

# Twenty Years for Nothing: An Exploration of Wrongful Conviction Cases in Canada<sup>1</sup>

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*The manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.*

(Justice Report on Miscarriages of Justice, 2011)<sup>2</sup>

Wrongful convictions steal years – if not decades – of life and opportunities from innocent citizens, with irreparable impact not only on the wrongly convicted,<sup>3</sup> but also on their families and

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1. A portion of this title, “Twenty Years for Nothing”, contains lyrics from the song “Wheat Kings” by Canadian band, The Tragically Hip. The song details the highly publicized case of David Milgaard, who was wrongfully imprisoned for more than 20 years for the rape and murder of Gail Miller.

Note: The significant personal costs of a wrongful conviction cannot be overstated, including profound mental suffering, physical harm, loss of liberty and dignity, personal sacrifices, missed opportunities in career and education, and long-term psychological harm. This work is dedicated to those who have been wrongfully convicted in this country, in the hope that we may learn from our past and avoid future injustices.

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2. Stephen Bindman and Mary Nethery, “Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions”, *The Path to Justice: Preventing Wrongful Convictions*, Department of Justice (2011); Citing George Stanley Waller, *Miscarriages of Justice*, Justice (1989).

3. Kathryn Campbell and Miriam Denov, “The Burden of Innocence: Coping with a Wrongful Imprisonment” (2004), 46 *Can. J. Criminol. & Crim. J.* 139; Kathryn Campbell and Miriam Denov, “Miscarriages of Justice: The Impact of Wrongful Imprisonment”, Department of Justice, Government of Canada (2005), *JustResearch*, Edition no. 13; Adrian T. Grounds, “Understanding

communities<sup>4</sup> and possibly on additional victims and their families, as the true offender is still free and may commit further crimes.<sup>5</sup> The fact that such appalling, life altering errors occur with some frequency in mature democratic countries is alarming. As of early 2019, there were over 2,400 known wrongful convictions in the United States<sup>6</sup> and the numbers continue to grow. Westervelt and Cook<sup>7</sup> (2010) reported 138 known cases of death row exonerations in the United States, and they interviewed 18 of these individuals to present their life stories, highlighting the great harm done to – and the near absence of support provided for – innocent individuals in prison and post-release.

This article aims to contribute to the growing literature on wrongful conviction by first gathering as many known Canadian exonerations as possible, as Canada currently lacks a national database that tracks cases of wrongful conviction. Second, we provide an initial systematic analysis of the profile of these known Canadian exonerees, the factors that contributed to these wrongful convictions, the compensation (if any) that was provided, and the nature of any apologies that were offered. Third, we focus on notable similarities and differences between American and Canadian cases. Fourth, we hope to stimulate greater research in Canada, and other countries, to examine the extent to which current knowledge of wrongful conviction is universal, and whether there are reliable national differences as well.

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the Effects of Wrongful Imprisonment” (2005), 32 *Crime & Justice* 1; Heather Weigand, “Rebuilding a Life: The Wrongfully Convicted and Exonerated” (2009), 18 *Public Interest L.J.* 427.

4. Lola Vollen and Dave Eggers, *Surviving Justice: America's Wrongfully Convicted and Exonerated* (Voice of Witness Books, 2005) [Vollen and Eggers]; Weigand, *supra*, footnote 3.
5. Frank R. Baumgartner, Amanda Grigg, Rachele Ramirez and J. Sawyer Lucy, “The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration” (2017), 81 *Albany L. Rev.* 1263; Maurice Chammah, “When the Innocent Go to Prison, How Many Guilty Go Free?”, *The Marshall Project* (March, 2018), online: <<https://www.themarshallproject.org/2018/03/21/when-the-innocent-go-to-prison-how-many-guilty-go-free>.
6. National Registry of Exonerations, (April, 2019), online: <<https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.
7. Saundra D. Westervelt and Kimberly J. Cook, “Framing Innocents: The Wrongly Convicted as Victims of State Harm” (2010), 53 *Crime L. & Social Change* 259 [Westervelt and Cook]. The authors frame wrongful convictions within the context of state crimes and state harms: “The [exonerees] have been wrongly convicted and incarcerated for crimes they did not commit as a result of explicit illegal state action or the misapplication of state power” at 261.

## 1. Frequency of Wrongful Conviction

A true evaluation of the frequency of wrongful convictions is, by definition, impossible to obtain.<sup>8</sup> As many researchers have noted, the known instances of wrongful conviction are not an indication of the actual frequency of wrongful conviction, but merely the tip of an iceberg, where the greater proportion may be hidden below the surface.<sup>9</sup> As Bedau and Radelet suggested, “the coincidences involved in exposing so many of the errors and the luck that is so often required suggest that only a fraction of the wrongly convicted are eventually able to clear their names.”<sup>10</sup> For instance, it is very difficult to convince people of someone’s innocence without DNA evidence, but as offenders are motivated to avoid leaving DNA evidence at crime scenes, only a very small proportion of cases, typically murder or sexual assault cases, have DNA evidence associated with them.<sup>11</sup> Within the United States, approximately 10% of offenders are incarcerated for rape or murder, and not all murder and rape cases have DNA evidence available; thus, the vast majority of wrongly convicted individuals may simply be unable to convince people of their innocence.<sup>12</sup> As such, for every wrongful conviction we know about, there are likely countless others that are currently unknown, suggesting that known cases of wrongful conviction are a poor estimate of the actual number of wrongful convictions occurring in a country.<sup>13</sup>

Although we may never know how often wrongful convictions occur, or whether the ones that are discovered differ from the ones that are not, a number of authors in the United States have attempted to provide feasible estimates of wrongful convictions. Based on U.S. exoneration data, various estimates of wrongful convictions have

8. Samuel R. Gross, “Convicting the Innocent” (2008), 4 Annual Rev. L. & Soc. Sci. 173 [Gross]; Tony G. Poveda, “Estimating Wrongful Convictions” (2001), 18 Justice Quarterly 689; Kent Roach, “Wrongful Convictions in Canada” (2012), 80 University of Cincinnati L. Rev. 1465 [Roach].
9. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery, and Sujata Patil. “Exonerations in the United States 1989 through 2003” (2005), 95 J. Crim. L. & Criminol. 523 [Gross et al]; Barry C. Scheck, “Barry Scheck Lectures on Wrongful Convictions” (2006), 54 Drake L. Rev. 597.
10. Hugo Adam Bedau and Michael L. Radelet, “Miscarriages of Justice in Potentially Capital Cases” (1987), 40 Stanford L. Rev. 21 at 70 [Bedau & Radelet].
11. Keith A. Findley and Michael S. Scott, “Multiple Dimensions of Tunnel Vision in Criminal Cases” (2006), 2 Wisconsin L. Rev. 291 [Findley & Scott].
12. Gross et al., *supra*, footnote 9.
13. Brandon L. Garrett, “Judging Innocence” (2008), 108 Colum. L. Rev. 55 [Garrett]; Roach (2012), *supra*, footnote 8.

been put forth, with estimates ranging from 2.3% to 7% for death row cases,<sup>14</sup> 2.3% to 5% for rape and murder cases,<sup>15</sup> and 3.3% to 5% for capital rape-murder cases.<sup>16</sup> Anonymous self-reported data of factual innocence collected from individuals sent to the primary reception facility for the Pennsylvania Department of Corrections led to estimates of a 6% wrongful conviction rate for that state, with systematic fluctuations in estimates based on the crime.<sup>17</sup> In contrast, when U.S. criminal justice personnel (police officers, prosecutors, defence counsel, and judges) were asked to estimate the number of convictions in the United States that were wrongful, the overall modal response provided was 1-3%.<sup>18</sup>

Extrapolating from a much more conservative estimate of wrongful conviction than that provided by the surveyed criminal justice personnel, Huff<sup>19</sup> calculated that even a very small percentage (0.5%) would result in thousands of U.S. citizens wrongly convicted each year (7,500 in the year 2000 alone). Following a similar approach to estimate the frequency of wrongful convictions in the United Kingdom, Grounds<sup>20</sup> suggested it was approximately 1,000 wrongful convictions per year. Roach<sup>21</sup> has estimated at least 450 wrongful convictions each year in Canada relying on a conservative estimate of 0.5% of the 90,000 convictions that occur annually.

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14. Samuel R. Gross and Barbara O'Brien, "Frequency and Predictors of False Conviction: Why We Know so Little, and New Data on Capital Cases" (2007), 5 J. Empirical Legal Stud. 927; James S. Liebman, Jeffrey Fagan, and Valerie West, "A Broken System: Error Rates in Capital Cases 1973-1995" (2000), Columbia Law School, Public Policy Law Research Paper, 15.
  15. Gross (2008), *supra*, footnote 8.
  16. D. Michael Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate" (2007), 97 J. Crim. L. & Criminol. 761.
  17. Charles D. Loeffler, Jordan Hyatt, and Greg Ridgeway, "Measuring Self-Reported Wrongful Convictions among Prisoners" (2018), 35 J. Quant. Criminol. 259.
  18. Robert J. Ramsey and James Frank, "Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors" (2007), 53 Crime & Delinq. 436; Marvin Zalman, Brad Smith, and Angie Kiger, "Officials' Estimates of the Incidence of 'Actual Innocence' Convictions" (2008), 25 Justice Quarterly 72.
  19. C. Ronald Huff, "Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address" (2002), 40 Criminology 1.
  20. Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004), 46 Canadian J. Criminology & Crim. Just. 165 [Ground].
  21. Roach (2012), *supra*, footnote 8.

## 2. Innocence Is Not Enough

Being innocent is not enough for exoneration.<sup>22</sup> Even having compelling evidence of innocence is not enough. In Canada, as well as the United States and United Kingdom, to have a case reviewed as a possible instance of wrongful conviction, the individual generally has to have already exhausted all normal appeals first, as the appellate courts exist to correct possible justice errors.<sup>23</sup> After all appeals have been exhausted, governments must balance the need to address possible wrongful convictions with the reality that they cannot endlessly re-examine the same case in perpetuity, essentially relitigating the same case over and over again. Thus, Canada (and many other countries) limits the post-conviction review process to cases with new and significant evidence. “New evidence” is fresh evidence that was not previously presented at trial or on appeal, whereas “significant evidence” is evidence that is viewed as so integral to the case that, had it been presented at the original trial, a not-guilty verdict might likely have ensued.<sup>24</sup>

Typically, when parties to a legal proceeding are aware of significant evidence, they will use that evidence in the original trial or appeals. Innocent individuals are often unable to apply to have their conviction reviewed, as they do not have new significant evidence in their cases. In rare circumstances, old evidence may be subjected to new technology that was developed post-conviction, as occurred with the advent of DNA testing in the late 1980s.<sup>25</sup> And in

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22. Bedau and Radelet, *supra*, footnote 10; Findley and Scott, *supra*, footnote 11.

