

## The Wrongful Conviction Law Review



# Canada's False Guilty Pleas Lessons from The Canadian Registry of Wrongful Convictions

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Volume 4, numéro 1, printemps 2023

URI : <https://id.erudit.org/iderudit/1101999ar>

DOI : <https://doi.org/10.29173/wclawr92>

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Éditeur(s)

University of Alberta Library

ISSN

2563-2574 (numérique)

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Citer cet article

Roach, K. (2023). Canada's False Guilty Pleas: Lessons from The Canadian Registry of Wrongful Convictions. *The Wrongful Conviction Law Review*, 4(1), 16–47. <https://doi.org/10.29173/wclawr92>

### Résumé de l'article

The Canadian Registry of Wrongful Convictions [www.wrongfulconviction.ca](http://www.wrongfulconviction.ca), like similar registries in the United States and the United Kingdom, was designed to facilitate research on patterns and trends in wrongful convictions. As of its launch in February 2023, 15 of 83 remedied wrongful convictions or 17% were the result of guilty pleas by the accused. Forty percent of the guilty plea wrongful convictions were entered by women. Most of these involved the flawed expert testimony of Charles Smith about the cause of baby deaths. The majority of the 15 remedied guilty plea wrongful convictions were for imagined crimes that did not happen. Almost half (7 of 15) of Canada's false guilty pleas were taken from racialized people including three Indigenous men, one Black and Indigenous man, another Black man and a Brown man who had recently immigrated from India. Two of the fifteen false guilty pleas were taken from accused persons who had diagnosed with mental health and cognitive challenges. With the exclusion of one false guilty plea to a mandatory murder sentence of life imprisonment and ineligibility for parole for 10 years, the average sentence in the remaining 14 cases was 10 months. This is evidence of "lop-sided" plea deals producing lenient sentences. In two cases, the accused who pled guilty received sentences of time already served in pre-trial custody. A number of strategies to prevent false guilty pleas including abolition of mandatory sentences and better charge and pre-trial detention screening are examined. Nevertheless, it is argued that false guilty pleas are inevitable in high volume criminal justice systems that recognize a guilty plea as a reason to mitigate sentences. This article also raises concerns that both Canada's appeal courts and its proposed Miscarriage of Justice Review Commission are not well suited to remedying inevitable false guilty pleas.

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## Canada's False Guilty Pleas: Lessons from The Canadian Registry of Wrongful Convictions

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*The Canadian Registry of Wrongful Convictions [www.wrongfulconviction.ca](http://www.wrongfulconviction.ca), like similar registries in the United States and the United Kingdom, was designed to facilitate research on patterns and trends in wrongful convictions. As of its launch in February 2023, 15 of 83 remedied wrongful convictions or 17% were the result of guilty pleas by the accused. Forty percent of the guilty plea wrongful convictions were entered by women. Most of these involved the flawed expert testimony of Charles Smith about the cause of baby deaths. The majority of the 15 remedied guilty plea wrongful convictions were for imagined crimes that did not happen. Almost half (7 of 15) of Canada's false guilty pleas were taken from racialized people including three Indigenous men, one Black and Indigenous man, another Black man and a Brown man who had recently immigrated from India. Two of the fifteen false guilty pleas were taken from accused persons who had diagnosed with mental health and cognitive challenges. With the exclusion of one false guilty plea to a mandatory murder sentence of life imprisonment and ineligibility for parole for 10 years, the average sentence in the remaining 14 cases was 10 months. This is evidence of "lop-sided" plea deals producing lenient sentences. In two cases, the accused who pled guilty received sentences of time already served in pre-trial custody. A number of strategies to prevent false guilty pleas including abolition of mandatory sentences and better charge and pre-trial detention screening are examined. Nevertheless, it is argued that false guilty pleas are inevitable in high volume criminal justice systems that recognize a guilty plea as a reason to mitigate sentences. This article also raises concerns that both Canada's appeal courts and its proposed Miscarriage of Justice Review Commission are not well suited to remedying inevitable false guilty pleas.*

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<sup>1</sup> Co-Founder Canadian Registry of Wrongful Convictions and Professor of Law, University of Toronto. I thank Amanda Carling and Joel Voss and all who have worked on the Canadian Registry of Wrongful Convictions for all their work that has made the Canadian Registry of Wrongful Convictions and this article possible. This article is a significantly expanded version of the Canadian Registry's first report: Kent Roach, "Canada Has a Guilty Plea Wrongful Conviction Problem: The First Report of the Canadian Registry of Wrongful Convictions" (Feb 2023), online: <https://www.datocms-assets.com/75199/1676311113-report-on-the-guilty-plea-wrongful-convictions-in-the-canadian-registry-of-wrongful-convictions-feb-13.pdf>

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## I Introduction

Known to criminologists since the 1970's<sup>2</sup>, false guilty pleas have only recently gained prominence in wrongful conviction scholarship. They have been documented as constituting

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<sup>2</sup>See Steven Dell, *Silent in Court* (London: Bell, 1971); Anthony Bottoms & John McLean, *Defendants in the Criminal Process* (London: Routledge, 1976); Mike McConville & John Baldwin, *Courts, Prosecutions*

between 17% to over 30% of remedied wrongful convictions recorded in national registries in Canada, the United Kingdom and the United States.<sup>3</sup>

False guilty pleas are a critical part of any “criminology”<sup>4</sup> of wrongful convictions. They reveal deep and intractable flaws in high-volume justice systems that encourage plea bargaining about charges and sentences and that accept guilty pleas as a significant mitigating factor in sentencing. Guilty plea discounts, especially when combined with pre-trial detention, set up the possibility that accused persons may make rational decisions to plead guilty despite being innocent or having a valid defence.

Neither the courts, nor legislatures have been able effectively to remedy false guilty pleas. Criminal cases review commissions such as the Criminal Cases Review Commission (CCRC) of England and Wales also have encountered problems in remedying them.<sup>5</sup>

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*and Convictions* (Oxford: Oxford University Press, 1981); Richard Ericson & Patricia Baranak, *The Ordering of Justice* (Toronto: University of Toronto Press, 1981). For recent work in Canada see Cheryl Marie Webster, “Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty” (2022) 3:2 *Wrongful Conviction L Rev* 128; Chloe Leclerc & Elsa Euvrard, “Pleading Guilty: A Voluntary or Coerced Decision?” (2019) 34(3) *Can J L & Soc’y* 457; Amanda Carling, “A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions” (2017) 64:3-4 *Crim LQ* 415; Christopher Sherrin, “Guilty Pleas from the Innocent,” (2011) 30 *Windsor Rev. Legal & Social Issues* 1; Jerome Kennedy QC, “Plea Bargains and Wrongful Convictions” (2016) 63:1&2 *Crim LQ* 556 ; Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do To Safeguard Criminal Justice* (New York: Simon and Schuster, 2023) Part 1.

<sup>3</sup> From 2010 to 2016, 38% of the cases that the CCRC referred to the Court of Appeal were guilty plea cases. Carolyn Hoyle and Mai Sato, *Reasons to Doubt: Wrongful Convictions and Criminal Conviction Cases Review Commission* (Oxford: Oxford University Press, 2019) at 104-109. As of May 6, 2023 guilty pleas cases were 85 of 467 cases in the University of Exeter’s wrongful conviction registry as evidence of the guilty plea discounts that drive such false guilty pleas these cases resulted in an average of 0.37 years lost in prison whereas the average for all 467 wrongful convictions were 5.11 years, see “Case search map” (last visited 6 May 2023), online: <https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/case-search-map/>. The American registry as of May 26, 2023 showed 803 of 3,319 wrongful convictions as false guilty plea cases, see “Exoneration Detail List” (last visited 26 May 2023), online: <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P>.

<sup>4</sup> Richard Leo, “Rethinking the Study of Miscarriages of Justice: Towards a Criminology of Wrongful Convictions” (2005) 21 *J Contemporary Crim Justice* 201. See also Richard Leo, “The Criminology of Wrongful Convictions: A Decade Later” (2017) 33 *J Contemporary Crim Justice* 82.

<sup>5</sup> Juliet Horne reports that, from 1997 to 2013, guilty pleas constituted only 9% of referred cases, with the Court of Appeal quashing convictions in 39 of the cases, Juliet Horne, *A Plea of Convenience* (PhD, Warwick University, 2016) [unpublished] at 252. She also found inconsistency in reasons for rejecting guilty plea applications including one case worker who maintained that the only ground for referring a guilty plea was that the plea was not voluntary, *ibid* at 261. Dr. Horne also found inconsistency among Commissioners with some requiring innocence or duress in making the guilty plea and some stressing quick and efficient rejection of guilty plea applications in part to deal with the Criminal Cases Review

The first part of this article will set out key findings from the 15 remedied guilty plea wrongful convictions recorded in the Canadian Registry of Wrongful Convictions as of its launch in February 2023. These false guilty pleas were disproportionately made by women, Indigenous and other racialized persons and two were made by people facing cognitive challenges. The second part of this article will provide brief overviews of the 15 cases of these remedied false guilty pleas. The last part will discuss some possible remedial strategies to better protect and remedy guilty plea wrongful convictions. It will also raise concerns that neither Canada's appeal courts or its proposed Miscarriage of Justice Review Commission are well-equipped to provide remedies for false guilty pleas which appear to be inevitable given the benefits that many accused may receive for pleading guilty and the risks they face by claiming innocence or a defence at trial.

## II Key Findings from the Registry's 15 Guilty Plea Wrongful Convictions

The late Ronald Dworkin made an important argument that equality considerations should play an influential role in examining whether reforms are required to prevent wrongful convictions. His argument was based on the assumption that while there was no absolute right to the most accurate criminal justice system, the risk of the moral harm of a wrongful conviction should be distributed equally.<sup>6</sup> In other words, there may not be a right to the most accurate criminal justice system, but the costs of the system's inaccuracies should not be imposed on distinct and disadvantaged groups in a disproportionate manner. Given the overrepresentation of the disadvantaged in prison populations- the population most at risk of being wrongfully convicted- in many parts of the world and their overrepresentation among the wrongfully convicted, Dworkin's equality-based argument against wrongful convictions may have bite in most criminal justice systems.

The data from the Canadian registry suggests that the overrepresentation of distinct groups of the disadvantaged among those who have received remedies for their false guilty pleas may be even greater than among those who have received remedies for all wrongful convictions. Almost half of the victims of Canada's remedied guilty plea wrongful convictions are racialized and/or women. In contrast, 11 of all 83 remedied wrongful convictions involved women and 20 of all 83 remedied wrongful convictions involved racialized people (including 15 Indigenous people) and

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Commission's (CCRC) backlog and budget constraints. Horne raised concerns that the CCRC did not always focus on vulnerabilities such as mental illness that may produce false guilty pleas, *ibid* at 263, 269. She also found disincentives in trying to exhaust appeal requirements from guilty pleas including a potential loss of time order if the Court of Appeal for England and Wales rejected the appeal as clearly unmeritorious, *ibid* at 275. The CCRC, however, was more willing to refer guilty plea cases where there was no appeal under its exceptional circumstance's jurisdiction, *ibid* at 280. As will be seen, there is no similar provision in the bill to establish Canada's proposed Miscarriage of Justice Review Commission.

