

**Conviction Integrity:
The Canadian Miscarriages of Justice Commission**

Carrie Leonetti
Associate Professor, School of Law
University of Auckland
New Zealand

Recently, the Canadian Government has committed to creating an independent Canadian Criminal Cases Review Commission. Minister Lametti initiated a consultation process with stakeholders, led by Justice Harry S. LaForme of the Ontario Court of Appeal and assisted by retired Judge Juanita Westmoreland-Traoré of the Court of Quebec, to precede the implementation of the Commission. The resulting report recommends a visionary innocence commission for Canada that is more independent, better funded, more systematic, proactive, and inclusive, has scope to review far more potential miscarriages of justice, and has broader referral grounds and more remedies than existing innocence commissions in other countries. Hopefully, the Canadian Government will seize this singular opportunity to implement a monument to justice and place Canada as the global leader in addressing wrongful convictions.

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I Background

In 1989, the Commission of Inquiry into the wrongful murder conviction of seventeen-year-old Donald Marshall recommended the creation of an independent innocence commission.¹ The Commission noted that the ministerial referral of Marshall’s case for a new appeal “left Marshall with the burden of preparing and presenting the case to prove his own innocence. This reinforced the adversarial nature of an appeal and . . . precluded a complete examination of why the wrongful conviction occurred.”²

In 2001, an inquiry into Thomas Sophonow’s wrongful conviction, led by Supreme Court Justice Peter Cory, repeated this recommendation to create an independent commission to replace the Ministerial review that is a vestige of the royal prerogative of mercy.³

¹ Hon Harry LaForme & Hon Juanita Westmoreland-Traoré, “A Miscarriages of Justice Commission” (2022) at 16, online: *Department of Justice Canada* <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html>>.

² *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queen’s Printer, 1989) at 158.

³ LaForme & Westmoreland-Traoré, *supra* note 1 at 34; Colin Perkel, “Creation of Wrongful Conviction Review Board Edging Closer to Reality”, (1 Mar 2020), online: *CBC*

In 2002, the government created a review mechanism for postconviction claims of wrongful conviction, which enlarged the scope of review power of the Minister of Justice on applications for mercy and clemency.⁴ The legislation also created a Criminal Conviction Review Group (CCRG) within the Department of Justice to review and investigate applications and make recommendations to the Minister, but the federal Minister of Justice still held the power to make the final decision regarding whether to grant relief.⁵

These reforms disappointed advocates who had hoped that the government would follow the recommendations of the public inquiries for an innocence commission.⁶ The long struggle to create an independent commission in Canada has generated distrust among those seeking remedies for miscarriages of justice.⁷

In 2008, a commission of inquiry into David Milgaard's wrongful conviction concluded that the current ministerial review process was "reactive" and placed too heavy an onus on the wrongfully convicted.⁸ In total, all seven public inquiries into miscarriages of justice in Canada have urged the creation of an independent innocence commission without success until now.⁹

One driving force behind reform is the concern about the significant overrepresentation of Indigenous and Black Canadians in prison and underrepresentation among the exonerated.¹⁰ Indigenous Canadians comprise approximately five percent of the Canadian population but 30 percent of the prison population.¹¹ Overrepresentation is even higher for Indigenous women and youth.¹² Of the 20 cases that the Minister of Justice has referred to the courts for review over the past 20 years, all were men and 18 were white.¹³

Recently, the Canadian federal government has committed to creating an independent Canadian Criminal Cases Review Commission (CCCRC). On December 13, 2019, David Lametti, the Minister of Justice and Attorney General of Canada, was mandated to establish an independent CCRC to improve the process for assessing applications from potentially wrongfully convicted

<https://www.cbc.ca/news/canada/toronto/ont-wrongful-convictions-1.5481608>.

⁴ Carrie Leonetti, "The Innocence Checklist" (2021) 58 Am Crim L Rev 97 at 117; Kent Roach, "Exceptional Procedures to Correct Miscarriages of Justice in Common Law Systems" in Darryl K Brown et al, eds, *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019) at 962-963 [Roach, "Exceptional Procedures"].

⁵ "Criminal Conviction Review" (last visited 23 Aug 2022), online: *Government of Canada* <<https://www.justice.gc.ca/eng/cj-jp/ccr-rc/index.html>>; LaForme & Westmoreland-Traoré, *supra* note 1 at 51; Roach, "Exceptional Procedures", *supra* note 4 at 981.

⁶ Roach, "Exceptional Procedures", *supra* note 4 at 981.

⁷ LaForme & Westmoreland-Traoré, *supra* note 1 at 46.

⁸ *Ibid* at 39.

⁹ Leonetti, *supra* note 4 at 117.

¹⁰ LaForme & Westmoreland-Traoré, *supra* note 1 at 17, 31-32, 190.

¹¹ *Ibid* at 26, 59-60.

¹² *Ibid* at 26, 66.

¹³ *Ibid* at 6, 17, 31, 59, 190.

persons.¹⁴ The CCCRC will consider claims of wrongful conviction that have not been remedied by the courts. The CCCRC is intended to change fundamentally the way that wrongful convictions are addressed in Canada by removing the power to review claims of wrongful conviction from the federal Minister of Justice and transferring it to an independent body.¹⁵

Minister Lametti initiated a consultation process with stakeholders, led by Justice Harry S. LaForme of the Ontario Court of Appeal and assisted by retired Judge Juanita Westmoreland-Traoré of the Court of Quebec, to precede the implementation of the CCCRC.¹⁶ Stakeholders included prosecutors, police, judges, the defence bar, academics, legal-aid officials, victims' advocates, forensic scientists, and exonerees.¹⁷ The process also included consultation with representatives from existing innocence commissions in the United Kingdom (UK), Scotland, Norway, North Carolina, and New Zealand. A detailed consultation document was issued on June 18, 2021.¹⁸

The resulting report recommends a visionary innocence commission for Canada that is more independent, better funded, more systematic, proactive, and inclusive, has scope to review far more potential miscarriages of justice, and has broader referral grounds and more remedies than existing innocence commissions in other countries. It is a detailed blueprint for a transformational CCCRC.

II The Status Quo: Ministerial Review

Canada still relies on a traditional, discretionary ministerial review process to remedy miscarriages of justice, through which applicants can apply to the federal Minister of Justice for a remedy. The Minister can refer possible miscarriages of justice back to the provincial courts of appeal for review or ask an appellate court to answer specific questions relating to an application for review.¹⁹ The ministerial process dates back to 1892, although the grounds for relief were considerably narrowed in 2002.²⁰ The Minister of Justice has the authority to order a new trial or to refer the matter for a new appeal to the Court of Appeal in the appropriate province or territory.²¹ The present CCRG is funded through a revolving fund budget process that does not constrain its work.²²

¹⁴ Mandate Letter from Minister of Justice David Lametti to Hon. Harry S. LaForme, 16 Dec 2020 (on file with Author), online: <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-justice-and-attorney-general-canada-mandate-letter>.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ LaForme & Westmoreland-Traoré, *supra* note 1 at 5.

¹⁸ Consultation on a Criminal Cases Review Commission for Canada, online: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html>.

¹⁹ "Criminal Conviction Review", *supra* note 5.

²⁰ LaForme & Westmoreland-Traoré, *supra* note 1 at 48-49.

²¹ "Criminal Conviction Review", *supra* note 5.

²² LaForme & Westmoreland-Traoré, *supra* note 1 at 7.

The ministerial process involves exceptional requests for an extraordinary and highly discretionary remedy that derives from the royal prerogative of mercy.²³ The Minister *may* make a referral to a provincial Court of Appeal or order a new trial if there is a reasonable basis to conclude that a miscarriage of justice *likely* occurred, a discretionary determination that requires a finding that a miscarriage of justice probably happened.²⁴

The ministerial process places a heavy burden on applicants.²⁵ It has limited investigative powers and is solely application driven.²⁶ The Minister of Justice does not conduct a proactive investigation on receipt of an application, but rather relies on the applicant, lacking in investigative expertise, to identify the grounds for an alleged miscarriage of justice.²⁷ The CCRG does not have access to the Minister's powers to compel the production of documents or the answering of questions until an application moves to a formal investigation.²⁸ At the early phases of review, it must rely on the voluntary cooperation of police, prosecutors, and potential witnesses.²⁹ Ministerial review can take years to resolve.³⁰

The Minister will not exercise the discretion to order a new trial or appeal in the absence of new and significant evidence.³¹ The Minister is unlikely to order an investigation unless the application identifies new matters of significance.³² Most applications are denied after the preliminary assessment.³³

The CCRG devotes most of its resources to processing the applications that it receives.³⁴ It currently receives fewer than twenty applications per year – sometimes, considerably fewer.³⁵ Over the past 40 years, the Minister of Justice has decided 91 applications and sent 29 cases back to the courts, including that of Milgaard, who spent 23 years in prison for a murder that he did not commit.³⁶ There have been 20 referrals since 2002. Eight were for new trials; 12 were for new appeals.³⁷ All 20 successful applicants were represented by counsel.³⁸

²³ *Ibid* at 50, 58; Roach, “Exceptional Procedures”, *supra* note 4 at 982-983.

²⁴ *Criminal Code*, RSC 1985, c C-46, s 696.3.

²⁵ LaForme & Westmoreland-Traoré, *supra* note 1 at 52.

²⁶ *Ibid* at 34-35.

²⁷ *Roberts v British Columbia (Attorney General)*, 2021 BCCA 346 at para 58.

²⁸ LaForme & Westmoreland-Traoré, *supra* note 1 at 52.

²⁹ *Ibid*.

³⁰ Roach, “Exceptional Procedures”, *supra* note 4 at 981.

