

An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?

*Kent Roach**

Introduction

Commissions of inquiry have been recommending since 1989 that Canada create an independent commission to assume the powers of the federal Minister of Justice to refer cases of suspected miscarriages of justice for judicial re-consideration. Given this, one might have expected that Canada would be the first jurisdiction in North America to create such a commission. The honour goes, however, to North Carolina. The North Carolina Innocence Inquiry Commission (NCIIC) was created in 2006. It has already received over 1000 applications and led to the judicial exoneration of three people on explicit grounds of factual innocence.¹

Canadian commissions of inquiry, including most recently the Milgaard Commission,² have looked to England and Wales for inspiration and have proposed a commission model based on the Criminal Cases Review Commission (CCRC).³ Some

* Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto.

1. The NCIIC's website contains helpful information at: <<http://www.innocencecommission-nc.gov/>> (accessed on February 2, 2012). See also D. Wolitz, "Innocence Commissions and the Future of Post-Conviction Review" (2010), 52 *Ariz. L. Rev.* 1027, at p. 1049ff; K. Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both" (2010), 85 *Chicago-Kent L. Rev.* 89.
2. *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (Regina: Queens Printer, 2008), at ch. 6 ("Milgaard Inquiry").
3. See John Weedon "The Criminal Cases Review Commission (CCRC) of England, Wales and Northern Ireland" in this volume. The Australian debate has also been influenced by the CCRC model. See Lynne Weathered "The Criminal Cases Review Commission: Considerations for Australia" in this volume. The Norwegian model like the North Carolina model has been

criticisms have started to emerge of the CCRC.⁴ In addition, a straight importation of the CCRC model in Canada would result in a commission with less investigative powers than the Minister of Justice and his delegates in Canada can now exercise.⁵ Thought should be given to the best commission model so that reformers are not faced with buyer's remorse should a government in the future decide to create such a body. There is no reason why Canada would be constrained by the CCRC model. The NCIIC is of particular interest because of its focus on factual innocence, a criteria that is supported by volunteer innocence projects and some commentators.⁶ The NCIIC can also hold public hearings, a feature that could add some much needed transparency to both the CCRC and the s. 696.1 models.

The first part of this article will introduce the NCIIC and compare it to the Canadian s. 696.1 system. The second part will examine the North Carolina experience for lessons for Canadian reforms. The NCIIC emerged from a holistic and stakeholder driven reform of the broader criminal justice system in an attempt to reduce wrongful convictions. The North Carolina (as well as that of the CCRC) experience suggests that it would be a mistake to view a commission in isolation. In particular, a commission can be restrained by limits in the existing system on matters relating to new trials, overturning convictions and the admission of fresh evidence. Canadian reformers also need to be aware of the possibility that the existing system in Canada may have made some adjustments such as granting bail pending s. 696.1 Ministerial decisions and allowing appeals out of time in part to respond to the real or perceived deficiencies of the s. 696.1 system. The NCIIC is a bit more transparent than the s. 696.1 and CCRC

neglected. See Ulf Stridbeck and Svein Magnussen. "Opening Potential Wrongful Convictions — Look to Norway" in this volume.

4. Michael Naughton "The CCRC: Innocence versus Safety and the Integrity of the Criminal Justice System" in this volume. See also M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?* (Houndsmill: Palgrave, 2010).
5. *Criminal Code*, R.S.C. 1995, c. C-46, s. 696.2 (2) and (3). See Narissa Somji "A Comparative Study of the Post Conviction Review Process in Canada and the United Kingdom" in this volume.
6. C. Sherrin, "Declarations of Innocence" (2010), 35 *Queens L.J.* 354.

systems because it can include public hearings, but in general transparency could be increased in all the systems. Although commissions are often defended as “inquisitorial” institutions and the NCIIC has some inquisitorial elements, it will be suggested that more consideration needs to be given to how applicants and their representatives can better participate in the review process. Two distinctive features of the NCIIC — its limited focus on factual innocence and its composition which by statute includes judges, prosecutors, defence lawyers, sheriffs and victim advocates — will also be critically assessed.

