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COMPARATIVE REFLECTIONS ON MISCARRIAGES OF JUSTICE IN AUSTRALIA AND CANADA

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This article identifies comparative scholarship as a promising way to understand the causes of and remedies for wrongful convictions. Although there are many functional similarities among the causes of wrongful convictions, attention should also be paid to expressive differences related to legal and political cultures. The article starts by suggesting that a string of high-profile DNA exonerations and public inquiries examining their systemic causes have led to Canadian judges and prosecutors accepting the reality of wrongful convictions more readily than most of their Australian counterparts. In Australia, there has only been one recognised DNA exoneration and inquiries have focused on individual fault, making Australian officials somewhat defensive about wrongful convictions.

The next part of this article suggests that Australian legislatures have been more active than the Canadian Parliament in regulating police and prosecutorial behavior that contributes to wrongful convictions. In turn, the Canadian judiciary has been more creative in responding to the causes of wrongful convictions than the Australian judiciary.

This theme is carried over to the next part which examines Australian legislative innovations such as second appeals based on fresh and compelling evidence and mechanisms for courts to conduct their own inquiries. Except for some 2002 reforms to the petition procedure, most reforms in Canada have come from the courts. They include the Supreme Court of Canada hearing fresh evidence or remitting cases to

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Courts of Appeal to do so and the granting of bail pending petition decisions by the executive and judicial review of such decisions.

Australia and Canada can learn from each other in order to ensure that both legislatures and courts respond to wrongful convictions and that, where appropriate, there be both systemic and individual accountability for wrongful convictions.

I INTRODUCTION

Concerns have been raised that scholarship about wrongful convictions has been stuck in a narrative case study mode since the 1930's.[1] Comparative scholarship, along with greater engagement with social science research[2] and studies that examine groups who are particularly vulnerable to wrongful convictions,[3] are promising means to improve wrongful conviction scholarship.

Comparative law scholars have drawn an important distinction between functional similarities and expressive differences between jurisdictions.[4] Nascent comparative scholarship on miscarriages of justice has tended to focus on functional similarities in wrongful convictions in different parts of the world. These include the long and familiar list of common causes of wrongful convictions: police and prosecutorial misconduct and tunnel vision, mistaken eyewitness identification, lying witnesses, false confessions and forensic error.[5]

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1 Richard Leo, 'Re-thinking the Study of Miscarriages of Justice — Towards a Criminology of Wrongful Convictions' (2005) 21 *Journal of Contemporary Criminal Justice* 201.

2 Richard Leo and Jon Gould, 'Studying Wrongful Convictions: Learning from the Social Sciences' (2009) 7 *Ohio State Journal of Criminal Law* 7.

3 Debra Parkes and Emma Cunliffe, 'Women and Wrongful Convictions: Concepts and Challenges' (2015) 11 *International Journal of Law in Context* 219; Kent Roach, 'The Wrongful Convictions of Indigenous People in Australia and Canada' in this issue.

4 Mark Tushnet, *Weak Courts Strong Rights* (Princeton University Press, 2008) 5-10.

5 For a survey of these causes see Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia' in this issue.

The focus on the functional similarities of wrongful convictions throughout the world is understandable. Basic human psychology that contributes to false confessions, mistaken identifications and police and prosecutorial tunnel vision do not differ from country to country. Moreover, pointing out functional similarities helps to make the important point that no country is immune from wrongful convictions. Insights into the similar causes of wrongful convictions explain why Innocence Projects, started in the United States, have expanded to many different parts of the world including Australia and Canada.[6] The implicit premise of such an expansion is that the commonalities of wrongful convictions are more important than any differences.

At the same time, there is a danger of discounting differences in legal and political systems. As Eric Colvin has suggested, much of the scholarship on wrongful convictions is based on the American experience and that experience may not transfer well to even other common law jurisdictions.[7] An exclusive focus on the causes identified by the Innocence Projects ignores causes that may be more specific to particular countries and to particular subgroups among the wrongly convicted. For example, the Innocence Project's list of generic causes neglects some causes that are related to Australia's and Canada's particular histories as settler colonial states that imprison Indigenous populations at grossly disproportionate rates.[8]

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6 In 2011, the Innocence Network devoted its annual conference to 'An International Exploration of Wrongful Convictions'. For special issues arising from this conference see (2012) 80 *University of Cincinnati Law Review* 1666; (2012) 58 *Criminal Law Quarterly* 135. On innocence projects in Australia see Lynne Weathered, 'Reflections on the Role of Innocence Organisations in Australia' in this issue.

7 Eric Colvin, 'Convicting the Innocent: A Critique of Theories of Wrongful Convictions' (2009) 20 *Criminal Law Forum* 173.

8 See Kent Roach, 'The Wrongful Convictions of Indigenous People in Australia and Canada' in this issue, arguing that linguistic difficulties and racist stereotypes associating Indigenous people with crime have been important causes of wrongful convictions of Indigenous peoples.

Australia and Canada serve as examples of what comparative law scholars call the 'most similar case' principle.[9] Both have inherited a British based adversarial legal system with similar basic features such as requirements that confessions to persons in authority be proven to be voluntary before being admitted into evidence. Both countries have very similar grounds of appeal from convictions with petitions to the executive once appeals have been exhausted. As such, one would expect the functional similarities of wrongful convictions to dominate any comparative Australian-Canadian study. Nevertheless, there are some important and intriguing differences between Australia and Canada.

Canada has had a constitutional bill of rights since 1982.[10] Much American scholarship on wrongful convictions suggests that the American Bill of Rights has not been particularly effective in preventing or remedying wrongful convictions.[11] As will be seen, the picture in Canada is somewhat different.[12] The Supreme Court of Canada looked to the reality of wrongful convictions in 1991 as a reason for creating a broad and frequently litigated right for the accused to pre-trial disclosure of all relevant and non-privileged information held by the prosecution.[13] In 2001, it again looked to the reality of wrongful convictions as a reason for changing prior rulings and holding that it would no longer be constitutional in Canada to extradite a fugitive without assurances that the death penalty would not be applied.[14] Even when the Charter is not applied, Canadian courts have taken the lead with respect to wrongful conviction reform. They have engaged in various acts of judicial creativity in an attempt better to prevent and remedy wrongful convictions. In contrast, the Australian judiciary has generally been more conservative with the High Court continuing its practice of refusing to accept new evidence on appeals to it, despite strong arguments

9 Ran Hirshl, *Comparative Matters* (Oxford University Press, 2014) 244-50.
10 See *Canada Act 1982* (UK) pt 2.
11 See, eg, Brandon Garrett, *Convicting the Innocent* (Harvard University Press, 2011).
12 Kent Roach, 'The Protection of Innocence under Section 7 of the Charter' (2006) 34 *Supreme Court Law Review* 249.
13 *R v Stinchcombe* [1991] 3 SCR 326.
14 *USA v Burns and Rafay* [2001] 1 SCR 283.

that such a restrictive approach is dangerous given the reality of wrongful convictions.[15]

If Australian courts have been less active and creative than Canadian courts on wrongful conviction issues, Australian legislatures have been more active than the Canadian Parliament. New South Wales has twice legislated with respect to DNA retention and testing. More recently, South Australia and Tasmania have introduced a second appeal based on fresh and compelling evidence. Australian states also tend to provide detailed legislative regulation of police procedures such as the taking of confessions and identification procedures. Such matters are not regulated under the Canadian *Criminal Code*, but are subject to case by case and after the fact judicial supervision. Australian criminal laws regulate prosecutorial disclosure to the accused, a key contributor to wrongful convictions, while such matters are left to case by case judicial supervision under Canada's constitutional bill of rights.

The Australian emphasis on legislation and the Canadian emphasis on judicial reform suggests that wrongful convictions in Australia are primarily seen as a matter of politics whereas in Canada they are often seen a matter of law. These differing approaches provide an excellent opportunity to compare the strength and weaknesses of judicial and legislative regulation.[16]

The article will start by comparing DNA exonerations and their impact in Australia and Canada. A series of high profile DNA exonerations in Canada in the 1990's, four of which resulted in public inquiries, help explain a greater acceptance among judges and prosecutors of the reality of wrongful convictions in Canada than in Australia. The Canadian inquiries stressed systemic responsibility for

[15] Michael Kirby, 'Foreword' in Bibi Sangha, Kent Roach and Robert Moles *Forensic Investigations and Miscarriages of Justice* (Irwin Law, 2010) xvii.

[16] For an argument that suggests that legislative and administrative regulation may be more effective than judicial supervision under the American Bill of Rights see Craig Bradley, *The Failure of the American Criminal Procedure Revolution* (University of Pennsylvania Press, 1993).

wrongful convictions. Indeed, Canadian inquiries are precluded from making conclusions about the criminal or civil liability of individuals.[17] In contrast, Australian inquiries, including the one that followed Australia's first DNA exoneration, focused on individual fault. Canada's focus on systemic responsibility has facilitated increased judicial and prosecutorial acceptance of wrongful convictions[18] but has often allowed questions of individual responsibility and fault to go unaddressed. In contrast, the Australian focus on whether individual police officers, prosecutors or expert witnesses are at fault may help explain a certain defensiveness about the existence of wrongful convictions. An optimal system would recognise systemic responsibility for wrongful convictions but in appropriate cases also hold individuals to account for misconduct that contributes to wrongful convictions.

The next part of this article will examine some causes of wrongful convictions in both countries with a focus on police and prosecutorial behavior. Australia has created regulatory structures for police interrogations and identification procedures whereas Canada has relied on after the fact judicial regulation. Australia could benefit from more robust judicial enforcement of existing legislative regulations while Canada could benefit from increased legislative regulation to complement judicial enforcement.

The final part of this article will examine remedies for wrongful convictions. The focus will be on how Canada has used creative judicial reforms to avoid or mitigate having to petition the executive while Australia has tended to use legislation, such as the South Australian and Tasmanian provisions for second appeals, as a vehicle

[17] *Starr v Houlden*, [1990] 1 SCR 1366.

[18] For two important reports issued by all Canadian heads of prosecutions recognising the dangers of miscarriages of justice see Federal, Provincial and Territorial Heads of Prosecution, *Report on the Prevention of Miscarriages of Justice* (Ottawa Department of Justice, 2004) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf>; Federal, Provincial and Territorial Heads of Prosecution Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (Ottawa Department of Justice, 2011).

for reform. At the same time, this part of the article will examine some institutional questions about the extent to which the judiciary or the executive ought to assume responsibility for the correction of wrongful convictions. Australian reforms may be heading in the right direction by assigning increased error correction responsibilities to the judiciary.

