The first is a crime scene index, which contains DNA profiles that are derived from bodily substances found at a crime scene. The second is a convicted offender's index, which comprises DNA profiles derived from bodily substances taken from offenders against whom postconviction DNA data bank orders have been made (Department of Justice, Canada, 2002). The profiles from both banks are continually compared with each other, and it is through this matching that police can address previously unsolved cases where biological samples are available.¹¹ DNA exclusions also offer the opportunity to rule out innocent individuals early on in an investigation, particularly for cases of sexual assault. In the United States, the FBI admits an exclusion rate of 25% in sexual assault cases where DNA results could be obtained (Connors, Lundregan, Miller, & McEwan, 1996). Although it is possible that some excluded individuals were in fact guilty, the 25% exclusion rate suggests a substantial number of individuals who could have been wrongly convicted without this evidence (Scheck & Neufeld, 2001).

DNA forensic analysis has been heralded as a breakthrough in criminal investigations (Schneider, 1997), but several impediments limit its utility. Aside from court challenges to the stages of DNA profiling (i.e., sample collection, production of DNA profiling, matching the profiles, evaluation of the results and presentation of the evidence [Lincoln, 1997]), other issues are related to questions of access and availability. In the United States, many states have statutes of limitations of 6 months or less on motions to present newly discovered evidence of innocence (Scheck & Neufeld, 2001). Such statutes severely limit the ability of a person believed to be wrongly convicted to gain access to any evidence, let alone DNA, to aid in exonerations. Although no such statutes exist in Canada, the use of DNA testing in criminal

cases is limited by the resources of those convicted. The sophisticated testing and laboratory work necessary to establish DNA in biological samples is extremely costly, thus limiting access.

A further impediment to using DNA evidence postconviction is the availability of the relevant biological evidence. Although police departments are obligated to retain physical evidence following conviction, this evidence may be destroyed or lost.¹² Some concerns also continue to exist about sample handling in DNA forensic evidence, interpretation of results, and the collection and preservation of samples (Scheck & Neufeld, 2001). Still, the future use of this technology holds much promise.

Commissions of inquiry. When a wrongful conviction occurs, individuals often attempt to seek financial recourse and acknowledgement by the government that mistakes had been made. The awarding of financial compensation is an attempt by the government to rectify a miscarriage of justice, but such awards are a small consolation for the devastation to family, credibility, livelihood, and mental health that a wrongful conviction entails. In Canada, historically, it has been through the work of various royal commissions or commissions of inquiry that the judiciary and the public at large have become aware of flaws in the criminal justice process. Such undertakings, at the behest of a province and usually chaired by seasoned judges, involve investigations that result when questions raised concerning the administration of justice are of sufficient public importance or concern to justify an inquiry (cf. Manitoba Evidence Act, C.C.S.M.E. 150, Section 83; Public Inquiries Act [Ontario], R.S.O., 1990, c.p.41). The process of such inquiries can be likened to coroners' inquests into wrongful convictions, whereby cases are scrutinized through many months of hearings and presentations followed by comprehensive recommendations.

To date, three commissions of inquiry have occurred in Canada to address the circumstances surrounding wrongful convictions. The Marshall Inquiry,¹³ which emanated from the wrongful conviction of Donald Marshall, Jr., had a broad mandate to review and assess the administration of criminal justice in Nova Scotia and to make recommendations to help prevent such tragedies from happening in the future (Royal Commission on the Donald Marshall Jr. Prosecution, 1989). The mandates of the other two commissions—the Kaufman Inquiry¹⁴ and the Sophonow Inquiry¹⁵—were similar. The recommendations that emanated from all three commissions of inquiry were extensive. However, the extent to which provincial governments have implemented them into criminal justice practice is less clear.

There have been other cases of wrongful convictions where compensation was awarded by the courts in absence of commissions of inquiry. In these cases, provincial justice departments have recognized errors in the adminis-

tration of justice and have awarded compensation to defendants. Awards of compensation usually follow an exoneration, and amounts range anywhere from hundreds of thousands to millions of dollars. However, financial compensation, regardless of the amount, does little to rectify the emotional, social, and financial damages wrought by a wrongful conviction.