I. The North Carolina Innocence Inquiry Commission Compared to Section 696.1

(1) The NCIIC

The North Carolina Innocence Inquiry Commission (NCIIC) was created in 2006 and started operation in 2007. It was originally subject to a four year statutory sunset but the legislation has been renewed and is now not subject to a sunset. Unlike the Criminal Cases Review Commission (CCRC) or the Canadian Minister of Justice, the NCIIC is specifically limited to claims of factual innocence based on new evidence from living persons who have been convicted of felonies. The NCIIC is required to have eight members which must include a prosecutor, a victims’ advocate, a sheriff, a judge, a defence lawyer and lay members.⁷ It has an annual budget of under \$300,000, but has supplemented this budget with federal grants to encourage DNA testing. The NCIIC is not limited to DNA cases, but its statutory standards of “complete innocence of any criminal responsibility relating to the crime” which ultimately must be established “by clear and convincing evidence”⁸ that convinces a special three panel of three judges unanimously lends itself to DNA cases. DNA did not play a role in the first exoneration through the NCIIC process, but it did play a role in the second case which involved two men who pled guilty and made false confessions but were subsequently cleared in part by DNA evidence.⁹

7. N.C. Gen. Stat, ss. 15A-1463.

8. *Supra*, ss. 1460, 1469(h).

The NCIIC has the power to subpoena witnesses and under recent amendments it, like prosecutors in the U.S., can grant witnesses immunity in order to compel their testimony when they “take the Fifth”.¹⁰ Once the NCIIC commences a formal inquiry into the case (which is done only in a small subset of meritorious applications), the applicant is required by statute to waive “all procedural safeguards and privileges” including attorney client and spousal privilege.¹¹ The NCIIC has a duty to disclose favourable evidence to the accused and evidence of any wrongdoing or professional misconduct to the appropriate authorities.¹² There is a duty of victim notification in formal investigations and the NCIIC can only refer cases back to the courts if the commission after a hearing concludes that there is sufficient evidence of factual evidence to merit judicial review. This decision is made by majority vote of the eight commissioners, but all eight commissioners must be unanimous if the applicant had originally pled guilty.¹³ The commission has a discretion to determine if hearings are held in public. If the NCIIC determines a case shall be referred to a court, then the transcript of its hearing has to be made public, but in all other cases its proceedings and records remain confidential and are exempt from public record and meeting requirements.¹⁴ If the NCIIC refers the case to the courts, a special three judge panel can dismiss charges but only if they unanimously agree that there is clear and convincing evidence of innocence.¹⁵

Despite its limited factual innocence mandate, the NCIIC has received 1062 claims from the start of its operation in 2007 to October, 2011. Like the CCRC, the NCIIC rejects the vast majority of the applications it receives. The leading reason for rejection in 27% of cases is the absence of new evidence. At the same time, factual innocence is a barrier to many claims with

9. “North Carolina’s unique process spotlights innocence efforts” CBS News (September 23, 2011) available at: <<http://www.cbsnews.com/stories/2011/09/23/ap/business/main20110906.shtml>> (accessed on February 2, 2012).

10. N.C. Gen. Stat., ss. 15A-1468 (a1).

11. *Supra*, s. 1417 (b).

12. *Supra*, s. 1416(d)-(f).

13. *Supra*, s. 1468.

14. *Supra*, s. 1468(e).

15. *Supra*, s. 1469(h). The decision of this panel is final and not subject to review.

23% of cases being rejected because there is no way to prove innocence and 22% of cases being rejected on the grounds that there is not complete factual innocence.¹⁶ The commission has held four hearings, and referred three cases from those inquiries to the courts. In two of those cases, involving three people in total, the courts have found factual innocence and exonerated the accused.¹⁷ In the first case referred by the NCIIC, the judicial panel found that the evidence that convinced the NCIIC that the applicant was innocent and the conviction should be referred — namely evidence suggesting that the crime of sexual abuse of the convicted person’s daughter did not occur and that the 6-year-old girl had been coached by her grandmother — did not establish on clear and convincing evidence that the applicant was factually innocent. The first exoneration was Gregory Taylor who was convicted of murder in 1991 on the basis of faulty tests for blood in his car, scent detection by an untrained dog and the testimony of a jailhouse informer. The second and third exonerations involved Kenneth Kagonyera and Robert Wilcoxson who both pled guilty to murder and served 10 years in jail, but were declared factually innocent by a three judge panel after a NCIIC referral on September 22, 2011.

(2) The NCIIC and Section 696.1 Compared

As discussed above, from the start of its operations in 2007 to October 2011, the NCIIC received over 1000 applications. In contrast, the federal Minister of Justice from April 2007 to March 31, 2011 received only 88 applications under s. 696.1. North Carolina has a population of less than 10 million, but a prison population of about 40,000. Even accounting for these differences and the possibility that North Carolina might have a higher rate of wrongful convictions than Canada, the differences in the number of applications is dramatic and striking. It is also consistent with the dramatic difference

16. NCIIC “Statistics” based on 897 rejected cases available at: <<http://www.innocencecommission-nc.gov/stats.html>> (accessed on February 2, 2012).

