

Report Relating to Paragraph 1(f) of the Order In Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell

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Introduction

I was retained by Commissioner Patrick LeSage, Q.C. to prepare a report to assist him in carrying out paragraph 1(f) of the Order in Council mandating him as a Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell. The paragraph reads as follows:

f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases where

- the Minister of Justice for Canada directs a new trial under section 693.3(a)(i) of the Criminal Code (Canada), and
- after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579 of the Criminal Code (Canada)¹

This interesting and challenging assignment has required me to examine the significance of an order of a new trial by the Minister of Justice under section 696.3(a)(i) of the Criminal Code, as well as the significance of a stay of proceedings under section 579 of the Criminal Code (henceforth the prosecutorial stay to distinguish it from the judicial stay) and its related common law predecessor, the *nolle prosequi*. In addition, the significance of the prosecutorial stay can only be fully understood in light of alternative remedies open to Crown counsel once an order for a new trial has been made. These alternatives include the conduct of a new trial, the withdrawal of charges and the offering of no evidence by the prosecutor which will produce a not guilty verdict. The choice of these alternative remedies are largely matters of prosecutorial discretion that are guided by the distinct role of the Attorney General and Crown prosecutors as Ministers of Justice with a mandate to ensure that justice is done.² Justice Lamer has recently commented that “[t]he wide latitude for prosecutorial discretion in relation to stays and the absence of judicial accountability presents a variety of opportunities for abuse.”³

In addition to examining the choice of prosecutorial remedies or responses to an order for a new trial, this report examines how determinations and declarations of a wrongful conviction could be made after a prosecutorial stay has been entered. Although wrongful convictions of the innocent are an undeniable and tragic reality of our justice system that cause incalculable harm to the wrongfully convicted and their families and can undermine public confidence in the administration of justice, no explicit legal procedures exist in Canadian law to determine and declare that a wrongful conviction has occurred. This does not mean that the wrongfully convicted are never exonerated and

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¹ Order in Council Manitoba No. 479/2005

² *Boucher v. The Queen* [1955] S.C.R. 16.

³ The Right Honourable Antonio Lamer *The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken*, 2006 at 320 (henceforth the Lamer Inquiry).

their innocence never affirmed, but rather that exonerations generally come from more informal processes and often as a result of dna exonerations. Section 1(f) of the Order in Council raises the question of the ability of our existing system of criminal justice to make determinations or declarations of wrongful convictions that will fully exonerate the wrongfully convicted. An inability of the justice system to exonerate the wrongfully convicted can add insult and lingering suspicion and stigma to the irreparable injury of a wrongful conviction.

In discharging my mandate I have conducted research into Canadian, British, American and Australian law on the subject. I have also found the report of former Chief Justice Lamer on three Newfoundland cases released in late June, 2006 to be especially helpful on the use of prosecutorial stays and alternative remedies such as calling no evidence. I also had access to the letter by Robert H. Morrison Q.C. of March 3, 2005 explaining the rationale for the entry of a stay of proceedings under section 579 of the Code in Mr. Driskell's case. I have asked in writing that all Attorneys General to provide me with any policies, directives or practices that exist in their offices with respect to the use of stays under s.579 of the Criminal Code and in particular the use of such stays and alternative remedies such as withdrawal of charges or calling no evidence that may be used in possible miscarriage of justice cases and most of them have supplied me with their relevant policies. I have also conducted interviews with senior prosecutors and defence lawyers on this subject. I thank all who have generously provided their expert assistance to me.

The organization of this report is as follows. I will first examine the significance of an order for a new trial under section 696.3(3)(a)(i) of the Criminal Code. I start here because of the fundamental significance of such an order both for the public and the convicted person. Indeed, I stress that this report does not examine the use of prosecutorial stays in general, but only after the Minister of Justice has ordered a new trial on the basis that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

In the next section, I examine the significance of a prosecutorial stay under section 579 of the Criminal Code, as well as the related common law device of a *nolle prosequi*. Topics to be examined include whether a prosecutorial stay or a *nolle prosequi* bars subsequent prosecution and the effects of section 579(2) in providing that the proceedings will be deemed never to have been commenced a year after the prosecutorial stay has been entered.

The full significance of a prosecutorial stay under section 579 can only be understood in the context of alternative disposition open to Crown counsel and these will be examined in the third part of the report. One alternative disposition is, of course, to conduct a new trial in which the prosecutor will have to prove the convicted person's guilt beyond a reasonable doubt. In some cases, however, particularly when there is no reasonable prospect of conviction, the option of a new trial will not be appropriate. In such cases, the prosecutor has at least two other alternatives to the use of a prosecutorial stay: namely the withdrawal of charges or the calling of no evidence. I will examine the

implications of these alternative procedures for the accused and the public with particular regard to the possibility of subsequent proceedings.

In the fourth part of my report, I will make recommendations about the proper approach that should be taken by Crown counsel in using stays under section 579 of the Criminal Code and alternative remedies after the Minister of Justice has ordered a new trial under section 696.3(3)(a)(i) of the Criminal Code. In making these recommendations, I am fortunate to have the benefit of recommendations made on these questions by Chief Justice Lamer in his recent Newfoundland inquiry. Chief Justice Lamer has crafted helpful guidelines about the respective role of prosecutorial stays, withdrawal of charges and new trials which I incorporate in my analysis. I also propose a few additions to these guidelines that are designed to adapt them to the specific circumstance of a new trial having been ordered under section 696.3(3)(a)(i).

In the final part of my report, I consider the complex and difficult question of how determinations and declarations of wrongful convictions can be made in general and in particular after, as in Mr. Driskell's case, a prosecutorial stay has been entered. As threshold matters, I must consider possible definitions of a wrongful conviction and possible legal standards for determining whether a wrongful conviction has occurred. I will then examine a variety of informal, administrative and judicial procedures that could be used to determine and declare a wrongful conviction, as well as new procedures that could be used to determine and declare whether a wrongful conviction has occurred.

I. Understanding the Significance of Orders of New Trials under Section 696.3(3)(a)(i) of the Criminal Code

In recent years, there has been increasing recognition that wrongful convictions have occurred in Canada and many other countries. The most dramatic recognition of this problem in Canada came with the Supreme Court of Canada's decision in 2001 in *United States of America v. Burns and Rafay*.⁴ In that case, the Supreme Court essentially reversed decisions it made only a decade earlier⁵ to hold that section 7 of the Charter (which provides that a person's life, liberty or security of the person can only be deprived in accordance with the principles of fundamental justice) would generally be violated if a person was extradited to face trial in another country without assurances that the death penalty would not be applied. The main justification given by the Court for requiring assurances that the death penalty not be applied was the dangers of executing the innocent. The Court stated:

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The

⁴ [2001] 1 S.C.R. 283.

⁵ *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779 at 835.

instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.⁶

Increased awareness of the prevalence of wrongful convictions is in large part related to successful claims of “actual innocence”⁷ that have been made possible by dna testing. At the same time, however, it is extremely important to recognize, as the Supreme Court of Canada did, that “DNA testing only helps correct conviction of the innocent in a narrow class of cases; most homicides do not involve biological evidence that can be determinative of guilt or innocence”.⁸ The Court added that “the concern about wrongful convictions is unlikely to be resolved by advances in the forensic sciences, welcome as those advances are from the perspective of protecting the innocent and punishing the guilty” because “there is always the potential that eyewitnesses will get it wrong... And there is always the chance that the judicial system will fail an accused...”.⁹ In *Burns and Rafay* the Supreme Court clearly recognized that wrongful convictions involve the conviction of innocent people and that we cannot rely solely on DNA testing to protect the innocent from wrongful convictions.

Although DNA exonerations have undoubtedly increased awareness of wrongful convictions, there is a real danger that it has made it more difficult for innocence and wrongful convictions to be recognized in non-DNA cases. In my view, it would be fundamentally wrong to limit recognition of wrongful convictions to DNA exonerations. There is no principled reason why a person’s status as an innocent should be affected by the happenstance of whether there is DNA evidence and whether that evidence has been retained. Pioneers of DNA exonerations have warned that they only examine the surface of the much larger problem of wrongful convictions. Indeed, they even warn of the dangers that if wrongful convictions are only related to DNA exonerations, then awareness and concern about wrongful convictions will fade as police and prosecutors increasingly use DNA, when it is available, as a means of exclusion of the innocent as suspects.¹⁰

The Canadian Process for Re-Opening Convictions

The Canadian process of re-opening convictions is a matter of some controversy and is beyond my mandate in this report. What is within my mandate, however, is the

⁶ Ibid at para 1.

⁷ Barry Scheck, Peter Neufeld and Jim Dwyer *Actual Innocence When Justice Goes Wrong and How to Make it Right* (New York: New American Library, 2003).

⁸ [2001] 1 S.C.R. 283 at para 109 quoting testimony of Peter Neufeld to the House of Representatives Judiciary Committee on June 20, 2000.

⁹ Ibid at para 116.

¹⁰ Barry Scheck and Peter Neufeld “DNA and Innocence Scholarship” in Sandra Westervelt and John Humphrey eds *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick: Rutgers University Press, 2001).

need to understand the significance of an order of a new trial by the federal Minister of Justice when a convicted person has applied to re-open his or her case. In 1994, then Justice Minister Allan Rock articulated a number of principles to govern the then s.690 process for applications for the royal prerogative of mercy by those claiming to be wrongfully convicted. The 1994 guidelines, sometimes called the Thatcher guidelines after the case that prompted their announcement, characterized the s.690 process as an “extraordinary” remedy that “does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or a result on appeal”. Relief under s.690 will ordinarily be based on new evidence that was not considered in the courts below. The final principle is the most relevant in determining the significance of an order for a new trial under section 696.3. It provided:

Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.¹¹

This principle suggests that an order for a new trial (or the alternative remedy of a new appeal) will not be made by the Minister of Justice unless a relatively high threshold is satisfied usually on the basis of new evidence. At the same time, this principle also suggests that the order of a new trial by the Minister of Justice will not in itself constitute a determination or a declaration that a wrongful conviction has occurred.

The 1994 principles were in part codified when the Criminal Code was amended in 2002 to provide a new process for review of applications by those whose normal appeals had been exhausted. The new provisions provide for *Inquiries Act* powers to be exercised by the Minister or his or her delegate when investigating applications.¹² Section 696.3(3) provides:

On an application under this Part, the Minister of Justice may

(a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

¹¹ as quoted in 2005 Annual Report by the Minister of Justice on Applications for Ministerial Review of Miscarriages of Justice.

¹² Criminal Code s.696.2

(b) dismiss the application.

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

In addition, the Minister of Justice has a discretion “at any time” under s.696.3(2) of the Criminal Code to “refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court”. This latter power, unlike the order of a new trial or a new appeal under s.696.3(3), does not require a conclusion by the Minister that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The possible use of this power to refer a determination and declaration of a wrongful conviction to a Court of Appeal will be discussed in the last section of this report.

The extraordinary nature of s.696.1 process and the general need for new matters of significance to be presented to convince the Minister of Justice to order a new trial or a new appeal is underlined by section 696.4 of the Criminal Code which provides:

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(b) the relevance and reliability of information that is presented in connection with the application; and

(c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

Regulations provide an additional outline of the process used to decide such applications. Section 4(1)(a) of the regulations generally require the Minister of Justice to conduct an investigation in respect of the application “if the Minister determines that there *may* be a reasonable basis to conclude that a miscarriage of justice likely occurred.” This is a lower standard than the standard required under section 696.3(3)(a) to order a new trial which is that the “Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice *likely occurred*.”

Neither the Criminal Code provisions nor the regulations address the question of when an appeal or a new trial is the appropriate remedy ordered by the Minister. I am informed by the head of the Criminal Convictions Review Group that new trials are generally reserved for convictions that have the most fundamental and pervasive problems while new appeals are generally used for more discrete issues. I also note that Justice Kaufman in his extensive report on the Truscott case stated that a Minister’s

“order of a new trial must continue to be regarded as an extraordinary remedy...it is a remedy more likely to be adopted- and contemplated- where factual innocence has been demonstrated to the Minister.”¹³ The order of a new trial requires the Crown to establish guilt beyond a reasonable doubt whereas the convicted person has the burden of establishing that a conviction should be quashed under an appeal. It might be helpful if the rationale that the Minister of Justice uses to select between a new trial and a new appeal as a remedy was articulated in the regulations or the material issued by the Criminal Convictions Review Group.

The Minister of Justice’s most recent annual report explains the process as follows:

The *Criminal Code* gives the Minister of Justice the power to review a conviction under a federal law to determine whether there may have been a miscarriage of justice, or what is often called a "wrongful conviction." If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister has the authority to order a new trial or refer the matter to the court of appeal for the province or the territory in question.

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice can also occur where new information surfaces which casts doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system where the relevant legal issues are determined by the courts according to law. The issue of guilt, therefore, is determined by the courts, not the Minister.¹⁴

This passage is significant because it indicates that a successful applicant under s.696.1 will not receive a declaration of innocence or a declaration that he or she is a victim of a wrongful conviction. It also indicates that a miscarriage of justice is a broader concept than a wrongful conviction and includes an unfair trial. This is also a point made by Justice Kaufman in his report on the Truscott case.¹⁵ Finally the above quoted passage underlines the principle that the “the issue of guilt” is to be determined by the courts and not the Minister.

¹³ Hon. Fred Kaufman Truscott Report at para 2132

¹⁴ Minister of Justice 2005 Annual report on Applications

¹⁵ Drawing on the jurisprudence defining miscarriage of justice under s.686 of the Criminal Code, Justice Kaufman concludes that “while the continued conviction of a person shown to be factually innocent is the most obvious ‘miscarriage of justice’, the existence of new evidence which could reasonably be expected to have affected the verdict may also provide a reasonable basis for concluding that a miscarriage of justice likely has occurred, not because the accused is likely innocent, but because it would be unfair to maintain the accused’s conviction without an opportunity for the trier of fact to consider the new evidence.” Hon. Fred Kaufman *Truscott Report* April 2004 at para 163, see also para 2074.

A booklet prepared to assist those applying for a Ministerial review explains the process as follows:

If satisfied by the information contained in the application that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister has the power to grant you a remedy (i.e., a new trial or hearing or a new appeal proceeding).¹⁶

This booklet is significant because of its emphasis on the remedy provided by the Minister after a successful application. It supports a successful applicant's expectation that he or she will receive his or her day in court as a remedy in the form of a new trial or a new appeal. The possibility that there will be no new trial because of a prosecutorial stay is not mentioned. Yet prosecutorial stays have been ordered in three cases in which new trials have been ordered under s.696.3 thus effectively depriving the successful applicant of judicial proceeding as a remedy.¹⁷

Those familiar with the criminal justice system and its complex weave of federal and provincial authority would undoubtedly point out that the federal Minister of Justice has no power over the ability of a provincial Attorney General to enter a stay under section 579 of the Criminal Code. Although such an argument is constitutionally and legally correct, it does not change the fact that the Minister of Justice's order under s.696.3 creates a legitimate and reasonable expectation that a successful applicant's conviction will be reconsidered by the courts because there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

The final contextual matter that is relevant to understanding the significance of an order for a new trial under section 696.3 is that so few people apply for such a remedy and so few receive such a remedy from the federal Minister of Justice. In the 2005 annual report, the Minister of Justice indicated that he allowed five of six applications and ordered new trials in three of the successful applications and ordered new appeals in the other two cases. The 2004 annual report indicates that six decisions were made on applications and all were dismissed. The 2003 annual report indicates that one decision was made and it was to allow a new trial. As of March 31, 2005 there were 33 active applications under s.696.1. These figures are relevant because they demonstrate the comparative rarity of applications and the greater rarity of successful applications under section 696.1.¹⁸ They also indicate that new trials have so far been ordered in the

¹⁶ "Applying for a Conviction Review" at <http://canada.justice.gc.ca/en/ps/ccr/application/index.html>

¹⁷ Steven Kaminski received a prosecutorial stay after a new trial was ordered by the Minister under s.696.3(a) as did Darcy Borge and James Driskell. Prosecutorial stays were also used under the old s.690 system in cases where after a s.690 referral to the Court of Appeal, the Court of Appeal ordered a new trial. Wilson Neepose's case was subject to a prosecutorial stay after the Court of Appeal had ordered a new trial on a reference under s.690 and the same happened to Wilfred Beaulieu after the Court of Appeal had ordered a new trial on a reference under s.690. David Milgaard's case was subject to a prosecutorial stay after the Supreme Court ordered a new trial. See Melvyn Green Affidavit in *Unger v. The Queen*, October, 2005.

¹⁸ Between 1898 and 1987, the former s.690 process was used 32 times with an unknown number of applications. Between 1983 and 1990 there were 216 applications, but only 2 interventions under s.690.

majority (4 of 6 applications) of the small number of successful applications under the new regime. Moreover, three of the four orders for a new trial- the cases of Steven Kaminski, Darcy Bjorge and James Driskell- have been pre-empted by the entry of a prosecutorial stay.

II. Understanding the Significance of Prosecutorial Stays under Section 579 of the Criminal Code

In order to understand prosecutorial stays under section 579 of the Criminal Code, it is necessary to understand the *nolle prosequi* power that has historically been a prerogative of the Attorney General of England and Wales. In what follows, I will first examine the common law *nolle prosequi* and then examine the current Canadian statutory regime for prosecutorial stays.

The Nolle Prosequi

In his life long work on the Attorney General, John Edwards described the *nolle prosequi* as one of the pre-eminent powers of the Attorney General. Writing in 1964, Professor Edwards contrasted the ability a prosecutor to request that a judge allow the withdrawal of charges in the case before the judge with the power of “the Attorney-General alone...to enter a *nolle prosequi*, and that power is not subject to any control.”¹⁹ He stressed that the *nolle prosequi* could only be entered by the Attorney General²⁰ and that the Attorney General remained responsible to Parliament “for the manner in which he discharges the discretionary powers inherent in, or attached to, his ancient office.”²¹ At the same time, however, Professor Edwards was frank that the Attorney General had rarely, if ever, been questioned about the use of the *nolle prosequi* in Parliament.²²

Professor Edwards recognized that there were alternatives to the *nolle prosequi* and that many of them were more advantageous to the accused. Writing in 1964 he stated:

Wherever possible on grounds of fairness to the accused, it is agreed, the preferable course would be to dispose of the indictment, which would otherwise remain on the file, by offering no evidence and then obtain a directed verdict of not guilty from the jury.²³

At the same time, Professor Edwards acknowledged cases in which the Attorney General had entered a *nolle prosequi* in the face of inconsistent guilty and not guilty verdicts on closely related counts and multiple proceedings.²⁴ An anonymous 1958 article that was later revealed to have been written by Mr. G.E. Dudman, then Legal Secretary of the Law

Patricia Braiden and Joan Brockman “Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code” (1999) 17 Windsor Y.B. Access to Justice 3 at 15.

¹⁹ John Ll. J. Edwards *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 227

²⁰ *ibid* at 230

²¹ *ibid* at 227

²² See also “Nolle Prosequi” [1958] *Crim.L.Rev.* 573 at 582

²³ *ibid* at 235

²⁴ *ibid* at 233, 235.

Officer's Department ²⁵, observed that the use of a *nolle prosequi* with respect to a case involving a labour dispute where the jury had returned irreconcilable verdicts "produced neither a conviction nor an acquittal; it did not bring the strike to an end."²⁶ Another case in which the *nolle prosequi* was used also produced "an unsatisfactory result" in which a co-accused who the jury was unable to agree was guilty did not receive an acquittal. In another case in which the *nolle prosequi* was used, Mr. Dudman commented that because "it is scarcely conceivable that either the Attorney-General or any of his successors will seek to revive the charge contained in it, there appears to be no reason of any kind why [the accused] should not have been placed in charge of a jury and formally acquitted on the direction of the judge."²⁷ Both Professor Edwards and Mr. Dudman expressed a clear preference for the calling of no evidence as a fairer and more conclusive means to resolve criminal cases.