23. Department of Justice, “Indigenous Overrepresentation in the Criminal Justice System”, *Government of Canada* (2017), online: <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/jan02.pdf>.

24. Patricia Braiden and Joan Brockman, “Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code” (1999), 17 Windsor YB Access 3; Kerry Scullion, “Wrongful Convictions and the Criminal Conviction Review Process Pursuant to s. 696.1 of the Criminal Code of Canada” (2004), 46 Canadian J. Criminology & Crim. Just. 189. It should be noted that a growing number of wrongful convictions in both Canada and the United States have ensued following guilty pleas, raising concerns about the frequency with which false guilty pleas may be occurring: Joan Brockman, “An Offer You Can’t Refuse: Pleading Guilty When Innocent” (2010), 56 Crim LQ 116. The reasons for entering a guilty plea are multifaceted, but can include concerns surrounding the delay, expense, and uncertainty of maintaining innocence at trial, *ibid.*, see also Christopher Sherrin, “Guilty Pleas from the Innocent” (2011), 30 Windsor Rev. Legal and Social Issues 1. At present, the frequency of false guilty pleas remains unknown and cases of false guilty pleas difficult to identify.

some cases, exonerations are the result of serendipitous occurrences: the true perpetrator decides to come forward, evidence of police misconduct surfaces from investigations into a different case, DNA evidence linked to the case is discovered years later, or a supposed victim dramatically appears years after he or she was believed to have been murdered.<sup>26</sup> Although innocence is necessary, it is far from sufficient in leading to exoneration. Therefore, as was earlier discussed, it is likely that many innocent but convicted individuals are unable to even apply to have their cases reviewed.

### 3. Factors that Can Lead to Wrongful Conviction

With the limits on the post-conviction review process, it is astonishing how many cases have successfully cleared the hurdles. Researchers and innocence organizations have systematically analyzed these known exoneration cases in the United States, seeking to identify factors that are associated with wrongful convictions. With respect to post-conviction DNA exonerations specifically,<sup>27</sup> the most common factor identified was eyewitness misidentification.<sup>28</sup> This factor has continued to be touted as the leading cause of wrongful convictions, generally associated with upwards of 70% of known wrongful conviction cases.<sup>29</sup>

The National Registry of Exonerations records and tracks wrongful convictions in America, including those exonerated by

25. Gross et al., *supra*, footnote 9; Adina M. Thompson, Oscar R. Molina, and Lora M. Levitt, "After Exoneration: An Investigation of Stigma and Wrongfully Convicted Persons" (2008), 75 Alb. L. Rev. 1373.
26. Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2007), 31 Manitoba L.J. 403 [MacFarlane]; see also Gross (2008), *supra*, footnote 8 and Scheck, *supra*, footnote 9.
27. National Registry of Exonerations (April, 2020), online: <<https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>>. There are currently over 500 DNA-based exonerations recorded by the National Registry of Exonerations, see National Registry of Exonerations (April, 2020) online: <<https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>>.
28. Steven E. Clark and Ryan D. Godfrey, "Eyewitness Identification Evidence and Innocence Risk" (2009), 16 Psychonomic Bulletin 22; Gross et al. (2005), *supra*, footnote 9; Nancy Steblay, Jennifer Dysart, Solomon Fulero, and Roderick C.L. Lindsay, "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison" (2001), 25 Law & Human Beh. 459; Gary L. Wells, Mark Small, Steve Penrod, Roy S. Malpass, Solomon M. Fulero, and C.A.E. Brimacombe, "Eyewitness Identification Procedures: Recommendations for Lineups and Photo-spreads" (1998), 22 Law & Human Beh. 683.
29. Garrett, *supra*, footnote 13.

DNA evidence and those without DNA evidence.<sup>30</sup> It involves a much larger and more varied database of U.S. cases of wrongful conviction (over 2600 exonerations), and may provide insight into factors contributing to wrongful convictions from a broader range of offence types. Across all offences, the National Registry identified perjury and false accusations as the most frequently occurring factors (59%) – not eyewitness misidentification (29%)<sup>31</sup>. Perjury and false accusations were closely followed by official misconduct (54%), again occurring more frequently than eyewitness errors. False or misleading forensic evidence (24%) and false confessions (12%) were also noted, but to a lesser extent. These numbers differed, however, depending on the type of crime. When looking at only sexual assault cases – the cases most likely to have DNA evidence – the data look similar to what is reported by the Innocence Project, with mistaken witness identifications the most frequently occurring factor in the cases.<sup>32</sup> Homicide cases, however, more frequently involved either perjury/false accusations or official misconduct (both at 69%), as opposed to mistaken witness identifications (25%).

Moving beyond the numbers, considerable research has investigated mistaken witness identifications and false confessions, to better understand – and reduce – their occurrence.<sup>33</sup> Suggestions for improving police procedures in these areas have been made to reduce future wrongful convictions,<sup>34</sup> and endorsement of these recommendations can now be found in recent Canadian court decisions (e.g., see *R. v. Mohamed*, 2014, wherein the Ontario Superior Court of Justice discussed the importance of proper lineup identification procedures). For instance, recommendations emanating from the Sophonow Inquiry<sup>35</sup> have called for the use of

30. National Registry, *supra*, footnote 6.

31. The National Registry of Exonerations, *supra*, footnote 27, provides a graph that shows the exonerations by contributing factor, and contributing factor by crime type. These graphs are frequently updated. The numbers reported in this manuscript are from April 16, 2020.

32. *Ibid.*

33. Saul M. Kassin, “The Psychology of Confessions” (2008), 4 Annual Rev. L. Soc. Sci. 193; Wells et al. (1998), *supra*, footnote 28.

34. Brian L. Cutler (Ed.), *Reform of Eyewitness Identification Procedures* (Washington, DC: American Psychological Association, 2013); Saul M. Kassin, Sara C. Appleby, and Jennifer Torkildson Perillo, “Interviewing Suspects: Practice, Science, and Future Directions” (2010), 15 *Legal and Criminological Psychology* 39; John R. Turtle, Roderick C.L. Lindsay, and Gary L. Wells, “Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case” (2003), 1 *Canadian J. Police and Security Services* 5; Wells et al. (1998), *supra*, footnote 28.

sequential (as opposes to simultaneous) lineups, the use of double-blind identification procedures, as well as the video recording of lineup identifications and police interrogations, in their entirety.

#### 4. Compensation for Wrongful Conviction

When it has been determined that a wrongful conviction has occurred, conceptions of justice and fairness would dictate that the exoneree should be granted compensation by the state for their lost years, pain, suffering, and ruined life. This notion was first raised in 1912 by renowned legal scholar, John H. Wigmore, in his editorial preface that accompanied a bill (s. 7675) to grant relief to persons erroneously convicted in U.S. courts. Wigmore discussed the state's responsibility to recompense an individual who has been wrongfully convicted in this way:<sup>36</sup>

. . . one glaring instance of such heartlessness, not excusable on any grounds, is the State's failure to make compensation to those who have been erroneously condemned for crime . . . To deprive a man of liberty, put him to heavy expense in defending himself and to cut off his power to earn a living, perhaps also to extract a money fine – these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do?

Regarding financial redress in the United States, an Innocence Project report<sup>37</sup> indicated that 40% of the first 240 U.S. DNA exonerees had not received any compensation at all, and that nearly half of U.S. states ( $N = 23$ ) did not offer compensation to individuals who had been wrongly imprisoned at the time of the report. Even among the states that had compensation laws, exonerees had to wait an average of three years before receiving any compensatory funds. Other accounts suggest that compensation – and even apologies – must be sought through further legal battles and are often not provided.<sup>38</sup>

35. Manitoba, *Thomas Sophonow Inquiry Report*, Hon. Peter Corey (Winnipeg: Manitoba Justice, 2001) [Corey Inquiry].

36. John Henry Wigmore, Editorial preface to E.M. Borchard, *State Indemnity for Errors of Criminal Justice*, Law Librarian of Congress, to accompany the Bill (S. 7675) to grant relief to persons erroneously convicted in courts of the United States (Washington: Government Printing Office, 1912), at 8.

37. Innocence Project, "Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation", *Report for the Innocence Project* (Benjamin N. Cardozo School of Law, Yeshiva University, 2009).

More recently, Norris<sup>39</sup> found that compensation statutes varied greatly across states in the United States, with the majority of statutes focused on financial compensation rather than training or re-integration services (e.g., job training, education, and counseling), and involving many limitations (e.g., applications might have to be made within a specific time frame) and disqualifications (e.g., barring applications from individuals who had entered a false guilty plea or confession), making it difficult for exonerees to obtain any form of compensation. Again, for those who were successful, the compensation was often too late to assist with the individual's immediate needs of re-entering society. On this note, Chunias and Aufgang<sup>40</sup> have discussed the need for more than mere monetary compensation, suggesting the need for financial repayment support programs for exonerees to help with their re-integration upon release. Yet, exonerees are typically simply set free without any transitioning programs (e.g., work-release, housing assistance, job training, education, or psychological counselling), somewhat ironic, as they would likely have received some of this assistance had they committed these crimes and completed their sentences.

The outlook for restitution in Canada for a wrongful conviction is unclear, as a national database is lacking, and compensation – even if it is received – is sometimes an undisclosed amount. During the compensation inquiry into the case of Steven Truscott, who was wrongly convicted and sentenced to death at the age of 14, the Honourable Sydney L. Robins observed that “in Canada, there is no legal entitlement to compensation for a wrongful conviction. Unless a wrongfully convicted person can establish a civil cause of action ... he has no remedy for the wrongful conviction.”<sup>41</sup>

Although Justice Robins argued for compensation for Steven Truscott, who was subsequently compensated in 2008, his inquiry made it clear how difficult it can be to obtain restitution for wrongful convictions in Canada. Without compensation, however, many exonerees are unable to live independently.<sup>42</sup> Post-exoneration, exonerees may be unable to secure housing or to find and maintain

38. *Ibid.*; Westervelt and Cook (2010), *supra*, footnote 7.

39. Robert J. Norris, “Assessing Compensation Statutes for the Wrongly Convicted” (2012), 23 *Criminal Justice Policy Review* 352.

40. Jennifer L. Chunias and Yael D. Aufgang “Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongly Convicted” (2008), 28 *Boston College Third World Law J.* 105.

41. Sydney L. Robins, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation.* (2008).

42. Kimberley A. Clow, Amy-May Leach, and Rosemary Ricciardelli, “Life after Wrongful Conviction,” Brian Cutler (Ed.), *Conviction of the Innocent:*

employment due to suspicion and stigma.<sup>43</sup> Although research indicates that apologies and financial compensation are important for the psychological well-being of victims,<sup>44</sup> and that exonerees have indicated their need for restitution,<sup>45</sup> compensation and apologies are not systematically provided – nor legally required – in Canada.