17. North Carolina Innocence Inquiry Commission Case Statistics as of October, 2011 available at <<http://www.innocencecommission-nc.gov/stats.html>> (accessed on February 2, 2012).

between Canada and England where the CCRC receives about 1,000 applications each year or the Norwegian commission which receives about 150 applications each year.¹⁸ These figures suggest that even after the 2002 reforms, Canada's Ministerial process does not command the same confidence of potential applicants as those of independent commissions.

The s. 696.1 process has been criticized for its slowness and the practical burdens it places on applicants.¹⁹ The recent annual reports of the Conviction Review Group in the Department of Justice lists many of the applications received each year as only partially completed in that year because the applicants have not submitted all the supporting documents required by the regulations.²⁰ The NCIIC does not seem to have comparable problems of delay as it has closed 897 of 1062 applications as of October, 2011. It has 19 cases in investigation and six cases in formal inquiry despite having received 254 applications from January to October, 2011 alone.²¹ Efficiency in processing claims is not an unqualified good and raises concerns about the summary dismissal of potentially meritorious applications. Nevertheless the picture that emerges from a comparison is one in which the Canadian system receives less than a tenth of the applications than the NCIIC but seems from the reported information to take a slow and somewhat bureaucratic approach to the submitted claims and lists many claims as uncompleted because the applicant has not submitted all the information required by the regulations.

Any increase in the number of applications that an

18. Weedon, *op. cit.*, footnote 3; Stridbeck and Magnussen, *op. cit.*, footnote 3.

19. C. Walker and K. Campbell, "The CCRC as an Option for Canada: Forwards or Backwards?" in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 4, at p. 191.

20. The regulations require applicants to submit true copies of the indictment, trial transcript including preliminary hearings, true copy of all material filed by the defence and Crown in pre-trial matters and true copies of all factums and judgments and "any other documents necessary for the review of the application". *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice*, SOR/2002-416, s. 3. In 2010-2011, three applications were reported as completed but two were reported as not completed. In 2009-2010, seven applications were reported as completed but six were reported as not completed. In 2008-2009, four applications were reported as completed but 17 were listed as uncompleted and in 2007-2008, seven applications were reported completed but 23 applications were reported not completed.

21. NCIIC "Statistics", *op. cit.*, footnote 16.

independent Canadian commission might receive is not necessarily an unqualified good. Both the NCIIC and the CCRC reject the vast majority of applications that they receive. This raises the question of whether an independent commission is warranted if it only rejects the vast majority of applications made to it. At the same time, the very fact that the application is made demonstrates that the system is willing to entertain claims of wrongful convictions. Should Canada ever embrace a commission model, thought should be given about how to improve the initial triage of applications and to provide assistance to applicants that might perhaps lower the very high rejection rates seen in both the English and North Carolina systems. One possibility would be for a specialized legal aid clinic to assist applicants. Because the vast majority of applicants to commissions will have their claims rejected, it is also important to study their perceptions of the process. Although a willingness to entertain claims of error could enhance the legitimacy of the criminal justice system, a summary dismissal of an application could increase the alienation of those who have been convicted.

Even though most applications to either the Minister of Justice or the NCIIC are rejected, what happens to those that are referred to the courts? From November 2002 when the new provisions came into force to March 31, 2011, the Minister of Justice has made decisions on 86 applications and has referred 13 of those cases back to the court. This suggests that the Minister of Justice refers a significantly higher percentage of applications (15% compared to 4%) of applications to the courts than the CCRC. The Canadian rate is substantially higher than the NCIIC which has only referred three cases of the 1,062 applications producing a 0.28% referral rate. These statistics are significant because they suggest that even though the Minister of Justice is an elected official, he refers a greater percentage of applications to the courts than independent commissions in either England or in North Carolina.

It is also noteworthy that of the 13 cases referred by the Minister of Justice, nine were murder convictions, three involved sexual offences and one involved a property offence. All of the North Carolina referrals involved murder cases,

though the last referrals involved two people who originally pled guilty to murder. Both the s. 696.1 and North Carolina referrals are dominated by murder convictions in contrast to the CCRC where homicide cases only constitute about a third of referrals and summary cases in the magistrates courts account for 4% of referrals.²² This suggests that the CCRC may be more accessible than either the s. 696.1 or North Carolina process for those convicted of less serious offences.

