

INTRODUCTION

On October 26, 1998, the Minister of Justice, the Honourable Anne McLellan released a consultation paper entitled ***Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code***. At the same time, she requested responses to the paper from interested groups. The Association in Defence of the Wrongly Convicted (AIDWYC) is pleased to respond to this request.

PART 1

HISTORY OF AIDWYC

AIDWYC recognized the problems associated with the section 690 process at AIDWYC's inauguration in March, 1993. These problems were then, and are now part of the ***raison d'être*** of AIDWYC's existence. AIDWYC'S 1993 ***Draft Proposals for Legislative Changes*** are reproduced in their entirety herein.

AIDWYC'S DRAFT PROPOSALS FOR LEGISLATIVE CHANGES (1993)

A. THE NEED FOR AN INDEPENDENT REVIEW COMMISSION FOR THOSE WHO CLAIM TO HAVE BEEN WRONGLY CONVICTED

1. Commentary

1. A justice system is dependent on the people who administer it. No process dependent upon people is infallible. The worst error that can and does occur in our justice system is the conviction of a person for a crime that he/she did not commit.

2. The usual appeals process is not always able to remedy a miscarriage of justice. Ordinary avenues of appeal did not avail Marshall, Milgaard, Nepoose, Norris, Fox and others. The only legal option presently available to an innocent person who has been wrongly convicted is for him/her to make an application to the Minister of Justice under section 690 of the

Criminal Code.

3. The present referral procedure under Section 690 of the Criminal Code has proved to be inadequate; in particular because:

1. The role of the Minister of Justice as Chief Prosecutor is incompatible with a role of reviewing cases of persons wrongly convicted;
2. The procedure has led to inordinate delays in the reviews of individual cases. For example, Donald Marshall had to wait 10 years, David Milgaard had to wait 23 years;
3. The procedure is largely conducted in secret and is consequently without accountability;
4. Only a handful of cases have ever been re-opened in Canada; and
5. The response of the Courts to the occasional Section 690 referrals has been unsatisfactory. The Nova Scotia Court of Appeal blamed Donald Marshall for the injustice done to him. The Supreme Court of Canada finally gave David Milgaard his freedom but declined to clear his name.

4. Section 690 of the Criminal Code should be repealed forthwith. It should be replaced by an independent review mechanism for those who claim to have been wrongly convicted.

2. Proposals

5. A Wrongful Conviction Review Board should be established by the Federal Government as an independent review mechanism to review cases of persons who claim to be wrongly convicted.

6. The composition of the Board should include former and present members of the judiciary, members of the legal profession and lay members.

7. The Board shall review each case referred to it, and may decide to undertake an investigation into any such case.

8. The Board should have full powers in an investigation to compel

unhindered access to all documents and reports that pertain to the original investigation and compel witnesses to attend before it to give evidence.

9. The Board should not be bound by the usual appellate rules regarding the admissibility of fresh evidence during its investigation. It should hold a wide open investigation in which the rules of evidence would not be applied as in a regular appeal.

10. The Board should prepare a report on each case referred to it, which report must be a public document.

11. The Board should have the power to make a binding recommendation that the case be referred forthwith for a complete review by three Justices of Appeal from Provincial Appellate Courts which are **outside** the province in which the person was convicted. At least one of these Justices should have had significant experience as a trial judge.¹

12. The reviewing Justices should have the same broad evidentiary powers, and powers of evidentiary compulsion as the Board.

13. The three Justices should have the power after a full and public hearing to quash the conviction, affirm the conviction or make such other order as they may deem appropriate.

14. The three Justices should have the power to grant judicial interim release (bail) to the person concerned pending their hearing of the referral from the Board.

B. COMPENSATION (omitted)

C. POWERS OF PROVINCIAL APPELLATE COURTS

1. Commentary

15. Section 686 (1)(a)(i) of the Criminal Code has been interpreted by the Provincial Courts of Appeal and the Supreme Court of Canada in such a manner that Courts of Appeal cannot overturn a conviction even though they may feel that the accused has been wrongly convicted, absent an error of law in the trial. Many wrongful convictions could be avoided if the powers of

¹ AIDWYC is not presenting this position in this brief.

appellate courts were extended to allow them to quash a conviction in a case where the Court entertains a doubt as to the propriety of the conviction. In the U.K., the Courts have arrogated this power to themselves where they consider that there is a "lurking doubt" regarding the propriety of a conviction.

2. Proposal

16. Provincial Appellate Courts could be given the express power in the Criminal Code to overturn a conviction where, in the opinion of the Court, there is a reasonable doubt as to the accused's guilt.

AIDWYC made these proposals before the publication of ***The Royal Commission on Criminal Justice Report*** (The Runciman Report) which led to the creation of the Criminal Cases Review Commission in England.

AIDWYC is a public interest organization dedicated to preventing and rectifying wrongful convictions. Founded in 1993 in response to the wrongful conviction of Guy Paul Morin, the original members organized a voluntary non-profit association with two broad objectives: first, to reduce the likelihood of future miscarriages of justice and, second, to review and, where warranted, attempt to overturn wrongful convictions.

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 Joyce Milgaard and Rubin Carter, both of whom have personal experience of the horror of wrongful convictions.

AIDWYC has convened and sponsored several international conferences to discuss wrongful convictions. Our 1994 conference, ***Innocents Behind Bars*** attracted national media attention. We held further conferences; in 1995, ***Justice on Trial: The Wrongful Conviction of Guy Paul Morin***; in 1996, ***Coffin's Legacy: Keeping the Death Penalty at Bay***, and, in November, 1998, AIDWYC was a co-sponsor of a conference in Chicago, Illinois entitled ***The National Conference on Wrongful Convictions and the Death Penalty***. Rubin Carter, Joyce Milgaard and James Lockyer, three of our directors, were speakers at the conference

AIDWYC was granted standing at the ***Commission on Proceedings Involving Guy Paul Morin***. We prepared studies for the Commission including a paper entitled ***Wrongful Convictions: An International Comparative Study*** written by Professor Dianne Martin of Osgoode Hall Law School. Professor Anthony Doob, of the Criminology Department at the University of Toronto, prepared a paper, ***An Examination of the Views of Defence Counsel of Wrongful Convictions*** for AIDWYC, which was presented to the Commission. We called panels of experts at the Inquiry, including a panel of forensic scientists, and a panel of the wrongly convicted which included individuals from Canada, the United States and England. At the conclusion of the Inquiry, we prepared an 82 page brief which included 60 recommendations designed to avoid further miscarriages of justice. The Report of the Commission, released April 9, 1998, referred to our involvement in the Inquiry in very positive terms. Many of our recommendations were adopted in whole or in part.

One AIDWYC recommendation adopted by Mr. Justice Kaufman in his Report is the need to expand the current appellate review jurisdiction in s. 686 of the **Criminal Code** to include "lurking doubt" as a ground for reversing a conviction.

In 1998, AIDWYC provided a 44 page brief to the Criminal Justice Review Committee established by the Attorney General of Ontario, the Ontario Court of Justice and the Ontario Criminal Lawyers Association. The mandate of this **ad hoc** committee "is to develop recommendations on how to achieve a fair, yet simpler, more efficient, and less costly criminal justice process in Ontario." AIDWYC'S brief included recommendations on the following issues: Legal Representation for Accused Persons, Disclosure, The Preliminary Inquiry, Evidentiary Issues and the Need for Reform of ss. 686 and 690 of the **Criminal Code**.

On February 23, 1998, four AIDWYC directors, Peter Meier, Joyce Milgaard, James Lockyer and Melvyn Green met with the Honourable Anne McLellan to discuss reforms in the areas which form the subject matter of this brief. In particular, AIDWYC advanced our position that section 690 of the **Criminal Code** should be replaced by an independent commission similar to the Criminal Cases Review Commission in England.

On February 10, 1999, four AIDWYC directors, James Lockyer, Melvyn Green, Joanne McLean and Cindy Wasser met with the Honourable Charles Harnick, the Attorney General of Ontario, to discuss these issues with him. He seemed very receptive to our ideas.

