Department of Justice Canada
Ministère de la Justice Canada

Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal Code*

A Consultation Paper

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Canada

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ADDRESSING MISCARRIAGES OF JUSTICE: REFORM POSSIBILITIES FOR SECTION 690 OF THE *CRIMINAL CODE*

Executive Summary

The primary goals of the criminal justice system are the protection of the public and the deterrence of crime. Efficient detection, punishment, and rehabilitation of criminals are essential to fulfilling these objectives. At the same time, however, important safeguards must exist to ensure that no person is unjustly deprived of fundamental rights and freedoms. Indeed, the credibility of any criminal justice system rests in large part on the fairness it accords every individual charged with an offence. The Canadian commitment to fairness is reflected, *inter alia*, in the presumption of innocence, the Crown's burden of proving guilt beyond a reasonable doubt, and in the availability of appellate review in cases of legal and factual error.

However, no system is infallible. Wrongful convictions regrettably can and sometimes do occur. In such cases, the entire justice system is called into question.

Wrongful convictions are usually addressed and remedied through the appellate courts. Once these judicial avenues have been exhausted, section 690 of the *Criminal Code* stands as a final safety net which allows the Minister of Justice to review alleged wrongful convictions that have not been detected and remedied by the courts.

This paper examines the Canadian post-conviction review process and explores ways to improve it. It describes the current section 690 process, criticisms of that process, and options available for reform. It concludes by asking a number of specific questions for your consideration.

We thank you in advance for taking part in this process and helping us to improve the criminal justice system.

Please send written responses by **February 15, 1999**, to the following address:

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SECTION ONE: THE CURRENT CONVICTION REVIEW PROCESS

Introduction

Ministerial powers under section 690 of the *Criminal Code* originate in the Royal Prerogative of Mercy. Historically, the Royal Prerogative of Mercy allowed the sovereign to "extend mercy whenever he thinks it is deserved." For example, if the commission of an offence offended the letter (but not the spirit) of the law, the sovereign could prevent the appearance of injustice by utilizing this power to relieve a convict of criminal liability.

Section 690 enables the Minister of Justice, upon an application for mercy of the Crown by, or on behalf of, a person convicted in proceedings by indictment, or sentenced to preventive detention, to:

- direct a new trial, or a new hearing for a person in preventive detention, if after inquiry the Minister is satisfied that in the circumstances a new trial or hearing should be directed;
- refer the matter to a court of appeal for hearing as if it were an appeal; or
- refer any question to a court of appeal for its opinion on which the Minister desires assistance.

Successive federal Ministers of Justice have been of the view that the jurisdiction given them by section 690 should not constitute another level of appellate review. They have also held that the extraordinary remedies contemplated by this section are not available unless new information demonstrates that there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

Section 690 does not set out the test that should be applied by Ministers of Justice in determining whether a remedy should be available to an applicant. However, in April, 1994, in his reasons for decision in the section 690 application of *W. Colin Thatcher,* the Honourable Allan Rock, then Minister of Justice, articulated the principles which guide the discretionary powers found in section 690:

- The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.
- The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or a result on appeal. Merely because the Minister might take a different view of the same evidence that was before the court does not empower the Minister, under section 690, to grant a remedy.

- Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were before the trial and appellate courts. Applicants under section 690 who rely solely on alleged weaknesses in the evidence, or on arguments of law that were put before the court and considered, can expect to find that their applications will be refused.
- Applications under section 690 should ordinarily be based on new matters of significance that either were not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.
- Where the applicant is able to identify such "new matters", the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be "is there new evidence relevant to the issue of 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?"
- 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.

At present, there is no statutory test that dictates what specific remedy should be ordered once the Minister is satisfied that a remedy is required.

The Current Review Process

In 1989, the Royal Commission on the Donald Marshall, Jr. Prosecution recommended that provincial Ministers responsible for the administration of justice meet with the federal Justice Minister to consider creating an independent mechanism to facilitate the reinvestigation of alleged cases of wrongful conviction.