Writing in 1984, Professor Edwards noted that the practice of the Attorney General of England and Wales was only to use a *nolle prosequi* in cases "where, after the indictment has been signed, it is found that the accused, for reasons of ill-health or other medical reasons, is unlikely ever to be fit to stand his trial and there is no other way of disposing of the indictment."²⁸ He observed that "the policies of the Crown's prosecutors have shifted towards either seeking the leave of the court to the withdrawal of the charges or in offering no evidence and thereby ensuring a directed verdict of acquittal."²⁹ Returning to a theme expressed in his earlier writings, Professor Edwards added that:

From the point of view of the defendant the latter procedure is to be preferred, since his discharge in these circumstances is a reality not a fiction and the erasure of the indictment from the court's active file is proof that the proceedings in question have been permanently and irrevocably terminated.³⁰

Professor Edwards went on to contrast the option of withdrawing charges which required the judge's consent and did not result in a pleas of *autrefois acquit* and offering no evidence which generally did not require the judge's consent³¹ and would protect the accused from subsequent proceedings.

Writing from the perspective of the accused's protection from double jeopardy, M.L. Friedland also discussed the *nolle prosequi* and alternative dispositions including the Canadian statutory predecessor to s.579 of the Code. Professor Friedland stressed the discretion of the Attorney General to enter a *nolle prosequi* "at any time after, but not before, a bill of indictment has been signed. The case law is clear that, notwithstanding a

²⁵ Edwards *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984) at 445 n.11

²⁶ "Nolle Prosequi" [1958] *Crim.L.Rev.* 573 at 580.

²⁷ *Ibid* at 580.

²⁸ Edwards *The Attorney General, Politics and the Public Interest* at 445

²⁹ *Ibid* at 446

³⁰ *Ibid* at 446

³¹ He did note some authority for the proposition that the trial judge would have to approve a prosecutorial decision to call no evidence. *R. v. Broad* (1978) 68 Cr. App. R. 281.

nolle prosequi, the accused remains liable to be re-indicted.”³² He observed with reference to Professor Edward’s work cited above that:

Although there may be cases in which a *nolle prosequi* has been entered where it would have been preferable to obtain a directed verdict of acquittal by offering no evidence, the accused is not normally subjected to further proceedings in these cases.³³

Professor Friedland, however, also indicated that a withdrawal of a prosecution was “normally used in cases, where, usually because of a weak case, no evidence is offered and the jury bring in a verdict of acquittal”³⁴. He stressed that this procedure should be distinguished from either a *nolle prosequi* or a withdrawal of charges both of which would leave the accused exposed to further proceedings. Professor Friedland also noted that the predecessor to section 579 of the Canadian Criminal Code was the “equivalent to the *nolle prosequi*”³⁵, but one that should in his view be amended to require approval by either the Attorney General or perhaps his deputy. Professor Friedland based his law reform recommendation on the need to ensure accountability in Parliament for the use of prosecutorial stays and his prediction that the Attorney General “will tend to use his power in cases to end proceedings against accused persons, whereas Crown attorneys will tend to use it to lay other charges.”³⁶

Commentators in Australia have also drawn a distinction between a *nolle prosequi* and an acquittal. One commentator has written that “the fact that a *nolle prosequi* has been entered in a particular case has the consequence that the jury has not determined the question of guilt or innocence of an accused.”³⁷ Caselaw in Australia has also made the point that the “entry of a *nolle prosequi*, although establishing that the proceedings have terminated in favour of the accused person, does not establish her innocence.”³⁸ Commonwealth authority on the *nolle prosequi* is united in determining that its use is a traditional prerogative of the Attorney General that suspends but does not preclude further proceedings.

The Prosecutorial Stay Power under Section 579 of the Criminal Code

Canada has contained a statutory equivalent to the *nolle prosequi* power ever since the Criminal Code was first enacted in 1892. The current section provides:

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or

³² M.L. Friedland *Double Jeopardy* (Oxford: Oxford University Press, 1969) at 30.

³³ *Ibid* at 31.

³⁴ *ibid* at 31.

³⁵ *ibid* at 35.

³⁶ *ibid* at 36.

³⁷ Peter McDermott “*Nolle Prosequi- The Law and Practice in Queensland*” (1993) 17 *Crim.L.J.* 319 at 323

³⁸ *R. v. Saunders* [1983] 2 Qd R. 270 at 271-272

preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

As early as 1919, the Ontario Court of Appeal analogized the prosecutorial stay under what is now s.579 with the *nolle prosequi* and approved of a case holding that the prosecutorial stay, as distinct from the calling of no evidence to produce a not guilty verdict, did not bar subsequent proceedings.³⁹ Professor Friedland in his leading work on double jeopardy concluded that “as with a *nolle prosequi*, the entering of a stay does not bar subsequent proceedings on another indictment and is not subject to the control of the courts”.⁴⁰ This authority was cited with approval by the Manitoba Court of Appeal in 1983 in rejecting an accused’s argument that the Charter right against double jeopardy applied to a prosecutorial stay under section 579 of the Code.⁴¹

Canadian commentary has generally cautioned against reliance on prosecutorial stays. One commentator in 1962 commented that while the prosecutorial stay was “necessary” if “used sparingly and with responsible discretion”, it was an exception to the general principle that everyone has the “right to be called upon once and only once to stand in peril on an accusation in respect of the same matter and the same offence.” He colourfully drew an analogy between the stay and the “sword of Damocles” adding that the stay was “mysterious because no one knows why his accusers have put the case indefinite cold storage.”⁴² This author advised that the stay should not be made available in magistrate’s courts because a prosecutor should not be able “to back away and stay the proceedings and escape reprisals for possibly false and frivolous accusations damaging and harmful”.⁴³ He also warned that stays should not be used in the lower courts unless the Attorney-General was prepared personally to supervise such proceedings. Another writer recommended the abolition of the prosecutorial stay power in 1974. Alternatively, she argued that it should only be exercised by the Attorney General in order to promote accountability for its use.⁴⁴ Writing in 1977, Stanley Cohen warned about the potential for abuse of prosecutorial stays and argued that withdrawals of charges were superior because they would subject “the discretion of the prosecutor to court scrutiny”.⁴⁵

Melvyn Green, a vice President of AIDWYC before his appointment to the bench, has recently commented critically on the use of prosecutorial stays in possible miscarriage of justice cases. He argued that the prosecutorial stay is a means to terminate proceedings “without conceding either factual innocence or prosecutorial error.” He adds that a prosecutorial stay is a “grey-zone message. A stay, it is clear, is not an

³⁹ *R. v. Spence* (1919) 31 C.C.C. 365 (Ont.C.A.).

⁴⁰ M.L. Friedland *Double Jeopardy* at 36

⁴¹ *Re Burrows* (1983) 6 C.C.C.(3d) 54 at 67 (Man.C.A.)

⁴² D.E. Greenfield “The Position of the Stay in Magistrate’s Court” (1962) 4 Crim.L.Q. 373 at 374

⁴³ *ibid* at 382.

⁴⁴ Connie Sun “The Discretionary Power to Stay Criminal Proceedings” (1973-74) 1 Dalhousie L.J. 482 at 522.

⁴⁵ Stanley Cohen *Due Process of Law* (Toronto: Carswell, 1977) at 159.

exoneration...The defendant is left in a legal- and very public limbo: no longer an accused but forever shrouded in a cloud of officially induced suspicion.”⁴⁶

Academic cautions and warnings about the use of prosecutorial stays, however, have generally not been heeded. Parliament extended the use of prosecutorial stays to summary conviction matters⁴⁷ and it has not acted on reform proposals that only the Attorney General personally be able to exercise this power. Stays of proceedings are used routinely in many jurisdictions as a means to terminate proceedings with apparently little thought given by prosecutors about the fact that such a disposition does not provide the accused with an acquittal or prevent subsequent proceedings. As outlined above, prosecutorial stays have been used in three cases in which the Minister of Justice has ordered a new trial under s.696.3 of the Code.

Judicial Consideration of Prosecutorial Stays

The power of the prosecutor to stay public or private prosecutions under s.579 of the Criminal Code has been described by the Supreme Court as one of five “core elements of prosecutorial discretion” that relate to whether a prosecution will be brought and what form a prosecution will take. As such, the decision whether to use a stay should be made independently by the prosecutor in accordance with the traditions of the prosecutor as a Minister of Justice. At the same time, the use of the prosecutorial stay like other exercises of prosecutorial discretion, will be treated with deference by the courts and other parts of government.⁴⁸

The reference to counsel instructed by the Attorney General in section 579 has been interpreted broadly so that the prosecutorial stay, unlike the *nolle prosequi* is not restricted to use by the Attorney General.⁴⁹ Section 579(2) provides that proceedings may be recommenced without laying a new information or preferring a new indictment within a year of entry of the stay. Once the year has expired, however, the proceedings “shall be deemed never to have commenced.” This means that the accused is liable to further proceedings. For example, murder charges have been re-laid years after the entry and expiry of the prosecutorial stay.⁵⁰ The prosecutorial stay, like its common law cousin

⁴⁶ Melvyn Green “Crown Culture and Wrongful Convictions” (2005) 29 C.R.(5th) 262

⁴⁷ Criminal Code s.795

⁴⁸ *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 at paras 45-46.

⁴⁹ *R. v. McKay* (1979) 9 C.R.(3d) 378 (Sask.C.A.) recognizing that an agent of the Attorney General has general authority to enter a prosecutorial stay without specific instructions from the Attorney General.

⁵⁰ *R. v. Allen* (2002) 208 Nfld and P.E.I. R 250 (Nfld.C.A.). Philip Stenning has similarly concluded that “There seems to be no reason to suppose that the introduction...of a one-year limit on the suspension of criminal proceedings, following a stay of proceedings in any way alters the implications of such a stay, other than in relieving the accused of the threat of recommencement of *those* proceedings once the time limit has elapsed. Since sections 508(2) and 732.1 [see now s.579(2) and s.795] both provide that proceedings which have been stayed but not recommenced during the time limit ‘shall be deemed never to have been commenced’, they would seem to present no bar to the subsequent initiation of fresh proceedings for the same offence.” Philip Stenning *Appearing for the Crown* (Montreal: Yvon Blais, 1986) at 233. (emphasis in original) Tim Quigley, however, appears to take a different position and states that “If the Crown does not recommence within the time periods [of s.579(2)], the stay is equivalent to an acquittal.

the *nolle prosequi*, does not constitute a bar to subsequent prosecutions.⁵¹ This is of particular relevance to cases under section 696.3 which tend to be serious cases that have no statute of limitations. It is also of relevance because it suggests that the prosecutor could re-open a case by relaying the charge even years after a prosecutorial stay has been entered. As will be discussed in the last section of this report, this could provide a means through which a not guilty verdict and perhaps even a declaration of a wrongful conviction could be made after the entry of a prosecutorial stay.

In 1983, the Supreme Court stated in relation to the predecessor of section 579 that:

The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a justice of the peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney-General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.⁵²

This case is significant in its recognition that a traditionally important use of the prosecutorial stay has been in relation to private prosecutions and that the Attorney General has generally only been held accountable in the legislature and not the courts for the exercise of the discretionary power to enter a prosecutorial stay.

The advent of the Charter has, however, increased the possibility for challenging various forms of prosecutorial discretion. In *R. v. Fortin*⁵³, the Ontario Court of Appeal rejected a Charter challenge to prosecutorial stays stressing the traditional ability of prosecutor to enter such stays as well as the ability of all counsel instructed by the Attorney General to use the stay. In *R. v. Scott*⁵⁴, the majority of the Supreme Court held that the use of a prosecutorial stay to protect the identity of a confidential informer was not an abuse of process. Justice Cory stated for the majority:

Thus, in a conceptual sense, a prosecutorial stay merely suspends the proceeding until the requisite time period has elapsed, where-upon it becomes permanent." Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed (Toronto: Carswell, 2006) at 16.4. I must disagree with the proposition that an expired stay is the equivalent to an acquittal and note that Professor Quigley himself discusses occasional cases in which the Crown has commenced new proceedings after the use of a prosecutorial stay.

⁵¹ This is distinct from the Court's recognition that a judicial as opposed to a prosecutorial stay of proceedings should be treated as an acquittal for the purposes of the appeal provisions of the Criminal Code. *R. v. Jewitt* [1985] 2 S.C.R. 128 at para 56.

⁵² *R. v. Dowson* (1983) 7 C.C.C.(3d) 527 at 536.

⁵³ (1989) 33 O.A.C. 123

⁵⁴ [1990] 3 S.C.R. 979 See also *Chartrand v. Quebec* (1987) 40 C.C.C.(3d) 270 (Que. C.A.) leave denied 41 C.C.C.(3d) vi recognizing right to review under Charter but holding no violation.

At the outset, it must be noted that Crown counsel was at all times acting in good faith. The Crown was obliged to protect the identity of the informer: see *R. v. Hunter*, supra. Crown counsel attempted to fulfill that obligation. Yet the judge presiding at the first trial made it very clear by his rulings and statements that he would not listen to the Crown's submission. In my view, Crown counsel acted properly in staying the action to protect the identity of an informer. In the circumstances, the Crown was not bound to follow the lengthy and somewhat circuitous route of offering no further evidence and appealing the inevitable acquittal. On the facts of this case, it was appropriate for the Crown to move for a stay in accordance with the statutory authority granted by s. 508 (now s. 579) of the Code. Subsequent to the stay of proceedings the Crown moved at the first reasonable opportunity to renew them. Once again the Crown acted properly. In the circumstances of this case, it could not possibly be said that the appellant was prejudiced in any way by delay in his trial as he was at all times in custody on another matter.⁵⁵

Scott recognizes the ability of the prosecutor to recommence proceedings against the accused after the use of the prosecutorial stay as opposed to the alternative of offering no evidence. It also recognizes the possibility that the use of the stay could be challenged in subsequent cases on the basis that the Crown is acting in bad faith and abusing its discretionary powers.

Although there is caselaw in Canada, including a few cases decided after the Charter that supports the view that the use of the prosecutorial stay is immune from judicial review⁵⁶, the better view is that the use of prosecutorial stays are subject to judicial review, albeit a deferential form of judicial review that will generally only intervene when the prosecutorial stay has been used for an improper purpose or one that constitutes an abuse of the court's own process.⁵⁷

The prosecutorial stay has not been the subject of extensive judicial comment in relation to orders for new trials under section 696.3 or its predecessor section 690. In *Reference re Milgaard*⁵⁸, however, the Supreme Court noted that:

It would be open to the Attorney General for Saskatchewan under the *Criminal Code* to enter a stay if that course were deemed appropriate in light of all the circumstances. However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.

This passage suggests that the Supreme Court recognized that a prosecutorial stay could be used in a case in which a new trial was ordered because of concerns about the safety of

⁵⁵ *ibid* at 992

⁵⁶ *R. v. Panartic Oils Ltd.* (1982) 69 C.C.C.(2d) 393 (N.W.T.S.C.); *Hebert v. Marx* (1990) 62 C.C.C.(3d) 371 (Que.C.A.); *Whitehead v. Saskatchewan Provincial Court* (1989) 76 Sask. R. 78 (Q.B.).

⁵⁷ *R. v. N(D)* (2004) 188 C.C.C.(3d) 89 (Nfld.C.A.); *Kostuch (Informant) v. Alberta (Attorney General)* (1995) 101 C.C.C.(3d) 321 (Alta.C.A.)

⁵⁸ [1992] 1 S.C.R. 866.

the conviction and that a stay could prevent the holding of a new trial. As outlined in part one of this report, this is what happened to Mr. Milgaard and Mr. Driskell and two other successful applicants under s.696.3. It should be noted that Mr. Milgaard was exonerated in 1997 by the results of DNA testing and an apology by the federal Minister of Justice.⁵⁹

In the case of Rejean Hinse, the Supreme Court recognized that a judicial stay would not result in a verdict on the merits and would not provide finality for the convicted person. In that case, the Quebec Court of Appeal entered a judicial stay in the case after Mr. Hinse had served 15 years in prison in the face of new evidence including undisclosed assertions of an alibi and problems with a physical line up and testimony from the admitted perpetrators. Justice Steinberg of the Quebec Court of Appeal concluded that the evidence was “not sufficiently clear and conclusive enough to justify acquittal of the appellant at this stage”, but that the fact that 33 years had passed since the crime that “proceeding with a second trial of the appellant under these circumstances would be vexatious and oppressive, would violate the community’s sense of fair play and decency and, therefore, would constitute an abuse of process.”⁶⁰ The accused was not satisfied with such a judicial stay and sought leave to appeal it to the Supreme Court which decided that it could hear the appeal pursuant to its general jurisdiction under s.40 of the *Supreme Court Act*. One of Chief Justice Lamer’s rationale for this ruling was that it was necessary to hear appeals from additional orders that were ancillary to an appeal court’s order relating to a conviction or appeal. He stated:

A court of appeal could effectively undermine an accused’s success on appeal by ordering a new trial only on certain limited issues which are completely unrelated to the accused’s underlying innocence or culpability. The accused’s success in procuring a new trial under s. 686(2)(b) would be eviscerated by the court’s “additional order” under s. 686(8). To deny the existence of an appeal to this Court in such an instance would deprive the accused of any mechanism to vindicate his substantive right to a new trial or an acquittal under s. 686(2) following a successful appeal. Given this troubling concern, I am inclined to adopt a more generous interpretation of s. 40(1) (and a correspondingly more narrow interpretation of s. 40(3)) which would facilitate this Court’s supervisory role in ensuring the underlying consistency of appellate court orders rendered under the procedural regime of the Criminal Code.⁶¹

The significance of this passage is the Court’s recognition that a stay of proceedings did not address the “accused’s innocence or culpability” or the accused’s interest in a verdict on the merits.

The Court’s concern with the underlying issue of guilt or innocence and its recognition of the stay as a remedy that did not address such central questions was affirmed when in 1997 in a decision on the merits, an unanimous Supreme Court concluded:

⁵⁹ News Release July 18, 1997 at http://www.milgaardinquiry.ca/June1_06JoyceMilgaard.shtml

⁶⁰ *R. v. Hinse* (1994) 64 Q.A.C. 53 at paras 34, 36

⁶¹ *R. v. Hinse* [1995] 4 S.C.R. 597 at para 34.

In the circumstances, being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt, we are all of the view that the appropriate remedy is an acquittal.

Accordingly, the appeal is allowed, the stay of proceedings order is set aside and the acquittal of the appellant is entered.⁶²

The Court's two decisions in the Rejean Hinse case underlines that in the wrongful conviction context, the Court has become more sensitive to the accused's interest on a verdict on the merits and that a stay of proceedings is a remedy that does not address the underlying and ultimate issue of guilt and innocence.

Another relevant case was the Court's decision in *R. v. Balafrej* in which the accused tried to bring proceedings under the Quebec Civil Code to overturn an acknowledged wrongful conviction. The Court subsequently on consent reversed the Court of Appeal's decision under s.70 of the Supreme Court Act, quashed the conviction and entered an acquittal.⁶³

Although prosecutorial stays are distinct from the court's use of stay of proceedings as either a Charter or an abuse of process remedy, both prosecutorial and judicial stays are united by the fact that they deprive the accused of a verdict on the merits. The Supreme Court of Canada in a number of cases has recognized that a judicial stay does not determine the merits of charges against the accused and has taken steps to preserve the accused's opportunity for a verdict on the merits. In 1988, the Court recognized that a stay of proceedings would be the appropriate remedy for a successful defence of entrapment, but also devised a creative procedure that ensured that the entrapment defence leading to a stay would only be litigated after a decision on the merits. In other words, in a case in which the Crown could not establish the accused's guilt beyond a reasonable doubt, the accused would still receive a not guilty verdict.⁶⁴ The entrapment cases, like the *Hinse* cases and the *Balafrej* case all suggest that the Supreme Court has recognized the accused's interest in a verdict of an acquittal on the merits as opposed to either a prosecutorial or judicial stay of proceedings. These cases are somewhat in tension to the Supreme Court's seeming acceptance in the *Milgaard Reference* that a prosecutorial stay may be an acceptable disposition.