The conclusion will suggest that Australia and Canada can learn from each other with respect to preventing and remedying wrongful convictions. In particular, Australia could benefit from the Canadian focus on systemic accountability for wrongful convictions. Australian judges could also learn from the willingness of Canadian judges to revisit old practices in light of what has been learned about wrongful convictions. Canada's judicial creativity, coupled with exclusive federal legislative responsibility for criminal law and procedure, has not, however, been costless. The Canadian Parliament has largely been silent about preventing and remedying wrongful convictions. Hopefully, a new Canadian government elected in October 2015 will learn from Australian legislatures and become more active in enacting reform legislation better to prevent and remedy wrongful convictions. At the same time, even increased legislative regulation will require robust judicial enforcement. Both courts and legislatures should work in common cause better to prevent and remedy wrongful convictions.

II DIFFERING LEVELS OF RECOGNITION OF THE REALITY OF WRONGFUL CONVICTIONS AND DIFFERING NUMBERS OF DNA EXONERATIONS

DNA exonerations are a powerful but problematic form of recognising wrongful convictions. DNA is only available for some crimes, often sexual assault and murder. DNA testing will only be possible if evidence with biological material is retained and available for testing. The scientific allure of DNA can also promote a false

sense of certainty. DNA exonerations are also problematic because they support claims of exoneration and factual innocence that do not match recognised criminal law verdicts. They have the potential to raise the standard for reversing convictions and establishing wrongful convictions. Nevertheless, it is undeniable that DNA exonerations have increased awareness and concerns about wrongful convictions in North America in particular.

The United States has led the way with over 300 DNA exonerations. Canada as a close neighbor to the US has been heavily influenced by this experience. Starting in the 1990's, Canada experienced a number of well publicised DNA exonerations. Indeed DNA cases account for four of seven public inquiries conducted in Canada into wrongful convictions. These public inquiries have played an important role in creating increased awareness of wrongful convictions and a sense of systemic responsibility for them.

Australia's history with DNA exonerations has been very different. It is generally accepted that Australia's only DNA exoneration is the Frank Button case examined below. DNA legislation in New South Wales did not produce one DNA exoneration and has been allowed to expire. Contaminated DNA testing in the Farah Jama case also led to a wrongful conviction.[19] The High Court has subsequently and rightly warned that the existence of a suspect's DNA at the scene does not displace the prosecution's obligation to establish guilt beyond a reasonable doubt.[20] What has been missing in Australia is a string of high profile DNA exonerations followed by public inquiries stressing the systemic causes and lasting risks of wrongful convictions.

[19] See Victoria, Inquiry into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama, *Report* (2010).

[20] *Fitzgerald v The Queen* [2014] HCA 28.

A *Australia's Largely Neglected DNA Exoneration and its Fraught and Fragile History of DNA Testing*

Australia's first recognised DNA exoneration did not come until the Queensland Court of Appeal overturned Frank Button's sexual assault conviction in 2001. This was done after DNA material on the complainant's bed was eventually tested and was found not to originate from Mr Button.[21] Despite the Queensland Court of Appeal's bold declaration that the DNA exoneration was 'a black day in the history of the administration of justice in Queensland',[22] the case seems not to have had a dramatic impact. One factor may have been that Mr Button was an Indigenous man who only served one year in jail before his conviction was corrected. A similar Canadian case involving another Indigenous man, Herman Kaglik, also did not attract widespread attention either when it was discovered in 1997 or when Mr Kaglik received compensation in 2001.[23]

Another factor that may help explain why the Frank Button case was not particularly high profile was that a subsequent inquiry into the case by the Queensland Crime and Misconduct Commission found that no individual official in the case was at fault. The inquiry was not particularly concerned with systemic issues.[24]

Australia's history of using DNA testing to reveal wrongful convictions has been both fraught and fragile. In 2001, New South Wales created an Innocence Panel to consider DNA testing, but it was suspended in 2003 in response to concerns that DNA testing could harm victim interests.[25] The case that triggered the suspension was an application by Stephen Jamieson convicted with others in the

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21 *R v Button* [2001] QCA 133.

22 Ibid.

23 See Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' in this issue.

24 Crime and Misconduct Commission, *Forensics Under the Microscope* (Crime and Misconduct Commission, 2002).

25 Lynne Weathered, 'A Question of Innocence: DNA Based Exonerations In Australia, (2004) 9 *Deakin Law Review* 279.

brutal gang rape and murder of Janine Balding. Even though there were reports that Jamieson's DNA was not found on the victim, his conviction was not challenged presumably on the basis that he was still guilty as an accomplice to the terrible crime. DNA exclusions are not always a magic bullet. This underlines the continued importance of the presumption of innocence and the reasonable doubt standard.

Even the Chair of the first New South Wales DNA Panel, the Hon Mervyn Finlay QC, did not seem to expect much from DNA testing. He argued that DNA exonerations were much less likely in Australia than in the United States because judges and prosecutors are not elected in Australia, legal aid is more readily available than in the United States and interrogations are video-taped in Australia.[26] These are all valid points. Nevertheless they discount the significant number of DNA exonerations in Canada which has a criminal justice system more similar to Australia's than the American system.

New South Wales reconstituted a DNA review panel in 2006, but under restrictive legislation that only applied to serious cases before 2006.[27] This may have been based on the assumption that biological evidence would be retained and tested in all new cases. This is at odds with what happened in Frank Button's case. Because of resource constraints and an apparent belief that it was not necessary, the Queensland Forensic Centre did not conduct DNA testing until after Mr Button's wrongful conviction.[28]

The New South Wales DNA panel created in 2006 had victim, police and prosecutorial representatives as well as those from the

[26] Mervyn Finlay, *Review of the NSW Innocence Panel* (2003) 14 as quoted in Lynne Weathered, 'A Question of Innocence: Facilitating DNA-Based Exonerations in Australia' (2004) 9 *Deakin Law Review* 277, 279.

[27] *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW).

[28] *R v Button* [2001] QCA 133.

judiciary and public defenders.[29] In an attempt to be sensitive to victim issues, the new law was matched with legislation to allow double jeopardy to be abrogated.[30] This reflects a twinning of the issues of factual innocence and factual guilt that would be repeated again in South Australia and Tasmania. Both states have followed the model of laws abrogating double jeopardy to allow the accused a second or subsequent appeal on the basis of fresh and compelling evidence.

The 2006 NSW DNA legislation was quite restrictive because only those convicted of the most serious offences and subject to 20 years imprisonment were allowed to apply. The NSW panel referred no cases to the Court of Appeal including another application by Stephen Jamieson.[31] The legislation was allowed to sunset in 2014.

In other states, there was no legislation with respect to DNA testing or preservation of material. Lynne Weathered has suggested that a possible explanation for the paucity of Australian DNA exonerations relate to difficulties faced by the accused in gaining access to relevant material for DNA testing and the retention of such material. She has urged Australian states to enact laws such as those in the United States that provide for the preservation and testing of DNA material.[32] These are valid points, but as will be seen Canada has had a number of DNA exonerations without such legislation. Consistent with general trends that will be seen throughout this article, Australians tend to look to legislation to remedy wrongful convictions whereas Canadians have generally relied on judicial

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29 *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW) s 90.

30 *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

31 Geesche Jacobsen, 'Appeal over Balding murder may go to Chief Justice', *Sydney Morning Herald* (online), 26 November 2009 <http://netk.net.au/Balding/Balding11.asp>.

32 Lynne Weathered, 'Reviewing the NSW DNA Review Panel' (2013) 24 *Current Issues in Criminal Justice* 449.

powers to ensure that the accused has access to material for DNA and other forensic testing.[33]

In short, there are strong arguments that Australia never fully committed to DNA testing as a means to reveal wrongful convictions.[34] In any event, it is clear that DNA exonerations, for all their strengths and weaknesses, have not played a critical role in the recognition of wrongful convictions in Australia.

B *Canada's Richer Experience with DNA Exonerations and Follow-On Inquiries Focused on Systemic Fault*

In Canada, a number of DNA exonerations in the 1990's have attained iconic status. Four of them resulted in full public inquiries. The cases of Guy Paul Morin, David Milgaard, Gregory Parsons and James Driskell are now routinely cited by the courts as evidence of the reality of wrongful convictions as well as the need for caution in dealing with both suspect evidence and extradition to face the death penalty.[35]

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[33] See, eg, *R v Hay* (2010) SCC 54 where the Supreme Court authorised the defence to have access to facial hair held by the Crown for purpose of forensic testing in a case that eventually resulted in the accused's acquittal. See 'Leighton Hay, wrongfully convicted of murder in 2002, walks free', *CBC News* (online), 28 November 2014 <http://www.cbc.ca/news/canada/toronto/leighton-hay-wrongfully-convicted-of-murder-in-2002-walks-free-1.2853578>.

[34] For arguments that 'a wider legislative framework for DNA innocence testing is necessary if DNA testing is to be utilised as a tool for exposing wrongful convictions in Australia': see Lynne Weathered, 'The Growing Acknowledgement of Wrongful Convictions: Australia in an International Context' (2013) 3 *Victoria University Law and Justice Journal* 79, 87. See also Weathered, above n 32.

[35] See, eg, *United States v Burns* [2001] 1 SCR 283, [1] noting five notorious wrongful convictions, three of which involved DNA as a reason not to extradite a fugitive to face the death penalty; *R v Trochym* [2007] 1 SCR 239, [1] noting the same five wrongful convictions as a reason to exclude post hypnosis evidence; *R v Lifchus* [1997] 3 SCR 320, [13] citing two DNA exonerations as a reason for defining and explaining the reasonable doubt principle to the jury.

The first DNA case in Canada came earlier than the Frank Button case in Australia. In 1995, Guy Paul Morin was exonerated in Canada when DNA testing disproved hair comparisons made at trial in a case involving the abduction and murder of a nine year old girl. Mr Morin subsequently received $1.25 million in compensation. A subsequent public inquiry concluded that 'we will never know if Guy Paul Morin would have been exonerated had DNA results not been available'. The Commission warned that the wrongful conviction 'was not an aberration' and 'one can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are not available'. The Commission also found that the wrongful conviction was 'rooted in systemic problems' found throughout the world.[36]

Another famous case in Canada involved David Milgaard. He was convicted of murder in 1970, but released in 1992 after the Supreme Court decided that fresh evidence about an alternative suspect meant his conviction constituted a miscarriage of justice.[37] The Court ordered a new trial, but it was not held even though the prosecutor continued to maintain that Milgaard was guilty. In 1997, however, DNA testing identified the real perpetrator. Only then did Mr Milgaard receive $10 million in compensation and a public inquiry into his wrongful conviction.[38] This underlines the power of DNA.

Gregory Parsons was exonerated by DNA evidence of murdering his mother in 1998. The DNA evidence in that case also revealed the real perpetrator. Like Milgaard, Parsons was already freed before the DNA results were known and a public inquiry was held into his case.[39] Another Canadian DNA case that resulted in a public inquiry

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[36] Ontario, Kaufman Commission on Proceedings Involving Guy Paul Morin, *Report* (1998)1092-3.

[37] *Re Milgaard* [1992] 1 SCR 866.

[38] Saskatchewan, Commission of Inquiry into the Wrongful Conviction of David Milgaard, *Final Report* (2008).