³¹ *Albon v Ontario*, 2019 ONSC 3372 at para 112.

³² *Roberts*, *supra* note 27 at para 57.

³³ LaForme & Westmoreland-Traoré, *supra* note 1 at 53.

³⁴ *Ibid* at 39.

³⁵ *Ibid* at 35.

³⁶ Perkel, *supra* note 3; Roach, “Exceptional Procedures”, *supra* note 4 at 982.

³⁷ LaForme & Westmoreland-Traoré, *supra* note 1 at 53.

³⁸ *Ibid* at 58-59.

Almost all referrals have resulted in the conviction being overturned or dismissed.³⁹ This suggests that the Minister has only referred relatively clear miscarriages of justice back to the courts.⁴⁰ Experts believe that the 29 referrals likely represent a small fraction of actual wrongful convictions in Canada.⁴¹ As the LaForme and Westmoreland-Traoré report notes, “they are the tip of the iceberg.”⁴²

III International Comparison of Independent Review Bodies

A. The UKCCRC

From 1989 to 1992, the British Home Secretary referred twenty-eight cases involving forty-nine people to the Court of Appeal, including the Guildford Four, Birmingham Six, and Maguire Seven cases, which involved wrongful convictions and police misconduct by the notorious West Midlands Serious Crime Squad.⁴³ In 1993, the Royal Commission on Criminal Justice (the Runciman Commission) recommended the creation of an independent and proactive innocence commission to replace the previous discretionary system of ministerial referrals.⁴⁴ The Commission concluded that the Home Secretary’s role as part of the political executive in the cabinet and the minister responsible for criminal justice and policing was “incompatible” with the constitutional separation of powers between the courts and the executive.⁴⁵

The UKCCRC was created in 1995 and has been operating since 1997.⁴⁶ It examines putative miscarriages of justice in England, Wales, and Northern Island. It was the first independent public body in the world responsible for reviewing alleged miscarriages of justice and sending meritorious claims back to the Court of Appeal for further review.⁴⁷ It can obtain new expert reports and appoint investigating police officers to obtain new evidence.⁴⁸ It has 12 commissioners and makes referral decisions in three-member panels.⁴⁹ It does not have the power to reverse convictions. Instead, a referral functions as a grant of leave to appeal to the Court of Appeal.⁵⁰

³⁹ *Ibid* at 41, 58; Roach, “Exceptional Procedures”, *supra* note 4 at 983.

⁴⁰ *Ibid*.

⁴¹ Perkel, *supra* note 3.

⁴² LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

⁴³ Roach, “Exceptional Procedures”, *supra* note 4 at 963.

⁴⁴ *Ibid*; LaForme & Westmoreland-Traoré, *supra* note 1 at 32.

⁴⁵ “Report of the Royal Commission on Criminal Justice” (1993) at 181, online:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf [“Runciman Commission Report”].

⁴⁶ LaForme & Westmoreland-Traoré, *supra* note 1 at 32; Roach, “Exceptional Procedures”, *supra* note 4 at 961-963.

⁴⁷ Leonetti, *supra* note 4 at 116.

⁴⁸ Roach, “Exceptional Procedures”, *supra* note 4 at 964.

⁴⁹ *Criminal Appeal Act*, 1995, c. 35 (UK).

⁵⁰ “Welcome to the Criminal Cases Review Commission” (last visited 26 Sept 2022), online: [CCRC](https://ccrc.gov.uk) <https://ccrc.gov.uk>.

Since its creation, the UKCCRC has been the subject of criticisms that it has not done enough to remedy wrongful convictions in the UK. Some of these criticisms stem from the fact that it cannot overturn convictions that it deems unsafe or admit fresh evidence.⁵¹ Others have complained that it does not show enough concern for factual innocence.⁵² Others have complained that it has not made proposals for systemic policy reforms to prevent future miscarriages of justice, as contemplated by the Runciman Commission.⁵³

The UKCCRC refers relatively few applications to the courts, fewer than three per cent of the approximately 1400 applications that it reviews per year.⁵⁴ While referrals require the assent of three commissioners, a single commissioner can reject an application.⁵⁵ Approximately two thirds of the appeals resulting from UKCCRC referrals have been allowed by the Court of Appeal.⁵⁶ While this may seem like a high rate of “success” for the UKCCRC, it could also indicate that the Commission is not referring enough cases to the Court of Appeal for reconsideration.

Few of the cases that the UKCCRC has referred to the Court of Appeal have involved actual innocence.⁵⁷ Instead, the referrals have largely involved claims of procedural injustice, diminished responsibility, police misconduct, and witness reliability.⁵⁸

B. The Scotland CCRC (SCCRC)

The SCCRC was established in 1999 and is structured similarly to the UKCCRC.⁵⁹ It has a chief executive, seven commissioners, and several legal officers.⁶⁰

Unlike the UKCCRC, the SCCRC does not have the authority to grant leave to appeal. Instead, the Court of Appeal retains the power to reject a referral if it deems that the appeal is not in the interests of justice.⁶¹

⁵¹ Laforme & Westmoreland-Traoré, *supra* note 1 at 32.

⁵² Michael Naughton, *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* (London, UK: Palgrave Macmillan, 2013) [Naughton, *The Innocent*]; Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (London, UK: Palgrave Macmillan, 2010).

⁵³ Roach, “Exceptional Procedures”, *supra* note 4 at 969; Kent Roach, “The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?” (2010) 85 Chi-Kent L Rev 89.

⁵⁴ “Facts and figures” (last visited 10 Sep 2022), online: CCRC <<https://ccrc.gov.uk/facts-figures>>.

⁵⁵ *Criminal Appeal Act*, *supra* note 49.

⁵⁶ Laforme & Westmoreland-Traoré, *supra* note 1 at 58; Roach, “Exceptional Procedures”, *supra* note 4 at 967.

⁵⁷ Roach, “Exceptional Procedures”, *supra* note 4 at 968.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 970; Laforme & Westmoreland-Traoré, *supra* note 1 at 34.

⁶⁰ “Annual Report 2017-2018” (2018) at 8, online: SCCRC <<https://irp-cdn.multiscreensite.com/8f56052e/files/uploaded/SCCRC%20-%202017-18%20Annual%20Report%20-%20Final%20%28Online%20Version%29.pdf>>.

⁶¹ *Criminal Procedure (Scotland) Act*, 1995, c. 46 (UK), s 194DA (2).

The SCCRC receives approximately 300 applications per year.⁶² Since 1999, it has received almost 3000 applications and referred 85 convictions back to the courts as probable wrongful convictions, of which 41 have been quashed.⁶³ Its referral rate is higher than that of the UKCCRC at 5.4%, but its success rate is lower at less than 50%.⁶⁴ These figures suggest that the SCCRC is more aggressive than the UKCCRC at referring cases to the Court of Appeal.

The SCCRC has been more active than the UKCCRC on systemic issues. It has commissioned and published research on a range of systemic justice topics, including the correlation between legal representation for applicants in the SCCRC and referrals back to the courts.⁶⁵

Nonetheless, like the UKCCRC, the SCCRC has been criticized for being too conservative and dependent on the views of the Court of Appeal and the Commission's criminal-justice insiders rather than acting independently and pushing the courts to reform.⁶⁶

C. The Norway CCRC (NorCCRC)

Norway established the NorCCRC in 2004.⁶⁷ It is supposed to operate completely independently of the political and legal systems and is not bound by High Court rulings in particular cases.⁶⁸ It has the power to investigate and reopen criminal cases in which there may have been a wrongful conviction.⁶⁹ As long as there is new evidence not presented previously, there is no limit to the number of times that an application may be filed with the NorCCRC in a given case.⁷⁰ When the NorCCRC reopens a case, it refers it for retrial to a court district other than the district that imposed the original conviction.⁷¹

⁶² Laforme & Westmoreland-Traoré, *supra* note 1 at 56.

⁶³ *Ibid* at 57.

⁶⁴ Roach, "Exceptional Procedure", *supra* note 4 at 973.

⁶⁵ *Ibid*.

⁶⁶ James Chalmers & Fiona Leverick, "The Scottish Criminal Cases Review Commission and Its Referrals to the Appeal Court: The First 10 Years" (2010) 8 Crim L R 608; Stephanie Roberts & Lynne Weathered, "Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission" (2009) 29 OJLS 43 at 58.

⁶⁷ Ulf Stridbeck & Philos Svein Magnussen, "Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission" (2012) 80 U Cin L Rev 1373 at 1381. The Norwegian justice system is quite different to the justice system in the other comparator jurisdictions reviewed here. Unlike much of Europe, Norway has a party-led adversarial system of criminal justice and a majority of judges are lay jurors. Like most European inquisitorial systems, however, plea bargaining is forbidden in Norway. All criminal cases are tried before a judge, and there is no way to circumvent trial through guilty plea; *ibid* at 1375.

⁶⁸ *Ibid* at 1381.

⁶⁹ *Ibid* at 1374.

⁷⁰ *Ibid* at 1389.

⁷¹ *Ibid* at 1383.

