IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

SYSTEMIC SUBMISSIONS OF

THE ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED (AIDWYC)

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OVERVIEW

1. The case of David Milgaard, alongside other well-known cases of wrongful conviction, shatters the illusion that the criminal justice system is immune from the ordinary human and systemic failings that plague every other institution in Canadian society. As our Supreme Court recently acknowledged:

> Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.[1]

2. One of the challenges facing this Commission of Inquiry is to give meaningful institutional expression to this emerging recognition of the justice system's fallibility. This is more than a mere academic exercise: the fate of others who have been, or will be, wrongly convicted depends on it. Aside from the devastating personal toll inflicted on the wrongly convicted when our justice system fails to address its own errors and shortcomings, as it did in David Milgaard's case, the impact on public confidence in the administration of justice is incalculable.

3. The focus of AIDWYC's submissions with respect to the systemic phase of the inquiry is the adequacy of Canada's current conviction review process, and recommendations for a drastic overhaul of that process. In particular, AIDWYC submits that the conviction review process as

[1] *United States v. Burns*, [2001] 1 S.C.R. 283 at para.1

presently constituted through section 696.1 through 696.6 of the *Criminal Code of Canada* fails against any reasonable standard of independence, fairness, and transparency. AIDWYC respectfully submits that this Commission of Inquiry should recommend a conviction review process modeled on the English Criminal Cases Review Commission. In particular AIDWYC seeks a recommendation that the Saskatchewan Minister of Justice pursue the introduction of such an independent tribunal with his or her Federal and Provincial counterparts; should this be unsuccessful, AIDWYC respectfully submits that the Saskatchewan Minister of Justice institute a "made in Saskatchewan" independent tribunal.

4. AIDWYC respectfully submits that its recommendations fall well within the Terms of Reference of this Commission of Inquiry. In particular the Terms of Reference entrust this Commission of Inquiry with the responsibility to: "make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan".

5. AIDWYC respectfully submits that the only mechanism in the province of Saskatchewan for the review of an alleged wrongful conviction, after the exhaustion of appellate remedies, is the Federal Minister of Justice's review pursuant to sections 696.1 through 696.6 of the *Criminal Code of Canada*. In other words, the Canadian Parliament has chosen to insert itself into the administration of criminal justice in the province of Saskatchewan through these provisions, and as such those provisions may be subject to recommendations by this Commission.

6. Furthermore, AIDWYC submits that it is evident from the debates of the Standing Committee on Justice and Human Rights on what would ultimately become sections 696.1 through 696.6 of

the *Code* that Parliamentarians from all sides of the House had a clear expectation that this Commission of Inquiry would make recommendations concerning the adequacy of those amendments[2]. It would represent an unfortunate irony if this Commission is persuaded by counsel for the Department of Justice to decline to provide the benefit of its insight on this matter to Canadian Parliamentarians, when those same Parliamentarians have specifically expressed their collective desire to receive such advice and recommendations.

7. AIDWYC's submissions will consist of six parts:

A. AIDWYC's mandate

B. Background to Canada's current conviction review process

C. Canada's current conviction review process: sections 696.1-696.6

D. Shortcomings in Canada's current conviction review process

E. The Solution: England's Criminal Cases Review Commission

F. Summary of AIDWYC's proposed recommendations

A. AIDWYC's mandate

8. AIDWYC is a national public interest organization, founded in 1993 and dedicated to preventing and rectifying wrongful convictions. AIDWYC has two broad objectives, first, eradicating the conditions that give rise to miscarriages of justice and second, participating in the review and, where warranted, correction of wrongful convictions. AIDWYC is an entirely voluntary, non-profit association dedicated to assisting factually innocent persons who have been wrongly convicted.

[2] Standing Committee on Justice and Human Rights, October 3, 2001, DocID 340801 at 34820-34830

9. AIDWYC's Honourary President is the Honourable Gregory T. Evans, the former Chief Justice of the Supreme Court of the Province of Ontario and one of the three Commissioners who presided over the "Royal Commission on the Donald Marshall Jr. Prosecution". The directors of AIDWYC include lawyers, academics and other interested member of the public. Several of the directors have been instrumental in the exoneration of Canadians convicted of homicides of which they were factually innocent. Joyce Milgaard, mother of David Milgaard, is one of AIDWYC's founding directors.

10. AIDWYC has sponsored or co-sponsored a number of international conferences including the 1994 conference, "Innocents Behind Bars", the 1996 conference, "Justice on Trial: The Wrongful Conviction of Guy Paul Morin", the 1996 conference "Coffin's Legacy: keeping the Death Penalty at Bay", the November 2002 conference "Innocents Behind Bars 2002" and the June 2005 conference in St. John's Newfoundland, "Between a Rock and a Hard Place". AIDWYC was also a co-sponsor of the 1998 conference in Chicago, Illinois, "The National Conference on Wrongful Convictions and the Death Penalty". AIDWYC sponsored in March 2005 "An Evening with Death Row Survivor: Juan Roberta Melendez Colon."