Although the small sample sizes makes comparisons risky, there is some evidence to suggest that even though the federal Minister of Justice refers 15% of applications to the courts that the subsequent handling of those cases suggest that the Minister is actually quite risk adverse when sending convictions back for re-consideration. My research suggests that 12 of the 13 cases that the Minister of Justice has referred to the courts have been resolved. In all but one of these 12 cases, the applicant has received a favourable outcome in the form of a prosecutorial stay or withdrawal of charges (six cases), a judicial stay of proceedings (one case) or an acquittal (five cases).²³ In only one case, that involving Rodney Cain, was there a conviction on a retrial. Even in that case, Mr. Cain who was originally convicted of second degree murder received a manslaughter conviction on retrial. In contrast, about a third of the cases referred by the CCRC to the Court of Appeal are not overturned on appeal and of the three cases involving four accused referred by the NCIIC, the court found no factual innocence in one of the three cases. Although the small sample size suggest the need for caution, there is some evidence that

22. L. Elks, *Righting Miscarriages of Justice?* (London: Justice, 2008), at pp. 184, 264.

23. The prosecutor stayed proceedings when the Minister ordered a new trial in the cases of Steven Kaminski (sexual assault); Daniel Wood (murder) James Driskell (murder) and L.G.P. (sexual assault) and withdrew charges when a new trial was ordered in the Romeo Phillion case (murder). The court stayed proceedings with respect to Darcy Bjorge (stolen property). Acquittals were obtained in the cases of Steven Truscott (murder); William Mullins-Johnson (murder), Andre Tremblay (murder), Erin Walsh (murder); and Kyle Unger (murder). Rodney Cain, originally convicted of second degree murder, was convicted of manslaughter at the new trial ordered by the Minister of Justice and the referral of sexual abuse convictions in D.S.'s case to the Alberta Court of Appeal after the 10-year-old victim recanted is apparently still before that court.

while the federal Minister of Justice refers a significantly higher percentage of cases to the courts than either the English or North Carolina commissions that the cases that he does refer are relatively clear examples of miscarriages of justice as determined by the decisions of courts or prosecutors not to sustain or even seek a conviction.

As discussed above, the s. 696.1 process has been criticized for delay and burdens imposed on applicants.²⁴ One possible response to real or perceived delay is that in a number of cases, the courts have responded by fashioning a remedy that allows an applicant to obtain bail pending a decision by the Minister of Justice.²⁵ This is an important act of judicial creativity because the Code only specifically authorizes bail pending appeal²⁶ and not bail pending a decision by the Minister of Justice. Another possible response to delays in the s. 696 process has been the willingness of the Supreme Court of Canada in a number of recent cases to allow appeals out of time and remand cases back to the Court of Appeal which applies relatively generous rules for the admission of fresh evidence.²⁷ These procedures and perhaps others may be examples of substitution effects for the s. 696.1 process. It is also possible that delay in both bringing and deciding s. 696.1 application may help explain why prosecutors have stayed or withdrawn charges in the majority of cases referred back to the courts by the Minister of Justice since 2002. All of these possibilities are reminders that it is a mistake to study post conviction relief in isolation from the other parts of the criminal justice system with which it interacts.

The requirement that an elected politician, the Minister of Justice, has the exclusive power to re-open a case after all appeals have been exhausted remains in place in Canada

24. But for rebuttals of these criticisms see K. Scullion, "Wrongful Convictions and the Criminal Conviction Review Process" (2004), 46 Can. J. of Criminology and Criminal Justice 189.

25. *R. v. Phillion*, [2003] O.J. No. 3422 (S.C.J.); *Driskell v. Manitoba (Minister of Justice)*, [2004] 4 W.W.R. 182, 115 C.R.R. (2d) 9, 2004 MBQB 3; *Unger v. Canada (Minister of Justice)*, 2005 MBQB 238, 196 Man. R. (2d) 280, 67 W.C.B. (2d) 853, add'l reasons 2005 MBQB 242, 196 Man. R. (2d) 280 at p. 294, 67 W.C.B. (2d) 852.

26. Code, *supra*, footnote 5, s. 679.

27. This approach was used recently in the cases of Jack White and Tammy Marquardt. See online at: <http://www.aidwyc.org/Exonerations_15.html> (accessed on February 2, 2012).

despite recommendations by six inquiries that the Minister's powers be transferred to an independent commission. The Minister of Justice receives relatively few applications each year, perhaps in recognition of the difficulty of producing new evidence that will satisfy him or her that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. It can take years for the Minister to investigate a case and make a decision, but the courts have mitigated the effects of this delay in some cases by granted applicants bail pending the Minister's decision and also allowing some wrongfully convicted persons to avoid the s. 696 process by applying to the Supreme Court for appeals out of time with the Supreme Court itself remanding the case to the Court of Appeal for a new appeal. At the same time, it must be recognized that since 2002, the federal Minister of Justice has referred 13 convictions back to the courts and that his 15% referral rate is much higher than the CCRC's 4% referral rate or the NCIIC's 0.28% referral rate. That said, referral rates are largely an artifact of the number of applications received and the federal Minister of Justice receives far less applications than either the CCRC or the NCIIC. It is also noteworthy that in all but one case referred by the Minister of Justice back to the courts that no subsequent conviction has been sustained. This suggests that the Minister of Justice may refer less borderline cases to the courts than either the CCRC or the NCIIC.

