Trust in the criminal justice system

Trust in the criminal justice system is predicated on the assumption that the guilty will be held accountable for their crimes, and the innocent will not be convicted. Unfortunately, the criminal justice system falsely convicts innocent citizens every year. Wrongful convictions (or miscarriages of justice—both terms may be used interchangeably) are defined as those legal convictions that wrongly accuse the innocent of the crime in question (Denov & Campbell, 2005). While the actual instance of wrongful conviction is unknown, it is estimated that approximately 1% of all inmates have been falsely accused, which is roughly 6,000 to 10,000 miscarriages of justice annually (Denov & Campbell, 2005). The justice system is composed of various legal groups and actors, making a miscarriage possible at any stage of the legal process, or at the hands of any legal actor. Eyewitness error, police misconduct, or falsification of evidence are examples of factors that may lead to a wrongful conviction. The purpose of this paper is to analyze the ex post facto mechanisms that sustain a wrongful conviction once it has occurred. The Criminal Conviction Review Group (CCRG), the review criteria under s.696.1 of the Criminal Code, and the role of the Minister of Justice will be examined before evaluating current criticisms of these systems.

In 2002, the application under s.690 of the Criminal Code was reformed and replaced by s.696.1 (Department of Justice, 2012). The reform included greater transparency of the process, criteria outlined for the Minister of Justice to grant a remedy, and criteria for eligibility, among other things (Department of Justice, 2012). The Criminal Conviction Review Group (CCRG), a unit of the Department of Justice, is responsible for undertaking part of the review process. The findings are then transmitted to the Minister of Justice before a recommendation is made (Department of Justice, 2012). For the review process to take place, the wrongfully convicted must meet a number of conditions (Denov & Campbell, 2005). Applicants must have been guilty of a criminal offense, or be categorized as a dangerous or long-term offender. They must also exhaust all levels of appeal before the form becomes available to them. Finally, the CCRG will only review the candidate’s case if there is new and significant information to present. This information may include newly acquired DNA evidence, or material that was not presented to the courts during the conviction process (Denov & Campbell, 2005). Whether these criteria are met will be determined in the first stage of the review process, in which a precursory investigation takes place to determine eligibility. Following this stage, all relevant information and evidence will be reviewed for reliability, which may involve interviewing witnesses, conducting required forensic tests, and consulting associated police personnel. The results of the investigation are then condensed into a report, where the applicant has the opportunity to review the investigation to date. Finally, the Minister of Justice receives legal advice to help inform hisdecision (Denov & Campbell, 2005). It is important to note that it is not the responsibility of the Minister of Justice to arrive at a finding of guilty or not guilty (Denov & Campbell, 2005). The role of the Minister is restricted to making recommendations for possible remedies, such as a new trial or requesting the opinion of the court on how to proceed.

Superficially, the application is a mechanism to restore justice once a wrongful conviction has occurred. Individuals who maintain their innocence post-conviction may apply for review under this section. While the intention was to provide an avenue for the wrongfully convicted to seek justice, s.696.1 does not completely achieve this goal, and may actually sustain a false

conviction. The CCRG has been criticized for its lack of independence and transparency (Scullion, 2004). As a unit of the Department of Justice, the CCRG is a law-appointed body investigating legal matters and agents (Roach, 2012). By conducting investigations internally, powers of review are kept within the realm of law. A lack of transparency reinforces the concentration of investigative powers, as there is less opportunity for external criticism. Since the Canadian review board is not independent, there is concern over whether the CCRG and the Minister of Justice conduct objective investigations on the basis of the evidence, or if they are influenced by Court decisions (Saguil, 2007). This results in negative implications for the applicant due to institutional conflict. The application is being reviewed by the same body that led to the initial miscarriage of justice, casting doubt on the fairness of the review process. Of the existing Commissions of Inquiry in Canada, six have made the recommendation to create an independent board for the review of wrongful conviction (Public Prosecution Service of Canada, 2011). Unfortunately, it is unclear whether the recommendations made by a Commission of Inquiry are taken into consideration (Denov & Campbell, 2005). Many advocates for the wrongfully convicted have claimed that Canada should adopt a review model similar to that of North Carolina. The North Carolina Innocence Inquiry Commission (NCIIC) is an independent review body composed of eight members, including lay-persons, a prosecutor, a defense lawyer, and an advocate for victims, among others (Roach, 2012). This diverse board of members prevents the review process from being dominated by legal officials, and allows for equal representation and deliberation. Unlike the CCRG, the NCIIC may hold public hearings and release trial transcripts, increasing their transparency (Roach, 2012). While the establishment of the CCRG was intended to investigate instances of false conviction, its lack of independence and transparency may actually sustain a miscarriage of justice.