<sup>6</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) ch 3. Dworkin recognized that "it is never true, at any time, that all members of a society are equally likely to be accused of any particular crime. If there is economic inequality, the rich are more likely to be accused of conspiring to monopolize and the poor of sleeping under bridges." *Ibid* at 87. He went on, however, to conclude that "majoritarian decisions" about procedure and accuracy "can be faulted for serious unfairness only if these decisions discriminate against some independently distinct group....". *ibid* at 88.

these numbers include those who entered false guilty pleas.<sup>7</sup> In other words, there is evidence that distinct disadvantaged groups are especially subject to guilty plea wrongful convictions. This makes sense if one accepts that the women, Indigenous people and other racialized minorities and those with cognitive challenges may be at a disadvantage in being believed in court and that they are also aware of such a sad reality. Such an understanding of false guilty pleas follows Dworkin by stressing the importance of equality. It also shifts understandings of the wrongfully convicted from those who always maintain and fight for their innocence to those who, at least at the point that they plead guilty, admit defeat at the hands of a coercive and often alien criminal justice system that they do not trust to vindicate their innocence.<sup>8</sup>

### A. Women are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized guilty plea wrongful convictions, six involved women (C.F., C.M, Sherry Sherett-Robinson, Maria Shepherd, Brenda Waudby, Wendy Scott).<sup>9</sup> All but one of these women were charged with murder which has a mandatory sentence of life imprisonment. Five of these women entered false guilty pleas when faced with expert testimony of Charles Smith, a now discredited pathologist but one who was regarded as an icon or star witness at the time of their

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<sup>7</sup> “False Guilty Pleas” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/issues/false-guilty-pleas>.

<sup>8</sup> Jamie Gladue, an Indigenous woman, pled guilty to manslaughter after having been charged with murder in the killing of her partner who had previously been convicted of assaulting her. Gladue entered this guilty plea only after been committed for trial at a preliminary inquiry and after a jury had been selected. She received a three year sentence but was allowed to serve the sentence close to her family and was released after 6 months. I represented Aboriginal Legal Services of Toronto that intervened in Ms. Gladue’s unsuccessful sentencing appeal in the Supreme Court of Canada which nevertheless established an important precedent about the sentencing of Indigenous offenders. *R. v. Gladue* [1999] 1 SCR 688. For my subsequent concerns that Ms. Gladue might have had a successful self-defence claim that her lawyers had explored before her guilty plea see Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do to Safeguard Justice* (New York: Simon and Schuster, 2023) at xxvi-xxix.

<sup>9</sup> A seventh woman, Tammy Bouvette, was added to the Canadian registry after its launch in February 2023. Bouvette, like most of the women wrongfully convicted in cases involving Charles Smith, was charged with second degree murder but pled guilty to manslaughter receiving a sentence of one year imprisonment minus time served and two years probation. In finding that the guilty plea was a miscarriage of justice that warranted a stay of proceedings, the British Columbia Court of Appeal stated: “at the time of the guilty plea, the appellant was facing a charge of second-degree murder and, upon conviction, an automatic life sentence with a minimum parole ineligibility period of 10 years. She is the mother of four young children. In short, she was facing the loss of her liberty for a substantial period of time, the stigma associated with a murder conviction, and the loss of her relationships with her children.... the Crown held out a powerful inducement: a guilty plea to a lesser charge and the certainty of a much-reduced sentence. Indeed, the Crown sought the imposition of a two-year custodial term on the appellant’s plea of guilty to criminal negligence causing death. It is not difficult to imagine why, unarmed with critical information that could assist her, this marginalized, overwhelmed and intellectually challenged appellant would enter a guilty plea to a lesser offence.” *R v Bouvette*, 2023 BCCA 152 at paras 108-111.



false guilty pleas.<sup>10</sup> The sixth involving a woman, Wendy Scott, who has significant cognitive challenges and pled guilty to second degree murder with a 10 year parole ineligibility period when charged with first degree murder which carries a mandatory sentence of life imprisonment and parole ineligibility for 25 years.

Although women make up half of the Canadian population, they make up only 6% of the federal prison population of those serving two years or more: the population at most immediate risk of being wrongfully convicted.<sup>11</sup> The majority of the 11 women in the Canadian registry who have had wrongful convictions remedied have entered false guilty pleas. Women have frequently explained their decision to plead guilty as one designed for their own good and the good of their family.<sup>12</sup>

In her 1997 self-defence review, Justice Ratushny commented that women might plead guilty for a range of “extraneous factors,”<sup>13</sup> including families to care for, regret, and concerns about testifying about the abuse they have endured. In 1997, Martha Shaffer found that the most frequent references to the *Lavallee*<sup>14</sup> case, the leading case recognizing battered woman’s ability to claim self-defence, was in sentencing decisions.<sup>15</sup> In early May 2023 there were 1,140 reported cases on CanLii, the database of Canadian legal decisions, that cited *Lavallee*. Well over one third (444) also contained the word “sentence”.<sup>16</sup> In addition, women who unsuccessfully claim self-defence at trial may be subject to a mandatory sentence for murder and lose the benefit of a guilty plea discount when sentenced for manslaughter. Debra Parkes and Emma Cunliffe have persuasively shown the limits of factual innocence paradigms by focusing on intimate homicide and baby death cases. They also joined with Dianne Martin in arguing that concerns about wrongful conviction should be extended “into the mundane world of the thousands of guilty pleas made every day.”<sup>17</sup>

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<sup>10</sup> On Charles Smith, see Hon Stephen Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queens Printer, 2008). I served as the inquiry’s director of research.

<sup>11</sup> “Statistics and research on women offenders” (last modified 16 May 2019), online: <https://www.csc-scc.gc.ca/women/002002-0008-en.shtml>.

<sup>12</sup> Debra Parkes & Emma Cunliffe, “Women and Wrongful Convictions: Concepts and Challenges” (2015) 11 Int JLC 219 at 230-237; Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes and What Canada Must Do to Safeguard Justice* (New York: Simon and Schuster, 2023) ch 2.

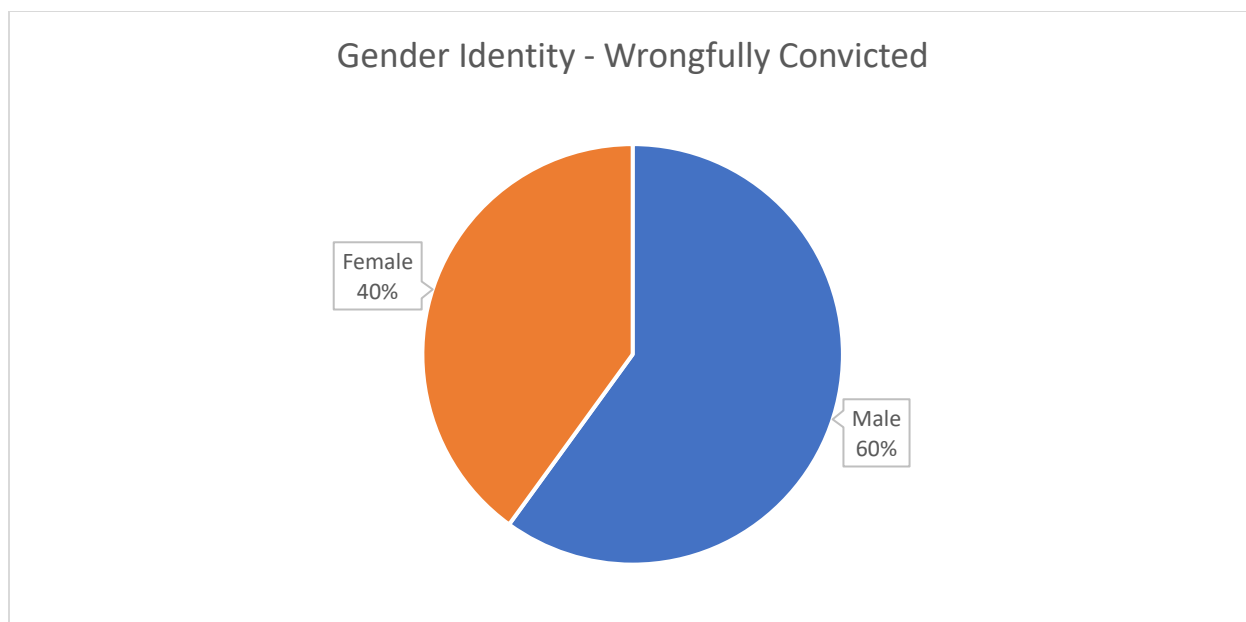
<sup>13</sup> Hon Lynn Ratushny, *The Self-Defence Review- Final Report* (Ottawa: Department of Justice, 1997) 10.

<sup>14</sup> [1990] 1 SCR. 852.

<sup>15</sup> Martha Shaffer, “The Battered Woman’s Syndrome Re-Visited.” (1997) 47 UTLJ 1.

<sup>16</sup> For a recent case where an Indigenous woman charged with murder who might have argued self-defence pled guilty to manslaughter and was sentenced to 11 years see [R v Dedam, 2023 NBKB 24](#). For another example where a battered woman charged with murder pled guilty to manslaughter and eventually received a nine year sentence see [R v Naslund, 2022 ABCA 6](#).

<sup>17</sup> Debra Parkes & Emma Cunliffe, “Women and Wrongful Convictions: Concepts and Challenges” (2015) 11 Int’l J L C 219 at 230; Dianne Martin, “Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences and Wrongful Convictions” (2001) 39 Osgoode Hall LJ 513 at 520.



### B. Indigenous People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, four or 27% (Richard Brant, Clayton Boucher, Gerald Barton and Richard Catcheway) involved Indigenous men. This is disproportionate to the about 5% of the Canadian population that is Indigenous. It is, however, slightly less than the about 30% of the prison population that is Indigenous. This suggests that Indigenous people, as the population most at risk for wrongful convictions, may face barriers in receiving remedies for guilty plea wrongful convictions.<sup>18</sup>

Strikingly, none of the 15 remedied guilty plea wrongful convictions involve Indigenous women even though Indigenous women constitute 40% of Canada's prison population and about 50% of the federal prison population for those serving sentences of two years imprisonment or more. This underrepresentation of Indigenous people and especially Indigenous women with respect to those who have received remedies for false guilty pleas likely represents access to justice problems including problems with respect to withdrawing guilty pleas and bringing appeals.

<sup>18</sup> The American registry records that Black accused were 478 of the 808 of guilty plea wrongful convictions recorded as of June 2023 with Black people even more overrepresented in group exonerations which are listed separately in the American registry. See National Registry of Exonerations. "Groups Registry" at <https://www.law.umich.edu/special/exoneration/Pages/Group-Exonerations.aspx>. Black people are significantly overrepresented among those who receive remedies for wrongful convictions in the United States even compared to their overrepresentation in prison in the United States. The lack of similar overrepresentation of Indigenous people among those who have received remedies for wrongful convictions in Canada may suggest that Indigenous people face greater barriers in obtaining remedies for their wrongful convictions. For further discussion of overrepresentation of distinct groups of the disadvantaged among wrongfully convicted people see Kent Roach "The Wrongful Convictions of Indigenous People in Australia and Canada" (2015) 17 Flinders L.J. 203 at 223-228.



The Canadian registry does not include all Indigenous people who have pled guilty but may have been innocent or have had a defence.

In 1968, the Supreme Court of Canada with just one dissent upheld the guilty plea of Lawrence Brosseau even after the Cree man explained: “I only have a grade 2 education and my lawyer told me that if I didn’t plead guilty to the charge they would sentence me to hang.” To add insult to injury, his own lawyer not only participated in this plea but also told the court that in taking the plea his client was “an absolute primitive. I don’t pretend to have any particular understanding of his mind or intent.”<sup>19</sup>

Unfortunately, the *Brosseau* case remains a valid and relevant legal precedent. Justices Alvin Hamilton and Murray Sinclair in their 1991 Manitoba Aboriginal Justice Inquiry related “inappropriate guilty pleas” and “passivity” and “indifference” to the alienation of Indigenous people from a colonial criminal justice system. They heard testimony in the early 1990’s from inmates who told them “It was easier to plead guilty because they don’t really believe us”.<sup>20</sup>

In 2011, Justice Frank Iacobucci noted that many Indigenous people in northern Ontario “plead guilty to their offences, rather than electing trial, in order to have their charges resolved quickly but without appreciating the consequences of their decision.” He elaborated that many who he spoke to “have never known a friend or family member” who when charged ever risked a trial. Many Indigenous people “believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members”.<sup>21</sup>

A 2017 Department of Justice study based on 25 interviews with court workers and lawyers from 2016 to 2017 similarly found that many Indigenous people, especially those with criminal records, pled guilty to “get it over with” with one participant concluding:

Wrongful convictions happen every day in court when people are pleading guilty to things they didn’t do because they’re denied bail or their sense of responsibility is different from criminal responsibility and people are pleading guilty because they feel responsible for something even though they might not in fact be criminally responsible.<sup>22</sup>

Another respondent stated: “discrimination at the police level, Crowns, judges, JPs, even lawyers. They feel like the odds are stacked against them, so what’s the point.”<sup>23</sup> Others cited the costs of repeat court appearances. This study reported that one reason why an Indigenous court worker plan was instituted in the 1960’s was a realization that Indigenous people were pleading

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<sup>19</sup> *R v Brosseau*, [1969] SCR 181 at 185-186.