A federal-provincial-territorial working group was established to examine the Marshall Inquiry recommendations and to report to the next meeting of Ministers. The working group was satisfied with the existing section 690 procedures but recommended that

compulsory powers to compel witnesses and documents would be desirable. In its report, tabled at the 1991 meeting of Ministers responsible for criminal justice, the working group rejected the recommendation of the Marshall Inquiry pertaining to section 690 reform. It concluded that establishing an independent review body was undesirable because:

- the Marshall Inquiry did not criticize the section 690 review mechanism that were in place at that time;
- persons who claim that they were wrongfully convicted had the full benefit of the presumption of innocence, a trial in which their guilt had been established beyond a reasonable doubt, and appeal procedures;
- a review mechanism would create another level of appeal that would detract from the notion of judicial finality;
- the establishment of a mechanism as proposed by the Marshall Inquiry would likely result in many requests for reviews, most of which would likely be *pro forma*. The proposed mechanism would permit the reinvestigation of cases but would not provide any remedy for the wrongfully accused person;
- the review of these cases would incur significant costs that would divert resources from cases deserving review;
- section 690 of the *Criminal Code* enables the Minister of Justice to order a new trial or an appeal in appropriate cases;
- the section 690 process is independent from the prosecutions conducted by the provincial Attorneys General. It satisfies the requirement for an independent review mechanism, but could be improved by the provision of power to compel individuals to testify; and
- the review of judicial decisions by a non-judicial body would be inappropriate.

The Minister of Justice currently receives approximately 50 to 70 requests for a review under section 690 of the *Criminal Code* per year. The numbers have grown over the last few years. Each case varies in the number and complexity of issues to be addressed. Factors influencing the time it takes to review a case include: the nature and quality of the evidence submitted in the initial application; the time needed to gather additional evidence; the time required to assess new submissions made during the investigative and review process; and the additional fact-finding inquiries that follow new submissions.

In 1993, the Department of Justice considered ways to enhance the efficiency of the section 690 process. In particular, it examined potential changes designed to:

- improve the timeliness of case review;
- provide more openness; and

- provide greater independence from the prosecution function of the Department.

As a result of the Department's internal review, the following steps were initiated. To improve the timeliness of section 690 applications, a case management system was implemented and additional lawyers were hired. The Criminal Conviction Review Group (CCRG), whose sole function is to investigate section 690 applications and report to the Minister, was established. The CCRG consists of counsel who have experience both as former Crown and Defence counsel. The Minister also started using outside counsel on a more regular basis. Timelines for counsel reviewing the application and the applicant were instituted. Prior to 1994, section 690 applications were usually assigned on an *ad hoc* basis to legal counsel within the Litigation Sector of the Department of Justice. To provide greater independence from the prosecution function of the Department, the CCRG, upon its creation, was transferred to the Policy Sector.

To provide greater openness, the Department of Justice published a booklet that outlines the required documents, guidelines, and process by which one applies for a section 690 review. The booklet has been widely distributed and continues to be available. It is posted on the Internet at the Department's website.

To provide greater accountability, the CCRG now provides the applicant with a copy of an investigative summary which discloses all of the information gathered and which will be considered by the Minister in reaching a decision in an application. The applicant is invited to make written submissions with respect to the findings in the investigative summary. All evidence to be considered by the Minister is disclosed to the applicant before the Minister makes a final decision.

Although no procedure is outlined in the *Criminal Code* as to how one applies for a conviction review, a standard procedure has been in place since 1994 to assist the Minister of Justice in the review of section 690 applications. Reviews are usually initiated by correspondence from applicants or their legal representatives. There are no formal application forms to be completed under section 690. As each application is different, additional information may be required to complete the application. Generally, the following documents are required:

- a description of the reasons for the claim that there was a miscarriage of justice and any new information to support that claim;
- the trial transcripts;
- a copy of all court judgments; and
- the factums filed on appeal.

Once the necessary documents have been provided, the review process begins. The review process is divided into four stages:

Preliminary Assessment: At this initial stage, a member of the CCRG examines the information in the application and compares it with the trial and appellate records. There must be an "air of reality" to the allegations raised by the applicant. As a threshold, the applicant must disclose grounds that could lead to the conclusion that a miscarriage of justice likely occurred.

If the application reveals new and significant information that was not available at trial or on appeal that could have affected the outcome of the case, the application will go on to a full investigation. If not, the applicant is informed and provided with reasons why the intervention of the Minister is not warranted.