The NorCCRC has five commissioners, with a mix of three who are legally trained and two who are not, appointed in three-year terms.⁷² It receives between 150-300 applications per year and has reopened 351 cases since 2004.⁷³ It primarily focuses on fresh evidence: new medical or psychiatric evidence, a confession by an alternate suspect, or new witnesses.⁷⁴

The administrative staff includes two investigators with police training and seven legally trained investigators, and it also has the power to recruit extra police investigators for individual cases.⁷⁵ The NorCCRC can appoint expert witnesses and defense lawyers at public expense during the post-conviction review process.⁷⁶

D. Virginia and North Carolina

Virginia and North Carolina are the two American states that have had innocence commissions.⁷⁷ The North Carolina Innocence Inquiry Commission (NCIIC) was the first innocence commission in the United States.⁷⁸ It was created in 2006.⁷⁹ The eight-member Commission reviews claims of factual innocence and investigates those that meet certain criteria.⁸⁰ After investigation, it decides whether to transfer the claim to a special panel of three judges with no prior involvement in the case for an adversary proceeding.⁸¹ The judicial panel can vacate convictions and charges.⁸²

The NCIIC receives approximately 200 applications per year.⁸³ It has referred 19 cases involving 27 convicted people for judicial review, less than one percent of the applications that it has reviewed.⁸⁴

⁷² Laforme & Westmoreland-Traoré, *supra* note 1 at 69; Stridbeck & Magnussen, *supra* note 67 at 1381.

⁷³ Laforme & Westmoreland-Traoré, *supra* note 1 at 56-57.

⁷⁴ Stridbeck & Magnussen, *supra* note 67 at 1374.

⁷⁵ *Ibid* at 1381.

⁷⁶ *Ibid* at 1382.

⁷⁷ Jon B Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System* (New York: NYU Press, 2008).

⁷⁸ Christine C Mumma, "The North Carolina Innocence Inquiry Commission: Catching Cases That Fall Through the Cracks" in Marvin Zalman & Julia Carrano, eds, *Wrongful Conviction and Criminal Justice Reform: Making Justice* (London, UK: Routledge, 2014) at 255.

⁷⁹ Roach, "Exceptional Procedures", *supra* note 4 at 962.

⁸⁰ Nancy J King, "Judicial Review: Appeals and Postconviction Proceedings" in Allison D Redlich et al, eds, *Examining Wrongful Convictions* (Durham, NC: Carolina Academic Press, 2014) at 229.

⁸¹ Roach, "Exceptional Procedures", *supra* note 4 at 977.

⁸² King, *supra* note 80 at 229.

⁸³ King, *supra* note 80 at 229; LaForme & Westmoreland-Traoré, *supra* note 1 at 56; Roach, "Exceptional Procedures", *supra* note 4 at 976.

⁸⁴ LaForme & Westmoreland-Traoré, *supra* note 1 at 57; Roach, "Exceptional Procedures", *supra* note 4 at 976.

The NCIIC considers only claims of actual innocence and uses a “factual innocence” test for referring cases.⁸⁵ Most claims are rejected because the applicant has no fresh evidence, there is no evidence of innocence, or the claimant did not claim factual innocence.⁸⁶ Conversely, most exonerations have involved DNA analysis or other forms of fresh forensic evidence.⁸⁷

Since the inception of the NCIIC, ten applicants have been exonerated as factually innocent.⁸⁸ Because of the high standard for referral and reliance on fresh evidence, in cases in which the NCIIC makes a referral to the judicial panel, the State often concedes that a conviction should be overturned.⁸⁹

The creation of the NCIIC was followed by the creation of the Innocence Commission for Virginia (ICVA). The ICVA was not a CCRC. It was not a governmental entity, but rather it was a privately funded innocence reform commission. It was a time-limited organization primarily focused on the study of wrongful convictions, based on case investigations and legal research.⁹⁰ It lacked the powers to compel evidence and enact reform.⁹¹ It was sponsored by the Innocence Project of the National Capital Region (IPNCR) (now the Mid-Atlantic Innocence Project), the Administration of Justice Program at George Mason University, and the Constitution Project.⁹² It was supported by pro bono contributions from large law firms.⁹³ Its staff were volunteers and served without compensation.⁹⁴ It examined only official exonerations (i.e., cases in which the defendant’s conviction was overturned by a governor’s pardon or a court order or in which prosecutors conceded that the wrong person had been convicted).⁹⁵ It did not examine matters of legal error or procedural injustice, only cases involving factual innocence, in part because of a calculation that “‘legal technicalities’ were less likely to generate public concern than were factual exonerations.”⁹⁶ It released its report in 2005 after 18 months of investigation.⁹⁷

⁸⁵ LaForme & Westmoreland-Traoré, *supra* note 1 at 15; Roach, “Exceptional Procedures”, *supra* note 4 at 962.

⁸⁶ King, *supra* note 80 at 229; Roach, “Exceptional Procedures”, *supra* note 4 at 976.

⁸⁷ Roach, “Exceptional Procedures”, *supra* note 4 at 977.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Gould, *supra* note 77 at 56-66.

⁹¹ *Ibid* at 70.

⁹² *Ibid* at 58.

⁹³ *Ibid* at 58-59.

⁹⁴ *Ibid* at 70.

⁹⁵ *Ibid* at 61.

⁹⁶ *Ibid* at 61.

⁹⁷ *Ibid* at 66.

E. The New Zealand CCRC (NZCCRC)

In 2019, New Zealand formally established the NZCCRC, Te Kāhui Tātari Ture.⁹⁸ The Commission began operations in July 2020.⁹⁹ It was largely modeled on the UKCCRC. The primary function of the NZCCRC is to investigate and review convictions and sentences (whether arising before or after the creation of the Commission) raised by applicants and to decide whether to refer the conviction or sentence to the relevant appellate court for further consideration.¹⁰⁰ The Commission may also choose to investigate any “practice, policy, procedure or other matter of a general nature” that it considers may be related to cases involving a miscarriage of justice or have the potential to do so.¹⁰¹

There are seven commissioners who come from a range of backgrounds. The New Zealand Parliament delegated to the NZCCRC the power to regulate its procedures for performing its functions, including how applications will be made.¹⁰²

The NZCCRC is vested with wide powers to gather information and evidence in relation to any application that it decides to investigate. These investigative powers include accessing documents held by the courts or other persons or agencies and compelling persons to give evidence.¹⁰³ The Commission is authorized to challenge objections to the production of documents or giving evidence based on claims of privilege and confidentiality in court.¹⁰⁴

The NZCCRC considers applications in a three-stage process: screening, investigation, and evaluation. In the screening stage, it decides whether to investigate the application. In the investigation stage, it reviews in more detail the cases that survive the initial screening. In the evaluation stage, it determines whether the case should be referred to an appellate court. The primary test for referral is whether referral is in “the interests of justice”. In making that assessment, the Commission must consider: whether the eligible person has exercised their rights of appeal against the conviction or sentence;¹⁰⁵ the extent to which the application relates to argument, evidence, information, or a question of law that was raised or dealt with in prior

⁹⁸ *Criminal Cases Review Commission Act 2019* (NZ), s 7 [CCRCA].

⁹⁹ Natalie Akoorie, “New Commission for Miscarriages of Justice Poised to Refer Unjust Sentence Back to Court” (7 Sept 2022), online: *NZ Herald* <<https://www.nzherald.co.nz/nz/new-commission-for-miscarriages-of-justice-poised-to-refer-unjust-sentence-back-to-court/QLEA5HF4XL3W XK5DRGN75A6M7I>>.

¹⁰⁰ *CCRCA*, *supra* note 98 at s 11.

¹⁰¹ *Ibid* at s 12.

¹⁰² *Ibid* at ss 15, 16.

¹⁰³ *Ibid* at ss 31-33.

¹⁰⁴ *Ibid* at ss 38-42.

¹⁰⁵ The applicant is not required to have pursued an appeal against conviction or sentence, but it is likely that the failure to pursue an appeal through normal channels, without justification, will inure against a reference.

proceedings; the prospects of the court allowing the appeal;¹⁰⁶ and any other matter that it considers relevant.¹⁰⁷

The NZCCRC has received 308 applications in its first two years of operation, significantly more than what was anticipated by the government when it was established in 2020.¹⁰⁸ It is currently poised to refer its first case back to the appellate court, a case involving a putatively unjust sentence, which could lead to a sentence reduction.¹⁰⁹

IV Major Decision Points for the Creation of a Canadian Innocence Commission

The LaForme and Westmoreland-Traoré report is comprehensive. This article focuses only on some of the significant decisions that the Canadian government will have to make and particularly those that have bedeviled innocence commissions in other jurisdictions: staffing, funding, independence, defining miscarriages of justice, the standard for referral to appellate courts, and the standard for appellate review of putative wrongful convictions.

A. Staffing

The first important issue is the composition of the CCRC. There are three possible models for the Commissioners. The first is an expertise model. The second is a vulnerable-stakeholder model. The third is an adversarial-stakeholder model. In addition, the government must decide whether to authorize the CCRC to retain expert consultants or investigators in individual cases.

a. The Expertise Model

Under an expertise model, the Commissioners are predominantly legal and criminal-justice experts commissioned by the state. For example, in the UK, Scotland, and New Zealand, one third of the commissioners must be experienced lawyers and two thirds must have expertise in criminal justice.¹¹⁰ One downside of a commission of experts is that it can “underestimate the understandable distrust that many applicants have towards the system that has convicted them.”¹¹¹

b. The Vulnerability Model

Under the vulnerability model, the Commissioners must have special expertise and understanding of groups that are overrepresented in the justice system and/or particularly vulnerable to miscarriages, such as indigenous and other racialized peoples or individuals with

¹⁰⁶ Success on appeal does not have to be certain, but, in the typical case, there will be new and cogent evidence that came to light after regular appeals are exhausted that raises a real possibility that the conviction or sentence was erroneous or unsafe.

¹⁰⁷ *CCRCA*, *supra* note 98 at s 17 (2).

¹⁰⁸ Akoorie, *supra* note 99.

¹⁰⁹ *Ibid.*

¹¹⁰ Roach, “Exceptional Procedures”, *supra* note 4 at 970.