[39] Newfoundland and Labrador, Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken, *Report* (2006). This inquiry examined three wrongful convictions only one of which involved

was the James Driskell case where DNA testing in 2002 disproved hair comparison evidence that at trial was said to link Mr Driskell to a murder victim.[40] There are other Canadian DNA exonerations that did not result in public inquiries.[41]

The Canadian DNA exonerations have played an important role in making judges and prosecutors aware of the reality of wrongful convictions. DNA evidence can result in dramatic exonerations where even the most skeptical accept that the accused is innocent. They are associated with lay (albeit inaccurate) understandings about the supposed certainty of science. Nevertheless, Milgaard and Parsons had already been released before DNA testing because of concerns about the fairness and safety of their initial convictions.

DNA exonerations have made it virtually impossible for Canadian judges and prosecutors to deny the reality of wrongful convictions. One measure of comparative awareness of wrongful convictions is a search of how often the phrases "wrongful conviction" appear in the decisions of the highest court. A search on a database of Australian High Court decisions found only one judgment that used the phrase "wrongful conviction" while the phrase has been used in 62 Supreme Court of Canada judgments.[42]

DNA. Chief Justice Lamer stressed that Parsons 'was completely innocent' because of the DNA exoneration which helped convict the perpetrator at 70.

40 Manitoba, Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Final Report* (2007).

41 For example the Simon Marshall case in Quebec where DNA testing revealed that a mentally disadvantaged person had pled guilty to sexual assaults that he did not commit. DNA testing also disproved hair comparison evidence in the Kyle Unger case.

42 The Australian case was *Conway v The Queen* [2002] HCA 2 and the court found no wrongful conviction. The Canadian cases included numerous references to the need to prevent wrongful convictions. For a rare and praiseworthy recognition by President Maxwell of Victoria's Court of Appeal of the dangers that unreliable forensic evidence 'can lead to grave injustices' see *Tuite v The Queen* [2015] VSCA 148, [108]. This judgment also recognises the development of a practice note concerning expert evidence, the role of the judge as a "gate-keeper" and indicates that '[c]onsideration should be given to the development of a further practice note to assist trial judges in assessing evidentiary reliability' at [114], [118]. On the linkage between the development

Another measure is the degree to which prosecutors accept wrongful convictions. Starting in 2004, senior Canadian prosecutors have published extensive reports on wrongful convictions largely based on the findings and recommendations of Canadian public inquiries.[43] I am aware of no similar document in Australia. Canadian prosecutors have accepted the reality of wrongful convictions in part because Canadian public inquiries have repeatedly stressed that wrongful convictions are a systemic problem that are not caused by 'the outright malevolence' of police or prosecutors.[44] The systemic focus of Canadian public inquiries is in large part explained by the fact that they are precluded from making holdings that individuals are civilly or criminally liable.[45]

Prosecutors in Canada have frequently agreed to appeals out of time and even consented to the overturning of convictions. They have also apologised for wrongful convictions. Such prosecutorial conduct seems much rarer in Australia. In some Canadian jurisdictions, prosecutors have proactively conducted audits of cases after problems have been discovered with a particular form of evidence or a particular criminal justice actor.[46]

In summary, a number of high profile DNA exonerations and public inquiries help explain why Canadian judges and prosecutors more readily accept the reality of wrongful convictions than their Australian counterparts. The Frank Button DNA exoneration in

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of Victoria's practice note and the prevention of wrongful convictions see Stephen Cordner, 'Expert Opinions and Evidence: A Perspective from Forensic Pathology' in this issue.

43 Federal, Provincial and Territorial Heads of Prosecution, *Report on the Prevention of Miscarriages of Justice* (Department of Justice, 2004) <http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf>; Federal, Provincial and Territorial Heads of Prosecution Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (Department of Justice, 2011).

44 Ontario, Kaufman Commission on Proceedings Involving Guy Paul Morin, *Report* (1998) 1093.

45 *Starr v Houlden* [1990] 1 SCR 1366.

46 Bruce Macfarlane, 'Is it Proper for the Crown to Root Around, Looking for Miscarriages of Justice?' (2012) 36 *Manitoba Law Journal* 1.

Australia has not attained a similar iconic status. A public inquiry following Button's case simply concluded that no individual officials were at fault for Mr. Button's wrongful conviction.[47] Although individuals should be held accountable for blatant misconduct that contributes to wrongful convictions, the Australian focus on individual fault both makes officials defensive about recognising wrongful convictions and suggests that if wrongful convictions occur it may be because of a 'rotten apple' in the form of a blameworthy official.

With some notable exceptions, Australian judges, particularly at the High Court level, are much less likely to make reference to the risk of wrongful convictions than Canadian judges. Canadian prosecutors have also been more willing than Australian prosecutors to accept the reality of wrongful convictions. As will be seen, however, Australian legislatures have sometimes compensated for the general Australian judicial and prosecutorial silence about wrongful convictions.

III DIFFERING LEGISLATIVE AND JUDICIAL APPROACHES TO SOME COMMON CAUSES OF WRONGFUL CONVICTIONS

The following section will examine a few select common causes of wrongful convictions in both Australia and Canada. The focus will be on how the two countries have responded to these common causes in different ways. Australia has often responded with ex ante legislative regulation while Canada has relied on ex post judicial enforcement.

[47] Crime and Misconduct Commission, above n 24.

A *Police Taking of Statements: Legislative and Judicial Regulation*

Police conduct plays an important role with respect to false confessions. Australia has responded with legislation providing for recording of custodial police interrogations. No such legislation exists in Canada, but the judiciary has tried to encourage such recordings. Canadian courts have also regulated both custodial and non-custodial forms of police interrogations in an attempt to protect against false confessions.

1 *Australian Legislative Regulation*

Inquiries into police corruption including verballing suspects into fabricated confessions has led to legislation in all Australian states requiring the electronic recording of custodial interrogation. This legislation establishes important ex ante standards for the police to follow. At the same time, the legislation must be enforced by the courts in cases where the police do not follow the rules. The Australian High Court has refused to admit an unrecorded confession taken on a 'toilet break'.[48] Lynne Weathered has suggested that recording has 'significantly reduced the problem of verballing and ... false confessions' while still not eliminating it.[49]

In South Australia, pt 17 of the *Summary Offences Act 1935* (SA) provides for the video or tape recording of police interviews with suspects. Section 74D provides for videotaping of interrogations of suspects for indictable offences if reasonably practicable. A number of Australian jurisdictions also provide that Aboriginal and other vulnerable accused may have an 'interview friend'.[50] These provisions are especially important given that false confessions have played a role in several Australian wrongful convictions of

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48 *Coates v The Queen* [2005] HCA 1. See also *Kelly v The Queen* [2004] HCA 12 reading down videotaping requirements.

49 Lynne Weathered, 'Wrongful Convictions in Australia' (2012) 80 *University of Cincinnati Law Review* 1391, 1396.

50 See, eg, *Crimes (Forensic Procedures) Act 2000* (NSW) ss 54-5.

Indigenous people including those of Kelvin Condren and Jeanie Angel.[51]

2 *Canadian Judicial Regulation*

Canada lacks legislation requiring the police to record custodial interrogations. Unlike in Australia, such legislation could only be enacted by the federal Parliament of Canada which has exclusive jurisdiction over criminal law and procedure.[52]

The Supreme Court of Canada has been responsive to scholarship and advocacy identifying false confessions as a cause of wrongful convictions. In the 2000 case of *Oickle*,[53] the court recognised that false confessions are a leading cause of wrongful convictions. In response, the court stressed that one of the purposes of the common law voluntariness rule was to prevent the admission of false confessions. Nevertheless, the court admitted a statement in that case over a strong dissent that would have excluded the statement because it was obtained as a result of a prolonged interrogation starting at 5.00pm and ending at 2.45am. In addition, there were real concerns that the suspect confessed to a series of arson incidents to avoid the police interrogating his girlfriend. The court also refused to exclude a re-enactment by the accused done at 6.00am when he was re-awoken after a short sleep. This case illustrates how judges, especially acting without legislative support, may be reluctant to exclude confessions.

There has been continued criticism of the Supreme Court of Canada's willingness to tolerate prolonged interrogations in the face of a suspect's repeated invocation of the right to silence.[54] The court has also refused to interpret the right to counsel to include the ability

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51 As discussed in Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' in this issue.

52 *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 91(27) ('*Constitution Act 1867*').

53 *R v Oickle* [2000] SCC 38, [34]-[46].

54 *R v Singh* [2007] SCC 48.

of counsel to attend the interrogation of their clients.[55] It has also maintained a minimal operating mind test that allows the admission of false confessions from mentally ill suspects.[56] The Canadian experience with judicial regulation of custodial interrogations suggests that judicial recognition of the reality of false confessions is no guarantee of a robust regulatory regime.

Similar patterns may also be emerging in some recent cases involving Canada's controversial practice of so called "Mr Big" operations. These are elaborate undercover stings where suspects are encouraged to confess to prior crimes in order to continue to enjoy the benefits of being included in lucrative crime schemes. These elaborate stings have generally been used in high profile cases where the police are having trouble discovering enough evidence to charge the suspect. In other words, "Mr Big" stings are often used in cases where there are indicia of tunnel vision and predisposing circumstances for wrongful convictions.[57] They have been used in a few Australian cases. Australian courts have not attempted to regulate Mr Big operations and have concluded that the voluntariness rule does not apply because the suspect does not know that he or she is talking to a person in authority.[58]

In the 2014 case of *Hart*,[59] the Supreme Court of Canada articulated a new approach to regulating Mr Big stings. It recognised that wrongful convictions are often caused by unreliable and prejudicial evidence. Justice Moldaver stated wrongful convictions are 'a blight on our justice system and we must take reasonable steps to prevent them before they occur'.[60] The Supreme Court's

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55 *R v Sinclair* [2010] SCC 35. In this case, the court adverted to the dangers of wrongful convictions at [90], but interpreted the Charter right to counsel not to include counsel's presence in a custodial interview.

56 *R v Whittle* [1994] 2 SCR 914. See generally Chris Sherrin, 'False Confessions and Admissions in Canadian Law' (2005) 30 *Queen's Law Journal* 601.

57 On the idea of predisposing circumstances for wrongful convictions see Bruce MacFarlane, 'Convicting the Innocent: A Triple Failure of Criminal Justice' (2007) 31 *Manitoba Law Journal* 403.

58 *R v Cowan* [2013] QSC 337.

59 *R v Hart* [2014] SCC 52.