Investigation: During the investigation or evaluation of the application, the function of CCRG counsel is three-fold. First, counsel must verify all the information and evidence submitted in the application. Second, counsel may obtain any additional facts deemed necessary for a full investigation. This may involve interviewing witnesses and obtaining scientific tests or other assessments from forensic and social science specialists. Police agencies, prosecutors, defence and appellate counsel involved in the case may be consulted. In addition, the information obtained may raise issues other than those identified by the applicant. When this happens, the applicant will be asked to provide additional submissions to ensure that the matter is fully considered. Third, this process allows counsel to formulate a recommendation as to whether there is a basis to conclude that a miscarriage of justice likely occurred.

Investigative Summary: Counsel reviewing the application then organizes the results of the investigation into an investigative summary. This summary serves as the framework for informing the applicant, his or her counsel, and the Minister of the facts gathered during the investigation. The investigative summary is disclosed to the applicant for comments.

Recommendation and Ministerial Decision: Once the applicant's final submissions have been received and CCRG counsel have arrived at an informed conclusion regarding the applicant's eligibility for a section 690 remedy, legal advice is prepared for the Minister. The application, all submissions by or on behalf of the applicant, the investigative summary, and the CCRG's advice are then forwarded to the Minister for review and decision.

SECTION TWO: REFORMING THE REVIEW PROCESS

A number of objections have been raised regarding the current section 690 process. In general, critics suggest that the present review procedure under section 690 is inadequate and should be replaced with an independent review mechanism. The criticisms may be summarized as follows:

- the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted;
- the procedure has led to inordinate delays in the reviews of individual cases.
- the procedure is largely conducted in secret and is consequently without accountability;
- counsel who review section 690 applications are former prosecutors who will look at miscarriage of justice evidence with a prosecutorial bias and will therefore not investigate allegations of error in a fair and objective manner.
- only a handful of cases have ever been re-opened in Canada;
- the response of the Courts to the occasional section 690 referral has been unsatisfactory.

Although the legal roles of the Attorney General of Canada and the Minister of Justice are distinct in law, in practice each function is discharged by a single Minister. In section 690 of the *Criminal Code,* Parliament has bestowed the powers of the Royal Prerogative of Mercy upon the Minister of Justice. The vast majority of section 690 applications involve cases prosecuted by provincial Attorneys General. Very few applications involve prosecutions conducted by the Attorney General of Canada. When this does occur, counsel from outside the Department of Justice are retained to assess the application and to advise the Minister.

It has also been claimed that the review process lacks fairness because of the absence of clear procedures for making an application. Some have advocated the need for clear statutory authority setting out the procedural requirements for section 690 reviews. Others have recommended that section 690 should include the power to compel the attendance of witnesses and to order the production of documents.

With respect to the time it takes to process section 690 applications, some reviews may be completed in a matter of several months, while others may take years. The time it takes to complete an assessment is in part related to the thoroughness of the investigations, and the ability to have access to potential witnesses and documents. As well, some of the delay is attributable to applicants who adjust or supplement their application with further submissions during the course of the review process.

In view of the seriousness of wrongful convictions and to maintain the credibility of the process, the Department of Justice has held that any review must be thorough and comprehensive. Accordingly, the current practice requires that all plausible claims that a miscarriage of justice occurred must be investigated.

There are several options for reform of the section 690 process. Steps could be taken to enhance the independence of the review process -- with the British system being one example. In Britain, an independent agency enjoys the power to refer cases directly to the Court of Appeal without a Minister being directly accountable for the decisions made. Alternatively, appellate powers could be reviewed and enhanced, such as in the United States, where appeals are allowed as long as the applicant has the financial resources to support them. In the United States, there is no governmental body tasked with vetting applications and investigating them for the purpose of providing a remedy in meritorious cases.

Other reform options might include some combination of enhanced appellate powers and reforms to the conviction review process. All options have financial implications for government, the court system and individuals, all of which should be carefully considered.

There has been recent action taken in some jurisdictions to address the problem of wrongful convictions. While some jurisdictions have completely overhauled their system of post-conviction review, others have only just begun to look at changing their current systems. What follows is a review of post-conviction mechanisms existing in other jurisdictions.