Provincial Policies with Respect to the Use of Stays

I have been informed that no written policies exist in Manitoba with respect to the use of stays under s.579. I note, however, that at the time that a stay was entered in Mr. Driskell's case that Bob Morrison was quoted in the Winnipeg press as stating that the stay should not be interpreted as a "a recognition of factual innocence" and that Bruce MacFarlane stated that "a stay of proceedings means we're unable to prove the case, its not a statement of exoneration. We can't prove either guilt or innocence. (Driskell) is free of charges, he's no longer restricted by bail and he's no longer a convicted murderer."⁶⁵

⁶² *R. v. Hinse* [1997] 1 S.C.R. 3 at paras 2-3.

⁶³ Supreme Court Bulletin April 15, 2005; Criminal Conviction Review Annual Report 2005

⁶⁴ *R. v. Mack* [1988] 2 S.C.R. 903.

⁶⁵ Dan Lett and Leah Janzen "Driskell Free at Last" Winnipeg Free Press March 4, 2005.

In testimony before the Lamer inquiry, Mr. MacFarlane commented that he did not “have strong views as to whether or not you stay or offer no evidence. My point is that there’s an obligation at that point to terminate the case. As to the proper mechanism, I think it would depend largely on local practice. The practice in Manitoba would likely be to say because that the Crown action.”⁶⁶ Chief Justice Lamer added that Mr. MacFarlane “did recognize the importance of the negative public impression that could be left by the stay. He stated that where there is some ‘anxiety’ that additional evidence might arise, a stay is appropriate, but where there is ‘simply no evidence’ an acquittal should occur.” Chief Justice Lamer concluded that “Crown policy with respect to invoking the stay of proceedings varies in different parts of Canada.”⁶⁷

The Ontario Crown Policy Manual states that with respect to stays that approvals are required for criminal offences that have resulted in death and “that Crown counsel should ensure that the use of this discretionary power is consistent with the proper administration of justice.”⁶⁸ Chief Justice Lamer, however, also considered and expressed approval for an elaboration of the Ontario policy that “a stay of proceedings should not be entered unless there is a reasonable likelihood of additional, incriminating evidence coming to light.”⁶⁹ Chief Justice Lamer approved of this standard and, as will be seen, incorporated it in his proposed guidelines for the use of prosecutorial stays.

The New Brunswick Manual provides that “In New Brunswick, the practice has been to stay proceedings only for special circumstances. If there is a legitimate reason why the Crown cannot expeditiously proceed to trial, the request for a stay will likely be granted. Where, however, the Crown has no reasonable prospect of proceeding to trial within the time for re-commencement, the charge should be withdrawn and the matter thereby concluded.”⁷⁰

I have been informed that there are no specific policies in British Columbia concerning the use of a stay of proceedings, but that “a stay of proceedings is the usual process by which Crown counsel terminate a prosecution in British Columbia”.⁷¹ In general, a case in British Columbia requires a substantial likelihood of conviction and that the prosecution be in the public interest. Exceptional circumstances can justify departures from this rule, but the Crown Policy Manual indicates that “such circumstances will most often arise in cases of high risk, violent or dangerous offenders or where public safety concerns are of paramount consideration.”⁷² There is no specific mention of the accused’s interest in a verdict on the merits as being one of the exceptions to bringing a prosecution where there is no substantial likelihood of conviction. There is also no specific discussion of the relative merits of using a prosecutorial stay, withdrawing charges or calling no evidence to produce a not guilty verdict, but I am

⁶⁶ Lamer inquiry at 319

⁶⁷ *ibid* at 320.

⁶⁸ Province of Ontario, Ministry of the Attorney General *Crown Policy Manual Stay and Recommencement of Proceedings* March 21, 2005 at <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp>

⁶⁹ Lamer inquiry at 320.

⁷⁰ DPP Guideline 18 New Brunswick Stay of Proceedings March 10, 2003.

⁷¹ Correspondence Allan Seckel Deputy Attorney General of British Columbia June 26, 2006.

⁷² Crown Counsel Policy Manual British Columbia Nov. 18, 2005 CHA 1.

informed that in a minority of cases where there is no substantial likelihood of conviction that the procedure of calling no evidence is used.⁷³

Alberta's guidelines provide that when deciding whether to enter a Stay of Proceedings, agents should consider:

- a) the circumstances of the case and inability of the Crown to proceed with the case;
- b) the merits of the particular case (including the sufficiency of evidence and the likelihood of conviction);
- c) the relative importance of the case;
- d) the likelihood of re-activation or recommencement.⁷⁴

In these guidelines, then, the likelihood of recommencement of proceedings is only one of many factors to be considered before a prosecutorial stay is used.

The Newfoundland Crown Policy Manuel which is under review in light of the Lamer report, stresses that prosecutorial stays under s.579 are one of the core functions of prosecutorial discretion and that they allow the prosecutor to recommence proceeding either on the same indictment within a year of the entry of the stay or with a new indictment at any time. It provides:

In Krieger v. Law Society of Alberta 2002 SCC 65, the Supreme Court of Canada listed what it considered to be the core elements of prosecutorial discretion: (a) the discretion to prosecute a charge laid by the police; (b) the discretion to enter a stay of proceedings in either a public or private prosecution; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether; and (e) the discretion to take control of a private prosecution. The SCC stated that ...While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General....

After the expiration of a year, if the proceedings are not recommenced, the proceedings are deemed never to have been commenced. This does not mean that the Crown can never proceed on the charge. It is not the same as an acquittal. It means that a new information will have to be sworn or a direct indictment preferred, and the proceedings will commence from that point.⁷⁵

This policy makes the important point that a prosecutorial stay even after a year will not prevent the re-laying of charges. This is especially important in homicide and other serious cases which in Canada do not have a statute of limitations. To this end, the Newfoundland guidelines cite a case in which a murder charge was subject to a

⁷³ Crown policies in British Columbia are also under review in light of the Lamer report.

⁷⁴ Alberta Attorney General Guideline 11 Stay of Proceedings and Withdrawal of Charges Nov. 10, 1993.

⁷⁵ Newfoundland Crown Policy October, 2005 appendix D

prosecutorial stay in November, 1995, but a new information charging the accused was sworn almost three years later.⁷⁶

The Newfoundland guidelines emphasize that the prosecutorial stay is a matter of prosecutorial discretion and state that:

the Crown is **not** required to give reasons for entering a stay of proceedings. A stay is a direction to the Court, not a request of it. There are many reasons why the Crown may not wish to provide reasons for its' decision in a particular case, and legitimate policy reasons as to why the Crown should not be asked to do so in **any** case. These include the protection of the identity of informers or undercover police officers, avoiding jeopardizing ongoing investigations, protection of the privacy interests of witnesses or complainants, or preservation of the possibility of pursuing the prosecution at a later time.

The Newfoundland guidelines add that:

It is the prerogative of the Crown Attorney to withdraw charges, enter a stay of proceedings or to call no evidence and allow an acquittal to be entered. ...Should the decision be made to enter a stay of proceedings, then the police and victim should be advised of the nature of a stay of proceedings. The Crown Attorney should address with the police the possibility of the stay charge again proceeding should circumstances or evidence change....If a new trial is ordered after an appeal and the Crown decides that it will **not** pursue the matter then some action must be taken. The matter cannot be left in limbo. The Crown Attorney must consider whether to say, withdraw or call no evidence.⁷⁷

An appendix to these guidelines suggests that “where the investigation discloses conclusive evidence that either the offence did not occur or that it was not committed by the accused, you should consider whether it is appropriate to call no evidence and ask for an acquittal to be entered. “ It also contemplates situations where the prosecutor concludes “that the offence probably occurred and was committed by the accused, but that there is not a reasonable prospect of conviction.... In general, if there is a reasonable possibility that the circumstances may change or further evidence found which would change that, it is preferable to enter a stay. These are not absolute rules, though, because there are a lot of grey areas.”

The Newfoundland guidelines were subject to some criticism by the Lamer inquiry and its proposals for prosecutorial policies with respect to stays and alternative remedies will be discussed in the fourth part of this report.

None of the provincial policies that I have seen specifically address the use of prosecutorial stays in possible wrongful conviction cases and many of them do not situate the selection of a stay in the context of the alternatives of withdrawal of charges or the offering of no evidence.

Summary

⁷⁶ *R. v. Allen* (2002) 208 Nfld and P.E.I.R. 250.

⁷⁷ Newfoundland Crown Manuel October, 2005 Topic 460

The prosecutorial stay under s.579 is the equivalent of the *nolle prosequi* in that it does not bar subsequent proceedings and it deprives the accused of a verdict on the merits. In both entrapment cases and in the Rejean Hinse case, the Supreme Court has recognized that the accused may have a legitimate interest in a not guilty verdict of a merits as opposed to either a judicial or prosecutorial stay. At the same time, however, the Supreme Court contemplated that a prosecutorial stay might be an appropriate disposition in its decision in the Milgaard reference and a stay was used in that case before the Minister of Justice recognized and apologized for Mr. Milgaard's wrongful conviction after his DNA exoneration. Although prosecutorial stays have traditionally been immune from judicial review, the current position is that they can be challenged as an abuse of process but that the courts will generally defer to their use as a legitimate form of prosecutorial discretion. Provincial policies with respect to the use of prosecutorial stays generally see them as an issue of prosecutorial discretion and do not usually provide helpful guidance about when they or the alternatives of calling no evidence or withdrawing charges should be used. A number of provinces, however, have indicated that they may reconsider their policies in light of the detailed proposals in the Lamer inquiry report. These proposals will be discussed in the fourth part of this report, but first I will examine in greater depth the alternative to prosecutorial stays.

III. Understanding the Significance of the Alternative Remedies of New Trials, Charge Withdrawals or Calling No Evidence

The significance of the use of prosecutorial stays under section 579 after a new trial is ordered under section 696.3 can only be fully appreciated in light of alternative remedies or options that could be used by Crown counsel. As discussed above, the main alternative to the use of a prosecutorial stay is a decision by the prosecutor to call no evidence which results in a not guilty verdict for the accused. There are, however, other alternatives that should also be examined including the conduct of the trial and the withdrawal of charges.

New Trials

One alternative remedy that will be available in some cases is to allow the new trial to proceed. This option was used when the Minister of Justice in May 2004 ordered a new trial for Rodney Cain who had been convicted of murder in 1985. The Crown was able to prosecute that case and in June 2006, a jury, after three days of deliberation, acquitted Mr. Cain of murder but convicted him of manslaughter.⁷⁸ The option of conducting a new trial is relevant when considering the issue of determining and declaring a wrongful conviction. In any new trial, the Crown would have to prove guilt beyond a reasonable doubt and a failure to satisfy this high standard would result in a not guilty verdict. In jury trials, the jury will simply announce their verdict on each count. There is nothing in present trial procedures to allow for the determination and declaration of a wrongful conviction.

In Mr. Driskell's case the Crown determined that it would not be proper to proceed with the new trial. Crown counsel Robert H. Morrison Q.C. explained this

⁷⁸ "Retrial finds man guilty of manslaughter" Toronto Star June 24, 2006.

decision by stating: “The Crown is ethically entitled to proceed with a criminal trial only where there is a reasonable likelihood of a conviction. Our ethical obligation to ensure the standard is met continues throughout and at every state of a prosecution”. Mr. Morrison elaborated by stating:

When assessing whether there is a reasonable likelihood of conviction we, as Crown Attorneys, have to be mindful of our critical role. Crown Attorneys are said to have a quasi-judicial function. We have obligations of objectivity and fairness. And so, even where there is evidence pointing to guilt, if we conclude at any stage that our ethical standard is not met, then we are obliged to discontinue a prosecution.

In making this assessment he stressed that “the issue of our ethical standard involves analysis of the totality of the evidence and the logical and expected weight of it...Practical realities of the evidence, considered through the lens of experience must, obviously, also be taken into account....In the final analysis, my view is that no reasonable jury could now have sufficient confidence in the testimony of Zanidean and Gumieny so as to convict Mr. Driskell of the murder on the standard of proof beyond a reasonable doubt”⁷⁹ The standard of not prosecuting when there is no reasonable prospect of conviction represents best and common standards in Crown screening and the situation presented in Mr. Driskell’s case may well re-occur in future cases where new trials have been ordered under section 696.3 of the Code. In other words, it may not always be possible to have a new trial and this raises the issue of alternative dispositions.

Withdrawal of Charges

One alternative disposition would be for the Crown to withdraw charges in cases where there is no reasonable prospect of conviction. Some might argue that a withdrawal would be preferable to a prosecutorial stay because it would remove the sword of Damocles over the accused. A withdrawal would certainly remove the present ability of the prosecutor under s.579(2) to revive proceedings within a year without laying a new information or preferring an indictment, but it might not otherwise protect the accused from subsequent proceedings. In a 1990 case, the Supreme Court held that a new information could be laid after the prosecutor had withdrawn an information at the start of the trial before evidence was adduced against the accused. In other words, the accused could not plead *autrefois acquit* after this withdrawal of charges.⁸⁰ In an earlier case the Supreme Court held that a withdrawal after the accused had pleaded barred the prosecution proceeding by summary conviction, but did not prevent a proceeding by indictment that unlike the proceeding by summary conviction was not statute barred.⁸¹ A similar procedure in which the Crown withdrew an information on a summary conviction offence and proceeded by indictment has been upheld under the Charter as a legitimate exercise of prosecutorial discretion barring evidence of bad faith or improper motive.⁸²

⁷⁹ Letter of Robert H. Morrison Q.C. to Clerk of the Manitoba Queens Bench March 5, 2005.

⁸⁰ *R. v. Selhi* [1990] 1 S.C.R. 277. See also *R. v. Bourque* (1999) 140 C.C.C.(3d) 435 (N.B.C.A.).

⁸¹ *R. v. Karpinski* (1957) 117 C.C.C. 241

⁸² *R. v. McAuthur* (1995) 102 C.C.C.(3d) 84 (Sask.C.A.)

These cases suggest that the withdrawal of charges will not generally constitute a verdict of acquittal or allow the accused to plea autrefois acquit.⁸³

Although it will not generally prevent subsequent proceedings, a withdrawal of charges may nevertheless be perceived in some cases to be more of an exoneration than a prosecutorial stay because it does not indicate as clearly as a stay that the proceedings could be revived and because it is possible that Crown counsel could say that he or she was withdrawing charges because the accused is innocent and the charges should never have been laid in the first place. Much would depend on how the withdrawal was presented to the accused and the public.

There is some confusion about whether judicial approval is required before charges are withdrawn by the Crown. Canadian authority seems to suggest that charges can be withdrawn without judicial approval prior to the entry of plea or the preferring of an indictment.⁸⁴ After that time, “most authority holds that after a plea has been entered and especially after evidence has been called, leave of the Court is required before the Crown may withdraw the charge.”⁸⁵ The possibility that the prosecutor may seek or have to obtain judicial approval of a decision to withdraw a charge is relevant because it opens the possibility that the judicial approval could provide a means for a judicial determination and declaration that a wrongful conviction has occurred or at least some judicial amplification and approval of the prosecutor’s decision. The possibility of judicial involvement both with respect to the withdrawal of charges or the decision to offer no evidence distinguishes these procedures from the prosecutorial stay which is clearly a decision that is not subject to judicial approval, though as discussed above it could be challenged on grounds that it violated the Charter or constituted an abuse of process.

Calling No Evidence

Another alternative to the prosecutorial stay is the calling of no evidence. This remedy, unlike either a withdrawal of charges or a prosecutorial stay, protects the accused from subsequent recommencement of proceedings because it produces a not guilty verdict that can be used to plea autrefois acquit.⁸⁶ In essence, the calling of no

⁸³ To the same effect see Stanley Cohen *Due Process of Law* (Toronto: Carswell, 1977) at 163; Ulrich Gautier “The Power of the Crown to Reconstitute Proceedings After the Withdrawal or Dismissal of Charges” (1978-79) 22 *Crim.L.Q.* 463 at 471; Philip Stenning *Appearing for the Crown* (Montreal: Yvon Blais, 1986) at 249. The Newfoundland Crown Manual for example provides that “if a charge is withdrawn, it is possible for the Crown to substitute other charges arising out of the same transaction or to even to re-lay the same charge at a later date. A withdrawal of a charge is not the equivalent of a determination of the merits of a criminal charge” Newfoundland Crown Manual October, 2005 appendix D.

⁸⁴ *R. v. Osborne* (1975) 25 C.C.C.(2d) 405 (N.B.C.A.); *R. v. Blasko* (1975) 29 C.C.C.(2d) 321 (Ont.H.C.J.); *R. v. Carr* (1984) 54 N.B.R. (2d) 99 (N.B.C.A.); *R. v. McMullen* (1983) 60 N.S.R.(2d) 440 (T.D.).

⁸⁵ Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed (Toronto: Carswell, 2006) at 16.4. For an argument that leave of the court is required in all cases see David Vanek “Prosecutorial Discretion” (1987-88) 30 *Crim.L.Q.* 219 at 224-232. For a rebuttal of this argument see J.A. Ramsay “Prosecutorial Discretion: A Reply to David Vanek” (1987-88) 30 *Crim.L.Q.* 378.

⁸⁶ *R. v. Riddle* (1978) 48 C.C.C.(2d) 365 at 379-380 (S.C.C.)

evidence will result in the same plea, a not guilty verdict, as would occur should a trial have been held and the Crown was unable to prove guilt beyond a reasonable doubt. In a legal sense, the calling of no evidence resulting in a not guilty verdict in the context of an order for a new trial under section 686.3 restores the presumption of innocence that the was lost when the successful applicant was originally convicted. The sociological or practical meaning of calling no evidence and a not guilty verdict may, however, depend on the circumstances, including statements made by Crown counsel about why no evidence was called and statements made by the judge about the meaning of the resulting not guilty verdict.

As with the option of withdrawing charges, there is some uncertainty about whether judicial approval is required when the Crown decides to call no evidence. The United Kingdom's Crown Prosecution Service Guidelines respecting Termination of Procedures reflects the ambiguity of the situation when it provides that the prosecutor should provide advance notice in writing to the clerk of the Crown court of the intention to offer no evidence:

The judge has a discretion whether to accept the prosecution's decision and counsel may be reluctant to adopt a course not approved by the judge. But in practice, a court cannot compel the prosecution to proceed if the prosecution decide to offer no evidence.

It is indeed difficult to imagine the judge refusing any reasonable explanation by the prosecutor of his or her decision not to call evidence.

As was the case with withdrawing charges discussed above, possible judicial involvement in approving a decision not to call evidence raises the possibility that such a procedure could be used as a means to determine and declare that a wrongful conviction exists. Even if the judge simply accepts the Crown's decision not to call evidence and explains the importance of the not guilty verdict, judicial involvement could play a positive role in the exoneration process. As will be discussed in the fifth part of this report, there are some cases where judges have gone beyond explaining the not guilty verdict and have declared that a wrongful conviction has occurred and/or have apologized to the accused on behalf of the justice system. The courts carry much authority and prestige in our society and some judicial involvement in undoing a prior conviction by the courts may be necessary to make clear both to the successful section 696.1 applicant and to society at large that the person is innocent..

