Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice

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Professor Kent Roach, C.M. is uniquely situated to teach Canadians about the problem of wrongful convictions. As a senior member of the Faculty of Law at the University of Toronto, Roach is Canada's leading scholar on wrongful convictions. During his career, he has worked as counsel or as research director on the Guy Paul Morin Inquiry, the Driskell Inquiry, and the Goudge Inquiry, all concerned with wrongful convictions. He also worked closely with former justices Harry LaForme and Juanita Westmoreland-Traore on the 2022 Miscarriages of Justice Consultation Report. He has written myriad journal articles on topics important to wrongful convictions in Canada and abroad. Roach has also, along with his former colleague, Amanda Carling (now CEO of the BC First Nations Justice Council), created the Canadian Registry of Wrongful Convictions.

Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice ("*Wrongfully Convicted*") is Roach's latest achievement in the field and will have an immense impact. This book is designed to increase public awareness of the causes of wrongful convictions in Canada. With a foreword by James Lockyer, Canada's best-known wrongful conviction counsel, *Wrongfully Convicted* should be required reading for every law student and lawyer in the nation and will be of great interest to anyone concerned about the many harms caused by miscarriages of justice. In it, Roach addresses not only cases involving crimes for which the wrong person was convicted but also the less well-known class of cases in which a person was convicted where no crime was committed at all. He explains that many people have served years in prison for crimes that never in fact occurred. While Canadian-focused, Roach's work has lessons for justice systems around the world.

In *Wrongfully Convicted*, Roach both illuminates what led to the wrongful conviction of those exonerees whose names are familiar to many Canadians and shines a light on many of the lesser-known cases of Canadian wrongful conviction. He also highlights some of the less frequently discussed issues underlying wrongful convictions – for example, the problem of people pleading guilty to crimes they did not commit. Roach observes that wrongful convictions are almost always about reinvestigating the facts of the case and not issues of law, limiting the ability of the appellate courts to identify wrongful convictions in appeals from conviction. David Milgaard, Steven Truscott, and Tomas Yebes, names familiar to most Canadian lawyers, along

with many other exonerees, exhausted the appellate process, yet their wrongful convictions were not identified during those appeals. Roach writes:

> "…wrongful convictions are almost never about the law. They are about human beings making mistakes about the facts. They are sometimes about people cutting their risks in order to receive a lesser sentence, even if they are not guilty or have a valid defence."[1]

In *Wrongfully Convicted,* Roach discusses how errors flowing from areas such as forensic science, eyewitness identification, incentivized witnesses, police "tunnel vision" and interrogation techniques can falsely implicate an innocent person and turn into a wrongful conviction, false guilty plea, or a conviction for a crime which never took place.

Critically, Roach tackles issues rarely addressed in wrongful conviction literature. He comments on: the relationship of juries to wrongful convictions (i.e. that the majority of wrongful convictions occur when the accused is tried by a jury rather than a judge alone); the unfairness suffered by a wrongfully convicted person when exoneration proceedings are not published or do not receive public attention equivalent to the massive coverage of the conviction; the injustice which results from the crown or court entering administrative "stays of proceedings" when a more formal pronouncement of an exoneration is deserved; and the challenges of assessing wrongful convictions for sexual assault.

Perhaps the most significant lesson we learn from Roach, in conjunction with his Registry, involves *who* is being wrongly convicted in this country. The cataloging of wrongful convictions is essential to demonstrating critical trends in the causes of wrongful conviction, the areas of evidence that were used to wrongfully convict, and the background and characteristics of the persons subject to miscarriages of justice. Roach confirms what has been long suspected by those who work in this field, that a person is far more likely to be wrongly convicted if they are poor, racialized, suffer from addictions or mental health issues, have cognitive deficiencies, or are affected by a combination of these factors. Each of these issues on their own can lead to individuals being initially suspected of a crime by the police or witnesses, having increased susceptibility to suggestion in stressful police interviews, more readily admitting guilt in the hopes of getting out of custody, or being wrongfully convicted by prejudiced triers of fact.