Post-Conviction Review Mechanisms in Other Jurisdictions

United Kingdom: The Criminal Cases Review Commission (CCRC), created by the *Criminal Appeal Act, 1995*, was established in the United Kingdom in response to high-profile cases of wrongful conviction. These cases were viewed to have been inadequately addressed by the Home Secretary, who is responsible for all policing and criminal prosecutions in England, Wales, and Northern Ireland in addition to his responsibility for reviewing alleged miscarriages of justice.

Prior to the creation of the CCRC, section 17 of the *Criminal Appeal Act, 1968*, authorized the Home Secretary to refer cases involving allegations of miscarriages of justice to the Court of Appeal. However, it was contended that the office of the Home Secretary was too political. In addition, it was argued that the Home Secretary was in a conflict-of-interest situation, in that he was also in charge of policing and all criminal prosecutions. There was also criticism that the Home Office had non-lawyers reviewing these cases. Of those cases that were referred to the Court of Appeal by the Home Secretary, very few were overturned. The approach taken by appellate courts towards fresh evidence at that time was very restrictive.

Le principal objectif de la CCRC est d'examiner les erreurs judiciaires soupçonnées et de faire enquête sur celles-ci, et de renvoyer à la cour d'appel appropriée tout cas lorsqu'il y a une possibilité réelle qu'une condamnation, un jugement, un verdict ou une peine ne sera pas confirmé. On a aussi confié à la CCRC les responsabilités suivantes :

- enquêter et faire rapport à la Cour d'appel sur toute question pour laquelle on lui demande de le faire;
- étudier tout renvoi du secrétaire d'État sur les questions relatives à la prérogative royale de clémence, et faire état de ses conclusions;
- donner les raisons de son opinion dans toute cause où elle estime que le secrétaire d'État devrait songer à recommander l'exercice de la prérogative royale de clémence;
- envoyer au secrétaire d'État un rapport annuel des fonctions dont il s'est acquitté, lequel doit être déposé devant chaque chambre du Parlement.

Un demandeur doit avoir interjeté appel de sa condamnation devant le tribunal approprié avant de pouvoir présenter une demande à la CCRC. La commission a aussi le pouvoir de renvoyer à la Cour d'appel toute question sur laquelle elle désire de l'aide pour obtenir l'opinion de celle-ci.

Selon la pratique de la CCRC, un commissaire fait l'évaluation initiale d'une demande. S'il « n'est pas enclin à renvoyer » la cause devant une cour d'appel, un énoncé des raisons est alors rédigé et envoyé pour ses commentaires au demandeur. Après avoir reçu du demandeur les commentaires finals, un groupe de trois commissaires rend la décision finale sur chaque demande.

Le Home Office subventionne entièrement la CCRC. Le budget annuel de la CCRC, durant sa première année de fonctionnement, devait se situer entre 4 et 5 millions de livres. Cependant, dans son premier rapport annuel, la CCRC a indiqué qu'elle devait accroître son personnel et ses installations pour pouvoir traiter les nombreuses demandes qui se sont accumulées depuis sa création.

Le nouvel organisme indépendant présente un certain nombre d'avantages par rapport au processus d'examen antérieur. La CCRC peut contraindre des organismes publics à produire des documents, même si elle n'est pas investie du pouvoir d'assignation de témoin afin de lui fournir de l'information. Elle a le mandat d'examiner toutes les condamnations criminelles, tant les poursuites prises par voie sommaire que celles prises par voie d'acte criminel, ce qui assure ainsi un filet de sécurité pour toutes les condamnations injustifiées. Ajoutons que, de façon restreinte, les demandeurs ont eu accès à l'aide juridique.

Le modèle britannique peut aussi présenter certains désavantages. Étant donné qu'il n'y a pas de limite quant au nombre de fois qu'une personne peut demander un examen, un tel système risque du même coup de violer le caractère définitif des jugements et de créer un important arriéré de causes. Une autre grande préoccupation est que cela peut simplement devenir un autre palier d'appel. De plus, tous les commissaires ne possèdent pas une formation juridique et leur responsabilité à l'égard du public n'est pas claire.

