THE WRONGFULLY CONVICTED DESERVE ACQUITTALS NOT PROSECUTORIAL STAYS

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Between 2006 to 2008, no less than three public inquiries recommended that, absent a reasonable likelihood of re-prosecution, prosecutors should allow the wrongfully convicted to be acquitted and not be subject to prosecutorial stays. Prosecutorial stays are an exercise of prosecutorial discretion under. 579 of the Criminal Code that can only be challenged with evidence of flagrant impropriety. They do not provide protection against double jeopardy. They can amount to a third "legal limbo" verdict between guilty and not guilty. Only two prosecutorial services in Canada have adopted the three inquiry recommendations in their guidelines or deskbooks. This failure has real world consequences: namely at least five cases involving seven accused in four different provinces since 2016 where convictions were overturned because of new evidence relevant to guilt or innocence only to be the subject of a prosecutorial stay which deprived the previously convicted person of a verdict on the merits. In addition to being at odds with the three inquiry recommendations, such uses of prosecutorial stays promote continued suspicion of the wrongfully convicted and create two classes of the wrongfully convicted: those who are acquitted and those who only receive a prosecutorial stay.

Entre 2006 et 2008, pas moins de trois enquêtes publiques se sont conclues par la recommandation qu'en l'absence d'une probabilité raisonnable de nouvelle poursuite, le poursuivant devrait accorder l'acquittement aux parties condamnées injustement plutôt que la suspension des poursuites, celle-ci étant un exercice du pouvoir discrétionnaire en matière de poursuites en vertu de l'article 579 du Code criminel et ne pouvant être contestée que par la preuve d'une irrégularité flagrante. Cette suspension n'offre pas de défense de double incrimination et peut être à l'origine d'un troisième jugement se situant dans un flou juridique entre condamnation et acquittement. Seuls deux services de poursuites au Canada ont adopté les trois recommandations de ces enquêtes et les ont intégrées à leurs manuels et directives. Cet échec a des conséquences bien réelles : au moins cinq dossiers dans quatre provinces différentes depuis 2016, où sept personnes accusées ont vu leur déclaration de culpabilité annulée en présence de nouvelles

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preuves et se sont retrouvées l'objet d'une suspension des poursuites qui a privé les personnes déjà déclarées coupables d'un jugement sur le fond. En plus d'être contraires aux trois recommandations des enquêtes, ces recours à la suspension des poursuites contribuent à prolonger les soupçons contre des personnes injustement condamnées et créent deux catégories chez celles-ci : les personnes acquittées et celles qui ne reçoivent qu'une suspension des poursuites.

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1. Introduction

The most infamous use of a prosecutorial stay under s. 579 of the Criminal Code[2] was in the case of the late David Milgaard. After hearing new evidence about the real murderer, the Supreme Court found that Milgaard's murder conviction was a miscarriage of justice.[3] Because Milgaard could not establish his innocence, the Court refused to acquit him in 1992. Instead, it ordered a new trial while encouraging prosecutors to stay or place the prosecution on hold. The Court's decision freed Mr. Milgaard after 23 horrific years in prison. Nevertheless, the prosecutorial stay had devastating effects on him. It encouraged wide-spread suspicions among some that he was guilty.[4]

David Milgaard died a national hero.[5] But from 1992 to his DNA exoneration in 1997, he was a desperate and even feared man who sued

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2 *Criminal Code*, RSC 1985 c C-34, s 579(2). Section 579 refers to "stays of proceedings" but the term "prosecutorial stay" will be used throughout this article to distinguish stays of proceedings entered by prosecutors from those entered by judges for reasons of abuse of process. The latter preclude re-prosecution while the former do not. Judicial stays of proceedings are a rarely ordered remedy whereas prosecutorial stays are routinely used. The term prosecutor will be used rather than the word Crown to underline that prosecutors are humans with moral agency and responsibility.

3 *Reference re Milgaard (Can)*, 1992 CanLII 96 (SCC) [*Milgaard Reference*].

4 A majority of Canadians polled in May 1992 believed that Milgaard should be compensated, but only 46% of those on the Prairies. See Stephen Bindman, "Most Canadians support Milgaard's call for an inquiry", *Canwest News* (4 May 1992). The Attorney General of Saskatchewan at the time told reporters, "[t]he Supreme Court couldn't find him innocent, so it's difficult for me to make a pronouncement on that subject. All I can do is to decide whether or not to proceed with the trial. There is nothing I can do to dispel (the cloud over Milgaard)." See Stephen Bindman, "Out but not really free", *Ottawa Citizen* (16 April 1992) A3.

5 On David Milgaard's role with respect to his advocacy for the wrongfully convicted and a permanent commission to help uncover miscarriages of justice see Honourable Harry LaForme and Honourable Juanita Westmoreland-Traore, "A Miscarriage of Justice Commission for Canada" (31 October 2021) at 1–2, 19, 31, 194, online (pdf): <http://tinyurl.com/3kbkddr2> [perma.cc/4YF7-WSLY]; Kent Roach, *Wrongly Convicted: Guilty*

multiple Saskatchewan officials in a futile attempt to clear his name.[6] The public inquiry into Milgaard's wrongful conviction did not blame prosecutors for entering the prosecutorial stay given the Supreme Court's encouragement of this option. It did, however, find that the prosecutorial stay left Milgaard "with significant stigma" and "without a chance of a not guilty verdict."[7] Such a prosecutorial stay sends a message that the charge still hangs over the accused and may need to re-prosecuted. This message is magnified if the person has been convicted of and served time for a serious crime. Therefore, the inquiry into Milgaard's wrongful conviction agreed in its 2008 report with recommendations by the two other inquiries:[8] prosecutorial stays should only be entered if there is a reasonable likelihood that the prosecution would be recommenced.[9]

One of the five Supreme Court judges who in 1992 recommended the use of a prosecutorial stay for Milgaard was Chief Justice Antonio Lamer. In 2006, Chief Justice Lamer criticized the use of prosecutorial stays in both Gregory Parsons' and Randy Druken's wrongful convictions. He found they were the product of the same "tunnel vision that pervaded the investigation" and should not have been entered.[10] In an inspiring example of professional learning and growth, the retired Chief Justice recognized the harm that prosecutorial stays caused to the wrongfully convicted. He also drafted three pages of new prosecutorial guidelines stressing that prosecutorial stays should only be used "where there is a reasonable likelihood of recommencement of proceedings."[11] His draft guidelines are reflected in Newfoundland's present prosecutorial

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Pleas, Imagined Crimes and What Canada Must Do To Safeguard Justice (New York: Simon and Schuster, 2023) at 298–302 [Roach, *Wrongfully Convicted*].