Despite replacing s.690 with s.696.1, the current request form still creates some difficulties for the wrongfully convicted. The criteria for review are rather narrow. First, the wrongfully convicted must exhaust all levels of the judiciary before having access to the application (Denov & Campbell, 2005). This criterion is difficult for the applicants to meet because the appeal process requires substantial economic investment. The economically marginalized tend to be overrepresented in miscarriages of justice, because a lack of financial resources is one of many risk factors that increases the likelihood of being falsely accused of a crime (Menard & Pollock, 2014). Not only are the economically marginalized targeted in a wrongful conviction's case, but they are not able to afford adequate counsel to fight the false accusation. This was the case for Donald Marshall, Jr., where his counsel did not provide adequate evidence, did not cross-examine witnesses, nor did they ask for disclosure of evidence (Royal Commission on the Donald Marshall, Jr., Prosecution, 1989). Thus, there is an inherent barrier written in s.696.1. The application is designed to obtain justice for the wrongfully convicted, but this group often lacks the economic resources required to access it.

A second requirement for review is that the candidate must provide new and significant information. This may either be new DNA evidence, or evidence that was not previously presented in court. This criterion presents two issues. First, DNA testing is an extremely costly process, and must be undertaken at the expense of the accused (Denov & Campbell, 2005). As stated, the economically marginalized are often targeted in wrongful convictions (Menard & Pollock, 2014). Therefore, the wrongfully convicted may not have the means to produce DNA evidence, in the event that it is available. Second, although there have been 250 exonerations with the use of DNA evidence, not all cases collect biological samples (Smith & Hattery, 2011). Unlike murder and rape, robbery or drug-related crimes do not typically involve the collection of DNA evidence (Smith & Hattery, 2011). Of the 250 exonerations up until 2011, there were 69

murder cases, 48 convictions involving sexual assault, and 139 rape cases (Smith & Hattery, 2011). Absent from these statistics are cases involving drug offenses or robbery. Consequently, the requirement of biological proof limits the scope of exoneration. It becomes difficult for those falsely convicted of crimes lacking DNA evidence to have their cases reviewed. The intention of s.696.1 was to allow the wrongfully convicted to challenge their convictions after exhausting the appeal process. Despite amending this section of the Criminal Code, this criterion prevents those lacking economic resources to access the application. Even with the necessary finances, the requirement for new and significant information, which is usually DNA evidence, limits the scope of exoneration to those convicted of serious indictable offenses. Those convicted of crimes lacking DNA evidence seldom have access to exoneration through the application. In practice, the criteria for review outlined under s.696.1 may in fact prevent the wrongfully convicted from seeking justice.

Applicants who meet the criteria of review face an arduous journey to exoneration. The process has been criticized for the length of review. David Milgaard, for example, was not accepted for consideration until three years after the submission of his application (Campbell, 2008). The delays in review can be attributed to the lack of staff on the review board, and the stages of investigation, which may involve interviewing witnesses and consulting with police personnel. The CCRG is limited to six lawyers, which is insufficient to address the number of requests submitted annually (Campbell, 2008). In a recent analysis of s.696.1, Roach (2012) revealed that between April 2007 and March 2011, the Minister of Justice had only reviewed 88 applications under this section, when the number of requests was far greater. To dissect this further, between April 2003 and March 2004, 29 applications were submitted for consideration. The Minister completed 11 investigations, and only made six decisions, all of which were dismissed. From April 2005 to March 2006, the Minister of Justice received 39 requests. During that time, only two investigations were completed, and the Minister had only arrived at one decision that year, where the case was referred back to the Court of Appeal (Campbell, 2008). Evidently, the number of cases received anually surpasses the number of cases under investigation. Although cases may be accepted for review, it is not guaranteed that the investigation will result in an exoneration or referral to the Court of Appeal, as was the case for the applications reviewed between April 2003 and March 2004.