<sup>20</sup> Hon Alvin Hamilton & Hon Murray Sinclair, *Aboriginal Justice Inquiry* (Toronto: Queens Park, 1991) chs 6 and 7.

<sup>21</sup> Hon Frank Iacobucci, *First Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2011) 372.

<sup>22</sup> Angela Bressan & Kyle Coady, *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017) at 9.

<sup>23</sup> *Ibid* at 10.

guilty when they were not legally guilty.<sup>24</sup> Amanda Carling, a co-founder of the Canadian registry of wrongful convictions, has argued that Indigenous people may suffer from prolonged depression connected with the harms of colonialism and have a lack of faith in the colonial justice system.<sup>25</sup>

Despite Parliament adding in 2019 whether there is a factual basis to support a guilty plea as a factor for judges to consider when deciding whether to accept guilty pleas, matters do not seem to be improving. A failure to consider the factual basis for a plea is not fatal to the validity of a guilty plea.<sup>26</sup>

In 2021, the Ontario Court of Appeal ruled that the circumstances of an Indigenous accused need not always be considered when accepting a guilty plea from an Indigenous person.<sup>27</sup> It upheld a guilty plea made by an Indigenous man who was detained in solitary confinement and who fired his lawyer before he pled guilty. The man sought to reverse his guilty plea a day after it was made. The Court of Appeal was concerned that a more searching inquiry for Indigenous people seeking to plead guilty would both delay guilty pleas and be paternalistic.

In 2022, a five-judge panel of the British Columbia Court of Appeal did not allow an Indigenous man to re-open his guilty plea to assaulting a police officer. The court stressed that he was represented by counsel even though the man was in pre-trial detention at the time he pled guilty and had previously suffered trauma while in jail. The Indigenous man had argued that he did not intend to assault a police officer when he threw a hammer while the police officer was in an altercation with the man's mother who was concerned that the police would shoot her son.<sup>28</sup>

The British Columbia Court of Appeal also refused to reverse a guilty plea to second degree murder that Philip Tallio made when he was 17 years old on the basis that he had failed to prove on a balance of probabilities that he lacked the capacity to enter a guilty plea and had not established that another person had killed his 22-month-old cousin.<sup>29</sup>

A guilty plea can be entered and accepted by a criminal court in a matter of minutes. The adverse effects of the guilty plea can be life-long.

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<sup>24</sup> *Ibid* at 6. Thanks to Amanda Carling for bringing this report (and many other things) to my attention.

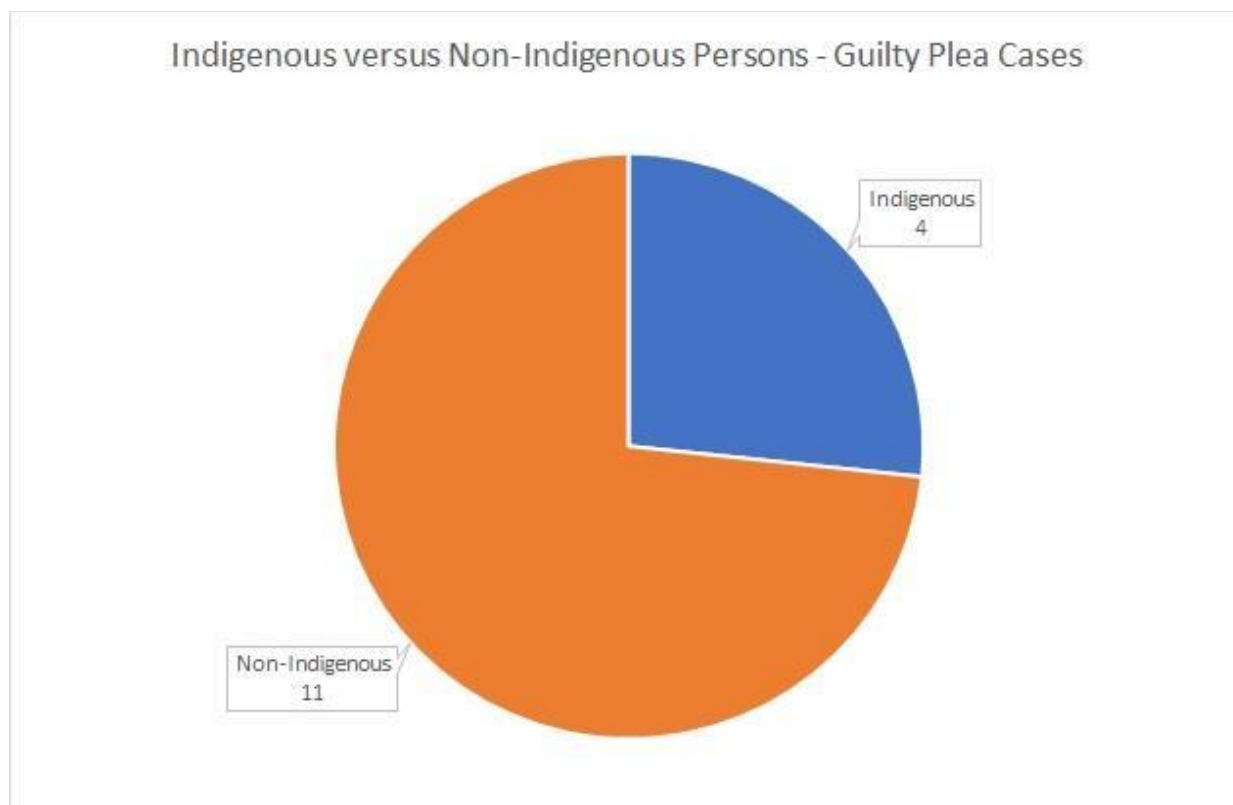
<sup>25</sup> Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64 Crim LQ 415 at 449.

<sup>26</sup> [Criminal Code, RSC 1985, c C-46, s 606 \(1.2\)](#).

<sup>27</sup> [R v CK, 2021 ONCA 826](#).

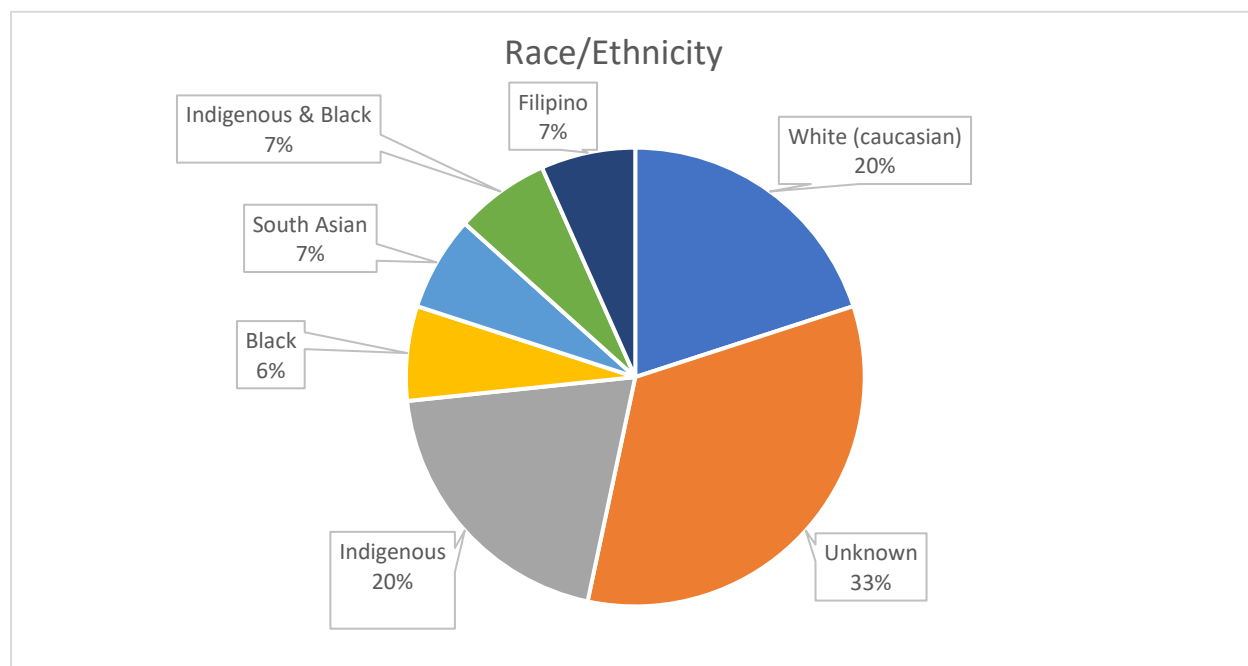
<sup>28</sup> [R v Zaworski, 2022 BCCA 144](#).

<sup>29</sup> [R v Tallio, 2021 BCCA 314](#); *Phillip James Tallio v Her Majesty the Queen*, 2022 CanLII 21676 (SCC) (leave to appeal denied).



### C. Racialized People are Disproportionately the Victims of False Guilty Pleas

Of the 15 recognized false guilty pleas, two involve Black men (Gerald Barton (who is also Indigenous) and O'Neill Blackett); one involves a Brown man who had recently migrated from India (Dinesh Kumar) and one involved a woman of Filipino birth (Maria Shepherd) married to a Black man. The Canadian registry only contains one additional case of a Black man, Leighton Hay, receiving a remedy for his wrongful conviction and only one other case of a South Asian man, Gurdev Singh Dhillon, receiving a remedy for a wrongful conviction.



Data on the overrepresentation of Black and Brown people is less readily available in Canada than for Indigenous people. In 2020/21 Black people constituted 11% of admissions to custody in Nova Scotia where Barton's wrongful guilty plea occurred compared to 3% of the population. They were 14% of admissions to custody in Ontario compared to 5% of the population in Ontario where Blackett's wrongful conviction occurred. They also were 9% of admissions to federal custody compared to 4% of the Canadian population.<sup>30</sup> Such overrepresentation in prison is also reflected in that 2 of 15 or 13% of remedied wrongful convictions that have involved Black people. Given the difficulties of remedying guilty plea wrongful convictions, however, it is difficult to know whether Black people may be more inclined than other groups to plead guilty in cases where they are innocent or may have a valid defence. Black people, like Indigenous people, may have valid fears that they will not be represented on the bench or the jury and that the jurors in particular will not be adequately screened to prevent the use of racist stereotypes associating them with crime.