Summary

I have examined four possible responses to an order for a new trial under section 696.3. They are 1) a prosecutorial stay under section 579, 2) a withdrawal of charges by the prosecutor , 3) a new trial and 4) calling no evidence and a resulting verdict of acquittal. The first two dispositions are united in not precluding subsequent proceedings and in not producing a plea of autrefois acquit that will bar subsequent prosecutions. In contrast, the last two dispositions will result in a verdict that will preclude subsequent proceedings. At the same time, the not guilty verdict that will result from a decision by

the prosecutor to call no evidence and may result from a trial may not, depending on the circumstances, amount to a determination or declaration of a wrongful conviction.

Another difference between the alternative dispositions is that the prosecutorial stay like the *nolle prosequi* does not require any judicial approval while both charge withdrawal and the calling of no evidence may, depending on the stage of the process, require some judicial approval. The issue of judicial involvement is relevant because it may provide a basis for judicial involvement in a determination or declaration of a wrongful conviction. Alternative means for determining and declaring wrongful convictions will be examined in greater depth in the fifth part of this report. The next section, however, will outline the principles that should govern Crown counsel's choice of alternative responses to an order for a new trial under s.696.3 of the Criminal Code.

IV. A Proposed Approach to the Choice Between Prosecutorial Stays and Calling No Evidence in Section 696.1 Cases

As discussed above, a prosecutor has four potential options when faced with an order for a new trial under section 696.3. The first is to proceed with a trial, but in some cases this will not be possible because there will be no reasonable prospect of conviction because of various factors including the age of a case. In my view, it would not be advisable for the prosecutor to proceed with a trial without regard to the prospect of a conviction just because the Minister of Justice has ordered a new trial. Such an approach would abdicate the prosecutor's role to ensure that justice is done and to screen charges. It would also pose significant costs on the accused, including the possibility of conviction despite the prosecutor's judgment that there is no reasonable prospect of conviction.

A second option is to withdraw charges. As a technical matter, this may not be possible where a Minister of Justice has ordered a new trial or appeal under s.696.3 because such an order does not overturn the conviction which remains *res judicata*.⁸⁷ In any event, a withdrawal of the charges would not generally be an appropriate disposition because, as discussed above, it would leave the convicted person open to subsequent prosecution and would not produce a court verdict. At the same time, I acknowledge that withdrawal of charges may signal in a symbolic sense that the prosecutor either accepts the convicted person's innocence or has concluded that a subsequent prosecution is not in the public interest. That said, the practical distinction between a withdrawal of charges and a prosecutorial stay is minimal.

The rest of this section with focus on the principles that should guide the prosecutor's choice between the third and fourth possible procedures that can be used in response to an order for a new trial under s.696.3. These options are the entry of a prosecutorial stay under s.579 or the calling of no evidence and the subsequent entry of an acquittal. As discussed above, the use of the prosecutorial stay does not produce any verdict or judicial involvement in the case and leaves the accused open to further proceedings. On the other hand, the calling of no evidence will produce a not guilty verdict that will bar subsequent proceedings. In determining the choice between these

⁸⁷ I am assuming here that the Minister of Justice does not have the power to nullify the previous conviction and this is why the Minister of Justice only has powers to refer the case back to the courts.

two options, we are fortunate to have the learned reflections of the former Chief Justice of Canada in his recent report.

The Lamer Report

Chief Justice Lamer in his recent inquiry report on three Newfoundland cases was critical of the use of a prosecutorial stay of proceedings under section 579 after the Court of Appeal had overturned Randy Druken's murder conviction and ordered a new trial. In that case, the decision to enter a stay was taken after three Crown Attorneys and one outside Crown Attorney from Ontario gave their opinion supporting such a disposition on the basis that there was no reasonable prospect of conviction, but that further investigation of Mr. Druken was warranted. Chief Justice Lamer, however, found that their advice was in some cases infected by tunnel vision about Randy Druken's guilt and in other cases by a misapprehension of the facts. He concluded that a subsequent police investigation to determine whether there was further evidence against Randy Druken was another futile exercise. It produced nothing. It did prevent Randy Druken from obtaining an acquittal. The message from Inspector Brown and his colleagues should have been clear to DPP, Tom Mills. There was no prospect of recommencement of the proceedings against Randy Druken. Mr. Mills should have done the right thing and directed a Crown Attorney to appear on the charge but call no evidence. This would result in an acquittal. Instead, the investigation was needlessly prolonged and the stay of proceedings expired ten days later.⁸⁸

Chief Justice Lamer noted that practices on the use of prosecutorial stays varied throughout Canada, but he stated that "the most preferable" was an Ontario policy as represented not in Ontario's Crown Policy Manual but in an opinion that an Ontario Crown Attorney, Tara Dier, had provided to the Newfoundland government on the Druken case. Ms. Dier had written that "it would be inappropriate to enter a stay of proceedings if there is no prospect whatsoever of recommencement. In this case some reasonable likelihood that additional evidence implicating Randy Druken will come to light is required."⁸⁹ Chief Justice Lamer contemplated a slightly higher standard to justify the use of the prosecutorial stay, namely that "there be a reasonable expectation that the prosecution will be pursued in the future."⁹⁰ This standard recognizes that the prosecutorial stay leaves a person open to further proceedings and should only be used with there is a reasonable expectation that the prosecution will indeed be recommenced.

Chief Justice Lamer remarked that for the Crown, the use of a stay under s.579 is a relatively easy and "nothing to lose" choice because "the former accused may be charged with the same offence for the same conduct at any time." In contrast, the accused, especially one "that has been convicted and spent years in prisons" has much to lose because "a stay of proceedings may leave an impression with the public that the charge is being 'postponed' or 'the authorities', in the broad sense, still believe in the

⁸⁸ Lamer Report at 315

⁸⁹ *ibid* as quoted at 313

⁹⁰ *ibid* at 319

validity of the charged.”⁹¹ Chief Justice Lamer quoted with approval AIDWYC’s submission that a stay is not an exoneration and can leave the accused in ‘limbo’ and that it ‘indelibly tarnishes the defendant’. He added that while AIDWYC “speaks largely from the perspective of a person who had been wrongfully convicted” that the validity of its observations “extends to an accused who cannot be exonerated but for whom it is unreasonable to expect any future prosecution in relation to the charge in question.”⁹²

Chief Justice Lamer considered the DPP’s defence of the stay as a remedy that leaves the person in the same position as any other person who enjoys the presumption of innocence as “legally correct but practically unrealistic.”⁹³ Chief Justice Lamer was speaking of the use of prosecutorial stays in general but his comments about a stay placing a person in legal limbo and tarnishing a person’s reputation are particularly apt in the context of a person who has been convicted but has received from the Minister of Justice an order for a new trial on the basis that a reasonable basis exists to conclude that a miscarriage of justice likely occurred.

Chief Justice Lamer concluded that “in contrast to a stay of proceedings, a statement by the Crown, in open court, that it has no evidence to present often carries the implicit message that this person should not have been charged.”⁹⁴ Justice Kaufman in his Truscott report also contemplated that a new trial in which the Crown agreed to call no evidence could also serve as a form of exoneration for an actually innocent person.⁹⁵ I would only add that much would depend on the actual content of what Crown counsel and the judge said in open court. It is possible to imagine circumstances in which the Crown attempted to justify the decision not to call evidence either on the basis of a recognition of innocence, or alternatively, on the very different basis that there was no reasonable prospect of conviction. In the latter case, the Crown’s rationale for calling no evidence might be essentially the same rationale as was given for the decision to enter a prosecutorial stay under s.579 in Mr. Driskell’s case. Even in the latter scenario, the decision to call no evidence would result in an acquittal, albeit likely not a determination or a declaration that a wrongful conviction occurred.

Justice Lamer recommended the following guidelines to govern Crown selection between prosecutorial stays, withdrawal of charges and the calling of no evidence. It should be noted that these guidelines apply generally and not only with respect to cases where a new trial has been ordered under s.696.3:

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an even greater obligation on the Crown Attorney to ensure that it is exercised in

⁹¹ *ibid* at 317-318

⁹² *ibid* at 318

⁹³ *ibid* at 319

⁹⁴ *ibid* at 319

⁹⁵ Truscott Report at para 2133

a fair and principled manner. The following are guidelines to assist in achieving that goal:

- 1) A withdrawal of charges is appropriate where the Crown Attorney decides that;
 - i) Reasonable and probable grounds did not exist to lay the charge;
 - ii) There is no probability of conviction; or,
 - iii) It is not in the public interest to proceed with the charge
- 2) A Stay of Proceedings is appropriate where there is a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.
- 3) It is appropriate for the Crown to start a trial but to elect to call no further evidence, and request an acquittal, where there is no probability of conviction nor a reasonable likelihood of recommencement of proceedings.
- 4) Where the Crown has called evidence, it is appropriate to call no further evidence, and request an acquittal, where the Crown Attorney determines that the evidence is so manifestly unreliable that it would be dangerous to convict.

Chief Justice Lamer's proposed guidelines also stress the importance of the Crown Attorney consulting with senior Crown officials and providing reasons, generally in open court, for the exercise of the discretion between these three different remedies. He notes, however, that "the public reasons for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney."⁹⁶

The Lamer guidelines are very helpful in understanding the appropriate prosecutorial response to an order for a new trial under s.696.3. They suggest that a prosecutorial stay should only be used if 1) there is a reasonable likelihood of recommencement of the proceedings and 2) it is necessary to conduct a police investigation because of unforeseen circumstances. These guidelines recognize that a prosecutorial stay leaves the convicted person subject to further proceedings and does not give rise to a special plea of *autrefois acquit*.

Chief Justice Lamer's reference to unforeseen circumstances giving rise to a police investigation is of particular significance in the s. 696.1 context because in all such cases, there will be extensive investigation by the federal Minister of Justice or a person delegated by him or her before an order for a new trial is made. Such mandatory investigations under the extensive inquisitorial powers provided by the *Inquiries Act* should involve the investigating police force and alert them to the reality that the case is being re-considered. In other words, orders by the Minister of Justice of a new trial under

⁹⁶ Lamer report at 322-324.

s. 696.3 should never come out of the blue. In all such cases, the relevant police forces should be well aware that the case is being reconsidered and they should generally be able to commence and often complete any needed re-investigation before the Minister of Justice makes a decision whether to order a new trial. This advance warning should generally place the prosecuting authorities in a good position shortly after a new trial has been ordered to decide whether there is sufficient evidence to justify a new trial or alternatively whether they should call no evidence so that the convicted person can have the matter settled with a not guilty verdict. Further police investigations after the order for a new trial under s.696.3 should only be necessary in rare cases.

The Lamer guidelines favour the calling of no evidence over a prosecutorial stay both when there is no probability of conviction and no reasonable likelihood of recommencement of proceedings and also when the Crown counsel determines that the evidence is so manifestly unreliable that it would be dangerous to convict. The latter ground is of particular relevance in cases in which the Minister of Justice has ordered a new trial under s.696.3 because in such cases the Minister of Justice will already have determined that the conviction is dangerous or unsafe because there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The Lamer guidelines favour the accused's person interests in a final not guilty verdict while only recognizing society's possible interests in allowing recommencement in cases where there is a reasonable likelihood of recommencement of proceedings after a police investigation.

Some Suggested Additions to the Lamer Guidelines to Tailor them for Cases in which a New Trial Has Been Ordered Under Section 696.3

I would propose only a few additions to Chief Justice Lamer's guidelines in order to tailor them to the unique and extraordinary circumstances of orders under s.696.3 by the Minister of Justice for a new trial. In cases where there is a reasonable likelihood of recommencement and a further police investigation is necessary, I would suggest that the decision to enter a prosecutorial stay should generally be made by the Attorney General or the DPP in jurisdictions with a DPP. The prosecutorial stay in the s.696.3 context should be an extraordinary remedy that is used only in cases where there is a need for additional investigation and a reasonable likelihood of recommencement of proceedings. Requiring that the stay be entered by the highest official should increase deliberation before it is entered and help to focus responsibility and accountability for the exercise of an extraordinary power that will delay and perhaps prevent the Minister of Justice's order of a new trial. Given that the order for a new trial has been made at the highest level within the federal Department of Justice, it is appropriate that the entry of the prosecutorial stay at the provincial level also be made at the highest level. The involvement of the Attorney General or the Director of Public Prosecutions should also help ensure that the police re-investigation is treated as a matter of the highest priority.

I would also suggest that the Attorney General or the DPP should first allow the successful s.696.1 applicant to make written submissions to him or her about the

appropriateness of using a prosecutorial stay as opposed to other remedies.⁹⁷ The successful applicant may well have information that will assist in the exercise of prosecutorial discretion, in particular information about the reliability of the evidence. Chief Justice Lamer found that the decision to enter a prosecutorial stay may reflect the tunnel vision of police and prosecutors that may make them particularly unwilling to abandon the case against completely. In such circumstances, the use of the prosecutorial stay provides an attractive means to keep the case open even when the prosecutor must acknowledge that there is no reasonable likelihood of conviction at present. Giving the accused person an opportunity to make representation provides an opportunity, albeit no guarantee, for the prosecutorial authorities to look at the case in a new light and to confront fundamental problems with the case that might otherwise not be confronted if a prosecutorial stay is used as a means to defer the difficult issue of whether the person who has been convicted is innocent. In addition, allowing the convicted person to make representations before the prosecutorial stay is entered recognizes that the successful s.696.1 applicant has a reasonable expectation that he or she will receive another day in court.

Both my proposals that a prosecutorial stay should only be entered by the Attorney General (or the DPP, as the case may be) and after hearing submissions from the affected parties accords with the common law origins of the prosecutorial stay in the *nolle prosequi*. Although neither procedures are required under the strict terms of s.579, they are appropriate given that a prosecutorial stay will pre-empt and prevent a new trial that has been ordered by the Minister of Justice under s.696.3. If the extraordinary remedy of a new trial is to be delayed or displaced by a prosecutorial stay, then there should be accountability at the highest levels for such a decision and the successful s.696.1 applicant should be heard in the matter.

A third addition that I would recommend be placed on Chief Justice Lamer's guidelines is that any decision to pre-empt the order for a new trial under s.696.3 with a prosecutorial stay should be revisited as soon as possible and in any event within one year after its entry. This revisiting should allow the Attorney General or the DPP to decide whether the police re-investigation has either yielded enough evidence to justify a new trial or whether the investigation has failed to yield such evidence. As suggested above, police re-investigation should rarely be required after a matter has been fully invested by the Minister of Justice before an order for a new trial is made under s.696.3 of the Code. In those rare cases where further police investigation is justified, it should in almost all cases be completed in a year's time.

A time limit of no more than one year on the use of the prosecutorial stay should have a number of salutary effects. One benefit is simple to limit further periods of delay and legal uncertainty for the successful s.696.3 applicant. Such persons will already have endured long delays and in many cases years of imprisonment under circumstances that the Minister of Justice has determined indicate a reasonable basis for concluding that a

⁹⁷ Edwards observes that up to the 19th century, the Attorney General would hold hearings and hear from the parties before issuing a *nolle prosequi*. Edwards *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 236.

miscarriage of justice has likely occurred. Another benefit is to help ensure that the police re-investigation is a matter of the highest priority for the police. A third benefit is that re-visiting the stay within a year prevents the deeming provisions of s.579 (2) from coming into effect and depriving the court, at least in the absence of a new information being laid, from considering the case. As such, it will be easier and quicker for the prosecutor within a year to recommence the case and call no evidence. Section 579(2) deems that “the proceedings shall be deemed never to have been commenced.” As will be discussed in greater detail below, there is jurisprudence from two Courts of Appeal which holds that once proceedings are deemed never to have been commenced a year after the entry of the stay, courts then lose jurisdiction and become unable to consider the matter further. Such a result risks placing the successful s.696.1 applicant in a permanent legal limbo in which he or she will never receive a definitive verdict. In addition, the legal fiction in s.579(2) that the proceedings never were commenced severely discounts the experience of a convicted person who has been able to demonstrate to the satisfaction of the Minister of Justice that there are reasonable grounds to believe that a miscarriage of justice likely occurred.

Summary

The guidelines proposed by Chief Justice Lamer in his recent Newfoundland report provide a valuable and principled basis for deciding the appropriate prosecutorial response to an order for a new trial under s.696.3 of the Criminal Code. They suggest that a prosecutorial stay should only be used “where there is a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen.” This recognizes that the prosecutorial stay leaves the convicted person vulnerable to further proceedings. I would only add that the unforeseen circumstances that should necessitate an additional police investigation after a new trial has been ordered under s.696.3 should be rare given the extensive investigation by the Minister of Justice and his or her delegates that will proceed an order for a new trial.

The Lamer guidelines also suggest that the appropriate prosecutorial disposition “where there is no probability of conviction nor a reasonable likelihood of recommencement of proceedings” or where the evidence is so manifestly unreliable that it would be dangerous to convict is not a prosecutorial stay, but rather the calling of no evidence resulting in a verdict of acquittal. I would only add that the interest in settling the matter with a not guilty verdict is only greater in the s.696.1 context in which the Minister of Justice has concluded that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. In many and perhaps all such cases, the evidence will be so manifestly unreliable as to make the conviction dangerous and in such cases, the Lamer guidelines dictate that calling no evidence to produce a not guilty verdict is to be preferred to a prosecutorial stay.

I would suggest that any prosecutorial stay that may be entered after an order for a new trial under s.696.3 in order to allow a police re-investigation into unforeseen circumstances should only be a provisional stay and should be re-visited within a year of

its entry and before the proceedings are deemed under s.579(2) never to have been commenced. In other words, the prosecutorial stay should only be used as an interim measure where there is justification for an ongoing police investigation. That police investigation should be a priority and the prosecutorial stay should be revisited within a year of its entry to determine whether a not either a new trial or the calling of no evidence resulting in a not guilty verdict is the appropriate disposition. Rarely, if ever, should a stay under s.579 be the final remedy because such an approach may well deprive the courts of jurisdiction over the case. This would mean that both the convicted person and the public could be left in a permanent legal limbo without the finality of a verdict in a case where by definition there are reasonable grounds to conclude that a miscarriage of justice likely occurred.⁹⁸

V. Possible Reforms to Achieve Determinations or Declarations of Wrongful Convictions

Section 1(f) of the Order in Council asks that consideration be given to whether and in what way a determination or declaration of a wrongful conviction can be made in a case where the Minister of Justice has ordered a new trial but a prosecutorial stay has been entered. As necessary preliminary matters, this question raises the issue of how a declaration of a wrongful conviction differs from a prosecutorial stay and a not guilty verdict and on what grounds should a determination that a wrongful conviction has occurred should be made.

After these preliminary matters have been explored, I will then examine a variety of possible mechanisms that could be used to determine and declare the existence of a wrongful conviction. As will be seen, there are a number of existing means that could be used to determine and declare a wrongful conviction after a prosecutorial stay has been entered but most of them depend to some extent on the executive as opposed to the judiciary taking action. The judicial process is not readily designed to determine or declare wrongful convictions. As one American commentator has noted:

Actual innocence is difficult to verify. Courts virtually never address or rule upon the question of whether the defendant is truly innocent. Instead judges and juries determine that a defendant is ‘not guilty’ or that a guilty verdict was infected by legal error and must be reversed. Those making these decisions, whether judge or jury, do not answer the question whether they are persuaded (either by a preponderance of the evidence or beyond a reasonable doubt) that the defendant either had not involvement whatsoever in the crime or was involved but lacked the mens rea required to establish criminality. Thus, while any serious evaluation of the quality of criminal justice rendered requires an inquiry into whether the

⁹⁸ At least two ways to re-open a case after a prosecutorial stay has been expired will be outlined below, but both depend on the exercise of discretion by the executive. For reasons to be explored below, the judiciary has the responsibility to correct wrongful convictions and wherever possible should be given the opportunity to do so.

innocent are convicted, an explicit answer cannot be found in the results of the adjudicatory process itself.⁹⁹

The failure of the existing system to exonerate the wrongfully convicted can add insult, in the form of enduring stigma and suspicion, to the already irreparable injury suffered by the wrongfully convicted.