11. In June 1996, the Government of Ontario convened a public inquiry into the wrongful conviction of Guy Paul Morin (the "Morin Inquiry"). The Honourable Justice Fred Kaufman was appointed Commissioner. AIDWYC participated extensively at the Morin Inquiry. In particular, during the final phase of the Inquiry devoted to "systemic issues", AIDWYC helped organize and called much of the evidence, including a number of expert witnesses. This role

included submitting the results of two research studies pertaining to systemic factors leading to wrongful convictions and convening a panel of wrongly convicted persons from Canada and the United States.

12. In the Morin Inquiry report, released on April 9, 1998, much of the evidence called by AIDWYC's counsel is summarized in detail and relied upon in reaching conclusions and recommendations with respect to systemic issues. Furthermore, many of the Inquiry's recommendations reflect those advanced by AIDWYC in its final submissions; indeed some are adopted verbatim from AIDWYC's proposal for reform.

13. In June 2000, the Government of Manitoba convened a public inquiry, headed by the Honourable Peter C. Cory, into the wrongful conviction of Thomas Sophonow (the "Sophonow Inquiry"). AIDWYC was the only public interest organization granted standing at the Inquiry and participated throughout the hearings, including calling expert evidence on the crucial areas of identification evidence and compensation. Many of the recommendations made by AIDWYC are echoed in the Inquiry's final report. That report, titled "The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation," was released in November 2001.

14. In March 2003, the Government of Newfoundland and Labrador convened a public inquiry into various issues arising from the wrongful conviction of three persons within a decade in that province: Gregory Parsons, Ronald Dalton and Randy Druken. AIDWYC was invited to participate in a special hearing concerned with the interpretation and scope of the Commission's

mandate and the resolution of constitutional questions raised by its terms of reference. AIDWYC's position on these issues was largely adopted by the Commissioner.

15. Recently, AIDWYC was granted full standing at the public inquiry convened in Manitoba into the wrongful conviction of James Driskell. The evidentiary portion of that Inquiry is finished and awaits a final report by the Commissioner, the Honourable Mr. Justice Lesage.

16. In addition, AIDWYC has also been actively engaged in criminal law reform dealing in particular with proposed amendments to Canada's criminal conviction review process. For example, in 1998, representatives of AIDWYC met with then federal Minister of Justice, the Honourable Anne McLellan, to discuss AIDWYC's proposals for amendments to the Criminal Code by which wrongful convictions may be more effectively addressed and remedied. The discussions focused primarily on reforms to s.686 (the scope of the review powers of Provincial Courts of Appeal in criminal cases) and s.690 of the *Criminal Code of Canada*.

17. Subsequently, on October 26, 1998, the Minister of Justice released a consultation paper entitled "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code". The consultation paper, and the enumerated questions to which the Minister sought answers, extended beyond section 690 reform to include other measures intended to reduce the risk of factual miscarriages of justice, such as expanding the jurisdiction of Courts of Appeal and relaxing the rules governing the introduction of fresh evidence on appeals.

18. AIDWYC appeared by invitation before the Legal Affairs Committee of the House of Commons and the Legal and Constitutional Affairs Committee of the Senate in 2001 to make submissions and answer questions regarding proposed amendments to section 690, as contained in Bill C-15A. In 2002, section 690 was repealed and replaced by sections 696.1 to 696.6 of the Criminal Code.

19. AIDWYC has also been granted intervenor status in a number of cases before the Supreme Court of Canada, including *R. v. Biniaris, R v. Molodowic* and *R. v. G.(A.); Odhavji v. Woodhouse,* [2003] 3 S.C.R. 263, a case dealing with the tort of abuse of public office and, *Hill v. Hamilton Wentworth Police Services Board et al*[3], a case dealing with the tort of negligent investigation.

20. AIDWYC has also played an important role in advocating for persons who have been wrongly convicted. AIDWYC receives applications for assistance from wrongful convictions claimants on a routine basis from across Canada. Many of these are assigned to volunteer counsel across the country to review and assess. AIDWYC actively prosecutes the claims of those who it accepts as having been wrongly convicted, including the following cases:

(a) David Milgaard (Saskatchewan), whose ultimate vindication, through DNA testing in England, was assisted by AIDWYC' s crucial negotiations with representatives of the federal Department of Justice. AIDWYC has been associated with David Milgaard's pursuit of justice since its inception.

[3] Heard on November 9, 2006 (on reserve).

(b) Gregory Parsons (Newfoundland), who had been wrongly convicted of the second degree murder of his mother. After a successful appeal and Mr. Parson's subsequent vindication as a result of DNA evidence, and, over the objection of the defence (who sought an acquittal), the Crown entered a stay of prosecution at Mr. Parson's retrial. Following an application brought by AIDWYC and Mr. Parsons' counsel, the Newfoundland Supreme Court set aside the stay and substituted an acquittal. A third party later pleaded guilty to the murder.