60 Ibid [8].

willingness to recognise the reality of wrongful convictions is admirable and is perhaps related to its willingness to hear from a broad array of intervener groups including those representing innocence projects, defence lawyers and civil liberties groups.[61]

In *Hart*, the court created a new rule of evidence that presumed that statements obtained in an exploitative Mr Big operation were inadmissible unless the Crown could establish that the probative value and reliability of the statement outweighed any prejudice. The court also held that in some cases, the abuse of process doctrine could be used. On the facts, the court excluded the confessions that a man had murdered his two young daughters. It stressed that the statements were self-contradictory and lacked confirmatory evidence.[62]

A few months later, however, the court in *R v Mack* admitted confessions in another Mr Big murder investigation largely on the basis that the confessions were confirmed by other evidence. The court stressed that judges did not have to rely on the drastic remedy of exclusion of confessions. In some cases, a judicial warning with reference to indicia of reliability such as confirmatory evidence would be appropriate.[63]

One problem with *Mack* — interestingly revealed by Brandon Garrett's research on false confessions which the court cites with approval in *Hart*[64] — is that a false confession may look reliable because it contains detailed 'hold back' information that the police have consciously or unconsciously conveyed to the suspect in unrecorded interactions. Another problem is that courts may settle on

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[61] The Criminal Lawyers Association of defence lawyers intervened in both *Oickle* and *Hart* and were joined in the latter case by the Association in Defence of the Wrongfully Convicted, Canada's premier innocence project, as well as civil liberties and other groups of defence lawyers.

[62] *R v Hart* [2014] SCC 52, [141]-[144].

[63] *R v Mack* [2014] SCC 58, [53].

[64] Brandon Garrett, 'The Substance of False Confessions' (2010) 62 *Stanford Law Review* 1051.

warnings to juries as a less drastic alternative to exclusion of confessions even though the effectiveness of such warnings is a matter of contention.

A similar pattern of judicial reluctance to exclude evidence can be seen with respect to the use of jailhouse informers.[65] The use of jailhouse informers in Canada has been strongly criticised by different public inquiries into wrongful convictions. Such informers often had incentives to lie. They can be used to bolster an otherwise weak case against a suspect.[66] Nevertheless, the Supreme Court of Canada has held that evidence from jailhouse informers is still admissible provided that jurors receive warnings about their unreliability.[67] Again a judicial tendency to rely on warnings rather than exclusion of evidence provides uncertain protections against wrongful convictions.

The *Oickle* and *Hart* cases can be praised for their recognition of the dangers of false confessions and wrongful convictions. Nevertheless, there are limits to judicial regulation of police behavior. The regulation is done on a case by case basis that may not establish clear standards for the police. *Oickle* and *Hart* fail to establish clear and bright line limits that the police cannot go beyond. The bottom line of judicial regulation often depends on whether courts are prepared to exclude relevant evidence that may have been obtained in circumstances that compromise its reliability. The court in *Hart* was prepared to exclude statements obtained from a suspect through a Mr Big sting, but in *Oickle*, *Mack* and the jailhouse informer cases, the court pulled back from the drastic remedy of exclusion of evidence.

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[65] Kent Roach, 'Unreliable Evidence and Wrongful Convictions' (2007) 52 *Criminal Law Quarterly* 210.

[66] Ontario, Kaufman Commission on Proceedings Involving Guy Paul Morin, *Report* (1998); Manitoba, Inquiry Regarding Thomas Sophonow, *Report* (2000).

[67] *R v Brooks* [2000] 1 SCR 237. In a more recent case, evidence from jailhouse informers was allowed even though doubt was cast on it by DNA: *R v Hurley* [2010] 1 SCR 637.

B *Police Identification Procedures: Legislative and Judicial Regulation*

Another leading cause of wrongful convictions is mistaken eyewitness identification. A good deal of research has been done by psychologists on the dangers of mistaken identification. The same researchers have devised best practices for minimising these risks. This is an area that seems ripe for legislative regulation.

1 *Canada's Failure to Legislate Standards*

As early as 2000, a public inquiry in Canada, drawing on the work of a leading expert, Dr Elizabeth Loftus, proposed detailed rules to minimise the risk of mistaken identifications. These recommendations included the use of double blind procedures and sequential photo line-ups.[68] Although police and courts have taken note of these recommendations, the *Criminal Code* of Canada still remains silent on what identification procedures police should use.

The Supreme Court of Canada broke new ground in 2007 by recognising a new tort of negligent investigation by the police. The case involved the wrongful conviction of an Indigenous person, Jason Hill, for robbery. Two bank tellers were shown a photo array that included a picture of Mr Hill that the police had previously released to the press for assistance in the apprehension of a string of robberies. Mr Hill was the only Indigenous person in the 12 person photo line-up. The police also did not show the two tellers a picture of an alternative robbery suspect.

After having recognised the new tort, the Supreme Court held that the police were not negligent because there were no clear rules governing photo line-ups when the misidentifications occurred in 1995.[69] More than 20 years later, unfortunately there are still no rules in the Canadian *Criminal Code*. This is true even though the

[68] Manitoba, Inquiry Regarding Thomas Sophonow, *Report* (2000).
[69] *Hill v Hamilton-Wentworth Regional Police* [2007] SCC 41.

Criminal Code is amended multiple times each year, generally to create new crimes and provide police with additional investigative powers.

2 *South Australia's Approach*

A number of Australian states have legislation governing identification procedures. Some of this legislation expresses preference for the use of in person identification procedures over the use of photo line-ups. South Australia's *Evidence Act 1929* (SA)[70] was amended in 2014 to abolish such a preference. The new law provides that photo line-ups can be governed by regulation. A schedule to the Act provides that police orders governing photo line-ups will be reviewed by the Minister to determine whether they reflect 'scientific best practice' and to ensure that police orders make provisions for those under disability and persons 'of cultural and linguistic diversity'.[71] At the same time, however, the 2014 amendment was a missed opportunity to legislate best practices. These would include mandated use of sequential photo line-ups and the use of the double blind procedures so that those administering the line-up do not know the identity of the suspect to ensure that they do not provide conscious or unconscious clues and feedback to the witness.

Even if Australian states did a better job of legislating identification procedures, there would still be a need for judicial enforcement when such standards were breached. In this respect, the South Australian record seems, at best, mixed. A divided South Australian Court of Appeal recently upheld a conviction and admitted a Facebook and a photo identification even though the police had tainted the identification. The police had told the victim of a home invasion the name of the suspect. This allowed the victim to look the suspect up on Facebook before making a photo identification. Peek J issued a strong dissent that would have

[70] *Evidence Act 1929* (SA) s 34AB.
[71] Ibid sch 1.

excluded both the Facebook and the photo identification.[72] In a somewhat similar 2013 case, Peek J excluded another identification that the police had tainted in the same way.[73]

An optimal system to govern identification procedures would combine clear legislative direction to the police to use best practices and robust judicial enforcement if the police breach such standards without a reasonable excuse. Unfortunately both ex ante standards and ex post enforcement seem often to be absent in South Australia.

C *Lack of Disclosure and Tunnel Vision as Common Causes*

In Australia and Canada, the non-disclosure of relevant material to the accused has played an important role in a large number of wrongful convictions. For example, the Donald Marshall Jr case in Canada and the Andrew Mallard case in Australia are both cases where full disclosure to the accused of all relevant material in the prosecutor's possession would likely have prevented the wrongful convictions. In Marshall's case, the prosecutor should have disclosed prior inconsistent statements by witnesses who falsely testified that they saw Marshall stab another young person. Mallard was wrongfully convicted of murder in part because of the non-disclosure of a forensic report that indicated that Mallard's confession about killing a shop-keeper was not reliable. A subsequent inquiry found that the investigating officers and prosecutor had engaged in misconduct relating to lack of full disclosure.[74]

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[72] *R v Crawford* [2015] SASCFC 112. For another earlier but similar case where the court admitted an identification despite police actions that had tainted the identification process see *Hirst v Police* [2005] SASC 201, [47].

[73] *Strauss v Police* [2013] SASC 3. The identifications were also excluded because of suggestions made to the witness about the suspect, the witness's intoxication and poor ability to identify the perpetrator at the time of the crime.

[74] Western Australia Corruption and Crime Commission, *Report of the Inquiry into the Alleged Misconduct of Public Officers in Connection with the Investigation of the Murder of Mrs. Pamela Lawrence, the Prosecution and Appeals of Mr. Andrew Mallard and Other Related Matters* (Corruption and Crime Commission, 2008).

1 *Canada's Failure to Legislate Disclosure Requirements*

The Royal Commission on the Donald Marshall Prosecution in Canada recommended in 1989 that the *Criminal Code* of Canada be amended to require the prosecutor to disclose relevant material to the accused before trial.[75] As has unfortunately been the norm, the federal Parliament demonstrated little interest in this legislative reform that could help prevent wrongful convictions. This raises questions about the politics of wrongful conviction reform. Both the Australian and American experience of legislative reform demonstrate that legislative reforms to prevent and remedy wrongful convictions are not impossible to achieve. Nevertheless, they will often require broad based political coalitions that include not only those who support due process for the accused, but those who see wrongful convictions as a failure of crime control.

Even though the Canadian Parliament was not responsive to the recommendation for disclosure reform, the courts stepped into the breach. In 1991, the Supreme Court of Canada cited the Marshall Commission's recommendations as a prime justification for recognising that the accused had a constitutional right to pre-trial disclosure of all relevant non-privileged information in the Crown's possession.[76] This decision revolutionised the practice of criminal justice in Canada and continues to be enforced in a voluminous jurisprudence. At the same time, Canadian disclosure standards are not fool proof. They depend on the accused requesting disclosure. The courts are often reluctant to enforce them with drastic remedies such as stays of proceedings or exclusion of evidence.[77]

2 South Australia's Approach

Many states in Australia provide statutory obligations for disclosure that are not dependent on the accused's request for disclosure. For

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[75] Nova Scotia, Royal Commission on the Donald Marshall Jr Prosecution, *Report* (1989).

[76] *R v Stinchcombe* [1991] 3 SCR 326.

[77] For an examination of remedies for breach of disclosure see Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book, 2nd ed, 2013) 9.520.

example in South Australia, s 104 of the *Summary Procedure Act 1921* (SA)[78] provides that the prosecutor must disclose witness statements, documents or other evidentiary material that it 'relies upon in tending to establish the guilt of the accused' and 'all other material relevant to the charge (whether relevant to the case for the prosecution or the case for the defence) that is available to the prosecution except material exempt from production because of privilege or for some other reason'. This is a broad disclosure obligation not dissimilar to that established in Canadian constitutional law. The Canadian courts have similarly stressed that no distinction should be made between incriminatory or exculpatory material.[79] This makes sense once it is recognised that police and prosecutors may experience difficulties in identifying exculpatory material or other material helpful to the accused especially if they are influenced by tunnel vision which interprets all evidence as consistent with the accused's guilt.[80] Again the optimal system would include both clear ex ante legislative standards and robust ex post judicial enforcement.

D *The Impact of a Constitutional Bill of Rights in Canada*

From a comparative perspective, Canada represents something of a Cadillac model of judicial regulation of police and prosecutorial conduct that can result in wrongful convictions. The Charter has produced some undeniable benefits for the wrongfully convicted. As examined above, these include broad constitutional rights that require prosecutors upon request to disclose all relevant and non-privileged material to the accused before trial[81] and a right not to be extradited to face the death penalty. The Supreme Court reached the later

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78 *Summary Procedure Act 1921* (SA).