Approaches to the offices of the Provincial Attorneys General for Nova Scotia, Newfoundland and Manitoba have also been made by AIDWYC members. Further approaches are planned in other provinces..

AIDWYC'S role as an advocate in Canada on behalf of those wrongly convicted whom it believes to be factually innocent include the cases of David Milgaard (Saskatchewan), Guy Paul Morin (Ontario), Donzel Young (Ontario), Clayton Johnson (Nova Scotia), Christopher Bates (Quebec), Stephen Truscott (Ontario), and Gregory Parsons (Newfoundland). AIDWYC is currently examining several other cases. Recently, AIDWYC intervened in the case of Stanley Faulder, a Canadian facing the death penalty in Texas.²

In December 1998, AIDWYC sent a delegation of Joyce Milgaard, Rubin Carter, Paul Copeland, Reverend Susan Eagle and Sid Ryan to publicize Mr. Faulder's case and to attempt to prevent his execution. We created a strong Canadian presence in Texas which resulted in increased public awareness in Canada, the United States and Europe of Mr. Faulder's case.

AIDWYC is affiliated with several other related organizations including Centurion Ministries in New Jersey, the Southern Centre for Human Rights in Atlanta, Georgia, the Alliance for Prison Justice in Boston, Massachusetts and Amnesty International. We have close relationships with several lawyers and academics in the United States and in the

² AIDWYC has not asserted that Mr. Faulder is innocent. We have asserted that he did not get a fair trial, and should not be executed in any event. We oppose use of the death

United Kingdom who have worked on cases of miscarriages of justice. We have also carefully nurtured relationships with the wrongly convicted themselves in these jurisdictions, as well as in Canada.

PART 2

Miscarriages of Justice in Canada

In her news release accompanying the release of the Consultation Paper, the Minister said:

“Canada has an excellent criminal justice system, but no system is perfect. Regrettably, wrongful convictions sometimes can and do occur and, when they do, the entire justice system is called into question.”

In March, 1998, Justice Kaufman concluded his Report on the Commission on Proceedings Involving Guy Paul Morin with the following:

“This Report ends where it started. An innocent person was convicted of a heinous crime he did not commit. Science helped convict him. Science exonerated him.

We will never know if Guy Paul Morin would ever have been exonerated had DNA results not been available. One can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable.

The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not

penalty in all cases.

know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future. As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened in Guy Paul Morin's case and by education as to the causes of wrongful conviction.”

AIDWYC agrees with these sentiments. There can be no doubt that numerous people are presently imprisoned in Canada for crimes that they did not commit. We have conservatively estimated that at least 40 people are presently serving sentences of **life imprisonment** for crimes they did not commit. We have never attempted to estimate the total numbers of those presently **imprisoned** for crimes they did not commit.

A significant number of wrongful conviction in Canada have been uncovered, or are in the process of being uncovered. Some of them involved successful s. 690 applications.

Following is a list of cases frequently cited as examples of wrongful convictions in Canada:

3

1. Cases in which a S. 690 Reference was Made Resulting in an Eventual Quashing of the Conviction

³ Some of the dates provided herein may be inaccurate.

- David Milgaard, sentenced in 1970 to life imprisonment for murder; a second s. 690 application was granted in 1991; a new trial was ordered by the Supreme Court of Canada in 1992 and the charges were then stayed. He was subsequently exonerated by DNA testing arranged by AIDWYC in 1997.
- Donald Marshall Jr., sentenced in 1971 to life imprisonment for murder; a s. 690 application was granted in 1982; he was acquitted by the Nova Scotia Court of Appeal in 1983.
- Wilson Nepoose, sentenced in 1987 to life imprisonment for murder; in 1991, a s. 690 application resulted in his case being referred to the Alberta Court of Appeal; a new trial was ordered in 1992; a retrial was not proceeded with.
- Wilfred Beaulieu, sentenced in 1992 to 3 1/2 years imprisonment for two sexual assaults. A s. 690 was allowed in 1996, his appeal was allowed by the Alberta Court of Appeal and an acquittal was subsequently entered in 1997.
- Norman Fox, sentenced in 1976 to 6 years imprisonment for rape, buggery and assault; a pardon was granted in 1984 on the recommendation of the Justice Department.

2. Cases Which are Still Before the Courts after a Successful S. 690 Application

- Richard McArthur, sentenced in 1986 to life imprisonment for murder; a s. 690 reference was granted in February, 1998; it is scheduled to be heard by the Alberta Court of Appeal in April, 1999 at which time AIDWYC has been advised an acquittal will be entered at the Crown's request.
- Clayton Johnson, sentenced in 1993 to life imprisonment for murder; a s. 690 application was filed by AIDWYC in March, 1998; his case was referred by the Minister to Nova Scotia Court of Appeal in September, 1998. Mr. Johnson is presently free on bail.
- Patrick Kelly, sentenced in 1985 to life imprisonment for murder; a s. 690 application resulted in a Reference to the Ontario Court of Appeal; the Court's judgment is presently under reserve.

3. Cases Which Never Left the Court System But Which Are Generally Accepted By the Public to Be Cases in Which an Innocent Person Was Convicted

- Rejean Hinse, sentenced in 1964 to 15 years imprisonment for armed robbery; acquitted by the Supreme Court of Canada in 1997 after being granted an extension of time to appeal.
- Richard Norris, sentenced in 1980 to 23 months imprisonment for sexual assault; acquitted in 1991 by the Ontario Court of Appeal after being granted an extension of time to appeal.
- Benoit Proulx, sentenced in 1991 to life imprisonment for murder; acquitted by the Quebec Court of Appeal in 1992.
- Michael McTaggart, sentenced in 1987 to 5 years imprisonment for bank robbery convictions; a new trial was ordered by the Ontario Court of Appeal in 1990; the charges were withdrawn 4 months later.
- Thomas Sophonow, sentenced in 1983 to life imprisonment for murder; reconvicted in 1985; an acquittal was entered in December, 1985 by the Manitoba Court of Appeal. AIDWYC is presently working on DNA testing in his case.
- Peter Frumusa, sentenced in 1989 to life imprisonment for murder; a new trial was ordered by the Ontario Court of Appeal in 1996; the charges were withdrawn in June, 1998. AIDWYC assisted in his case.
- Gregory Parsons, sentenced in 1994 to life imprisonment for murder; the Newfoundland Court of Appeal ordered a new trial in 1996; a stay of proceedings was entered in 1998 based on DNA testing; AIDWYC intervened before the Newfoundland Supreme Court on a Charter application to set aside the stay and have an acquittal entered; an acquittal was entered with the consent of the Crown in November, 1998.
- Guy Paul Morin, sentenced in 1992 to life imprisonment for murder; an acquittal was entered by the Ontario Court of Appeal in 1995 as a result of DNA testing.
- Herman Kaglick, sentenced in 1993 to 10 years imprisonment for sexual assaults; the Court of Appeal in the Northwest Territories entered an acquittal in 1998 based on DNA findings.

There is a further group of cases in which AIDWYC is presently involved because it believes

they are cases of wrongful conviction.

4. Cases which AIDWYC Believes are Wrongful Convictions that are Presently Being Pursued by AIDWYC

- Gary Comeau, Rick Sauve, Mervin Blake and Jeff McLeod, sentenced in 1979 to life imprisonment for murder; a s. 690 application was dismissed in 1991; AIDWYC is preparing a second s. 690 application.
- Steven Truscott, sentenced to death in 1959 for capital murder; his sentence was commuted to life imprisonment in 1960; his conviction was upheld in 1967 after a Reference to the Supreme Court of Canada; AIDWYC is now preparing a s. 690 application on Mr. Truscott's behalf.
- Kenshin Lee, sentenced in 1989 to life imprisonment for murder; his appeal was dismissed in the Supreme Court of Canada; AIDWYC is now preparing a s. 690 application based on new DNA testing.
- Christopher Bates, sentenced in 1993 to life imprisonment for murder; his appeal was allowed by the Quebec Court of Appeal in 1998 and a new trial is pending. AIDWYC assisted in discovering fresh evidence for his case.
- Gordon Folland, sentenced in 1994 to 5 years imprisonment for sexual assault; his conviction appeal was allowed by the Ontario Court of Appeal in January, 1999, after post-conviction DNA testing and a new trial is pending. AIDWYC assisted in his appeal.
- Donzel Young, sentenced in 1991 to life imprisonment for murder; a s. 690 application was filed in 1995 by Mr. Young and by AIDWYC; Young was murdered in prison in 1995; Mr. Justice Kaufman was appointed by the Minister to review the case. However, due to witnesses disappearing, his case is now in limbo.