6 *Misgaard v Saskatchewan*, 1994 CanLII 4592 (SKCA); *Milgaard v Kujawa*, 1993 CanLII 8951 (SKKB); *Milgaard v Mitchell*, 1996 CanLII 6950 (SKKB). See also Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40:3 Man LJ 1 at 29–34 [Roach, "Reforming and Resisting Criminal Law"].

7 *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1(Saskatoon: 2008) (The Honourable Edward P MacCallum) at 332–337 [*MacCallum Inquiry*].

8 *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken: Report and Annexes* (St John's: 2006) (The Right Honourable Antonio Lamer) at 303–325 [*Lamer Inquiry*]; *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: 2007) (The Honourable Patrick J LeSage, QC) at 123–145 [*LeSage Inquiry*].

9 *MacCallum Inquiry*, *supra* note 7 at 334.

10 *Lamer Inquiry*, *supra* note 8 at 98.

11 *Ibid* at 323. See generally Stephen Bindman, "Antonio Lamer and Wrongful Convictions: From Confidence to Contrition" in Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: LexisNexis, 2009) [Bindman, "Lamer"].

guidelines. Unfortunately, they are not reflected in the guidelines of the vast majority of other prosecutorial services.

Prosecutorial stays have been entered in five cases since 2016 where convictions have been overturned on the basis of new evidence relevant to guilt or innocence and as such recorded in the Canadian Registry of Wrongful Conviction.[12] These uses of prosecutorial stays have deprived the wrongfully convicted of a "not guilty" verdict.[13] None of these five cases have been re-prosecuted. This suggests that a prosecutorial stay placing the prosecution on hold was not necessary. Of the seven people affected by these prosecutorial stays, two are Indigenous, two are Black and Muslim, one has cognitive challenges and one is a gay, HIV-positive man.

The problem of prosecutorial stays placing the wrongfully convicted in legal limbo has persisted even after being diagnosed by three public inquiries more than 15 years ago. Because their guidelines do not address the matter,[14] a future decision by Quebec prosecutors to either enter a prosecutorial stay or call no evidence producing an acquittal should they decide not to prosecute Jacques Delisle in the wake of recent orders of a new murder trial by the federal Minister of Justice and the Quebec Court of Appeal is both difficult to predict. A prosecutorial stay could only be challenged with evidence of a clear abuse of process. Alas, the absence of guidelines restricting the use of prosecutorial stays after wrongful

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[12] A wrongful conviction will be defined in this article as "when a criminal conviction is overturned based on new matters of significance related to guilt not considered when the accused was convicted or pled guilty. A conviction that is overturned on appeal without new evidence or that is stopped because of a *Charter of Rights and Freedoms* violation will generally not be counted unless specific indicia of a wrongful conviction are present, such as unreliable evidence on issues relating to guilt. A conviction is overturned if an acquittal is recorded (on appeal or after a new trial) or if the Crown does not proceed with a prosecution when a new trial is ordered." Canadian Registry of Wrongful Convictions, "What is a Wrongful Conviction?", online: <http://tinyurl.com/ya48ah7a> [perma.cc/B8A5-79UM].

[13] Some wrongfully convicted want more than a not guilty verdict, namely, a declaration of innocence. For different perspectives on this topic, which is beyond the scope of this paper, see Christopher Sherrin, "Declarations of Innocence" (2009) 35 Queen's LJ 437; Kent Roach, "Exonerating the Wrongfully Convicted: Do We Need Innocence Hearings?" in Margaret Beare, ed, *Honouring Social Justice Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 55ff [Roach, "Exonerating the Wrongfully Convicted"].

[14] *R c Delisle,* 2023 QCCA 1096. The Quebec directive does not refer to the three inquiries and only provides that a prosecutorial stay "est exceptionelle et doit utilisée avec circonspection." See Directeur Des Poursuites Criminelles et Penales, "Arrêt Des Procédures (Nolle Prosequi)" (9 June 2021) at 1, online (pdf): <http://tinyurl.com/2nkuw88k> [perma.cc/US8W-ECSX].

convictions would make a prosecutorial stay almost impossible to challenge.[15]

The three inquiries that recommended that prosecutors should only enter prosecutorial stays if there were a reasonable prospect of re-prosecution all involved DNA exonerations. As predicted, such exonerations have declined in recent years.[16] In what I have called "wrongful conviction amnesia",[17] wrongful convictions are rarely, in the words of The Tragically Hip in their 1992 song *Wheat Kings* that attempted to exonerate David Milgaard, a "late breaking story on the CBC."[18] The last wrongful conviction public inquiry finished its work in 2008. Thus, the "royal commission test" of whether prosecutors could "publicly explain" their decisions, including to enter prosecutorial stays, "under the glare of lights and cameras of a future Royal Commission" must seem remote to many prosecutors.[19]

2. Outline

The first part of this article explains the effects of a prosecutorial stay. Prosecutorial stays of proceedings, as distinct from judicial stays of proceedings, do not provide protections against double jeopardy. The use of judicial stays of proceedings in the wrongful conviction context will also be briefly reviewed with an emphasis on how both forms of stays deprive the accused of a verdict on the merits.

The second part reviews the recommendations made by the three public inquiries that all recognized the potential unfairness of using prosecutorial stays in wrongful conviction cases. The inquiries all

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15 For arguments that prosecutors are rarely disciplined by law societies about how they exercise their powers but that breach of guidelines can play a role in the few successful discipline cases see Andrew Martin, "Twenty Years After Krieger v Law Society: Law Society Discipline of Crown Prosecutors and Government Lawyers" (2024) 61:1 Alta L Rev 37.

16 Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (New York: Penguin, 2000) at 323.

