Submission on

Wrongful Conviction Review
(Section 690, *Criminal Code)*

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association and its Committee on Imprisonment and Release, with assistance from the Legislation and Law Reform Directorate at National Office. The Section consists of both defence and Crown counsel from across Canada. Its Committee on Imprisonment and Release is comprised of practitioners and academics with years of experience on issues related to incarceration and conditional release. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION - INQUIRIES INTO ALLEGEDLY WRONGFUL CONVICTIONS

The National Criminal Justice Section (the Section) of the Canadian Bar Association (the CBA) is pleased to have this opportunity to contribute to the federal government's review of section 690 of the *Criminal Code*. We have carefully considered the issues raised in the Department of Justice consultation paper, *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*, in developing our submission.

Canada's criminal justice system can make mistakes, mistakes with tragic results. Judicial decisions are the product of human endeavour and can never be free of the risk of human error.

> Any process which relies on human beings to make decisions about guilt and innocence will inevitably make mistakes. Neither truth nor justice can ever be guaranteed. The trial process, no matter how refined and circumscribed, can produce at best only an approximation of truth. Rules of procedure and evidence, directed by concerns about fairness and the presumption of innocence, cannot ensure that prejudice or extraneous considerations will not enter into the decision-making process. People may err; participants may take shortcuts; and officials will react with the biases of their own experience.[1]

Many factors can work to obscure the truth at trial.[2] Incomplete investigations, premature investigative or prosecutorial judgments, the financial limitations of the

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1 Allan Manson, "Answering Claims of Injustice" (1993) 12 C.R.(4th) 305 at 305.

2 *Ibid.* at 306.

accused, inadequacies of our legal aid system, unwise strategic choices by counsel and sometimes even fabrications, official or otherwise, can contribute to an erroneous verdict.

In Canada, the criminal justice system permits convicted persons to appeal their convictions on a relatively broad range of grounds.[3] Appellate courts regularly review judges' reasons or jury charges for errors in the presentation of issues of law. Similarly, rulings on procedure and the admissibility of evidence are carefully considered to ensure the fairness and integrity of the trial process that led to conviction. However, appeals are conducted on the trial record and, subject to the power to admit fresh evidence on appeal, the record may hide from scrutiny a critical set of factual mistakes, exaggerations, falsehoods, or misinterpretations. Moreover, jurors and judges are susceptible to their own biases when assessing testimony. The dynamic of the trial, especially jury trials, presents opportunity for misplaced zeal to inject subtle influences which, in the right situation, can tip the balance. At the end of the day, an innocent person may stand to hear a verdict of 'guilty' pronounced.

This is the simple reality. It does happen that innocent people are sometimes convicted of criminal offences and forced to serve long sentences of imprisonment as a result. In some cases, like that of Guy Paul Morin and David Milgaard, new DNA technologies produced scientific evidence which eventually proclaimed their innocence. In other cases, innocence cannot be established so readily but new evidence or witness recantations cast sufficient doubt on the validity of the original conviction that it must be characterized as a miscarriage of justice. [4] An ideal system,

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3 Section 675(1) of the *Criminal Code* enables individuals who were convicted in proceedings by indictment to appeal against conviction (i) on any ground of appeal that involves a question of law alone, (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certification of the trial judge that the case is a proper case for appeal, or (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal with leave of the court of appeal."

4 The Alberta Court of Appeal sitting on a reference pursuant to section 690(b) in the case of Wilson Nepoose, concluded that "the evidence adduced at trial coupled with the new evidence heard by the commissioner is sufficient to allow us to conclude that there was a miscarriage of justice or at least a real possibility that a miscarriage of justice occurred at trial": see *R.v. Nepoose* (1992), 12 C.R. (4th) 296 (Alta.

recognizing its own fallibility, would provide ready access to review, reconsideration and re-opening of convictions to respond to claims of injustice. We accept, however, that judicial resources are not infinite and the judicial system demands finality at some point.