We believe these cases represent a small percentage of the actual numbers of wrongly convicted in Canada. Our belief is enhanced by the United Kingdom experience since the establishment of the Criminal Cases Review Commission, a body which has already referred a remarkable number of convictions to the Court of Appeal, some of which have since been quashed by the Court, and many more of which remain outstanding before the

Court (*infra*).

PART 3

A History of the Reviews of the Section 690 Process in Canada

As far as AIDWYC is aware, ***the Royal Commission on the Donald Marshall Jr. Prosecution*** was first to address the need for reform of the section 690 process. In their report, the Commissioners said:

“The Marshall case is not unique, and it would be unrealistic to assume otherwise. ‘Justice’, the British Section of the International Commission of Jurists, for example, estimates there are at least 15 cases a year in the United Kingdom in which people are imprisoned for crimes they did not commit. One such incident, of course, is clearly too many, so the question for us is how do we bring these situations to light and provide wrongly convicted people with a fair opportunity to establish their innocence.

We believe someone - or some body - has to be appointed to serve as a kind of ‘court’ of last resort, not only for individuals who claim they have been wrongfully convicted but also for others who may have information that someone else has been wrongly convicted.

....

Recommendation 1

We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys 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.”

Later that year, in October, 1990, a 'working group' was set up by the Department of Justice to review these recommendations. Their review was conducted in secret and their findings were never released. However, AIDWYC has acquired extracts of their report. In it, the working group, with one dissent,⁴ explicitly rejected the Marshall Inquiry recommendations. Their report included the following:

"The general thrust of the comments [of those in attendance] was to the effect that the establishment of an independent review body was undesirable. General concern was expressed that such a review mechanism would create another level of appeal, and that the establishment of a mechanism would result in a great number of requests for reviews of convictions. The Commission envisioned that there would be a national body which would report to both the Federal Minister of Justice and the relevant Attorney-General of the province. There was serious concern that this type of dual accountability as suggested by the Commission would create a great deal of difficulty. Given the financial constraints under which every government is labouring, concern was expressed that it would be very difficult to justify the creation of another bureaucratic level to deal with the requests for a review likely to arise from persons claiming to be wrongfully convicted. The Criminal Code, at s. 690, provides for a review mechanism by which the Minister of Justice may have a particular case reviewed by the courts.

This review process was explained to the working group. It was pointed out that the process is fairly lengthy, that there is certain lack of resources which can be applied to all of the requests for a s. 690 review, but that by and large the process worked fairly satisfactory, albeit somewhat slowly. One area where it was thought that the process could be improved was to provide for a power to compel individuals to testify to facts which may be relevant to a particular review. It was noted that the Marshall Commission did not criticize the present s. 690 review mechanism. Lastly, concern was expressed by some that the judiciary might strenuously object to court decisions which would be reviewed by a non-judicial body."

AIDWYC views the approach taken to the Marshall Inquiry recommendations as nothing short of disgraceful. Lip service responses, given in secret, do not further the public

⁴ AIDWYC has been advised that the dissenter was the representative from Nova Scotia, the province out of which the Marshall Inquiry made its recommendation.

interest in identifying and setting free the wrongly convicted. AIDWYC notes that the present government was not in power when this review was conducted.

More recently, Justice Kaufman received evidence and submissions on the section 690 process at the Morin Inquiry. He heard evidence from several experts on wrongful convictions from Canada, the United States and the United Kingdom, and from David Kyle, a Commissioner from the British Criminal Cases Review Commission. Justice Kaufman received submissions from AIDWYC, the Criminal Lawyers Association and the Canadian Bar Association on the section 690 process. Recommendation 117 of the Morin Report provided as follows:

“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*.”

In support of this recommendation, Justice Kaufman wrote:

“Based upon my ruling and the limited evidence I have heard, I am not able to make recommendations as to the existing or any proposed review mechanisms for cases involving potential wrongful convictions. However, the availability of an adequate review is an issue of great importance. I am able to recommend that the Government of Canada study the adequacies of the present regime and the desirability of a criminal case review board, drawing upon the representations of all interested parties.”

It is within this background that the Minister has produced her 1998 Consultation Paper.

PART 4

The Problems Inherent in the Section 690 Process

Section 690 of the ***Criminal Code*** is, in essence, a copy of the former Home Secretary reference powers under U.K. legislation. Section 17 of the ***Criminal Appeals Act***, 1968 (U.K.) provided as follows:

“17. –(1) Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability and to have done the act or made the omission charged against him, the Secretary of State may, if he thinks fit, at any time either –

(a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person; or

(b) if he desires the assistance of the court on any point arising in the case, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion accordingly.

(2) A reference by the Secretary of State under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application.”

Viscount Runciman said in his Report for the Royal Commission on Criminal Justice (July, 1993):

“The available figures for the number of cases referred by the Home Secretary to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 show that the power is not often exercised.”

The same can be said for the Minister's exercise of her powers under section 690 of the ***Criminal Code***. References are few and far between. Overall statistics are not available but it is known that only about 1% of applications for a Reference are granted. This extraordinarily low percentage may, in part, reflect the integrity of the applications. It certainly reflects the numerous problems inherent in the section 690 process. We now

propose to examine these problems.

(1) Section 690 is Incompatible with the Constitutional Separation Of Powers Between the Courts and the Executive

Traditionally, the separation of powers between the courts and the executive has ensured that the executive does not interfere with the judicial process. Section 690 is an anomaly; since an applicant cannot obtain access to the courts without a Reference by the Minister, the Minister is effectively authorized by section 690 to usurp the powers of the courts by refusing a Reference. In our view, it is unacceptable to justify this by asserting that the courts have already rendered their decisions in those cases in which a Reference is sought. Once it is acknowledged, as it has been by the present Minister, that wrongful convictions occur, it must be for **an independent tribunal** to decide on an application for a Reference.

This point was made by Viscount Runciman in his Report. He said:

“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 a 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.

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.”

The reality of the conflict caused by section 690 is readily apparent in times of public and/or political demands for "law and order". The political realities undoubtedly weigh on the executive in these circumstances. This was most apparent in the Irish cases in the United Kingdom. Political considerations were allowed to dominate over considerations of individuals being the victims of miscarriages of justice. In addition, the decision maker in a section 690 application is inevitably affected by an institutional bias which will only be overcome by overwhelming evidence of the failure of the judicial process in a particular case. Institutional considerations result from the Minister of Justice who is the principal prosecutor of all Federal Statutes except the **Criminal Code** seeking to defend the **status quo** of a conviction once it has been confirmed by the appellate process. The refusal of the Reference in David Milgaard's case in 1989 was likely caused by these kinds of institutional considerations. His second Reference application was only allowed in 1991 after strong public pressure had been brought to bear on the then Conservative government.

AIDWYC maintains that section 690 violates section 7 of the **Canadian Charter of Rights and Freedoms**. The empowerment of a member of the Executive to decide whether the courts can review a case is contrary to the principles of fundamental justice. Only an independent tribunal should be able to rule on a claim upon which access to the Courts to demonstrate innocence depends. AIDWYC intends to raise the constitutionality of

section 690 in the courts, and is considering using the **Kinsella** case for this purpose.⁵

AIDWYC suspects that, in some quarters, miscarriages of justice such as those in the cases of Donald Marshall and David Milgaard are viewed as embarrassments to the justice system as a whole. AIDWYC believes otherwise. The rectification of a miscarriage of justice can only reflect **well** on the system. It not only remedies individual cases of injustice but, as well, flags systemic issues that can be better addressed in the future. It can also lead to the apprehension of the real culprit.