II. Lessons from North Carolina

(1) The Need for a Holistic Approach

The North Carolina experience holds some lessons and some warnings for Canadian reformers. The NCIIC emerged from a reform process created by a conservative Chief Justice who became concerned about several high profile wrongful convictions in the state. He invited prosecutors, police, defence lawyers, law professors and victim advocates to meet regularly on a volunteer basis and to study and make reform proposals with respect to reducing the risk of wrongful convictions. The result was the North Carolina Actual

Innocence Commission. Its broad and diverse membership agreed to defer discussions of the death penalty because of the lack of agreement on the issue²⁸ even though the death penalty had been the focus of wrongful conviction reform in other states, most notably Illinois. The Actual Innocence Commission first addressed the issue of eyewitness identification, a leading cause of wrongful convictions. It was able to achieve first administrative and subsequently statutory reforms designed to minimize the danger of misidentification. This commission next voted 19 to 9 in favour of the creation of a permanent commission modeled after the CCRC but limited to complaints about actual innocence.²⁹ In 2006, the North Carolina legislature enacted legislation creating the NCIIC and limiting it to claims of factual innocence.

A valuable lesson from the North Carolina experience is that a commission should be part of a holistic approach to reducing wrongful convictions. With the singular exception of the 2002 reforms to s. 696, the federal Parliament has not enacted any reforms designed to reduce the risk of wrongful convictions. The Code remains silent on matters such as the proper procedures for eyewitness identifications and the recording of interrogations despite the fact that such reforms have been adopted in a number of American states and the U.K. to reduce wrongful convictions. The Supreme Court created broad constitutional disclosure rights in response to the recommendations of the Marshall inquiry, but the only Code provisions on disclosure attempt to restrict it in order to better protect the privacy of complainants in sexual cases.³⁰ The appeal provisions of the Code do not recognize lurking doubt as a ground for overturning the convictions despite recommendations by the Morin inquiry to that effect. The federal Parliament under both Liberal and Conservative governments have resisted such reforms perhaps because the reforms have been recommended by provincial inquiries and

28. C. Mumma, "The North Carolina Actual Innocence Commission" (2004), 52 Drake L. Rev. 647.

29. Wolitz, *op. cit.*, footnote 1, at p. 1048.

30. Compare *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, with Code, *supra*, footnote 5, ss. 278.1-278.9.

perhaps because the constituency for wrongful conviction reform is small.

The Runciman commission that recommended what became the CCRC took a holistic approach that recognized the need not only to introduce a new commission but also to regulate identification procedures, interrogations and forensic evidence providers and to liberalize rules relating to the admission of fresh evidence and appeals on the basis of ineffective assistance to counsel.³¹ The CCRC has recently been criticized by Professor Naughton³² and others for its lack of concern about innocence, but as Professor Zander observes “some of these criticisms of the CCRC . . . could perhaps with more justice be directed at the Court of Appeal”.³³ Reform of s. 696.1 and the creation of a commission should not be viewed in isolation and attention should also be directed to other issues, especially those relating to the hearing of appeals. At the very least, Canadian reformers should be aware of the danger that the creation of a commission might paradoxically toughen approaches to bail pending referral decisions, the admission of fresh evidence, appeals out of time and the grounds of appeal. In short, commissions should not be viewed in isolation from the rest of the criminal justice system with which they interact.

(2) The Need for More Transparency

As with the CCRC and the s. 696.1 process, most of the deliberations of the NCIIC are not transparent and indeed are exempted from public record and public meeting laws.³⁴ There is a need for more transparency at least to the extent of requiring public reasons for all decisions. The giving of reasons is an important aspect of procedural justice required in criminal courts and in administrative law. There is no reason why commissions or the Minister should be exempt from such requirements. To be sure, there may be legitimate concerns

31. The Royal Commission on Criminal Justice Cm 2263 (London: HMSO, 1993), at ch. 12.

32. *Ibid.*, footnote 4.