(c) Clayton Johnson (Nova Scotia), whose s. 690 application, prepared by AIDWYC counsel, led to him being granted an appeal of his murder conviction. Subsequently, on February 18, 2002, Mr. Johnson was granted a new trial by the Court of Appeal. That same day, he appeared before the Chief Justice of Nova Scotia where Mr. Johnson was finally acquitted.

(d) James Driskell (Manitoba) was represented by AIDWYC counsel in securing his release on bail after 15 years of imprisonment, pending ministerial determination of his AIDWYC- prepared s. 696.1 application. Recently, the Minister of Justice concluded that a miscarriage of justice likely occurred and directed a new trial, which trial was immediately stayed by the Attorney General following arraignment. An inquiry into Mr. Driskell's wrongful conviction is ongoing.

(e) Steven Truscott (Ontario) AIDWYC filed a lengthy s.696.1 brief on behalf of Mr. Truscott, whose 1959 murder conviction when he was 14 years old has long been notorious in Canadian judicial history. The Minister of Justice referred this case

to the Court of Appeal for Ontario in 2004 and the appeal is scheduled to be argued in January 2007. Mr. Truscott's lawyers include two AIDWYC directors, James Lockyer and Marlys Edwardh.

B. Background to Canada's current conviction review process

Origins: Common law and Section 690

21. Historically, the only jurisdiction to reconsider a criminal conviction following the exhaustion of appellate review was the common law "Royal Prerogative of Mercy". This body of extraordinary powers allowed the Crown to extend "mercy" at its discretion by granting a pardon, reducing a sentence, or generally taking steps to correct a miscarriage of justice.

22. The Royal Prerogative of Mercy was enacted in section 748 of the 1892 *Criminal Code*. Section 748 permitted the Minister of Justice to direct a new trial where the Minister entertained a doubt as to whether a person ought to have been convicted. The provision underwent various amendments culminating in the enactment of section 690 of the *Code* in 1968:

> 690. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventative detention under Part XXIV,
>
> (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventative detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
>
> (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventative detention, as the case may be; or

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

23. This section remained in effect for more than thirty years, until the enactment of sections 696.1-696.6 in 2002. It was under section 690 that David Milgaard's two applications for review, the first unsuccessful, were brought. Other features of the Royal Prerogative of Mercy, such as the granting of pardons, are reflected in s.748 and s.748.1of the *Criminal Code of Canada*. S.749 of the *Criminal Code of Canada* preserves the existence of the prerogative although AIDWYC is not aware of any case where it has been used to rectify alleged wrongful convictions.

Criticisms of the section 690 process by Commissions of Inquiry

24. No less than three public Inquiries into wrongful convictions in Canada recommended the creation of an independent tribunal to supplant the powers of the Minister of Justice under s.690. There is a remarkable consistency in the respective inquiry reports in the emphasis placed on the proposed new tribunal's "independence".

25. In 1989, the Commissioners at the *Marshal Inquiry* wrote:

> Although it is important to note that the RCMP's 1982 investigation did lead to Marshall being freed from prison – implying that one cannot always assume that a police force will not be able or willing to conduct a proper investigation into allegations of wrongful conviction – we believe that most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system, or directly or indirectly involved in the original investigation. We believe that it makes more sense to expect citizens to provide information to a body that would not seem to have any sort of vested interest.

> In order for such an independent body to function effectively, people must not only know about that body's existence and role, but also have confidence that such a body has the power and the resources to conduct a thorough reinvestigation of the conviction. There are two issues here. The first is the constitution of a reinvestigative body and the second is the nature of its powers.[4]

The Commissioners made two recommendations:

> Recommendation 1
>
> We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorney's General with a view to constituting an independent review mechanism – an individual or body – to facilitate the reinvestigation of alleged cases of wrongful conviction.
>
> Recommendation 2
>
> We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.[5]

26. Similarly, in his 1998 report, Commissioner Kaufman made the following recommendation at the *Commission on Proceedings Involving Guy Paul Morin*:

> Recommendation 117: Creation of a Criminal Case Review Board.
>
> The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice pursuant to section 690 of the *Criminal Code*.[6]

27. Commissioner Cory was particularly pointed in his recommendation of an independent review body in his 2001 report arising out of the *Inquiry Regarding Thomas Sophonow*:

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[4] *Royal Commission on he Donald Marshall Jr. Prosecution*, (1989) Commissioners' Report at pp.143-45
[5] *Ibid*, at p.145
[6] *The Commission on Proceedings Involving Guy Paul Morin* at pp.1237-41

RECOMMENDATION

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.[7]

28. While section 690 was replaced with sections 696.1-696.6 in 2002, the recommendation that a truly independent review body be created to replace the power of the Attorney General went unheeded.