#### **D. Canada's False Guilty Plea Problem Disproportionately Affects People Living with Cognitive Difficulties**

Of the 15 recognized false guilty pleas, two involve people with diagnosed mental health and cognitive challenges. Simon Marshall's guilty plea to a series of well-publicized sexual assaults in a suburb of Quebec City were accepted by the trial court in 1997. Simon Marshall then served five years in jail during which he suffered horrific abuse. When released, he pled guilty to two more sexual assaults. These pleas were proven to be false by DNA testing. DNA testing was

<sup>30</sup> Research and Statistics Division Department of Justice *Overrepresentation of Black People in the Canadian Criminal Justice System* December 2022 at [https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD\\_JF2022\\_Black\\_Overrepresentation\\_in\\_CJS\\_EN.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD_JF2022_Black_Overrepresentation_in_CJS_EN.pdf)

then belatedly done on material from the earlier assaults and the results excluded Marshall. The wrong person had been arrested and allowed to plead guilty while the true perpetrator went free.

Wendy Scott has been diagnosed with an extremely low IQ. She confessed to a murder when she was presented with false evidence by the police, as is legal in Canada.<sup>31</sup> She was charged with first degree murder and subsequently pled guilty to second degree murder and received the mandatory minimum sentence of life imprisonment with parole ineligibility for ten years. Her guilty plea was overturned in 2015, but without the Alberta Court of Appeal issuing a published judgment.<sup>32</sup> Scott also was the star witness in Connie Oakes' trial for the same murder. Connie Oakes's conviction was overturned based on new evidence of the overturning of Scott's conviction.<sup>33</sup> Connie Oakes is one of 16 Indigenous people out of the present total of 83 people in the Canadian Registry of Wrongful Convictions.

The number of remedied false guilty pleas made by people with cognitive challenges may be undercounted even among the 15 false guilty pleas in the Canadian registry because the Registry is based solely on publicly available material and cognitive challenges are often under-diagnosed.<sup>34</sup>

One third of over 1,200 accused persons with mental health issues have reported that they pled guilty to an offence that they did not commit at some time during their life.<sup>35</sup> At the same time, Canadian courts, however, generally only require a basic awareness or operating mind for a person to be competent to plead guilty<sup>36</sup>, thereby giving up their right to a trial, often for a reduced sentence.

### **E. In the Majority of Guilty Plea Wrongful Convictions, No Crime Was Committed**

The power of the criminal justice system with respect to the disadvantaged is well demonstrated by its ability to wrongfully convict people for crimes that did not happen.

All of the eight guilty plea wrongful convictions related to Charles Smith's flawed expert testimony involved baby deaths where no crimes occurred. The same is true with respect to the guilty plea wrongful conviction of Clayton Boucher, a Métis man, who pled guilty to possession of illegal drugs and received a sentence of time served, reflecting his time in pre-trial detention. The RCMP lab results were that the substance Clayton Boucher possessed (in a baking soda

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<sup>31</sup> Colin Sheppard, "The Connie Oakes Tragedy" (2020) 67 CLQ 523 at 534-5.

<sup>32</sup> Chris Purdy, "Senator says Alberta murder case 'screams' for an inquiry" *Global News* (18 Jan 2017), online: <https://globalnews.ca/news/3188660/senator-says-alberta-murder-case-screams-for-review-calls-for-public-inquiry/>.

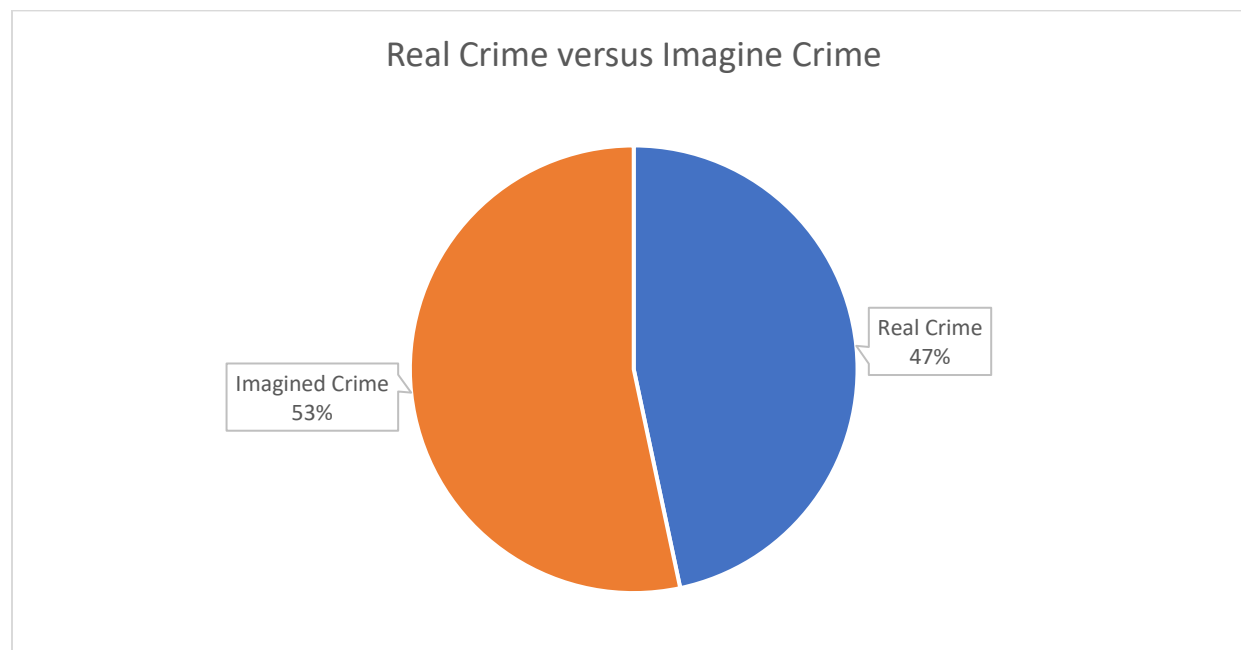
<sup>33</sup> *R v Oakes*, 2016 ABCA 90.

<sup>34</sup> On the under-diagnosis of fetal alcohol spectrum disorder see Jonathan Rudin, *Indigenous People and the Criminal Justice System* 2<sup>nd</sup> ed (Toronto: Emond Montgomery, 2022) at 259-269.

<sup>35</sup> Allison D Redlich et al, "Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness" (2010) 34 L & Human Behaviour 79 at 83-4, 88-9.

<sup>36</sup> *R v T (R)*, 1992 CanLII 2834 (ON CA); *R v Taylor*, 1992 CanLII 7412 (ON CA); *R v MAW*, 2008 ONCA 555, accepting the limited cognitive capacity test in *R v Whittle* [1994] 2 SCR 914.

container) were not illegal drugs. Mr. Boucher pled guilty in the wake of his wife's accidental death and having had to attend her funeral in shackles.



#### **F. The Average Sentence Received by the Fifteen who Made False Guilty Pleas Was 10 Months Imprisonment**

Guilty plea wrongful convictions result from sentence and charge bargains that are difficult for many accused and even the hypothetical “reasonable person” to decline.

The average 10-month sentence received by 14 victims of guilty plea wrongful convictions excludes the one remedied guilty plea wrongful conviction that involved a sentence of life imprisonment with the minimum period of parole ineligibility of 10 years (Wendy Scott). Even in that case, Scott had been charged with first degree murder, which has a mandatory 25 years of parole ineligibility and so received a significant sentence reduction by pleading guilty.

Four of the remaining 14 remedied false guilty plea cases (Brenda Waudby, C.F., C.M., Chris Bates) received a non-custodial sentence. Dinesh Kumar received a 90-day sentence to be served on the weekends. These are examples of what Deborah Turkheimer has identified as “lop-sided pleas” that she found in American cases dealing with expert evidence based on the controversial shaken baby syndrome.<sup>37</sup> They suggest that the legal system was accommodating the shaky basis of the underlying science in these cases not by acquitting the accused but by reducing their sentences. This is not how a system committed to giving the accused the benefit of any reasonable doubt is supposed to operation.

Both the Richard Catcheway and Clayton Boucher cases involved Indigenous men accused of a break and enter and possession of illegal drugs respectively who received “time served”

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<sup>37</sup> Deborah Tuerkheimer, *Flawed Convictions* (New York: Oxford University Press, 2014) at 159ff.

sentences and who had been denied bail after being charged. This provides support for Professor Webster's recent argument that Canada's high rate of pre-trial imprisonment, particularly in the case of long-term pre-trial detention, may contribute to false guilty pleas.<sup>38</sup>

### **G. Guilty Plea Wrongful Convictions Generally Require Proactive Work by More than the Accused to Remedy**

In 13 of the 15 cases, the guilty plea wrongful convictions were corrected primarily by actions by justice system participants other than the accused. Accused people who plead guilty will face many barriers overturning their plea and will often require some form of assistance from the state especially with respect to discovering new evidence that was not considered at the time of the guilty plea.

The eight cases related to Charles Smith's erroneous testimony required work by the coroners' office to commission opinions from better qualified experts and eventual agreement by prosecutors that the guilty plea in light of new evidence constituted a miscarriage of justice. The evidence that Richard Catcheway was in jail in Brandon at the time of the break and enter in Winnipeg he pled guilty to was originally obtained by a correctional official. A RCMP forensic lab conducted the analysis that established that Clayton Boucher was innocent of possessing illegal drugs. A Toronto police re-investigation of Paul Bernardo, a serial killer and rapist, was critical in overturning Anthony Hanemaayer's false guilty plea. Gerald Barton's false guilty plea was overturned after the complainant recanted after 38 years and the prosecutor agreed to entering the new evidence and reversing the convictions.

An important role of Canada's proposed Miscarriage of Justice Review Commission should be to reach out to those often-disadvantaged people who made false guilty pleas and to use public powers and funds to find new evidence. As will be discussed below, however, there are concerns that the bill that was introduced in the Canadian Parliament in February 2023 may impose high barriers by requiring applicants in every case, including guilty plea cases, to have appealed their cases to a Court of Appeal before they can apply to the new commission to request a new trial or new appeal. In summary conviction cases, this will require an accused who pled guilty to obtain decisions from two levels of appeal before the proposed Commission can consider their applications for assistance and relief.

## **III The Cases**

The 15 false guilty pleas are not just statistics. The Canadian Registry of Wrongful Convictions attempts to tell their stories as fully and fairly as possible from the information provided in publicly available documents. The Registry relies on publicly available documents in an attempt to minimize the trauma that wrongfully convicted persons have already suffered.<sup>39</sup> This

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<sup>38</sup> Cheryl Marie Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty" (2022) 3: 2 Wrongful Conviction L Rev 128.

<sup>39</sup> For an account of the trauma that media reporting can itself cause see Tamara Cherry, *The Trauma Beat* (Toronto: ECW Press, 2023).



focus also allows the Registry to document media and official responses to wrongful convictions. At the same time, it may result in the under-reporting of relevant personal characteristics of the wrongfully convicted that are not recorded by the media or the courts. This may particularly be the case with respect to mental health and cognitive issues.

#### **A. C.F.<sup>40</sup>**

An 18-year-old who did not know she was pregnant gave birth to a baby in 1996 who was either still-born or died shortly after birth. Charles Smith, when asked for a second opinion, concluded the cause of death was asphyxia and “in the absence of an alternative explanation, the death of this baby girl is attributed to infanticide.” C.F. was charged and pled guilty to infanticide. She received a 2-month conditional sentence to be served at home, 150 hours community service and 3 years probation.

C.F. received a pardon in 2006. With the prosecutor’s consent her guilty plea was overturned by the Ontario Court of Appeal in 2010 with the prosecutor subsequently withdrawing the infanticide charge.<sup>41</sup>

#### **B. C.M.<sup>42</sup>**

A 21-year-old who did not know she was pregnant gave birth in November 1992. Charles Smith performed the autopsy and concluded that the cause of death was “asphyxia (infanticide)”.

The woman was charged with second degree murder. She pled guilty to manslaughter, receiving a suspended sentence, 300 hours of community services and three years’ probation.

With the prosecutor’s consent, her guilty plea was overturned by the Ontario Court of Appeal in 2010<sup>43</sup> with the prosecutor subsequently withdrawing all charges.