The Distinction Between a Declaration of a Wrongful Conviction and a Prosecutorial Stay or a Not Guilty Verdict

The distinction between a prosecutorial stay and a declaration of a wrongful conviction is significant and fairly straight forward to describe. As discussed above, a prosecutorial stay under s.579 of the Criminal Code simply suspends proceedings. It does not constitute a verdict on the merits or establish the basis for a plea of *autrefois acquit*. It does not provide the accused with a not guilty verdict, let alone a determination of a wrongful conviction. As Chief Justice Lamer has recently recognized, a prosecutorial stay only revives the presumption of innocence in the thinnest and most technical sense. In practice, a stay produces a legal limbo where the accused is vulnerable to subsequent criminal proceedings. Section 579(2) has the further effect of deeming that proceedings never were commenced a year after the prosecutorial stay was entered. This creates a legal fiction that denies that a successful s.696.1 applicant both has been convicted and that the Minister of Justice has determined that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

The distinction between a not guilty verdict and a declaration of a wrongful conviction is more complex. For the purposes of double jeopardy, an acquittal is considered to be a finding of innocence. In *R. v. Grdic*, Justice Lamer concluded:

There are not different kinds of acquittals and, on that point, I share the view that "as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence" (see Friedland, *Double Jeopardy* (1969), at p. 129; also Chitty i, 648; *R. v. Plummer*, [1902] 2 K.B. 339 at p. 349. To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of "not proven", which is not, has never been, and should not be part of our law.¹⁰⁰

Although a not guilty verdict may for some limited legal purposes amount to a finding of innocence, there is a great practical difference between the two types of findings. Chief Justice Lamer recognized the huge practical distinctions between a not guilty verdict and a finding of innocence when in November, 2003 he considered whether his inquiry's terms of reference and constitutional restrictions on public inquiries would allow him to rule on the factual innocence of Ronald Dalton, Gregory Parsons and Randy Druken. In the course of this ruling, he stated:

⁹⁹ Daniel Givelber "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" (1997) 49 Rutgers L.Rev. 1317 at 1322-23.

¹⁰⁰ [1985] 1 S.C.R. 810 at para 35.

A criminal trial does not address ‘factual innocence.’ The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.¹⁰¹

The above statement by the former Chief Justice recognizes the practical distinctions between an accused who has been acquitted because the state has failed to prove guilt beyond a reasonable doubt and an innocent person who has been wrongfully convicted. Professor Stuesser made a similar point when he argued that “there is a difference between innocent accused such as David Milgaard, Guy Paul Morin, Thomas Sophonow and those persons who are found not guilty, such as O.J. Simpson.”¹⁰² Professor Quigley notes that a not guilty verdict covers a range of circumstances “from complete innocence to proof just short of beyond a reasonable doubt...”¹⁰³ Justice Hickman, the former Chair of the Marshall Commission, has stressed that the label “wrongful conviction” should not be applied to cases in which an appellate court corrects an error but “should be reserved for those situations in which there is a suspected failure or breakdown” of the system by, for example non-disclosure of evidence or perjured evidence, so that “there cannot be a fair trial, and neither a trial court nor an appellate court would have before it the facts necessary to remedy the wrong.”¹⁰⁴

The Association in Defence of the Wrongly Convicted has repeatedly stressed the distinction between the wrongful conviction of the innocent and the acquittal of those whose guilt cannot be proven beyond a reasonable doubt. It argued in submissions to the Lamer inquiry that

it is not the Association in Defence of those whose convictions are overturned on appeal, or those whose charges are stayed once a new trial is ordered or those wrongly acquitted. AIDWYC’s interests are narrowly focused on the ‘wrongly convicted’- a settled term of art in Canadian jurisprudence that refers to persons who are found guilty of crimes they did not commit: factually innocent persons....it is difficult to comprehend the purpose of a public inquiry into errant homicide prosecutions unless it is driven by the same concerns that bottom AIDWYC’s participation. A public inquiry into why a guilty man was successfully convicted has as much social utility as one into why a plane did not crash or a mine did not have an accident.¹⁰⁵

In submissions to the Milgaard Inquiry, AIDWYC and David Milgaard argued that a wrongful conviction “refers to the conviction of a person who is factually innocent. It is not, and has never been, the conviction of ‘a person found guilty when he should not have been found guilty’”. AIDWYC points out that in *Burns and Rafay*, as well as some other

¹⁰¹ Lamer Inquiry Annex C.

¹⁰² Lee Stuesser “Admitting Acquittals as Similar Fact Evidence” (2002) 45 C.L.Q. 488 At 500

¹⁰³ Tim Quigley *Procedure in Canadian Criminal Law* 2nd ed at 22.6.

¹⁰⁴ Hon. T. Alexander Hickman “Wrongful Convictions and Commissions of Inquiry: A Commentary” (2004) Can J. of Criminology and Criminal Justice 183 at 184.

¹⁰⁵ AIDWYC submission Oct 17, 2003

cases, the Supreme Court had equated wrongful convictions with the conviction of “innocent individuals”¹⁰⁶

Although it is undeniable that wrongful convictions have occurred, the term is not used in the Canadian Criminal Code or related jurisprudence. The term that is generally used in Canadian criminal law is a miscarriage of justice which is both a ground for allowing an accused’s appeal from a conviction under section 686(1)(a)(iii) and a ground for the Minister of Justice to order a new trial or an appeal under section 696.3 of the Code. A miscarriage of justice would include a wrongful conviction, but it would also include other injustices such as an unfair trial. This point is confirmed by Justice Kaufman in his report on the Truscott case.¹⁰⁷ A wrongful conviction is a sub-category of the broader concept of a miscarriage of justice and refers to the conviction of those who are innocent. Courts do not usually recognize the concept of innocence as part of the regular trial process. A common definition of a wrongful conviction would be the conviction of an innocent person. A related term that is often used, especially with regards to dna exonerations, is factual or actual innocence. I prefer the simple term innocence because of the danger that actual innocence will be associated with the often unrealistically high standards that are achieved in DNA exonerations and because the term factual innocence might be interpreted to not include those who may be guilty of some unrelated misconduct pre or post charge. A wrongful conviction is the conviction of a person who is innocent of the offence for which he or she is convicted.

In many cases, the wrongfully convicted have a powerful and very practical interest in being exonerated by a declaration of a wrongful conviction and of their innocence. A simple not guilty verdict will often not be a sufficient recognition of the grievous harms caused by a wrongful conviction. Adrian Grounds of the University of Cambridge, a leading researcher into the devastating effects of wrongful conviction, has reported how many of the people he interviewed:

reported continuing apprehension and fear when out in public. One reported an attempt to burn his house down...for many of the interviewed men, money was not a motivating factor. They were much more preoccupied with their need for exoneration- a public acknowledgement that they were innocent and an apology. An Appeals court decision that the conviction must be quashed because it is ‘unsafe’ does not provide this.¹⁰⁸

In an affidavit filed in support of a Charter challenge to a stay of proceedings, Gregory Parson stated:

¹⁰⁶ Submissions to the Commission of Inquiry into the Wrongful Conviction of David Milgaard on Behalf of David Milgaard, Joyce Milgarrd and AIDWYC

¹⁰⁷ Kaufman Truscott Report at paras 163-164, 2074.

¹⁰⁸ Adrian Grounds “Psychological Consequences of Wrongful Conviction and Imprisonment” (2004) Can J. of Criminology and Criminal Justice 165 at 172, 178.

This stay of proceedings has left a cloud of suspicion hanging over my head and many members of the public have the impression that I must have had something to do with my mother's death.¹⁰⁹

On the eve of hearing the Charter challenge, the stay was withdrawn in Mr. Parson's case and the Attorney General offered no evidence producing a verdict of acquittal. He subsequently sought an exoneration and a declaration of innocence from the Lamer inquiry. Chief Justice Lamer made the following conclusions:

It is possible for a person to commit a criminal offence, to be tried and to be acquitted even though the person is actually guilty. A finding of 'not guilty' may mean no more than the Crown has not been able to prove its case 'beyond a reasonable doubt'. This is not such a case.

Gregory Parsons played no part whatsoever in the murder of his mother, Catherine Carroll. He is completely innocent. His innocence was established by DNA evidence which placed another male at the scene of the murder. That individual ultimately was apprehended, confessed and was convicted.¹¹⁰

The general public, including those who interact with the wrongfully convicted, may need a more formal and official exoneration than a not guilty verdict to truly restore a person who has been wrongfully convicted to full standing in the community. Once a person has been convicted and imprisoned, something more than a not guilty verdict may be needed to fully and truly restore the presumption of innocence.

There are some arguments that can be made against the concept of determining and declaring that an innocent person has suffered a wrongful conviction. In *Gridic*¹¹¹, the Supreme Court held that for the purposes of double jeopardy that a not guilty verdict should be considered as a determination of innocence and it expressed concerns about introducing a third verdict of "not proven" into Canadian criminal law. In other words, there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict and create two classes of people who have been convicted: those who have "gotten off" because the Crown could not prove their guilt beyond a reasonable doubt and those who have been declared to be innocent. Writing in 1988, Peter MacKinnon argued that "we may not be able to prevent suspicion that lingers, but there ought not to be *official* pronouncements of probable guilt, whether implicit in assessments of 'innocence in fact' for the purpose of cost awards, or anywhere else." He went on to argue at that time, that Donald Marshall, Susan Nelles and Thomas Sophonow would not be eligible for compensation under an approach that required the establishment of innocence, but that they would be eligible under a more generous approach that he advocated that tied compensation to a not guilty verdict.¹¹² I would

¹⁰⁹ Affidavit of Gregory Parsons para 6, April 2, 1998.

¹¹⁰ Lamer Inquiry at 70.

¹¹¹ [1985] 1 S.C.R. 810 at para 35

¹¹² Peter MacKinnon "Costs and Compensation for the Innocent Accused" (1988) 67 Can. Bar Rev. 489 at 498-499.

note, however, that this argument, like the *Grdic* case, was made before the full extent of wrongful convictions in our justice system was recognized.

Even before the extent of wrongful convictions were recognized, there was a strong argument that the justice system broadly conceived implicitly recognized a “third verdict” of actual innocence. Article 14(6) of the International Covenant on Civil and Political Rights¹¹³ contemplates a distinction between not guilty verdicts and miscarriages of justice that deserve compensation by providing a requirement of compensation when a final conviction has subsequently been reversed “on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.” In addition, the current federal/provincial guidelines on compensation for the wrongfully convicted provide that “compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty).”¹¹⁴ Although arguments can be made that all accused who receive not guilty verdicts should receive some compensation and that it could undermine the presumption of innocence to introduce a “third verdict” based on factual innocence,¹¹⁵ the present reality is that such compensation is generally restricted to those who can demonstrate that they have been wrongfully convicted and are innocent.¹¹⁶ Even apart from the issue of compensation, the public draws a distinction between those who have received a not guilty verdict because the state could not prove their guilt beyond a reasonable doubt with admissible evidence and the innocent people who are victims of wrongful convictions.

I accept that there is some danger that determinations and declarations of wrongful convictions could erode the integrity of the not guilty verdict. For that reason, I think it is vitally important that the person who receives a not guilty verdict should be able to make the decision whether to seek a determination of whether he or she was wrongfully convicted. Determinations of innocence should not be foisted on a person who has been acquitted. The rationale for placing the onus on the formerly convicted to start any process to determine whether there has been a wrongful conviction is related to the difficulty that many persons may have in demonstrating their innocence.

Possible Standards for Making a Determination and Declaration of a Wrongful Conviction

Once it is accepted that in some cases those who have received a not guilty verdict (or a prosecutorial stay) have a legitimate and compelling interest in obtaining a determination and a declaration that they have been wrongfully convicted, this raises the issue of how a wrongful conviction and the convicted person’s innocence should be proven. The Supreme Court dealt with this issue somewhat indirectly in 1992 when it decided the *Reference re Milgaard* [1992] 1 S.C.R. 866. During the course of the hearing

¹¹³ 21 U.N. GAOR Supp 15 U.N. Doc A/6316 CST 1976, No.47.

¹¹⁴ Guidelines for Compensation of Wrongfully Convicted or Imprisoned Persons no date

¹¹⁵ MacKinnon “Costs and Compensation for the Innocent Accused” (1988) 67 Can. Bar Rev. 489 at 498-499.

¹¹⁶ Kaiser “Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course” 1989 9 Windsor Y.B Access to Justice 96.

the Court determined that in the interests of justice the guidelines that would be followed in responding to the questions should be set out for the parties. These guidelines provided:

(a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, *the Court is satisfied beyond a reasonable doubt* that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, *to grant a free pardon* to David Milgaard.

(b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, *the Court is satisfied on a preponderance of the evidence* that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed *and a verdict of acquittal entered*, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.

(c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this Court which is relevant to the issue of David Milgaard's guilt, *which is reasonably capable of belief, and which taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict*. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground we would consider advising the Minister of Justice to *quash the conviction and to direct a new trial* under s. 690(a) of the *Criminal Code*. In this event it *would be open to the Attorney General for Saskatchewan to enter a stay if a stay were deemed appropriate in view of all the circumstances including the time served by David Milgaard.*¹¹⁷

On the merits at that time in 1992, the Court determined that it was not convinced beyond a reasonable doubt that David Milgaard was innocent of the murder of Gail Miller. It also concluded that it was “not satisfied, on the basis of the judicial record, the Reference case and the further evidence heard on this Reference, on a preponderance of all the evidence, that David Milgaard is innocent of that murder.” It then ruled:

¹¹⁷ *Reference re Milgaard* [1992] 1 S.C.R 866 at 868 (emphasis added)

Third, we are satisfied that there has been new evidence placed before us which is reasonably capable of belief and which taken together with the evidence adduced at trial could reasonably be expected to have affected the verdict. We will therefore be advising the Minister to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In light of this decision, it would be inappropriate to discuss the evidence in detail or to comment upon the credibility of the witnesses.

In 1997, however, a DNA test exonerated Mr. Milgaard and he received an apology from the federal Minister of Justice. As in Gregory Parson's case, another person has subsequently been convicted of the murder for which Mr. Milgaard was wrongfully convicted. It should provide some pause that such a clearly innocent man as Mr. Milgaard could not satisfy the burden of proving his innocence that was placed upon him by the Supreme Court in 1992.

Although the Milgaard standards articulated by the Supreme Court obviously command careful attention, a number of questions can be raised about whether today they provide an appropriate standard for making a determination and a declaration of a wrongful conviction. One contextual factor is that the *Milgaard* guidelines were articulated in 1992 a year after the Court had found that extradition to face the death penalty did not violate the Charter and before most of the recent wrongful convictions in Canada had been discovered. As discussed in the first part of this report, the Supreme Court in 2001 changed its approach to extradition and the death penalty in large part because of subsequent learning about wrongful convictions including Mr. Milgaard's DNA exoneration. As such, it is an open question whether the Supreme Court would apply the same standards today.¹¹⁸ The precedential value of the *Milgaard* standards are also suspect because they were crafted not in the present context of s.696.1 applications or a regular appeal but in the course of a unique reference question being directed at the Court that asked it whether Milgaard's continued conviction constituted a miscarriage of justice.

The first guideline articulated by the Court in *Milgaard* required Milgaard to prove his innocence beyond a reasonable doubt in order to obtain a free pardon. In principle, it is difficult to justify requiring an individual to bear the burden of proof beyond a reasonable doubt. Such a high standard of proof in all other contexts is only imposed on the state with its superior resources and coercive powers. Although it is possible to posit cases in which an individual could satisfy such an extraordinary burden, such cases might well be reserved to cases where DNA demonstrates conclusively that the convicted person was not the perpetrator of the crime. In a practical sense, this may

¹¹⁸ I have found surprisingly little commentary on the Supreme Court's decision in *Reference re Milgaard*. One article, however, commented that "The Supreme Court's decision, in response to the minister, was not helpful. In saying that Milgaard's innocence is not more likely than his guilt, the court was suggesting that they were unable to make even a probabilistic judgment about Milgaard's responsibility for Gail Miller's death. Not innocent, not guilty and not deserving of compensation. Saskatchewan is spared the embarrassment of a new trial, the police and prosecutors of Saskatoon are spared the embarrassment of an inquiry into their conduct and David Milgaard is released from jail. Substantial political finesse, but little in the way of legal principle." At Neil Boyd and Kim Rossmo "David Milgaard, the Supreme Court and Section 690: A Wrongful Conviction Re-visited" *Canadian Lawyer*. February, 1994 28 at 32.

well restrict such declarations of wrongful convictions or DNA exonerations in cases involving sexual assaults or other similar encounters between the perpetrator and the victim. As the Supreme Court has subsequently reminded us in *Burns and Rafay*, it would be a mistake to rely on advances in forensic science as the sole corrective or marker of wrongful convictions.

Another problematic aspect of the first Milgaard standard is its linking of proof of innocence beyond a reasonable doubt with a free pardon. Although a person who receives a free pardon is deemed under s.748(3) of the Criminal Code “never to have committed the offence in respect of which the pardon is granted”, there is an element of a legal fiction in such a deeming provision not unlike the deeming that takes place under s.579(2) that a proceeding never has been commenced a year after a prosecutorial stay. The word pardon implies that a person has done something wrong and is not commonly thought to be synonymous with the term exoneration. Finally, it seems problematic to rely on the executive through the Governor in Council to exonerate an individual who has been able to discharge the extraordinary burden of proving his or her innocence to a court beyond a reasonable doubt.

The second standard articulated in the *Milgaard Reference* requires the convicted person to establish innocence on the “preponderance of the evidence”, a standard similar to the balance of probabilities standard that the person would have to bear in a civil action or in criminal cases where a reverse onus has been held to be a reasonable limit on the presumption of innocence. Such a standard is a more familiar one in our legal system and could serve as a basis for distinguishing between not guilty verdicts produced by the state’s failure to prove guilt beyond a reasonable doubt and declarations of wrongful convictions. At the same time, the balance of probabilities standard could often be a difficult standard for a convicted person to satisfy especially in cases where it remains clear that a crime has been committed, where there is no DNA evidence and where the perpetrator remains at large. In most wrongful conviction cases, there will be reasonable and probable grounds to charge the person and circumstantial evidence that is suggestive of the person’s guilt. Such evidence will make it more difficult for the person to establish innocence on a balance of probabilities.

The second Milgaard standard links proof of innocence on a preponderance of evidence with the verdict of an acquittal. This standard is in my view preferable to the first Milgaard standard because it provides a judicial remedy and does not rely on the cabinet issuing a pardon. On the other hand, the idea that a person who establishes his or her innocence on a balance of probabilities should receive an acquittal risks undermining the principle that an acquittal is the appropriate disposition when the state fails to prove guilt beyond a reasonable doubt. Proof of innocence by the accused on a balance of probabilities should not be conflated with the failure of the Crown to prove guilt beyond a reasonable doubt. The former standard places a significant burden on the individual, a standard similar to that satisfied by those who receive compensation for their wrongful conviction. An accused who establishes innocence on a balance of probabilities should be entitled to more than a not guilty verdict. Such a person should receive a clear declaration of innocence and a clear declaration that a wrongful conviction has occurred.

The third Milgaard standard suggests that a new trial should be ordered if new evidence could reasonably have been expected to affect the verdict. This standard incorporates the traditional standard that the state must prove guilt beyond a reasonable doubt and is more consistent with the tests used by the courts with respect to appeals, including matters involving both new evidence¹¹⁹ and disclosure violations.¹²⁰ The third Milgaard standard is not, however, connected to the determination or declaration of a wrongful conviction but rather the safety of the verdict and the need for a new trial.