C. Canada's current conviction review process: sections 696.1-696.6

29. The current conviction review process was introduced in 2002 through the omnibus *Criminal Law Amendment Act, 2001*, S.O. 2002, Ch.13. The *Act* repealed section 690 and replaced it with sections 696.1 to 696.6 of the *Code*. Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice were introduced simultaneously with the coming into force of the *Code* amendments. Section 696.6 provides as follows:

Application

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Form of application

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

2002, c. 13, s. 71.

Review of applications

696.2 (1) On receipt of an application under this Part, the Minister of Justice

[7] *Inquiry Regarding Thomas Sophonow*, at p.101

shall review it in accordance with the regulations.

Powers of investigation

(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under section 11 of that Act.

Delegation

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in 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 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 under subsection (2).

2002, c. 13, s. 71.

Definition of "court of appeal"

696.3 (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part relates was tried.

Power to refer

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

Powers of Minister of Justice

(3) On an application under this Part, the Minister of Justice may

(*a*) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(*b*) dismiss the application.

No appeal

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

2002, c. 13, s. 71.

Considerations

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(*a*) whether the application is supported by new matters of significance that

were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(*b*) the relevance and reliability of information that is presented in connection with the application; and

(*c*) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

2002, c. 13, s. 71.

Annual report

696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

2002, c. 13, s. 71.

Regulations

696.6 The Governor in Council may make regulations

(*a*) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

(*b*) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

(*c*) respecting the form and content of the annual report under section 696.5.

2002, c. 13, s. 71.

30. The main feature of the amendments is that the role of the Minister of Justice in determining applications for review is preserved[8]; as a result the amendments remain rooted in the Prerogative of Mercy. An annual report to Parliament by the Minister in relation to applications for review is required[9]. In addition, the amendments provide the Minister, or his designate, the powers of a commissioner under the *Inquiries Act* to take evidence, issue subpoenas, enforce

[8] Section 696.1
[9] Section 696.5 and SOR/2002-416, s.7

attendance of witnesses, and to compel them to give evidence, and otherwise conduct an investigation in relation to the application for review[10].

31. The amendments permit the Minister of Justice to direct a new trial (or hearing as the case may be) or to refer the matter to the court of appeal for hearing and determination if the Minister is "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred".[11] In rendering his or her decision, the Minister is invited to take into account all matters that are considered relevant including: "whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister"[12]; and, "the relevance and reliability of the information that is presented"[13].

32. The regulations prescribe the information that must be included in an application for review, and more particularly, the documents that are required. The regulations provide that no application can be considered until such time that true copies of all of the prescribed documents, including the information/indictment, the trial and preliminary hearing transcripts, all motion material filed by Crown or defence, all appeal factums, and all court decisions, have been submitted[14].

33. The regulations also provide for the conduct of a "preliminary assessment" by the Minister, to determine whether an investigation of the application for review will be conducted[15]. No

[10] Section 696.2(2) and (3)
[11] Section 696.3(3)(a)
[12] Section 696.4(a)
[13] Section 696.4(b)
[14] SOR/2002-416, s.2(2)
[15] SOR/2002-416, s.4(b)

investigation will occur where the Minister "is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred"[16]. While the applicant is given notice that his or her application will not be investigated pursuant to a preliminary assessment, and given an opportunity to submit further information (within one year), no reasons for the Minister's preliminary assessment are required by the regulations[17].

34. Where following a preliminary assessment the Minister determines that the matter will be investigated, an investigation report must be completed and provided to the applicant[18]. The applicant is provided with an opportunity to submit further information in support of the application, within one year. A copy of the Minister's ultimate decision is provided to the applicant[19]. Although reasons for decision are not specifically mandated by the regulations, AIDWYC's experience is that such reasons are provided at that stage.

35. At the same time as the amendments were introduced, the Department of Justice instituted some non-legislative changes to the organization of the Criminal Cases Review Group (hereafter "CCRG"). In particular, the CCRG was physically moved to new office space. The corporate reporting structure was also changed to provide a more direct route between the CCRG and the Minister. Finally, a special advisor was appointed to give non-binding, impartial advice to the Minister with respect to applications for review.

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[16] SOR/2002-416, s.4(b)(ii)
[17] SOR/2002-416, s.4(2) and (3); it is AIDWYC's experience that no reasons for the preliminary assessment are delivered to the applicant or his representative.
[18] SOR/2002-416, s.5(1)
[19] SOR/2002-416, s.6

D. Shortcomings in Canada's current conviction review process

36. AIDWYC respectfully submits that sections 696.1 through 696.6 represent little more than cosmetic changes to the predecessor legislation, and as such fail against any reasonable standard of independence, fairness, efficiency and transparency. AIDWYC's concerns about the current conviction review process fall into six categories:

(a) Lack of independence

(b) The threshold standard for referral to the courts is too high: "Putting the cart before the horse"

(c) Barriers to access

(d) The potential for applications to be dismissed with no investigation

(e) Lack of timeliness

(f) Absence of transparency

(a) Lack of independence

37. AIDWYC's most fundamental objection to the current conviction review process is the lack of institutional independence on the part of the body responsible for determining applications for review i.e. the Minister of Justice. AIDWYC submits that the Minister of Justice is neither independent, nor could he or she reasonably be perceived as independent, in performing what amounts to a judicial (or at minimum a quasi-judicial) function. None of the administrative measures undertaken in an effort to render the Criminal Convictions Review Group more

independent are a substitute for real independence, as that term is recognized by our courts in both the judicial and quasi-judicial context[20].