#### **C. Sherry Sherett-Robinson<sup>44</sup>**

A 20-year-old was charged in 1996 with first degree murder of her four-month-old baby on the basis of Charles Smith’s conclusion that the baby had injuries to support a finding of intentional killing. In 1999, Sherry Sherett-Robinson pled guilty to infanticide and received a one-year sentence.

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<sup>40</sup> For a fuller account see “C.F.” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/c-f>.

<sup>41</sup> *R v CF*, 2010 ONCA 691.

<sup>42</sup> For a fuller account see “C.M.” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/c-m>.

<sup>43</sup> *R v CM*, 2010 ONCA 690.

<sup>44</sup> For a fuller account see “Sherry Sherett-Robinson” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/sherry-sherret-robinson>.

In 2009, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence that the injuries were not a result of her actions and entered an acquittal.<sup>45</sup>

#### **D. Maria Shepherd<sup>46</sup>**

Maria Shepherd, as a young and pregnant mother, pled guilty to manslaughter in the death of her three-year-old stepdaughter. She received a sentence of two years less a day that allowed her to serve her sentence with contact from her family.

In 2016, with the prosecutor's consent, the Ontario Court of Appeal admitted new evidence discrediting Charles Smith's evidence of an intentional killing and entered an acquittal.<sup>47</sup>

#### **E. Brenda Waudby<sup>48</sup>**

Brenda Waudby was charged with murdering her 21-month-old daughter, Jenna, who died of injuries sustained when in the care of a teen-aged babysitter. Charles Smith maintained that the blunt force injuries could have been inflicted by Waudby because of a "honeymoon period where an infant appears essentially normal."

In 1993, Brenda Waudby pled guilty to child abuse and was given a non-custodial sentence. Waudby's conviction was overturned with the prosecutor's consent on the basis of new evidence, including a manslaughter conviction of the babysitter. Justice Fuerst stated that "There was no factual basis to the charge of child abuse or to Ms. Waudby's guilty plea to it. Her guilty plea along with the ensuing conviction of child abuse was a miscarriage of justice". The judge added that Waudby "should have been treated over these many years as the person she is- a victim, not a perpetrator, a loving mother who suffered the excruciating loss of her daughter's life at the hands of someone else."<sup>49</sup> Unfortunately, this judgment exonerating Brenda Waudby was not officially published and not extensively covered in the media.

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<sup>45</sup> *R v Sherett-Robinson*, 2009 ONCA 886.

<sup>46</sup> For a fuller account see "Maria Shepherd" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/maria-shepherd>.

<sup>47</sup> *R v Shepard*, 2016 ONCA 188.

<sup>48</sup> For a fuller account see "Brenda Waudby" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/brenda-waudby>.

<sup>49</sup> "Brenda Waudby cleared of child abuse charges from 1997" *Peterborough This Week* (27 Jun 2012), online: [https://www.thepeterboroughexaminer.com/life/brenda-waudby-cleared-of-child-abuse-charges-from-1997/article\\_e45ac486-58a8-542a-825d-2a4f600b80ed.html](https://www.thepeterboroughexaminer.com/life/brenda-waudby-cleared-of-child-abuse-charges-from-1997/article_e45ac486-58a8-542a-825d-2a4f600b80ed.html)1997/article\_e45ac486-58a8-542a-825d-2a4f600b80ed.html; Roach, *Wrongfully Convicted*, *supra* note 2 at 25-27.

**F. Richard Brant**<sup>50</sup>

Richard Brant, who is Mohawk, was charged with manslaughter of his infant son on the basis of a Charles Smith diagnosis of shaken baby syndrome even though an autopsy had concluded the infant died as a result of complications from pneumonia.

Brant pled guilty to aggravated assault and was sentenced to six months' imprisonment in 1995. In 2011, with the prosecutor's consent, new evidence was admitted and Brant was acquitted by the Ontario Court of Appeal. The Court of Appeal explained: "Although he had always maintained that he did not harm his son, an important consideration for the appellant choosing to plead guilty was the unequivocal opinion of Dr. Charles Smith that the infant had died from non-accidental head injury. In the fresh evidence Mr. Brant has explained why he pleaded guilty notwithstanding his belief that he was innocent. Moreover, there is some doubt that the facts agreed to at the time of the guilty plea could support the charge of aggravated assault and we note that the trial judge who accepted the plea indicated that it appeared to be the result of a compromise."<sup>51</sup>

**G. Dinesh Kumar**<sup>52</sup>

Dinesh Kumar, a recent immigrant from India was charged with second degree murder in the death of his son in 1991 on the basis of a diagnosis of shaken baby syndrome by Charles Smith and another doctor at the Hospital for Sick Children.

He pled guilty in 1992 to criminal negligence causing death and received a sentence of 90 days' imprisonment to be served on the weekends. Such a sentence also avoided the threat of deportation from Canada if he had been convicted of murder. Concerns were expressed in the press about the leniency of the sentence.

In 2011, with the consent of the prosecutor, Kumar's guilty plea was overturned on the basis of fresh evidence and an acquittal was entered. The Court of Appeal noted that Dinesh Kumar "explained that he was in a new country with its own culture, and he did not speak English very well. He was told that he would be deported if convicted of murder or manslaughter but assured that the police would not report his case to immigration if he accepted the plea."<sup>53</sup>

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<sup>50</sup> For a fuller account see "Richard Brant" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/richard-brant>.

<sup>51</sup> *R v Brant*, 2011 ONCA 362 at para 1.

<sup>52</sup> For a fuller account see "Dinesh Kumar" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/dinesh-kumar>.

<sup>53</sup> *R v Kumar*, 2011 ONCA 120 at para 13.

**H. O’Neil Blackett**<sup>54</sup>

O’Neil Blackett, who is Black, was charged with the second-degree murder of 13-month-old Tamara on the basis of Charles Smith’s opinion that she had died from strangulation or blunt force.

After 15 months of pre-trial detention, Blackett pled guilty in August 2001 to manslaughter. He received a sentence of 3.5 years’ imprisonment. His lawyers had observed that “a jury was unlikely to be sympathetic to him because the case involved the alleged murder of an infant”. They also believed Blackett “would not be an effective witness on his own behalf.” At the same time, Blackett’s lawyers told him he should not pled guilty to something he did not do.<sup>55</sup>

In 2018, with the prosecutor’s consent, the Ontario Court of Appeal admitted new evidence that Smith’s opinion was unreliable and ordered a new manslaughter trial.<sup>56</sup> The prosecutor subsequently withdrew the charges.

**I. Simon Marshall**<sup>57</sup>

Simon Marshall pled guilty to 13 sexual assaults committed between 1992 and 1996 in Ste. Foy Quebec. He was sentenced to 62 months in prison and served his full sentence.

Shortly after his release, Marshall, who had both mental disorders and cognitive difficulties, confessed and pled guilty to two subsequent sexual assaults. Fortunately, he was excluded by DNA testing of these sexual assaults as. There were plans to seek his indeterminate detention through a dangerous offender designation. DNA testing subsequently excluded him of the earlier sexual assaults. His guilty plea to these sexual assaults were overturned by the Quebec Court of Appeal on the basis of the new evidence and an acquittal was entered.<sup>58</sup>

**J. Anthony Hanemaayer**<sup>59</sup>

In October 1989, Anthony Hanemaayer pled guilty to breaking and entering and committing an assault after he was identified at the first day of his trial by a homeowner as the person who broke into her home and assaulted her daughter. He was sentenced to two years less a day’s imprisonment. He had been told that if convicted at the completion of the trial, he might be sentenced to six years’ imprisonment.

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<sup>54</sup> For a fuller account see “O’Neil Blackett” (last visted May 2023), online: <https://www.wrongfulconvictions.ca/cases/o-neil-blackett>.

<sup>55</sup> *R v Blackett*, 2018 ONCA 119 at para 19.

<sup>56</sup> *Ibid*.

<sup>57</sup> For a fuller account see “Simon Marshall” (last visted May 2023), online <https://www.wrongfulconvictions.ca/cases/simon-marshall>.

<sup>58</sup> *Marshall c The Queen*, 2015 QCCA 852.

<sup>59</sup> For a fuller account see “Anthony Hanemaayer” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/anthony-hanemaayer>.

In 2008, with the consent of the prosecutor, the Ontario Court of Appeal admitted new evidence that Paul Bernardo was the perpetrator and acquitted Hanemaayer. Justice Marc Rosenberg stated: “the court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.”<sup>60</sup>

#### **K. Gerald Barton** <sup>61</sup>

Barton, who is Black and Indigenous, pled guilty in 1968 to having sex with a girl between 14 and 16 years of age after having been charged with rape. He was sentenced to one year of probation.

In 2011, his conviction was overturned on the basis of new DNA evidence excluding him and a recantation from the complainant. There were no published reasons for this decision. He later unsuccessfully sued for compensation.<sup>62</sup>

#### **L. Chris Bates** <sup>63</sup>

Chris Bates’ conviction of second-degree murder, robbery and conspiracy to commit robbery was overturned by the Quebec Court of Appeal in 1998 on the basis of evidence that was not disclosed to him at his 1994 trial.

A new trial was ordered but Bates pled guilty to conspiracy to commit a robbery stating he was “tired of all this”. He received a conditional sentence and probation. In 2014, the Quebec Court of Appeal refused to grant Bates an appeal out of time on the basis of new evidence that his plea was a result of post-traumatic stress disorder, emphasizing the importance of the finality of verdicts and that Bates was able to avoid prison by pleading guilty.<sup>64</sup> Although Bates has yet to receive a remedy this case was included in the Registry because it correlates with strong indicia of other guilty plea wrongful convictions and is subject to a pending application to the Minister of Justice for a new trial or new appeal.

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<sup>60</sup> *R v Hanemaayer*, 2008 ONCA 580 at para 18.

<sup>61</sup> For a fuller account see “Gerald Barton” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/gerald-barton>.

<sup>62</sup> *Barton v Nova Scotia*, 2015 NSCA 34.

<sup>63</sup> For a fuller account see “Chris Bates” (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/chris-bates>.

<sup>64</sup> *Bates c R*, 2014 QCCA 2269.

**M. Clayton Boucher<sup>65</sup>**

In 2017, Clayton Boucher, a Métis man, pled guilty to possession of drugs even though he claimed that a white substance found in a baking soda container after a search of house was baking soda. Boucher pled guilty and received a sentence of time served shortly after his wife has been killed in a car accident.

Subsequent analysis revealed that the substance was not illegal drugs. Clayton Boucher's drug conviction was overturned, and an acquittal entered by the Alberta Court of Appeal with the consent of the prosecutor but without published reasons.

**N. Richard Catcheway<sup>66</sup>**

In 2017, Richard Catcheway, an Indigenous man with cognitive difficulties, pled guilty to a break and enter and received a sentence of time served for his 6 months in pre-trial detention. A prison administrator subsequently forwarded evidence to Catcheway's lawyer that Catcheway had been in prison at the time of the break in. This new evidence was admitted with the Manitoba Court of Appeal stating that it "conclusively proves the accused's innocence".<sup>67</sup>

**O. Wendy Scott<sup>68</sup>**

In 2012, Wendy Scott, a woman with cognitive difficulties and an IQ of 50, was charged with first degree murder but pled guilty to second degree murder of a man in Medicine Hat. She had made incriminating but inconsistent statements when interrogated by the police. In 2015, the Alberta Court of Appeal, with the consent of the prosecutor, quashed her conviction and ordered a new trial without published reasons. The prosecutor subsequently stayed proceedings in 2017.