### 5. The Canadian Context

As was noted by Clarke and Witt (2008), the “problem of convicting the innocent has no borders.”<sup>46</sup> Since its inception in April 1997, the Criminal Cases Review Commission (CCRC) for England, Wales, and Northern Ireland has received over 26,221 applications for case review as possible wrongful convictions, and it has referred 692 of those cases back to the appellate courts as suspected cases of wrongful conviction; 450 of those appeals were allowed and 207 were dismissed.<sup>47</sup> Between 1999 and 2016, the Scottish Criminal Cases

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*Lessons from the Psychological Research* (American Psychological Association, 2012), 327.

43. Lesley Zannella, Kimberley Clow, Emma Rempel, Leah Hamovitch, and Victoria Hall, V., “The effects of race and criminal history on landlords’ (un)willingness to rent to exonerees” (2020), 44 *Law and Human Behavior*, 300; Kimberley A. Clow, “Does the ‘Wrongful’ Part of Wrongful Conviction Make a Difference in the Job Market?” In R. Ricciardelli and A.M.F. Peters (Eds.) *After Prison: Navigating Employment and Reintegration* (Waterloo: Wilfred Laurier University Press, 2017), 243; Corey Inquiry, *supra*, footnote 35; Vollen and Eggers, *supra* note 4; Westervelt and Cook, *supra*, footnote 7.
44. Giacomo Bono, Michael E. McCullough, and Lindsey M. Root, “Forgiveness, Feeling Connected to Others, and Well-Being: Two Longitudinal Studies” (2008), 34 *Personality & Social Psychology Bulletin* 182; Roman David and Susanne Y.P. Choi, “Getting Even or Getting Equal? Retributive Desires and Transitional Justice” (2009), 30 *Political Psychology* 161.
45. Kimberley A. Clow, Isabella M. Blandisi, Rose Ricciardelli, and Regina A. Schuller, “Public Perception of Wrongful Convictions: Support for Compensation and Apology” (2012), 75 *Albany L. Rev.* 1415 [Clow et al, 2012]; Vollen and Eggers, *supra*, footnote 4.
46. Alan W. Clarke and Laurelyn Whitt, “Problem without Borders: A Comment on Garrett’s Judging Innocence” (2008), 33 *Queen’s L. J.* 619 at 620.
47. Criminal Cases Review Commission (CCRC) for England, Wales, and Northern Ireland (CCRC) (April, 2020), online: <<https://ccrc.gov.uk/case-statistics/>>. It should be noted the CCRC has been criticized for its lengthy waiting list and delay, as well as a tendency to focus on technicalities. See e.g., Stephanie Roberts and Lynne Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission” (2008), 29 *Oxford J. Legal Studies* 43; Annabelle James, Nick Taylor, Clive Walker, “The Criminal Cases Review Commission: Economy, Effectiveness, and Justice” (2000), 1 *Crim. L. Rev.- London* 140. Michael Naughton (2018) was critical of the CCRC’s

Review Commission has been involved in the successful appeal of over 70 wrongful conviction cases.<sup>48</sup> Numerous public inquiries and reports in Canada have similarly brought an alarming number of wrongful convictions to light.<sup>49</sup> For instance, the Goudge Inquiry<sup>50</sup> into the criminal forensic cases involving Toronto Sick Kid's (Hospital for Sick Children) former forensic pathologist, Dr. Charles Smith, discovered a dozen possible cases of wrongful conviction stemming from Smith's inaccurate testimony and/or inaccurate analysis. Innocence Canada (formerly known as the Association in Defence of the Wrongly Convicted, or AIDWYC), first founded in 1993, has helped to exonerate 23 innocent individuals.<sup>51</sup>

In Canada, however, there has been little in the way of systematic examination or tracking of wrongful conviction cases across the

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spending limited resources on sentencing miscalculations or minor variations on an appellant's sentence. He argued that the CCRC should focus on settling claims of factual innocence, which is the work the public believed it was set up to do. He also criticizes the CCRC for its unwillingness to consider issues of guilt or innocence, but its focus on whether there is sufficient evidence or argument to raise doubts about the conviction. He notes that the CCRC does not consider issues of guilt versus innocence, as many assume, but rather whether this are grounds to refer the case back to court. See Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System" (2018), 58 *Crim. L. Q.* 207.

48. Scottish Criminal Cases Review Commission (SCCRC) (April, 2020), online: < <https://www.sccrc.co.uk/>.
49. E.g., Hon. Edward P. MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*. Saskatoon, SK (2008), online: < [http://www.publications.gov.sk.ca/freelaw/Publications\\_Centre/Justice/Milgaard/09-Vol2-Intro.pdf](http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/09-Vol2-Intro.pdf) [Milgaard Inquiry]; Hon. S.T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (2008), online: < <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html> [Goudge Inquiry]; Newfoundland and Labrador, The Lamer Commission of Inquiry, *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Hon. Antonio Lamer (St. John's, 2006), online: < <https://www.gov.nl.ca/jps/files/publications-lamerreport.pdf> [Lamer Commission]; Federal/Provincial/Territorial Heads of Prosecution Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice*, (Ottawa: Department of Justice, 2005), online: < <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf>; Federal/Provincial/Territorial Heads of Prosecution Committee, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: Department of Justice, 2019), online: < <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/index.html>.
50. *Ibid.*
51. Innocence Canada (April, 2020), online: < <https://www.innocencecanada.com/exonerations/>.

country. Back in 1998, Anderson and Anderson published a book focusing on seven different Canadian cases of wrongful conviction.<sup>52</sup> Innocence Canada does routinely examine its own cases, providing explanations of the various factors related to each wrongful conviction in their system. In addition, government inquiries have provided a highly-detailed exploration of the contributing factors in the specific, highly publicized cases they are mandated to investigate—as well as valuable recommendations for how to prevent similar wrongful convictions from occurring in the future.<sup>53</sup> Parallel to our own efforts, and unbeknownst to us at the time, Kathryn Campbell<sup>54</sup> tracked down a wide variety of confirmed and suspected cases of wrongful convictions in Canada using similar sources to us (inquiries, newspaper articles, and various websites including Innocence Canada). Embedded within sociological theories, she used specific case examples to demonstrate the occurrence of known contributing factors (e.g., eyewitness misidentifications, government misconduct, misuse of forensic evidence), as well as detailing the Canadian government's historic responses to exoneration and wrongful conviction.

In the current article, we offer a systematic examination of Canadian cases to test for commonalities across cases, as well as to determine how this sample of Canadian cases do or do not differ from similar examination of the much larger U.S. databases. Such examinations are crucial if we are to effectively inform policy in Canada, with its unique cultural history and judicial structures, as to what has been most likely to go wrong in Canadian wrongful conviction cases, what we should—and perhaps should not—rely on from the literature on U.S. cases, and what actions and reforms would be most helpful when things do go wrong, and someone is wrongly convicted in Canada.

## 6. Current Research

As noted in the numerous public commissions of inquiry and reports<sup>55</sup> that have followed high profile Canadian cases in which individuals were incarcerated for serious crimes they did not commit (e.g., David Milgaard, Guy Paul Morin, Donald Marshall Jr., James Driskell, Steven Truscott), wrongful convictions seriously

52. Barrie Anderson and Dawn Anderson, *Manufacturing Guilt* (Halifax: Fernwood Publishing, 1998).

53. *Supra*, footnote 49.

54. Kathryn M. Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018).

55. *Supra*, footnote 49.

undermine the legitimacy of the criminal justice system. MacFarlane<sup>56</sup> notes the fallibility of the criminal justice system as threefold, spotlighting the profound impact that wrongful convictions have at three distinct levels: 1) the unjustifiable harm inflicted upon the individual wrongly convicted; 2) the failure to apprehend the actual perpetrator of the crime, leaving him or her unpunished and free to victimize others, and 3) the re-victimization of the victim and his or her family by undoing any sense of closure that the original, but erroneous, conviction might have provided. Moreover, early data on public perceptions of wrongful conviction in Canada found that approximately two-thirds of survey respondents felt that “the justice system should increase its efforts to deal with people who claim they have been wrongly convicted”<sup>57</sup> and that student participants lacked confidence in the government’s commitment to rectifying wrongful convictions.<sup>58</sup>

A more systematic and transparent approach to wrongful conviction, at a national level, could facilitate greater faith in the Canadian criminal justice system, and demonstrate the government’s commitment to diminishing and rectifying these horrendous errors of justice. The current study attempts to shed greater light on wrongful convictions in Canada by compiling and analyzing known Canadian wrongful conviction cases. Efforts were made to collect information on as many Canadian cases as possible where an individual was labeled innocent, wrongly convicted, or exonerated. As “innocence” and “exonerated” are not legal terms that result after specific procedures or processes, we began this investigation into Canadian wrongful convictions as broadly as possible. To do so, we made use of public commissions of inquiry and reports, as well as publicly available documents (e.g., newspaper accounts). After compiling as large a pool of cases as possible, we vetted our sample and what remained was a robust sample of 68 cases where available public documents (i.e., government commissions, media sources, innocence organizations’ websites) confirmed, and were in consensus, that the case was a wrongful conviction.

For this preliminary foray into the known cases of wrongful conviction in Canada, we focused our analyses on a) the profile of the exonerees (e.g., gender, age), b) the profile of their cases (e.g., charge,

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56. MacFarlane, *supra*, footnote 26.

57. Angus Reid. “Public Perspectives on Wrongful Convictions” (1995), July/August *The Angus Reid Reports* 75 [Angus Reid].

58. James G. Bell and Kimberley A. Clow, “Student Attitudes toward the Post-Conviction Review Process in Canada” (2007), 7 *J. Institute of Justice and International Studies* 90.

sentence, timeframe from conviction to exoneration), c) the factors that contributed to the original conviction, d) what restitution, if any, was provided for the wrongful conviction, and e) whether an apology, if any, was issued for the wrongful conviction. We also offer some commentary on how the cases identified are similar to or different from wrongful convictions in other countries, most notably, the United States. Due to the nature of our data, and to reduce unnecessary repetition, results and discussion are presented combined together.