¹¹¹ LaForme & Westmoreland-Traoré, *supra* note 1 at 67.

serious mental illness. For example, in New Zealand, at least one commissioner must have special expertise and understanding of Māori world views and customary practices. In Norway, Commissioners include academic psychiatry and psychology experts. The New Zealand CCRC can appoint, as required, qualified persons to give advice on cultural, scientific, technical, or other matters involving particular expertise. The benefits of drawing Commissioners from disadvantaged groups include expertise in diversity, enhancing creativity, and facilitating outreach to the disproportionately justice-involved populations that the CCRC seeks to serve.

c. The Adversarial Model

Under the adversarial model, the emphasis is on ensuring that a cross-section of criminal-justice stakeholders and personnel are represented. Commissioners are partisan criminal-justice advocates. For example, the NCIIC commissioners are judges, prosecutors, defense lawyers, police, and victims' advocates.¹¹²

B. Funding

Underfunding is a chronic problem with CCRCs internationally. They tend to be particularly vulnerable to underfunding because they receive more applications than ministerial processes and cannot draw on central governmental resources.¹¹³ It is difficult for innocence commissions accurately to predict the budgets that they need because their expenditures depend on the number of applications that they receive and the complexity of the investigations that they perform.¹¹⁴

The UKCCRC and NCIIC have manifestly inadequate resources.¹¹⁵ The budget of the UKCCRC was cut by 30 percent between the 2009-10 and 2014-15 fiscal years.¹¹⁶ A 2015 Parliamentary committee found that the UKCCRC was under-funded and that its funding was 43% lower in real terms than in 2004.¹¹⁷ The number of days worked by the commissioners in the UK has recently been reduced by 30%, and their full-time equivalents have been cut by more than two thirds.¹¹⁸ Caseloads have more than doubled, and salaries are no longer competitive.¹¹⁹ This has increased delays in processing applications and significantly hampered the UKCCRC's ability to fulfill its role effectively.¹²⁰

The SCCRC has a minimal budget for investigation, and it has also experienced budgetary and staffing reductions over the past few years, while the number of applications submitted has

¹¹² Roach, "Exceptional Procedures", *supra* note 4 at 974.

¹¹³ LaForme & Westmoreland-Traoré, *supra* note 1 at 7.

¹¹⁴ *Ibid* at 45.

¹¹⁵ *Ibid* at 38-39, 90.

¹¹⁶ Roach, "Exceptional Procedures", *supra* note 4 at 964.

¹¹⁷ "Twelfth Report of Session 2014-15" (17 Mar 2015), online: CCRC <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf>> ["Twelfth Report"].

¹¹⁸ LaForme & Westmoreland-Traoré, *supra* note 1 at 44.

¹¹⁹ *Ibid* at 90.

¹²⁰ Roach, "Exceptional Procedures", *supra* note 4 at 964.

increased.¹²¹ The NZCCRC is already facing budgetary shortfalls because it has received twice the number of applications that it anticipated before it started work in 2020.¹²² These existing commissions devote most of their resources just to processing the applications that they receive.¹²³

This history with other commissions demonstrates that the motivations and aspirations when CCRCs are created are often not matched by realities of providing them with sufficient resources and the complexity of the investigations and analyses that are involved. Ensuring adequate and sustainable funding for the CCRC will likely be a challenge in Canada.

C. Independence

The government must choose between having a CCRC that is treated like a small administrative agency in the federal government or having an adequately funded and independent commission at arm's length from the government and the courts.¹²⁴ For example, the UKCCRC commissioners are appointed by the government, while the NCIIC commissions are appointed by the North Carolina judiciary.¹²⁵

D. Scope of Review: Actual Innocence or Procedural Injustice

One of the first steps in establishing a CCRC is determining the scope of cases for review and the standard of proof necessary to demonstrate an unsafe verdict.¹²⁶ The government must choose between having a commission that is limited to cases in which factual innocence can be established or one that is concerned with all miscarriages of justice.¹²⁷

The academic literature on miscarriages of justice proposes three primary models for defining them: (1) actual innocence;¹²⁸ (2) legal innocence;¹²⁹ (3) or procedural injustice.¹³⁰

¹²¹ “Case Statistics” (last visited 28 Sep 2022), online: SCCRC <<http://www.sccrc.co.uk/case-statistics>>; LaForme & Westmoreland-Traoré, *supra* note 1 at 90; Roach, “Exceptional Procedures”, *supra* note 4 at 970.

¹²² LaForme & Westmoreland-Traoré, *supra* note 1 at 18, 45, 90.

¹²³ *Ibid* at 39.

¹²⁴ *Ibid* at 38.

¹²⁵ Roach, “Exceptional Procedures”, *supra* note 4 at 974.

¹²⁶ Leonetti, *supra* note 4 at 105.

¹²⁷ LaForme & Westmoreland-Traoré, *supra* note 1 at 38.

¹²⁸ David Hamer, “Wrongful Convictions, Appeals, and the Finality Principle: the Need for a Criminal Cases Review Commission” (2014) 37 UNSWLJ 270 at 306; Richard Leo, “Has the Innocence Movement Become an Exoneration Movement?” in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017) at 61, 72.

¹²⁹ Naughton, *The Innocent*, *supra* note 52 at 20-23; Keith Findley, “Defining Innocence” (2010) 74 Alb L Rev 1157 at 1162-63.

¹³⁰ Bibi Sangha et al, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at 67; Sarah A Crowley & Peter J Neufeld, “Increasing the Accuracy of Criminal Justice Decision Making”

The government must decide whether the CCCRC will be an innocence commission, focused only on claims of actual, factual innocence, or whether it should be given a larger scope to review all forms of miscarriages of justice, including failures of procedural justice. This is one of the most fraught policy determinations.

The benefit of a narrow focus on cases involving actual innocence is that it would allow the CCCRC to focus on the core of cases that gave rise to its creation, which have historically been the cases that traditional appeals processes have been the least able to address.¹³¹ The disadvantage of focusing only on actual innocence is that factual innocence is often unknowable and unprovable, particularly in cases where there have been failures of procedural justice. For example, if the police extracted an unreliable confession through coercion or an eyewitness made an unreliable identification due to suggestion, the falsity of the confession or the error in identification might be unprovable, but the use of coercive and suggestive tactics to generate them creates an intolerable risk of error. If a procedural injustice resulted in a guilty verdict that would otherwise have been an acquittal, then the defendant is legally innocent.¹³² In this way, procedural injustice and wrongful conviction are interwoven.¹³³ Actual innocence claims have also historically been DNA-based, but DNA can only exonerate defendants in a narrow subset of cases.¹³⁴

The existing CCRCs are concerned with miscarriages of justice, largely following the original model of the UKCCRC, except for the NCIIC, which is exclusively concerned with claims of factual innocence for serious crimes.¹³⁵ The NCIIC statute defines factual innocence as “complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.”¹³⁶ A successful application must be supported by fresh evidence and cannot involve a claim only of procedural injustice.¹³⁷

in Thomas R Zentall & Philip H Crowley, eds, *Comparative Decision Making* (Oxford: Oxford University Press, 2013) at 357; Marvin Zalman, “Wrongful Convictions: Comparative Perspectives” in A Javier Trevino, ed, *The Cambridge Handbook of Social Problems* (Cambridge: Cambridge University Press, 2018) at 449.

¹³¹ Hamer, *supra* note 128 at 270-71; Leonetti, *supra* note 4 at 103.

¹³² Leonetti, *supra* note 4 at 108.

¹³³ *Ibid* at 102, 140-142.

¹³⁴ Stephanie Roberts Hartung, “Post-Conviction Procedure: The Next Frontier in Innocence Reform” in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017) at 247, 252; Leonetti, *supra* note 4 at 102-105.

¹³⁵ LaForme & Westmoreland-Traoré, *supra* note 1 at 47.

¹³⁶ *NC Gen Stat*, s 15A-1460 (2015).

¹³⁷ Roach, “Exceptional Procedures”, *supra* note 4 at 976.

E. Intake Process

The government must choose between a CCCRC that only responds to individual applications or one that takes a more proactive and systemic approach.¹³⁸ All the existing CCRCs have focused on error correction and processing individual applications in a quasi-judicial manner, as opposed to engaging in research or advocacy for systemic reform to decrease miscarriages of justice in the future, although this is often a result of budgetary shortfalls rather than intentional design.¹³⁹

a. Private Complaints

The current ministerial process is reactive and depends on applications. As a result, it reviews few applications and has made only twenty referrals to the courts since 2003.¹⁴⁰ All the applicants granted new appeals or trials through the existing ministerial process were men; one was Indigenous, and one was Black.¹⁴¹ As a percentage of defendants, these statistics suggest that women, Indigenous people, and Black people have been under-represented in the ministerial process.¹⁴² By contrast, the Scottish CCRC has referred 85 convictions back to the courts since 1999, even though Scotland has a population of less than one seventh of Canada's.¹⁴³

b. Pipeline

The government must decide whether the CCCRC will be application-based or empowered to self-initiate investigations. For example, the SCCRC has referred cases to the courts without an application.¹⁴⁴ The government also must decide what, if any, outreach to potential applicants the Commission will be permitted or required to make.

c. Independent Investigations

Investigating potential miscarriages of justice is one of the most important roles of a CCRC. The English Court of Appeal can direct the UKCCRC to investigate matters that would help it decide appeals.¹⁴⁵ Between 1997 and 2017, the Court of Appeal made 95 investigation requests to the UKCCRC.¹⁴⁶ The UKCCRC has investigated a range of matters, including jury irregularities, police misconduct, witness retractions, and alternative suspects.¹⁴⁷ To be effective, it critical that

¹³⁸ LaForme & Westmoreland-Traoré, *supra* note 1, at 38.