79 *R v Stinchcombe* [1991] 3 SCR 326.

80 One Canadian public inquiry found that the police influenced by both tunnel vision and noble cause corruption focused 'on one individual as the perpetrator, to the exclusion of other reasonable possibilities … they marshaled all of their skills as advocates to 'shore up a weak case' and secure a conviction': see Newfoundland and Labrador, Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken, *Report* (2006) 303.

81 *R v Stinchcombe* [1991] 3 SCR 326.

conclusion primarily because of a recognition of the risk of wrongful convictions in all justice systems.[82]

Nevertheless, there are limits to the willingness of the Canadian judiciary to interpret the Charter in a manner that minimises the risk of wrongful convictions. Canadian courts have rejected arguments that testimony by a jailhouse informer violates the Charter.[83] They have also rejected the idea that the Charter requires the preservation of evidence at least in cases where there is a satisfactory explanation for the loss of evidence and no prejudice to the accused.[84] The Supreme Court has rejected a Charter challenge to rules that protect the secrecy of jury deliberations even in the face of concerns that juror misconduct might play a role in wrongful convictions.[85] Courts may be more reluctant to use the Charter as opposed to the common law in part because constitutional rulings are less provisional than common law rules.

A bill of rights could be useful in preventing wrongful convictions, but the Canadian experience suggests that it is not a panacea. Australian legislatures should continue to regulate police and prosecutorial conduct that creates risks of wrongful convictions. Indeed, in my view, the Canadian Parliament should follow suit. In the end, the optimal system would involve legislatures establishing clear rules to govern police and prosecutorial conduct that when breached could then be enforced by the judiciary on a case by case basis.

82 *United States v Burns* [2001] 1 SCR 283.
83 *Baltrusaitis v Ontario (Attorney General)* [2011] ONSC 532.
84 *Chaudhary v. Ontario (Attorney General*) [2012] ONSC 5023, [89].
85 *R v Pan* [2001] 2 SCR 344.

IV DIFFERING JUDICIAL AND LEGISLATIVE APPROACHES TO REMEDYING WRONGFUL CONVICTIONS

In this section, the variety of remedies available for the wrongfully convicted will be examined. Consistent with the theme of the last section, we will see that Australian legislatures have been more creative than the Canadian Parliament but that Canadian courts have been more creative than Australian courts.

A *Appeals*

The first line of defence against wrongful convictions is the accused's right to a first appeal. The Canadian *Criminal Code* and the various laws governing appeals in the Australian states have very similar grounds for allowing appeals from convictions. All allow appeals on the basis of: 1) error of law; 2) unreasonable verdict or one that cannot be supported on the evidence; or 3) if there was a miscarriage of justice.[86]

The leading Australian case on unreasonable convictions or convictions that were not supported by the evidence remains the High Court's decision in *M v The Queen*.[87] The court indicated that 'the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'. The High Court, however, demonstrated considerable deference to the jury by warning appellate courts not to 'disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses'.[88]

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[86] *Criminal Code*, RSC 1985, c C-34, s 686(1)(a); *Criminal Law Consolidation Act 1935* (SA) s 353.

[87] [1994] HCA 63.

[88] Ibid [7].

The comparable Canadian jurisprudence on unreasonable verdicts or those not supported by the evidence also demonstrates deference to the jury. At the same time, Canadian courts will apply a more exacting standard to review of convictions from judge alone trials and will intervene if a trial judge's reasoning process is irrational or illogical.[89] In practice this may mean that appeals from convictions in Canada may be easier to obtain because in Canada, the vast majority of non-murder trials are heard before judges sitting without juries.[90] In other words, similar appeal rights may play out differently in Canada because of its restricted use of the jury.[91]

The level of review of convictions by Canadian appellate courts should not be exaggerated. Like Australian courts, Canadian courts continue to reject the idea that convictions should be overturned simply because an appellate court is left with an unarticulated lurking doubt. Despite a recommendation from the Morin inquiry that appeal courts should adopt a lurking doubt standard,[92] Canadian courts have refused to do so. A recent case has stressed that:

> The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written

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89 *R v H (W)* [2013] 2 SCR 180.

90 That said, one study found 614 successful appeals from conviction in Australia from 1 June 2005 to 31 December 2006 with 83 appeals being allowed on the basis of unreasonable or unsupportable verdicts. This suggests that *M v The Queen* allows for a significant number of appeals. In addition 35 appeals related to prosecutorial excess; 20 to expert evidence; 17 were based on fresh evidence and 15 related to identification mainly errors in warnings to juries; 10 to incompetent defence counsel and 9 to change of plea: Judge Sydney Tilmouth, *The Wrong Direction* <http://clant.org.au/images/images/the-bali-conference/2013/Tilmouth.pdf>.

91 The accused only has a constitutional right to a jury under s 11(f) of the *Canada Act* 1982 (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') if he or she faces five years imprisonment or more. The Canadian *Criminal Code* has a broader statutory entitlement to a jury, but many accused elect for trial by judge alone because of perceptions that trial in lower trial courts will be speedier, often more expert and result in more lenient sentences: See Martin L Friedland and Kent Roach, 'Borderline Justice: Choosing Juries in the Two Niagaras' (1997) 31 *Israel Law Review* 120.

92 Ontario, Kaufman Commission on Proceedings Involving Guy Paul Morin, *Report* (1998) recommendation 87.

> record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.[93]

In Australia one of the leading cases which rejects the lurking doubt ground is the High Court's 1984 decision dismissing the Chamberlain's appeal.[94] The fact that this case is now recognised as one of Australia's most notorious miscarriages of justice has not yet caused a rethink among the Australian judiciary.

Both Australian and Canadian appellate courts have defined the miscarriage of justice ground of appeal in a broad and flexible form as befits its role as a residual safeguard ground of appeal. A 1937 High Court decision holds that a miscarriage of justice occurs 'not only in cases where there is affirmative reason to suppose the appellant is innocent' but also in case where 'it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial' or because there is 'substantial possibility' that 'the jury may have been mistaken or misled'.[95] The Supreme Court of Canada has stressed that a miscarriage of justice includes errors 'whether procedural or substantive' that deprive the accused of a fair trial[96] and also include cases where trial judges substantively misapprehended the evidence when that evidence was an essential part of the reasoning process resulting in conviction.[97] This miscarriage of justice ground of appeal is especially important when it is recognised that in many cases, definitive evidence of innocence may simply not be available.

In both Australia and Canada, appellate courts can apply a proviso to deny an appeal if they are convinced that no substantial miscarriage of justice has occurred. Such provisions should be used

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93 *R v H (W)* [2013] 2 SCR 180 [27].
94 *Chamberlain v The Queen* [1984] HCA 7 [12].
95 (1937) 57 CLR 170 cited in *Nudd v The Queen* [2006] HCA 9 [4].
96 *R v Khan* [2001] 3 SCR 832 [27].
97 *R v Loher* [2004] 3 SCR 732 [2].

with caution given findings that American courts applied a similar harmless error rule in 38 percent of cases that subsequently resulted in DNA exonerations.[98] On the one hand, appeal courts should not quash convictions simply because of technical and truly harmless legal errors. On the other hand, appellate courts have had trouble in the past detecting true miscarriages of justice perhaps because of their focus on legal as opposed to factual issues and their considerable caseloads.

B *The Aftermath of Appeals: Acquittals, New Trials and Prosecutorial Conduct*

Both Australian and Canadian appellate courts that overturn a conviction on appeal have discretion whether to enter an acquittal or to order a new trial. Canadian courts have been more inclined to enter an acquittal in cases of wrongful convictions. Some courts have even developed separate tests for determining whether an acquittal is warranted in historical cases.[99] In contrast, Australian courts seem much more inclined to order new trials even in wrongful conviction cases.[100] The order of the new trial, especially in historical cases, places the formerly convicted person at the mercy of prosecutorial discretion.

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98 Garrett, above n 11, 201.

99 *Truscott (Re)*, 2007 ONCA 575, [247]-[249]; *Walsh (Re)*, 2008 NBCA 33 [57]-[62].

100 For an important exception see *R v Klamo* [2008] VSCA 75. An acquittal was entered in this case because of a misunderstanding of expert evidence. The case also led to reforms in Victoria in terms of a new practice direction to encourage better understanding of expert evidence. Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, 2015) 9.6; Chris Maxwell, 'R v Klamo: an example of miscommunication and misunderstanding of expert evidence where the conviction was later overturned' (2014) 46 *Australian Journal of Forensic Sciences* 4; Stephen Cordner, 'Expert Opinions and Evidence: A Perspective from Forensic Pathology' in this issue. Other important exceptions are two Western Australian cases involving Indigenous accused where, with prosecutorial consent, appeal courts issued acquittals: see *Narkle v The State of Western Australia* [2006] WASCA 113, [13]; *R v Angel* (Unreported, Western Australia Court of Appeal, 8 October 1991) as discussed in Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' in this issue.

Two Canadian public inquiries have warned about possible unfairness to the wrongfully convicted if prosecutors simply stay proceedings or issue a *nolle prosequi* after a wrongful conviction has been quashed and a new trial ordered. Such an approach may mean that the wrongfully convicted person will never receive a verdict on the merits. In other words, they will remain in a legal limbo that could sustain suspicions and stigma caused by the original conviction even though it has been overturned.[101]

There is an increasing willingness among prosecutors in Canada to call no evidence in wrongful conviction cases where new trials have been ordered, but there is no reasonable prospect of conviction. This can be contrasted with prior Canadian cases where prosecutors simply issued stays that meant that they can revive the prosecution at any time. A prosecutorial stay of proceedings in Canada is similar to the *nolle prosequi* that was recently entered by the prosecutor in the Henry Keogh case after Mr. Keogh's wrongful conviction was quashed and a new trial ordered.[102] The new Canadian approach allows the wrongfully convicted person to be acquitted, something that may help in the process of overcoming the stigma of their original convictions. That said, Canadian courts have also held that they do not have jurisdiction to make findings of factual innocence or to overturn prosecutorial decisions that prevent a wrongfully convicted person from receiving an acquittal.[103]

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[101] Newfoundland and Labrador, Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken, *Report* (2006) 317-24; Manitoba, Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *Final Report* (2007) 125-45.

[102] 'Henry Keogh free after murder charges dropped', *The Australian,* 13 November 2015.