The third Milgaard standard is also problematic because of its apparent acceptance that a new trial might legitimately be pre-empted by a prosecutorial stay. This reference to a prosecutorial stay should now be read in light of the guidelines articulated by Chief Justice Lamer in his Newfoundland report. As discussed above, Chief Justice Lamer (who was a member of the Milgaard panel) indicated that prosecutorial stays should only be used where there is a reasonable likelihood of recommencement of proceedings. Chief Justice Lamer has now suggested that the calling of no evidence and a not guilty verdict is appropriate in cases where there no reasonable likelihood of recommencement or a successful prosecution or when the evidence is so manifestly unreliable that it would be dangerous to convict.

Justice Kaufman in his report on the Truscott case accepted that proof of any of the three standards outlined in the *Milgaard Reference* could be sufficient to justify the Minister of Justice ordering a new trial under s.696.3.¹²¹ In practice, this suggests that the focus will often be on the third Milgaard standard which places the lowest burden on the accused. Although Justice Kaufman did not offer explicit criticism of the Milgaard standards, his decision that the third and lowest standard should govern can be interpreted as implicit rejection of the high burden that the first and second standard place on the convicted person. At the same time, his task was not to determine whether a wrongful conviction occurred, but to determine whether there was a reasonable basis to conclude that a miscarriage of justice likely occurred.

Should a decision be made to devise a procedure to determine the existence of a wrongful conviction, the second Milgaard standard is in my view the most likely standard that would be used to declare the existence of a wrongful conviction. Such a standard would require the convicted person to establish innocence on a balance of probabilities and would be compatible with the standard that the person would have to discharge in administrative or civil proceedings. A balance of probabilities standard would create a meaningful distinction in law between a not guilty verdict that would occur when the state failed to prove guilt beyond a reasonable doubt and a declaration of a wrongful conviction. It would also avoid the possible injustice of requiring the accused to prove innocence beyond a reasonable doubt, an exacting standard that would probably limit declarations of wrongful convictions to DNA exonerations.

¹¹⁹ *R. v. Palmer* [1980] 1 S.C.R. 759.

¹²⁰ *R. v. Dixon* [1998] 1 S.C.R. 244 ; *R. v. Tallifer* [2003] 3 S.C.R. 307

¹²¹ Hon. Fred Kaufman *Truscott Report* April 2004 at paras 163-164, 2074

I recognize that even a balance of probabilities standard would place an onerous burden on a person to establish innocence and that it might not be possible for a person who had been wrongfully convicted to satisfy that demanding standard in all cases. An alternative and lower standard would be the third Milgaard standard, but it seems to be directed more at the safety of the verdict and the possibility of a wrongful conviction than an actual determination that a wrongful conviction has occurred. Given the difficulties of establishing that a wrongful conviction has occurred and the risks of diminishing the meaning of a not guilty verdict, any process to determine and declare a wrongful conviction should only be initiated at the request of the person whose conviction has been overturned.

Processes of Determining and Declaring a Wrongful Conviction

In considering possible means to make determinations and declarations of a wrongful conviction, it is necessary to consider informal, administrative and judicial avenues for exoneration. Informal methods have been used more frequently than formal methods in part because of the existing criminal justice system is generally oriented around the requirement of proof of guilt beyond a reasonable doubt and a not guilty verdict. The Sophonow case is a good example where informal actions by police and prosecutors resulted in an exoneration. Another example would be the apology offered by the federal Minister of Justice after David Milgaard's DNA exoneration. Administrative means of exoneration include the granting of a free pardon by the Governor in Council and declarations of innocence by public inquiries which technically remain part of the executive even though they are usually headed by sitting or retired judges. It is important to consider possible judicial mechanisms for exonerations through existing or perhaps new procedure. Finally, it is possible to contemplate some creative hybrid mechanism to determine wrongful convictions that may like public inquiries themselves involve elements of the executive and judicial process or perhaps elements of the executive and informal processes.

The criteria for choice between informal, administrative and judicial means for determining whether a wrongful conviction has occurred will depend on a number of factors. The choice made by the previously convicted person may depend on the practicalities and politics of the particular situation. If the executive is willing to declare that the person is innocent, this may well be the most effective means to achieve a declaration of a wrongful conviction. At the same time, the executive may be unwilling or reluctant to declare that the person has suffered a wrongful conviction. One factor may be the persistence of tunnel vision which caused the wrongful conviction in the first place. Another factor may be concerns about liability.

From a constitutional perspective, there is much to be said for judicial determinations and declarations of wrongful convictions. The whole s.696.1 process is designed to respect the separation of powers and ultimate judicial responsibility for convictions by limiting the Minister of Justice to references of miscarriage of justice cases back to the courts. Even in systems where there is an independent criminal case review commission, such commissions can only refer cases back to the courts for similar

reasons. If a miscarriage of justice must return to the courts to be corrected, this begs the question of why the courts should not see the matter through to an exoneration. In *Burns and Rafay*,¹²² the Supreme Court stressed that wrongful convictions were matters within the inherent domain of the judiciary because they affect the basic operation of the justice system. Constitutional principles of separation of power and ultimate judicial responsibility for wrongful convictions suggest that careful consideration should be given to possible ways in which the courts might make determinations and declarations of wrongful convictions rather than the process being left to either formal or informal executive processes.

A. Informal Means of Determining and Declaring a Wrongful Conviction

Apologies by Police and Prosecutors

In his comprehensive paper, *Convicting the Innocent A Triple Failure of the Justice System*, Bruce MacFarlane Q.C. suggests that “government may wish to consider issuing an apology to the person wrongfully convicted. An apology goes well beyond a simple reversal of the conviction or the granting of a pardon: it publicly confirms that something went wrong in the case, and that the accused ought never have been convicted in the first place.”¹²³ As an example of an apology, Mr. MacFarlane cites the following apology provided by the Winnipeg Police in 2000 to Thomas Sophonow:

A recent police investigation has demonstrated that you were in no way involved in this crime, and a review of that police investigation by my department supports that conclusion.

You were arrested, charged and imprisoned for a crime that you had not committed. I cannot begin to even understand the anguish that you must have felt as you going through this process. I wish, therefore, to extend to you, on behalf of the Province of Manitoba, my full and unqualified apology for your imprisonment under these circumstances, as well as the lengthy struggle you subsequently endured to clear your name.¹²⁴

The full impact of this apology can only be understood in the context of the case. On appeal after his third trial, Mr. Sophonow was acquitted by the Manitoba Court of Appeal because of its concerns about ordering a fourth trial and because Mr. Sophonow had already served 45 months in prison. As Justice Cory observed in his Sophonow inquiry,

From the time of his acquittal by the Manitoba Court of Appeal in 1985, Thomas Sophonow has sought exoneration. For 15 years he was thought of by his co-

¹²² The Court stressed it was concerned with “the narrower aspects of the controversy are concerned with the investigation, prosecution, defence, appeal and sentencing of a person within the framework of the criminal law. They bear on the protection of the innocent, the avoidance of miscarriages of justice, and the rectification of miscarriages of justice where they are found to exist. These considerations are central to the preoccupation of the courts, and directly engage the responsibility of judges “as guardian[s] of the justice system”. We regard the present controversy in Canada and the United States over possible miscarriages of justice in murder convictions (discussed more fully below) as falling within the second category, and therefore as engaging the special responsibility of the judiciary for the protection of the innocent.” *United States of America v. Burns* supra at para 71.

¹²³ Bruce MacFarlane Q.C. *Convicting the Innocent* revised December, 2005 at 103.

¹²⁴ *Ibid* at 103-104.

workers as a murderer. This opinion was shared by his neighbours and many others. Truly, he bore the mark of Cain.¹²⁵

The Sophonow case demonstrates the power of apologies and exonerations as announced by police, prosecutors and the province responsible for the prosecution. It also demonstrates the human costs for the wrongfully convicted when these apologies are not made or are delayed.¹²⁶

One obstacle to apologies and a recognition of innocence by police and prosecutors, however, may be a reluctance on the part of police and prosecutors to admit that they made mistakes and concerns that an admission of a wrongful conviction may have implications with respect to compensation. Melvyn Green has written about how “Crown culture” and “tunnel vision” may affect prosecutorial conduct both in the production, but also in the aftermath of a wrongful conviction. He argued that:

Prosecutorial resistance to righting wrongful convictions is deeply ingrained. There is a profound reluctance to acknowledge even the possibility of error, and an equally profound reluctance to admit any responsibility for a miscarriage of justice once incontrovertibly exposed. This posture is an endemic form of institutional denial that inhibits the reforms necessary to eliminate further wrongful convictions.¹²⁷

The Lamer inquiry has confirmed that police and prosecutors who have been involved in wrongful convictions are often subject to a form of tunnel vision that makes it difficult them to consider alternative suspects and theories or admit mistakes. My point is not that some police or prosecutorial agencies or provinces are incapable of overcoming these obstacles and doing the right thing, but rather that these obstacles make reliance on police, prosecutorial or provincial apologies less than an ideal mechanism for determining and declaring the existence of wrongful convictions. Such a conclusion, however, does not diminish or devalue the importance of such exonerations or apologies in the cases where they are made.

Civil Society Reviews and Exonerations

Another way of obtaining a determination and a declaration of a wrongful conviction is to rely on private or civil society groups for such determinations or declarations. A declaration of innocence is often implicit or explicit in the very important work done by the Association in Defence of the Wrongfully Convicted and other such groups. For example AIDWYC explains its choice of cases in the following manner:

While we recognize that there are many cases in which the reasonableness of a guilty verdict may be questioned, AIDWYC has chosen to devote itself exclusively to cases in which the Board is convinced--and will be able to prove--

¹²⁵ *The Inquiry Regarding Thomas Sophonow* Introduction

¹²⁶ Another example would be the 1997 press release in which the federal Minister of Justice recognized that “a terrible wrong” and a “wrongful conviction” had been done to David Milgaard and offered apologies. News Release July 18, 1997 at http://www.milgaardinquiry.ca/June1_06JoyceMilgaard.shtml

¹²⁷ Melvyn Green “Crown Culture and Wrongful Convictions: A Beginning” (2005) 29 C.R.(6th) 262.

that the accused is *factually innocent*. This process ensures quality control of all cases and speaks clearly to the integrity of our process.

*FACTUAL INNOCENCE is where proof exists (through DNA or other means) that the person was not involved in any way with the murder.*¹²⁸

Another means outlined by MacFarlane is the use of private panels of judges or other eminent persons reviewing the case. He comments that such an approach “has the advantage of being focused and speedy” but that it “lacks full transparency”.¹²⁹ Such an approach was taken when evidence including evidence from recanting witnesses was presented in a public forum to the Hon. Fred Kaufman in the Lenard Peltier case. Justice Kaufman was persuaded by this new evidence and made recommendations to this effect but it did not result in clemency being granted to Mr. Peltier. AIDWYC has also hosted conferences where other retired judges have stated their belief in the innocence of those who have wrongfully convicted.¹³⁰

Although civil society groups serve an invaluable role in correcting wrongful convictions, reliance on them may not be the optimal method of determining and declaring a wrongful conviction. They have less official status than the police and prosecutors and may be viewed by some as having an interest in a case in which they have invested their time and credibility. In any event, a private exoneration will generally not have the same impact as an official one. This does not discount the possibility that in some cases, the state may refer a case to an ad hoc process and accept its recommendations as binding.

B. Administrative Means of Determining and Declaring a Wrongful Conviction

The Section 696.1 Process

One possible vehicle for determining and declaring a wrongful conviction is the section 696.1 process itself. The section 696.1 process is designed to collect the relevant evidence and apply it against the statutory standard of whether “the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”¹³¹ I have been advised that the Criminal Conviction Review Group interprets this reference to a miscarriage of justice has synonymous with a wrongful conviction, but also that they take the position that only the Governor in Council can declare a person factually innocent in the form of a free pardon. The statutory criteria in s. 693.3 of a reasonable basis to conclude that a miscarriage of justice likely occurred is seen as an intermediate position between guilt and factual innocence. The Minister of Justice has limited powers under s.696.3 that do not explicitly include declarations of wrongful conviction and are limited to directing new trials or appeals. Indeed, a Minister that declared the existence of a wrongful conviction when exercising this power might be

¹²⁸ http://www.aidwyc.org/index.cfm/ci_id/1114/la_id/1.htm

¹²⁹ Bruce MacFarlane *Convicting the Innocent*

¹³⁰ “Judicial accountability urged in wrongful conviction cases” *Globe and Mail* June 13, 2005.

¹³¹ Criminal Code section 696.3(3) (a).

criticized for pre-judging a matter that was before the courts. At the same time, I note that then Minister of Justice Irwin Cotler was quoted by reporters at the time that he ordered a new trial under s.696.3 as saying that Mr. Driskell had been “vindicated in his innocence. In my view, yes, this was a wrongful conviction. On a personal level, I can say to (Driskell) I’m sorry both for him and his family that he had to endure this miscarriage of justice.”¹³² These statements seem to constitute a declaration of a wrongful conviction after a lengthy investigation of the matter and suggest that some Ministers of Justice may go quite far in using the section 696.1 process as a platform for declaring that a wrongful conviction has occurred even though they are legally limited to referring the case back to the courts. I would add, however, that the official federal Department of Justice press release in this matter explicitly stated that the Mr. Driskell’s successful s.696.1 application did not constitute a finding of innocence and that the Minister of Justice did not have the power to make such a finding.¹³³

Free Pardons

Section 748 of the Criminal Code provides for the Governor in Council to grant either free or conditional pardons. In *Reference re Milgaard*¹³⁴, the Supreme Court suggested that a free pardon would be the appropriate disposition should Mr. Milgaard be able to prove his innocence beyond a reasonable doubt to the Court. Section 748(3) of the Criminal Code provides:

Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

The National Parole Board describes a free pardon granted under the royal prerogative of mercy as follows:

¹³² Dan Lett and Leah Janzen “Driskell Free at Last” Winnipeg Free Press March 4, 2005. Minister of Justice Cotler’s quote on the official press release released by the Department of Justice are more restrained. He is quoted as stating that he “has concluded that a miscarriage of justice likely occurred in Mr. Driskell’s case. Accordingly, I am granting the application for ministerial review, quashing the conviction, and ordering a new trial” He added that Mr. Driskell had been “clearly denied... the right to a full and fair hearing. They so seriously prejudiced the fairness of the original trial and the validity of the original conviction that the only appropriate remedy is to quash the conviction and grant a new trial.” The official press release went on to disclaim the idea that the Minister was determining that Mr. Driskell was innocent when it stated: “When rendering a decision on an application for ministerial review, the Minister is not making a finding of guilt or innocence. The Minister has no legal power to make such a finding. The Minister is simply returning the matter to the courts in circumstances where there is a reasonable basis to conclude that a miscarriage of justice likely occurred. Ultimately, the courts will decide the issue of the applicant’s guilt or innocence.” Department of Justice Canada “Minister Orders New Trial in Manitoba Murder Case” March 3, 2005 at http://canada.justice.gc.ca/en/news/nr/2005/doc_31408.html

¹³³ The press release stated that “ultimately, the courts will decide the issue of the applicant’s guilt or innocence” though I have been advised that a declaration of innocence would be obtained through a free pardon granted by the Governor in Council.

¹³⁴ [1992] 1 S.C.R. 866

A free pardon is a formal recognition that a person was erroneously convicted of an offense. Any consequence resulting from the conviction, such as fines, prohibitions or forfeitures, will be canceled upon the grant of a free pardon. In addition, any record of the conviction will be erased from the police and court records, and from any other official data banks.

The sole criterion upon which an application for a free pardon may be entertained is that of the innocence of the convicted person.

In order for a free pardon to be considered, the applicant must have exhausted all appeal mechanisms available under the *Criminal Code*, or other pertinent legislation. In addition, the applicant must provide new evidence, which was not available to the courts at the time the conviction was registered, or at the time the appeal was processed, to clearly establish innocence.¹³⁵

Under section 607 of the Criminal Code, a free pardon is, like *autrefois acquit*, a special plea in defence of a criminal charge. The Supreme Court has also recognized that a free pardon is distinct from other pardons because only a free pardon deems that the conviction has never occurred.¹³⁶

The royal prerogative of mercy was historically closed intertwined with the correction of miscarriages of justice, but the trend is towards greater separation of the two processes.¹³⁷ This is understandable because the very word pardon suggests that the person has done something wrong. In an article examining the work of the Self Defence Review, Gary Trotter, before his recent appointment to the bench, observed that the judge conducting the review recommended the grant of free pardons in three cases, two on the strength of evidence that established on a balance of probabilities that the women were acting in self-defence and one on the basis of a reasonable doubt as to her liability for the death of the victim. In all three cases, however, the applicants were not granted a free pardon in large part because the Ministers determined that such relief was not justified on compassionate or public protection grounds.¹³⁸ Trotter concludes that such an approach was unfair to the women because it judged them on grounds of their character and future danger and not on the grounds of their culpability. His conclusions cast doubt on the adequacy of the pardon process as a means of determining wrongful convictions.

Peter Howden, a sitting judge, has written that “‘mercy’ requests presume the guilt of the petitioner....applications alleging miscarriages of justice presume that the applicant was wrongly convicted of a criminal offence. They do not presume guilt and request mercy...”¹³⁹ Jean Teillet has similarly argued that a pardon “does not mean that

¹³⁵ National Parole Board “Clemency and Pardons” at http://www.npb-cnlc.gc.ca/infocntr/policym/man_14_e.htm#14_2

¹³⁶ *Re Therrien* [2001] 2 S.C.R. 3 at para 121.

¹³⁷ Gary Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2001) 26 *Queens L.J.* 339 at 353-354.

¹³⁸ *ibid* at 392

¹³⁹ Peter Howden “Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process” (2002) 21 *Windsor Y.B. Access to Justice* 569 at 593.

the conviction is wiped out or that the person was wrongly convicted...A pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.”¹⁴⁰ All of this commentary is very skeptical of the pardon process as a means of determining and declaring the existence of a wrongful conviction.

Even if a free pardon was awarded on the grounds of clearly established innocence as suggested by the National Parole Board’s policy manual, this process would still be questionable from a separation of powers perspective. In other words, a branch of the executive government would be nullifying an act of the judiciary in convicting a person. In addition, it is not clear that the National Parole Board would have an oral hearing in order to determine eligibility for a free pardon or that it would have investigative powers similar to those provided to the Minister of Justice or his or her delegate under s.696.1. Allan Manson has written:

In dealing with a pardon application, there are no limits on the information the executive can consider in deciding whether to grant a pardon. Equally, there is no stipulated requirement to hear or consider any specific material. While the exercise of the prerogative power remains entirely within the discretion of the Governor General on the advice of the Minister, there is now a limited opportunity for judicial review. Some procedural obligations may be imposed either through the common law doctrine of fairness or s.7 of the Charter.¹⁴¹

Even though a free pardon would clearly in law deem the person never to have committed the offence, the very word pardon suggests that the person is being excused and forgiven for doing something wrong. In the United Kingdom and New Zealand free pardons have been used in cases where the innocence of the person is not clear.¹⁴² Although Stephen Truscott originally requested a free pardon in reliance on the Supreme Court’s statement in the *Milgaard Reference* that a free pardon will be the appropriate disposition when innocence was proven beyond a reasonable doubt, he noted that the term pardon was “ambiguous” and abandoned the request when it became clear that the Ontario Attorney General would not consider a pardon an exoneration.¹⁴³

Although the free pardon process is offered as a means to declare innocence, it is suspect in part because the word pardon implies forgiveness for wrongdoing and because there is some evidence that applicants will be judged on their character as opposed to their culpability. In addition, it is not clear whether there would be an adequate process to

¹⁴⁰ Jean Teillet “Exoneration for Louis Riel: Mercy, Justice or Political Expediency?” (2004) 67 Sask.L.Rev. 359 at 376.