L'Australie : L'Australie possède un système d'examen postérieur à la condamnation qui est semblable à maints égards à celui que possédait le Royaume-Uni avant la création de la CCRC. Il est fondé sur la prérogative royale de clémence et il est la responsabilité d'un ministre. Bref, après qu'on a épuisé toutes les voies judiciaires d'appel, si une nouvelle preuve soulève un doute grave quant à l'à-propos d'une condamnation, il peut y avoir soit (selon la compétence) une enquête sur la condamnation, soit un renvoi à une cour d'appel pour qu'elle se prononce sur un point de droit ou de fait. Si une enquête est tenue, le tribunal qui en est chargé a le pouvoir de citer à comparaître des témoins, que la personne condamnée a le droit de contre-interroger. Lorsque la cause est envoyée devant la cour d'appel, la cour agit comme s'il s'agissait d'un appel ordinaire. Après l'enquête, la personne condamnée peut obtenir un pardon de l'exécutif ou le tribunal peut annuler la condamnation ou ordonner un nouveau procès.

Des cas notoires de condamnations injustifiées semblables à ceux survenus au Royaume-Uni ont mené à la création de la *Fitzgerald Royal Commission (1987-1989)* en Australie. Pendant qu'il se trouvait dans l'opposition, le Parti travailliste a annoncé au Parlement qu'il créerait un nouveau mécanisme pour corriger les erreurs judiciaires. Le service qui devait être créé examinerait les condamnations jugées incertaines selon des normes que la Commission royale aurait établies. Cependant, une fois au pouvoir, le Parti travailliste n'a pas mis en oeuvre ces réformes.

En raison de la preuve produite de la corruption systématique des processus policiers (c.-à-d., la fabrication de preuves sous de nombreuses formes), on signale qu'il y a eu de récentes demandes en Nouvelle-Galles du Sud pour que soit créée une commission d'examen des causes criminelles comme celle qui existe au Royaume-Uni. Initialement, les demandes concernant un organisme d'examen indépendant ont été rejetées et une approche d'examen selon chaque cas est encore utilisée pour décider si un cas particulier mérite de faire l'objet d'un examen. Cependant, on semble faire du progrès vers la création d'un organisme d'examen des causes criminelles en Nouvelle-Galles du Sud. Un projet de loi a été récemment présenté devant l'assemblée législative de cet État pour que soit créé un organisme d'examen indépendant ayant pour but d'enquêter sur les questions que lui renverraient la cour d'appel, le gouverneur ou le procureur général. Il serait investi du pouvoir de renvoyer les causes à la cour d'appel lorsqu'il estimerait qu'il pourrait y avoir eu erreur judiciaire. Il convient de noter que ce projet de loi a été présenté par un député de l'opposition et qu'il reste à voir si celui-ci sera adopté.

En Australie, les mécanismes utilisés pour corriger les condamnations injustifiées varient selon l'État, puisque chaque État possède sa propre méthode d'examen. Toutefois, les

France: The French equivalent of section 690, called the *pourvoi en révision*, is to be found in the *Code de procédure pénale* (CPP). The French legal system, which has its origins in Napoleonic France, attempts to foresee all possible situations that might arise and to clearly spell out solutions in codified form. With respect to the mechanism for redressing miscarriages of justice, the French are faithful to their legal tradition. In section 622 of the *Code de procédure pénale*, they have tried to define the precise situations that open the door to a *pourvoi en révision.*

Section 622 of the CPP provides four clearly defined grounds upon which criminal convictions can be reviewed, once all possibilities of appeal have been exhausted. It must be noted that such a remedy is considered an exceptional one. The four specific grounds are:

(1) when after a conviction for homicide, evidence appears that indicates the supposed victim is alive;

(2) when after a conviction for a serious or major offence, another accused has been convicted of the same act and the two convictions being irreconcilable, their contradiction is proof of the innocence of one or the other of the convicted persons;

(3) when after a conviction, one of the witnesses has been prosecuted and convicted for false testimony against the accused;

(4) when after a conviction, new facts or evidence unknown at the time of the trial is produced or revealed so as to create doubt about the guilt of the accused.

The notion of "new facts" may comprise the following: the admission of a third party, the statement of a witness, the discovery of mental disorder in the convicted person at the time of the events, and new interpretation of a fact already known (i.e., through technological advancement in science). It should also be noted that the present wording of section 622(4) requires that the new evidence raise "a doubt about the guilt of the accused", whereas the previous wording of this section required the new evidence to "establish the innocence of the convicted person".