¹³⁹ Roach, "Exceptional Procedures", *supra* note 4 at 989.

¹⁴⁰ LaForme & Westmoreland-Traoré, *supra* note 1 at 6.

¹⁴¹ *Ibid* at 6.

¹⁴² *Ibid* at 6.

¹⁴³ *Ibid* at 6.

¹⁴⁴ *Johnston v HM Advocate*, [2006] HCJAC 30 (Scot).

¹⁴⁵ *Criminal Appeal Act*, *supra* note 49.

¹⁴⁶ LaForme & Westmoreland-Traoré, *supra* note 1 at 180.

¹⁴⁷ *Ibid* at 180.

a CCRC be able to obtain new evidence, but, in practice, many existing CCRCs actively reinvestigate only a tiny percentage of the applications that they receive.¹⁴⁸

d. Access to Materials

CCRCs typically have broad inquisitorial powers allowing them to access files and other materials held by public and private bodies as part of their investigation, including materials in the databases of police, prosecutors, and crime laboratories. For example, the UKCCRC can obtain relevant material from any party regardless of any claim of legal privilege, confidentiality, or privacy.¹⁴⁹ The SCCRC has broad powers to summon relevant information from public and private bodies, undertake inquiries, obtain statements, opinions, or reports, and require reluctant witnesses to provide information through a judicial process.¹⁵⁰ The NorCCRC can compel individuals who are suspected or convicted of any serious criminal offense to provide fingerprints and DNA samples, access national DNA and fingerprint databases, and obtain documents and files from all official bodies.¹⁵¹ The NCIIC is entitled to all relevant official documents and files, can order forensic testing, can compel the attendance of witnesses and sworn testimony, and can grant immunity to witnesses who assert their privilege against self-incrimination to compel their testimony.¹⁵² The UKCCRC, SCCRC, and NCIIC can obtain relevant documents from private bodies with court assistance.¹⁵³ This is consistent with the investigative powers that the Minister of Justice currently has in Canada for ministerial reviews.¹⁵⁴

F. Legal Test for Referral to Courts

There are at least four possible legal thresholds for referral to the courts after investigation: probable miscarriage of justice, possible miscarriage of justice, substantial evidence of actual innocence, and the interests of justice.

a. Probability

The first option is the probability or likelihood that the conviction will be quashed by the courts. For example, the NCIIC largely bases its referral decisions on a prediction of whether an appellate court will overturn the conviction.¹⁵⁵ The current ministerial review mechanism employs “a reasonable basis to conclude that a miscarriage of justice likely occurred”.¹⁵⁶

¹⁴⁸ Roach, “Exceptional Procedures”, *supra* note 4 at 965.

¹⁴⁹ *Ibid* at 13, 18.

¹⁵⁰ *Criminal Procedure (Scotland) Act*, *supra* note 61, s 1941.

¹⁵¹ Stridbeck & Magnussen, *supra* note 67 at 1384.

¹⁵² *NC Gen Stat* ss 15A-1467 (d), 1468 (a1), 1471 (2015); Robert P Mosteller, “NC Innocence Inquiry Commission’s First Decade: Impressive Success and Lessons Learned” (2016) 94 NC L Rev 1725.

¹⁵³ Roach, “Exceptional Procedures”, *supra* note 4 at 965.

¹⁵⁴ *Ibid*.

¹⁵⁵ LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

¹⁵⁶ *Criminal Code*, RSC 1985, c C-46, s 696.3 (3)(a).

b. Possibility

The second option is a possibility that the conviction will be quashed by the courts. For example, the UKCCRC has the power to refer a conviction to the courts if it finds that there is “a real possibility” that a conviction is unsafe.¹⁵⁷ “The ‘real possibility’ test . . . denotes a contingency which, in the Commission’s judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty.”¹⁵⁸ This is a predictive test, requiring the UKCCRC to determine whether the Court of Appeal would overturn the conviction,¹⁵⁹ although the UKCCRC insists that it does not simply make predictions about whether the Court of Appeal will overturn a conviction as unsafe. The “real possibility” test is also discretionary.¹⁶⁰ The UKCCRC has the authority but not the obligation to refer qualifying cases back to the courts.

c. New Evidence of Factual Innocence

The third option is an actual-innocence test. For example, the NCIIC refers cases to the courts if there is credible, verifiable new evidence of “factual innocence”. Factual innocence is defined as “complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.”¹⁶¹

d. Interests of Justice

The fourth is an “interests of justice” test. For example, the NZCCRC uses the “interests of justice” as its sole criterion for referral.¹⁶² The SCCRC will refer a case to the Scottish Appeals Court if a miscarriage of justice *may* have occurred¹⁶³ and it is in the “interests of justice” that a referral be made.¹⁶⁴ The first prong of the referral test requires the SCCRC, like the UKCCRC, to have regard to the practices of the Court of Appeal.¹⁶⁵

G. Legal Test for Courts Allowing Appeals: Substantive Grounds for Granting Relief

While the grounds for allowing an appeal used by the appellate courts is not necessarily within the scope of legislation creating a CCRC, in practice, the effectiveness of CCRC referrals

¹⁵⁷ *Criminal Appeal Act*, *supra* note 49 s 13 (1)(a).

¹⁵⁸ *R v Criminal Cases Review Commission (ex parte Pearson)*, [1999] EWHC 452 (UK) at para 17.

¹⁵⁹ LaForme & Westmoreland-Traoré, *supra* note 1 at 15.

¹⁶⁰ Roach, “Exceptional Procedures”, *supra* note 4 at 967-68.

¹⁶¹ *NC Gen Stat*, ch 92, s 15A-1460 (2015).

¹⁶² LaForme & Westmoreland-Traoré, *supra* note 1 at 160. This is a different test from the one that appeals courts use once the case has been referred.

¹⁶³ This is the same ground of appeal that the Scottish courts use.

¹⁶⁴ *Criminal Procedure (Scotland) Act*, *supra* note 61, s 194C.

¹⁶⁵ Roach, “Exceptional Procedures”, *supra* note 4 at 971.

and the test used for referral are significantly affected by the test that courts employ for deciding whether to allow appeals on the ground of miscarriage of justice. After all, there is not much point to a CCRC referring cases to an appellate court under a standard more lenient than the standard used by the courts to review convictions because doing so would only result in the referred convictions being upheld by the courts.

Several inquiries have suggested that the conflicts between standards for referral and standards for appellate review should be resolved by lowering the judicial standards of review. The Runciman Commission recommended that the Court of Appeal be more willing to consider new evidence suggestive of factual innocence and to apply a more rigorous “lurking doubt” standard when reviewing convictions.¹⁶⁶ The 2015 Parliamentary committee recommended that the Law Commission examine reforming the grounds that the Court of Appeal uses in determining whether to overturn convictions by changing the safety standard to one focused on serious doubt.¹⁶⁷ One significant decision for the government in creating a CCCRC, therefore, will be whether to maintain the existing legal test that Canadian appellate courts use in reviewing putatively wrongful convictions or to adopt a lower threshold like a serious doubt.

a. Existing Legal Test in Canada

Canada still follows the traditional common-law test for quashing a conviction – whether the evidence was sufficient to permit a reasonable jury to reach a guilty verdict. Appellate courts in Canada can overturn convictions if there were errors of law, the conviction was unreasonable or unsupported by the evidence, or there was a miscarriage of justice. This test is more deferential to jury verdicts than the ones used in many comparable jurisdictions.¹⁶⁸ The Canadian courts have been resistant to the idea of a more lenient standard of review for putative wrongful convictions.¹⁶⁹

The leading case on the test for appeals is *R v Corbett*,¹⁷⁰ in which a majority of the Supreme Court clarified that the proper test was whether the verdict was one that no reasonable jury could have reached. The Court explained that the function of a reviewing court was not to substitute itself for the jury and decide guilt or innocence, but rather the task was to decide whether the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.¹⁷¹ The Court adopted a presumption that the result achieved at trial was proper and explained that it fell to the appellant in a given case to demonstrate that the conviction was a miscarriage of justice. The dissenting justices would have held that the existence of some evidence upon which the jury could convict did not permit an appellate court to abdicate its function of assessing whether, on the evidence taken as a whole, the verdict was unreasonable.¹⁷²

¹⁶⁶ Runciman Commission Report, *supra* note 45 at 173.

¹⁶⁷ “Twelfth Report”, *supra* note 117 at paras 27-28.

¹⁶⁸ Andrew Furguele, “The Self-Limiting Appeal Courts and Section 686” (2007) 52 CLQ 237; Michael Cory Plaxton, “The Biased Juror and Appellate Review: A Reply to Professor Coughlan” (2002) 44:5 CR 294.

¹⁶⁹ Roach, “Exceptional Procedures”, *supra* note 4 at 968, n 30.

¹⁷⁰ *R v Corbett*, [1975] 2 SCR 275, 14 CCC (2d) 385.

¹⁷¹ *Ibid* at 389.

¹⁷² *Ibid* at 391 (Laskin & Spence JJ).