¹⁴¹ Alan Manson “Answering Claims of Injustice” (1992) 12 C.R.(4th) 305,

¹⁴² David Cole and Alan Manson *Release from Imprisonment* (Toronto: Carswell, 1990) at 403-404; A.T.H. Smith “The Prerogative of Mercy, the Power of Pardon and Criminal Justice.” [1983] Public Law 398

¹⁴³ In his reply to the Attorney General’s submissions on the s.696.1 application, Truscott stated “any ambiguity in the eyes of the government or the public about Steven Truscott’s innocence is unacceptable. Consequently, we have become distinctly uncomfortable about our request that a free pardon be considered as a possible remedy for his case.”

determine whether a wrongful occurred actually occurred. Finally, the free pardon process is also suspect on constitutional separation of powers grounds because it is issued by the federal executive.

Public Inquiries

In Australia a number of declarations of wrongful convictions have been made by royal commissions. In Canada, some commissions of inquiry have contributed to the exoneration of the wrongfully convicted. For example, the Commission on the Donald Marshall case heard extensive evidence and reached different factual conclusion than the Court of Appeal that heard the reference. Its conclusions affirmed Mr. Marshall's innocence, as did those of the Kaufman Inquiry into the Guy Paul Morin case and the Cory Inquiry into the Thomas Sophonow case. The Lamer inquiry determined that it was not authorized by its terms of reference to make determinations and declarations of factual innocence¹⁴⁴, but the former Chief Justice also ruled that it was constitutionally permissible for public inquiries in Canada to make determinations of factual innocence. He distinguished a finding of factual innocence from a finding of factual guilt which would be covered by the constitutional prohibition on Canadian inquiries making determinations of criminal or civil liability. He also analogized the position of a public inquiry mandated to determine factual innocence with those who might be asked by a government to determine the accused's factual innocence as part of determining the compensation process.¹⁴⁵

Commissions of inquiry are called only in a few cases at the government's discretion. As one Australian commentator has observed "unfortunately their employment is often associated only with high profile or highly publicized cases. Many and perhaps the majority of victims of wrongful convictions will not simulate sufficient media or other attention to ignite a royal commission into their case."¹⁴⁶ Although Canada has been a world leader in holding public inquiries into wrongful convictions, there are a number of wrongful convictions in Canada that have not been subject to public inquiries and public inquiries are expensive and not meant to be routine. As such, public inquiries are an inadequate mechanism to make determinations and declarations of wrongful convictions.

The Compensation Process

Present guidelines for compensation of the wrongfully convicted require proof of factual innocence as a pre-requisite to compensation. The present guidelines which are under review provide that such proof will generally be obtained either by the grant of a free pardon or "a statement by the Appellate Court, in response to a question asked by the

¹⁴⁴ Lamer Inquiry at 7-8, 175. The inquiry, however, did "that there was no reliable evidence" on which to base the prosecution of Randy Druken. It also declared Gregory Parsons to be "completely innocent" *ibid* at 70.

¹⁴⁵ Lamer Ruling November, 2003 Annex C of Lamer Report

¹⁴⁶ Lynne Weathered "Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia" (2005) 17 *Current Issues in Criminal Justice* 203at 213

Minister of Justice... to the effect that the person did not commit the offence.” The guidelines contemplate that the later question could be asked under the predecessor to what is now s.696.2. The present guidelines also recognize that these routes :

may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

The guidelines go on to provide that the provincial government could appoint “either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below” including the requirement of innocence. This raises the possibility that a government’s determination that a person was eligible for compensation could provide a means to determine and declare the existence of a wrongful conviction. In other words, the provincial government could appoint independent fact-finders and perhaps even public inquiries to make findings relevant to the compensation process, including findings related to the determination of a wrongful conviction.

C. Judicial Means of Obtaining a Determination and Declaration of a Wrongful Conviction

As discussed above, there is much to be said in principle for having determinations and declarations of wrongful convictions come from a court rather than through informal and/or executive processes. The judiciary bears the ultimate responsibility for a wrongful conviction and the independent courts are in a better position than the executive to make determinations of wrongful convictions. At the same time, however, a barrier to judicial determinations of wrongful convictions is that the judicial system has not been designed to exonerate the accused. In addition, there may be specific problems related to a lack of jurisdiction of the judiciary to make determinations and declarations of a wrongful conviction, especially in cases where a prosecutorial stay has been issued.

As Part of Interim Release Pending a Section 696.1 application or Pending a New Trial or Appeal

Judges are increasingly granting bail pending a s.696.1 application to the federal Minister of Justice. This practice, first used in *R. v. Phillion*¹⁴⁷, was also used in the Driskell case when on January 8, 2004, Justice Scurfield of the Manitoba Queens Bench ordered Mr. Driskell’s release on reasonable terms. In that case, Justice Scurfield applied a higher test for the grant of interim release than used in *Phillion* on the basis that Mr. Driskell’s application to the Minister of Justice was at a more preliminary stage than Mr. Phillion’s. This test required the applicant to establish “on a balance of probabilities that there is new, reliable evidence that is sufficiently material to raise very serious concerns

¹⁴⁷ [2003] O.J. no. 3422

as to the reliability of the original conviction.”¹⁴⁸ Although this is a high standard, it is not one that is the equivalent to a declaration or a determination of a wrongful conviction. Indeed, Justice Scurfield specifically stated:

My function is limited to determining if it is appropriate to release Mr. Driskell from custody pending the result of a more formal investigation. It is not my job to determine if Mr. Driskell is innocent of the crime for which he has been convicted....For the purposes of this application, there is no need for me to decide whether or not Mr. Driskell was wrongfully convicted.¹⁴⁹

It thus appears that the present ability of judges to grant interim release or bail being granted pending an application under s.696.1 will not produce a determination or declaration that a wrongful conviction has occurred.

In the preliminary stages of a s.696.1 application, there may often not be enough evidence to make a determination and declaration of a wrongful conviction. There will be more evidence available after an investigation is completed and the Minister of Justice has made an order either for a new trial or a new appeal under s.696.3 and at this stage I would not preclude the possibility that a judge might be in a position to make a determination and a declaration that a wrongful conviction has occurred if for example the convicted person applies for bail pending a new trial or a new appeal. At the same time, however, in such cases, the convicted person may already have been granted interim release at an earlier stage. In addition, the judge on an interim release application may understandably be reluctant to make a determination or declaration of a wrongful conviction for fear of pre-empting the task of the trial judge or the Court of Appeal. In short, interim release pending the determination of a s.696.1 application or pending a new trial or appeal ordered under s.696.3 constitute an important and salutary development with respect to wrongful convictions, but this process itself will not likely lead to determinations and declarations that wrongful convictions have occurred.

Determinations by Courts of Appeal under Section 696.3(2)

The present federal-provincial guidelines on compensation for the wrongfully convicted require that the person be declared to be innocent. The guidelines contemplate a number of ways for such determinations to be made including the granting of a free pardon or as a result of a judicial or administrative inquiry commissioned by the government. They also contemplate that a Court of Appeal could be asked to make a determination and declaration of whether the person is innocent under the predecessor to what is now section 696.3(2) of the Code. It provides that:

The Minister of Justice may, at any time, refer to the court of appeal, for its opinion any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

The predecessor of this section was section 690(c) of the Code which provided that the Minister of Justice can upon on application for the mercy of the Crown:

¹⁴⁸ *R. v. Driskell* 2004 MBQB 3 at para 18

¹⁴⁹ *ibid* at paras 8, 48

refer to the Court of Appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion. The guidelines on compensation contemplate that the Court of Appeal could be asked to provide its views on the innocence of the accused in the course of hearing an appeal.

To my knowledge, Canadian appeal courts have not declared that a person is innocent or the victim of a wrongful conviction, but nothing would preclude such statements in appropriate cases. There are some precedents from of the willingness of English Court of Appeal to make determinations and declarations of wrongful convictions. In the case of Peter Fell who was imprisoned for 17 years on the basis of a false confession, the Court of Appeal stated that:

the longer we listened to the medical evidence, and the longer we reviewed the interviews, the clearer we became that the appellant was entitled to more than a conclusion simply that this verdict is unsafe...since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders, and he should be entitled to have us say so.¹⁵⁰

In another case, the Court of Appeal expressed its “great regret that as a result of what has now been shown to be flawed pathological evidence the appellant was wrongly convicted and has spent much a very long time in jail.”¹⁵¹

Courts of Appeal will not be able to make determinations of innocence in cases such as Mr. Driskell where the Minister of Justice has ordered a new trial. It may also not be possible for the Minister of Justice to use his powers under s.696.2 to refer the question of innocence to the Court of Appeal after a new trial has been ordered under s.696.3 and either ended in a verdict of acquittal or, as in Mr. Driskell’s case, ended with a prosecutorial stay. Here a slight change of wording in s.696.3(2) as opposed to the old s.690(c) may be relevant. Although the Minister retains the explicit ability to refer questions to the Court of Appeal “at any time” under the new section, the question must now be “in relation to an application under this Part”. Taken literally this may deprive the Minister of the ability to refer the question of innocence or a wrongful conviction to a Court of Appeal once the application under Part XX1.1 of the Code has been made successfully. Moreover, it does not appear possible for a person who has been acquitted or subject to a prosecutorial stay to bring a fresh application under this part because they would no longer qualify under section 696.1 as a person who has been convicted of an offence. Although the ability of Courts of Appeal to make determinations and declarations of innocence and a wrongful conviction may be especially helpful in the context of appeals ordered under s.696.3, it is not helpful with respect to a person who has received an order for a new trial that has resulted either in a new trial or a not guilty verdict.

Judicial Apologies

¹⁵⁰ *R. v. Fell* 2001 EWCA Crim 696 at para 117

¹⁵¹ *R. v. Nicholls* 1998 EWCA Crim 1918

In a number of Canadian cases, judges have apologized on behalf of the administration of justice to those who have been wrongfully convicted. For example, Justice Forestell apologized to Peter Frumusa after the Crown withdrew two murder charges after the Court of Appeal had ordered a re-trial. Justice Stayshyn apologized to Gordon Folland in 1999 after the Crown entered a stay of proceeding after the Ontario Court of Appeal had overturned his sexual assault conviction.¹⁵² Justice Watt apologized in 2000 to Kulan Karthiresu after the Crown stayed proceedings after the Ontario Court of Appeal had set aside his second degree murder conviction and ordered a new trial.¹⁵³

Judicial apologies are a flexible instrument because they could be made at any time in which a judge has jurisdiction over a case. As discussed above, judicial apologies have been made both when Crown counsel withdrew charges and when they issued a prosecutorial stay under s.579.¹⁵⁴ They could also be made after Crown counsel decides to call no evidence and a verdict of acquittal is recorded. The public should accept a judicial apology as an official recognition that an error had been made with respect to the person's conviction and the use of a judicial apology would accord with the idea discussed above that miscarriages of justice are a matter within the inherent domain and responsibility of the judiciary.

Civil Actions

Another possible means of achieving a judicial determination and declaration of a wrongful conviction may be a civil action by the convicted person against the police officers or prosecutors responsible for the wrongful conviction. Although prosecutors are no longer absolutely immune from suits for malicious prosecutions, a successful action must demonstrate 1) an acquittal 2) no reasonable and probable grounds to bring the prosecution and 3) that the prosecution was motivated by malice or an improper purpose.¹⁵⁵ In many wrongful conviction cases, the convicted person would have difficulty establishing all three factors. In his report on the Sophonow case, Justice Cory concluded:

It is sufficient to note that potential claimants in an action for malicious prosecution would be unlikely to succeed in demonstrating that a lack of reasonable and probable grounds and malice against the police or prosecutors. Such an action could only succeed in exceptional circumstances where malicious or unlawful conduct has been established.¹⁵⁶

In addition, the use of prosecutorial stay might make it impossible to establish the first element of the tort of malicious prosecution.¹⁵⁷

¹⁵² "Wrongly convicted man given apology" Toronto Star May 22, 1999.

¹⁵³ James Lockyer and Philip Campbell to Chief Justice Kennedy re Clayton Johnson Feb. 14, 2002.

¹⁵⁴ As will be discussed below, however, courts may not have jurisdiction over the case and may be precluded from issuing such apologies after a prosecutorial stay has expired under s.579(2) and proceedings are deemed never to have been commenced.

¹⁵⁵ *Nelles v. Ontario* [1989] 2 S.C.R.170; *Proulx v. Quebec*[2001] 3 S.C.R 9.

¹⁵⁶ *The Inquiry Regarding Thomas Sophonow* at Compensation

¹⁵⁷ In Canada, there is some authority that only a withdrawal of charges as opposed to a prosecutorial stay will be considered a judgment in favour of the plaintiff for the purpose of bringing a malicious prosecution action. *Fancourt v. Heaven* (1919) 18 O.L.R. 492. There is, however, some Australian authority for the

Other alternative civil actions include suing for negligent investigations or misuse of public office¹⁵⁸ or suing a defence lawyer in negligence.¹⁵⁹ The police should have a duty of care towards a person who was subjected to a negligent investigation that contributed to a wrongful conviction and there should be no policy reasons, especially as related to indeterminate liability, to defeat such a duty of care. The duty of care on the police when they conduct investigations will likely be clarified by the Supreme Court in the upcoming case of *Hill v. Hamilton-Wentworth Regional Police Services Board*.¹⁶⁰ A five judge panel of the Ontario Court of Appeal unanimously accepted that police officers owed a duty of care to a suspect and that harm to the suspect from a negligent investigation was reasonably foreseeable. The Court of Appeal stated while its conclusions were at odds with those of the House of Lords¹⁶¹, it was consistent with the Supreme Court's refusal to strike out negligence claims against a police chief in *Odhavji Estate v. Woodhouse*.¹⁶² The Court of Appeal stated that there would be "no alternative remedy for the loss suffered by a person by reason of wrongful prosecution and conviction", the right to liberty and the principles of fundamental justice under s.7 would be implicated and there would be no concerns about indeterminate liability or liability for legitimate policy choices.¹⁶³

Although civil actions are a possible vehicle for determining and declaring wrongful convictions and are increasingly being used as such in the United States¹⁶⁴, they will impose onerous costs on the convicted person and could in some cases be decided without determining whether there was a wrongful conviction. Moreover if the case is settled, defendants often insist that the terms and amount of the settlement not be publicly

proposition that a *nolle prosequi* while not establishing innocence does establish that proceedings were terminated in the accused's favour for the purpose of a malicious prosecution suit. *Gilchrist v. Gardiner* (1891) 12 L.R. (N.S.W.) 184. See generally I.R. Scott "Criminal Prosecution and Tort: The Effects of Nolle Prosequi on Actions for Malicious Prosecutions" (1973) 2 Anglo-American L.Rev. 288.

¹⁵⁸ *Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263.

¹⁵⁹ *Folland v. Reardon* Jan. 2005 Ont.C.A at para 41.concluding that there "was no justification for departing from the reasonableness standard. For an argument that civil litigation against defence lawyers is not a proper way to deal with a wrongful conviction and that it can constitute a collateral attack on the criminal verdict see Paul Calarco "The Ontario Court of Appeal Gives a Green Light to Re-Litigate Criminal Convictions by Suing Your Lawyer." (2000) 31 C.R.(5th) 129. An attempt by the Birmingham Six to challenge their wrongful convictions by bringing a civil action against the police alleging assault was stopped by the courts as an abuse of process with Lord Denning making the infamous statement that the prospect of a wrongful conviction "is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further..." *McIlkenny v. Chief Constables of the West Midlands* [1980] Q.B. 283 at 323. Witnesses, however, may be immune from suit for testimony that contributed to a wrongful conviction. *Reynolds v. Kingston* [2006] O.J. no 2039 (Div.Ct.).

¹⁶⁰ *Hill v. Hamilton-Wentworth Police* Sept 26, 2005 (OCA) leave granted SCC

¹⁶¹ *Hill v. Chief Constable of Yorkshire* [1988] 2 All E.R. 238; *Brooks v. Commissioner of Police for the Metropolis* [2005] UKHL 24.

¹⁶² [2003] 3 S.C.R. 263

¹⁶³ *Hill v. Hamilton-Wentworth Police* Sept 26, 2005 (OCA at paras 68-69.

¹⁶⁴ In the United States, the rise in civil suits have been related to the inadequacy of compensation statutes. Adele Bernhard "Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated" (2004) 52 Drake L.Rev. 703; Brandon Garrett "Innocence, Harmless Error and Federal Wrongful Conviction Law" [2005] Wisconsin L.Rev. 35.

disclosed and this may defeat the ability of civil actions resulting in public declarations of wrongful convictions.

Determinations of a Wrongful Conviction After a Prosecutorial Stay

Section 1(f) of the Order in Council asks the Commissioner to consider whether and in what way a determination or declaration of a wrongful conviction can be made where a stay of proceedings has been entered under s.579. As discussed above, informal declarations of a wrongful conviction through an apology or an announcement by the province, police or prosecutors could be made at any time. Both the Sophonow and Milgaard cases provide example of this type of declaration of a wrongful conviction that can occur years after the case has ended. In addition, a declaration of a wrongful conviction could emerge through the compensation process or the grant of a free pardon or through a public inquiry that had been authorized by its terms of reference to make such a finding or through some form of civil society process. The section 696.1 process has resulted at best in mixed messages on the subject for Mr. Driskell with Minister of Justice Cotler being quoted in the press as recognizing a miscarriage of justice, but with Manitoba officials explaining that the prosecutorial stay was not a recognition of innocence.¹⁶⁵

As suggested above, a judicial determination of a wrongful conviction is in many ways preferable to an administrative determination and this raises the question of whether courts would have jurisdiction to make a determination of a wrongful conviction after the entry of a prosecutorial stay. As suggested above, it is probably no longer possible for the Minister of Justice to direct a reference under section 696.3(2) to the Court of Appeal and ask it to make a determination of whether Mr. Driskell has suffered a wrongful conviction. Mr. Driskell could bring a civil lawsuit but as discussed above, this would be costly and may well not address the question of whether there has a wrongful conviction.

The fact that more than a year has passed since the entry of the stay in Mr. Driskell's case means that under s.579(2) that the proceedings are deemed never to have commenced. Two Courts of Appeal have fairly recently considered the ability of courts to consider matters after a prosecutorial stay has been entered under s.579. In both cases, they have determined that the courts do not have jurisdiction to consider matters after the entry and expiry of a prosecutorial stay.

In *R. v. Smith*¹⁶⁶, the British Columbia Court of Appeal held that the court was functus and unable to consider a Charter challenge after the accused objected to the use of a prosecutorial stay under section 579 of the Criminal Code. The Court of Appeal relied on its early and criticized 1967 precedent of *R. v. Beaudry*¹⁶⁷ which held that a verdict of an acquittal was a nullity because it was rendered after the Crown had entered a stay after the jury had returned a verdict of not guilty at the direction of the judge. Hollinrake J.A. concluded:

¹⁶⁵ Dan Lett and Leah Janzen "Driskell Free at Last" Winnipeg Free Press March 4, 2005

¹⁶⁶ (1992) 79 C.C.C.(3d) 70 (B.C.C.A.)

¹⁶⁷ [1967] 1 C.C.C. 272 at 274-275.