AIDWYC also urges the Minister to consider the practical realities of the process in a section 690 application. The ultimate disposition of an application is largely dependent on the opinions of members of the Criminal Conviction Review Group, who work within the Ministry which is responsible for all federal prosecutions in Canada. The Minister has pointed out that outside counsel have been used more frequently in recent years to examine section 690 applications. Within the section 690 framework, this is a welcome development. However, the fact remains that outside counsels' recommendations to the Minister are not necessarily followed; indeed, AIDWYC has it on reliable authority that,

⁵ Allen Kinsella's section 690 application for a Reference of his 1978 murder conviction to the Ontario Court of Appeal was denied by the Minister on January 13, 1999.

in at least one recent case, outside counsel's recommendation was not followed. In any event, outside counsel is still subject to the authority and direction of the Minister, and is not "independent" of her.

(2) The Section 690 Investigatory Practice is Unsatisfactory

For similar reasons, the investigatory practices used by the Minister in section 690 applications have proved to be unsatisfactory. They are conducted in an adversarial way, defensive of the *status quo* and premised on an assumption of guilt. They are not conducted in an impartial manner. The best known example of this was the manner in which the investigation of David Milgaard's first section 690 application was undertaken.

Witnesses favourable to the prosecution were interviewed in a friendly and leading way; witnesses favourable to Mr. Milgaard were cross-examined in a hostile and disbelieving manner. Extraordinary statements, which reflected an abiding and cynical belief in Mr. Milgaard's guilt, were made to the media by Justice Ministry officials. This kind of approach typifies the way in which section 690 applications are reviewed.

(3) Section 690 Reviews Are Conducted with A Lack of Accountability

There is no process established for the review of section 690 applications. As a consequence, they are conducted largely in secret. The applicant is rarely aware of the progress in the review, and is not invited to participate in interviews of witnesses. Lengthy delays in the processing of applications are the norm. They can take years to decide. One lawyer has said that section 690 applications move "as briskly as a snail with arthritis". The

Minister has acknowledged that many of these delays have been inexcusable. In addition, the Minister is not obliged to give reasons for the rejection of an application. AIDWYC appreciates that improvements have been made in recent years in this regard but, even now, reasons, when given, are generally scanty in content.

(4) Prohibitive Costs to the Applicant

The present system in Canada for uncovering miscarriages of justice is not a system at all. Applicants face almost impossible hurdles in establishing a basis for a section 690 review. There is a limited access to funding in some provinces. In Ontario, for example, the Ontario Legal Aid Plan may provide assistance. In most provinces, no publicly funded assistance is provided. AIDWYC assists individuals where it can, but our resources are extremely limited. As has been said by several experts in the field, for a miscarriage of justice to be exposed, it is more a question of good fortune or "pot luck" than justice at work. At the Morin Inquiry, Professor Radelet, an expert from the University of Florida, testified:

“So the bottom line answer is that unless somebody is incredibly lucky, unless they get a juror who retains doubts about the case, unless that police officer who investigated or prosecuted, or who worked on the case, unless the defence attorney is lucky enough to have extra time to pursue the conviction, then the person is in prison and living that life in prison alone.”

(5) Disclosure and Subpoena Powers

An applicant under section 690 has no right to subpoena records and/or individuals. His/her rights to disclosure are also seriously circumscribed. It is a familiar problem for those engaged in wrongful conviction work to obtain access to the original police and Crown files. Individual privacy considerations are regularly used to deny access to records.

In some cases, the authorities cooperate fully, in many more cases they do not. This reflects the absence of a process which entitles an applicant to obtain disclosure.

Conclusion

The systemic problems associated with section 690 applications demand reform. It can be assumed that they constitute a real impediment to the number of applications brought, as well as an impediment to successful applications. AIDWYC believes that any attempt to modify the present system can amount to no more than tinkering; a newly created independent tribunal to review applications is the only acceptable model.

PART 5

THE U.K. EXPERIENCE - THE CRIMINAL CASES REVIEW COMMISSION

(1) The Establishment of the Commission

Until 1997, the post-appellate route for claims of wrongful conviction in England and Ireland was similar to that currently in place in Canada. Under s. 17 of the Criminal Appeals Act, 1968, applicants were obliged to direct their claims of wrongful conviction to the Home Secretary (or the Secretary of State for Northern Ireland) who had exclusive power to refer cases to the Court of Appeal for reconsideration. In the late 1980s and early 1990s, approximately 700 to 800 applications were received by the Home Secretary each year. Of these, only a very few were referred to the Court of Appeal.⁶

On March 14, 1991, as a result of growing concerns about the failings of the justice system, the Home Secretary announced the establishment of the Royal Commission on Criminal Justice, headed by Viscount Runciman. After an extensive review of the practices of the Office of the Home Secretary, the Commission adopted the words of Sir John May who had

⁶ In the years 1981-88, 36 cases involving 48 individuals were referred to the Court of Appeal as a result of concerns about the safety of the convictions. Between 1989 and 1992, 28 cases involving 49 individuals were referred, many of them arising from trials of individuals accused of terrorist activities in the United Kingdom.
The Runciman Report at p. 181

led the inquiry into the wrongful conviction of the Maguire Seven:

“The very nature and terms of the self-imposed limits on the Home Secretary's power to refer cases have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial ... the approach of the Home Office was throughout reactive, it was never thought proper for the Department to become proactive.”⁷

The Commission reported in July, 1993 and recommended, *inter alia*, the establishment of an independent body to investigate claims of wrongful conviction and to refer to the Court of Appeal those cases in which there was a real possibility that the convictions or sentences would not be upheld.

The Criminal Appeal Act 1995 repealed the sections of the earlier Act which provided for references by the Home Secretary. Sections 8(1) and (2) of the new Act created the Criminal Cases Review Commission as an independent body. In January, 1997, the Commission came into formal existence.

(2) Investigatory Powers Given to the Commission

⁷ *The Royal Commission on Criminal Justice*, at p. 182 quoting Sir John May

The Commission's mandate includes investigating all allegations of wrongful conviction or sentence in summary or indictable proceedings in England, Wales and Northern Ireland. The Commission is given wide ranging supplementary powers, not formerly available to the Home Office, as regards its investigative powers. The Commission has the power to subpoena documents or other materials (s. 17); to require the appointment of independent police officers to investigate on its behalf (s. 19); and a general power to take whatever steps it considers necessary to assist it in the exercise of its duties. The Commission has advised us that a section 17 notice is sent out in every case which has some ***prima facie*** merit. The Commissioners to whom we spoke consider their wide-ranging statutory powers to be essential to their work.

At the conclusion of its review, the Commission must consider whether

“... there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made”.⁸

If so, the Commission must refer the case to the Court of Appeal. The Commission is required to provide written reasons for its decision in all cases. In the case of a Reference, the statement must be furnished to the Court of Appeal and to any person likely to be a party to any proceedings in the forthcoming appeal. If the Commission declines to make a Reference to the Court, the applicant must be provided with the written reasons for the Commission's decision.

⁸ ***Criminal Appeal Act***, 1995, s. 13(1)

(3) The Commission's First 18 Months

The Commission's casework began on March 31, 1997 with the transfer of 252 cases from the Home Office and the Northern Ireland Office, and a further 32 original applications.

By March 31, 1998, applications for consideration by the Commission totalled 1,380, rising to 2,123 by the end of November, 1998. Of these cases, a review of 613 cases had been completed by November, 1998. The Commission has advised that in 80% of the cases, the applicants are not represented by counsel.