In addition to tackling false guilty plea cases and no-crime wrongful convictions, Roach examines the more familiar "who done it?" wrongful convictions**.** When a crime is committed and the police or a witness identify the wrong person as the perpetrator, "safeguards" we think are built into the justice system can fail and the wrong person is convicted. These failings can include the police focusing only on evidence that confirms their conclusion that the accused is the perpetrator, relying on witnesses who are receiving significant benefits in exchange for their testimony, exerting pressure on suspects to confess to a crime, conducting an incomplete investigation, and not providing critical investigative findings to the defence. These problems not only lead to

[1] Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice* (Toronto: Simon & Schuster Canada, 2023) at xxviii.

wrongful convictions but also may leave the actual perpetrator free and emboldened to commit further crimes.

As Roach observes, not all wrongful convictions will be caught through DNA analysis. Fewer than 20% of convictions in our courts involve DNA. Moreover, DNA interpretation can be subjective and susceptible to human error. Sometimes the presence of DNA on a suspect has an innocent explanation. In terms of prevention or wrongful conviction, however, DNA plays an important role. Roach notes an oft-reported (in wrongful conviction spheres) FBI study in which DNA analysis revealed that the police had the wrong suspect in a remarkable 25% of investigations. Because many of the factors leading to wrongful conviction are the result of human behaviour, studies between jurisdictions are often comparable.

As with cases involving false guilty pleas, in the "who done it" cases Indigenous accused face particular challenges. Roach's Registry revealed that 19% of the identified wrongful convictions in Canada are of Indigenous people. With Indigenous people making up only 5% of the Canadian population, they are over three times more likely to be wrongly convicted than the non-Indigenous population. While that figure by itself is startling, Roach asks, "How many more Indigenous people have been wrongly convicted that don't have the money, support, or faith in the system to go through the long process of correcting their wrongful convictions."[2]

Roach documents the little-known cases of Indigenous accused persons Willie Nepoose and Connie Oakes. Nepoose was subjected to an inhumanely long police interrogation despite suffering from cognitive deficiencies. Tunnel vision led to a poor investigation in which exculpatory information was not disclosed to the defence, witnesses were pressured to provide inculpatory information, and alternative suspects were not investigated. Despite an alibi and no forensic evidence tying him to the crime, Nepoose was convicted by an all-white jury. The Justice Minister at the time, Kim Campbell, sent the matter back to the courts for a new appeal finding that there was a possibility of a miscarriage of justice. The Alberta Court of Appeal sent the case to a special commissioner who ultimately ordered a new trial. Eventually, the prosecution stayed proceedings ending the matter for Nepoose but, like many of the wrongly convicted, he did not get the acquittal he deserved.

Roach uses the Nepoose case to highlight many ways in which the justice system can fail Indigenous accused persons, but he also focuses on how the poor investigation in Nepoose's case failed the Indigenous victim and on the justice system's tendency not to believe Indigenous accused and witnesses:

> "The common denominator in these and other cases, including those of William Mullins-Johnson, Tammy Marquardt, and James Turpin (chapter 4), is that judges or juries simply did not believe the Indigenous people who testified before them. Wrongful convictions generally revolve around factual, not legal errors. The facts often depend on who the trial judge or jury believes."[3]

[2] *Ibid*, 154.

[3] *Ibid,* 162.

Factual errors to do with credibility pose a very significant problem in our justice system. Trial judges will instruct jurors to be particularly cautious with Crown witnesses with serious credibility or reliability issues, but Roach notes that psychological studies indicate that jury instructions may be ineffective. Further, appellate courts usually defer to the credibility findings in the trial courts. Many wrongful convictions have occurred where judges have *properly* instructed juries.