Convicted persons who have exhausted their avenues of appeal have resort to the Royal Prerogative of Mercy to assert claims of injustice. This residual power to grant various forms of clemency has a long constitutional history. While it has been used both to extend mercy and to correct errors, it has no inherent structure. Also, because it involves the advice of Ministers of the Crown who are elected officials, it may be open to criticism on political grounds. To provide an extraordinary forum for judicial consideration, the first Canadian *Criminal Code* contained a provision authorizing the Minister of Justice to order a new trial if there was doubt "whether such person ought to have been convicted."[5] This ability to refer matters back to court has been expanded over time[6] and is currently encompassed by section 690. While this statutory mechanism permits Ministerial review and references back to court, it has inherent limitations. Principal among those limitations is the fact that it is conducted, for the most part, within the offices of the Department of Justice.

The United Kingdom, following the revelation of a number of wrongful convictions, has moved to create an independent review mechanism in an effort to provide an effective instrument to inquire into and remedy, where appropriate, miscarriages of justice. Another goal of this model was to restore public confidence in the integrity of the administration of justice.

To summarize, wrongful convictions arise as a result of misplaced zeal, errors in the forensic process, single-minded investigations, and misinterpretations of circumstantial evidence. Sometimes, a combination of these factors will occur to

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C.A.) at 299.

5 See S.C. 1892, c.29, section 748.

6 See Manson, *supra*, note 1 at 315-317, and the notes thereto.

produce an unjust or untenable verdict. Every system of criminal justice requires a mechanism which can effectively answer claims of injustice. In our view, the current section 690 process does not provide a sufficiently fair, transparent and impartial vehicle capable of rectifying wrongs and maintaining public confidence in the administration of justice.

The following is a detailed account of the kind of vehicle which, in our submission, would better serve the needs of the Canadian community. We acknowledge that the changes we propose would have financial implications. Rather than offering an opinion on each decision that the government would ultimately confront, we have identified what we believe are the most significant issues for consideration to improve the wrongful conviction review process.

II. WHO SHOULD REVIEW CONVICTIONS?

The profound institutional resistance within the current system to open up matters for review must be recognized and addressed. This resistance is inevitable, given that the Minister of Justice is asked to simultaneously fulfill the role of chief law officer of the Crown for Canada and the person charged with exposing errors in the prosecutorial process. The structural problem goes beyond the fact that the Minister of Justice and her officials are responsible for the current review scheme. As cases move through the justice system, the validation of convictions from stage to stage tends to invest the various participants, including prosecutors, police officers, judges and even defence counsel, with a stake in maintaining the conviction. For anyone whose working career is devoted to achieving justice, it is difficult to recognize and accept that one's efforts have, in fact, produced an injustice. This investment tends to add to the institutional inertia which cements convictions and obscures attempts to re-open them. For all these reasons, a review mechanism must have an independent structure situated outside the usual processes and offices of the administration of justice.

Given the overlap and conflict in roles under the current section 690 process, the National Criminal Justice Section believes that conviction review cannot remain within the discretion of the Minister of Justice. We recognize that in some cases independent counsel have been retained, and we appreciate that those counsel are respected senior members of the bar, including some of our own Section members. However, so long as the ultimate discretion vests in the Minister of Justice, the perception of conflict continues and the overlap of roles alone justifies changing the current process.

The National Criminal Justice Section of the Canadian Bar Association agrees with the recommendations of the Royal Commission on the Donald Marshall, Jr. Prosecution that a new mechanism must be established. That Commission concluded:

> We believe an independent review mechanism needs to be established to deal with allegations of wrongful convictions. Its existence must be well publicized so that both those who claim to have been wrongfully convicted and those who have knowledge about a wrongful conviction will know who to approach with their concerns. The review mechanism must be independent so that those with information will be willing to come forward. Finally, if it is to be effective, this body will need to have investigative powers to look into allegations and obtain access to all relevant information and interview all witnesses.[7]

We believe that section 690 should be repealed and the process should be replaced with an independent body charged with the review of all allegations of wrongful convictions. Where there is a real possibility of a wrongful conviction, an application is more likely to come forward and be given appropriate scrutiny if it is done by an independent body with the sole function of examining these cases. The procedures for this independent body should be set out in amendments to the *Criminal Code*.

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7 Royal Commission on the Donald Marshall, Jr. Prosecution, Digests of Findings and Recommendations (1989) at 9.