To date, not surprisingly, the Commission has focussed on the more serious cases. Of the 613 cases reviewed, the Commission referred 34 cases to the Court of Appeal involving 37 individuals, 4 of these being limited to sentencing issues. By the end of December, 1998, the Court of Appeal had heard ten of these cases.⁹ Seven convictions (four of them for murder) were quashed, one murder conviction was reduced to manslaughter, and one sentence was reduced. Two of the murder cases in which the convictions were quashed, the cases of Derek Bentley and Mahmoud Mattan, involved posthumous applications brought on their behalf as a result of their execution in the early 1950's.¹⁰ Previous

⁹ The judgments of the Court of Appeal in each of these cases can be found in the supplementary materials filed with this brief.

¹⁰ Three other cases of persons who were executed after conviction are presently being examined by the Commission. These cases are those of George Kelly, hanged in 1950, Alfred Whiteway, hanged in 1953, and James Hanratty, hanged in 1962.

applications to the Home Office under section 17 for both had been refused. Of the cases heard by the Court of Appeal, in only one case has the conviction been upheld. 24 cases referred by the Commission await a hearing in the Court of Appeal. Of these, three cases were previously refused by the Home Office. It is worthy of note that the vast majority of the Commission's referrals arise from cases that were "run of the mill" cases, albeit involving serious charges, in which no political considerations were at stake as they were in the pre-Commission Irish cases.

(4) The Commission's Case Management System

The majority of cases are investigated by a Case Review Manager; a few are investigated directly by a Commissioner. The decision as to whether to make a Reference is made by a committee of three Commissioners who review the work and findings of the Case Review Manager (or Commissioner).

(5) Funding and Staffing Concerns

At its inception, the Commission had a huge backlog of cases inherited from the Home Office. New cases were coming in at the rate of four to five a day. Many of the Commission's Referrals are of cases previously rejected under the Home Secretary Reference system. An initial large number of cases was therefore to be expected. It is unlikely that this rate of cases will continue as the backlog abates, and more realistic expectations take hold. However, to meet the initial demand, the Commission applied for an additional £1.3 million funding for the 1998-99 financial year. The true annual costs of the Commission can only be measured a few years hence.

(6) The Commission and the Judiciary

Commissioners to whom we have spoken told us that when the Commission commenced its work, there were fears expressed by members of the judiciary. There was a fear that there would be a mass of referrals by incompetent Commissioners that would then be denied by the Court of Appeal, and that this would hurt the Court of Appeal's reputation. Trial judges expressed concern that their reputations would be damaged.

However, the Commissioners were certain that after two years of operation, judicial opinion about the Commission had changed. Their work is now seen as a fail-safe mechanism essential to the proper functioning of the administration of justice. In the Court of Appeal's judgment in ***R. v. Mattan***, the first of the Referrals to come before the Court, Lord Justice Rose said:

“The Criminal Cases Review Commission is a necessary and welcome body, without whose work the injustice in this case might never have been identified.”

Similar laudatory comments have been made in subsequent cases by the Court of Appeal.

(7) AIDWYC and the Commission

AIDWYC has maintained a close relationship with the Commission since its inception. We have collected all their decisions. We have met some of the successful applicants. In January, 1999, one of our directors, James Lockyer, as a part of our preparation for this brief, visited the Commission in Birmingham, England, and met with several of the Commissioners. There is no doubt in our minds that the Commission has been remarkably effective, and has helped restore confidence in the administration of justice

in that country.

PART 6

THE UNITED STATES EXPERIENCE

AIDWYC has had extensive contacts with experts in wrongful convictions from the United States. In particular, we have shared information with Reverend Jim McCloskey of Centurion Ministries, a wrongful conviction organization in Princeton, New Jersey, and Professor Michael

Radelet of the University of Florida who has co-authored a book ***In Spite of Innocence*** which catalogues 400 cases of people sentenced to death in the United States who were subsequently proved to be innocent.

Neither AIDWYC nor the American experts whom we have met, are impressed by the U.S. post-conviction remedies. They are numerous, tortuous in nature, expensive and time-consuming. Recent legislation, at the Federal and State levels, has reduced the remedies available.

In short, AIDWYC does not believe that we should in any way adopt the U.S. system for post-conviction remedies.

PART 7

AIDWYC RECOMMENDS THE CREATION OF A CRIMINAL CASES REVIEW COMMISSION EQUIVALENT IN CANADA

AIDWYC urges the creation of a system modelled on the British system of the Criminal Cases Review Commission as discussed ***supra***. The Commission's power should be limited to a power of referral to the appellate court in the province in which the conviction was

registered. AIDWYC does not propose that the Commission should have compensation powers.

The creation of such a Commission would solve all of the problems associated with the present system.

(1) **A Newly Created Commission Would Be An Independent and Impartial Tribunal**

A newly created Commission would remove all political considerations from the review of applications submitted to it. A separation of powers between the executive and the judicial process would be maintained, a most desirable result that reflects the traditional separation of powers. The incompatible roles of the Minister as Chief Prosecutor and as the person to review wrongful convictions would disappear.

(2) **A Commission, As An Independent Tribunal, Could Investigate Applications Impartially**

An independent Commission would not be compromised by dangers of partiality or bias presently inherent in the section 690 process. As a body with investigative powers, it could conduct its reviews in an inquisitorial fashion. David Kyle, a member of the British Commission, was asked at the Morin Inquiry whether the Commission saw its function as more inquisitorial than adversarial. He responded:

“A. ... we will see ourselves in much more of an inquisitorial role than an adversarial role.

And I emphasize that means what it says. We do not regard ourselves

as acting on behalf of the applicant, nor do we regard ourselves as acting in some way on behalf of the organs of state which investigated the case and prosecuted. It seems to me that if you adopt an inquisitorial position, that carries with it the need for impartiality, and we will expect to conduct our investigations in that light. And accordingly, the investigations that we carry out, whatever results are produced, we will act on.

Q. So you, for example, would not view -- or the commission, should I say, doesn't view its task when an applicant makes an application, to setting about either establishing or disproving the claimant's claims, rather investigating them as fairly and even-handedly as you possibly can without fear or favour, so to speak, to either side?

A. That effectively, yes, is the position that we see. Our activity, of course, will be triggered by an applicant, and therefore, our starting point is always going to be somebody who has been convicted coming to us, if you like, so far as that person is concerned, as the last-chance resort, because he's already been convicted, he's already been through the appeal process, and his conviction remains. So our starting point will be an applicant who is convicted who maintains that for whatever reason, he has been wrongfully convicted, and that's how he'll see it. He'll see himself as a victim of a miscarriage of justice.

Our responsibility then is to investigate that matter, and we will do so as rigorously as we can, and as impartially as we can. And the outcome, as you put it a moment ago, may go one way, may go the other."

This approach, in turn, will reduce to a minimum the present handicap of an indigent person attempting to establish under the section 690 process that he/she has been wrongly convicted.

(3) **A Commission Should Be Given Powers Ancillary to its Mandate**

Legislation that creates an independent Commission in Canada should provide the Commission with powers necessary for a thorough investigation. This should include the power to compel production of documents from officials, and the power of subpoena.

(4) **The Commission's Responsibility to its Applicants**

The Commission should be required to communicate regularly with an applicant regarding progress in its investigation of his case. Subject to limited exceptions, full disclosure should be provided. The Commission should honour the rule of ***audi alteram partem***. The British Commissioners to whom we spoke all stressed the importance of this.

Written reasons should be provided to the applicant for the granting or refusal of his application.

(5) **A Commission Should Be Accountable to the Legislature**

An independent Commission should be accountable for its work, and required to provide annual reports to the Legislature using the Auditor-General model.¹¹

(6) **The Jurisdiction of the Proposed Canadian Model**

The British Commission has jurisdiction over all convictions, including the whole spectrum of summary and indictable offences.

a) AIDWYC's primary position is that a Canadian Commission should likewise have

¹¹ The British Commission is required to provide an annual report to Parliament (Schedule 1, section 8, ***Criminal Appeal Act*** 1995)

jurisdiction over all summary and indictable **convictions**. Section 690 of the **Criminal Code** should be repealed.