## 7. Data and Methods

As Canada does not currently track wrongful conviction cases systematically and publicly, we used a variety of sources to obtain information on the known cases of wrongful conviction in Canada. We began with the formal government reports that pertained to wrongful convictions:

- Royal Commission on the Donald Marshall Jr. Prosecution (1989);<sup>59</sup>
- Commission on Proceedings Involving Guy Paul Morin (1998);<sup>60</sup>
- Inquiry Regarding Thomas Sophonow (2001);<sup>61</sup>
- Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006);<sup>62</sup>
- the Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007);<sup>63</sup>
- the Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008);<sup>64</sup>
- Goudge Report of the Inquiry into Pediatric Forensic

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59. Nova Scotia, Royal Commission on the Donald Marshall Jr. Prosecution, *Report of the Royal Commission on the Donald Marshall Jr. Prosecution*, Chief Justice T. Alexander Hickman, Assoc. Chief Justice Lawrence A. Poitras, and Hon. Gregory T. Evans (Sydney, NS, 1989).

60. Ontario, Kaufman Commission, *Report of the Kaufman Commission on Proceedings Involving Guy-Paul Morin*, Fred Kaufman (Toronto: Ministry of the Attorney General, 1998).

61. *Supra*, footnote 35.

62. *Supra*, footnote 49.

63. Manitoba, Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, *The Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, Hon. Patrick Lesage (Winnipeg: Ministry of the Attorney General, 2007).

64. *Supra*, footnote 49.

- Pathology in Ontario (2008);<sup>65</sup>
- Advisory Opinion on The Issue of Compensation in the Case of Steven Truscott (2008);<sup>66</sup>
- Report of the FPT Heads of Prosecutions Committee (2011)<sup>67</sup>

In addition to these reports, information on Canadian cases of wrongful convictions was also gathered through Canadian organizations who look into wrongful convictions (i.e., Innocence Canada, Osgoode Hall Innocence Project), and several scholars who have written on the topic.<sup>68</sup> Finally, up until February 2021, internet searches were conducted using the following keywords, “Canada” and “wrongful conviction,” “wrongful conviction Canada” or “wrongful conviction [name of province]” to identify media coverage pertaining to cases of wrongful convictions. Admittedly, the methods employed to identify cases of wrongful convictions are not exhaustive, include secondary and general sources, and only scratch the surface of the problem. Indeed, sources we relied upon likely capture only the most serious crimes and those in which serious government misconduct was uncovered, as these are the ones that would be a priority for inquiries, innocence groups, and media attention.

Cases were coded for the following information: demographic information pertaining to the exoneree (e.g., age, gender), jurisdiction in which the conviction occurred, the offence for which the individual was convicted, the year of conviction, sentence (including time served in prison), year of exoneration, and whether DNA evidence played a role in the exoneration. In addition, we tried to discern whether the exoneree received financial compensation for the wrongful conviction (and if so, what was the monetary amount) and whether the exoneree received an apology (and if so, its source). Finally, we coded the factors identified in our sources as contributing to the original [wrongful] conviction, such as mistaken witness identification, false confession and false admission of guilt (plea bargains), perjury-false accusation, misleading forensic testimony, tunnel vision, jailhouse informant testimony, and official misconduct (including both police and prosecutorial misconduct). Some of this

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65. *Supra*, footnote 49.

66. Ontario, *Advisory Opinion on The Issue of Compensation in the Case of Steven Truscott*, Hon. Sydney L. Robins (Ministry of the Attorney General, 2008).

67. *Supra*, footnote 2.

68. John Chipman, *Death in the Family* (Doubleday Canada, 2017); Helena Katz, *Justice Miscarried: Inside Wrongful Convictions in Canada* (Dundurn, 2011); Roach (2012), *supra*, footnote 8.

information was readily available and consistent across sources (e.g., province, offence), whereas other variables were harder to locate (e.g., compensation information) or sometimes differed across sources (e.g., time served in prison). Frequently, we were unable to find all desired information for all cases. Our difficulty in finding this relatively straightforward information for Canadian cases was telling, and points to the necessity of housing a central location for the collection of national wrongful conviction cases for accurate and reliable dissemination of information, among other benefits. As researchers in other fields have similarly struggled with incomplete data sets, we have elected to report the information we have available now, rather than waiting for perfection that we are unlikely to attain. In the words of personality theorist, David Funder, when you are dealing with ambiguous and imperfect data, “something beats nothing, two times out of three.”<sup>69</sup>

## 8. Results & Discussion

### (a) Profile of the Exonerees

In terms of the demographic profile of the sample, our search identified 69 wrongly convicted Canadians: 62 men and 7 women who had been convicted of a crime that our sources indicated they did not actually commit. Their age at the time of the conviction (when we could find this information;  $n = 65$ ) ranged from 14 to 50 years, with a mean age of 28.92 years ( $SD = 8.61$ ). Given their age when they were convicted, these exonerees were mostly convicted in the prime of their lives. For the most part, cases did not specify the ethnicity of the exoneree, which may mean they were White/Caucasian, or may simply mean that the sources did not collect and/or report the ethnicity of the exoneree. Although this might sound surprising to international readers, Canada typically does not track or report racial information, whether it is in the labour market, the justice system, education, or even health care.<sup>70</sup> When ethnicity was

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69. David Funder, *The Personality Puzzle*, 3<sup>rd</sup> ed. (New York: Norton, 2004), at 21.

70. E.g., Tavia Grant and Denise Balkissoon, “How Canada’s Racial Data Gaps Can be Hazardous to Your Health” *The Globe and Mail* (February 6, 2019), online: <<https://www.theglobeandmail.com/canada/article-how-canadas-racial-data-gaps-can-be-hazardous-to-your-health-and/>>; Karen Robson, “Why Won’t Canada Collect Data on Student Race and Success” *National Post* (December 12, 2018), online: <<https://nationalpost.com/pmn/news-pmn/why-wont-canada-collect-data-on-race-and-student-success>>.

explicitly mentioned, or we were able to discern the information with one of the case lawyers, 10 of the exonerees were identified as Indigenous (e.g., First Nations, Métis), three were Black, and two were South Asian (e.g., Tamil)<sup>71</sup>. Thus, the known Canadian exonerees appear to be predominantly male and White, which is a departure from the U.S. data,<sup>72</sup> where the majority of known exonerees are Black (49.58%;  $n = 1,351$ ), not White (36.22%;  $n = 987$ ). The next most frequently occurring ethnicity in the U.S. data is Hispanic (11.63%;  $n = 317$ ), with relatively few cases attributed to other ethnicities (63, 2.31%).

Whereas African Americans constitute close to half of the known exoneree population in the National Registry of Exonerations,<sup>73</sup> but only about 13% of the overall population in the United States,<sup>74</sup> there were only three exonerees identified as Black among our Canadian sample. As of our last census, Statistics Canada<sup>75</sup> estimates that Blacks constitute 3.5% of the overall Canadian population. Thus, it is possible that these numbers show that Blacks are over-represented in wrongful conviction cases in Canada, though perhaps less so than their over-representation at other stages throughout the Canadian Criminal Justice System,<sup>76</sup> though conclusions based on three cases would be highly tentative. The Black population in Canada surpassed one million individuals for the first time, this past census, but some readers may be unaware that Black-identifying persons are the third largest ethnic minority in Canada.<sup>77</sup> From our data, it is unclear

71. More specifically, Indigenous exonerees included Donald Marshall Jr., Wilson Nepoose, Allan Miaponoose, Herman Kaglik, Jason George Hill, Clayton George Mentuck, Steven Jones Kelly, William Mullins-Johnson, Richard Brant, and Connie Oakes. Black exonerees included Gerry Barton, Leighton Hay, and O'Neil Blackett. South Asian exonerees included Kulaveeringsam Karthiresu and Dinesh Kumar.

72. These analyses were conducted on 2,725 wrongful conviction cases, as reviewed on February 6, 2021.

73. National Registry, *supra*, footnote 6.

74. Samuel R. Gross, Maurice Possley, and Klara Stephens, *Race and Wrongful Convictions in the United States*, Report for the National Registry of Exonerations and the Newkirk Center for Science and Society, (March, 2017) online: <[https://law.umich.edu/special/exoneration/documents/race\\_and\\_wrongful\\_convictions.pdf](https://law.umich.edu/special/exoneration/documents/race_and_wrongful_convictions.pdf).

75. Statistics Canada, "Immigration and Ethnocultural Diversity: Key Results from the 2016 Census", *The Daily* (October 25, 2017), online: <<https://www150statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-eng.htm>.

76. John Howard Society of Canada, "Race, Crime and Justice in Canada" (October 19, 2017), online: <<http://johnhoward.ca/blog/race-crime-justice-canada>; Shelley Trevethan and Christopher J. Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correctional System* (Research Branch, Correctional Service of Canada, 2004).

whether more Canadian exonerees are Black but the records simply do not mention their ethnicity (as mentioned previously, Canada does not routinely collect and/or report racial statistics), or their cases are not publicized (and thus were not captured in this sample). Without a thorough database of Canadian wrongful conviction cases, the answer is unclear. What our data do suggest is that further research on race and wrongful conviction in Canada – and abroad – would help disentangle these various possibilities.

The ethnicity that was explicitly mentioned most frequently in our data was Indigenous, with at least 10 of the exonerees (14.71%) Indigenous. While the Indigenous population in Canada has grown by more than 42% since 2006, it remains less than 5%.<sup>78</sup> Moreover, Indigenous exonerees were more numerous than all the other mentioned ethnic minority groups combined. The Canadian government has acknowledged the overrepresentation of Indigenous individuals in Canadian prisons, and more generally as victims of crime in Canada.<sup>79</sup> Although there have been assumptions that Indigenous individuals would be particularly at risk for wrongful conviction in Canada<sup>80</sup> – and the Donald Marshall Jr wrongful conviction case is a historic reminder of the very real threat that racism poses for Indigenous individuals within the Canadian Criminal Justice System – our data lend larger numbers to the argument that Indigenous individuals are systemically disadvantaged throughout the Canadian Criminal Justice System, even in our justice errors.

### **(b) Profile of the Cases Identified**

Of the 69 cases identified, all but five received a custodial sentence.<sup>81</sup> The sentence for those receiving a custodial sentence, was lengthy ( $M = 15.55$  years,  $SD = 10.25$ ), with more than half receiving a sentence of 10 years or more. Of these, 37 had received a

77. *Supra*, footnote 75.

78. Statistics Canada, (2016), *Aboriginal Peoples Highlight Tables, 2016 Census* (April, 2020), online: <<http://www.statcan.gc.ca/daily-quotidien/171025/dq171025a-eng.htm>.

79. Department of Justice, *supra*, footnote 23.

80. Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” (2015), 17 *Flinders L.J.*203; Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada” (2018), 50 *UBCL Rev.* 51.