"Thinking dirty" is a catchy turn of phrase used by Roach throughout *Wrongfully Convicted*. Roach refers to the tendency of the police to focus on a particular suspect or an accused to the exclusion of all other possible suspects. In criminal law, this highly problematic phenomenon is often referred to as "tunnel vision". Psychologists call it "confirmation bias." It is a critical concept to understand when reviewing cases of wrongful conviction because one is often able to identify important aspects of the investigation that were missed due to a hyper-focus on the suspect. Roach notes that almost all of Canada's public inquiries examining wrongful convictions have identified tunnel vision as a problem leading to the conviction. However, he emphasizes that many justice system participants continue to misunderstand tunnel vision because they characterize it as a type of police misconduct, whereas it is a natural, unconscious brain process that helps people organize information. If incoming information does not fit with one's beliefs and expectations, it is frequently and unconsciously discarded. The insidious workings of tunnel vision are readily apparent in Glen Assoun's case where four alternative suspects were not considered. To combat the problem, Roach recommends various mechanisms to cast the net wider during police investigations and prosecutions. Police should thoroughly investigate alternative suspects and their alleged alibis, find ways to avoid "groupthink" during investigations, take more thorough notes and have better systems to retain them, give prosecutors access to the entire investigative file to help identify relevant information, and introduce an independent "contrarian" to challenge the prevailing police theory about the identity of the suspect. If new exculpatory information comes to light after the person is convicted, the police should recognize that wrongful conviction is a possibility and investigate the new information. Roach notes a conversation he once had with one of the early leaders of the Innocence Movement who wisely noted that much of the work in uncovering wrongful convictions is the work that should have been done in the original investigation.

A justice system can never eliminate wrong convictions. While acknowledging this inevitability, Roach doesn't leave readers disillusioned and instead provides a roadmap for progress (as part of *Wrongfully Convicted*'s subtitle suggests - "*What Canada Must Do to Safeguard Justice*"). First, we need to implement the recommendations from Canada's many wrongful conviction inquiries to prevent wrongful convictions; and second, we need robust systems for review and remedy where we suspect and uncover wrongful convictions. The current post-conviction review regime under s. 696.1 of the *Criminal Code* lacks independence, is plagued by delay, and is too narrow in its scope. Roach repeatedly observes that even Texas is doing better than Canada in terms of addressing the problem of wrongful convictions.

Roach also offers a host of specific ways to reduce the risk of wrongful convictions, including how to address issues of cross-racial identification (now a well-known phenomenon identified by psychologists), improving how the police administer photo lineups, allowing experts to help us understand how the human brain processes facial recognition, finding better ways to

protect our justice system from incentivized witnesses who are seeking critical benefits for their false testimony, and using interrogation techniques which are less likely to create a false confession. Roach hits every issue requiring consideration in discussing the common causes of wrongful conviction.

Finally, Roach notes that Canada is behind the United States in terms of reforming our forensic science regimes. Texas has a nine-member Forensic Science Commission, and Canada has no equivalent. A 2013 University of Toronto report recommending more research, education, and increased regulation in this area has not resulted in action. Roach discusses four public inquiries in Ontario identifying wrongful convictions in which Canadian forensic scientists had either overstated conclusions, relied on unreliable testing, or lacked the appropriate forensic training to give evidence in a particular area. Because so many in the criminal justice system face myriad social and economic barriers, one lawyer cited by Roach referred to forensic science as "poor people's science" – "good enough to convict the usual suspects", even though it may not have been subject to thorough research, repeated testing, and best practices in quality control".[4] Science evolves, sometimes quickly, yet the law is often insufficiently nimble to keep pace. The debunking of what was once known as "Shaken Baby Syndrome", a diagnosis that has led to many wrongful convictions of parents or caregivers following the death of a child, highlights the weakness of forensic science and the law's insufficient caution in placing reliance upon it. The justice system, Roach argues, must do more to correct errors when our understanding of a particular area of science has changed and now supports a valid claim of innocence.

Roach's identification of the problems in the Canadian justice system leading to wrongful conviction and his recommendations for systemic change are comprehensive and thoroughly studied. Those who work in post-conviction review see daily the wisdom of Roach's recommendations. The barriers to proving innocence currently facing the wrongly convicted are often insurmountable and Roach's examination of the cases in the Registry illustrates the many problems that can arise as a post-conviction review case unfolds. When innocence organizations initially determine to examine a case, they first must find the case materials – from the applicant, from court registries, from the crown, from forensic labs, and from the police. This is often a multi-year process, in which lawyers and advocates face the problem of evidence retention that Roach addresses in the final chapters of the book. In numerous cases, evidence that could have determined guilt or innocence has been lost or destroyed. This is a frustrating and all too common reality for the wrongly convicted. Roach cites the Milgaard case as a compelling justification for the need for retention. Had a clerk who believed in Milgaard's innocence not taken special care to preserve the DNA evidence that ultimately led to the identification of the real perpetrator, Milgaard may never have been exonerated. Roach uses the case of Leighton Hay, a lesser-known Canadian wrongful conviction, to illustrate that even retention will not, on its own, be a sufficient reform if the state is not willing to release and re-test evidence when questions are raised about a potential wrongful conviction. In Hay's case, the applicable science had evolved and retention and retesting of hair exhibits set Mr. Hay free.