[103] *R v Mullins-Johnson* [2007] ONCA 720 [24] (appellate courts have no jurisdiction to make findings of factual innocence); *R v Phillion* [2010] ONSC 1604 [130] (rejecting challenge to prosecutor's decision to withdraw murder charge rather than allow a wrongfully convicted person a chance to have an acquittal on the merits). Cases refusing to recognise factual innocence as a concept should not diminish the important role of the media and civil society in producing "exonerations" based on "innocence": see David Schiff and Richard Nobles, *Understanding Miscarriages of Justice* (Oxford University Press, 2000). For a discussion of conflicts that have emerged between lay understandings of factual innocence and legal understandings of the safety of

C *Alternative Australian Routes to Appeal Courts*

In Canada, all appeals from convictions are determined under s 686 of the *Criminal Code* because of the federal Parliament's exclusive jurisdiction over criminal law and procedure. There have been no changes to these provisions even though Canadian inquiries have recommended that appellate judges should take a more inquisitorial approach to appeals and that appeals should be allowed on the basis of a lurking doubt. This fits into a pattern of Canada's Parliament not being responsive to demands to reform the law better to prevent and remedy wrongful convictions.

Because of concurrent state and Commonwealth jurisdiction over criminal law and procedure, there is more diversity in Australian appeal procedures. This allows a degree of experimentation that is not available in Canada where criminal procedures are a matter of exclusive federal jurisdiction.

D *Judicial Inquiry Provisions in NSW and ACT*

In both New South Wales and the Australian Capital Territory, a person can apply to the Supreme Court for an inquiry by a judicial officer. Section 79 of New South Wales *Crimes (Appeal and Review) Act 2001* (NSW) allows an appeal court to convene a judicial inquiry if 'it appears that there is doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'. In Canada, only the executive can trigger an inquiry, though such inquiries are often run by sitting or retired judges.[104]

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verdicts see Michael McNaughton (ed), *The Criminal Case Review Commission: Hope for the Innocent?* (Palgrave, 2010).

[104] The Canadian *Criminal Code* does allow an appeal court that already has jurisdiction over an appeal to appoint a commissioner to conduct 'prolonged examination of writings or accounts, or scientific or local investigation' that could not be conveniently conducted by the Court of Appeal: see *Criminal Code*, RSC 1985, c C-34, s 683(1)(e). Such a procedure was used in at least one Canadian wrongful conviction case and discovered serious acts of non-disclosure: see *R v Nepoose* [1992] ABCA 77.

David Hamer has raised concerns that judicial inquiries are not sufficiently used in cases of suspected miscarriage of justice.[105] More recently, he has suggested in this issue of the journal that when such inquiries are used, as in the Eastman case, they may be costly and time consuming as compared to the creation of an independent body similar to the Criminal Cases Review Commission in England and Wales.[106] That may well be so, but the NSW and ACT provisions are attractive in principle because they have the potential to place some of the responsibility for correcting miscarriages of justice on the independent judiciary as opposed to the executive. Judges may be able to make more impartial decisions than the executive about whether an inquiry into a suspected miscarriage should be held. The NSW and ACT inquiry provisions are also attractive because they allow inquisitorial procedures to be added to adversarial procedures in aid of discovering wrongful convictions. Many miscarriages of justice represent failures of the adversarial system. Judicial inquiries have a potential to inject inquisitorial procedures that may be useful in discovering the truth where adversarial procedures fail.[107] Professors Finlay, Odgers and Yeo praise the NSW and ACT inquiry provisions as 'less formalistic than the traditional appellate structure. More important, they permit full investigation of all relevant evidence (including new evidence)' and they do not 'require the

[105] David Hamer, 'Wrongful Convictions, Appeals and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37 *University of New South Wales Law Journal* 270, Fn 143. As Professor Hamer argues 'police corruption is only one among many possible causes of wrongful conviction. What of mistaken eyewitness identification, failure of prosecution disclosure, biased expert witnesses and ineffective defence counsel? There may be many more wrongful convictions that are not being corrected because the state has not invested resources in uncovering them' at 291.

[106] David Hamer, 'The Eastman Case: Implications for an Australian Criminal Case Review Commission' in this issue.

[107] For an argument that Anglo-American procedures could prevent wrongful convictions if they were much more inquisitorial see George Thomas III, *The Supreme Court on Trial: How the American Criminal Justice System Sacrifices Innocent Defendants* (University of Michigan Press, 2008). For my own arguments about the need to use both adversarial and inquisitorial procedures see Kent Roach, 'Wrongful Convictions: Adversarial and Inquisitorial Themes' (2010) 35 *North Carolina Journal of International Law* 387.

approval of the executive with all the unfortunate political implications that such a requirement imports'.[108]

Although relatively novel in the context of Anglo-American justice systems, assigning the judiciary more responsibility for investigating possible miscarriages of justice seems constitutionally sound.[109] The idea that the executive can disturb a judicial verdict is awkward and this is why petition procedures in Anglo-American systems generally only allow the executive to refer cases back to the judiciary. Moreover, executive deference to judicial decisions may explain some of the traditional reluctance of the executive to order new appeals or new trials.

The idea that that the judiciary can trigger an inquiry into a potential wrongful conviction is appealing because the judiciary with its guaranteed protections of independence may have less incentive than the executive to deny or cover up potential errors. In Australia, state Attorneys-General who decide petition applications may have ultimate responsibility for prosecutions. They may be reluctant to admit mistakes or start a process that will reveal mistakes, especially given the frequent focus in Australia on whether individual criminal justice actors — police, prosecutors and those who provide forensic evidence — are individually at fault for their contributions to wrongful convictions.

E *Second Fresh and Compelling Evidence Appeals in South Australia and Tasmania*

A novel mechanism for appeals is the ability since 2013 to bring a second or subsequent appeal under s 353A of South Australia's *Criminal Law Consolidation Act 1935* (SA) on the basis that the full

[108] Mark Finlay, Stephen Odgers and Stanley Yeo, *Criminal Justice* (Oxford University Press, 4th ed, 2009) 312.

[109] However, note that this is questioned by Sangha and Moles in Sangha and Moles, above n 100 on the basis that the review power is administrative and not judicial. They raise the question whether the provision of such "administrative" advice is compatible with the separation of powers at 4.4.2.

Court 'is satisfied that there is fresh and compelling evidence that should, in the interests of justice be considered on an appeal'. The provision also provides that 'The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice'.[110] Similar legislation was enacted in Tasmania in 2015.[111] The South Australian reform arose when a Legislative Review Committee considered but rejected a private member's bill that would have created a Criminal Cases Review Commission in Australia. The Australian Human Rights Commission made submissions expressing concerns that limited appeal procedures in South Australia, especially in light of the Australia High Court's unwillingness to hear fresh evidence, might violate international law.[112] The Human Rights Commission focused on the High Court's refusal to consider fresh evidence[113] as criticised by Justice Kirby both judicially[114] and extra-judicially.[115]

South Australia's and Tasmania's new second or subsequent appeal procedures are on their face quite restrictive. Those seeking a second or subsequent appeal are required to present evidence that is fresh in the sense that it could not have been obtained by reasonable diligence at trial. The evidence must also be compelling in the sense that it is reliable, substantial and highly probative to the issues in dispute at the trial.[116] These provisions are patterned on laws that allow second prosecutions to be started afresh and thus abrogate the

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110 *Statutes Amendment (Appeals) Act 2013* (SA) adding s 353A to *Criminal Law Consolidation Act 1935* (SA).

111 *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tas).

112 Australian Human Rights Commission, Submission to the Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011, [5].

113 *Mickelberg v The Queen* [1989] HCA 344, [2].

114 *Sinanovic's Application* (2001) 180 ALR 448, 451.

115 Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195, 206.

116 *Criminal Law Consolidation Act 1935* (SA) ss 353A (1), (3). For criticisms of the restrictive nature of the appeal see Bibi Sangha, Robert Moles and Kim Economides, 'The New Statutory Right of Appeal in South Australian Law: Problems Facing an Applicant, Unanticipated Interpretative Difficulties' (2014) 16 *Flinders Law Journal* 145.

accused's right against double jeopardy.[117] As Sangha, Moles and Economides have argued, however, this is a false equivalence because 'whilst a very demanding standard might be required before commencing a second prosecution, the same standard might be quite inappropriate when considering the correction of a wrongful conviction'.[118]

Taken to their logical extreme, the appeal provisions suggest that wrongful acquittals are as bad as wrongful convictions once fresh and compelling evidence emerges. Such a view may be politically popular, but it could undermine fundamental principles of restraint in the use of the criminal law including the presumption of innocence and the requirement that the state prove guilt beyond a reasonable doubt. At the same time, the demanding nature of the new appeal right helps explain the broad political consensus that has developed behind these amendments in both South Australia and Tasmania.. The new right of appeal has had bi-partisan appeal and was enacted by a Labor government in South Australia and a Liberal government in Tasmania without dissent. What could be seen as a surprising and disruptive innovation that alters the criminal justice system's traditional emphasis on finality has received wide acceptance in both states.

So far only two appeals have been heard under the new South Australian provisions and both have overturned convictions. In both cases, the Court of Appeal ordered that a new trial be held after it

[117] *Criminal Law Consolidation Act 1935* (SA) s 337; *Criminal Code Act 1924* (Tas) s 390ff.

[118] Bibi Sangha, Robert Moles and Kim Economides, 'The New Statutory Right of Appeal in South Australian Law: Problems Facing an Applicant, Unanticipated Interpretative Difficulties' (2014) 16 *Flinders Law Journal* 145, 160. David Hamer has observed that fresh and compelling evidence has not been used to allow subsequent prosecutions of an acquitted accused in South Australia since it was first allowed in 2008. He argues: 'If the prosecution, with all of its resources and expertise, is unable to meet this demanding threshold, what hope can there be for the wrongfully convicted person, in most cases lacking skills, resource and support and stuck in prison?': see Hamer, above n 105, 297. As will be seen, however, two persons have so far successfully had their convictions quashed on second appeals in South Australia.

reversed the conviction.[119] As suggested above, the trend in Canadian historical cases where fresh evidence casts doubt on the conviction is to order acquittals rather than new trials.[120]

A divided South Australian Court of Appeal in *Drummond* has interpreted the new appeal provisions in a manner that is generous to the accused. In particular, it indicated that disclosure violations by the prosecutor, the presentation of false and misleading evidence and the violation of the duties of expert witnesses all may contribute to finding evidence to be fresh in the sense that it could not have with reasonable diligence been adduced at trial.[121] This approach is very helpful to those claiming wrongful convictions because of the prevalence of disclosure violations and misleading expert and other testimony in such cases. *Drummond* gives the accused an incentive to allege that prosecutors, expert witnesses and perhaps others engaged in misconduct or gave misleading evidence and that the accused is now presenting fresh evidence in light of this newly discovered misconduct. This accords with the Australian tendency to view wrongful convictions with a focus on the fault of individual officials.

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[119] *R v Keogh* (No 2) [2014] SASCFC 136; *R v Drummond* (No 2) [2015] SASCFC 82.

[120] *R v Truscott* [2007] ONCA 575; *Re Walsh* [2008] NBCA 33; *R v Henry* [2010] BCCA 462.