81. Gerry Barton had been placed on one-year probation; Jack White was given a suspended sentence. Several cases involved the testimony of Charles Smith in which guilty pleas were entered (CM, BF, Waudby), receiving suspended sentences and/or probation.

life sentence (i.e., minimum 25 years before parole eligibility for first degree murder, 10 years for second degree). Their age at the time of the exoneration was, on average, 42.86 years (ranging from 15 to 77 years,  $SD = 13.61$ ), reflecting the considerable time they spent in prison (averaging 6.94 years,  $SD = 6.75$ ), as well as the lengthy time awaiting resolution of the case. Indeed, the amount of time that had elapsed from the time of conviction to the eventual exoneration was, on average, 13.79 years ( $SD = 11.43$ ).

One of the striking disparities that arose in our data was that the Canadian wrongful conviction cases we uncovered were not equally distributed across provinces and territories (see Appendix). The most common jurisdiction for cases was in the province of Ontario ( $n = 32$ ; 46.38%). The remaining cases were scattered throughout the other 10 provinces and one of the territories (Northwest Territories), with exonerations ranging from one in Saskatchewan and Prince Edward Island to eight in Quebec (no cases were identified in Nunavut or the Yukon). Although we expected the Internet searches and government reports to reduce any geographical bias, it is possible that some disparity may nevertheless remain for reasons beyond our control (e.g., more frequent publishing in more populated areas). Alternatively, the numbers could reflect geographical differences in criminal justice practices, differential attention and resources allocated to wrongful conviction cases across Canada, or they could reflect differences in provincial populations, as more than one-third of Canadians live in the province of Ontario.<sup>82</sup> At this point, the underlying cause of the variability remains unknown, underscoring the need for systematic tracking and examination of wrongful convictions. Indeed, a database dedicated to Canadian wrongful conviction cases could examine this issue more closely to discern the answer and, more importantly, address any potential underlying issues—should there be any—giving rise to these differential numbers.

As we drew heavily on public inquiries and media reports, we expected an emphasis on violent crimes in our data set, as such government and media attention could arguably be more likely when serious crimes are involved. Moreover, the most frequent crimes identified in the U.S. data<sup>83</sup> were also violent crimes: homicide

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82. Statistics Canada, “Population and dwelling counts for Canada, Provinces, and Territories, 2016 and 2011 Censuses” (2016), online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.-cfm?Lang=Eng&T=101&S=50&O=A>>.

83. We used the current National Registry of Exonerations numbers as of April 16, 2020 from <<http://www.law.umich.edu/special/exoneration/Pages/ExonerationConvictionYearCrimeType.aspx>>.

(40.04%;  $n = 1091$ ), sexual assault (12.48%;  $n = 340$ ), and child sexual abuse (10.75%;  $n = 293$ ). Consistent with our expectation, the clear majority of cases in our sample involved either homicides (66.67%,  $n = 46$ ), generally resulting in convictions of either murder or manslaughter (a small number involved convictions of infanticide, child abuse, criminal negligence), or convictions of rape or sexual assault (21.74%,  $n = 15$ ).<sup>84</sup> The remaining cases involved crimes such as aggravated assault or robbery.

While our data does show that Canadians have been wrongly convicted for serious offenses, we are not suggesting that wrongful convictions are more likely to occur for serious crimes. Although it is possible that public pressure or other variables surrounding serious crimes could lead to greater risk for wrongful convictions, there are other possible explanations for this data. For instance, it is also probable that wrongful convictions occur as frequently – if not more frequently – among less serious offenses, but that less public and media attention will be paid to these cases. Moreover, such cases are more difficult cases in which to establish innocence (e.g., murder and sexual assault are more likely to have DNA evidence associated with them than other crimes). Not to belabor the point, but a dedicated database of Canadian wrongful convictions could start to address these differing possibilities.

Figure 1 provides a graphic illustration of the frequency with which these exonerations occurred over time. Based on the considerable time that elapses from conviction to exoneration,<sup>85</sup> and that wrongful convictions were not highly publicized – or widely believed – prior to the advent of post-conviction DNA testing,<sup>86</sup> it is not surprising that there was only a smattering of exonerations prior to the mid-1990s. By the late 1990s, however, we see a slow, but steady increase. The apparent decline of exonerations in more recent years might reflect the slow progression of the exoneration process, as it may take several years before wrongful convictions are identified and resolved through existing legal channels, as opposed to a decline in the occurrence of wrongful convictions per se.

84. Under current Canadian criminal, the term rape has been replaced by the more general term “sexual assault” pursuant to s. 265 of the *Canadian Criminal Code*. The authors have retained the term “rape” where applicable to reflect the original charge against the exoneree, which may have predated this legislative change in terminology.

85. Gross et al. (2005), *supra*, footnote 9.

86. Bedau and Radelet, *supra*, footnote 10; C. Ronald Huff, Arye Rattner, and Edward Sagarin, “Guilty until Proved Innocent: Wrongful Conviction and Public Policy” (1986), 32 *Crime & Delinquency* 518; Ramsey and Frank, *supra*, footnote 18.

As “innocence” and “exoneration” are not legal terms, it is not surprising that the path to exonerations in our sample could take a variety of pathways. As outlined by Roach,<sup>87</sup> the path will typically begin with the convicted individual first appealing the decision to a higher court (i.e., provincial Court of Appeal). The Court of Appeal may either allow the appeal or dismiss it. If the latter, the conviction remains, but appeals of the Appellate Court’s decision to the Supreme Court of Canada, under some conditions (e.g., Court of Appeal decision is not unanimous), are still possible. If the Appellate Court allows the appeal, the court may quash or overturn the original conviction. In this case, the court may either issue an order for a new trial or enter an acquittal. Finally, when all in-court appeals have been exhausted, the final avenue is an application to the federal Minister of Justice under s. 696.1 of the *Criminal Code* (previously s. 690 of the *Code*). These reviews are seen as extraordinary remedies and are available only when there is new and significant evidence that was not considered previously at trial. If new and significant evidence suggests that a miscarriage of justice has occurred, the Minister may order a new trial or refer the case to the relevant provincial Court of Appeal. If the case is sent back on appeal, the original conviction can be set aside, and the case is heard anew. The Court of Appeal may then order a new trial, enter an acquittal, or make any other order it deems fit, which may include a stay of proceedings. If the Crown does not lay or withdraws the charges within a one-year period, the proceedings will be effectively terminated.

These various paths to exoneration were all represented, although not equally, in our data. More than half of the cases eventually resulted in an acquittal (60.87%,  $n = 42$ ), that is, a formal acknowledgment that the individual has been found not guilty, and thus the presumption of innocence theoretically restored. For the most part, these acquittals followed successful appeals of the conviction to either the appropriate Court of Appeal or to the Supreme Court of Canada. In some cases, the conviction was set aside by the court and an acquittal was entered. In others, the original conviction was overturned, and a new trial was ordered.<sup>88</sup> In some of

87. Roach (2012), *supra*, footnote 8.

88. Note that the present data does not include cases where Courts of Appeal overturned convictions through a regular appeal process that did not consider new matters of significance [to guilt]. We have also not included cases in which the accused spent time, even years, in pre-trial custody before obtaining an acquittal at trial. Rather, this dataset includes cases in which new matters of significance were discovered post-conviction that were not considered when the accused was convicted or pled guilty. In these cases, the conviction might have been overturned, sent back for a new trial, had

these cases, an acquittal ensued at the new trial, but in another group of cases, the conviction was quashed or overturned, and the Crown elected not to proceed with a new trial (5.79%,  $n = 4$ ). In still others, following the higher courts' ruling for a new trial, either an eventual stay of proceedings (14.49%,  $n = 10$ ) or withdrawal of the charges (17.39%,  $n = 12$ ) ensued. These latter paths have been judged as inappropriate for wrongful convictions because they provide no exoneration or even a verdict.<sup>89</sup> After having spent considerable years in prison (in our dataset, an average of 9.03 years amongst the cases that resulted in withdrawn charges, and an average of 10.75 years for cases that resulted in a stay of proceedings), these resolutions – while favourable in the sense that the freedom of the wrongly convicted person is restored – do little to clear their name, sweeping the conviction away in ambiguity. Moreover, these paths to exoneration offer little closure and can perpetuate stereotypes of guilt instead – as has been noted in several of the inquiries. For instance, the Lamer Inquiry noted that these resolutions “may leave an impression with the public that the charge is merely being ‘postponed’ or ‘the authorities,’ in a broad sense, still believe in the validity of the charge.”<sup>90</sup> The Milgaard<sup>91</sup> and Driskell<sup>92</sup> reports have similarly acknowledged the profound stigma that the exoneree is left with following a prosecutorial stay of proceedings, for instance, leaving Milgaard with “significant stigma” that was only dispelled when DNA evidence exonerated him in 1997.<sup>93</sup>

### (c) Factors Contributing to Wrongful Convictions

Table 1 provides a summary of the factors contributing to the wrongful convictions in our database. Of course, we were only able to compile and analyze the factors that were noted in our sources. Once again, a national database would allow for a more thorough analysis of the factors that contributed to Canadian cases of wrongful conviction, and a more consistent means of determining those factors from case to case. As our Canadian data frequently shows a different pattern than the U.S. data, a national database would be useful for

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charges withdrawn or stayed, or resulted in an acquittal on appeal. If anything, our dataset presents a conservative estimate of the scope of wrongful convictions in Canada.

89. Lamer Inquiry, *supra*, footnote 49; Roach (2012), *supra*, footnote 8.

90. Lamer Inquiry, *supra*, footnote 49, at p. 129.

91. Milgaard Inquiry, *supra* note 49 at 336.

92. Driskell Report, *supra*, footnote 63, at pp. 129-139.

93. Milgaard Inquiry, *supra*, footnote 49, at p. 336.

further examining these issues in a more systematic fashion than current data allows.

By far, the most common contributing factor identified in our Canadian sample of wrongful conviction cases involved official misconduct, which could include police or prosecutorial misconduct (55.07%,  $n = 38$ ). The presence of official misconduct is in line with the U.S. exoneration data, as the National Registry of Exonerations<sup>94</sup> found 53% of their exonerations involved official misconduct, although it was their second most frequent contributing factor. Two other factors related to potential official misconduct in our data included tunnel vision (26.09,  $n = 18$ ) and the use of jailhouse informants (13.04%,  $n = 9$ ), which occurred with some regularity as well. As we began our search with official government inquiries into wrongful convictions, these findings may not be so surprising. Cases that seem most in need of a public inquiry would likely be those where government officials were perceived as engaging in inappropriate conduct. Inquiries are typically called to restore Canadians' faith in the criminal justice system by bringing the issue fully to light and recommending protections against future occurrences.

The National Registry of Exonerations<sup>95</sup> found that perjury and false accusations accounted for most U.S. wrongful convictions (58%). While perjury and false accusations played a role in several of the cases in our dataset (33.33%,  $n = 23$ ), we were surprised to find that our homicide-heavy sample did not appear to contain more instances of perjury and false accusations. In fact, further examination of our data revealed that perjury or false accusations were more likely to be noted in cases involving charges of sexual assault (10 of the 15 cases), as opposed to homicide cases (10 of the 46 cases) – the opposite of what has been found in the U.S. data.