Further, even if one obtains the key evidence, getting that evidence before the court can be very difficult. Roach invites readers to think about wrongful conviction reform initiatives in other

[4] *Ibid,* 225.

jurisdictions which have implemented changes to the appeals process such as employing a different standard of review on appeal, or perhaps allowing second appeals as is now done in Australia. Roach makes a strong case for change, identifying the many problems with the current post-conviction review regime under the *Criminal Code*, and comparing our low case review rate to those in other jurisdictions. Additionally, Roach suggests that our current conviction review process works best if one is white and male; only one black man, one Indigenous man, and no women are among those for whom the Minister has granted a remedy. The barriers in the application process might explain why so few people apply for conviction review and therefore, why so few wrongful convictions are exposed.

Having worked in this area for so many years, Roach could not have chosen a better example than his recounting of one federal official's comments at the Milgaard Inquiry. He aptly stated, "Currently, one could not say to the Minister 'I'm innocent. I'd like you to investigate. I don't know what went wrong.'"[5]Yet that is the position in which so many of the wrongly convicted find themselves. In Canada, we have had a number of cases where the wrongful conviction applicants have applied to the Project after already having unsuccessfully applied to the Minister. All that these applicants know is that they are innocent, and they have no idea how they came to be wrongful convicted. In DNA cases, they don't know how their DNA could have ended up where it was found (perhaps not knowing about issues such as secondary DNA transfer or the possibility of a false positive match) or, in other cases, how an expert could have concluded they shook their baby to death (not knowing that the science now shows that short falls can cause the same symptoms). Sometimes this lack of knowledge can lead to applicants having what can be viewed as far-fetched theories about the police planting evidence. Most of the time, people don't appreciate the frailties of forensic science in criminal cases.

At the time this book review is being drafted, Bill C-40 (also known as the Joyce and David Milgaard Act), is being debated, clause-by-clause, by Canada's House of Commons Standing Committee on Justice and Human Rights. The proposed legislation was drafted in response to the vital work that Roach and former justices LaForme and Westmoreland-Traore put into the Miscarriages of Justice Commission consultation process and report. The Bill aims to improve the process of wrongful conviction review in Canada. As Roach writes: "New legislation to establish a new Commission has the potential to be the most important law reform with respect to wrongful convictions in a generation." As he had much to do with the creation of this Bill, in the final chapters of *Wrongfully Convicted* Roach discusses the extensive recommendations that they made following the consultation process. These recommendations were the result of over 215 submissions from many of the stakeholders in the wrongful convictions review process. Roach describes these recommendations and explains the reasons behind them.

Some of the report's key recommendations include: 1) that any new Commission should have strong powers of investigation, 2) that the budget of the Commission be sufficient to allow the necessary work to be conducted, and 3) that those who have not exhausted their appeal process should have access to the Commission to help them identify what might have gone wrong. Roach and the team also made recommendations involving the structure of the Commission, its referral and appeal powers, and the need for the Commission's work to include outreach and support.

[5] *Ibid*, 257.

Wrongfully Convicted is the culmination of much of Roach's career studying the problem of Canadian wrongful convictions. He delivers the "lessons learned" in a highly accessible format that will be of interest to any reader interested in justice. It is a book that has its finger on the pulse of the criminal justice system in Canada and exposes the truth about its frailties, too many of which have been left uncorrected for far too long. Many lives have been ruined by our acceptance of the status quo despite numerous governmental inquiries and academic studies revealing a better path to exposing and preventing miscarriages of justice. *Wrongfully Convicted* charts a better path for our justice system and all justice system participants should give it their careful review.