[121] Peek J stated: 'when assessing whether defence counsel used reasonable diligence, one must take into account that counsel is entitled to assume that the prosecution will disclose to the defence relevant evidence and material and, *a fortiori*, that the prosecution will not lead false or misleading evidence as part of its case. Further, when making an assessment of whether there was reasonable diligence, the court will extend to an accused great latitude': *R v Drummond (No 2)* [2015] SASCFC 82, [174]. Blue J similarly observed that in determining whether the evidence is fresh 'it is important to understand the duties of an expert witness in proceedings, the duties of disclosure on the prosecution in criminal proceedings and the conditions of admissibility of expert opinion evidence. The duties of an expert witness include providing independent assistance to the court, stating the facts on which his or her opinion is based, stating if his or her opinion is not properly researched and making disclosure of all material matters that affect his or her opinion. The duties of the prosecution include timely disclosure of the evidence it proposes to lead, material that would assist the defence case and in the case of scientific evidence all material matters that affect positively or negatively the scientific case relied on by the prosecution' at [305].

More importantly, however, the generous *Drummond* interpretation breathes life into the new appeal provisions and reduces some of the barriers caused by the fresh evidence requirement.

The new South Australian and Tasmanian second appeal provisions are positive developments in easing the emphasis on finality of convictions. They will be particularly important and effective in case where science has evolved and has cast doubt on older expert evidence that played a role in the original conviction. The second appeal provisions as interpreted in *Drummond* will be useful in cases involving non-disclosure that had the effect of making evidence misleading.

The new appeal provisions are also notable because they represent a legislative transfer of responsibility for correcting wrongful convictions from the executive to the judiciary. As suggested above, the independent judiciary may well be in better position to admit error than the executive. One shortcoming is that the new appeal provisions place the onus on the convicted person to produce fresh and compelling evidence without the assistance of a Criminal Cases Review Commission.

There is a strong case that other Australian states should enact similar provisions to allow for second and subsequent appeals if there is fresh and compelling evidence.[122] This would provide an accused with an alternative route to petitioning the executive. As will be seen, accused in Canada have increasingly used procedures that avoid having to petition the executive even though the Canadian petition procedures are more transparent and accord a petitioner more procedural rights than the Australian petition procedures. In my view, the Canadian Parliament should also consider amending the *Criminal Code* to allow second and subsequent appeals on the basis of fresh and compelling evidence even though Canada does not have comparable provisions that abrogate double jeopardy and allow second prosecutions in cases of fresh and compelling evidence. Such

[122] Bibi Sangha and Robert Moles, above n 100, 6.2.

a second appeal right to benefit the accused but not the prosecutor would reflect the asymmetry of the criminal law as embodied in the presumption of innocence and the reasonable doubt standard. That said, the Canadian petition procedure should also be retained or replaced with a Criminal Cases Review Commission to ensure that those claiming wrongful convictions can in appropriate cases use state powers and resources to discover and obtain new evidence that could lead to convictions being reversed.

F *Petitions*

Both Australia and Canada have so far rejected numerous calls to create an independent Criminal Cases Review Commission to determine whether a new appeal or a new trial should be ordered after ordinary appeals are exhausted. Both countries still allow the executive in the form of Cabinet ministers holding the office of Attorney-General or Minister of Justice to decide petitions for re-opening cases.

1 *Differences Between Australian and Canadian Petition Procedures*

There are, however, some significant differences between the petition procedures in each country. In South Australia, for example, the petition procedure is cast in discretionary terms and allows the Attorney-General to refer an appeal or other matters to the Full Court 'if he thinks fit'.[123] There is even some authority for the proposition that the Minister's decision on a petition is not subject to judicial review.[124] Bibi Sangha and Robert Moles have argued persuasively that such an approach is inconsistent with the rule of law and international human rights and that a decision on a petition should be subject at least to review for unreasonableness.[125] Nevertheless, little

[123] *Criminal Law Consolation Act 1935* (SA) s 369.

[124] *Von Einem v Griffin and Anor* (1998) 72 SASR 110. For a critique of this decision and arguments that decisions on petition could be subject to judicial review see Bibi Sangha and Robert Moles, above n 100, ch 4.

[125] Bibi Sangha and Robert Moles, 'Mercy or Right? Post-Appeal Petitions in Australia' (2012) 14 *Flinders Law Journal* 293.

is known about how petitions in Australia are decided. This lack of transparency has been cited in both South Australia and Tasmania as reasons for creating new procedures for second or subsequent appeals.[126]

Since 2002, the Canadian petition procedure has been more structured than that found in Australian states. The Minister of Justice is required to consider all relevant matters including 'new matters of significance'[127] not previously considered by the courts or the Minister. The reference to 'new matters of significance' is less onerous than the South Australian and Tasmanian provisions that require fresh and compelling evidence. At the same time, the Canadian provision provides that the Minister must assess the relevance and reliability of the new material. The Canadian law also provides that the petition process 'is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy'.[128]

Another difference is related to the constitutional division of powers in each country. In Australia, state Attorneys-General make the decision on a petition. They often will be in a conflict of interest because they or their Cabinet colleagues have responsibility for policing, prosecutions and forensics that may be implicated in the alleged wrongful conviction. In Canada, the federal Minister of Justice has exclusive jurisdiction to decide petitions. The federal Minister of Justice will only be in a direct conflict of interest in the minority of cases where he or she bears ultimate responsibility for criminal prosecutions, largely drug and national security prosecutions and prosecutions in Canada's three northern territories.

The federal Minister of Justice has placed review of petitions in a Criminal Convictions Review Group separate from the other lawyers

[126] Bibi Sangha, 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' in this issue.
[127] *Criminal Code*, RSC 1985, c C-34, s 696.4(a).
[128] Ibid s 696.4(c).

in the federal Department of Justice or the Director of Public Prosecutions. This separate group also has an independent advisor.[129] The Minister has broad investigative powers that can be delegated to outside persons.[130] For example, retired Justice Kaufman was given the power to investigate matters arising from the high profile petition of Stephen Truscott, convicted of murder in 1959. Both the ordinary staff and those delegated by the Minister of Justice have broad powers under the *Inquiries Act* to subpoena any relevant material.[131] These powers are even broader than those of the Criminal Cases Review Commission in England and Wales which can only demand access to relevant material held by public authorities.[132]

The Canadian Minister of Justice can direct a new trial or appeal if satisfied 'that there is a reasonable basis to conclude that a miscarriage of justice likely occurred'.[133] This is a relatively high standard, arguably more onerous than the standard used by the Criminal Cases Review Commission in England and Wales which is based on 'a real possibility'[134] that the conviction would not be sustained on appeal.

The Supreme Court of Canada has recently held that even before the 2002 reforms, petitions decided as part of the royal prerogative of mercy were subject to judicial review, albeit a deferential form of review that would only intervene if the Minister acted in bad faith or with serious recklessness.[135] The Minister of Justice's decision on a petition under the 2002 reforms is subject to more searching

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[129] On the workings of the Canadian system and arguments that it has some of the independence and investigative powers of the Criminal Cases Review Commission in England and Wales see generally Narissa Somji, 'A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom' (2012) 58 *Criminal Law Quarterly* 137.

[130] *Criminal Code*, RSC 1985, c C-34, s 696.2.

[131] *Criminal Code*, RSC 1985, c C-34, ss 696.2(2), (3).

[132] *Criminal Appeal Act 1995* (UK) c 35, s 17.

[133] *Criminal Code*, RSC 1985, c C-34, s 696.3(a).

[134] *Criminal Appeal Act 1995* (UK) c 35, s 13.

[135] *Hinse v Canada (Attorney General)* [2015] SCC 35 in the course of finding the Minister of Justice not liable under the Civil Code of Quebec for rejecting four petitions for pardons from a person wrongfully convicted of robbery in 1964.

reasonableness review.[136] The Supreme Court of Canada has stressed that reasonableness review should also incorporate proportionality principles that animate human rights law.[137]

Attempts to review the federal Minister of Justice's denial of petitions has often been unsuccessful.[138] In *Ross v Canada (Justice)*,[139] however, the Federal Court overturned the Minister's decision to deny a petition in a case relating to fraud convictions. Justice Mosley held that the Minister has applied a wrong and outdated test in focusing on whether the new evidence would have affected the verdict. He explained:

> ... the Minister was bound not only to rely on the Supreme Court jurisprudence as a guide to the exercise of his discretion but to apply the principles set out therein within the framework of the authority granted him by Parliament under s 696.1. Having agreed that the applicable principles to determine the application are those that have been set out by the courts in dealing with the effects of non-disclosure at trial, it was not open to the Minister to apply them erroneously.[140]

Justice Mosley also noted that while the Minister was entitled to reject the advice of the independent person to whom he delegated his investigatory powers:

> The Minister did not interview the witnesses or read the volumes of documents assembled in the investigation. Within the broad range of acceptable outcomes open to him in the exercise of his discretion, it was not open to the Minister to err in his assessment of important material facts.[141]

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136 *Daoulov v Canada (Attorney General)* [2008] FC 544 affirmed [2009] FCA 12; *Jolivet v Canada (Attorney General)* [2011] FC 806; *Bilodeau v Canada (Attorney General)* [2011] FC 886; *Timm v Canada (Attorney General)* [2012] FC 505.

137 *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

138 See, eg, *McArthur v Ontario* (Attorney General) [2012] ONSC 5773.

139 [2014] FC 338.

140 Ibid [47].

141 Ibid [57].

The availability of meaningful judicial review for how the Minster decides a petition does not eliminate all the problems with the petition procedure. It can, however, ensure that the executive applies the proper legal tests and considers relevant evidence in making a decision.

One motivation for the more structured Canadian procedure was a concern that the pre 2002 petition procedure which, like Australian provisions today, simply made reference to petitions for the mercy of the Crown might not survive review under the *Canadian Charter of Rights and Freedoms* because of its lack of procedural fairness. The Canadian approach has been to try to salvage the petition process by making it more transparent and procedurally fairer.

2 *Short-circuiting the Petition Process*

One of the main benefits of the new provisions relating to second appeals in South Australia and Tasmania, and judicial inquiries provisions in NSW and the ACT, is that they allow a person claiming a wrongful conviction to avoid petition procedures which in Australia are opaque and involve direct conflicts of interests. Consistent with the overall theme of this article, these alternatives to petitions have been created in Australia by legislative reform.

Even after the 2002 reforms making petitions more transparent, those who work on behalf of the wrongfully convicted in Canada frequently avoid the petition process. Consistent with a theme of this article, Canadian courts and not parliament have crafted creative means to avoid the petition process.