17 Roach, *Wrongfully Convicted*, *supra* note 5 at 293–297.

18 Roach, "Reforming and Resisting Criminal Law", *supra* note 6 at 32ff.

19 Bruce A MacFarlane, QC, "Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors" (2016) 63 Crim LQ 439 at 470. The late Justice Marc Rosenberg, a global innovator in educating judges about wrongful convictions, recalled that the public inquiry into Donald Marshall Jr's wrongful conviction ranked with the *Charter* as the two most important developments in the Canadian criminal justice system during his lifetime. See Honourable Marc Rosenberg, "The Attorney General and the Administration of Justice" (2009) 34:2 Queen's LJ 813.

recommended that prosecutorial stays should only be used if there was a realistic prospect for the prosecution to be re-commenced.

The third part examines publicly available prosecutorial guidelines. It concludes that only Newfoundland, Prince Edward Island and to some extent Ontario have guidelines that reflect the three inquiry recommendations. Most prosecutorial guidelines neither reflect or cite the recommendations of the three public inquiries.

The fourth part examines nine cases since 2016 where convictions were overturned either by appellate courts or by the federal Minister of Justice on the basis of new evidence relevant to guilt or innocence and new trials were ordered. In four of these cases (involving Glen Assoun, Tomas Yebes, Brian Anderson and Allan Woodhouse and Robert Mailman and Walter Gillespie), prosecutors called no evidence and the men received a not guilty verdict. In five of the cases, however, the prosecutor entered a prosecutorial stay. This left seven wrongfully convicted people, Connie Oakes, Wendy Scott, James Turpin, Sean Hosannah, Maria Hosannah, Joshua Dowholis and Gerald Klassen, in a legal limbo where they could be re-prosecuted and have not received a not guilty verdict. In none of these cases has there been a re-prosecution, begging the question of why the prosecutorial stays were used and have not been replaced with not guilty verdicts.

3. Prosecutorial Stay and Their Judicial Review

A) What is a Prosecutorial Stay?

Prosecutorial stays under s. 579 of the *Criminal Code* are a codification of the discretionary power of the Attorney General to enter a *nolle prosequi* which halts the prosecution. In 1964, Professor John Edwards observed that only the Attorney General could enter a *nolle prosequi* and the Attorney General was only answerable to Parliament "for the manner in which he discharges the discretionary power inherent in, or attached to, his ancient office."[20] The Attorney General was rarely questioned in Parliament about the use of a *nolle prosequi*. Professor Edwards also expressed the view that "[w]henever possible on grounds of fairness to the accused … the preferable course would be to dispose of the indictment, which would otherwise remain on file, by offering no evidence and then obtain a directed verdict of not guilty from the jury."[21]

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[20] John Ll J Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 227.

[21] *Ibid* at 235.

Professor M.L. Friedland in his 1969 text *Double Jeopardy* observed that "the case law is clear that, notwithstanding a *nolle prosequi*, the accused remains liable to be re-indicted." He noted that even though the accused is "not normally subjected to further proceedings," the best course if there is "a weak case" is for the prosecutor to offer no evidence and the accused to receive an acquittal."[22] Only the calling of no evidence by the prosecutor results in an acquittal that provides double jeopardy protections against re-prosecution.

B) Prosecutorial Stays Provide No Protection Against Re-Prosecution

Courts have consistently held that the use of a prosecutorial stay does not provide protection from re-prosecution of the same matter subject to the stay.[23] As one judge has explained, an accused subject to a prosecutorial stay, "was not acquitted of the charge. He was not exonerated. The matter was not finally adjudged at all. There was no final disposition."[24] Another judge has called a prosecutorial stay "a temporary suspension" of proceedings.[25]

C) Judicial Review of Prosecutorial Stays

The power to issue a prosecutorial stay is a core element of prosecutorial discretion[26] that is only reviewable in the event of an abuse of process.[27] Most attempts to judicially review the use of a prosecutorial stay have come in the context of private prosecutions where the prosecutor may well have good reasons to stay a prosecution that is manifestly unfounded or requires additional police investigation. Prosecutorial stays are used routinely in cases where charges laid by the police are screened out and in cases where multiple and overlapping charges are laid. Such uses of prosecutorial stays are generally unobjectionable and are not the subject of this article.

Both the British Columbia and Ontario Court of Appeals have stressed the need for those challenging a prosecutorial stay to establish

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22 Martin L Friedland, *Double Jeopardy* (Oxford: Oxford University Press, 1969) at 30–31.

23 *R v Spence*, 1919 CanLII 582 (ONCA); *R v Burrows*, 1983 CanLII 3123 (MBCA).

24 *R v Ringel*, 2016 ONSC 4184 at para 196 [*Ringel*].

25 *R v Mann*, 2012 BCSC 1248 at para 18, aff'd 2014 BCCA 231.

26 *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 32, 46–47, 49; *R v Nixon*, 2011 SCC 34 at paras 31, 68; *R v Anderson*, 2014 SCC 41 at paras 48–50 [*Anderson*]; *R v Glegg,* 2021 ONCA 100 at para 39 [*Glegg*].

27 See *Anderson*, *supra* note 26 at paras 1, 4–5, 36, 43, 48–49. See also *R v Olumide,* 2014 ONCA 712; *Longchamps c R*, 2021 QCCA 700.

a proper evidentiary foundation to displace a presumption that prosecutorial discretion is exercised in good faith.[28] Lower courts have expressed a reluctance to overturn a prosecutor's decision to enter a stay of proceedings unless they are presented with evidence of prosecutorial "misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence."[29] The Court of Appeal of Newfoundland and Labrador has noted that s. 579 "absent abuse of process … confers untrammeled discretion on the Attorney General as to whether and when to enter a stay."[30] The reference to the prosecutor's "untrammeled discretion" to enter a stay comes uncomfortably close to Melvyn Green's statement that too often the use of prosecutorial stays amounted to an implicit statement that: "I am the Crown. I can do what I want. I don't answer to anyone."[31]

D) Unsuccessful Charter Challenges

The prosecutorial stay has been challenged numerous times under the *Charter*, usually in the context of when the prosecutor has used s. 579 to stop a private prosecution. All of these challenges have failed with courts stressing their deference to the exercise of prosecutorial discretion.[32]

Chief Justice Wells concluded that the use of a prosecutorial stay did not infringe the accused's right to life, liberty or security of the person

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[28] *Pereira v British Columbia (Attorney General*), 2023 BCCA 31 at para 52; *Glegg*, *supra* note 26 at paras 60–61.