Similar to the National Registry of Exonerations' U.S. data, although mistaken eyewitnesses were involved in a number of Canadian wrongful conviction cases (36.23%,  $n = 25$ ), it was not “the leading factor” in wrongful conviction cases, and it was far below the often quoted 70% mark often associated with DNA-based exonerations reported by the Innocence Project. That is not to say that mistaken eyewitness identifications are not an important contributor to wrongful convictions, but we need to stop perpetuating the “eyewitnesses are the leading factor” myth, and there are equally important – if not more important – factors out there

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94. National Registry, *supra*, footnote 27.

95. *Ibid.*

that might benefit from further psychological research scrutiny as well.

Misleading forensic testimony was identified in 23 cases (33.33%) in our sample, a number somewhat higher than that reported in the U.S. National Registry of Exonerations data (23%). However, part of the elevation in the Canadian context may be due to the high number of cases in which the testimony of the infamous Charles Smith (now discredited forensic pathologist) was central to the conviction.<sup>96</sup> Charles Smith conducted autopsies and provided testimony in numerous cases involving possible suspicious deaths of children between 1982 and 2003. Despite his renowned reputation, Smith lacked training in forensic pathology and it eventually became evident that his testimony was at the heart of several false accusations and wrongful convictions.<sup>97</sup> Indeed, the formal inquiry conducted into 45 of the autopsies in which Smith had concluded that the death was due to foul play or criminal activity, detected mistakes in 20 of the cases, 12 of which had resulted in a criminal conviction.<sup>98</sup>

A false admission of guilt, whether in the form of a false confession or a guilty plea was observed in a significant number of the cases. Specifically, 11 (15.94%) of the exonerees pled guilty to lesser charges than the charges they were originally facing. It is of note that, in all but three of these cases, the testimony of Charles Smith was to be offered. In eight of these cases, the accused, in exchange for having the original murder charge dropped, accepted plea deals to lesser forms of homicide (e.g., manslaughter, infanticide, child abuse, aggravated assault), thereby avoiding the potential mandatory life sentence that would have likely been received upon conviction of the original murder charge. Indeed, the two Smith cases in which not guilty pleas were entered and went to trial resulted in mandatory life sentences upon conviction. There appears to be some credence to the claim that taking a plea deal, from a cost benefit analysis, makes sense if minimization of jail time is the goal.

False confessions were also present in several cases (13.04%,  $n = 9$ ), and similar in proportion to the U.S. National Registry data (12%,  $n = 294$ ). In our data, seven of the confessions were obtained via in-custody police interrogations, while two involved confessions from suspects elicited via undercover police operations. These undercover operations, colloquially referred to as the Mr. Big procedure, involved a technique developed by the RCMP, wherein the police creates a fictitious criminal organization with police

96. e.g., MacFarlane, *supra*, footnote 26.

97. e.g., Goudge Inquiry, *supra*, footnote 49.

98. *Ibid.*

officers posing as members of said organization.<sup>99</sup> Within the operation, considerable effort, time, and money are spent to entice the suspect to join the supposed criminal organization, with the sole purpose of the operation being to ultimately obtain evidence of the suspect's involvement in an unsolved crime (i.e., via confession). A surreptitious encounter first occurs with the suspect and one of the undercover officers. Once befriended, the suspect is engaged in increasingly serious, but staged, criminal activities. A variety of "ruses and threats" are then used to demonstrate the benefits of group membership (gifts, companionship, paid employment) and the consequences of failing (threats of violence, staged torturing of others) to follow through on expectations of the organization (i.e., the importance of honesty and trust). As the operation progresses, the suspect will be pressured to demonstrate their loyalty to the organization by confessing to their involvement in past criminal acts. The operation typically culminates in an encounter with "Mr. Big," an undercover police officer posing as the head of the organization, with the suspect's confession to Mr. Big then captured on video. While this technique appears effective at eliciting admissions (whether truthful or not), it can also cause innocent people to falsely confess.

#### **(d) Compensation and Apology**

Of the 69 exonerees in our dataset, approximately half received financial compensation (50.72%,  $n = 35$ ). The proportion of exonerees compensated in our sample is lower than the 60% initially reported by the Innocence Project<sup>100</sup> for post-conviction DNA exonerees in the United States, which is perhaps not surprising, given that there is no legal entitlement to compensation for a wrongful conviction in Canada,<sup>101</sup> and that the U.S. data comes from a DNA subset, whereas many of our Canadian cases – and the

99. Timothy E. Moore, Peter Copeland and Regina A. Schuller, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009), 55 *Crim. L. Q.* 348; see also Steven Smith, Veronica Stinson, and Marc Patry, "Confession Evidence in Canada: Psychological Issues and Legal Landscapes" (2009), 18 *Psychology, Crime & Law* 317.

100. Innocence Project, *supra*, footnote 37.

101. See Ministry of the Attorney General, Ontario, Ministry of the Attorney General, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation* by the Honourable Syndey L. Robins (Ottawa: Ministry of the Attorney General, 2008), online: < <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/truscott/section5.php>; Roach (2012), *supra*, footnote 8.

broader database of U.S. cases – do not involve DNA evidence. Moreover, our number is likely somewhat inflated due to the large number of individuals in our sample who were impacted by former forensic pathologist Charles Smith – as the government, in the wake of the Goudge Inquiry, established a unique (and limited-term) compensation fund for impacted parties.<sup>102</sup> Thus, our 50% compensation rate is probably an overestimate of the likelihood that any given Canadian exoneree receives compensation in the future. Most of the exonerees in our sample were forced to launch civil suits to sue for compensation, to be paid by various parties (e.g., provincial government, police services).

For the 24 cases where the amount of compensation was publicly available (10 received an undisclosed amount), the amount of compensation awarded ranged from \$36,000 to \$10 million, with the average amount being just over 2.5 million (median amount was \$1.4 million). It is worth drawing attention to the Charles Smith cases. As mentioned earlier, a unique compensation fund was established for the victims of his false and erroneous testimony. As the exact amounts of compensation received were not all disclosed or publicized, we coded those cases as undisclosed. It is unclear how the inclusion of these cases impacts compensation for Canadian wrongful conviction cases. On the one hand, the creation of the fund arguably made compensation more readily available to a greater number of wrongly convicted – as well as falsely accused – victims. On the other hand, it is possible that a much higher amount than the maximum of \$250,000 that this specific fund provided might have been received if victims had individually – or collectively – sued.

We also examined whether the contributing factors identified in the wrongful convictions were predictive of whether the exoneree received compensation. Of the eight factors presented in Table 1, only one, the presence of official misconduct,  $\chi^2_{\text{correction}}(1) = 6.40, p = .011$ , was associated with whether compensation was likely to be received: Specifically, for the cases in which professional misconduct was found ( $n = 38$ ), 25 of the cases (65.79%) received compensation and 13 did not (34.21%). For cases in which professional misconduct was

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102. Ontario Ministry of the Attorney General, online: < <https://www.attorney-general.jus.gov.on.ca/english/goudge/> Applications for reimbursement were accepted until August 10, 2012 and included up to \$250,000 for wrongfully convicted persons, \$25,000 for children wrongfully removed from their homes, and \$12,500 for other impacted family members. This funding was limited to the 19 cases reviewed by the Goudge Inquiry. Private litigation remained an option for those who believed their injuries exceeded this level of reimbursement.

not found ( $n = 31$ ), 10 of the cases (32.36%) resulted in compensation and 21 did not (67.74).

Numbers are even lower for apologies, with just 40% of the exonerees ( $n = 28$ ) receiving an apology for the miscarriage of justice they suffered. For the most part, those receiving financial compensation were more likely to receive an apology,  $\chi^2_{\text{correction}}(1) = 9.53, p < .002$ . Of those who received compensation ( $n = 35$ ), 60% ( $n = 21$ ) also received an apology. In contrast, of those who had not received compensation ( $n = 34$ ), the vast majority had also not received an apology ( $n = 27, 79.41\%$ ). It is important to note that apologies were coded as “issued” only if the media, or any of the inquiries we consulted, had noted the apology; therefore, it is possible that the actual number of apologies is higher, and the apologies simply were not documented in the sources consulted. Nonetheless, exonerees often complain about not receiving an apology,<sup>103</sup> so whatever the true number is, improvements could be made. Indeed, Grounds<sup>104</sup> noted that many of the exonerees in his clinical sample reported that they were more interested in receiving an apology and acknowledgment of wrongdoing from the government than they were in receiving monetary payout.

#### (e) Limitations & Future Research

Despite all reasonable best efforts, the present data are subject to some unavoidable limitations. We cannot confirm, nor do we believe, that this database represents a comprehensive summary of all documented wrongful convictions in Canada. To be clear, we do anticipate that other cases of exoneration exist which were unreported by the media, did not result in a governmental inquiry or commission, or which did not receive support through innocence groups (e.g., Innocence Canada). We also acknowledge the probability that many wrongful convictions in Canada would not result in exoneration. Many of these may have involved false guilty pleas, in which an innocent person agrees to plead guilty to a lesser charge rather than facing harsher penalties if unsuccessful at the end of an expensive and lengthy trial. Indeed, it is likely that these forms of injustice occur at much higher rates than generally suspected. Gross notes that “tens of thousands of defendants each year face similar choices: plead guilty and go home; insist your innocence and stay in jail.”<sup>105</sup> Similar concerns are expressed by Covey,<sup>106</sup> who outlines

103. Vollen and Eggers, *supra*, footnote 4.

104. Grounds (2005), *supra*, footnote 3.

105. Gross (2008), *supra*, footnote 8, at p. 180.

strong forces at work in the criminal justice system that can induce guilty pleas. These include the frictional costs of pleading not guilty, such as the pains of pre-trial imprisonment, loss of employment, family stress, need for daycare and transportation, and legal fees among many others. He notes that it is the imprecise nature of the trial itself that makes plea bargaining so attractive – if trials could perfectly separate the innocent from the guilty, plea bargaining would be less tempting. Moreover, plea bargains are evaluated by the strength of the evidence against the accused, which may have nothing to do with actual guilt.<sup>107</sup> Where false guilty pleas are entered, there may be a loss of public confidence in the justice system and impaired public safety and security, as the true offenders remain on the streets.<sup>108</sup> False guilty pleas are likely a profound and unexplored source of wrongful convictions, and cases that are exceedingly difficult to identify.

