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Editorial

Introduction to Special Issue on Wrongful Convictions

Wrongful convictions reveal much about the operation of all stages of the criminal process. The CLQ is happy to contribute to the very necessary of learning from our mistakes with another special issue devoted to the compelling subject.

The CLQ has partnered with Innocence Canada (formerly AIDWYC) in providing a venue for the publication of the first student essay award for a wrongful conviction. This recognizes that wrongful convictions have increasingly been integrated into the law school curriculum. Law students, no less than medical students, should learn from mistakes that cause much suffering.

This special issue starts with an exchange from two senior lawyers who have throughout their careers played a fundamental role in raising awareness about wrongful convictions in this country. Jerome Kennedy, Q.C. brings his unique perspective as a defence lawyer who has represented the wrongfully convicted, as well as a person who served as Attorney General, to write an article on Crown culture and wrongful convictions. Although noting some positive developments, he calls for further change including increased judicial review and accountability of prosecutorial decisions.

Bruce Macfarlane, Q.C., draws on his equally impressive experience as a long serving Deputy Attorney General and as one of our most active and accomplished scholars and teachers about wrongful convictions to reflect on the prosecutorial role in wrongful convictions. Macfarlane does not shy away from concrete examples of distorted prosecutorial thinking and offers an illuminating examination of the psychological and institutional determinants of tunnel vision. He also outlines a number of practical and concrete remedial initiatives that can and have been taken by Crowns including education, increased transparency and openness to contrary views. Taken together these two lead essays advance our understanding of the critical role that prosecutors play with respect to wrongful convictions.

Kerry G. Watkins then brings his long experience as a police detective to examine the police role in taking statements from vulnerable people through a case study of the taking statements from Indigenous suspects. His approach reflects an interesting trend in the wrongful conviction literature to focus on vulnerable groups who may be disproportionately vulnerable to wrongful convictions. Watkins provides a very helpful overview of multiple forms of vulnerability of Indigenous people. He also outlines concrete reforms taken in Australia, the UK and by the Nishnawbe-Aski Police Service that could counter the vulnerability of Indigenous people to false confessions.

Nadia Klein's article on how the Reid technique used by many North American detectives to interrogate the accused could contribute to false confessions provides an interesting complement to Watkins' article. Klein critically examines the Reid technique in light of relevant psychological literature. She concludes that confessions obtained through the technique should be inadmissible. If not inadmissible, they should be accompanied by corroboration requirements, judicial warnings and expert testimony about the dangers of the Reid technique. Like Watkins, Klein urges Canadian police to use British interview techniques that are more open to suspects offering explanations for why they may not be guilty.

After having examining the prosecutorial and police role in wrongful convictions, the articles next turn to the judicial role. Jason M. Chin and Scott Dallen critically examine judicial acceptance of forensic expert evidence of dubious or unknown reliability. Their article is particularly timely as it focuses on *R. v. Awer* (2016), 29 C.R. (7th) 118 (Alta.C.A.), a case currently under appeal to the Supreme Court. Their article also deals with broader problems related to the admission of specialized knowledge evidence that may not have a transparent scientific basis that can be contested and used to assess reliability. It also argues for trial judges to play a robust gatekeeper role in the majority of judge-alone trials.

The next article by Jerome Kennedy examines the emerging problem of wrongful convictions that arise from plea bargains. The late Justice Marc Rosenberg who authored the landmark decision in *R. v. Hanemaayer* (2008), 234 C.C.C. (3d) 3 (Ont. C.A.), deserves much credit for making us more aware of this guilty plea problem. Justice Rosenberg also pioneered the first judicial education program on wrongful convictions and was on many of the panels that overturned many Dr. Smith wrongful convictions caused by plea bargains that the accused could not refuse. The second Kennedy article examines some of these cases and raises troubling questions about the roles of defence lawyers, prosecutors and judges in guilty plea wrongful convictions.

The last article is written by Ryan Elias the winner of the first Wrongful Conviction Essay contest sponsored by Innocence Canada. Elias uses an

impressive dataset based on 28 recognized wrongful convictions to demonstrate how the admission of bad character evidence may have played a role in 13 of the 23 erroneous jury verdicts of guilt. Elias also outlines the available research on how juries might be influenced by bad character evidence while noting that s. 649 of the *Criminal Code* prevents research into actual jury deliberations.

The articles in this special issue advance our knowledge about wrongful convictions but much more work remains to be done. The essays provided should have a wide readership among criminal justice professionals. They provide police officers, prosecutors, defence lawyers and judges with valuable information about concrete steps they can take to help prevent wrongful convictions.

But wrongful convictions are too pressing to be left simply to the professionals. At the end of a melancholy summer where Canadians voted *Wheat Kings* as their favourite Tragically Hip song, we must admit that Gord Downey and the Hip recognized and honoured David Milgaard's innocence long before our legal system did. Hopefully Canadians will demand that their Parliament enact a variety of measures so that we can better prevent and correct wrongful convictions.

K.R.