33. M. Zander “Foreword” in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 4.

34. N.C. Gen. Stat., ss. 15A-1468(e). See generally Wolitz, *op. cit.*, footnote 1, at p. 1078ff.

about the privacy of victims and others in some cases, but these concerns should be addressed on a case-by-case basis.

The enabling statute of the NCIIC purports to prevent not only appeals from its decisions but also judicial review applications.³⁵ In contrast, the CCRC as well as the Minister of Justice under s. 696.1 is subject to judicial review. Although judicial review may be rare, it is an important safeguard that removes the lingering idea that applications to re-open convictions after ordinary appeals have been exhausted are a matter of mercy or clemency.

Although the NCIIC could be more transparent and its processes could be subject to judicial review, it, unlike either the CCRC or the s. 696.1 process, has provisions that allow the commission to hold public hearings and that at least require the release of transcripts of those hearings in cases where the NCIIC refers convictions back to the courts. Three such hearings have been held and the transcripts of the most recent two-day hearing are available on the NCIIC's web site. The Norwegian commission also has the power to conduct a public hearing, but has only done so once.³⁶ Thought should be given to whether any new Canadian commission should be able to hold similar public hearings in order to increase transparency.

(3) Tensions Between Error Correction and Systemic Reform

As discussed above, the NCIIC was created as a part of a systemic reform process that involved all criminal justice stakeholders and that successfully advocated for systemic reform. In its most recent annual report, however, the NCIIC stresses that it reviews cases "in a non-advocatory fact-finding manner".³⁷ Its approach is also consistent with the CCRC's approach which has focused on error correction. The CCRC has not made proposals designed to reform the criminal justice system to reduce the risk of wrongful convictions or to oppose criminal justice innovations such as increased use of anonymous witnesses that may increase the risk of wrongful

35. N.C. Gen. Stat., ss. 15A-1470(a).

36. Stridbeck and Magnussen, *op. cit.*, footnote 3.

37. NCIIC Annual Report 2010, at p. 1, available at: <<http://www.innocence-commission-nc.gov/gar.html>> (accessed on February 2, 2012).

convictions. To some extent, it may be inevitable that an independent commission with the power to refer convictions back to the courts will assume a quasi judicial stance and be both too busy and hesitant to advocate for systemic reform.³⁸ If this holds true, it will be important to ensure that systemic reform still continues in some other venue. One possibility would be for a Canadian commission to have an advisory panel composed of various stakeholders and experts who could engage in research and advocacy on wrongful conviction issues. It is possible that the federal government might be more responsive to the recommendations made from those associated with a commission it appointed than from provincially appointed public inquiries. In the absence of such a systemic reform wing of any new commission, it will be important that governments in Canada continue to appoint public inquiries that can make systemic reform recommendations.

(4) The Composition of the Review Body

The likelihood that the NCIIC will not engage in much research or advocacy for systemic reform to reduce the risk of wrongful convictions begs the question of why it has mandatory stakeholder representation including sheriffs, prosecutors and victim advocates. To be sure, such representation can be critical when lobbying for systemic reform, but it is much less relevant in determining whether there is a need to refer a specific conviction back to the courts. In this respect the post 2002 Canadian system which features an expert special advisor who is a retired judge who reviews all applications and allows for Ministerial investigative powers to be delegated to retired judges or comparable legal experts³⁹ is more fit for the purpose of deciding whether a case should be referred back to the courts than the more representational North Carolina model.

38. K. Roach, "The Role of Innocence Commissions" (2010), 85 *Chicago-Kent L. Rev.* 89.

39. Code, *supra*, footnote 5, s. 693.2(3).

(5) The Need to Include Representatives for Applicants in the Review Process

Both the Driskell and Milgaard inquiries stressed that the CCRC operates as an “inquisitorial body”.⁴⁰ They then defended an independent commission as a means to compensate for the limits of the adversary system. To be sure, an unbalanced adversary system has caused many wrongful convictions and there is a long history in the common law world of looking to the inquisitorial system as a solution to wrongful convictions.⁴¹ Nevertheless, it is not clear that commissions should take a purely inquisitorial approach if that means excluding applicants and their representatives.

The inquiry stage of the NCIIC has been described as an inquisitorial process that is driven by commission staff with both prosecutors and defence attorneys playing no role.⁴² The NCIIC’s staff also plays a lead role in leading evidence in its public hearings. The applicant has to agree not only to cooperate with the NCIIC, but also to waive solicitor-client, spousal and other forms of privilege. Professor Sherrin has argued that such waivers of privilege will be necessary to determine factual innocence while also noting that they are not required under the present s. 696.1 process.⁴³ The idea that innocence applicants must waive privileges seems to bring the innocence determination closer to a process where an applicant pleads for mercy than a legal process where an applicant asserts claims of rights. Waiver of privilege also may harm the ability of lawyers and other representative effectively to work for an applicant by exploring all possibilities.