38. The lack of independence on the part of the Minister of Justice, both actual and perceived, springs from the constitutional separation of powers between the courts and the executive branch of government. Traditionally, this separation of powers ensures that the executive does not interfere, nor can it be perceived as interfering, with the judicial process. Sections 696.1 through 696.6 represent an anomaly; because the Minister through section 696.2 acts as a gatekeeper for access to the courts, the Minister is effectively authorized to usurp the powers of the court by refusing a reference. The corollary of this is that the Minister could be perceived as "second guessing" judicial decisions by courts of competent jurisdiction by allowing a reference.

39. This point was made by Viscount Runciman in the report of the Royal Commission on Criminal Justice, in recommending the creation of an independent body to investigate claims of wrongful conviction and refer them to the court of appeal where appropriate:

> 9. Our recommendation is based on the proposition, adequately established in our view by Sir John May's Inquiry, that the role assigned to the Home Secretary and his Department under the existing legislation is incompatible with the constitutional separation of powers as between the courts and the executive. The scrupulous observance of constitutional principles has meant reluctance on the part of the Home Office to enquire deeply enough into cases put to it and, given the constitutional background, we do not think that this is likely to change significantly in the future.
>
> 10. We have concluded that it is neither necessary nor desirable that the Home Secretary should be directly responsible for the consideration and investigation of alleged miscarriages of justice as well as being responsible for law and order and for the police. The view that these two heavy responsibilities should be divided was expressed to Sir John May's Inquiry by a former Home Secretary and confirmed in oral evidence to us by the then Home Secretary and two of his predecessors.

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[20] *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 69; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para.68-69; *Canadian PacificLtd v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para.80

> 11. We recommend therefore that the Home Secretary's power to refer cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 should be removed and that a new body should be set up to consider alleged miscarriages of justice, to supervise their investigation if further inquiries are needed, and to refer appropriate cases to the Court of Appeal. We suggest that this body might be known as the Criminal Cases Review Authority.[21]

AIDWYC respectfully submits that the Commission's findings apply with equal force to the Canadian context.

40. The reality that the Minister of Justice is an elected official who is, or must necessarily be perceived to be, responsive to the ebb and flow of public opinion also seriously undermines independence, perceived and actual. The most dramatic example of this is the treatment of the "Irish cases" by the Home Office in the United Kingdom in the 1980's. With the emergence of prosecutions under Canada's anti-terrorism legislation and heightened public concern over security, one can readily contemplate a scenario in which public opinion could similarly be brought to bear on a Minister's decision to refer an application. Leaving aside terrorism cases, the proliferation of broadcast and electronic media has meant that "high-profile" criminal cases regularly become part of our national political discourse. This reality leaves the Minister vulnerable to the perception that his or her decision-making concerning an applicant's access to the courts has been motivated by political considerations[22].

41. The non-legislative administrative changes to the constitution of the Criminal Cases Review Group do little to dispel the perceived lack of independence on the part of the Minister. Simply moving the lawyers of the CCRG to new offices and altering their corporate reporting structure,

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[21] The Royal Commission on Criminal Justice, DocID 340178

[22] *Evidence of D. Kyle,* October 3, 2006 at 403130-40319 re lengthy discussion with respect to the potential for political influence.

does not alter the reality and the perception that the CCRG lawyers are selected from, and are part of, the culture of the Department of Justice. The appointment of the Special Advisor does not detract from the lack of independence in circumstances in which his advice is neither public nor binding on the Minister. AIDWYC submits that a decision-maker cannot be rendered "a little bit independent" through such administrative tinkering: a decision-maker either is or is not independent as our jurisprudence recognizes.

42. Finally with respect to the issue of independence, preserving the role of the Minister in determining access to the courts for the wrongly convicted firmly roots sections 696.1 through 696.6 in the Royal Prerogative of Mercy. AIDWYC respectfully submits that exoneration is a fundamental legal right enjoyed by the wrongly convicted, not something for which they should be required to seek the Mercy of the Crown. The conviction review process must be distinct from the Prerogative of Mercy, and rooted in an independent judicial or quasi-judicial process.

(b) The threshold standard for referral to the courts is too high: "Putting the cart before the horse"

43. AIDWYC further submits that section 696.4 imposes too high a threshold with respect to whether an applicant has access to the courts for review of his or her conviction; the requirement that the applicant "demonstrate a reasonable basis to conclude that a miscarriage of justice likely occurred" effectively imposes a higher standard than would be applied by the court of appeal on review. In essence, the Minister's screening function "puts the cart before the horse".