[29] *Holland v British Columbia (Attorney General)*, 2022 BCSC 613 at para 17. See also *Takefman c Director of Criminal and Penal Prosecutions*, 2014 QCCS 226; *Lochner v Attorney General of Ontario*, 2017 ONSC 5293 at para 64. An additional hurdle is that courts often hold that the case is moot and they are functus once a prosecutorial stay is entered. *R v Trang*, 2004 ABCA 246; *R v Codina*, 2017 ONCA 527. After a prosecutorial stay has been entered, the courts have no powers to award costs. *R v Martin*, 2016 ONCA 840; *Lapointe v Mount Polley Mining Corporation and HMQ*, 2017 BCPC 140; *R v Smith*, 79 CCC (3d) 70 at 80–81; 1992 CanLII 325 (BCCA) [*Smith*]; *R c Dufresne*, 1990 CanLII 3296 (QCCA). As well, after a prosecutorial stay is entered, the courts do not have powers to determine whether the duty to consult Aboriginal peoples has been breached. *Labrador Métis Nation v Canada (Attorney General*), 2006 FCA 393.

[30] *R v DN,* 2004 NLCA 44 at para 28 [*DN*].

[31] Melvyn Green, "Crown Culture and Wrongful Convictions: A Beginning" (2005) 29 CR (6th) 262 at 270.

[32] *R v Baker*, 1986 CanLII 1151 (BCSC); *Quebec (Attorney General) v Chartrand,* 1987 CanLII 751 (QCCA); *Osiowy v Linn, PCJ*, 1989 CanLII 4780 (SKCA); *R v Hamilton*, 1986 CanLII 2813 (ONCA); *R v Stoddart*, 1987 CanLII 168 (ONCA); *R v Fortin*, [1989] 47 CRR 348 (ONCA); *R v Pike,* 2018 NSSC 12; *Smith*, *supra* note 29, leave to appeal to SCC refused, [1993] SCCA No 7; *R v Parsons*, 1998 CanLII 4617 at para 2 (BCCA); *R v Reed,* 1998 CanLII 4614 (BCSC), aff'd 1998 CanLII 6395 (BCCA); *Ringel*, *supra* note 24 at paras 163–225; *R v Cunsolo*, 2008 CanLII 48640 at para 32 (ONSC).

under s. 7 of the *Charter*. He reasoned that it was better for an accused to have proceedings deemed under s. 579(2) to never have occurred than face the alternative of a new trial.[33] He also speculated that a person's reputation could be restored by the use of a prosecutorial stay.[34] Two years later, in his 2006 public inquiry report, Chief Justice Lamer noted that while the presumption of innocence formally applies after a conviction is quashed, such a conclusion is "legally correct but practically unrealistic."[35]

In my view, Chief Justice Lamer's approach is more compelling than Chief Justice Wells'. A prosecutorial stay can leave suspicions hanging over an accused, even after their original conviction is overturned. The possibility of re-prosecution may cause all people subject to a prosecutorial stay some degree of anxiety. It is likely to cause much more anxiety to a person who had already been wrongfully convicted in the very matter. Adrian Grounds' pioneering work has found that the experience of being wrongfully convicted understandably makes a person mistrustful and subject to a chronic feeling of threat.[36] The wrongfully convicted understandably have no reason to trust the justice system.

E) Comparing the Use of Judicial and Prosecutorial Stays of Proceedings

A judicial stay of proceedings should provide judicial protections against re-prosecution. This is an important difference from a prosecutorial stay. At the same time, a judicial stay also prevents the accused from receiving a verdict on the merits. In other words, it functions as a third verdict between guilty and not guilty.

In three recent cases, provincial Courts of Appeal have ordered stays of proceedings. In 2014, the British Columbia Court of Appeal quashed Gurdev Dhillion's sexual assault conviction on the basis of new, undisclosed and exonerating DNA evidence. It refused the accused's request for an acquittal and stayed proceedings.[37] In 2023, the same Court of Appeal

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33 *DN*, *supra* note 30 at paras 36–37.

34 *Ibid*.

35 *Lamer Inquiry*, *supra* note 8 at 319.

36 See Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Corr 165; Adrian Grounds, "Understanding the Effects of Wrongful Imprisonment" (2005) 32 Crime and Justice 1 at 22ff, recounting that one wrongfully convicted man was so fearful he disguised himself to avoid arrest whenever he returned to his hometown where the crime occurred. "Others described being constantly on edge, apprehensive when out in public places, fearful of being re-arrested or attacked, and feeling they were being looked at malevolently and talked about" (*ibid* at para 23).

37 *R v Dhillon*, 2014 BCCA 480. See Canadian Registry of Wrongful Convictions, "Gurdev Singh Dhillon", online: <http://tinyurl.com/3xdj93c2> [perma.cc/PB3K-2XDK].

entered a judicial stay on the basis that Tammy Bouvette could still be convicted of manslaughter if she left a child in her care unattended in a bathtub for even a minute despite new evidence that undermined forensic pathology that suggested that the child died of blunt force trauma.[38] On a second appeal ordered by the federal Minister of Justice on the basis of new evidence, the Manitoba Court of Appeal stayed proceedings against Frank Ostrowski in 2018. It stressed that despite the new undisclosed evidence, it was still possible that a jury could find Mr. Ostrowski guilty of murder and he had not established that it was "clearly more probable than not that the accused would be acquitted at a hypothetical new trial."[39]

My concern about these three recent cases is that the Courts of Appeal have not adequately considered the adverse effects on the previously convicted person of a judicial stay of proceedings that avoids a verdict on the merits. In all of the above cases, the original convictions were overturned on the basis of new evidence relevant to guilt and innocence. It is not unreasonable to assume that the effects of overturned murder, manslaughter and sexual assault wrongful convictions would hang over the heads of the previously convicted person. This is particularly the case in *Ostrowski* where the Manitoba Court of Appeal included the Crown's continued case against Mr. Ostrowski in a 34-paragraph appendix to its judgment without apparently considering the possibility that the Crown's case could be influenced by the natural human phenomena of confirmation bias or tunnel vision.[40]

In contrast, in the 2007 Steven Truscott Reference, a five-judge panel of the Court of Appeal for Ontario was alive to the residual stigma and suspicion that could be fostered by a judicial stay of proceedings as opposed to a not-guilty verdict. It observed that a judicial stay "would remove the stigma of the appellant's conviction, but leave in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one."[41] Without an acquittal, there would be

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Compare with *R v DRS*, 2013 ABCA 18, where the Court of Appeal of Alberta entered an acquittal given new evidence heard on an appeal ordered by the federal Minister of Justice involving a sexual assault complainant who recanted his testimony at the trial in which the accused was convicted of sexual assault.