There is some evidence that the Milgaard’s inquiry description of the CCRC as inquisitorial is a simplification. Recent research has demonstrated that applicants who are represented by lawyers in their applications to the CCRC and

40. Milgaard Inquiry, *op. cit.*, footnote 2, at p. 390; *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Queens Printer, 2007), at p. 121.

41. See generally K. Roach, “Wrongful Convictions: Adversarial and Inquisitorial Themes” (2010) 35 *N. Carolina J. of Int. Law and Comm. Reg.* 387, at pp. 388-393.

42. Wolitz, *op. cit.*, footnote 1, at p. 1051.

43. Sherrin, *op. cit.*, footnote 6, at pp. 478-479.

the Scottish Criminal Cases Review Commission are significantly more likely to have their cases referred by the commissions back to the courts than those who are not represented. Although it is possible that stronger cases are more likely to attract representation, research into the CCRC process also finds cases where lawyers have persuaded the CCRC to refer cases even though it was initially minded to reject the application.⁴⁴ Even though the Norwegian criminal justice system would be classified as inquisitorial, Norway's commission appoints lawyers to assist some applicants.⁴⁵

There are weaknesses in relying exclusively on either adversarial or inquisitorial models and the best approach may be to combine the advantages of both. A commission can play an important role in ensuring that witnesses and public institutions co-operate in an investigation of a suspected miscarriage of justice and they can also retain the appropriate experts to evaluate forensic and other expert evidence used to sustain a conviction but that may now be in dispute. At the same time, however, there are dangers in placing lawyers and innocence projects representing the applicant on the sidelines.⁴⁶ They may have their own expertise and understandably lack confidence in a process from which they are excluded. Some Canadian human rights commissions are also moving towards a more adversarial model⁴⁷ and a Canadian commission should attempt to combine both the strengths of inquisitorial and adversarial systems in correcting miscarriages of justice.

44. J. Hodgson & J. Horne, "The Extent and Impact of Legal Representation on Applications to the Criminal Case Review Commission (CCRC)" (2009), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721> (accessed on February 2, 2012); The Impact of Legal Representation on Applications to the Scottish Criminal Cases Review Commission (August 2010), available at: <<http://www.sccrc.org.uk/View-File.aspx?id=476>> (accessed on February 2, 2012).

45. Stridbeck and Magnussen, *op. cit.*, footnote 3.

46. S. Roberts and L. Weathered, "Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission" (2009), 29 *Oxford J. of Legal Studies* 43.

47. For example, Ontario has a human rights support centre to assist complainants.

(6) The Allure and Dangers of a Factual Innocence Mandate

The biggest challenge that the North Carolina experience presents for Canada is its focus on factual innocence. Canadian courts have traditionally not concerned themselves with factual innocence and the Ontario Court of Appeal in *Reference re: Mullins-Johnson*⁴⁸ confirmed that it did not have jurisdiction to make determinations and declarations of factual innocence. Factual innocence is appealing because of the clear injustice of convicting the innocent. This injustice has been recognized under s. 7 of the Charter and the Charter should be interpreted in a manner that is more sensitive to the dangers of convicting the innocent.⁴⁹ The present Canadian system places the wrongfully convicted in the impossible position of having to demonstrate factual innocence to obtain compensation, but being unable to obtain such declarations from the courts. Factual innocence is also appealing because in theory it should attract agreement between police and prosecutors who subscribe to the crime control model because of their focus on factual guilt (and its converse factual innocence) as well as defence lawyers and judges who while prepared to protect legal rights even in the face of factual guilt are also concerned about factual innocence.⁵⁰ There are many examples in the U.S. of tough on crime people being convinced to reform the criminal justice system by incontrovertible examples of convicting the innocent. It would be ideologically consistent for the current federal government with the priority it assigns to the rights of law abiding Canadians to follow the North Carolina model to only providing extraordinary relief for those who are factually innocent of any involvement in crime.

Nevertheless, there are many dangers of limiting post-conviction relief to factual innocence. The NCIIC itself recognizes that in 22% of the applications that it rejects that there is no way to establish innocence. Defenders of a factual innocence such as Professor Sherrin argue that this is unavoidable and we should not decide that “the potential

48. (2007), 228 C.C.C. (3d) 505, 50 C.R. (6th) 265, 87 O.R. (3d) 425 (C.A.).