44. Logically, the threshold as presently constituted will result in some cases that would have been successful in the Court of Appeal being dismissed by the Minister: such cases would necessarily include those that are possibly or even probably (but short of likely) miscarriages of justice. The reality that the Minister is required to apply a stricter threshold test than that which the Court of Appeal is required to apply, is simply inconsistent with the notion of 696.3 as a preliminary screening process. The threshold as presently constituted will necessarily result in miscarriages of justice not being referred to court.

45. The "likely miscarriage of justice" threshold is consistent with a strong presumption that the conviction is appropriate, and is opposed to an impartial, inquisitorial approach to investigating claims of wrongful conviction. It is inconsistent with our emerging understanding that wrongful convictions are endemic to our criminal justice system, and with an honest and open-minded effort to seek out and remedy such injustices.

(c) Barriers to access

46. AIDWYC submits that the current conviction review process presents virtually insurmountable financial and practical barriers for potential applicants. The regulations provide that no application will even be considered until all the necessary documents are provided by the applicant. In circumstances in which the application for review follows immediately upon the exhaustion of the applicant's appeal, this may not present much of a problem. Typically, however, applications will be initiated long after the appeals have been completed; the applicant's trial or appeal counsel may have retired and documents may be difficult to access.

To add to this barrier to access, the applicant may be incarcerated and will likely be subject to other social and economic disadvantage.

47. The data presented in the Annual Report 2005 of the Minister of Justice strongly suggest that the regulations present a significant barrier to access. Of the 35 applications submitted during the reporting period, 26 were deemed "partially completed" by the CCRG, with only 7 applications designated "complete"[23]. The statistics paint a picture of a process that is fundamentally passive and oriented toward the status quo, as opposed to a system that pro-actively seeks out wrongful convictions and remedies them.

(d) The potential for applications to be dismissed with no investigation

48. The "preliminary assessment" stage of the current conviction review process is also of significant concern to AIDWYC. Under the regulations, the applicant is required to demonstrate to the satisfaction of the Minister that there "may be a reasonable basis to conclude that a miscarriage of justice likely occurred" before an investigation is conducted. This requirement has the potential to create an obvious "catch-22" situation: it is almost inconceivable that an unrepresented applicant, from his prison cell, could meet any such standard prior to some form of investigation (however modest) being conducted.

49. To make matters worse, the Minister is empowered to make the decision that no investigation shall be conducted (effectively disposing of the application), without providing reasons to the applicant. While the applicant is given an opportunity to provide additional

[23] Annual Report 2005 at p.29

information where the Minister determines that no investigation will be conducted, the applicant is left to guess as to how, from the point of view of the Minister, his application is deficient. Not surprisingly, the statistics reported by the Minister amply demonstrate that applications rarely survive the so-called "preliminary assessment" stage: of 13 preliminary assessments completed during the reporting period, only one application proceeded to the investigation stage.[24]

(e) Lack of timeliness

50. The current conviction review process makes no provision for ensuring that applications for review are considered and determined on a timely basis. AIDWYC's experience has been that applications can take years to process, with the applicant being largely unaware of the progress of the review.

51. The statistics reported by the Minister in the 2005 Annual Report seem to bear this out. Of 33 applications at the preliminary assessments, only 13 were completed during the reporting period. Similarly, of the 24 applications at the investigation stage, only 6 were completed during this same period. Of the 18 applications at the "investigation report stage", only 6 investigation reports were completed. Overall, the CCRG received 33 applications during the reporting period, but rendered decisions in respect of only 6 cases.

(f) Absence of Transparency

52. Beyond what is prescribed in the *Code* and the Regulations there are simply no publicly accessible guidelines or rules that prescribe how an application is to be considered: what

[24] Annual Report 2005 at p.30

documents are provided for the Minister's consideration, what is the nature of the investigation to be conducted, or how evidence is to be considered and against what standard. The applicant submits his application, and a final decision is rendered, with no reasons in the event that it is dismissed at the preliminary assessment stage, or with very brief reasons if it is dismissed following an investigation.

E. The Solution: England's Criminal Cases Review Commission

53. AIDWYC respectfully submits that England's Criminal Cases Review Commission (hereafter the "CCRC") represents a model that could readily be adapted to the Canadian context. Through its structure and practice, the CCRC succeeds by any measure of independence, accessibility, fairness, efficiency and transparency. Its creation heralds the emergence of a mature criminal justice system that has shown the will to confront its mistakes honestly, rather than maintain the status quo[25]. Approaching its tenth year of existence, the CCRC has silenced the majority of its critics and earned the respect of the courts[26], the prosecuting authorities and the public.

54. AIDWYC will identify the salient features of the CCRC with a view to distilling the essential features that should form part of a reformed Canadian conviction review process.