38 *R v Bouvette*, 2023 BCCA 152 at para 133, leave to appeal to SCC granted, 2023 CanLII 122426 (SCC). See also Canadian Registry of Wrongful Convictions, "Tammy Bouvette", online <http://tinyurl.com/3h4v25xt> [perma.cc/SD6Q-DFC3].

39 *R v Ostrowski*, 2018 MBCA 125 at para 79 [*Ostrowski*]. See also Canadian Registry of Wrongful Convictions, "Frank Ostrowski", online: <http://tinyurl.com/4fc3t8dp> [perma.cc/ZGD7-P25W].

40 *Ostrowski*, *supra* note 39 at Appendix A.

41 *Truscott (Re)*, 2007 ONCA 575 at para 265 [*Truscott*]. See also Canadian Registry of Wrongful Convictions, "Steven Truscott", online: <http://tinyurl.com/2ytt8v4z>

continued "uncertainty as to the validity of the appellant's conviction" even after Truscott's murder conviction was overturned on the basis of new evidence.[42] The five judge panel was influenced by the fact that the prosecutors had refused to commit to exercising their prosecutorial discretion to call no evidence at a new trial as opposed to the other options of entering a prosecutorial stay or withdrawing charges.[43] It entered an acquittal despite observing that a new trial "could result in an acquittal or a conviction."[44]

Despite requiring the previously convicted person formally to establish that an acquittal would be "clearly the more probable result of a hypothetical new trial" the Court of Appeal for Ontario seemed influenced by both the requirement of proof of guilt beyond a reasonable doubt at any hypothetical new trial and the stigma of leaving a previously convicted person without a definitive verdict of guilty or not guilty.[45] This approach is also consistent with its decision in William Mullins-Johnson's appeal to not make declarations of innocence for fear of introducing a third verdict that could undermine the meaning of a not guilty verdict.[46]

The Court of Appeal for Ontario did not want to create two classes of acquittal: the not guilty and the innocent. A judicial stay of proceeding, like a prosecutorial stay, effectively provides a third verdict that avoids a decision on the merits. A judicial stay of proceedings can promote continuing suspicion especially when the previously convicted person requests an acquittal. As Peter MacKinnon observed in this journal 35 years ago, "[w]e may not be able to prevent suspicion that lingers, but there ought to be no *official* pronouncements of probable guilt."[47] Judicial

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[perma.cc/9MRN-YT4F].

42 *Truscott*, *supra* note 41 at para 267.

43 The Court of Appeal for Ontario observed that if it ordered a new trial, "[t]he Attorney General then has three options: stay the charge, withdraw the charge, or have the appellant arraigned before the trial court and offer no evidence against him. If the Attorney General were to choose the last option, the appellant would have his acquittal. On either of the other two options, there would be no final verdict in this case. The Crown has advised the court that it cannot commit to any of these possible options until it has the opportunity to consider the court's judgment on the Reference." *Ibid* at para 257.

44 *Ibid* at para 265.

45 *Ibid* at paras 270, 787.

46 *R v Mullins-Johnson*, 2007 ONCA 720 at paras 25–27 [*Mullins-Johnson*]. This rejection of a third verdict based on proven innocence has recently received some approval from the UK Supreme Court. *R (on the application of Hallam) v Secretary of State for Justice*, 2019 UKSC 2 at paras 28, 34.

47 Peter MacKinnon, "Costs and Compensation for the Innocent Accused" (1988) 67:3 Can Bar Rev 489 at 498.

stays may prevent subsequent prosecutions, but they also suggest that courts were unwilling to acquit the previously convicted person.

Like the Court of Appeal for Ontario, the Supreme Court of Canada also seems inclined in the wrongful conviction context to lean towards an acquittal rather than a judicial stay. It reversed a stay of proceedings entered by the Court of Appeal of Quebec in the Rejean Hinse case. In granting leave to hear Hinse's appeal in 1995, Chief Justice Lamer recognized that the judicial stay of proceedings was a matter "completely unrelated to the accused's underlying innocence or culpability" and that the previously convicted person had a "substantive right to a new trial or an acquittal."[48] Two years later, the Supreme Court substituted an acquittal for the judicial stay of proceedings on the basis that "the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt."[49]

Judicial stays of proceedings are better for the wrongfully convicted than prosecutorial stays because they would prevent re-prosecution. Nevertheless, the Supreme Court in *Hinse* and the Court of Appeal for Ontario in *Truscott* have been more sensitive to a wrongfully convicted person's understandable interest in obtaining an acquittal on the merits rather than a stay of proceedings than some other provincial Courts of Appeal in more recent wrongful conviction cases.

F) Summary

All stays of proceedings—whether entered by prosecutors or judges—can foster continued suspicion caused by a conviction even though the conviction has been quashed because of new evidence related to guilt or innocence. They all should be used with caution.

4. Concerns Raised by Public Inquiries About the Use of Prosecutorial Stays

A) Early Concerns

Commentators raised concerns about the fairness of prosecutorial stays well before wrongful convictions were accepted as an inevitable risk of

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[48] *R v Hinse*, 1995 CanLII 54 at para 34 (SCC). Rejean Hinse was wrongfully convicted of armed robbery despite having an alibi and applied to the federal Minister of Justice for extraordinary relief without success four times and despite affidavits from the perpetrators that Hinse was not with them. See Canadian Registry of Wrongful Convictions, "Rejean Hinse", online: <http://tinyurl.com/2fxtxfvc> [perma.cc/H4G5-MGB5].