RECOMMENDATION:

1. **The National Criminal Justice Section of the Canadian Bar Association recommends that section 690 of the *Criminal Code* be repealed and replaced with an independent wrongful conviction review board.**

The Criminal Cases Review Commission in the United Kingdom[8] provides a useful model for Canada, consistent with that recommended by the Royal Commission which investigated the Donald Marshall, Jr. case in Nova Scotia. The U.K. Commission has found a much greater demand for its services than the Home Office originally expected. Staffed with 24 full-time investigators, it is asking to double its resources. While the resource implications of creating a similar body in Canada may appear daunting, we believe that the allocation is justified in that it would reflect the systemic importance of establishing an independent body to respond to claims of injustice. Further, the costs of leaving a wrongful conviction in place, to the individuals, their families and to the administration of justice, are immeasurable.

III. CONSTITUTION OF THE BOARD

The fundamental purpose of the wrongful conviction review board would be to examine cases for errors, improper conduct and questionable findings within the criminal justice system. Independence and the appearance of independence will be the key to the proper functioning of this Board. The possibility of conflicted loyalties should also be kept in mind when considering who makes decisions about referral of a case.

The Board needs appropriate staff to conduct investigations. Investigations of the wrongful conviction review board should be conducted by case workers with expertise in criminal investigations, such as former police officers. Of course, there can be no potential conflict of interest. If the Board has a limited staff and hires

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8 Established by *Criminal Appeal Act* 1995, section 8(1).

external people chosen for their experience and knowledge of the same system, those individuals must be completely free of any connection to the case. Lawyers and police officers seconded from a certain region may be reluctant to levy criticism at colleagues or the judiciary if they will be returning to work in that region.

Once the investigation is completed, Board decisions should be made by panels. The panel deciding a specific case should generally be comprised of those from outside the jurisdiction under scrutiny. One possibility is to have a large membership with regional representation of the judiciary, including retired and current judges from across the country, as well as members of the criminal bar (both Crown and defence lawyers) and lay people. The panel that examines a certain case could then be chosen with regard to regional concerns and any other relevant conflicts.

IV. WHICH CASES SHOULD THE BOARD CONSIDER?

In our view, the initial net should be quite wide. Over time, the independent body would gain experience in doing a preliminary analysis to weed out frivolous or impossible cases. Given that its sole function is the review of alleged wrongful convictions, we anticipate that the Board's staff will become adept at conducting an expedited overview of cases to decide which warrant further careful investigation. Relying on that expertise, the criteria for which cases may initially be received by the Board should be expansive rather than restrictive. The threshold for commencing an inquiry should be whether there is some basis to suspect a miscarriage of justice.

RECOMMENDATION:

2. **The National Criminal Justice Section of the Canadian Bar Association recommends that expansive criteria be used to decide which cases should be referred to the wrongful conviction review board and the threshold for commencing an inquiry should be whether there is some basis to suspect a miscarriage of justice.**

We acknowledge that a filter is required to prevent a flood of applications. However, an absolute requirement that a person exhaust all avenues of appeal before applying to the Board would be unfair to individuals without financial resources. If legal aid to fund an appeal has been refused, can we say with certainty that the conviction should not be reviewed by the Board? The general rule should be that a convicted offender must have exhausted all appeals available. Notwithstanding that rule, the Board should have residual discretion to examine cases where, for some reason, the appellate route was unavailable and there is some basis to suspect that a miscarriage of justice may have occurred.

Ultimately, the Board should be available to review the cases of any convicted offender, whether alive or not. While live cases should have priority, the Board should also be able to reopen posthumous cases in appropriate circumstances.

V. SCOPE OF REVIEW

As is the case in the U.K., both indictable and summary conviction offences should be reviewable by the Board. While the Board's investigative staff may reject some cases after only preliminary review, it should have extensive powers to investigate those cases that require further scrutiny. Adequate resources must be dedicated to permit the necessary investigatory process in those cases that warrant it. The Board should have the authority to compel witnesses to appear and to order the production of material from either private or public bodies, so long as that material is relevant to the investigation. Although it would be exceptional, the Board should also have power to recommend bail pending a new hearing in appropriate cases and the *Code* should be amended to ensure that the court to which the case is referred has the power to order bail.

