



FPT Heads of Prosecutions Committee



Comité FPT des Chefs des poursuites pénales

**The Path to Justice:
Preventing Wrongful Convictions**

THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS

Report of the Federal/Provincial/Territorial Heads of Prosecutions
Subcommittee on the Prevention of Wrongful Convictions

Fall 2011

“No criminal justice system is, or can be, perfect. Nevertheless, 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 (1989),
The British Section of the International Commission
of Jurists*

EXECUTIVE SUMMARY

In the fall of 2002, the Federal/Provincial/Territorial Heads of Prosecutions (HOP) Committee established a Working Group on the Prevention of Miscarriages of Justice in response to a number of wrongful convictions that had been identified and studied across the country. The mandate of the Working Group was to develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions, and to recommend proactive policies, protocols and educational processes to guard against future miscarriages of justice.

Two years later, the Working Group, composed of senior police and prosecutors from across the country, completed and presented the *Report on the Prevention of Miscarriages of Justice* (the “*Report*”). It was released to the public by Federal, Provincial and Territorial Ministers Responsible for Justice on January 25, 2005.

The 165-page *Report* comprehensively explored common causes of wrongful conviction. In addition, the findings and recommendations made by commissions of inquiries into wrongful convictions throughout Canada and internationally were collected and examined. Most importantly, the *Report* provided clear, comprehensive and practical recommendations for improvements to the criminal justice system which were designed to reduce the likelihood of wrongful convictions.

The Ministers lauded the strong collaboration that produced the *Report*, viewing it as “a clear signal that prosecutors and police take the issue of wrongful convictions seriously.” The Canadian Association of Chiefs of Police (CACP) issued a news release welcoming the *Report* and asking all police agencies to review their policies and procedures to ensure consistency with the *Report’s* recommendations. Then CACP President Edgar Macleod stated:

It is important that all players in the justice system – police, prosecutors, the judiciary and defence bar – work together and thereby effectively reduce the risk of wrongful convictions.

Following release of the *Report*, each prosecution service (federal and provincial) conducted an in-depth review of its policies to assure compliance with the recommendations. Several services are now adding separate chapters in their policy manuals on preventing wrongful convictions.

Similarly, many police forces conducted in-depth reviews of the recommendations. As a result, a number of police departments have developed training modules that focus on the common causes of wrongful convictions and the best practices to prevent them in the conduct of criminal investigations.

Nationally, the *Report* has been cited at all levels of Court, including the Supreme Court of Canada. The National Criminal Justice Section of the Canadian Bar Association appreciated the *Report's* "many practical suggestions" and commended the Working Group on its recommendations. It has been studied at conferences in several countries, and is now part of the curriculum in several law school courses dedicated to the study of wrongful convictions.

In short, the *Report* has had a significant influence and has been an important catalyst in shedding light on the causes and circumstances leading to wrongful convictions. While such cases are mercifully infrequent, the troubling number of Canadians convicted of crimes of which they are factually innocent has heightened the urgent need for implementation of the *Report's* recommendations.

The *2005 Report* suggested that its recommendations be continually reviewed and updated in order to incorporate developments in the law and technology and recommendations made by subsequent commissions of inquiry. It was recommended that, at a minimum, a full review should take place five years after the *Report's* publication.

Even before the *Report* was released by Ministers, the HOP Committee did indeed establish a permanent committee on the prevention of wrongful convictions. The Subcommittee generally meets twice a year to share information and best practices, and the latest developments, educational activities, cases and emerging issues. It reports to the HOP Committee at each of its twice-yearly meetings. Thus, there now exists an established network of senior police and prosecution officials with expertise in these issues, which meets regularly to discuss best practices on the prevention and detection of wrongful convictions.

One of the Subcommittee's major projects has been the completion of this updated Report.

As will be seen in this update, the prevention of miscarriages of justice remains an overarching goal in criminal justice. The format of this update mirrors the original report: it provides a summary of developments in the law and reports on efforts to implement the 2005 recommendations. Those recommendations are re-examined in light of events over the past six years and, where appropriate, modifications are suggested. It also highlights international developments since 2005 and summarizes the key findings of Canadian commissions of inquiry held since the *2005 Report*.

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The update canvasses the latest information on the most important causes of wrongful convictions, as described in the *2005 Report*, including tunnel vision; eyewitness mis-identification; false confessions; use of in-custody informers; and inappropriate use of forensic evidence and expert testimony. Each of these issues is discussed in the context of what has been learned since 2005, through research and commissions of inquiry, for example.

For example, the update notes that following a recommendation in the *2007 Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, all Canadian jurisdictions have conducted reviews in different forms of their use of hair microscopy evidence to determine if any cases should be reopened, as occurred in Manitoba. The most formal reviews were in Ontario and British Columbia.

Importantly, since release of the *2005 Report*, the Subcommittee has been able to track developments across the country in relation to the issue of preventing wrongful convictions. It is pleased to report that one of the most important developments as a result of the *2005 Report* has been the focus of all justice system participants on education.

As set out in Chapter 10, there has been a phenomenal level of educational activity among police and prosecutors about the causes of wrongful convictions. Today there is a higher level of awareness than ever before among Canadian police and prosecutors about the causes of wrongful convictions and what can be done to prevent them, as the issue of wrongful convictions has achieved an unprecedented prominence in discussions at the highest level of police and prosecution organizations. Education about the phenomenon of miscarriages of justice is now a staple of training for rookie and senior officers and prosecutors alike.

There is now a wealth of resources available to police and prosecutors on wrongful convictions. For example, a select list of Web sites is attached at Appendix A. Through this Subcommittee and its expert members, it is now clear that Canadian police, prosecutors and even the judiciary know where to turn for information and expertise on wrongful convictions.

That said, of great concern is that in this era of fiscal restraint and new pressures on the justice system, there is a danger that this promising new level of activity will inevitably diminish. Thus the central message of this report must be the need for continued vigilance.

The Subcommittee strenuously urges a continuing national commitment at a senior level to focus attention on the issue of wrongful convictions. The HOP Committee, federal, provincial and territorial governments and the Canadian Association of Chiefs of Police can sustain and support this initiative. Much progress has been made in understanding and addressing the causes of wrongful conviction. But “victory” cannot be claimed until the risk of a factually innocent person being convicted of a crime in Canada is eliminated – continued vigilance and much work remains to be done to reach that important goal. Innocent lives depend on it.

The Subcommittee does not believe it is necessary to conduct another five-year review. However, the Subcommittee will continue to monitor police and prosecution activities and continue to act as an advocate for change and concerted action in this area. It believes it would be more useful to issue reports on specific issues as they arise rather than to conduct another complete review. And it is recommending a national conference, following on the success of “*Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction*,” held in Winnipeg in 2005, to canvass the developments over the past five years, together with the latest issues in relation to wrongful convictions.

The *2005 Report* stated that it “should not be viewed as a beginning or a starting point, but as another stop along a well-established road.” As this update illustrates, much progress has been made along that road. Nevertheless, the Subcommittee recognizes that, as a quintessentially human endeavor, the investigation and prosecution of crime brings with it the possibility of error. Therefore, constant awareness of the risk factors common in wrongful conviction cases and continued vigilance by key criminal justice players in guarding against them is crucial to ensuring the integrity of the criminal justice system. The human cost of one wrongful conviction cannot be tolerated. Our society cannot afford to let justice fail.

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