The *pourvoi en révision* can be requested by the Minister of Justice, the convicted person or a legal representative. If the convicted person dies, a spouse, child, parent, relative, or legatee may request the *pourvoi en révision.*

Section 623 of the CPP provides that the *pourvoi en révision* be lodged before a commission of five judges who are nominated by the *assemblée générale* of the appropriate jurisdiction. If the panel, sitting as a *cour de révision*, considers the application well-founded, it will annul the conviction and consider whether it is possible to proceed to a new trial, in which event the case is remitted to another court of the same rank as the one whose judgment has been annulled (section 625 CPP).

This approach may not permit latitude for valid grounds that have not been contemplated by the legislation. The French system may result in much more rigidity when unforeseen situations arise that may require redress. The State does not take a proactive approach in such reviews. It is the applicant who is responsible for initiating the legal proceedings.

A Review of Appellate Powers

In 1923, the right of appeal in criminal cases, as we know it, was introduced in Canada. At that time, the relevant section (1022) of the *Criminal Code* that dealt with a ministerial review of wrongful convictions was also amended to permit the Minister of Justice to refer either an entire case or one or more specific points to the court of appeal for its opinion.

Courts of appeal in Canada can also allow the introduction of fresh evidence on appeal. Appellate courts can allow an appeal on the ground that there has been a miscarriage of justice. Section 686 of the *Criminal Code* describes the current powers for courts of appeal in criminal matters.

The issue of section 690 reform and appellate remedies, particularly based on fresh evidence, are clearly linked. Any envisaged changes to section 690 of the *Criminal Code* should be considered in correlation with an analysis of available appellate remedies and the grounds for appealing a conviction.

The following suggestions to expand appellate powers are found in the recommendations of *The Commission on Proceedings Involving Guy Paul Morin* (Hon. Fred Kaufman, C.M., Q.C., 1998, at p. 1238):

Recommendation 86: Fresh evidence powers of the Court of Appeal:

> (a) In the context of recanted evidence, the requirements that evidence must reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness's original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.
>
> (b) Consideration should be given to further change to the "due diligence" requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.

Recommendation 87: Powers of a court of appeal to entertain "lurking doubt":

> Consideration should be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt.

Further powers in the hands of the appeal courts, as those recommended by Commissioner Kaufman, may result in more cases going to appeal and less need for any form of post-appellate review. Broader appellate powers in Canada may lead us in the direction of the post-conviction review mechanisms that currently exist in the United States.

The United States: In the United States, miscarriages of justice are handled mainly by judicial appeals. American appellate courts have greater and more liberal powers than their counterparts in the UK, France, Canada, and Australia. The possible grounds for appeal in the United States are also more numerous.

Since criminal law falls within the jurisdiction of each State, the remedies available depend on the State in question. There is also a much greater use of collateral remedies which are available to a convicted defendant. For example, a conviction may be challenged by an independent civil action after all opportunities for appellate review are exhausted (i.e., *habeas corpus* and *coram nobis*). From a Canadian perspective, the wide range of appellate remedies in the United States is remarkable. With relatively little procedural difficulty, any person may collaterally attack his or her conviction on one or more grounds.

The existence of these types of remedies appears to be a product of the historical development of the American federal system. This system gives the power over criminal law to each State but provides for a broad supervisory power by the federal court system. In the period immediately following the American Civil War and the abolition of slavery, the federal government sought to exert considerable control over the still recalcitrant southern States. The *habeas corpus* remedy was used to review State convictions as part of this federal initiative. Since that time, each State appears to have developed its own enactments establishing post-conviction review.

The most frequently used grounds of appeal appear to be based on violations of constitutional rights, including the right to counsel. The impressive array of grounds that may be considered under any particular State jurisdiction includes:

- all constitutional violations;
- all jurisdictional defects;
- material evidence, not previously heard, that justifies vacating the judgment "in the interest of justice";

- imposition of a sentence in excess of the maximum authorized by law;
- continued detention following the expiration of a sentence;
- unlawful revocation of probation or parole;
- retroactive alteration or amendment of the law under which the applicant was convicted or sentenced;
- any other objections recognized as proper subject of collateral attack under any common law or statutory remedy recognized in the jurisdiction.