**Summary**

The wrongfully convicted people and the families affected by these 15 wrongful conviction guilty pleas matter. The injustices they suffered should inspire change in criminal justice policies. At the same time, these remedied false guilty pleas are likely only the tip of the iceberg of cases where people felt they had no choice but to pled guilty despite being innocent or having a defence for the crime committed. The absence of any published reasons for overturning guilty pleas in four of the 15 cases and the absence of an extended discussion of the dilemma faced by those who enter false guilty pleas in most of the cases (*R. v. Hanemaayer* being the most important exception) is regrettable because it fails to raise awareness of false guilty pleas among criminal justice participants and policy-makers.

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<sup>65</sup> For a fuller account see "Clayton Boucher" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/clayton-boucher>.

<sup>66</sup> For a fuller account see "Richard Catcheway" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/richard-catcheway>.

<sup>67</sup> *R v Catcheway*, 2018 MBCA 54 at para 8.

<sup>68</sup> For a fuller account see "Wendy Scott" (last visited May 2023), online: <https://www.wrongfulconvictions.ca/cases/wendy-scott>.

## IV What Can Be Done About False Guilty Pleas?

### A. Eliminate Mandatory Sentences, Including for Murder

The majority of the remedied false guilty pleas were cases involving the flawed expert testimony of Charles Smith. In most of these cases, the accused was charged with murder, which carries a mandatory sentence of life imprisonment. All of the accused pled guilty to lesser offences that had no mandatory minimum penalty.

In 1997, Justice Lynn Ratushny, in her Self-Defence Review, noted that the threat of mandatory life imprisonment made it very difficult for women with self-defence claims who were charged with murder to refuse a plea bargain to manslaughter. Unfortunately, Justice Ratushny's 1997 recommendation to allow exceptions from mandatory life imprisonment in murder cases has still not been implemented more than a quarter of a century later even though many democracies do not require mandatory life imprisonment for murder.<sup>69</sup>

### B. Regulate Sentencing Discounts

The remedied false guilty pleas involving Charles Smith, as well as the other remedied false guilty pleas in the registry, involve steeply discounted sentences as represented by the average sentence of 10 months. Canadian law makes no attempt to remedy the sentencing discount that an accused receives for a guilty plea. Such discounts also constitute *de facto* penalties for going to trial should, as happens in the majority of cases, the accused not receive an acquittal.

English law has attempted to regulate guilty plea sentencing discounts in an attempt to ensure that such discounts are not disproportionate or coercive. Nevertheless, it should be noted that false guilty pleas are a problem in the United Kingdom. Indeed, they constitute 85 of 466 recorded wrongful convictions recorded in the University of Exeter's registry. Sentencing discounts appeared to play a role in those false guilty pleas. In the 85 UK cases that involved a guilty plea, each accused served an average of 0.37 of a year's sentence compared to an average time served of 5.11 years in all 467 remedied miscarriages of justice.<sup>70</sup>

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<sup>69</sup> Hon Lynn Ratushny, "Self-Defence Review" (11 July, 1997), online (pdf): online: <https://www.publicsafety.gc.ca/lbrr/archives/ke%208839%20r3%201997-eng.pdf>>. For similar and recent recommendations in the United States, see Thea Johnson, "Plea Bargaining Task Force Report" (2023) at 15-16, online(pdf): <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>.

<sup>70</sup> "Case Search Graph" (last visited 8 Feb 2008), online: <https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/overview-graph/>. The 804 remedied guilty plea wrongful convictions in the American registry also feature many low sentences including orders of probation or a few months in prison. See "Exoneration Detail List" (last visited May 2023), online: <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P>.



### C. Make Searching Reviews of Guilty Pleas Mandatory and Place Less Emphasis on Plea Bargaining as the Solution to Trial Delay

In 2019, Parliament, as part of Bill C-75, added a factual basis to provisions in the *Criminal Code* that also provide for an inquiry into whether a guilty plea is knowing and voluntary. Unfortunately, all of these provisions are subject to s.606(1.1) of the *Criminal Code*, which provides that the failure of a judge to make such inquiries does not affect the validity of the plea.

Reported cases on this new provision do not so far reveal that judges are engaging in substantial inquiries into the factual basis of a plea. One recent decision of the Prince Edward Island Supreme Court reveals a somewhat casual approach to this requirement that accepts agreed statements of facts at face value. In affirming the guilty plea, the judge stated: “I note parenthetically that at the June 16, 2020 hearing counsel presented an Agreed Statement of Facts signed by the Crown, defence counsel” and the accused. “Both the Crown and defence confirmed their submissions that the facts supported the charges for which Mr. Cudmore had offered the pleas of guilty. I was satisfied the agreed facts supported the charges for which Mr. Cudmore had offered pleas of guilty and as such, I accepted Mr. Cudmore’s pleas of guilty in relation to the charges.”<sup>71</sup> Some courts seem even to have accepted that the wording of the charge itself provides a factual basis and also presume that the plea is valid if the accused is represented by a lawyer.<sup>72</sup>

Unless judges become comfortable exercising inquisitorial powers at the guilty plea hearing stage or an accused goes “off script,”<sup>73</sup> it is unlikely that guilty plea hearings will often serve as a tool to prevent guilty plea wrongful convictions. As Justice Pomerance has stated: “false guilty pleas can be difficult to detect... It is relatively easy to divine what the “correct” answers are to the court’s questions. The accused will invariably have been asked the same questions by his or her lawyer in the discharge of counsel’s ethical obligations. Moreover, the traditional plea inquiry does not tend to concern itself with the substantive quality of a guilty plea.”<sup>74</sup> Courts of Appeal also remain reluctant to overturn guilty pleas in the absence of clear evidence of a miscarriage of justice.<sup>75</sup> The 15 remedied false guilty pleas in the Canadian registry all had such clear evidence and in the vast majority of these cases, this evidence was produced by state officials with prosecutors often agreeing to reverse the conviction.

Despite its recognition of wrongful convictions as an inevitable reality that precludes extradition to face the death penalty,<sup>76</sup> the Supreme Court of Canada has facilitated plea bargaining in a way that may also facilitate false guilty pleas. In 2014, the Court noted that: “it is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the

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<sup>71</sup> [R v Cudmore, 2020 PESC 25](#) at para 13.

<sup>72</sup> [R v Harris, 2022 BCPC 250](#) at paras 20, 27.

<sup>73</sup> For an example of a more searching inquiry that found that a guilty plea while voluntary and informed should be struck as a miscarriage of justice, see [R v McIlvride-Lister, 2019 ONSC 1869](#).

<sup>74</sup> *Ibid* at paras 63-64. See also [Khanfoussi c R, 2010 QCCQ 8687](#) at paras 9-10.

<sup>75</sup> [R v CK, 2021 ONCA 826](#); [R v Tallio, 2021 BCCA 314](#); [R v Zaworski, 2022 BCCA 144](#); *R. v. King*, 2022 ONCA 665.

<sup>76</sup> [United States v Burns, 2001 SCC 7](#).

accused pleads guilty.”<sup>77</sup> In 2016, it stressed that trial judges should only depart from a joint submission on sentencing if the result would bring the administration of justice into disrepute.<sup>78</sup> The Supreme Court of Canada has stressed the need for increased efficiency and a rejection of a “culture of complacency towards delay”<sup>79</sup> but without advertent to the risks of guilty plea wrongful convictions. The Court’s approach is consistent with what both Mirjan Damaska and Darryl Brown have argued is a *laissez faire* approach taken to plea bargaining by American courts that is based on free market assumptions about the minimal state that accepts the bargained decisions of the parties without putting much effort into ensuring that the result of the bargain is accurate.<sup>80</sup>

In 2018, the Supreme Court of Canada decided its first major guilty plea case since 1973 where the majority of the Court rejected Chief Justice Laskin’s call in dissent to ensure that a factual basis for a guilty plea was established.<sup>81</sup> In the 2018 case, the majority of the Court refused to overturn a guilty plea on the basis that the accused permanent resident of Canada would still have pled guilty to selling a small amount of cocaine to an undercover officer had he known that as a result of his conviction and nine-month sentence, he would have been declared inadmissible to Canada and deported to China due to of serious criminality.<sup>82</sup> The majority reached this conclusion even though the United States Supreme Court requires that a person be informed of the collateral consequence of deportation before pleading guilty to a charge.<sup>83</sup>

If the Supreme Court of Canada’s restrictive subjective test in *R. v. Wong* was applied to the eight people- five women and three racialized men- who pled guilty when faced with Charles Smith’s faulty expert evidence, their challenges to their false guilty pleas might not have been successful. Why? Decades after their false guilty pleas, a number of these wrongly convicted person have publicly stated they would have enter false guilty again for the good of their families if they were again placed in similar difficult circumstances.<sup>84</sup>

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<sup>77</sup> [R v Babos, 2014 SCC 16](#) at para 59.

<sup>78</sup> [R v Anthony-Cook, 2016 SCC 43](#).

<sup>79</sup> [R v Jordan, 2016 SCC 27](#) at para 4.

<sup>80</sup> Mirjan Damaska, *Faces of Justice and State Authority* (New Haven: Yale University Press, 1986); Darryl K. Brown *Fair Market Criminal Justice: How Democracy and Laissez Faire Undermine Criminal Justice* (New York: Oxford University Press, 2016).

<sup>81</sup> [Adgey v The Queen, \[1975\] 2 SCR 426](#). In 1991, the Court allowed a Crown appeal after a guilty plea to unlawful confinement was overturned subsequent to the acquittal of the accused’s alleged accomplice and co-accused for both unlawful confinement and sexual assault from the same incident. [R v Hick, \[1991\] 3 SCR 383](#).

<sup>82</sup> [R v Wong, 2018 SCC 25, \[2018\] 1 SCR 696](#).

<sup>83</sup> [Padilla v Kentucky, 559 US 356 \(2010\) 359](#).

<sup>84</sup> Maria Shepherd has stated that she was “terrified and pregnant” when she pled guilty and received a sentence that allowed her to be imprisoned in a provincial facility with touch visits from her family. She has explained that she pled guilty “with all intentions to save my family. In my view, under the circumstances, it was the right decision. Had I not done that I don’t know if I would be where I am today” as quoted Roach, *Wrongly Convicted*, *supra* note 2, at 24. Brenda Waudby has similar explained that her guilty plea to child abuse “worked. I did save my family.” *Ibid* at 27. On the other hand, Tammy Marquardt who turned down a manslaughter plea in another case involving Charles Smith was convicted of murdered

Many of those whose false guilty pleas were remedied after Charles Smith's testimony was debunked were given deals that were too good to refuse. This is especially true given that most of the eight wrongfully convicted faced mandatory life imprisonment if they went to trial and were convicted of murder. In these cases, mandatory sentences, steep sentencing discounts and the absence of provisions to ensure that the trial judges inquire into whether there was a factual basis for the guilty plea in every case all combined to produce miscarriages of justice.

#### **D. Ensure Culturally and Medically Competent Defence Lawyers with Less Financial Incentives to Enter Guilty Pleas**

Christopher Sherrin has demonstrated how private lawyers can make more money from their clients' guilty pleas than going to trial under Ontario's legal aid scheme.<sup>85</sup> When combined with the guilty plea discounts on sentencing, this presents compelling incentives built into the political economy of the criminal justice system for guilty plea wrongful convictions.

Despite 2018 recommendations by a Federal/Provincial/Territorial Heads of Prosecution Sub-committee on the Prevention of Wrongful Convictions<sup>86</sup>, no ethical codes have been changed to provide defence lawyers with clear guidance in dealing with what the late Justice Marc Rosenberg called the "terrible dilemmas"<sup>87</sup> posed when accused who may be innocent or have a valid defence are offered a plea bargain with a heavily reduced sentence.

Existing ethical codes in Canada speak of clients being required voluntarily to admit guilt,<sup>88</sup> but this begs the question of whether the clients are actually guilty. Even if defence lawyers refused to pled a client who privately maintained their innocence guilty, the accused could seek other legal representation and be less candid with their new lawyer.