We note also that the majority of our cases involved male defendants who were charged with lengthy sentences for more serious offences (murder, manslaughter, rape). These forms of offence are statistically rare in the larger picture of criminal offending, Cases<sup>109</sup> observed that what we know about the causes of wrongful convictions is essentially limited to cases of rape and murder, particularly where there has been a DNA exoneration. Ninety-five percent of the exonerations we located involved murder or rape cases, although these are only 2% of all felony convictions in the United States.<sup>110</sup> In Canada, violent offences constitute 23% of adult court cases, with murder and attempted murder together representing 5% of violent crimes, and sexual assault and other sexual offences representing 6% of violent crimes.<sup>111</sup> Gross<sup>112</sup> argues that our knowledge beyond this specific type of offence is non-existent, and that we know little about the rates of wrongful convictions among less serious or shorter-term offences, false guilty pleas, wrongful convictions in the youth court, or crimes that did not happen at all. Our data are subject to similar limitations. In our own database, the average exoneration took close to 15 years following the original conviction. Wrongful convictions for lesser sentences may simply not

106. Russel D. Covey, “Signaling and the Plea Bargaining’s Innocence Problem” (2009), 66 Wash. & Lee Rev. 73.

107. *Ibid.*

108. Sherrin (2011), *supra*, footnote 24.

109. Gross (2008), *supra*, footnote 8.

110. *Ibid.* at 179.

111. Mia Dauvergne, “Adult Criminal Court Statistics in Canada, 2010/2011” (2012), Juristat, Catalogue No. 85-002-X.

112. Gross (2008), *supra*, footnote 8.

be worth the emotional and financial burden needed, and most likely would not result in national news coverage or governmental inquiry. Thus, our review most likely underestimates the frequency of wrongful convictions, as well as the characteristics associated with convictions from less serious offences.

One promising avenue of future research might explore applications made to the Federal Minister of Justice, pursuant to s. 696.1 of the *Canadian Criminal Code*. These extraordinary remedies are brought forward when a defendant has exhausted all possible appeals but maintains their innocence.<sup>113</sup> A number of cases discussed in the above analysis included 696.1 applications, but a more systematic analysis may provide an additional level of insight. Legislative amendments in 2002 required the Minister of Justice to prepare and publish reports to Parliament on applications made under s. 696. These reports must include information pertaining to the number of applications made in the previous fiscal year, the number that are abandoned or incomplete, the number that are in the preliminary assessment stage, the number of decisions made by the minister, and any other information the minister feels is important. The applications are reviewed by the Canadian Conviction Review Group, which was established as a separate unit of the Department of Justice to maintain an arm's length relationship. On some occasions, the Minister of Justice will retain an outside agency to review an application where there is the possibility of a conflict of interest. Future work may engage in a detailed review of the s. 696.5 reports made to Parliament after 2002. Denov and Campbell<sup>114</sup> and Howden<sup>115</sup> have provided similar analyses based on the pre-2002

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113. More than 20 years ago, the Minister of Justice released a consultation paper in which it identified some limitations of the Ministerial review process. These included lengthy delays in having cases heard, the relative secrecy of the review proceedings, and the reliance on former prosecutors as review counsel: "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code" (1998) ... Similarly, Braiden and Brockman noted that applicants may have to wait between 3-5 years to have their case heard: Patricia Braiden and Joan Brockman, "Remedying Wrongful Convictions through Applications to the Minister of Justice under s. 690 of the Criminal Code" (1999), 17 Windsor YB Access. Just. 3. More recently, Roach (2012), notes that "there are frequent delays that accompany the petition process in part because of the onus it places on the petitioner to present new evidence and full records of the case and in part because of the investigations that are conducted to advise the Minister of Justice", *supra*, footnote 8 at p. 30.

114. Myriam S. Denov and Kathryn M. Campbell, "Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada" (2005), 21 J. Contemp. Crim. J. 224.

data, finding that only a handful of these applications are dealt with in each year. This line of inquiry might provide an ongoing source of data, potentially allowing us to observe trends over time.

As an alternative research stream, one might reach out to practitioners at the front line of the criminal justice system. What are the perceptions of defence lawyers, Crown prosecutors, police officers and judges with regard to the frequency and nature of wrongful convictions? Researchers have explored these questions in Ohio<sup>116</sup> and Michigan.<sup>117</sup> Their work found that estimates of the frequency of wrongful convictions varied by profession, with the lowest estimates provided by police and prosecutors (0-1%) and the highest provided by defence counsel (4-5%). Doob<sup>118</sup> provided a Canadian perspective with a survey of defence lawyers, finding that a very high percentage of defence lawyers identified judicial errors (79%), police errors (71%), defence errors (41%) or general factors such as faulty eyewitnesses or jailhouse informants (87%) as contributing to wrongful convictions in their own practice.

Moreover, we would like to stress the importance of apologies and compensation for exonerees. Presently, exonerees face equal – or greater – hardship upon release from prison than those who are guilty of their offence.<sup>119</sup> Those found to have been wrongfully convicted are released without job skills training, halfway housing, work placements, or transitional coaching. Exonerees, like many parolees, have difficulty finding housing and employment – and research has documented that they face similar job discrimination, even though they are innocent.<sup>120</sup> Research suggests that failing to compensate exonerees, thereby leaving them without any reintegration assistance, may force some exonerees without previous criminal records to turn to crime for survival – especially if their erroneous criminal records were not automatically expunged.<sup>121</sup> It defies comprehension that a democratic country could perpetuate the

115. Peter H. Howden, “Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process” (2002), 21 Windsor YB Access Just. 569.

116. Huff et al., *supra*, footnote 86; Ramsey and Frank, *supra*, footnote 18.

117. Zalman et al., *supra*, footnote 18.

118. Anthony N. Doob, *An Examination of the Views of Defence Counsel of Wrongful Convictions* (Center of Criminology, University of Toronto, 1997).

119. Kimberley A. Clow and Amy-May Leach, “Stigma and Wrongful Conviction: All Exonerees are not Perceived Equal” (2015), 21 Psychology, Crime & L. 172; Amy Shlosberg, Evan J. Mandery, Valerie West and Bennett Callaghan, “Expungement and Post-Exoneration Offending” (2014), 104 J. Crim. L. & Criminology 353 [Shlosberg et al].


120. Clow (2017), *supra*, footnote 43; Westervelt and Cook, *supra*, footnote 7.

121. Evan J. Mandery, Amy Shlosberg, Valerie West and Bennett Callaghan,

harms inflicted upon a wrongfully convicted person by denying them even these most basic forms of assistance to support their transition out of incarceration. Ongoing support in the form of work and educational support, subsidized post-secondary education, psychological counselling and addictions rehabilitation (if needed) are the most basic forms of assistance that should be provided as a right. Exonerees should not be forced to undertake private, years-long litigation to receive financial compensation for the deprivation of their constitutional rights and liberty.

Finally, we again wish to emphasize the importance of creating a comprehensive database of Canadian exonerees, with centralized recording of cases, contributing factors, and outcomes of specific cases. The difficulty in identifying this information on a case-by-case basis is a barrier to our understanding of the factors facing Canadian exonerees. We applaud the groundbreaking and tremendous efforts of pro bono legal clinics and organizations such as Innocence Canada, whose work has been critical at exposing miscarriages of justice and restoring innocence. Development of a Canadian registry with centralized resources and political voice would strengthen the innocence movement in this country and facilitate greater understanding of the issues facing Canadians, ultimately improving efforts to address systemic justice reform.

## 9. Concluding Remarks

In summary, our analysis of 69 cases of Canadian wrongful convictions showed some notable similarities and discrepancies from the more widely known U.S. data. We hope this article stimulates greater research in Canada, and abroad, to test the assumptions and conclusions stemming from our research. Replication and disagreements stimulate new research and continue to move us closer to the truth. Further research might consider the national flavor— even regional differences—in wrongful conviction cases, to better inform policy change and advocacy efforts.

Our data-driven approach pointed to a few areas where this sample does not conform to what we know from the United States. First, the ethnic profile of the Canadian exonerees appeared very different. In the United States, African Americans have been wrongly convicted more often than any other ethnic group, comprising nearly half of all U.S. exonerees,<sup>122</sup> and representing significantly more than their

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“Compensation Statutes and Post-exoneration Offending” (2013), 103 J. Crim. L. & Criminology 553; Shlosberg et al., *supra*, footnote 119.

122. National Registry, *supra*, footnote 6.

population numbers would suggest. In Canada, although most exonerees appear to be Caucasians, Indigenous exonerees appear over-represented. It is currently unclear with such a small Canadian sample whether Blacks and other are not over-represented as well. More research on race and wrongful conviction in Canada appears warranted. Secondly, the most frequently mentioned contributing factor, across the Canadian cases we examined, was official misconduct (perhaps not surprising, as many of the known Canadian cases stem from government inquiries into wrongful conviction). Notably, both mistaken eyewitnesses and perjury or false accusations were each implicated in about 33% of the cases, rates that are considerably lower numbers than are found in the U.S. data.<sup>123</sup> Further research in Canada would be helpful in determining if these factors have had less of an impact in Canada than the United States historically – though still frequently occurring – or if these factors are simply lower in the currently identified sample. Further international research would help identify general human trends versus culturally-specific, or justice system-specific, effects as well. Finally, Canadian exonerees appear to receive compensation less often than what has been reported in the United States, which is not surprising as Canada currently has no legal obligation to compensate exonerees. As public opinion among Canadians is highly favourable of compensating exonerees,<sup>124</sup> perhaps greater pressure could be made on the Canadian government (federal or provincial governments) to set-up permanent compensation funds or compensation statutes for exonerees. The present research demonstrated that those who made a false confession were less likely to receive compensation, whereas those subjected to professional misconduct were more likely to receive it. We submit that all wrongfully convicted persons receive compensation, regardless of the existence of a false confession, as such statements are typically made as the result of professional misconduct or aversive and lengthy interrogation practices.<sup>125</sup> As John H. Wigmore expressed back in 1912, it would be heartless and “not excusable on any grounds” for a government to fail “to make compensation to those who have been erroneously condemned for a crime.”<sup>126</sup>

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123. National Registry, *supra*, footnote 27.

124. Angus Reid, *supra*, footnote 57; Clow et al. (2012), *supra*, footnote 45.

125. E.g., Kassin (2008), *supra*, footnote 33; Kassin et al. (2010) *supra*, footnote 34.

126. *Supra*, footnote 36, at p. 665.