- b) In the alternative, to facilitate its introduction and to reduce start-up costs, AIDWYC proposes that the initial jurisdiction of the Commission could be somewhat narrower than that of the British model. AIDWYC proposes, as an alternative, that the Canadian model have jurisdiction over only those applications for conviction reviews in which the applicant was convicted of an offence on indictment. This alternative position would necessarily require maintenance of the section 690 regime for those persons who were convicted of summary offences. These applicants should retain a right to bring a section 690 application.

- c) The British Commission has jurisdiction over sentence review applications. AIDWYC proposes that a "mercy" process be retained for applications to review sentences, and that such applications not fall within the jurisdiction of the Commission.

- d) After a period of time, perhaps 5 years, parliament should review these limitations on the Commission's jurisdiction.

David Kyle was asked at the Morin Inquiry for his opinion of the British Commission's impact on public confidence in the administration of justice:

"I think I'd answer that by saying that I believe that the existence of the commission which has now been created is a good thing, and I believe that it will add considerable value to the integrity of the criminal justice system, and to maintaining public confidence in that system, but I believe that the reason why that is, as I'm sure I've already said and is implicit in the way you expressed that, that the value will come out of the fact that it is an independent body, and it has the resources to do the job with

which it is tasked -- at least we hope we have the resources to do the job.”

PART 8

AIDWYC'S PROPOSAL REGARDING THE APPROPRIATE TEST FOR A COMMISSION REFERENCE TO AN APPELLATE COURT

Section 13(1)(c) of the U.K. legislation provides that the Criminal Cases Review Commission shall refer a case to the Court of Appeal if there is a "real possibility" that the conviction would not be upheld by the Court of Appeal. This test is similar to the least demanding of the three tests set out by the Supreme Court of Canada in David Milgaard's case for allowing a conviction appeal after a Reference by the Minister under section 690.

The three guidelines set out by the Court in *Milgaard* (1992), 71 C.C.C. (3d) 260 are as follows:

- (a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this court in its discretion may receive and consider, the court is satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the ***Criminal Code*** to grant a free pardon to David Milgaard.
- (b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this court in its discretion may receive and consider, the court is satisfied on a preponderance of the evidence that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground, it

would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed and a verdict of acquittal entered, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.

- (c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. If we were to answer the first question put to this court by the Governor-General in the affirmative on this ground we would consider advising the Minister of Justice to quash the conviction and to direct a new trial under s. 690(a) of the **Criminal Code**. In the event it would be open to the Attorney-General of Saskatchewan to enter a stay if a stay were deemed appropriate in view of all of the circumstances including the time served by David Milgaard.”

The Court then said:

- “(d) If the judicial record, the Reference Case and such further evidence as this court in its discretion may receive and consider, fails to establish a miscarriage of justice as set out in paras. (a), (b) or (c) above, we might nonetheless consider advising the Minister of Justice that granting of a conditional pardon under s. 749(2) of the **Criminal Code** may be warranted where having regard to all the circumstances, it is felt some sympathetic consideration of David Milgaard's current situation is in order.”

There are no criteria for review in section 690. Presumably, the test for the Minister on a section 690 application should bear a direct relationship to the **Milgaard** tests.

Consequently, if there is a reasonable possibility that an appellate court, acting within the **Milgaard** parameters, would find a miscarriage of justice to have occurred if a Reference were to be made, the Minister should make the Reference.

In the section 690 application of Colin Thatcher, the then Minister of Justice, the Honourable Alan Rock, set out his interpretation of his section 690 obligations. He said:

- “5. Where the applicant is able to identify such ‘new matters’, the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such ‘new matters’ will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the ‘new matters’ when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be ‘is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict?’
6. Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate ... that there is a basis to conclude that a miscarriage of justice likely occurred.”

AIDWYC is not entirely comfortable with this interpretation of the Minister of his duties under section 690 but assumes that the Minister would always seek to exercise his powers within the ***Milgaard*** framework.

AIDWYC urges the adoption of the "real possibility" test, or a test akin to it, which does not require the production of fresh evidence before a conviction can be set aside as is required by the Supreme Court of Canada in ***Milgaard***. At the Morin Inquiry, David Kyle explained that the British Commission's understanding of "a real possibility" includes "lurking doubt" cases in which no fresh evidence is available. He said:

“...I think that can be translated into a real possibility that the court will think the conviction to be unsafe insofar as the authorities to which you've referred such as Cooper and McMahon allow the Court of Appeal to quash a conviction on the basis of a lurking doubt. It would seem to follow that in terms of our statute, we could make a reference on that basis. And indeed, if that was our view of the situation, I've no doubt that we should do so.”

Elsewhere in this brief (Part 12), AIDWYC argues that the **Criminal Code** should be amended to allow an appellate court to overturn a conviction in a case in which there is a lurking doubt about guilt. This leads to two possible scenarios in the context of the appropriate test for a Reference by the Commission:

- a) If section 686(1)(a)(i) of the **Criminal Code** is amended to provide appellate courts with "lurking doubt" jurisdiction, this would be an acknowledgement by the Legislature that convictions should not be upheld where such a doubt exists. In this scenario, the newly created Commission should be given a similar power of Reference to demonstrate consistency within the justice system.
- b) If appellate courts are not given this power, the Commission should still be permitted to refer a case despite the absence of fresh evidence where there is a reasonable prospect that an appellate court will quash the conviction on the basis of section 686(1)(a)(i) **if this ground was not argued on appeal.**

PART 9

THE PRICE OF A COMMISSION

AIDWYC recognizes that the likely costs associated with the creation of a Commission in Canada must be considered. In our view, they would be small compared with the

enhanced confidence in the administration of justice that would result from the creation of a Commission. They would also be small compared to the human cost, and the societal aversion to imprisoning the innocent for crimes they did not commit.

The British Commission has incurred more costs than originally anticipated. A Canadian equivalent would be less costly as our country has a smaller population. It can be reasonably inferred that wrongful convictions have occurred more frequently in England than in Canada because Canada has never experienced anything like the "Irish cases". The number of applications brought each year to the Home Secretary under the old system in England far exceeds the number of applications made to the Minister each year under section 690.¹² In addition, the proposed mandate of a Canadian Commission would be narrower than that of the British Commission.

The Commission would, of course, eliminate the need to fund a Criminal Conviction Review Group within the Department of Justice. The Commission's work, insofar as it

¹² AIDWYC understands that less than 100 applications are made each year under section 690. This number should be contrasted with 700 to 800 applications made each year to the Home Secretary under the former system in England.

uncovers cases of wrongful conviction, will save considerable public funds that would otherwise be spent in the continued imprisonment of the wrongly convicted person.

AIDWYC has neither the expertise nor resources to project anticipated costs. We do have the firm belief that the price to be paid will be minimal compared to the benefits to our system of justice.

While we concede the matter is beyond our expertise, in AIDWYC'S view, the Federal Government should be responsible for all costs related to the work of the Commission. Cost sharing between the Federal and appropriate Provincial or Territorial government may be appropriate once a Reference has been made to an appellate court by the Commission.

In the end, the obvious virtue of an independent review mechanism should not be frustrated by jurisdictional disputes over the cost of its operation. That innocent people remain in gaol while governments debate who will pay the costs can only erode confidence in the administration of justice.

PART 10

THE APPELLATE FRESH EVIDENCE TEST

Section 686 of the ***Criminal Code*** should be amended to change the present test for the

admission of fresh evidence by providing that fresh evidence should be admissible if it may have affected the verdict. The requirement that the evidence be credible should be amended to include a situation where a recantation, although not credible in itself, calls into question the overall credibility of the witness at the earlier trial. The Saskatchewan Court of Appeal decision in **R. v. Big Eagle**, Unreported, (Dec. 11/97) offers an example of an appellate court's refusal to admit the fresh evidence of a recanting witness, one Alain Germain, who had given material evidence of identification at trial.¹³ In the **Morin** Report, Justice Kaufman criticized this approach of the Saskatchewan Court of Appeal:

“The focus should not be placed only on the believability of the recantation, but also upon the believability of Germain's original testimony, given the recantation. If the fact that Germain recanted, in the circumstances under which he recanted, could reasonably be expected to have affected the result, a new trial should be ordered whether or not the Court finds the recantation itself believable.”