In addition to appellate review, the United States also has what is called "executive clemency", which translates in practical terms to the power of granting pardons. However, as a result of liberalized rights of appeal, there has been a marked reduction in the number of pardons granted for reasons of innocence.

Accessibility to the court system in the United States depends largely on the financial means of an applicant. Since the State does not assist the applicant, he or she is left to rely on other means in order to obtain a remedy for a wrongful conviction.

In addition, the numerous possibilities of appeal are costly to the court system and there are other consequences. For example, because a convicted individual can appeal so many times, public reaction to these multiple appeals, irrespective of the merits, is seen to have placed added pressure on politicians to adopt tougher legislation regarding appeals.

Another consequence of the American system is the fact that convictions are reviewed by the courts without the proactive assistance of the State. Frivolous (even vexatious) applications are not vetted and the meritorious ones are not assisted by specialized counsel who have no vested interest in the outcome. Anyone can appeal as long as resources last.

Other Options

Other possible avenues for reform could include amendments to section 690 of the *Criminal Code*. These amendments could include incorporating the principles enunciated in the *Thatcher* decision and legislating the appropriate governing procedure. This would provide Parliament with the opportunity to endorse the administrative practices for section 690 reviews. It would also clarify to a greater extent the process and the role of the Minister of Justice.

There are three main areas in the section 690 assessment procedure that critics identify as being unfair. First, section 690 does not set out the procedure to be followed for making an application. Second, it does not describe how the Minister should assess an application. For example, it does not authorize the Minister to compel the attendance of

moyens pour obtenir une mesure de redressement par rapport à une condamnation injustifiée.

De plus, les nombreuses possibilités d'appel coûtent cher au système judiciaire et il y a d'autres conséquences. Par exemple, parce qu'une personne condamnée peut interjeter appel de si nombreuses fois, on considère que la réaction publique à ces multiples appels, peu importe leur bien-fondé, exerce une plus grande pression sur les politiciens pour qu'ils adoptent une législation plus sévère sur les appels.

Une autre conséquence du système américain est le fait que les tribunaux révisent les condamnations sans l'aide proactive de l'État. Des demandes frivoles (voire vexatoires) ne sont pas filtrées préalablement et les cas méritoires ne reçoivent pas d'aide d'avocats spécialisés qui ne s'intéressent pas aux conclusions de ceux-ci. N'importe qui peut interjeter appel aussi longtemps que ses ressources durent.

Autres options

D'autres possibilités de réforme pourraient inclure des modifications à l'article 690 du *Code criminel.* Ces modifications pourraient incorporer les principes énoncés dans la décision *Thatcher* et légiférer la procédure de base appropriée. Cela donnerait au Parlement la possibilité d'appuyer les pratiques administratives pour les examens relatifs à l'article 690. Cela clarifierait aussi dans une plus grande mesure le processus et le rôle du ministre de la Justice.

Il y a trois principaux éléments de la procédure d'évaluation en vertu de l'article 690 que les critiques indiquent comme étant injustes. Premièrement, l'article 690 n'énonce pas la procédure à suivre pour présenter une demande. Deuxièmement, il ne précise pas comment le ministre devrait évaluer une demande. Par exemple, il n'autorise pas le ministre à contraindre la présence de témoins ou la production de documents. Troisièmement, on dit que les examens relatifs à l'article 690 se tiennent sous le voile du secret sans aucune divulgation réelle pour le demandeur.

En ce qui concerne la dernière critique, on suggère qu'il n'y a aucune responsabilité publique dans le processus. Les demandes d'examen présentées en vertu de l'article 690 sont menées en privé et sont confidentielles. Le ministre de la Justice est lié par les dispositions de la *Loi sur la protection des renseignements personnels*, L.R. 1985, c. P-21. Les renseignements recueillis durant l'évaluation d'une demande peuvent être divulgués au demandeur, mais ils ne peuvent pas l'être au grand public. Les demandes soumises en vertu de l'article 690 renferment des renseignements personnels au sens de la *Loi sur la protection des renseignements personnels*. Dans de nombreux cas, des renseignements personnels sur un certain nombre de personnes identifiables sont inclus dans la demande. Le ministre ne peut pas diffuser de renseignements personnels sur le demandeur ou sur toute autre personne identifiable, sauf s'il a obtenu le consentement de la personne à qui se rapportent les renseignements ou conformément à l'article 8 de la *Loi sur la protection des renseignements personnels.*