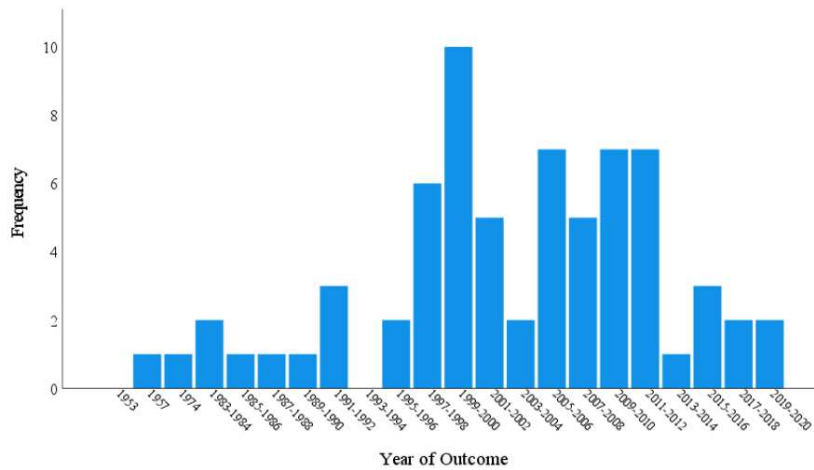
**Table 1**

*Presence and Frequency of Factors Contributing to Wrongful Conviction*

<b>Contributing Factors</b>	<b>Percent (frequency)</b>
Official Misconduct	55.07 (38)
Mistaken Witness ID	36.23 (25)
Perjury-False Accusation	33.33 (23)
Misleading Forensic Testimony	33.33 (23)
Tunnel Vision	26.09 (18)
False Admission of Guilt:	
False Confession	13.04 (9)
Plea	15.94 (11)
Jailhouse Informant	13.04 (9)

**Figure 1**

*Frequency of Exonerations in Canada, 1957-2020 in One or Two-Year Intervals*



Year of Exoneration	Name	Jurisdiction	Conviction	Year Convicted	Years Incarcerated	Compensation
1957	Ron Moffatt <sub>1</sub>	ON	Murder	1956	1 year	Undisclosed
1974	Gary Staples <sub>2</sub>	ON	Murder	1972	2 years	Undisclosed
1983	Donald Marshall Jr. <sub>3*</sub> §	NS	Murder	1971	11 years	\$1.5 million
1984	Norman Fox <sub>4</sub>	BC	Rape	1976	8.5 years	\$275,000
1986	Wilfred Truscott <sub>5</sub>	AB	Assault	1984	18 months	\$36,000
1988	Réjean Pépin <sub>6</sub>	QC	Armed Robbery	1986	7 months	\$188,000
1990	Michael McTaggart <sub>7</sub>	ON	Armed Robbery	1987	20 months	\$380,000
1991	Richard Norris <sub>8</sub>	ON	Sexual Assault	1980	9 months	\$507,000
1992	Wilson Nepoose <sub>9*</sub> §	AB	Murder (2 <sup>nd</sup> )	1987	5 years	Undisclosed
	Benoit Proulx <sub>10</sub>	QC	Murder (1 <sup>st</sup> )	1991	1 year	Undisclosed
1995	Guy Paul Morin <sub>11</sub>	ON	Murder (1 <sup>st</sup> )	1992	18 months	\$1.25 million
1996	Allan Miaponoose <sub>12§</sub>	AB	Sexual Assault	1994	1 year	\$10.0 million
1997	David Milgaard <sub>13*</sub>	SK	Murder (1 <sup>st</sup> )	1970	23 years	\$4.5 million
	Wilfred Beaulieu <sub>14*</sub>	AB	Sexual Assault	1992	3 years	Undisclosed
	Réjean Hinse <sub>15</sub>	QC	Armed Robbery	1964	5 years	\$4.5 million
1998	Peter Frumosa <sub>16</sub>	ON	Murder (1 <sup>st</sup> )	1989	8 years	Undisclosed
	Gregory Parsons <sub>17</sub>	NL	Murder (2 <sup>nd</sup> )	1994	3 months	\$1.3 million
	Herman Kaglik <sub>18§</sub>	NT	Sexual Assault	1992	4 years	\$1.1 million
1999	Jason George Hill <sub>19§</sub>	ON	Robbery	1996	1.6 years	Undisclosed

	Gordon Folland <sup>20</sup>	ON	Sexual Assault	1995	3 years	Undisclosed
	Richard McArthur <sup>21§</sup>	AB	Murder (2 <sup>nd</sup> )	1986	13 years	
	Stephen Leadbeater <sup>22</sup>	ON	Sexual Assault	1993	7 months	
	Steven Kaminski <sup>23*</sup>	AB	Sexual Assault	1992	7 years	\$2.2 million
2000	Ronald Dalton <sup>24</sup>	NL	Murder (2 <sup>nd</sup> )	1989	8 years	\$750,000
	Kulaveer-ingsam	ON	Murder (2 <sup>nd</sup> )	1995	6.5 years	
	Karthiresu <sup>25</sup>					
	Chris McCullough <sup>26</sup>	ON	Murder (2 <sup>nd</sup> )	1991	9 years	
	Clayton George Mentuck <sup>27§</sup>	MB	Murder (2 <sup>nd</sup> )	1998	1 year, 8 months	
	Thomas Sophonow <sup>28§</sup>	MB	Murder (2 <sup>nd</sup> )	1983, 1985	3 years, 9 months	\$2.6 million
2001	Steven Jones Kelly <sup>29§</sup>	NT	Sexual Assault	2000	8 months	
	Michel Dumont <sup>30*</sup>	QC	Rape	1991	2 years, 10 months	
	Jamie Nelson <sup>31</sup>	ON	Sexual Assault	1996	3 years	
	Felix Michaud <sup>32</sup>	NB	Murder (1 <sup>st</sup> )	1993	9 years	
2002	Clayton Johnson <sup>33*</sup>	NS	Murder (1 <sup>st</sup> )	1993	5 years	\$2.5 million
	Hugues Duguay <sup>34</sup>	QC	Man-slaughter	1991	8 years	
2003	Corey Robinson <sup>35</sup>	BC	Murder (2 <sup>nd</sup> )	1996	9 years	
2005	Simon Marshall <sup>36</sup>	QC	Sexual Assault	1997	6 years	\$2.3 million
	John Charles Cooper <sup>37*</sup>	PEI	Assault	2003	2 years, 5 months	

	Dimitre Dimitrov <sup>39</sup>	ON	Murder (2 <sup>nd</sup> )	1999	4.5 years	
	Randy Druken <sup>40</sup>	NL	Murder (2 <sup>nd</sup> )	1993	6 years	\$2.1 million
	Danny Wood <sup>41</sup>	AB	Murder (1 <sup>st</sup> )	1990	15 years	
2006	Billy Taillefer <sup>42*</sup>	QC	Murder (1 <sup>st</sup> )	1991	12 years	
2007	William Mullins-Johnson <sup>43*</sup> §	ON	Murder (1 <sup>st</sup> )	1994	12 years	\$4.25 million
	Steven Truscott <sup>44*</sup>	ON	Murder	1959	10 years	\$6.5 million
2008	Robert Baltovich <sup>45</sup>	ON	Murder (2 <sup>nd</sup> )	1992	8 years	Action dismissed w/out cost
	Erin Walsh <sup>46*</sup>	NB	Murder (2 <sup>nd</sup> )	1975	10 years	Undisclosed
	Anthony Hanemaayer <sup>47*</sup>	ON	Assault, B & E	1989	16 months	Undisclosed
2009	Kyle Unger <sup>48*</sup>	MB	Murder (1 <sup>st</sup> )	1992	13 years	Undisclosed
	Sherry Sherrett-Robinson <sup>49*</sup>	ON	Infanticide	1999	1 year	Undisclosed
2009	Sherry Sherrett-Robinson <sup>49*</sup>	ON	Infanticide	1999	1 year	Undisclosed
2010	Romeo Phillion <sup>50*</sup>	ON	Murder	1972	31 years	
	Ivan Henry <sup>51</sup>	BC	Rape	1983	27 years	\$8.0 million
	Joseph Webber <sup>52</sup>	ON	Armed Robbery	2007	1 year, 7 months	\$392,500
	Jack White <sup>53</sup>	ON	Sexual Assault	1995	0 years	
2011	CM (Baby M) <sup>55+</sup>	ON	Man-slaughter	1992	0 years	Undisclosed
	CF (Baby F) <sup>56+</sup>	ON	Infanticide	1996	0 years	Undisclosed

	Dinesh Kumar <sup>57+</sup>	ON	Crim. Negligence	1992	3 months	Undisclosed
	Richard Brant <sup>58+§</sup>	ON	Aggravated Assault	1995	6 months	Undisclosed
	Tammy Marquardt <sup>59+</sup>	ON	Murder (2 <sup>nd</sup> )	1995	14 years	Undisclosed
	Gerry Barton <sup>60</sup>	NS	Statutory Rape	1970	0 years	Undisclosed
2012	Brenda Waudby <sup>61</sup>	ON	Child Abuse	1999	0 years	Undisclosed
2014	Leighton Hay <sup>62</sup>	ON	Murder (1 <sup>st</sup> )	2004	12 years	
2015	John (Jack) Salmon <sup>63</sup>	ON	Man-slaughter	1971	3.5 years	
2016	Maria Shepherd <sup>64</sup>	ON	Man-slaughter	1992	8 months	
		AB	slaughter	2013	2.5 years	
	Connie Oakes <sup>65-§</sup>	AB	Murder (2 <sup>nd</sup> )	2013	2.5 years	
2018	O'Neil Blackett <sup>66-</sup>	MB	Man-slaughter	1987	4.5	
	Frank Ostrowski <sup>67-</sup>	MB	Murder (1 <sup>st</sup> )	1987	23 years	
2019	Glen Assoun <sup>68</sup>	ON	Murder (2 <sup>nd</sup> )	1999	16	
2020	Tomas Yebes <sup>69+</sup>	BC	Murder (2 <sup>nd</sup> ) 2 counts	1983	7	

### Notes

\* Denotes cases in which a ministerial review was sought and granted (s. 690 or s. 696).

+ Denotes cases involving the testimony of discredited forensic pathologist Charles Smith. In 8 of these cases, individuals pled guilty to lesser charges in exchange for reduced sentences: Sherry Sherrett-Robinson to Infanticide, CM (Baby M) to

Manslaughter, CF (Baby F) to Infanticide, Dinesh Kumar to Criminal Negligence, Richard Brant to Aggravated Assault, Brenda Waudby to Child Abuse, and Maria Shepherd and O'Neil Blackett to Manslaughter.

§ Cases in which the exoneree was Indigenous.

§ Thomas Sophonow was tried on three separate occasions. The first trial ended in a mistrial (jury failed to reach a unanimous verdict). The second trial ended in a conviction that Thomas appealed. The Manitoba Court of Appeal overturned the conviction, ordering a new trial. Thomas' third and final trial again resulted in a conviction, which Sophonow again appealed. This time, however, it resulted in an acquittal for Sophonow.