CONCLUSION

This article has demonstrated how wrongful convictions occur in Canada and how they are manifested in specific Canadian cases. Those who have successfully demonstrated that they were wrongly convicted have convincingly outlined the social and economic disruption and the emotional devastation of a wrongful conviction and how these factors affect their lives as well as those of their families. The means of redress available to those attempting to show that they have been wrongly convicted are unfortunately limited. Although the Canadian government has created a safeguard in statute to rectify miscarriages of justice, access to such a mechanism of review is difficult and requires great financial resources and many years of legal wrangling. The recent discovery of DNA forensic analysis is an important development that will likely expedite exonerations in the future. However, its use is confined to those cases where physical evidence is available and the accused possesses sufficient means to pursue such testing. The recommendations stemming from commissions of inquiry have the potential to force provincial justice ministries to examine the practices that contribute to wrongful convictions and take steps to rectify them. However, for the wrongly convicted, a more expedient and more accessible response from the Canadian criminal justice system is needed.

NOTES

1. These cases represent some of the known cases of wrongful conviction. The actual prevalence of wrongful conviction is unknowable.
2. Parts of this article reflect ideas expressed in Denov and Campbell (2003).
3. A 690 application (now 696.1 of the *Criminal Code*) refers to an appeal to the Minister of Justice for conviction review. This will be discussed in greater detail later in this article.
4. The recommendations included the following:
 - a. As a general rule, jailhouse informants should be prohibited from testifying.
 - b. Furthermore, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.
 - c. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the

dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informants.

- d. There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informants can, on occasion, obtain access to information that would appear that only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial (Cory, 2001).

5. A further analysis of these interviews can be found in Campbell and Denov (2004).

6. Pseudonyms are used to protect participants' anonymity.

7. A 690 application refers to a section of the Canadian *Criminal Code* (now section 696.1) that allows individuals who have exhausted all of their appeals to apply to the Minister of Justice for a review of their case. Although the Minister does not make decisions regarding guilt or innocence, if he or she is satisfied that a miscarriage of justice has occurred, he or she can then order a new trial, order a new appeal proceeding, or refer any question to the Court of Appeal for its opinion.

8. The information contained in this section was obtained through correspondence with counsel of the Criminal Conviction Review Group, Department of Justice Canada, 2002.

9. These include the following: The route chosen by the Minister could effect the outcome, lack of established rules of procedure and long delays, uncertainty regarding evidentiary burden of proof, concern regarding the types of evidence and documents collected by the Minister and lack of notification regarding adverse findings, reasons for rejecting an application remain unknown, lack of financial assistance for a review, and the role of Minister of Justice as chief prosecutor is incompatible with role of reviewing cases of wrongly convicted persons (Canada Gazette, 2002; Rosen, 1992).

10. Guy Paul Morin was ultimately exonerated through DNA evidence.

11. The murder of 11-year-old Alison Parrott in Toronto, Ontario, Canada, in 1986 was solved in 1999 through the matching of DNA samples found at the crime scene with the profile of a convicted sex offender. Francis Roy was found guilty of first-degree murder through this process and is now serving a life sentence.

12. One example of such an oversight is found in the case of Stephen Truscott. In 1959, at age 14, Stephen Truscott was convicted of murdering a young girl in Ontario and sentenced to death. His sentence was later commuted to life in prison. From the onset, Truscott's case was fraught with professional misconduct, including the reliance on the conflicting testimony of juvenile witnesses and bungled forensic evidence. Following an application for ministerial review in 2001, Truscott's case was referred back to the Court of Appeal. The forensic evidence in this case that could likely have facilitated Truscott's exoneration was "presumed destroyed" (Sher, 2001). Lawyers for the Association in Defense of the Wrongly Convicted have compiled a thorough and compelling case for Truscott's innocence.

13. This was formally called the Royal Commission on the Donald Marshall, Jr. Prosecution, chaired by Chief Justice T. Alexander Hickman in 1989.

14. This was formally called the Commission involving Guy Paul Morin, chaired by the Honorable Fred Kaufman, commissioner, in 1997.

15. The Sophonow Inquiry was chaired by retired Supreme Court Justice Cory in 2001. Thomas Sophonow underwent three trials for the murder of Barbara Stoppel in 1981. After a mistrial and two convictions that were successfully appealed, the Court of Appeal observed that because Sophonow had already spent 45 months in custody and another trial would constitute his fourth, the guilty verdict was set aside.

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