In *Yebe* v *R*,¹⁷³ the Supreme Court upheld Yebe's conviction for killing his sons. *Yebe* is leading precedent on the standard of review for legal innocence.¹⁷⁴ The Court reiterated the test in *Corbett*: that an appellate court must determine whether, on the whole of the evidence, the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.¹⁷⁵ It concluded that, given the evidence heard at trial, Yebe's conviction should be sustained. More than thirty years later, Yebe, who had always maintained his innocence, was exonerated through the existing ministerial review process.¹⁷⁶

In *R v Biniaris*,¹⁷⁷ the Supreme Court unanimously held that juries had considerable leeway in their appreciation of the evidence, the proper inferences to be drawn from it, their assessment of the credibility of witnesses, and their ultimate assessment of whether the Crown's case was made out beyond a reasonable doubt.¹⁷⁸ The Court held that any judicial system had to tolerate reasonable differences of opinion on factual issues and that all factual findings were open to the jury except unreasonable ones. The Court confirmed that a "lurking doubt" was not a proper basis upon which to interfere with the findings of a jury without further articulation of the basis for such a doubt.¹⁷⁹

In *A-G v R*,¹⁸⁰ the Supreme Court reaffirmed its holding in *Biniaris* and clarified that the fact that appellate judges would have had a doubt if they were jurors was insufficient to justify the conclusion that the trial judgment was unreasonable.¹⁸¹

b. Comparable Jurisdictions

(i) The UK

The threshold for overturning a conviction is relatively low in the UK compared to in Canada, although its stringency has fluctuated over time.¹⁸² The English Court of Appeals applies the same standard of appellate review to cases referred to it by the UKCCRC as it does to other appeals against conviction. The criminal appeal provisions were recast in 1968 and further refined in 1995.¹⁸³ The concept of unreasonable verdicts has been replaced with that of unsafe convictions.¹⁸⁴ After the 1968 amendments, the principle of "lurking doubt" emerged as the means of assessing whether a verdict is unsafe.¹⁸⁵ The Runciman Commission recommended that the

¹⁷³ *R v Yebe*, [1987] 2 SCR 168, 36 CCC (3d) 417 [*Yebe*].

¹⁷⁴ LaForme & Westmoreland-Traoré, *supra* note 1 at 171.

¹⁷⁵ *Yebe*, *supra* note 173 at 430.

¹⁷⁶ LaForme & Westmoreland-Traoré, *supra* note 1 at 171.

¹⁷⁷ *R v Biniaris*, [2000] 1 SCR 381.

¹⁷⁸ *Ibid* at para 24.

¹⁷⁹ *Ibid* at para 38.

¹⁸⁰ *R v AG*, [2000] 1 SCR 439, 143 CCC (3d) 46 (SCC).

¹⁸¹ *Ibid* at para 29.

¹⁸² Roach, "Exceptional Procedures", *supra* note 4 at 968, n 30.

¹⁸³ *Criminal Appeal Act*, 1968, c. 19 (UK), s 2.

¹⁸⁴ *R v Munro*, [2007] NZCA 510 at para 22.

¹⁸⁵ *Criminal Appeal Act*, *supra* note 183 s 2.

Court of Appeal be more willing to receive fresh evidence and overturn convictions based on “lurking doubt”.¹⁸⁶ The 2015 Parliamentary committee recommended an expansion of the Court of Appeal’s grounds for allowing appeals and receiving new evidence.¹⁸⁷

In 1969, in *R v Cooper (Sean)*,¹⁸⁸ the English Court of Criminal Appeal held that, because an appellate court had to allow an appeal against conviction if, under all of the circumstances of the case, it was unsafe, the court had to determine “whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done.”¹⁸⁹

Since *Cooper*, however, the Court of Appeal has often employed a more deferential standard of review.¹⁹⁰ Critics have argued that the safety standard is too restrictive, the Court of Appeal has been reluctant to follow the lurking-doubt standard of *Cooper*, and the effectiveness of the UKCCRC has been impaired by the Court of Appeal taking too restrictive an approach to appeals after referral.¹⁹¹ The UK Parliament recently recommended that the Law Commission examine the adequacy of the grounds of appeal.¹⁹²

(ii) Australia

Australia does not have a CCRC, but, over the past few decades, it has reformed its approaches to appeals in response to several high-profile exonerations. The reforms include easing bans on successive appeals and scrutinizing the threshold for allowing appeals in putative miscarriages of justice in several Australian states.

(a) Fresh Evidence and Successive Appeals

South Australia and Tasmania have recognized a right to a second appeal based on “fresh and compelling” evidence that a miscarriage of justice has occurred.¹⁹³ The purpose of establishing these new rights of appeal was to replace petition to the government for executive review with a process of judicial review.¹⁹⁴

“Fresh” evidence is evidence that was not and could not with due diligence have been produced at trial, and “compelling” evidence is evidence that is reliable, substantial, and “highly

¹⁸⁶ LaForme & Westmoreland-Traoré, above, at 32.

¹⁸⁷ Roach, “Exceptional Procedures”, *supra* note 4 at 988.

¹⁸⁸ *R v Cooper (Sean)*, [1969] 1 QB 267 (CA).

¹⁸⁹ *Ibid* at 271.

¹⁹⁰ Sangha et al, *supra* note 130 at chs 3-5. See, e.g., *R v Pope* [2012] EWCA (Crim) 2241.

¹⁹¹ LaForme & Westmoreland-Traoré, *supra* note 1 at 173-174.

¹⁹² *Ibid* at 172.

¹⁹³ *Statutes Amendment (Appeals) Act 2013* (SA); *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tasmania); Bibi Sangha, “The Statutory Right to Second or Subsequent Criminal Trial Appeals in South Australia and Tasmania” (2015) 17 *Flinders LJ* 471 at 486.

¹⁹⁴ Roach, “Exceptional Procedures”, *supra* note 4 at 986.

probative in the context of the issues in dispute at the trial”.¹⁹⁵ The courts have held that, even if there is fresh and compelling evidence, they still have the discretion to decline leave to appeal if denying leave is in the interests of justice – for example, if the evidence of guilt is overwhelming despite the new and compelling evidence.¹⁹⁶

In South Australia, two defendants have had their convictions overturned using these new second-appeal procedures. In both cases, the appellate court accepted that the new evidence was fresh and compelling and that it suggested that there had been a substantial miscarriage of justice and ordered new trials. In both cases, the defendant was not retried, and the prosecution acknowledged the wrongful convictions.¹⁹⁷

The appellate standard of review is more onerous for a successive appeal based on the exceptional mechanism for fresh and compelling evidence in comparison to an ordinary appeal. If the court grants leave for the second or subsequent appeal, it can allow the appeal if it concludes that there has been a “substantial miscarriage of justice.”¹⁹⁸ The “substantial miscarriage of justice” test requires a “significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at trial” considering all the evidence.¹⁹⁹

(b) Judicial Inquiry

New South Wales has adopted new exceptional procedures that allow an appellate court to convene a judicial inquiry if it appears that there is a doubt or question as to the convicted person’s guilt.²⁰⁰

(c) Appellate Standard of Review

The Australian caselaw regarding the ordinary appellate standard of review for putative miscarriages of justice has wavered between following the traditional reasonableness test or adopting a lower threshold for allowing appeals like in England and Wales, but, for the most part, Australian courts have resisted a lower “lurking doubt” standard.

Beginning in 1974, in *Ratten v R*,²⁰¹ the Australian High Court began to move away from the traditional common-law reasonableness test. Barwick CJ held that it was the reasonable doubt in the mind of the appellate court that was the operative factor on review.²⁰²

¹⁹⁵ *Criminal Law Consolidation Act 1935* (SA), s 353A.

¹⁹⁶ *Van Beelen v The Queen*, [2017] HCA 48 at para 30 (SA) [*Van Beelen*]; *R v Keogh (No 2)*, [2014] SASFC 136 at para 115 [*Keogh*]; *R v Bromley*, [2018] SASC 41 at para 386.

¹⁹⁷ *R v Drummond (No 2)*, [2015] SASFC 82; *Keogh*, *supra* note 196.

¹⁹⁸ Roach, “Exceptional Procedures”, *supra* note 4 at 985.

¹⁹⁹ *Van Beelen*, *supra* note 196 at paras 22-23.

²⁰⁰ *Crimes (Appeal and Review) Act 2001* (NSW), s 2 79.

²⁰¹ *Ratten v R*, (1974) 131 CLR 510.

²⁰² *Ibid* at 516.

*Chamberlain v R*²⁰³ complicated the law in Australia because there were two panels of the Australian High Court – the first granted Chamberlain leave to appeal with one judge in dissent, and the second dismissed the appeal and upheld Chamberlain’s conviction by a different majority with two judges in dissent. The plurality of the merits Court held that an appellate court had the power and duty to set aside a verdict which it considered to be unsafe, even if there was sufficient evidence to support it as a matter of law and there was no misdirection, erroneous reception or rejection of evidence, and no other complaint as to the course of the trial.²⁰⁴ The *Chamberlain* court, therefore, equated reasonableness with safety. A concurring judge agreed that the law did not permit an appellate court to overturn a jury verdict on the grounds that it was unsafe merely because the court entertained a reasonable doubt.²⁰⁵

One dissenting judge would have held that courts of criminal appeal had the power to set aside convictions not only if the trial judge wrongly admitted or rejected evidence or misdirected the jury but also if the appellate court considered it unsafe, even if there was evidence that could justify the verdict.²⁰⁶ In his view, the appellate courts had to operate as a further safeguard against mistaken conviction of the innocent.²⁰⁷ The other dissenting judge endorsed Barwick CJ’s approach in *Ratten* because, in his view, the safeguard provided by trial by jury did not depend upon any assumption of the infallibility of the jury’s verdict.²⁰⁸

In *M v R*,²⁰⁹ a majority of the Australian High Court observed that a verdict could be set aside if it was unsafe or unsatisfactory.²¹⁰ The Court held that the assessment required the appellate court to make its own independent assessment of the evidence to determine whether, notwithstanding that there was evidence upon which a jury could convict, it would nonetheless be dangerous in all of the circumstances to allow the guilty verdict to stand.²¹¹ The majority also noted that, in most cases, a doubt experienced by an appellate court would be a doubt that the jury ought to have experienced and that it was only in cases in which the jury’s advantage in seeing and hearing the evidence was capable of resolving the doubt experienced by an appellate court that the court could conclude that no miscarriage of justice occurred.²¹² Under *M v R*, therefore, deference to jury verdicts is only required if any discrepancy between the views of the appellate court and the views of the jury can be explained by the manner in which the evidence was given.