Par conséquent, les décisions relatives à l'article 690 sont rarement rendues accessibles au grand public. Parfois, le ministre a publié une décision rendue dans le cadre d'une demande relative à l'article 690, si, à son avis, l'intérêt du public dans la publication de la décision l'emportait clairement sur toute violation de la vie privée qui pouvait résulter d'une telle divulgation.

L'article 690 du *Code criminel* pourrait être modifié pour préciser qui peut présenter une demande et quand quelqu'un peut demander une mesure de redressement. Il pourrait préciser quels documents sont requis par le ministre et énoncer le processus à suivre durant l'examen. Il pourrait indiquer clairement qu'un demandeur doit épuiser toutes les voies d'appel avant de présenter une demande en vertu de l'article 690. Le pouvoir de contraindre la présence de témoins et la production de documents pourrait être conféré par une législation. Les délais pourraient aussi être fixés. Le critère minimal pour obtenir une mesure de redressement en vertu de l'article 690 pourrait aussi être indiqué clairement.

La portée de l'article 690 pourrait être élargie pour inclure la révision des infractions punissables par voie de déclaration sommaire de culpabilité. La compétence du ministre pour examiner une condamnation de sa propre initiative pourrait aussi être incorporée par l'entremise d'une nouvelle législation.

Légiférer tout le processus d'examen peut cependant limiter la souplesse dont le ministre dispose actuellement. La discrétion ministérielle de déterminer quel recours convient le mieux à un demandeur en particulier pourrait être réduite.

SECTION THREE: CONSULTATION QUESTIONS

A viable system for identifying and remedying miscarriages of justice is an essential aspect of any credible criminal justice system. The objective of the present inquiry is to assess whether our current post-conviction review process adequately respects the dual imperatives of societal protection and justice to individual accused. The attendant issues are complex and challenging. Reformation will inevitably require a careful balancing of numerous individual and institutional factors. Your responses to the following questions will help us to comprehensively assess the relevant issues and ensure that any reform is in the best interests of all Canadians.

1. Should conviction review remain with the Minister of Justice?
2. What steps could be taken to enhance the actual and apparent independence of the post-conviction review?
3. Should an independent body investigate all allegations of miscarriages of justice?
4. Are there steps that could be taken to address concerns about the independence of the current system that would not include the establishment of an independent body?
5. Should the appeals process be broadened and, if so, what implications might this have on other forms of post-conviction review?
6. Should the review process be available only when new matters are raised or should it also include matters that were not raised as a result of strategic decisions by the accused, acting on the advice of competent counsel?
7. What test should be used to determine whether a new matter is sufficiently serious and reliable to justify a remedy? Is the demonstration that there is a "reasonable basis to conclude that a miscarriage of justice likely occurred" an appropriate test? Should the test be based on a "lurking doubt"?
8. Should the standards and procedures for post-conviction review be made the subject of amendments to the Criminal Code?
9. Should the Minister of Justice make exclusive use of outside counsel to review alleged miscarriages of justice?
10. Should the Minister of Justice be empowered to compel the appearance of witnesses and the production of documents from private as well as public bodies?
11. Should cases of alleged wrongful conviction be restricted to convictions on indictment or should summary convictions also be subject to review?
12. Should the jurisdiction of courts of appeal be broadened to allow appeals where there is a "lurking doubt" about the safety of a conviction?

13. Should the rules governing the introduction of fresh evidence on appeal be relaxed?
14. Should the jurisdiction of appellate courts be broadened to accommodate cases that are considered out of the judicial system?
15. What percentage of available criminal justice resources should be allocated to extra-judicial review as opposed to miscarriage of justice prevention (i.e., police & prosecutor training)?

APPENDIX

Section 690 of the ***Criminal Code*** provides that:

The Minister of Justice may, upon application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after the inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

b) 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 under sentence of preventive detention, as the case may be; or

c) 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 accordingly.