Many of the remedies proposed by the Minister of Justice involve referring cases back to the Trial or Appeal Courts. Between April of 2002 and March of 2006, the Minister of Justice completed 22 investigations, but only made 13 decisions. Of those 13 decisions, over half of them resulted in a referral to the Court of Appeal or the order of a new trial (Campbell, 2008). As mentioned previously, the CCRG has been criticized for a lack of independence, given that a government body is reviewing the decisions of another government body (Scullion, 2004; Saguil, 2007). Not only is the CCRCG itself criticized, but solutions proposed by the Minister of Justice reinforce a concentration of power. Bias is rooted in a system that regulates itself, and using the adversarial system to correct the errors perpetuated by legal actors limits the scope of available remedies (Campbell, 2008). This presents certain difficulties for the wrongfully convicted, as they are forced to seek a remedy under the system that prompted a miscarriage of justice to begin with.

While, the CCRG and s.696.1 of the Criminal Code have been criticized for weaknesses such as transparency, independence, and cost, attempts have been made to confront these issues (Scullion, 2004). To address the topic of transparency, the applicant is able to review the investigation during the third stage of the process (Denov & Campbell, 2005; Scullion, 2004).

This allows the candidate to have access to the documentation collected, and provide input for the Minister of Justice. Furthermore, s.690 was amended and replaced by s.696.1, which involved a greater degree of transparency. This is not to say that the review process is completely transparent in its current form, but that there have been efforts made to increase public accessibility. In terms of independence, the CCRG and the Minister of Justice have been criticized for a conflict of interest, given that one government body is investigating the decisions of another (Scullion, 2004). Critics suggest that decisions made by the Minister of Justice cannot be impartial given the heavy influence of other legal departments and actors. However, it is important not to overlook the fact that the justice system, and the actors of which it is composed, seek to achieve justice. While the current format of the review process is not ideal, and an independent review board is preferred, the Minister of Justice and the members of the CCRG are still conscious of the legal importance accorded to the prevention of wrongful convictions (Scullion, 2004). Finally, many have argued that the review process is costly. It is important to interpret this criticism correctly. The application process itself is not costly, given that all documents required have been obtained during the initial appeal process (Scullion, 2004). The cost associated with the review process is rooted in the procurement of DNA evidence if it becomes available following trial, and the retention of counsel (Denov & Campbell, 2005; Scullion, 2004). Ultimately, efforts have been made to address these criticisms to improve the efficiency of s.696.1.

In conclusion, I have attempted to demonstrate the ways in which the roles of the CCRG and the Minister of Justice, as well as the application under s.696.1, are ex post facto mechanisms designed to achieve justice for the wrongfully convicted. However, I have demonstrated that in practice, these mechanisms often fall short of their goal for justice. S.696.1 of the Criminal Code, as well as the Minister of Justice and the members of the CCRG, often sustain a wrongful conviction. The CCRG has been criticized for a lack of independence and transparency. This may result in an institutional conflict of interest and a bias in the request for review. The criteria for review are quite narrow, and are difficult to meet for the economically marginalized. The DNA requirement limits the number of eligible applicants due to the cost associated with testing. This criterion also narrows the scope for exoneration, given that those convicted of crimes lacking biological evidence have less access to the application. The CCRG and the Minister of Justice have been criticized for the number of cases reviewed annually. As a consequence, few have their cases investigated, and the outcomes do not necessarily lead to a new trial. The remedies proposed by the Minister of Justice are rooted in the system that caused a miscarriage of justice in the first place, limiting other remedial possibilities. While these criticisms are based in fact, there have been attempts made to address these issues to improve the review process. In theory, the Minister of Justice, the CCRG and s.696.1 were designed to address issues of wrongful conviction. In practice, these mechanisms often fall short of the goal to achieve retroactive justice for the wrongfully convicted. For justice to be truly achieved, amendments must be made to further address the deficiencies inherent in the application, and in the duties assigned to the Minister of Justice and the Criminal Conviction Review Group.