[49] *R v Hinse*, 1997 CanLII 394 at paras 2–3 (SCC).

the criminal justice system.[50] In 1962, one commentator warned that the "sword of Damocles" in the form of re-prosecution hangs over accused subject to prosecutorial stays. In addition, prosecutorial stays are "mysterious because no one knows why" prosecutors "have put the case in indefinite cold storage."[51] Other commentators called for the abolition of prosecutorial stays[52] or the use of alternatives such as calling no evidence or withdrawing charges both of which are subject to more judicial scrutiny and transparency.[53] Others argued that courts should be less reluctant to review the use of prosecutorial stays given that they were based on statutory as opposed to prerogative powers.[54]

In 2005, before his appointment to the bench and reflecting on his work for the then Association in Defence of the Wrongfully Convicted (now Innocence Canada), Melvyn Green warned that the prosecutorial stay sent "a grey-zone message." It left the previously convicted person "in a legal—and very public limbo; no longer an accused but forever shrouded in a cloud of officially induced suspicion."[55]

Green could draw on plenty of experience with the use of prosecutorial stays in wrongful conviction cases. In addition to the David Milgaard case discussed above, a prosecutorial stay was used after Wilson Nepoose's 1987 murder conviction was quashed on the basis of new evidence discrediting the Crown's witnesses.[56] Although the RCMP would eventually apologize to Mr. Nepoose, they initially reported that the Cree man was still a suspect causing his sister-in-law to tell the press that "[t]hey still think Wilson is guilty. This man is not guilty. It is the RCMP that screwed up the investigation."[57] As well, the use of a prosecutorial stay encouraged the Alberta Attorney General to deny that there even was a wrongful conviction and to refuse to call a public inquiry. A prosecutorial stay was

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50 This recognition came with the Supreme Court of Canada's 2001 decision that the risk of wrongful conviction in every country including Canada required that Canada obtain assurances that the death penalty not be applied before a fugitive is extradited from Canada (see *United States of America v Burns and Rafay*, 2001 SCC 7).

51 DE Greenfield, "The Position of the Stay in Magistrate's Court" (1961) 4 Crim LQ 373 at 374.

52 Connie Sun, "The Discretionary Power to Stay Criminal Proceedings" (1973–74) 1:3 Dal LJ 482 at 521.

53 Stanley Cohen, *Due Process of Law* (Toronto: Carswell, 1977) at 159.

54 See Bryce C Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement" (1994) 28:2 UBC L Rev 309.

55 Green, *supra* note 31 at 262.

56 *R v Nepoose*, 1992 ABCA 77. See generally Canadian Registry of Wrongful Convictions, "Wilson Nepoose", online: <http://tinyurl.com/4zzkf565> [perma.cc/A2CK-HLM3]; Roach, *Wrongly Convicted*, *supra* note 5 at 155–163.

57 See Roach, *Wrongfully Convicted*, *supra* note 5 at 160.

also used in Andrew Rose's case in 2001 despite exonerating DNA and the use of Mr. Big techniques to obtain a false confession. Mr. Rose was never compensated despite serving almost 8 years in prison for a murder.[58] In 2003, a prosecutorial stay was also issued after the federal Minister of Justice ordered a new sexual assault trial for Steven Kaminski on the basis of new evidence.[59]

B) The Lamer Inquiry into the Druken, Parsons and Dalton Wrongful Convictions

In his 2006 public inquiry report, Chief Justice Lamer criticized the use of a prosecutorial stay in both Randy Druken's and Gregory Parson's wrongful convictions that were corrected without exhausting their appeals or a Ministerial remedy. He found there was "no prospect of recommencement of the proceedings against Randy Druken" when the prosecutorial stay was used six years after the crime and after Druken had been excluded by DNA analysis from biological material found at the murder scene. The use of the stay in Randy Druken's case (who recently passed away at 57 years of age) prevented him "from obtaining an acquittal." The Chief Justice concluded that "the right thing" for the prosecutor to have done was "to appear on the charge but call no evidence" resulting in an acquittal. [60]

In February 1998, prosecutors entered a stay of Gregory Parson's new trial for murdering his mother. Parsons swore in an affidavit that the prosecutorial hold on the new trial "left a cloud of suspicion hanging over my head and many members of the public have the impression that I must have had something to do with my mother's death."[61] Like Druken, Parson's DNA had been excluded from a biological sample found at the murder scene.

On the eve of his planned *Charter* challenge to the prosecutorial stay, Newfoundland prosecutors called no evidence finally allowing Mr. Parsons to be acquitted. Chief Justice Lamer also concluded that the use

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58 See generally Canadian Registry of Wrongful Convictions, "Andrew Rose", online: <http://tinyurl.com/wrz596hw> [perma.cc/8Y5D-ESX8].

59 See generally Canadian Registry of Wrongful Convictions, "Steven Kaminski", online: <http://tinyurl.com/t7enueac> [perma.cc/9FAR-W5PF].

60 *Lamer Inquiry*, *supra* note 8 at 315.

61 Kent Roach, "Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell" in *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Province of Manitoba, 2007) (Honourable Patrick J LeSage, QC) at Appendix F at 3 [Roach, "Report Relating to James Driskell"]. See also Canadian Registry of Wrongful Convictions, "Gregory Parsons", online: <http://tinyurl.com/h3rjsuyk> [perma.cc/NNJ5-SR47].

of a prosecutorial stay of an unrelated assault prosecution against Parsons meant that even though the charge was laid with great publicity and was "totally without merit," Parsons was again denied "the opportunity to be exonerated publicly."[62] In these comments, Chief Justice Lamer was far more sensitive to the harms that prosecutorial stays cause than he had been in 1992 as part of the five judge Supreme Court of Canada that encouraged prosecutors to stay the new murder trial it ordered for David Milgaard.[63]

In his 2006 public inquiry report, Chief Justice Lamer pointed out the incentives that prosecutors have to use prosecutorial stays that place prosecutions "on hold" indefinitely. For the prosecutor, "there is 'nothing to lose' by entering a stay" because the prosecution can be continued within a year on the same information or indictment or recommenced later. Moreover, the use of prosecutorial stays are rarely subject to successful judicial review. The Chief Justice added that the use of a prosecutorial stay could relieve the Crown "of the burden of having to assess the evidence and determine whether a prosecution is a realistic possibility."[64]

Chief Justice Lamer's proposals were that prosecutorial stays should only be used "where there is a reasonable likelihood of recommencement of proceedings." If there was no reasonable likelihood of a prosecution being held either because of the lack of evidence or public interest considerations, or if evidence was "so manifestly unreliable that it would be dangerous to convict," the prosecutor should call no evidence so that the previously convicted person would receive an acquittal.[65]

C) The LeSage Inquiry into the Driskell Wrongful Conviction

In 2007, Justice LeSage issued his report in the public inquiry into James Driskell's wrongful conviction. In Mr. Driskell's case, Manitoba prosecutors had entered a prosecutorial stay hours after the federal Minister of Justice had ordered a new trial on the basis that a miscarriage of justice had likely occurred when Driskell was convicted of first-degree murder in 1991. The new evidence in Driskell's case included undisclosed payments and other benefits to key Crown witnesses and new DNA evidence refuting hair analysis that linked Driskell to the crime scene.[66]

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62 *Lamer Inquiry*, *supra* note 8 at 320.