There should be a further amendment to enact an overriding consideration that fresh evidence should always be admitted if its admission is in the interests of justice.

The four pre-conditions to the admissibility of fresh evidence are set out by the Supreme Court of Canada in **Palmer and Palmer** (1979), 50 C.C.C. (2d) 193 (S.C.C.) at p. 205 and have recently been re-affirmed by the Court in **R. v. Warsing**, Unreported, Dec. 17/88 (S.C.C.). The principles are as follows:

“(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial

¹³ AIDWYC is aware that this issue is presently the subject of a reserved decision in the Ontario Court of Appeal in the case of **R. v. Babinski**.

provided that this general principle will not be applied as strictly in a criminal case as in civil cases ... ;

- (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;**
- (3) the evidence must be credible in the sense that it is reasonably capable of belief, and**
- (4) it must be such that if believed it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.”**

Submissions to relax the fresh evidence rules were made on Guy Paul Morin's behalf to Justice Kaufman at the Morin Inquiry. Justice Kaufman, after reviewing the issues, said:

“I favour a change to the present rule, which continues to address the concerns which motivate the 'due diligence' requirement.

a) In the context of recanted evidence, the requirements that evidence must reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness' original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.

(b) Consideration should be given to further change the 'due diligence' requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.”

AIDWYC recommends that the ***Palmer and Palmer*** rules be legislatively amended to read as follows (suggested changes are in italics):

- “(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases...
- (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (3) the evidence must be credible in the sense that it is reasonably capable of belief, ***or is such that it calls into question the credibility of a witness who testified at trial;***
- (4) it must be such ***that it can be legitimately said that it may have affected the verdict,*** and
- (5) ***in any event, the fresh evidence should be admitted if its admission is in the interests of justice.***”

Our recommended change to the third pre-condition (***infra***) better allows for the witness whose entire credibility comes into question as a result of a recantation which leaves the trier of fact in a quandary as to where the truth may lie. The proposed alternative ‘interests of justice’ change would make it easier for an appellant to overcome the due diligence hurdle in the appropriate case.

PART 11

BROADENING APPELLATE POWERS: THE NOTION OF LURKING DOUBT

Section 686(1)(a)(i) authorizes an appellate court to allow a conviction appeal

“...where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence ... or on any ground there was a miscarriage of justice.”

This section has been interpreted narrowly by the Supreme Court of Canada. As a general rule, the test applied has been whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. This is an extraordinarily difficult test to meet. In a rare case, an appellate court will look to issues of credibility where the assessment of credibility at trial is not supported by the evidence.

The concept of "lurking doubt" comes from the English Court of Appeal in **R. v. Cooper** (1968), 53 Cr.App.R. 82. In that case, Widgery J. said:

“[W]e are indeed charged to allow an appeal against conviction if we think the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. *That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.*” (emphasis added)

The Ontario Court of Appeal has demonstrated a willingness to go beyond a strict interpretation of s. 686(1)(a)(i) in some cases, especially in identification cases such as **R. v. Quercia** (1993), 60 C.C.C. (3d) 380. In **R. v. Malcolm** (1993), 81 C.C.C. (3d) 196, Finalyson J.A. approved the English cases which permit the quashing of a conviction in a case in which there is a lurking doubt. However, in **R. v. G.(A.)** (1999), 130 C.C.C. (3d) 30,

a recent decision of the Ontario Court of Appeal, the Court retreated from the position that it had established in **Malcolm**. This case is presently before the Supreme Court of Canada.

Other provincial appellate courts have also rejected the notion of lurking doubt as being within section 686(1)(a)(i). For example, in **R. v. Guyatt** (1997) 119 C.C.C. (3d) 304, the British Columbia Court of Appeal elected not to follow Finlayson J.A.'s reasoning in **Malcolm**.

Rejection of the lurking doubt jurisdiction has led to potential miscarriages of justice. This was acknowledged by the Ontario Court of Appeal in **R. v. H.(E.F.)** (1996), 105 C.C.C. (3d) 233, a case in which the accused was convicted of sexual offences. The Court considered the traditional unreasonable verdict test and concluded that the verdicts were not unreasonable within section 686(1)(a)(i) of the **Code**. The Court added:

“It follows therefore that the appeal from conviction must be dismissed. In coming to this conclusion, we are mindful of the fact that this type of case, perhaps more so than any other, carries with it the potential for a serious miscarriage of justice. Our uneasiness in this case has been heightened due to a number of concerns, including the complainant's apparent ability to recall in detail repressed memories of events which allegedly occurred when she was less than two years old; the bizarre nature of certain of the events described, including the murder of the hitchhiker, the appellant's act of slitting the family dog's stomach and then engaging in bestiality with the animal followed immediately by anal intercourse with the complainant, the appellant's act of fellatio with the complainant while she was recuperating from a tonsillectomy, the complainant's apparent repression of an abortion which the appellant caused her to undergo when she was 12 or 13 years old, and others.

Nonetheless, in view of the constraints which inform our powers of review, we can see no basis for interfering with the decision of the trial judge.”

It is apparent that the present law is in a most unsatisfactory state. Appellate courts are not presently empowered to deal with miscarriages of justice that appear obvious to the court on the face of the trial record.

Justice Kaufman, a former member of the Quebec Court of Appeal, discussed this issue in the Morin Report. He said:

“... I appreciate that appellate courts are reluctant to usurp the triers of fact, who are said to be better situated to assess a criminal case, particularly one which spins on credibility. I have expressed this reluctance myself. Of course, there is some merit to this position. However, I am also of the view that an appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of any assessment of credibility is the internal consistency of a witness' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this -- sometimes indirectly -- through their determination of whether there was legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly. It recognizes the most important, though not the exclusive, function of a criminal appellate court: to ensure that no person is convicted of a crime he or she did not commit.”

Justice Kaufman then recommended as follows:

Recommendation 87: Powers of a court of appeal to entertain ‘lurking doubt.’

Consideration should be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt.

The fact remains that appellate courts are reluctant to broaden their powers to include the power to quash a conviction solely on the grounds that there is a lurking doubt as to its validity. Appellate courts view themselves as courts of process, not courts to decide on

issues of factual guilt or factual innocence. Professor Radelet made the same point at the Morin Inquiry with respect to appellate courts in the United States:

“Right now, with some minor exceptions, the appellate courts do not deal with factual guilt/innocence claims. They only deal with procedural issues, so [it's] felt that that should be expanded so that they would have power, at least in some cases, to re-examine guilt/innocence.”

There seems to be no reason to suppose that a factually guilty person is more or less likely to have received due process than a factually innocent person. Hence, the chances are not high that a factually innocent person will more likely win his appeal than a factually guilty person.¹⁴ Professor Doob's examination of the views of defence counsel of wrongful convictions, which was presented at the Morin Inquiry, adds credibility to this analysis. Only 20.9% of the cases reckoned to be wrongful convictions by participating counsel were quashed in the Court of Appeal.¹⁵

This limited power of appellate review is, not surprisingly, a particular concern of AIDWYC. It is a concern shared by Guy Paul Morin who has often said that ‘one Guy Paul Morin is enough’. Alastair Logan quoted the **Justice Committee Report** in his testimony at the Morin Inquiry. **Justice** recommended in 1989:

“The powers of the Court of Appeal, Criminal Division should be reformed to enable it to quash a conviction where it has doubts about its correctness.”

¹⁴ The only difference will arise from the rarely used unreasonable verdict basis for the quashing of a conviction.

¹⁵ Participating counsel provided 91 cases of wrongful conviction. 55 of these cases went to appeal. 19 were overturned on appeal. Of the 36 convictions that were not appealed, it is reasonable to suppose that in many of them the case was never appealed due to counsel's knowledge of the limited powers of appellate review.