#### **E. Require Prosecutors to Screen Charges Even When They Do Not Know the Accused is Factually Innocent**

The Federal/Provincial/Territorial (FPT) Heads of Prosecutions Sub-committee on the Prevention of Wrongful Convictions suggested that prosecutors should never accept a guilty plea from an accused they know to be "factually innocent". The federal Director of Public Prosecution's deskbook similarly states that prosecutors should not accept guilty pleas if the prosecutor "has knowledge or concerns based on the evidence that suggest the accused may be factually innocent." This provision is intriguing because it demonstrates that even while Canadian courts have rejected

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and served 11 years in jail, often in solitary confinement because other inmates thought she had murdered her child. She stated that the truth as determined at trial "didn't set me free; it gave me a life sentence." *Ibid* at 77.

<sup>85</sup> Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal & Social Issues 1.

<sup>86</sup> Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) Chapter 8 – False Guilty Pleas

<sup>87</sup> *R v Hanemaayer*, 2008 ONCA 580 at para 18.

<sup>88</sup> Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) 193.

the concept of factual innocence as creating two categories of not guilty verdicts,<sup>89</sup> it is used by prosecutors in the guilty plea context.

In my view, the high and often impossible factual innocence standard should not be the standard for prosecutors accepting guilty pleas. Prosecutors may often not be in a position to know whether an accused is or is not factually innocent when accepting a plea. Given this, they should, when possible, ensure that forensic tests are conducted as soon as possible. In the Simon Marshall case, prompt DNA testing would have prevented his wrongful conviction and suffering. In the Charles Smith or other cases involving forensic pathology or less definitive forensic science, however, prosecutors may rarely be in a position to know that the accused was actually factually innocent. Justice Pomerance has carefully distinguished between factual innocence as a fact and the belief of accused persons in their factual innocence while indicating that the latter factor is relevant to determining whether a guilty plea should be struck as a miscarriage of justice.<sup>90</sup> Prosecutors should also not offer or accept a guilty plea unless the relevant charge screening requirement in their jurisdiction is satisfied. They should also exercise special care in cases where an accused is charged with murder and is subsequently offered a sentence to a lesser offence and a deep discount from a mandatory sentence of life imprisonment.

Unfortunately, prosecutors may have incentives to offer a plea to avoid lengthy disputes in court about expert evidence that they present in a case. Prosecutors should be concerned about cases where they provide significant bargains that may induce an accused into pleading guilty. Prosecutors should also continuously review if there is a reasonable or in some jurisdictions substantial likelihood of conviction and never offer a plea if the relevant charge screening standard is not satisfied. They should not wait to halt plea bargains in the rare and easy cases where they know that the accused is or even might be factually innocent. Such a standard would likely have only prevented a false guilty plea in two (Richard Catcheway and Clayton Boucher) of the above 15 remedied false guilty plea cases.

Prosecutors are also in a position to ask the police or forensic experts to conduct additional investigations in cases where there are concerns about innocence.<sup>91</sup> Indeed, they often be in a

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<sup>89</sup> [\*R v Mullins-Johnson\*, 2007 ONCA 720](#).

<sup>90</sup> She explained: “The accused need not demonstrate innocence as a pre-condition for striking a plea. In this case, the accused seeks to strike the plea before a conviction has been registered, and before a sentence has been imposed. She asks, not that she be acquitted, but that she be given the right to a trial. To require a showing of innocence in this context is to set the bar too high. An accused need not prove innocence *at* a trial. She should not have to prove innocence to *have* a trial. Moreover, the issue of guilt or innocence is the very issue to be determined at a trial if the plea is struck. To require a showing of innocence would render the trial superfluous. Worse, it would supplant the trial with a process in which the onus is placed on the accused rather than on the prosecution. Therefore, the question is not whether the person who offered the plea is actually innocent, or can prove innocence. The question is whether the person who offered the plea believed that she was innocent and pleaded guilty despite that belief.” [\*R v McIlvrde-Lister\*, 2019 ONSC 1869](#) at paras 69-71.

<sup>91</sup> For an interesting argument that prosecutors have an ethical duty to ensure that the expert evidence they present to the court is demonstrably reliable see Gary Edmond, “(Ad)ministering Justice and the Professional Responsibilities of Prosecutors” (2014) 37 UNSWLJ 921.

better position to prevent guilty plea wrongful convictions than defense counsel who may not have the resources to investigate. Even trial judges in the adversarial system are not equipped or inclined to act as investigators to determine the factual validity of the plea. This affirms the criminological insight that prosecutors are often the most powerful person in the courtroom. Through their control of plea discussions, they can act both as judge and sentencer.

The dangers of inducing false guilty pleas should also be considered by prosecutors when laying charges especially those such as murder that have mandatory minimum sentences. Care should also be taken with respect to pre-trial detention that equals or exceeds a realistic estimate of a sentence should the accused be convicted because this may place people in a situation where it is perfectly rational to plead guilty regardless of their guilt. Two Indigenous men, Clayton Boucher and Richard Catcheway, were denied bail despite being charged with less serious offences. They made rational decisions to make false guilty pleas which resulted in their immediate release with a time already served sentence.

The 2018 edition of the FPT report on wrongful convictions deserves credit for adding a new chapter on “false guilty pleas” and stating that “a false guilty plea is never acceptable in Canada’s criminal justice system.”<sup>92</sup> Citing the many false guilty pleas produced in the Charles Smith baby death cases, as well as the Anthony Hanemaayer case from Ontario and the Simon Marshall case from Quebec, the 2018 report acknowledged that guilty plea wrongful convictions have occurred in Canada, but concluded that “we simply do not know the scope of the phenomenon.”<sup>93</sup> The data in the Canadian Registry now suggests that the false guilty plea problem is significant and that the weight of the problem is borne by the most disadvantaged. That said, the extent of wrongful convictions especially false guilty pleas, will never be known given how difficult it is to remedy them. It is possible that the vast majority of people who enter false guilty pleas simply accept such an injustice and never attempt to overturn their conviction. This may especially be true with respect to those who plead to less serious crimes and are not presented with evidence of innocence by other criminal justice system participants.

The 2018 FPT report takes an individualistic as opposed to a systemic approach to false guilty pleas.<sup>94</sup> For example, it describes many of the causes of false guilty pleas in psychological terms related to the accused. It suggests that these factors were matters for defense counsel to consider in part because “the state, as represented by the police and prosecutor, clearly has no control over many of these factors, beyond being attuned to them during police interrogations and during the Crown review of the file when assessing the prospect of conviction.”<sup>95</sup> This ignores that

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<sup>92</sup> Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) 170.

<sup>93</sup> *ibid.*

<sup>94</sup> For arguments that increased pre-trial detention producing false guilty pleas are related to structural factors notably risk aversion in refusing to grant bail or bail reviews as opposed to the intentional fault of individual criminal justice actors see Cheryl Marie Webster, “Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty” (2022) 3: 2 Wrongful Conviction L Rev 128 at 152-155.

<sup>95</sup> Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* (Ottawa: Ministry of Justice, 2018) at 178.

prosecutors do have control over how many charges the accused faces and what sort of charge and sentence bargain they are offered.

Prosecutors will defend themselves by arguing that they will not lay charges if there is no reasonable prospect of conviction. Fair enough, but prosecutors should also examine whether the public interest is served when scary top-end charges like murder are withdrawn and an accused who may be suffering in custody or on strict bail conditions is given an offer with a steep sentencing or charge discount that they cannot refuse. The FPT report focuses on ethical codes that guide defense lawyers, prosecutorial guidelines or deskbooks, judicial education and the need for additional research. Perhaps understandably from a report that emerged from the work of senior prosecutors and police officers, it did not attribute guilty plea wrongful convictions to systemic flaws in the justice system.

#### **F. Improve Bail Review and Remand Facilities**

Another systemic factor that contributes to false guilty pleas is the tendency to deny bail and the harsh conditions that those denied bail face. In 2001, about 38% of criminal cases in Ontario started in bail court but that number had increased to 46% in 2017.<sup>96</sup> Although most people are released at bail hearings, those denied bail constitute a majority of those imprisoned in provincial facilities. In Ontario remand prisoners constituted 71% of the daily inmate population. Moreover, they were on average detained for 43 days in 2018 while those who were convicted or pled guilty and were sentenced to a provincial facility were detained in custody on average 59 days.<sup>97</sup> This suggests that average pre-trial detention, especially if the 1.5 day credit for every day spent in remand is applied, may quickly reach the point where a rational accused who is not concerned about a criminal record will plead guilty and receive a sentence of time served even if they are innocent or have a valid defence. Professor Webster has identified those subjects to pre-trial detention for six months at more as most at risk for false guilty pleas. She notes that in 2016 there were 2,035 persons subject to such long-term detention in Canada.<sup>98</sup> Bail reviews need to be improved to reduce such incentives for false guilty pleas.

In a series of recent decisions, the Supreme Court of Canada has paid greater attention to the high numbers of people denied bail. It has stressed the importance of considering alternatives to detention<sup>99</sup> and mandatory reviews after 90 days of remand detention.<sup>100</sup> In the latter case, it noted that even in the 1972 bail reforms, the government had been attentive to the fact that people denied bail could be induced into pleading guilty. In 2010, an Ontario judge warned that:

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<sup>96</sup> “Trends in Bail Courts Across Canada” (October 2018), online: <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/dec01.html>.

<sup>97</sup> “Auditor General of Ontario report on Adult Correctional Institutions” (2018) at 16, online (pdf): [https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3\\_100en19.pdf](https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf). See also Cheryl Webster, *‘Broken Bail’ in Canada: How We Might Go About Fixing It*. (Ottawa: Department of Justice, Canada, 2015).

<sup>98</sup> Cheryl Marie Webster, “Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty” (2022) 3: 2 Wrongful Conviction L Rev 128 at 146.

<sup>99</sup> *R v Antic*, 2017 SCC 27, [2017] 1 SCR 509.

<sup>100</sup> *R v Myers*, 2019 SCC 18, [2019] 2 SCR 105.



Public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if [they were] convicted.<sup>101</sup>

Yet, there is no systemic means of ensuring that pre-trial detention does not exceed the time that the accused would serve if found guilty. This is a compelling concern given the relatively short time of many sentences. Most remedied wrongful convictions involve serious crimes and those who make false but rational guilty pleas to less serious offences once they have already been detained for as long as they likely to be sentenced will face many challenges in remedying their wrongful convictions.

People may plead guilty because of the poor and often violent conditions in jails where they are held when denied bail. For example, from January 2012 to July 2017, 174 people died in provincial facilities across Canada while denied bail and awaiting trial. Remand prisoners who had been denied bail were even more likely to die than sentenced prisoners in those facilities.<sup>102</sup> In 2018, three inmates in a London Ontario facility died in the course of six weeks.<sup>103</sup> In December 2019, there were 41 COVID cases at a Calgary remand center where inmates were tripled bunked, substantially increasing their chances of contracting this potentially deadly disease.<sup>104</sup> Overcrowding, high turnover rates in the pre-trial population and frequent lock-downs are also associated with self-harm<sup>105</sup> which in some cases could include the entry of a false guilty plea in the hope of being released from pre-trial detention. Prolonged, harsh and sometimes violent periods of pre-trial detention will create predisposing circumstances for false guilty pleas.

#### **G. Create a Proactive and Well-Funded Commission to Review Convictions and Sentences**

A guilty plea wrongful conviction can happen in a matter of minutes. Once the guilty plea is entered, however, it can take decades for the convicted person to correct the miscarriage of justice. As discussed above, in 14 of the 15 remedied cases, the convicted person needed assistance from prosecutors, prison officials, coroner's offices or forensic labs to correct their false guilty

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<sup>101</sup> *R v White*, 2010 ONSC 3164 at para 10. For additional discussion see Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Sask L Rev 55.