49. K. Roach, “The Protection of Innocence under Section 7 of the Charter” (2006), 34 S.C.L.R. (2d) 249.

50. H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), part II.

costs to the innocents” who cannot prove innocence “outweigh the potential benefits to the innocents who could and would”.⁵¹ But there is a need to confront the difficulty of proving innocence especially as a legal matter. North Carolina’s approach would have denied relief to Donald Marshall Jr. if, as accepted by the Nova Scotia Court of Appeal in 1983 but subsequently rejected by the public inquiry, he had been involved in a robbery when he was wrongly convicted of murder. It is also far from clear that widely recognized wrongful convictions including Stephen Truscott and Romeo Phillion could establish their innocence in court, though their innocence is widely accepted in the media.⁵² In addition, an exclusive focus on innocence could erode even further respect for due process and related values such as solicitor-client privilege.

Canadian (and British reformers) who are attracted to the factual innocence model should look closely at the American experience. Innocence claims in the U.S. have largely been used as a means of limiting *habeas corpus*. The American federal courts have never recognized a *habeas corpus* based innocence based claim. Even though the United States Supreme Court intervened in the recent Troy Davis case on the basis of its original *habeas corpus* jurisdiction, the District Court on remand concluded that Mr. Davis had not established his innocence and he was subsequently executed.⁵³ A factual innocence approach has attracted favour with American legislators but in a manner that generally only benefits those with an opportunity for DNA testing. Although DNA did not play a role in the NCIIC’s first exoneration, it did play a role in

51. Sherrin, *op. cit.*, footnote 6, at p. 458.

52. Factual innocence is a powerful and enduring concept, but the immediate question is whether it should be incorporated into the legal system or whether it should remain the domain of other systems including those created by the media and advocacy groups. See generally R. Nobles and D. Schiff, *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis* (Oxford: Oxford University Press, 2000). For my admittedly tentative arguments that factual innocence should be left to determinations outside the legal system see K. Roach, “Exonerating the Wrongfully Convicted: Do We Need Innocence Hearings?” in M. Beare, ed., *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008), at pp. 63, 78.

53. J. Lott, “The End of Innocence: Federal Habeas Corpus after In Re Davis” (2011), 27 *Geo. State Univ. L. Rev.* 443.

its second and third. The Supreme Court of Canada has warned that DNA will not be available in many cases of wrongful convictions.⁵⁴ Indeed, a factual innocence approach runs the risk of wrongful convictions evaporating as a high profile issue if DNA tests are used in the minority of cases that involve DNA evidence. The moral and legal claims of the factually innocent are undeniable, but in many cases it will simply be impossible to establish factual innocence. This is borne out by the fact that only three findings of factual innocence have been made as a result of the important work of the NCIIC.

Conclusion

North Carolina was the first and remains the only jurisdiction in North America to have a permanent independent commission appointed and financed by the state that can investigate claims of wrongful convictions after ordinary appeals have been exhausted and refer them back to the courts. Since 2007, the NCIIC has received over 1,000 applications compared to 88 applications received by the federal Minister of Justice in the comparable time. Unlike the Minister of Justice, the NCIIC is limited to claims of factual innocence and has referred only three cases involving four men to the courts and the courts have found clear and convincing evidence of factual innocence of three men previously convicted of murder. Although the federal Minister of Justice receives less applications than the NCIIC, he has referred 13 cases since 2002 with 11 of these cases resulting in acquittals or prosecutorial or judicial stays of proceedings. Although there is warranted criticism of having an elected official as the ultimate decision-maker under s. 696.1, the present system that allows retired judges to act as special advisors and to exercise broad investigative powers may be better tailored to the purpose of correcting miscarriages of justice than the NCIIC's representative structure that includes sheriffs, prosecutors, defence lawyers and victim advocates as well as judges.

The NCIIC is an interesting model for Canadian reformers to consider. Its emphasis on factual innocence will have

54. *United States of America v. Burns*, [2001] 1 S.C.R. 283, 151 C.C.C. (3d) 97, 39 C.R. (5th) 205, at para 109.

supporters and might even be able to generate some bi-partisan political support. The NCIIC is more transparent than the s. 696.1 process because public hearings are held in cases that are referred to the courts. In general though, all commissions as well as the s. 696.1 process could be more transparent and should at least release public decisions on applications. The North Carolina experience also affirms the importance of a holistic approach that does not view the creation of a commission in isolation from other aspects of the criminal justice system. Finally, recent research suggests that it may be a mistake to characterize commissions as inquisitorial and thought needs to be given to better integrating representatives of the applicants into the investigations conducted by the commission.