Here, the direction to the clerk of the court to enter a stay is a statutory administrative discretion given to the Attorney-General which is outside the direction or control of the judge. That is what *Beaudry* tells us. When the stay has been entered there is no contest between the individual and the state. The prosecution has come to an end. The position of the accused as against the state is the same as if he had never been charged. The individual is not put at jeopardy by the stay. On the contrary, the jeopardy he faced as an accused in an ongoing prosecution has come to an end. It may be that if in this case a new indictment is preferred, an argument could be made that the action of the Crown in staying and then preferring a new indictment, gives rise to Charter violations. However, at the moment a stay is entered, and assuming the matter stops there, I can see no possible violation of the accused's Charter rights. In my opinion, *Beaudry* is still the law when the Crown directs a stay of proceedings be entered.... In my opinion, when the stay was entered, the Provincial Court judge became functus with respect to this charge and he has no jurisdiction to proceed further in the matter of *R. v. Smith*.¹⁶⁸

In *R. v. Dufresne*¹⁶⁹, the Quebec Court of Appeal considered whether it or a superior court would have jurisdiction to make damage or cost orders after a new trial had been ordered by the Supreme Court in part because of state misconduct, but the Crown entered a stay under s.579(1) of the Code. The Court of Appeal concluded:

Qu'il suffise de dire qu'après une étude des effets de l'art. 579(1) du Code criminel, et une revue de la doctrine et de la jurisprudence applicables, il a déclaré n'avoir pas juridiction pour les entendre et en adjuger. Il est maintenant acquis que, par l'écoulement d'une année depuis le dépôt du "nolle prosequi", la procédure attaquée en Cour supérieure n'existe plus, puisque, par l'effet de l'art. 579(2) du Code criminel, "les procédures sont réputées n'avoir jamais été engagées"...

Dans l'état actuel du dossier, et toujours par l'effet de l'art. 579(2) du Code criminel, la dénonciation, la citation à procès, bref toute la procédure entreprise a été annulée; elle est, comme le dit l'article précité, "réputée n'avoir jamais été engagée". Il y a donc un vacuum total. D'autre part, absolument rien ne permet de croire que le Procureur général entreprendra, dans un avenir proche ou éloigné, une nouvelle poursuite et, même si on pouvait assimiler la requête de l'appelant à une quelconque demande d'injonction contre un accusateur éventuel, encore faudrait-il qu'on démontre de sa part une menace ou quelque velléité de reprendre les hostilités, ce qui n'a pas été fait. ..

par le dépôt d'un "nolle prosequi", le juge a perdu momentanément juridiction sur le dossier, tel qu'il existait alors; par l'écoulement d'une année depuis ce dépôt et

¹⁶⁸ *R. v. Smith* (1992) 79 C.C.C.(3d) 70 at 80-81 (B.C.C.A.)

¹⁶⁹ (1990) 75 C.R.(3d) 117

par l'opération de l'art. 579(2) du Code criminel, il a maintenant totalement perdu juridiction. Et, d'abondant, il est évident que la Cour d'appel ne peut s'ériger en tribunal de première instance pour entendre une demande qui, si elle était accueillie, aurait pour effet de faire revivre un dossier désormais inexistant et, comme je l'ai souligné précédemment, pour prononcer d'avance l'invalidité de toute procédure qui pourrait être entreprise dans l'avenir..¹⁷⁰

The above cases decided by the British Columbia and Quebec Courts of Appeal suggest that it may well be impossible for a person in Mr. Driskell's position to reopen a case to obtain a determination or a declaration of a wrongful conviction once a stay has been entered and expired under s.579.¹⁷¹ Both cases suggest that the expiry of a prosecutorial stay results in a total legal vacuum unless the prosecutor decides to recommence proceedings.

The prospect that no court would have jurisdiction to make a determination or a declaration of a wrongful conviction after the entry of a stay lends additional support to the argument made in section 4 of this report that a prosecutorial stay should generally be provisional in cases in which a new trial is ordered under s.696.3. A year after the entry of a prosecutorial stay, the proceedings are deemed under s.579(2) never to have taken place and a total procedural vacuum takes place which leaves the formerly convicted person without a judicial forum or a judicial remedy (apart from civil litigation) should Crown counsel not recommence proceedings.

It is possible, however, that the Supreme Court of Canada could refuse to follow the above two Court of Appeal decisions and hold that a superior court was not *functus* and had some jurisdiction to consider claims under the Charter. In the civil case of *Doucet-Boudreau v. Nova Scotia*¹⁷², a majority of the Court rejected arguments that a trial judge was *functus* after having issued a remedy under s.24(1) of the Charter in a minority language rights case. Although the case is not exactly analogous, the Supreme Court has demonstrated some creativity and flexibility with respect to claims brought under the Charter.¹⁷³ Although the possibility of judicial intervention cannot be completely dismissed, the two Court of Appeal decisions discussed above suggest that someone in Mr. Driskell's position may have much difficulty in achieving a judicial determination or declaration of a wrongful conviction. He might be required to bring a civil action that will raise the issue or else have to seek such a ruling from the executive through the free pardon or compensation processes or by a voluntary decision by the province to make a declaration that a wrongful conviction has occurred.

There is, however, another option in cases where a stay has been entered and expired, but it depends on the co-operation of Crown counsel. The option is for the

¹⁷⁰ *ibid* at paras 23, 32, 35.

¹⁷¹ The Newfoundland Crown Policy Manuel October, 2005 Appendix D accepts this reading of these cases when it provides: "Once a stay of proceedings has been directed by the Crown, the court which had been dealing with the matter becomes *functus officio*, i.e. without jurisdiction to further deal with the matter.

¹⁷² [2003] 1 S.C.R. 3

¹⁷³ *Gamble v. The Queen* [1988] 2 S.C.R. 595.

Crown to relay charges and then to offer no evidence so that a person in Mr. Driskell's position can obtain a not guilty verdict, and the possibility of a judicial determination and/or apology for a wrongful conviction. It is possible to recharge a person in Mr. Driskell's position because the prosecutorial stay, like the *nolle prosequi*, does not produce a plea of autrefois acquit and because under s.579(2) the proceedings are deemed never to have been commenced. If charges were re-laid then it would be open to the Crown as a matter of prosecutorial discretion to offer no evidence. There is some irony in this prosecution. One of the reasons why the prosecutorial stay may be objectionable to someone in Mr. Driskell's position is that it leaves a cloud over their head and the possibility of re-opening the case. At the same time, the case could be re-opened and a decision made to call no evidence so as to produce a verdict of an acquittal. At such a hearing, a judge would not be required to make a determination of whether a wrongful conviction had occurred or offer a judicial apology, but it is possible that a judge might do so.

After Calling No Evidence

As suggested in part 4 of this report, the calling of no evidence by the prosecutor in cases where a new trial has been ordered under s. 696.3, but there is no reasonable prospect of conviction or the evidence is so unreliable as to make it dangerous to convict is preferred over the entry of a prosecutorial stay as a means to achieve a judicial termination of the proceedings. The effects of calling no evidence on the accused, however, may depend on the particular circumstances. I have been informed that the calling of no evidence by the Crown in Manitoba is relatively rare. One case has, however, been recently reported in the media and it provides some information about the procedure. In 1988, the Crown attorney, Ms. Clarke, decided to call no evidence in a case in which Mathew Lovelace faced drug charges. The transcript of the procedure has been reported as follows:

Ms. Clarke: The Crown will be proceeding to trial at this point, and has no evidence to call.

The Court: Enter a dismissal- acquittal

Ms. Clarke: Thank you.

Court Reporter: Did you say 'acquittal'?

The Court: Acquittal

Ms. Clarke: I believe that completes this afternoon's matters.

Clerk of the Court: Order. All rise.¹⁷⁴

Although it is doubtful that a case in which a new trial has been ordered by the Minister of Justice would be handled in such a routine matter, the above passage is relevant because it demonstrates the bare bones structure of the Crown's decision to call no evidence. It is even possible that Crown counsel could explain the decision to call no evidence with reasons very similar to those that were used to justify the use of a prosecutorial stay in Mr. Driskell's case. In other words, Crown counsel could stress that no evidence was being called not because the accused was factually innocent but because

¹⁷⁴ Bruce Owen "Ghost in the Machine" *Winnipeg Free Press* June 11, 2006.

there was no reasonable prospect of conviction. Indeed the new Lamer guidelines support this possibility by suggesting that a decision to call no evidence is appropriate when there is no reasonable possibility of either a successful prosecution or the recommencement of a case. Although calling no evidence will produce an acquittal, there is no guarantee that it will result in a determination or declaration of a wrongful conviction.

A New Judicial Procedure to Determine and Declare a Wrongful Conviction

The possibility that a prosecutorial stay or the calling of no evidence will not produce a determination and declaration of a wrongful conviction raises the issue of whether a new procedure should be studied or recommended that will allow judges to make determinations that a wrongful conviction has occurred. Such a process could also feed into revisions to the compensation process and could in some cases provide an alternative to costly public inquiries as a means of recognizing and learning from wrongful convictions.

The most likely judicial forum for a determination and a declaration that a wrongful conviction has occurred is either at the conclusion of a new trial or appeal that is ordered under s.696.3 of the Criminal Code or in a case in which the Crown decides to call no evidence at a trial or withdraw charges. As outlined above, there is some authority for the proposition that the prosecutor can seek judicial approval before calling no evidence or withdrawing charges. Indeed, the involvement of the judiciary with respect to the calling of no evidence or the withdrawal of a charge distinguishes these remedies from the prosecutorial stay that, absent a Charter or abuse of process challenge, is considered to be a matter of prosecutorial discretion that does not involve the judiciary. Indeed, the lack of judicial involvement in a prosecutorial stay under section 579 of the Criminal Code is one of the main reasons why its use is so problematic in cases of possible wrongful convictions and why as I have suggested in part 4 of this report its use should be rare and subject to re-evaluation within a year of its entry.

Building on the precedent of prior judicial involvement in cases where the prosecutor offers no evidence or decides to withdraw charges after plea, as well as the willingness of judges to offer apologies in some cases, judges could be asked by the defence to determine whether they have sufficient grounds to make a determination and a declaration that a wrongful conviction has occurred after a verdict of an acquittal has been entered. This procedure should only be invoked on the request of the defence in order not to undermine the integrity of the not guilty verdict. At the same time, however, the previously convicted person may, for the reasons articulated above, have a pressing interest in obtain a more complete exoneration that will be produced by the not guilty verdict. Although this procedure could be formalized through amendments to the Criminal Code as legislation in relation to criminal law and procedure, it might also be undertaken by judges on the basis of their inherent powers under the common law and to award appropriate and just remedies under the Charter in a creative manner similar to that used to consider bail applications pending a s.696.1 application.¹⁷⁵ With respect to the

¹⁷⁵ Section 679(7) provides statutory jurisdiction to grant bail after the Minister of Justice has made an order under s.696.3, but the courts have found jurisdiction to grant bail both under the common law and the

proposed innocence hearing, the court may have jurisdiction under the common law as it relates to control of its own process and the approval of the prosecutor's decision to withdraw charges or order no evidence. Once jurisdiction is recognized under the common law, the court would also have jurisdiction to make a determination of innocence as part of its broad remedial powers under s.24(1) of the Charter.¹⁷⁶ The stigma that follows conviction has been recognized as harm that falls under s.7 of the Charter¹⁷⁷ and courts might take a similar approach to the stigma created by a conviction, followed by an order for a new trial because a miscarriage of justice is likely, followed by a prosecutorial stay.

One possible approach at an innocence hearing would be to allow the formerly convicted person an opportunity to establish innocence on a balance of probabilities or a preponderance of evidence as contemplated under the second *Milgaard* guidelines. Such a standard would logically distinguish a verdict of not guilty, which is the result of the Crown failing to prove guilt beyond a reasonable doubt, and a declaration of a wrongful conviction, which would require an additional finding made by the court at the request of the accused. In some cases, the Crown might consent to this innocence application, in other cases it might oppose the application and in some cases it could take no position. Such a request by the previously convicted person would come with a fair share of risks. A finding by the court that innocence had not been established could be more damaging than even a prosecutorial stay. It should be recalled that in 1992 and before a DNA exoneration was obtained, the Supreme Court found that David Milgaard had not established his innocence on a balance of probabilities.

There are several arguments that can be made against such a new judicial procedure to determine and declare a wrongful conviction. One argument would be that such a process would take up too much judicial and prosecutorial time and constitute a second trial. In my view, this argument should be rejected on the basis that the new innocence application would only be made in some subset of cases in which new trials are ordered under s.696.3. The judicial system has been able to deal with the additional work that comes from decisions to grant interim release pending a s.696.1 application and innocence applications should not consume more time. Indeed, it is likely that less people will run the risk of an adverse determination at an innocence hearing than would attempt to seek bail pending their s.696.1 application. Aside from these pragmatic factors, I would also argue that the justice system owes a person whose conviction has been reversed through the s.696.1 process an obligation to provide an official exoneration that will restore their reputation.

There are, however, some other more compelling objections to the idea of new innocence hearings. One concern is that that an innocence hearing could impose too high a burden on the accused to demonstrate innocence on a balance of probabilities and could

Charter before such an order is made. *R. v. Phillion* [2003] O.J. no. 3422 (Sup.Ct.J. per Watt J.). See also *R. v. Driskell* 2004 MBQB 3 and *R. v. Unger* 2005 MBQB 238 but note that the Crown did not challenge jurisdiction in either of the Manitoba cases.

¹⁷⁶ *Doucet-Boudreau v. Nova Scotia* [2003] 3 S.C.R. 3; *R. v. Dunedin Construction* [2001] 3 S.C.R. 575.

¹⁷⁷ *R v Vaillancourt* [1987] 2 S.C.R. 636; *R. v. Finta* [1994] 1 S.C.R. 701.

potentially undermine the meaning of the not guilty verdict. In addition, this new process could be criticized as creating yet another trial for a person who has already suffered much from the justice system. These objections deserve serious consideration. Nevertheless, I would note that this process would only be undertaken at the request of the previously convicted person and that the whole concept of exoneration is premised on the need to distinguish a not guilty verdict from an exoneration on a principled basis. .

It should always be open for the previously convicted person and the Crown to devise some other less formal methods of determining whether a wrongful conviction had occurred in preference to the new legal procedure that I have outlined. For example, a person or group of persons agreed upon by the parties, perhaps including a retired judge, could be appointed to determine and make declarations of wrongful convictions. Such a process would not necessarily apply the formal legal standard of requiring proof of innocence on a balance of probabilities. It may also be possible that a judge may be willing to make apologies and explanations of a not guilty verdict that will make a formal application for an innocence hearing unnecessary. That said, however, I believe that it is important that the legal system at least provide a successful s.696.1 applicant with the choice of a more formal judicial process to determine and declare innocence and whether a wrongful conviction has occurred. It may be that few applicants will avail themselves of this somewhat risky process and others may be able to negotiate less formal alternatives. Nevertheless, the legal system should provide a remedy for the insult of stigma and suspicion for those who have suffered the irreparable injury of a miscarriage of justice.

Conclusion

In this report, I have stressed the significance of an order by the Minister of Justice under section 696.3(3)(a)(i) that a new trial should be held. Such an order is only made if the Minister concludes that there is a reasonable basis to conclude that a miscarriage of justice has *likely occurred*. The making of such an order means that the conviction is unsafe and that the convicted person may well be a victim of a miscarriage of justice. In my view, such a conclusion provides the successful applicant a reasonable expectation of a day in court. It also places obligations on Attorneys General as Ministers of Justice generally either to hold a new trial in which they will have to again prove the convicted person's guilt beyond a reasonable doubt or to call no evidence and obtain a verdict of acquittal in cases where there is no reasonable prospect of conviction or the evidence is so unreliable that it would be dangerous to convict. The successful s.696.1 applicant has a legitimate interest in obtaining a new verdict, whether that be guilty or not guilty. It is not acceptable that in three of the four cases in which a new trial has been ordered under section 696.3 that the successful applicant has not received a day in court or the finality of a verdict.

The use of a prosecutorial stay under section 579 of the Criminal as a response to an order of a new trial under section 693.3(3)(a) should only be reserved for cases where the accused is still under active investigation by the police as the perpetrator of the relevant crime. Moreover, I suggest that a prosecutorial in such cases, following the

traditions concerning the use of *nolle prosequi* in England, should only be made with the agreement of the Attorney General or the DPP and after hearing representations from the successful s.696.1 applicant. However useful and common prosecutorial stays may be in the ordinary course of justice, they are an extremely problematic device in a case where a new trial has been ordered because there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

The entry of a prosecutorial stay under section 579 as a response to the order of a new trial under section 693.3(3)(a) should place significant obligations on the state to use all reasonable efforts to conclude its investigation of the convicted person as soon as possible and within a year. I recommend that a stay under section 579 should be re-visited as soon as possible and in any event before the proceedings shall be deemed under section 579(2) never to have commenced within a year after the entry of the stay. The purpose of re-visiting the stay should be to decide in light of the police investigation whether the appropriate disposition is for the prosecutor to offer no evidence so that the convicted person obtains a not guilty verdict or whether enough evidence has been produced to justify the conduct of the new trial ordered by the Minister of Justice. There should be a very strong presumption that a successful applicant under s.696.1 should never be left with a prosecutorial stay as the final disposition of the case. The only cases that I can imagine where a stay would be justified as the final remedy a year after it has been entered would be ones where the police still have the convicted person under active and fruitful investigation and they have justified the reasons why the investigation should be allowed to continue. Once the investigation is completed, Crown counsel should still be obligated to relay the charges and either to conduct a new trial or call no evidence so as to produce a not guilty verdict. A successful applicant under s.696.1 should never be left in the legal limbo produced by a prosecutorial stay.

The above recommendations restricting the use of a stay under section 579 and recommending a re-visiting of this remedy within a year of its entry, however, will not necessarily produce a determination or a declaration of a wrongful conviction as contemplated by paragraph 1(f) of the order in counsel. In order to achieve such a result, reform is needed because the criminal justice system at present is not designed to make determinations or declarations of wrongful convictions. To be sure, a person's innocence can be determined and declared by various state officials and it might emerge from an application for a free pardon or for compensation. Nevertheless, these procedures are uncertain, untested and dominated by the executive who may be unwilling to recognize a person's innocence and their responsibility for a wrongful conviction. In my view, there is a need for a judicial procedure that can, at the request of the previously convicted person, make determinations and declarations that a wrongful conviction of an innocent person has occurred. In reaching this conclusion, I do not mean to diminish the possibility that the executive may recognize the previously convicted person's innocence through an apology or other means, but rather to make the argument that reliance cannot be placed on the executive to make such determinations.

When devising new means to achieve determinations and declarations of wrongful convictions, however, it is vitally important not to erode the foundational

principles of proof of guilt beyond a reasonable doubt including the obligations outlined above and proposed in the recent Lamer report that Crown counsel should call no evidence resulting in a not guilty verdict when there is no reasonable likelihood of recommencement of proceedings or when the evidence is so manifestly unreliable that a conviction would be dangerous. At the same time, the previously convicted person may often have a strong and compelling interest in a greater exoneration than may be provided by a not guilty verdict. Not providing a judicial vehicle for exoneration claims risks adding insult and enduring suspicion and stigma to the injury of a miscarriage of justice.

In order to distinguish exonerations from not guilty verdicts, the defence should have an opportunity to establish innocence or the occurrence of a wrongful conviction at an innocence hearing. In order to protect the integrity of the not guilty verdict, any innocence hearing to determine and declare a wrongful conviction should only be undertaken at the request of the previously convicted person and after a not guilty verdict has been obtained either as a result of a new trial or the calling of no evidence.

In cases where a prosecutorial stay has been entered under s.579, the convicted person may well be forced to seek exoneration through other less satisfactory means such as applications for free pardons, informal exonerations, civil lawsuits or requests that the Attorney General re-commence proceedings with a new charge. This less than ideal state of affairs underlines the need for prosecutorial stays only to be used as provisional measures after a new trial has been ordered by the Minister of Justice on the basis of reasonable grounds to believe that a miscarriage of justice has likely occurred. Successful s.696.1 applicants should not be left in the legal limbo of the prosecutorial stay. They deserve their day in court and the finality of a verdict. They also, in my view, deserve an opportunity to seek a judicial determination and declaration of whether they are innocent and a victim of a wrongful conviction.