RECOMMENDATION:

3. **The National Criminal Justice Section of the Canadian Bar Association recommends that the wrongful conviction review board should have adequate resources and powers to allow it to conduct comprehensive examinations of all cases it believes warrant scrutiny, including the power to compel witnesses and demand the production of documents.**

4. **The National Criminal Justice Section of the Canadian Bar Association recommends that the wrongful conviction review board have power to recommend bail pending a new hearing in appropriate cases and the *Criminal Code* be amended to ensure that the court to which the case is referred has the power to order bail.**

A. Rules of Evidence

A more accessible wrongful conviction review process will require specific rules about retaining files and evidence from the trial stage onwards. If these materials are to be available years later to demonstrate that the conviction was valid, they must be accessible and reliable.

RECOMMENDATION:

5. **The National Criminal Justice Section of the Canadian Bar Association recommends that more specific rules about retaining files and evidence from the trial stage onwards be enacted to facilitate possible later investigation by the wrongful conviction review board.**

All available evidence should be released to the Board during its investigations. Even testimony ruled inadmissible at trial should be available for assessing whether the conviction is one that should be upheld. Especially with respect to a jury trial, the significance of minor details which might have altered the turn of events during a trial may not be apparent by reviewing the trial record alone. It is important to have a body that has resources and authorization to access all available information to assist in assessing the evidence in support of conviction. At this stage, the evidence is not intended to establish guilt or innocence, but only to allow for an informed administrative decision about whether the case should be referred back to court.

Given that the issue is the legitimacy of conviction, the Board should not be constrained by the rules of evidence. The Board's review is not another level of appellate review. Rather, the Board is assessing whether there is a reasonable likelihood that a person was subject to a miscarriage of justice. This open process can work for or against the convicted person. Using such a process, the Board must still make its determinations with due consideration as to reliability and admissibility of evidence if the case is to be referred back to court.

RECOMMENDATION:

6. The National Criminal Justice Section of the Canadian Bar Association recommends that the Board not be constrained by the rules of evidence in making its administrative decision about whether a case should be referred back to the courts.

B. Fresh Evidence

On appeal, the usual test for considering fresh evidence includes four factors:

1. Was the evidence available, with due diligence, at trial?
2. Does it relate to a decisive or potentially decisive issue?

3. Is it credible in terms of being reasonably capable of belief?
4. If believed, can it reasonably be expected to affect the result when considered along with the other evidence adduced at trial?

The Supreme Court has recently confirmed that the "due diligence" aspect should not be applied as stringently in criminal cases, given the importance of the consequences.[9] Moreover, the Manitoba Court of Appeal, when dealing with a reference to it pursuant to section 690, has held that a "relaxed and flexible" standard should be applied to the issue of admitting fresh evidence to determine the referred question.[10]

For the purposes of review in the face of a claim of wrongful conviction, the independent reviewing agency must employ a relaxed standard for considering fresh material. The more stringent test applied by appellate courts is not appropriate when determining, as a forum of last resort, whether further scrutiny is required. A factual detail which, on its face, may appear small may take on greater dimensions when viewed dynamically as part of a larger forensic process. As well, trial tactics are a function of context. The forum of last resort ought not to be fastidious about rejecting material which was available but not adduced. It is impossible to speculate about counsel's decisions. Given the fallibility of jury findings, as was evident in Guy Paul Morin's second trial and documented by Mr. Justice Kaufman in his review of that case, the reviewing agency must take a broad and careful look at all material before deciding whether the claim of injustice should be rejected.

VI. THE BOARD'S DECISION-MAKING POWERS

Once the Board's staff has conducted its investigation into a claim of wrongful conviction, several outcomes should be available to the Board. If there is insufficient reason to believe that there has been a wrongful conviction, the Board would refuse

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9 See *R. v Warsing* (1998), 130 C.C.C.(3d) 259 (SCC).

10 See *Reference Re: Adele Gruenke* (1998), 131 C.C.C.(3d) 72 (Man.C.A.).

to consider the application further. The Board should be required to give an applicant full reasons for a refusal to refer a case forward and those reasons should be available in a transparent public document. However, there should be restrictions on disclosure in certain instances. The Board should be given discretion to publish only a summary of its decision in cases where providing more detailed reasons may cause additional harm to those initially affected by the crime.