In *Weiss v R*,²¹³ the Australian High Court moved closer to a return to the traditional reasonableness test, holding that the assessment of whether a substantial miscarriage of justice had occurred was to be undertaken in the same way that an appellate court decided whether a jury

²⁰³ *Chamberlain v R*, (1984) 153 CLR 521.

²⁰⁴ *Ibid* at 530-531.

²⁰⁵ *Ibid* at 603 (Brennan J, concurring in result).

²⁰⁶ *Ibid* at 569 (Murphy J, dissenting).

²⁰⁷ *Ibid*

²⁰⁸ *Ibid* at 617 (Deane J, dissenting).

²⁰⁹ *M v R*, (1994) 181 CLR 487.

²¹⁰ *Ibid* at 492.

²¹¹ *Ibid* at 493.

²¹² *Ibid* at 494.

²¹³ *Weiss v R*, (2005) 224 CLR 300.

verdict should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence.

In Australia, therefore, the test remains whether a reasonable jury ought to have had a reasonable doubt, but, in application, often leads to a detailed examination of the evidence, even in cases resting primarily on credibility findings.

(iii) New Zealand

New Zealand largely still follows the traditional reasonableness test, although in application the test allows an appellate court to exercise some independent judgment regarding the existence of reasonable doubt. The leading case on the test for appellate review in New Zealand is *R v Ramage*,²¹⁴ which dictated: “A verdict will be of such a character if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. It is not enough that this Court might simply disagree with the verdict of the jury.”²¹⁵

In *R v Munro*,²¹⁶ the New Zealand Court of Appeal revisited *Ramage* to determine whether to adopt a lower standard more akin to the “lurking doubt” standard used in the UK. The Court reaffirmed the *Ramage* test, explaining:

[A]n appellate court may find a verdict to be unreasonable or unsupported by the evidence even where there is some evidence to support it and there has been no misdirection. This will be the case if, taking into account all of the evidence, a reasonable jury could not be satisfied of guilt to the requisite standard. The concentration is on a reasonable jury and not on whether the appellate court might have differed in its conclusion from that reached by the jury.²¹⁷

The Court explicitly rejected an actual-innocence inquiry, which it characterized as “the wrong inquiry”, insisting instead that appellate courts should focus on “whether a jury ought to have had a reasonable doubt as to guilt”.²¹⁸ The Court also rejected the proposition that a reasonable doubt entertained by the court would “necessarily be a reasonable doubt that ought to have been entertained by a jury”.²¹⁹ The Court explained: “A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt.”²²⁰ The Court concluded that “by itself a ‘lurking doubt’ is not sufficient grounds on which an appeal court should deem a conviction to be unsafe.”²²¹ The Court explained that appellate courts needed “to recognise that reasonable minds

²¹⁴ *R v Ramage*, [1985] 1 NZLR 392 (CA).

²¹⁵ *Ibid* at 8.

²¹⁶ *R v Munro*, [2007] NZCA 510.

²¹⁷ *Ibid* at 21.

²¹⁸ *Ibid* at 41.

²¹⁹ *Ibid* at 44.

²²⁰ *Ibid* at 87.

²²¹ *Ibid* at 88.

might disagree on findings of fact and that the jury, not the appellate court, is the ultimate arbiter of fact. It is only where a jury's verdict is unreasonable on all the evidence . . . that an appeal court may properly differ from it."²²²

(iv) United States

Compared to other common-law jurisdictions, the United States has a severe and unforgiving finality doctrine that makes post-conviction review, including in cases of actual innocence, exceptionally difficult.²²³ In 1996, the United States Congress severely restricted the availability of postconviction review of state convictions by the federal courts when it enacted the Antiterrorism and Effective Death Penalty Act, which requires an applicant to “establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense”.²²⁴ In *Herrera v Collins*,²²⁵ the United States Supreme Court has held that the burden on defendants seeking post-conviction relief from capital convictions on the ground of actual innocence should be “extraordinarily high” because of “the very disruptive effect that entertaining claims of factual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases on stale evidence would place on the States.”

(v) North Carolina

In comparison to this baseline finality principle in American jurisprudence, the strict standard of review for referrals from the NCIIC is an improvement for defendants making claims of actual innocence. Because the NCIIC is limited to claims of likely factual innocence, the three-judge panel that reviews its referred cases applies a dedicated standard of review that is different from the standards used in the ordinary appellate review of convictions. To overturn a conviction for actual innocence, the judges must be unanimously satisfied that the applicant has proven by clear and convincing evidence that they are innocent of the charge.²²⁶ The panel found that all but one of the cases referred by the NCIIC met this stringent actual-innocence standard.²²⁷

V The Report: The Canadian Miscarriages of Justice Commission

On 4 February 2022, at the conclusion of the consultation process, Justice LaForme and Judge Westmoreland-Traoré issued their report, *A Miscarriages of Justice Commission*, outlining the options for the structure and mandate of the new Canadian innocence commission.²²⁸ As an initial matter, the report recommends that the new commission be called the Canadian

²²² *Ibid.*

²²³ Paige Kaneb, “Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim” (2014) 50 Cal W L Rev 220 at 220–224.

²²⁴ 28 USC s 2254 (1996).

²²⁵ *Herrera v Collins*, 506 US 390 (1993).

²²⁶ *NC Gen Stat*, s 15A-1469 (h) (2015).

²²⁷ Roach, “Exceptional Procedures”, *supra* note 4 at 977.

²²⁸ LaForme & Westmoreland-Traoré, *supra* note 1.

Miscarriages of Justice Commission (CMJC) rather than the Canadian CCRC in recognition of the fact that individuals who are wrongfully convicted are not “criminals”.²²⁹ The report makes the following major recommendations.

A. Staffing

The report recommends the creation of a CMJC with a minimum of nine commissioners in a combination of full-time and part-time appointments.²³⁰ It recommends a hybrid of the expertise and vulnerability models, proposing that one third of commissioners be legally trained, one third have expertise in the causes and consequences of miscarriages of justice, and one third represent groups that are overrepresented in prison but disadvantaged in seeking relief, including at least one Indigenous and one Black commissioner.²³¹ It also recommends equitable representation of women on the CMJC.²³²

The report recommends that the nine commissioners be appointed by an independent statutory advisory committee to maximize independence.²³³ This is somewhat similar to how the NCIIC was established, based on the recommendation of the North Carolina Actual Innocence Commission, a voluntary thirty-person commission.²³⁴ Unlike with the NCIIC, however, the LaForme and Westmoreland-Traoré report recommends that the advisory committee play a permanent role offering strategic advice and engaging in advocacy but that it not involve itself in individual applications that will be investigated and decided by the CCCRC.²³⁵

B. Intake

a. Proactivity

The report recommends that the CMJC be proactive and systematic and not simply react to the applications that it receives.²³⁶ It recommends that the CMJC have a vice chair who is responsible for culturally and linguistically competent outreach to and support of applicants and crime victims.²³⁷ It explains:

The commission must be proactive and reach out and accommodate those who have good reason to distrust the justice system that overrepresents them in prison and underrepresents them in positions of power. The success of the commission should be evaluated, in part, by whether it

²²⁹ *Ibid* at 9.

²³⁰ *Ibid* at 9, 20, 70, 151.

²³¹ *Ibid* at 9, 20, 65, 191.

²³² *Ibid* at 65, 191.

²³³ *Ibid* at 10, 74.

²³⁴ Roach, “Exceptional Procedures”, *supra* note 4 at 974.

²³⁵ LaForme & Westmoreland-Traoré, *supra* note 1 at 5, 20, 78, 193.

²³⁶ *Ibid* at 5, 20, 38, 122, 191.

²³⁷ *Ibid* at 9, 11, 22.

receives applications from vulnerable and disadvantaged groups to the extent that they are overrepresented in prison.²³⁸

None of the existing CCRCs in other jurisdictions have focused on systemic reform or made concrete proposals to prevent wrongful convictions.²³⁹ Instead, they stress error correction over systemic reform.²⁴⁰ The LaForme and Westmoreland-Traoré report rejects this application-based, error-correction model, concluding that “the reactive model is not ambitious enough. The reactive approach has already been tried. It has been repeatedly criticized as inadequate by Innocence Projects, commissions of inquiry and courts.”²⁴¹

b. Collaboration

Existing innocence commissions tend not to be collaborative.²⁴² In the UK, the 2015 Parliamentary committee recommended that the UKCCRC become more engaged with other justice-system to achieve systemic reform.²⁴³ Similarly, the LaForme and Westmoreland-Traoré report recommends that the CMCJ take a collaborative approach to working with counsel and Innocence Projects that represent applicants.²⁴⁴ It notes:

We have deep respect and appreciation for those who do grass roots work on behalf of the wrongfully convicted. They struggle with poor funding and sometimes lack of cooperation. It would be a mistake if a new commission ended the positive role that Innocence Projects and others have had in the lives of the wrongfully convicted. These groups deserve credit for teaching a too often reluctant justice system that wrongful convictions occur and are inevitable. They provide in depth education for students and justice participants about the reality and consequences of wrongful convictions.