In a number of Canadian cases, wrongfully convicted persons were able to avoid petitioning the executive because they had not sought leave to appeal to the Supreme Court of Canada after their conviction had been affirmed at the first level of appeal. In a least four cases since 2009, such accused have sought leave to appeal to the Supreme Court even though time limits for such appeal had

expired, sometimes by decades. Their application for leave to appeal has been accompanied by new evidence. In each of these cases, the Supreme Court has without extensive or sometimes any reasons granted leave to appeal and remanded the case back to the Court of Appeal to consider the fresh evidence.[142] Because the Supreme Court judgments in these cases are rendered only by a three judge leave panel generally without reasons, these decisions have largely escaped attention. Nevertheless, they provide an important alternative to a petition to the federal Minister of Justice in those cases where the accused had not yet appealed to the Supreme Court. This approach also means that the Supreme Court need not devote its limited resources to hearing and considering the effects of new evidence. It will be suggested below that a variant of this procedure might be used in Australia.

G *Apex Courts and Fresh Evidence*

The Supreme Court of Canada, unlike the Australian High Court in *Mickelberg v The Queen*,[143] will consider fresh evidence.[144] The Canadian position is an important safeguard and remedy against wrongful convictions. The Australian position in *Mickelberg* is based on an interpretation of the limits of appellate jurisdiction under the Australian Constitution. Even if *Mickelberg* is not overruled, the High Court might consider the Supreme Court of Canada's emerging practice of remanding cases of suspected wrongful convictions back to the Court of Appeal to consider fresh evidence.[145] The High Court has powers to make such orders[146] even if it continues to reject Justice Kirby's arguments both in dissent[147] and extra-judicially[148]

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142 *R v Marquardt* [2009] SCCA 17; *R v White* [2010] ONCA 474; *R v Salmon* [2015] ONCA 469; *R v Dhillion* [2014] BCCA 480.

143 [1989] HCA 35. For criticism of this case see Justice Kirby's dissenting judgment in *Eastman v The Queen* (2000) 203 CLR 1.

144 *R v Trotta* [2007] 3 SCR 453; *R v Hurley* [2010] 1 SCR 637; *R v Hay* [2013] 3 SCR 694; *R v Morin* [1988] 2 SCR 345.

145 *R v Marquardt* [2009] SCCA 17; *R v White* [2010] ONCA 474; *R v Salmon* [2015] ONCA 469; *R v Dhillion* [2014] BCCA 480.

146 *Judiciary Act 1903* (Cth) s 44. See Bibi Sangha, 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' in this issue.

147 *Eastman v The Queen* [2003] HCA 28.

148 Kirby, above n 15, xvii.

that *Mickelberg* should be reconsidered. Indeed, the unsatisfactory nature of the Australian petition procedure makes this approach arguably even more important in Australia than in Canada.

In a few cases, the High Court appears to have already finessed its self-imposed restriction on hearing new evidence. Interestingly both cases have involved an Indigenous person who had been wrongfully convicted. In the Kelvin Condren case, the High Court adjourned its hearing after expressing views that fresh evidence might well mean that Mr Condren should not have been convicted for murder. This work-around was flawed, however, because it ultimately depended on the decision of the executive to grant a new petition.[149] In the Terry Irving case, the High Court appears to have considered fresh evidence that emerged after the first appeal in allowing an appeal and ordering a new trial.[150] This work-around was also flawed because the High Court relied upon a concession by the prosecution that the trial had been unfair. The approach in both cases achieved justice but ultimately depended upon executive decisions that the court could not control.

There is a principled argument that the judiciary is the best institution to take responsibility for considering whether new evidence justifies the re-opening of a criminal conviction. The High Court might eventually revisit its restrictive interpretation of its appellate powers under the *Australian Constitution* in light of growing evidence of the reality of wrongful convictions. The Supreme Court of Canada did something similar when in 2001 it reversed decisions it had reached just a decade earlier and held that because of global recognition of the reality of wrongful convictions, it was no longer constitutional to extradite fugitives to face the death penalty.[151] In other words, there are precedents of courts interpreting

[149] [1989] HCA 35.

[150] Transcript of Proceedings, *Irving v The Queen* [1997] HCA Trans 404 as discussed in Bibi Sangha and Robert Moles, 'Post-appeal Review Rights: Australia, Britain and Canada' (2012) 36 *Criminal Law Journal* 300, 309-10.

[151] *USA v Burns* [2001] 1 SCR 283 effectively changing position taken in *Reference re Ng* [1991] 2 SCR 858.

the constitution in light of growing knowledge about wrongful convictions.

H *Creative Canadian Uses of Bail Pending Petition and Appeal Decisions*

A final example of judicial creativity in Canada in mitigating the shortcomings of the petition process is the decision of courts in a number of cases to grant bail pending a decision by the federal Minister of Justice on a petition application.[152] There is absolutely no statutory basis for such grants of bail. Nevertheless, judges have granted bail in cases where there is a strong prima facie case of a miscarriage of justice. Such decisions recognise that it typically takes years for investigations to be completed by or on behalf by the Minister of Justice. There have also been other cases in Canada where bail has been granted pending regular appeals in miscarriage of justice cases[153] once the Minister of Justice has granted a petition and ordered a new trial.

The Canadian development of bail pending petition decisions by the executive is consistent with the theme expressed in this article that Canadian judges have frequently accepted the reality that wrongful convictions do occur and that they have some degree of responsibility to correct such injustices. The willingness of judges to take matters into their own hands frequently allows the wrongfully convicted to receive their first breath of conditional freedom.

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[152] *R v Phillion* [2003] OJ 3422; *R v Driskell* [2004] MBQB 3; *R v Unger* [2005] MBQB 238; *Ostrowski v The Queen* [2009] MBQB 327; *R v Assoun* [2014] NSSC 419. The procedure was also used in the Wilson Nepoose wrongful conviction discussed in Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' in this issue.

[153] *R v Parsons* [1994] 9754 (NL CA); *R v Morin* (1993) 19 CR (4th) 398 (Ont CA); *R v Baltovich* [2000] 5680 (ON CA).

I *Bail Pending Second Appeals in Australia*

I am not aware of any similar attempt in Australia to seek bail pending a petition to the executive or an application for a judicial inquiry or a second appeal in those states where such procedures are available.

In principle, bail appears to be available pending a second appeal in both South Australia and Tasmania. Section 4(c) of South Australia's *Bail Act 1985* (SA) provides that a person who has been convicted and sentenced can still be eligible for bail if he or she 'has not exhausted all rights of appeal against the conviction or sentence, or to have it reviewed'. Section 415(2) of the Tasmania *Criminal Code Act* 1924 (Tas) sch 1 somewhat similarly simply states that '[t]he Court may, if it thinks fit, on the application of an appellant who has been sentenced to a term of imprisonment by the court of trial, admit him to bail pending the determination of the appeal'.

Although these bail pending appeal provisions were enacted before the second appeal provisions were enacted, it would now be possible to argue that a person seeking a second or subsequent appeal has not exhausted his or her rights of appeal and bail could be granted pending the determination of the appeal. Thus, a convicted person seeking a second appeal might in an appropriate case (for example a strong prima facie strong case of fresh and compelling evidence and little danger of fleeing the jurisdiction or harming others) be granted bail pending a second appeal. That said, bail is a highly discretionary decision. The Canadian willingness to grant bail pending appeals and even petition decisions may be related to the awareness and acceptance of the reality of wrongful convictions discussed in the first part of this article, an awareness that may at present be somewhat lacking in Australia.

IV CONCLUSION

There are many similarities between Australia's and Canada's experience of wrongful convictions, but there are also intriguing differences. Each country can learn something from the other. The Australian judiciary could benefit from appreciating the Canadian judiciary's willingness to recognise the reality of wrongful convictions. In particular, it could learn from the generous Canadian approach in admitting fresh evidence on appeals and granting bail pending appeals or petitions. The Australian High Court might reconsider its unwillingness to consider fresh evidence. More minimally, it could follow the practice of the Supreme Court of Canada of remanding cases to Courts of Appeal to consider fresh evidence.

Conversely, the Canadian Parliament could learn from Australia with respect to legislative regulation of police and prosecutorial practices that contribute to wrongful convictions and in devising statutory procedures that allow the judiciary to assume more responsibility for investigating and correcting wrongful convictions. It is shocking that there are no legislative standards in Canada that require custodial interrogations to be video-taped or that provide for proper identification procedures. The Canadian Parliament should also seriously consider following South Australia and create second or subsequent appeals based on fresh and compelling evidence. That said, Canada should retain its petition procedure because of its powers to compel the production of evidence in cases where the accused cannot access such new evidence. Alternatively, a Canadian Criminal Cases Review Commission should have similar powers to demand the production of relevant evidence from both public and private authorities.

Although many of the causes of wrongful convictions in Australia and Canada are similar, the remedies for wrongful convictions in both countries are influenced by their distinct legal and political cultures. The judiciary has often taken the lead in Canada in trying to prevent and remedy wrongful convictions whereas state legislatures

have taken the lead in Australia. This reflects both the influence of a constitutional bill of rights on Canadian judges and the ability of Australian states to experiment with wrongful conviction reforms. In contrast, criminal law and procedure is a matter of exclusive federal jurisdiction and wrongful convictions have yet to become a salient political issue in Canada.

The Canadian judiciary's recognition of the dangers of false confessions, mistaken identifications, jailhouse informers and the dangers of unreliable expert evidence[154] is admirable. At the same time, ex post case by case decisions do not always produce the clearest standards to guide the police and other criminal justice actors. In addition, such decisions are influenced by the reluctance of courts to exclude evidence. There is greater legislative regulation of police and prosecutorial practices that contribute to wrongful convictions in Australia. At the same time, these standards need to be enforced by the judiciary when breached, if need be by excluding evidence. Ideally, both the legislature and the judiciary would be concerned with remedying wrongful convictions.

With some exceptions, notably the South Australian Court of Appeal's generous approach to second appeals and efforts taken by President Maxwell of the Victorian Court of Appeal with respect to expert evidence, the Australian judiciary seems behind the Canadian judiciary in reforming the law better to prevent and remedy wrongful convictions. Australian prosecutors also seem less sensitive than Canadian prosecutors to the dangers that the use of a *nolle prosequi*

[154] *R v Trochym* [2007] 1 SCR 239 (excluding post-hypnosis evidence because of its unknown reliability and danger of wrongful convictions); *White Burgess Langille Inman v Abbott and Haliburton Co* [2015] 2 SCR 182 (recognising discretionary gatekeeper role in admitting expert evidence though ultimately admitting evidence.) See also Gary Edmond and Kent Roach, 'A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence' (2011) 61 *University of Toronto Law Journal* 343 on the reluctance of courts to exclude expert evidence. On competing approaches to expert evidence in Australian law which consistent with the overall theme of this article often depend on statutory interpretation see Gary Edmond, 'A Closer Look at *Honneysett*: Enhancing our Forensic Science and Medicine Jurisprudence' in this issue.

can deprive wrongfully convicted persons of the benefit of a not guilty verdict. The focus on individual fault in Australian inquiries into wrongful convictions may help explain why Australian judges and prosecutors seem more resistant than Canadian judges and prosecutors in recognising the reality that all justice systems will produce some wrongful convictions.