<sup>102</sup> In 50 of those cases the cause of death was suicide; nine were drug or alcohol related, four were homicides; and, in 46 cases, the cause of death was undetermined. See Anna Mehler Paperny "Canada's Jailhouse Secret" *Global News* 3 Aug 2017), online: <https://globalnews.ca/news/3644735/canada-jail-prisoners-dying/>.

<sup>103</sup> "Inmates are dying left, right and centre" *CBC News* (17 Jan 2018), online: <https://www.cbc.ca/radio/thecurrent/the-current-for-january-17-2018-1.4490288/inmates-are-dying-left-right-and-centre-third-death-in-six-weeks-renews-criticism-of-ontario-prison-1.4490295>.

<sup>104</sup> Meghan Grant, "Inmates tripled-bunked at Calgary remand centre" *CBC News*, (30 Nov 2020) online: <https://www.cbc.ca/news/canada/calgary/calgary-remand-centre-covid-outbreak-1.5822434>.

<sup>105</sup> Malcolm Horton et al, "Assessing the Predictability of Self-Harm" (2018) 6 Health Justice 18; Irina Frank et al, "Prison mental healthcare" (2009) 32 Current Opinion Psychiatry 342.



pleas. In many cases, they had to wait a decade or more before their false guilty plea was finally overturned.

In their 2021 report, Justices Harry LaForme and Juanita Westmoreland-Traoré stressed the need for an adequately funded proactive commission of at least nine persons that would have enhanced powers to investigate claims that either a conviction or a sentence constitutes a miscarriage of justice.<sup>106</sup> They stressed the need for a commission to conduct outreach to disadvantaged groups and to provide support for applicants. This equality-based approach was supported when the Canadian Registry was launched and revealed that the majority of Canada's 15 false remedied false guilty pleas were made by members of disadvantaged groups - women, Indigenous and other racialized groups and those with cognitive challenges.

In response to the LaForme and Westmoreland-Traoré report, the Canadian government introduced Bill C-40 for first reading in Parliament in February 2023. The bill would create a miscarriage of justice review commission to replace the role of the federal Minister of Justice in ordering new trials or appeals on the basis of new evidence. One problem with the bill, however, is that it deems inadmissible applications if “a court of appeal has not rendered a final judgment on appeal...”.<sup>107</sup> This is contrary to Justices LaForme and Westmoreland-Traoré's recommendation that “the new commission have the flexibility to define its own acceptance and screening policies without rigid statutory requirements. We also do not think that there should be a rigid exhaustion of appeal requirement as required as under s.696.1 and that it should be subject to exceptions in circumstances defined by the commission.”<sup>108</sup>

Unlike the Criminal Cases Review Commission in England and Wales, Bill C-40 does not allow the proposed commission to consider applications in “extraordinary circumstances” that were not appealed to the Court of Appeal. As written, it is possible that accused who had their leave to appeal denied by a Court of Appeal may not be eligible to apply to the new commission.<sup>109</sup> Those who have made false guilty pleas may have difficulty in presenting new evidence to the Court of Appeal that could challenge their conviction. In this respect, it is significant that almost none of the accused in Canada's 15 remedied false guilty pleas found new evidence without assistance from other criminal justice actors. Finally, appellate courts have, even after changes to the Criminal Code that indicate that guilty pleas should not only be informed and voluntary but also have a factual basis, continued to be reluctant to allow appeals from guilty pleas.<sup>110</sup> This may make it difficult for applicants to obtain legal aid or leave to appeal from false guilty pleas.

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<sup>106</sup> Hon Harry LaForme & Hon Juanita Westmoreland-Traore, “A Miscarriages of Justice Commission” (Oct 2021), online: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html>.

<sup>107</sup> “Bill C-40, An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)”, 1st Reading, *House of Commons Debates*, 44-1, 151 162 (16 Feb 2023), s.3 and proposed s.696.4(1)(a). For analysis, see Kent Roach, “The Proposed Canadian Miscarriage of Justice Commission” (2023) 71 CLQ 1.

<sup>108</sup> Hon Harry LaForme & Hon Juanita Westmoreland-Traore, *A Miscarriages of Justice Commission* (Oct 2021) at 144, Recommendation 31.

<sup>109</sup> See, for example, *Whittaker v R*, 2023 NBCA 8, denying leave to appeal a conviction where the accused pled guilty.

<sup>110</sup> *R v Zaworski*, 2022 BCCA 144; *R v Tallio*, 2021 BCCA 314; *R v CK*, 2021 ONCA 826.

Those who have entered false guilty pleas may often not be in a viable position to bring two levels of appeal in summary conviction cases or even one level of appeal in indictable offences. Bill C-75 enacted in 2019 made 118 previously indictable offences subject to summary conviction trials in provincial courts at the election of the prosecutor. It also encouraged the use of summary conviction procedures by raising the statute of limitation from 6 to 12 months and increasing the standard maximum penalty for summary convictions from 6 months to 2 years less a day. An unintended consequence of these changes that seems not to have been considered in the drafting of Bill C-40 is the requirement that those convicted under summary procedures must bring two levels of appeal, first to the provincial superior court and then to the Court of Appeal, before they are eligible to have the proposed commission even consider their application to receive a remedy of a new trial or a new appeal for a miscarriage of justice. Those who have received sentences under 2 years already have difficulty redressing wrongful convictions given the general lack of availability of legal aid or *pro bono* assistance from Canada's few Innocence Projects. The proposed restriction in s.3 of Bill C-40 will require potential applicants to have the resources to lose two levels of appeal before even being eligible to apply to the new commission which will have public funds and public powers to search for new evidence that a miscarriage of justice may have occurred. The reluctance of appellate courts to re-open guilty pleas may make it less likely that many people who have made false guilty pleas will try to appeal once, let alone twice.

The evidence in the Canadian registry suggests that victims of guilty plea wrongful convictions may be even more disadvantaged than other victims of wrongful convictions. All but one of the remedied false guilty pleas (Chris Bates) in the Canadian registry obtained remedies in the first appeal and Bates is still awaiting a decision from the Minister of Justice about his remedies. These 14 persons would have been unable to apply to the Miscarriage of Justice Review Commission proposed under Bill C-40 until they had been able to appeal their guilty plea to the Court of Appeal. If Bill C-40 is enacted in its current form, its promise of justice for the significant percentage of wrongfully convicted people who pled guilty, especially to offences prosecuted by way of summary conviction, may be illusory.

#### **H. Those who Plead Guilty to Crimes that they Did Not Commit Should Not be Precluded from Compensation**

A search of public available information suggests that only 4 of the 15 people who were wrongfully convicted on the basis of false guilty plea received any compensation. Both the federal and Nova Scotia governments opposed Gerald Barton's claims of compensation. They did so through numerous court hearings and even after a judge assessed relevant damages at \$75,000. The Nova Scotia Court of Appeal denied Barton relief, stating: "There is no guarantee in Canada that money will be paid to compensate a person who claims to have been wronged after an acquittal. This case demonstrates that fact."<sup>111</sup>

In their report, Justices LaForme and Westmoreland-Traoré recommended that the federal government should provide modest no-fault compensation for the wrongfully convicted. They also observed that the United Nations Human Rights Committee had found Canada's approach to

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<sup>111</sup> [Barton v Nova Scotia \(Attorney General\)](#), 2015 NSCA 34 at para 1.

compensation to have breached its international law obligations.<sup>112</sup> They also heard from the wrongfully convicted that having to litigate against governments after their wrongful convictions was a form of re-victimization.

Bill C-40 does not address compensation for the wrongfully convicted. Those who make false guilty pleas will continue to face special challenges in receiving compensation for their wrongful convictions. They may be blamed for having participated in their own wrongful convictions. Those who pled guilty to imagined crimes that never happened may face special challenges in establishing factual innocence which is still formally required in 1988 FPT guidelines governing compensation.<sup>113</sup>

## V Conclusion

In its 2018 report, the FPT Heads of Prosecution subcommittee for the first time recognized that Canada has a false guilty plea problem. At the same time, it stated that “no Canadian studies to date have quantified, through empirical research, the scope of the phenomenon of accused persons in Canada choosing to plead guilty to crimes they did not commit.” This has changed because of the work of the Canadian Registry of Wrongful Convictions. This work has made clear that false guilty pleas happen in 17% of all remedied wrongful convictions in Canada.

How many more false guilty pleas exist and could be remedied with the help of a proactive and well-resourced Miscarriage of Justice Commission is unknown. Unfortunately, the proposed Miscarriage of Justice Review Commission in Bill C-40 will be unlikely to discover many false guilty pleas given its proposed rigid requirement that applicants must have had their appeals rejected by the provincial Court of Appeal. Disadvantaged accused who have made false guilty pleas may have difficulty obtaining legal aid or leave to appeal to the Court of Appeal. Those who plead guilty in provincial courts to summary conviction offences will have to bring two unsuccessful appeals before they can apply to the Miscarriage of Justice Review Commission.

If applicants are able to bring such appeals, their appeals are likely to be rejected given the reluctance of courts of appeal to overturn guilty pleas. This same reluctance may make it more difficult for applicants, especially disadvantaged applicants including the women, Indigenous and other racialized people and those with cognitive challenge who made the majority of Canada's remedied false guilty pleas, to receive the legal aid funding necessary to bring such appeals in the first place.

Canada's remedied false guilty pleas required assistance from the state to correct their miscarriages of justice. It would be unfortunate if the proposed new Miscarriage of Justice Review Commission was not in a position to offer such assistance because of rigid and inflexible statutory

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<sup>112</sup> LaForme & Westmoreland-Traore, *A Miscarriage of Justice Commission*, *supra* note 105 at 205.

<sup>113</sup> See generally Kathryn Campbell, *Miscarriages of Justice in Canada* (Toronto: University of Toronto, 2018) ch 11; Myles Frederick McLellan, *Compensation for Wrongful Convictions in Canada* (Moldova: Eliva Press, 2021).

requirements that require an unsuccessful appeal to a Court of Appeal before the new commission could offer its assistance.

Canada has, since the 1990's, accepted and encouraged plea bargaining as a way to ensure efficiency and compliance with speedy trial standards under the Charter. Too much confidence has been placed in existing legal and ethical standards to ensure that innocent people and those with a valid defence are not pressured into pleading guilty. It has been suggested in this article that the legal standards imposed on judges since 2019 to ensure that there is a factual basis for a guilty plea are inadequate because they are not mandatory. The available evidence suggests that trial judges and appellate courts remain reluctant to overturn convictions based on guilty pleas. It has also been suggested that FPT Heads of Prosecutions sub-committee's suggestions that prosecutors should not accept guilty pleas if they know the accused is factually innocent are inadequate. If observed, they would not have prevented the vast majority of Canada's remedied false guilty pleas.

Despite calls for clarity, the ethical restraints on defence lawyers when it comes to false guilty pleas remain murky. Even if defence lawyers refused to plead clients guilty who maintained their innocence, clients may resile from maintaining their innocence when offered a deal that is too good to refuse. More specific ethical regulation of defence lawyers could also impair candour in the solicitor-client relationship so long as a guilty plea remains a significant mitigating factor at sentencing and so long as the Criminal Code with its overlapping offences of varying seriousness encourages charge bargaining.

Recommendations made by Justice Ratushny in 1997 that mandatory life imprisonment sentences should be abolished because they induce false guilty pleas to crimes like manslaughter and infanticide have unfortunately been ignored by successive governments because they would be politically unpopular. The problem of disadvantaged people being forced into pleading guilty to crimes that they did not commit and often did not happen is a real one that the Canadian criminal justice system must urgently address. There are, however, no easy or simple solutions given the reality of charge and sentencing bargaining and the encouragement of plea bargaining as a means to make the Canadian criminal justice system more efficient. If the system is to continue to prioritize efficiency with plea bargaining, it should at the very least make remedies for the false guilty pleas it encourages much more accessible, efficient and effective.