63 See also Bindman, "Lamer", *supra* note 11.

64 *Lamer Inquiry*, *supra* note 8 at 317. See also Canadian Registry of Wrongful Convictions, "Randy Druken", online: <http://tinyurl.com/2yj297nu> [perma.cc/93ME-U9B5].

65 *Lamer Inquiry*, *supra* note 8 at 322–324.

66 For a summary of some of this new evidence see *R v Driskell*, 2004 MBQB 3, granting Driskell bail pending the federal Minister of Justice's decision under Section 696.1

The *Globe and Mail* reported that the prosecutorial stay did "not officially exonerate" Driskell. James Lockyer, Driskell's lawyer, stated that "the problem you find in these cases is that the prosecution simply won't give up and will not acknowledge reality … They have done it and we are stuck with it."[67] Manitoba prosecutors were quoted as saying that the prosecutorial stay "is not a recognition of factual innocence" and is "simply a recognition that our ethical standard for proceeding is no longer met."[68] Driskell, like Druken, only received compensation after an inquiry had criticized the use of the stay.

Some prosecutors who appeared before the Driskell inquiry testified that a prosecutorial stay effectively terminates a proceedings and leaves "little or no stigma." Justice LeSage disagreed and concluded that prosecutorial stays leave "residual stigma and is not a satisfactory remedy in s. 696 cases."[69] The use of the prosecutorial stay in Driskell's case did not achieve "a fair and just result." At the same time, it did not constitute misconduct given Manitoba practice at the time of frequently using prosecutorial stays when there was no reasonable prospect of conviction and no ongoing re-investigation or reasonable prospect of further prosecution.[70]

Justice LeSage was clear that Manitoba practice should change. Prosecutorial stays should only be used in s. 696 cases "where there is some reasonable likelihood that the proceedings will be recommenced."[71] Like the guidelines in the *Lamer Inquiry*, the focus on re-prosecution would require prosecutors not to enter a stay unless they were satisfied that ongoing investigations would provide the reasonable likelihood of conviction and that a re-prosecution would be in the public interest.

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of the *Criminal Code*.

67 "Manitoba won't order new trial for Driskell", *Globe and Mail* (3 March 2005).

68 "Manitoba frees man convicted of murder", *Ottawa Citizen* (4 March 2005) A13; "Federal justice minister quashes murder conviction of James Driskell", *Cornwall Standard-Freeholder* (4 March 2005) 4.

69 *LeSage Inquiry*, *supra* note 8 at 126–129. Justice LeSage elaborated, "Mr. Gaul and Mr. Frater regarded the stay as 'the best possible result' for the accused because 'it ends the prosecution, full stop' and 'restores the state of nature' as the accused is deemed never to have been charged." *Ibid* at 136–137. Reporter Dan Lett observed that "it's hard to imagine the justice system could be so cruel, or so naive, as to believe that anyone in the real world could spend more than a decade of his life in a federal prison proclaiming his innocence and then be satisfied with a finding that the whole thing never happened." Dan Lett, "Legal limbo is a cruel place to be", *Winnipeg Free Press* (19 September 2006) A6. I conducted research for the LeSage Inquiry that was cited in support of its recommendations on prosecutorial stays. Roach, "Report Relating to James Driskell", *supra* note 61

70 *LeSage Inquiry*, *supra* note 8 at 145.

71 *Ibid* at 132.

Under his terms of reference, Justice LeSage was limited to considering prosecutorial stays in the context of Ministerial review under s. 696 making his recommendations narrower than those of Chief Justice Lamer. In my view, Justice LeSage's conclusion about a residual stigma should apply in cases where a conviction is overturned on the basis of new evidence relevant to innocence or guilt even on a first appeal, as was the case in the Druken and Parsons wrongful convictions examined by Chief Justice Lamer.

D) The MacCallum Inquiry into the Milgaard Wrongful Conviction

In 2008, Justice MacCallum found the 1992 prosecutorial stay after the Supreme Court of Canada quashed David Milgaard's murder conviction and ordered a new trial was reasonable, but only because the Court had signalled in its judgment that a prosecutorial stay was appropriate.[72] It is useful to place the Milgaard reference in historical perspective. At the time, the Supreme Court allowed extradition to face the death penalty.[73] It was only in 2001 that the Court reversed this position in large part because so many wrongful convictions has been discovered in the 1990s, largely because of DNA exonerations.[74]

Justice MacCallum agreed with Justice LeSage's recommendation that prosecutorial stays should only be used in s. 696 cases if a police re-investigation of the case was ongoing. He also expressed agreement with the idea that if a prosecutorial stay was used, the case should eventually be returned to the court either for prosecution or for the prosecutor to withdraw charges or call no evidence to produce an acquittal.[75]

E) Summary

All three public inquiries agreed that prosecutorial stays could only be justified if there was a reasonable likelihood of the previously convicted person being re-prosecuted. The *LeSage* and *MacCallum Inquiries* were limited to considering wrongful conviction cases involving extraordinary Ministerial remedies under s. 696 of the *Criminal Code*. The *Lamer Inquiry*, however, was not. The next section will examine whether the recommendations of these three inquiries are now reflected in prosecutorial guidelines and deskbooks.

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72 *Milgaard Reference*, *supra* note 3.

73 *Kindler v Canada (Minister of Justice)*, 1991 CanLII 78 (SCC); *Reference Re Ng Extradition*, 1991 CanLII 79 (SCC).

74 *United States v Burns*, 2001 SCC 7.

75 *MacCallum Inquiry*, *supra* note 7 at 336.

5. The Sparse Acceptance of the Public Inquiry Recommendations to Restrict the Use of Prosecutorial Stays

Prosecutorial guidelines and deskbooks are an important means of structuring prosecutorial discretion. The Public Prosecution Service of Canada's (PPSC) Deskbook is described as a compilation of directives for the exercise of prosecutorial discretion that must "be consulted, understood and adhered to by federal prosecutors." It is also a living document described as a "permanent work in progress."[76] Breach of guidelines can also potentially facilitate judicial review of the exercise of prosecutorial discretion especially when reasons are not provided for the exercise of that discretion.