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[25] *Evidence of D. Kyle,* October 3, 2006 at 40320-40322; see also DocID 339389 at 339392; see also David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, (2003-2004) 52 Drake L. Rev. 657 at 660 (DocID 339389 at 339392)

[26] The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective, [2005] Crim. L.Rev. 937 (DocID 339381)

Independence

55. The CCRC is structured in such a manner as to ensure that it is both independent and perceived to be independent, of both the executive branch of government[27]. It is constituted by statute[28] as a "non-departmental public body", wholly independent from the elected Home Secretary and her Ministry, and reporting directly to Parliament. The CCRC accounts to the Home Secretary solely with respect to financial and budgetary matters[29].

56. The CCRC's independence is also expressed through the composition of its commissioners. The CCRC is required to have at least 11 commissioners, of which only 1/3 are required to be legally qualified; only 2/3 are required to have experience with any aspect of the criminal justice system.[30] In practice, the CCRC draws on a diversity of backgrounds, and in particular non-legal perspectives, for its commissioners. This ensures that the CCRC adopts a multi-disciplinary approach to its work and that it is not seen as bound by a narrow legalistic approach.[31]

Accessibility

57. The CCRC demonstrates a commitment to being accessible to its applicants, consistent with an inquisitorial, pro-active approach to the identification and referral of possible wrongful convictions. Its application materials are presented in "plain English".[32] There is no requirement that the applicant gather all of the necessary documentation before an application will be considered; commission staff take on the responsibility for assembling the appeal file, transcripts

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[27] *Evidence of D. Kyle,* October 3, 2006 at 40306-40308
[28] *Criminal Appeal Act 1995*, c.35, s.8
[29] *Evidence of D. Kyle,* October 3, 2006 at 40310-40311
[30] *Criminal Appeal Act 1995*, c.35, s.8 (DocID 339707)
[31] *Evidence of D. Kyle,* October 3, 2006 at 40351-40352
[32] *Evidence of D. Kyle,* October 3, 2006 at 40327-40328

and other documentation[33]. The CCRC engages in aggressive outreach into the community, with a view to educating the general public about its role and to facilitating access by potential applicants[34]. Through a combination of these efforts, the CCRC attracts approximately 900 applications per year.

58. Most significantly, CCRC staff is wholly responsible for conducting the investigation into the alleged wrongful conviction, including interviews of relevant witnesses and consultation of forensic experts[35]. The Criminal Appeal Act also provides for the appointment of an investigating police office (if necessary from a police force unconnected to the initial investigation that led to the conviction) where police powers of search or questioning under caution is required. The applicant is actually discouraged from conducting his own investigation, so as not to interfere with the integrity of the commission's investigation.

Fairness

59. The CCRC has devised a formal and transparent process that governs every stage of the case review process[36]. Each application is assigned to a case manager, who is directed and supervised by a Commissioner, and the review follows a written investigation plan[37]. There is an internal process for prioritizing case files to ensure their timely completion, and identifying for special attention those cases that have not been subject to a determination within six months[38]. A case memorandum, outlining the case manager's preliminary analysis of the case, complete with a list

[33] *Evidence of D. Kyle,* October 3, 2006 at 40329-40330 and 40334; see also Kyle, *supra* DocID 339389 at 339399-339402
[34] *Evidence of D. Kyle,* October 3, 2006 at 40323-40327
[35] *Evidence of D. Kyle,* October 3, 2006 at 40402-40405, 40407-40413
[36] *Evidence of D. Kyle,* October 3, 2006 at 40335-40338
[37] *Evidence of D. Kyle,* October 3, 2006 at 40338-40341
[38] *Evidence of D. Kyle,* October 3, 2006 at 40345-40349

of documents that have been considered, is prepared and presented before a Commissioner (or panel of three Commissioners) for decision.

60. The applicant is provided with a formal "provisional decision", and disclosure of the results of the investigation, prior to a final determination as to whether a case will be referred to the Court of Appeal, and given an opportunity to make submissions or provide further evidence. Under no circumstances can an application be denied without the applicant having been provided with a written provisional decision, disclosure of the results of the investigation, and an opportunity to make submissions or provide further evidence[39]. When a decision is rendered final, detailed reasons are formally recorded, so that the applicant is left in no doubt as to the basis for the determination of his case.

Ensuring reasonable access to the courts

61. The statutory threshold test for referral of an application ensures that all possible wrongful convictions are reviewed by the Court of Appeal. There is no requirement to demonstrate a basis for a likely miscarriage of justice, or that the applicant is factually innocent; rather, a reference is made where "there is a real possibility that the conviction, verdict, finding or sentence would not be upheld"[40]. The low threshold test is consistent with an intention to seek out allegations of wrongful conviction, and to ensure that they are reviewed by the courts where there is a real possibility of success[41]. It specifically contemplates the referral of cases that will not ultimately succeed[42].