The Board should consider a referral wherever there is a credible basis for believing that the conviction may be wrongful. A credible basis may arise from new evidence, evidence reconsidered in a new light or an argument not previously raised. If there is a credible basis, the Board could either refer the conviction back to a court of appeal, refer specific questions back to a court of appeal or refer the case to a trial court for a new trial. When the issue is the relevance or admissibility of evidence, the matter should be referred to an appellate court, with or without a recommendation to hear *viva voce* evidence. When the issue is credibility alone, either a new trial or appellate review can be considered, depending on the nature of the testimony in issue. A serious question for consideration is whether the board's referral for a new trial should also require the Minister of Justice's concurrence, given that the result of ordering a new trial would be to wipe out the previous conviction.

RECOMMENDATION:

7. The National Criminal Justice Section of the Canadian Bar Association recommends that the wrongful conviction review board should consider referring a case wherever there is a credible basis for believing that the conviction may be wrongful.

In most instances where the case is referred back to a court, we believe that it should return to the original jurisdiction for consideration. This assumption is based on the idea that the system must repair itself. Whatever problems brought about the original flawed result should be addressed and rectified by the jurisdiction that produced

them. If necessary, however, the Board should have the power to send a case outside the jurisdiction to avoid a conflict.

A reference by the Board must be direct and mandatory. The court can have no discretion to refuse the referral.

There is a difference between judicial review powers under the appellate or section 690 processes and executive powers of clemency within the Royal Prerogative of Mercy. Currently, the Minister of Justice may recommend the exercise of the Royal Prerogative of Mercy, even without a section 690 application being made. In our view, it is important to retain the distinct process provided by the Royal Prerogative of Mercy. If the Board finds conclusive exonerating evidence such as DNA test results showing that a convicted person did not commit a crime, it should have statutory authority to recommend directly to the Minister of Justice that an absolute pardon be granted, rather than delaying the process by returning it to the court of appeal.

A conditional pardon is another matter. While it provides release from confinement, it does not reflect innocence. Some incarcerated persons may jump at the offer of a conditional pardon, but others may choose to have the case referred back to court to argue for an acquittal. The Board should respect an individual's choice if the option of a conditional pardon arises.

RECOMMENDATION:

8. The National Criminal Justice Section of the Canadian Bar Association recommends that the independent board created to review allegations of wrongful convictions be empowered to refer cases in whole or in part to an appellate court, order a new trial or recommend the exercise of the Royal Prerogative of Mercy to the Minister of Justice.

VII. POST REFERRAL POWERS OF AN APPELLATE COURT

Courts of appeal should have broader powers to address miscarriages of justice than simply applying the "unreasonable verdict" powers currently available. The test of whether a verdict is reasonable should be expanded to encompass something broader that allows a court of appeal to quash a conviction because it believes that the verdict is unsafe. We are opposed to the adoption of a "lurking doubt" as the test, given the subjective interpretation invited by the term.

VIII. CONCLUSION

No criminal justice system is perfect. Any system that relies on human beings will be fallible. The challenge is to acknowledge fallibility and allow injustice to be identified when it has occurred. The risk of embarrassment to particular courts or individuals does not justify wrongful imprisonment.

We urge the government to create an independent Board, fully funded and empowered to effect just results where injustices have been exposed.

IX. SUMMARY OF RECOMMENDATIONS

The National Criminal Justice Section of the Canadian Bar Association recommends that:

1. section 690 of the *Criminal Code* be repealed and replaced with an independent wrongful conviction review board.

2. expansive criteria be used to decide which cases should be referred to the wrongful conviction review board and the threshold for commencing an inquiry should be whether there is some basis to suspect a miscarriage of justice.

3. the wrongful conviction review board should have adequate resources and powers to allow it to conduct comprehensive examinations of all cases it believes warrant scrutiny, including the power to compel witnesses and demand the production of documents.

4. the wrongful conviction review board have power to recommend bail pending a new hearing in appropriate cases and the *Criminal Code* be amended to ensure that the court to which the case is referred has the power to order bail.

5. more specific rules about retaining files and evidence from the trial stage onwards be enacted to facilitate possible later investigation by the wrongful conviction review board.

6. the Board not be constrained by the rules of evidence in making its administrative decision about whether a case should be referred back to the courts.

7. the wrongful conviction review board should consider referring a case wherever there is a credible basis for believing that the conviction may be wrongful.

8. the independent board created to review allegations of wrongful convictions be empowered to refer cases in whole or in part to an appellate court, order a new trial or recommend the exercise of the Royal Prerogative of Mercy to the Minister of Justice.