We believe that the commission should work collaboratively with Innocence Projects and other community groups. A new commission must be independent, but that does not mean that it should operate in isolation. Moreover, it should respect the lived experience and expertise of community groups and victims of miscarriages of justice.²⁴⁵

²³⁸ *Ibid* at 32.

²³⁹ Roach, “Exceptional Procedures”, *supra* note 4 at 969.

²⁴⁰ *Ibid*.

²⁴¹ LaForme & Westmoreland-Traoré, *supra* note 1 at 41.

²⁴² Stephanie Roberts & Lynne Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission” (2009) 29 OJLS 43.

²⁴³ “Twelfth Report”, *supra* note 117.

²⁴⁴ LaForme & Westmoreland-Traoré, *supra* note 1 at 12, 22.

²⁴⁵ *Ibid* at 33-34.

c. Discretion

The report recommends that the CMCJ have the flexibility to define its own acceptance and screening policies without rigid statutory requirements.²⁴⁶ It also recommends against a rigid requirement that applicants exhaust appeals.²⁴⁷ It explains: “What must be avoided is an overly bureaucratic, harsh and unkind ‘tick box’ mentality that mechanically denies applications because there has been no appeal and then offers no assistance to rejected applicants.”²⁴⁸

d. Investigation

The report recommends that the CMCJ assist appellate courts by investigating matters raised by appeals but not fully explored at trial.²⁴⁹ It recommends that the CMCJ have the power to compel material witnesses to answer questions under oath.²⁵⁰ It also recommends that the CMCJ be able to obtain relevant material regardless of any claim of legal privilege or confidentiality.²⁵¹ The report recommends that appellate courts be empowered to ask the CMCJ to investigate matters related to any appeal, to assist in its resolution, which would create a new investigatory mechanism for appeals.²⁵²

C. Funding and Independence

The report recommends that the CMCJ be truly independent from the government and the judiciary, including in the method of appointing commissioners, and adequately funded through the federal Courts Administration Service.²⁵³ It recommends that Commissioners be subject to appointment, have security of tenure, and that their salaries be tied to the independent process that determines the salaries of superior court judges.²⁵⁴ It notes: “An institution, arm’s-length from government, is necessary to replace the current system of Ministerial reviews of miscarriages of justice in order to increase access to justice.”²⁵⁵

The report emphasizes the necessity of adequate funding.²⁵⁶ It recommends that the CMCJ have access to an adequate revolving fund budget that will allow it to hire and appoint contractors when necessary to deal with increased numbers and complexity of applications.²⁵⁷ It notes that there must be adequate funding to hire staff in an independent and competitive manner.²⁵⁸ The

²⁴⁶ *Ibid* at 12, 22, 134, 193.

²⁴⁷ *Ibid* at 12, 22, 134.

²⁴⁸ *Ibid* at 134.

²⁴⁹ *Ibid* at 173.

²⁵⁰ *Ibid* at 13, 23.

²⁵¹ *Ibid*.

²⁵² *Ibid* at 25, 33, 192.

²⁵³ *Ibid* at 7-8, 20-21, 30, 44, 90-92, 193.

²⁵⁴ *Ibid* at 7, 18-19, 21, 46, 193.

²⁵⁵ *Ibid* at 32.

²⁵⁶ *Ibid* at 18, 21, 30, 193.

²⁵⁷ *Ibid* at 18, 21.

²⁵⁸ *Ibid* at 10.

report explains that it is essential that the CCCRC's budget is adequate to ensure outreach to potential applicants and investigations that are national in reach.²⁵⁹ It notes that there is "a danger that an under-funded and weak commission could be even worse than the present Ministerial system of review."²⁶⁰

D. Defining Miscarriages of Justice

The report recommends that the CM CJ be concerned with all miscarriages of justice, not only cases where factual innocence can be established.²⁶¹ It explains:

Our understanding of miscarriages of justice is that it includes proven factual innocence. But it also includes cases where a conviction is no longer reliable, accurate, or fair. It also includes grave procedural errors such as the destruction of relevant material that make it impossible for the accused to demonstrate that the conviction is unreliable.²⁶²

The report rejects a "factual innocence" test as "too restrictive".²⁶³ It also recognizes that factual innocence can be difficult to establish in cases that do not involve DNA-based exoneration.²⁶⁴ It explains:

If miscarriages of justice are equated with proof of factual innocence, remedied miscarriages of justice may eventually shrink to nothing, leaving people with the false impression that our criminal justice system does not make errors. But no criminal justice system run by humans can be perfect. There are many miscarriages of justice that have not been discovered, recognized, or even yet understood as miscarriages of justice.²⁶⁵

At the same time, however, the report recommends that the CM CJ prioritize cases of factual innocence, particularly when applicants are still imprisoned.²⁶⁶ It notes that "factual innocence matters."²⁶⁷ It endorses a broad and flexible understanding of miscarriage of justice that is capable of growth as knowledge about the frequency and causes of miscarriages of justice grows.²⁶⁸

²⁵⁹ *Ibid* at 11.

²⁶⁰ *Ibid* at 30.

²⁶¹ *Ibid* at 8, 20, 191.

²⁶² *Ibid* at 165.

²⁶³ *Ibid* at 15.

²⁶⁴ *Ibid* at 24, 164.

²⁶⁵ *Ibid* at 165.

²⁶⁶ *Ibid* at 18.

²⁶⁷ *Ibid* at 165.

²⁶⁸ *Ibid* at 14, 192.

E. Grounds for Referral

The report rejects a predictive tests like a probability or real possibility that a conviction will be overturned by the courts and recommends instead that the CMCJ refer cases back to the courts if it concludes that a miscarriage of justice “may have occurred”, a lower threshold than the present ministerial standard of probability.²⁶⁹ The lower threshold is meant to encourage the CMCJ not to limit referrals only to cases that are nearly certain to be overturned.²⁷⁰ The test is not meant to be predictive of the outcome in the appellate courts.²⁷¹ Instead, the CMCJ should form an independent opinion of whether a miscarriage of justice has occurred.²⁷² The report also rejects an “interests of justice” test, in part out of concern that it could potentially disadvantage marginalized and racialized applicants.²⁷³

F. Grounds for Appeal

The report recommends a new ground for appellate courts to quash convictions: that the conviction is “unsafe”.²⁷⁴ It also recommends an innovative reform that has not been instituted in other jurisdictions: a requirement that courts must consider new evidence that the CMCJ considers reliable and probative to the question of whether a miscarriage of justice occurred.²⁷⁵ The purpose of this recommendation is to prevent appellate rules regarding admitting fresh evidence on appeal from keeping courts of appeal from considering all evidence that played a role in the CMCJ’s referral.²⁷⁶

VI Reflections

The LaForme and Westmoreland-Traoré report is a bold and masterful vision for the future. In practice, there are two lurking issues that could stymie its vision. The first, to which the report’s authors were clearly alert, is the risk that the government will not fully fund the proposed Commission. The second relates to the staffing of the new Commission. While it may seem technical and pedantic, the report’s recommendation of separating both the staff and the responsibilities of the proposed advisory committee and the commissioners is crucially important. In implementation, other countries have wrestled with the balance between personnel with high-level expertise (academics, judges, King’s Counsel) and personnel with technical expertise (criminal barristers, retired police and other investigators, psychologists and psychiatrists, social workers). While the high-level experts are often able to identify systemic issues (see the forest), they can lack the technical expertise necessary for the day-to-day work of innocence commissions (miss the trees), which is heavily investigative in nature. While the technical personnel understand

²⁶⁹ *Ibid* at 14, 24, 162, 192.

²⁷⁰ *Ibid* at 14, 192.

²⁷¹ *Ibid* at 163, 192.

²⁷² *Ibid* at 15, 163, 166, 192.

²⁷³ *Ibid* at 163.

²⁷⁴ *Ibid* at 15, 24, 173.

²⁷⁵ *Ibid* at 15, 24.

²⁷⁶ *Ibid* at 15-16.

the day-to-day operation of the criminal-justice system (see the trees), they can lack the multidisciplinary expertise to identify systemic issues and barriers to reform (miss the forest). Getting this balance right is crucial to the dual role of the proposed CMJ: identifying and exonerating those who have suffered miscarriages of justice and identifying areas for systemic reform.

VII Conclusion

Miscarriages of justice are a predictable byproduct of imperfect criminal investigations, prosecutions, and trials in politicized and racialized criminal-justice systems. They are not random mistakes but rather "organic outcomes of a misshaped larger system that is rife with faulty eyewitness identifications, false confessions, biased juries, and racial discrimination."²⁷⁷

Despite the increased consciousness around the prevalence of wrongful convictions, there remains a profound lack of consensus among common-law countries regarding the proper scope and procedure for correcting miscarriages of justice. The LaForme and Westmoreland-Traoré report has given Canada the opportunity to learn from the trials and errors of other jurisdictions. Like with many other proposals, however, the question will be how it survives the political process that gave rise to it. The experience internationally with the creation of innocence commissions has been that their success depends on sometimes seemingly minor design choices. The temptation will be to strip down and underfund the proposed CMJC, a trend that has already been seen in other places. One of the experiences of other innocence commissions has been a sizeable gap between aspiration and implementation. The enormity of the mandate is rarely backed up with resources proportionate to the task. Hopefully, the government will seize this singular opportunity to implement a monument to justice and place Canada as the global leader in addressing wrongful convictions. As the LaForme and Westmoreland-Traoré report notes: "The devil is in the details."²⁷⁸

²⁷⁷ Charles J Ogletree & Austin Sarat, eds, *When Law Fails: Making Sense of Miscarriages of Justice* (New York: NYU Press, 2009).

²⁷⁸ LaForme & Westmoreland-Traoré, *supra* note 1 at 38.