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[39] *Evidence of D. Kyle,* October 3, 2006 at 40343-40345
[40] *Criminal Appeal Act 1995*, c.35, s.13(1)(a) (DocID 339707)
[41] Kyle, *supra* (DocID 339389 at 339397)
[42] Zellick, *supra* at 339382

62. The CCRC's impact is evident from its case statistics reported annually to Parliament. As at the end of September 2006, the CCRC has received 9044 applications, of which it has completed 8342. It has referred 341 cases to the Court of Appeal. Of the 291 of its referrals heard thus far by the Court of Appeal, 199 have resulted in the conviction, verdict, finding, or sentence being quashed.[43]

Intangible benefits flowing from the CCRC

63. Aside from remedying a significant number of wrongful convictions, the CCRC has had a number of less tangible benefits. Perhaps most importantly, the CCRC has played a vital role in restoring public confidence in a criminal justice system that had been rocked by a spate of high-profile wrongful convictions. In addition, it is at least plausible that it serves as a form of deterrence against misconduct by officials within the criminal justice system. The CCRC also has the potential as it matures of becoming a repository of knowledge concerning the systemic causes of wrongful conviction, and a resource for those seeking to improve the "front end" of the criminal justice system.[44]

64. The operation of the CCRC also serves as a means through which guilty parties who have escaped prosecution in part through the wrongful conviction of another may be brought to justice. The CCRC's procedures require that where its investigation leads its staff to suspect a third party of a serious criminal offence, that the matter be referred to the police.[45]

F. Summary of AIDWYC's proposed recommendations

[43] http://www.ccrc.gov.uk/cases/case_44.htm
[44] *Evidence of D. Kyle,* October 3, 2006 at 40364-40367
[45] *Evidence of D. Kyle,* October 3, 2006 at 40352-40364 ; see also DocID 339587 and DocID 339444

65. AIDWYC respectfully urges this Commission of Inquiry to strongly recommend the creation of an independent tribunal to investigate alleged wrongful convictions and refer possible wrongful convictions to the court of appeal. AIDWYC's respectfully submits that the independent tribunal should be closely modeled on England's CCRC.

66. AIDWYC acknowledges that the creation of such a body would require a significant investment of resources. While the costs of having such an institution are high, the costs of not having one are higher. These costs include:

(a) The costs of repeated Royal Commissions of Inquiry into wrongful convictions;

(b) The costs of administrative reviews by various provincial Attorneys General to review issues of concern arising from recent Royal Commissions of Inquiry;

(c) The costs of incarcerating the innocent;

(d) The human and social cost to innocent persons, and their families, arising from wrongful conviction and incarceration;

(e) The cost to the reputation of the administration of justice arising from its failure to promptly identify and remedy wrongful convictions.

67. AIDWYC respectfully proposes that this Commission of Inquiry make the following recommendations:

1. The Minister of Justice should pursue with his Federal and Provincial counterparts the enactment of legislation creating a wholly independent tribunal to investigate allegations of wrongful conviction, and to refer appropriate cases for review by the courts.

2. The Minister of Justice should, in the event that his or her efforts at the national level are unsuccessful, introduce legislation creating an independent tribunal to investigate, and refer to the courts where appropriate, allegations of wrongful conviction.

3. The independent tribunal should report directly to the Provincial Legislature (or the Federal Parliament as the case may be).

4. The independent tribunal should draw its commissioners from both the legal and non-legal communities.

5. The independent tribunal should be statutorily required to refer any alleged wrongful conviction for which there is a real possibility that the conviction would not be upheld by the court of appeal.

6. The independent tribunal should be empowered to issue subpoenas, receive evidence under oath, and to compel the appearance of witnesses.

7. The independent tribunal should be sufficiently funded to conduct its own investigations of any and all allegations of wrongful conviction submitted to it.

8. The independent tribunal should be empowered to appoint and direct a police force to investigate an allegation of wrongful conviction where circumstances so require.

9. The independent tribunal should develop a detailed and publicly accessible code of procedure that would prescribe how the case review process shall be conducted.

10. The independent tribunal should develop procedures that entitle applicants to appropriate disclosure of the results of the tribunal's investigation, notice of provisional decisions with respect to applications and the reasons therefore, and an opportunity to make submissions or to provide further evidence before any final decision is made.

11. The independent tribunal should institute case management procedures to ensure that applications are reviewed on a timely basis.

12. The Minister of Justice should implement a policy that requires Crown Attorneys and police officers to disclose to the independent tribunal any exculpatory evidence regarding a convicted person that comes to their attention after the convicted individual has exhausted his or her appeals.

13. The Minister of Justice should pursue with his Federal and Provincial counterparts the amendment of the Criminal Code of Canada to repeal sections 696.1 through 696.6, and replace those sections with legislation establishing an independent tribunal (as outlined in previous recommendations).

14. The Minister of Justice should implement uniform regulations and procedures for the preservation of physical evidence and prosecution and police files following conviction, to permit review by the independent tribunal should an application for review be submitted.

ALL OF WHICH IS REPSECTFULLY SUBMITTED, THIS 14TH DAY OF NOVEMBER 2006.

Julian K. Roy

Elisabeth Widner

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