A system of justice that places so much faith in the trial process is inviting wrongful convictions. The appellate process should broaden the capacity to overturn cases in which serious doubts remain despite a conviction at trial.

PART 12

RESPONSES TO THE MINISTER'S QUESTIONS

The Minister has presented 15 specific questions to which responses are requested. The majority are answered *seriatim* in this brief. Nevertheless, we thought it would be helpful to respond to each question in the order presented.

1. *Should conviction review remain with the Minister of Justice?*

Section 690 should be repealed. In the alternative, section 690 should only be retained for reviews of cases in the applicant was convicted on indictment.

2. *What steps could be taken to enhance the actual and apparent independence of the post-conviction review?*

A Criminal Cases Review Commission should be created to review all applications for review of convictions provided that all appellate remedies have first been exhausted by the applicant.

3. *Should an independent body investigate all allegations of miscarriages of justice?*

An independent body should review all allegations of miscarriages of justice subject to our alternative recommendation that the section 690 process be retained for applicants convicted of summary offences.

4. *Are there steps that could be taken to address concerns about the independence of the current system that would not include the establishment of an independent body?*

In our view, no satisfactory steps can be taken to address concerns about the section 690 process other than to establish an independent tribunal to review applications.

5. ***Should the appeals process be broadened and, if so, what implications might this have on other forms of post-conviction review?***

The appellate process should be broadened to provide the power to an appellate court to quash a conviction where the court considers there is a lurking doubt about the conviction. This will reduce the number of wrongful convictions that may have to be subsequently reviewed by a newly created Commission. In addition, the mandate of the newly created Commission should include a power to refer a case in which the Commission considers there to be a lurking doubt.

6. ***Should the review process be available only when new matters are raised or should it also include matters that were not raised as a result of strategic decisions by the accused, acting on the advice of competent counsel?***

The review process should include matters that were not raised at trial as a result of strategic decisions by the accused, even if acting on the advice of competent counsel. We refer the Minister to the decision in *R. v. Warsing* (supra), wherein the Supreme Court of Canada took a similar position in the context of a not criminally responsible defence that was not raised at trial for tactical reasons. In our view, a miscarriage of justice can never be justified by the accused's conduct in the broadest sense. The Nova Scotia Court of Appeal was severely criticized by the Marshall Inquiry for taking a contrary view when it blamed Donald Marshall for his wrongful conviction.

7. ***What test should be used to determine whether a new matter is sufficiently serious and reliable to justify a remedy? Is the demonstration that there is a 'reasonable basis to conclude that a miscarriage of justice likely occurred an appropriate test? Should the test be based on a 'lurking doubt'?***

The test laid down by the Supreme Court of Canada in *Milgaard* is appropriate but for its requirement that there be fresh evidence produced by the applicant. Alternatively, the "real possibility" test set out in the British legislation for the Criminal Cases Review Commission is appropriate.

8. ***Should the standards and procedures for post-conviction review be made the subject of amendments to the Criminal Code?***

Yes.

9. Should the Minister of Justice make exclusive use of outside counsel to review alleged mi

If a Criminal Cases Review Commission is created to replace section 690, outside counsel will have no role to play. If our alternative recommendation of retaining section 690 for a limited number of cases is adopted, outside counsel should be exclusively used in all applications which *prima facie* have some merit.

10. Should the CCRC be empowered to compel the appearance of witnesses and the production of documents from private as well as public bodies?

The newly created Commission should be given these powers.

11. Should cases of alleged wrongful conviction be restricted to convictions on indictment or should summary convictions also be subject to review?

All convictions should be reviewable. We have presented two alternative regimes for review, the preferable one being that a Review Commission should have jurisdiction over all indictable and summary offence applications.

12. Should the jurisdiction of courts of appeal be broadened to allow appeals where there is a 'lurking doubt' about the safety of a conviction?

Yes.

13. Should the roles governing the introduction of fresh evidence on appeal be relaxed?

Yes, in the manner presented in our brief.

14. Should the jurisdiction of appellate courts be broadened to accommodate cases that are considered out of the judicial system?

The question is unclear. Obviously, appellate courts should review all cases properly referred to them. We do not suggest that an applicant should have a right

to go directly back to an appellate court without a Reference by a Review Commission.

15. What percentage of available criminal justice resources should be allocated to extra-judicial review as opposed to miscarriage of justice prevention (i.e., police & prosecutor training)?

We do not have the expertise or resources to answer this question. Nevertheless, we are certain that the costs associated with the establishment of a Review Commission would form a minute percentage of the criminal justice budget. We do, of course, support the allocation of resources to prevent miscarriages of justice but have no confidence that any system of justice, however perfect, can prevent their occurrence entirely.

CONCLUSION

AIDWYC welcomes the initiative of the Minister in addressing the need for an examination of the present system for reviewing wrongful convictions. Our legal system rightly focusses on process in the belief that fair process ensures a fair trial. The advent of the **Canadian Charter of Rights and Freedoms** has increased this focus on due process. However, a system of due process cannot, and will never guarantee that only the guilty will be convicted. The law can, and should be modified to better take this truism into account.

Expanding the powers of appellate courts to review convictions where doubts as to guilt remain will help reduce the number of wrongful convictions. Creating a Review Commission to refer cases of wrongful conviction after all appellate remedies have been exhausted will further ensure that wrongful convictions can be set right, rather than continue to exist in perpetuity. It is a small price to pay for an enormous improvement in the administration of justice whose job is to convict the guilty **and** protect the innocent.

The DNA testing performed in David Milgaard's case vividly demonstrates the importance of a system which is prepared to allow its mistakes to be uncovered. Not only did the testing prove that Mr. Milgaard was innocent but it also led to the apprehension of another individual for the crime. In Donald Marshall's case, his exoneration led to the arrest and conviction of the real perpetrator of the crime, Roy Ebsary. A similar result came from the exoneration of Richard Norris. That these cases have been uncovered should not be cause for complacency. AIDWYC believes that these cases have been uncovered *in spite* of the flaws of the present system, and their discovery suggest that there are many more waiting to be found. If we properly address cases of miscarriage of justice, it is more likely that the real criminal will eventually be apprehended. What could be more in the interests of justice?

An Inquiry into David Milgaard's case has been promised by the Saskatchewan Government. At this Inquiry, Mr. Milgaard's experiences under the section 690 system will be examined. It will surely result, once again, in the recommendation that an independent Review Commission be set up forthwith. There is no need to wait for the results of this Inquiry. The lessons have already been learned. The Minister, and the Government of Canada should act now.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of
February, 1999, by the ***Association in Defence of the Wrongly Convicted.***

Rubin Carter (***Ontario***)
Executive Director

Peter Meier (***Ontario***)
Chair

Joyce Milgaard (***Manitoba***)
Director

James Lockyer (***Ontario***)
Director

Melvyn Green (***Ontario***)
Director

Paul Copeland (***Ontario***)
Director

Marlys Edwardh (***Ontario***)
Director

Joanne McLean (***Ontario***)
Director

Cindy Wasser (***Ontario***)
Director

Hersh Wolsh
(***Alberta, Saskatchewan, Manitoba***)
Lawyer
Member

Lisa Pomerant
(***Alberta***), lawyer
Member

Malcolm Jeffcock
(***Nova Scotia***), lawyer
Member

Ed O'Neill
(Alberta), lawyer
Member

David Asper
(Manitoba)
Director of CanWest Global
Member

Jerome Kennedy
(Newfoundland), lawyer
Member

Bob Simmonds
(Newfoundland), lawyer
Member

Richard Fowler
(British Columbia), lawyer
Member

John Mitchell
(Prince Edward Island), lawyer
Member

Kent Roach
(Saskatchewan)
Dean of Law, University of Saskatoon
Member

Gary Miller
(New Brunswick), lawyer
Member

Josee Ferrari
(Quebec), lawyer
Member

Lawrence Greenspon
(Ontario), lawyer
Member