A) The Compliant Guidelines: Newfoundland and Prince Edward Island

The only Canadian examples of prosecutorial policies or guidelines that reflect the above public inquiry recommendations are from Newfoundland and Labrador and Prince Edward Island. Quantatively this is minimal compliance with the inquiries especially given that the two provinces contain less than one fortieth of Canada's total population.

The fact that Newfoundland policies are in line with the public inquiry recommendations should not be surprising given that Chief Justice Lamer devoted three pages of his inquiry to a draft of the policy that Newfoundland prosecutors should follow.[77] Directive 4 follows the *Lamer Inquiry* recommendations and provides that "a Stay of Proceedings is appropriate where there is a reasonable likelihood of recommencement of the proceedings."[78] The guidelines also suggest that no evidence should be called and an acquittal should be entered "where the Crown Attorney determines that the evidence is so unreliable that it would be dangerous to convict."[79] The guidelines also encourage prosecutors to provide basic reasons to the accused in open court for entering a stay. It notes, however, that the reasons given by the prosecutor for the stay "may be limited by the confidentiality of an ongoing investigation."[80] Newfoundland, which also includes an extensive chapter on wrongful convictions, has the best guideline on the use of prosecutorial stays—one that has practically been

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76 PPSC, *Deskbook* (2020) at Preface online: <http://tinyurl.com/bdzcv7jc> [perma.cc/78VQ-7H7K].

77 *Lamer Inquiry*, *supra* note 8 at 322–324.

78 Government of Newfoundland and Labrador, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (2022) at 12-4–12-5 online: <http://tinyurl.com/3f287hr2> [perma.cc/H8P7-3WBS].

79 *Ibid* at 12-5.

80 *Ibid* at 12-6.

written by a former Chief Justice of Canada. It is baffling and concerning that it has only been adopted by one of ten other prosecutorial services in Canada.

The Prince Edward Island (PEI) deskbook also reflects the *Lamer Inquiry* recommendations by stating that a stay is "appropriate where there is a reasonable likelihood of recommencement of the proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen."[81] It also addresses the alternatives of withdrawing charges and calling no evidence. Calling no evidence and requesting an acquittal is appropriate if there is "no probability of conviction nor a reasonable likelihood of recommencement of the proceedings" or when the prosecutor determines "that the evidence is so manifestly unreliable that it would be dangerous to convict."[82] Withdrawal of charges is appropriate if there are no reasonable and probable grounds to lay the charge, no reasonable probability of conviction or it is not in the public interest to proceed with the charges.

Both the Newfoundland and PEI guidelines follow the *Lamer Inquiry* recommendations. Unlike the *LeSage and MacCallum Inquiry* recommendations, the Newfoundland and PEI guidelines are not restricted to the context of the federal Minister of Justice issuing an extraordinary remedy of ordering a second appeal or second trial on the basis of new evidence and a probability of a miscarriage of justice.

B) The Ontario Guideline

The Ontario Prosecution Directive provides:

> A stay of proceedings is not appropriate where a charge does not meet the charge screening standard and there is no expectation that it will meet the standard within a year. A stay is only appropriate where the proceedings are temporarily discontinued with an expectation of recommencing within one year.[83]

This reflects much of the substance of the three public inquiry recommendations though they are not cited. In 2006, Chief Justice Lamer expressed support for the Ontario policy and viewed it as preferable to Manitoba's policy where prosecutorial stays were used routinely

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81 Government of Prince Edward Island, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island* (2009) at 8-2 online: <http://tinyurl.com/53cpdujm> [perma.cc/5MMM-LQLY].

82 *Ibid.*

83 Government of Ontario, *Charge Screening* (Prosecution Directive), No 3 (14 November 2017) online: <http://tinyurl.com/4c97xfd5> [perma.cc/7KLB-G3A9] [Government of Ontario, *Charge Screening Directive*].

because "a stay of proceedings should not be entered unless there is a reasonable likelihood of additional, incriminating evidence coming to light."[84] However, the Ontario guideline does not explicitly require that expectations of proceedings being recommenced be reasonable. This is more than a quibble given Chief Justice Lamer's findings that the use of prosecutorial stays in both the Druken and Parsons wrongful convictions were influenced by prosecutorial tunnel vision.

The impact of the somewhat bare bones Ontario directive perhaps should not be overestimated. As will be seen in the next section of this article, two of the problematic and recent uses of prosecutorial stays are from Ontario. Accordingly, there needs to be more study about how prosecutors interpret and comply with guidelines governing their exercise of prosecutorial discretion. The primary problem in the remaining jurisdictions, however, is not whether prosecutors comply with restrictions in the guidelines on the use of prosecutorial stays, but the lack of appropriate restrictions in the guidelines themselves.

C) The Vast Majority of Non-Compliant Prosecutorial Guidelines

Even though Justice LeSage's inquiry was appointed by Manitoba, Manitoba's current publicly available guidelines on the use of prosecutorial stays do not reflect his recommendations. The Manitoba guideline simply articulates the dual criteria of a reasonable likelihood of conviction and the public interest supporting a prosecution.[85] The same is true with respect to Saskatchewan's prosecutorial directives, even though Justice MacCallum endorsed Justice LeSage's recommendations in the inquiry that Saskatchewan called to examine David Milgaard's wrongful conviction.[86] Saskatchewan's policy on termination of proceedings states:

> The Attorney General has the power to stay or withdraw charges set out in an information or indictment. The control of a prosecution, including the ability to terminate it and the ability to select the manner of termination, is an important dimension of each Crown prosecutor's responsibilities. Although the court cannot generally interfere with the exercise of this discretion, it is incumbent on

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84 *Lamer Inquiry*, *supra* note 8 at 320.

85 Manitoba, Department of Justice, *Laying, Staying and Proceeding on Charges (Prosecutions Policy Directive)*, No 2:INI:1.1 (June 2017) online: <http://tinyurl.com/2btfbax5> [perma.cc/29GL-QK5V].

86 Saskatchewan, Ministry of Justice and Attorney General, *Prosecutions—Proceedings with Charges (Public Prosecution Policy)* online: <http://tinyurl.com/fp56ru6k> [perma.cc/5KY2-NLF8].

> prosecutors to make the decision taking into account the public interest and the proper administration of justice.[87]

This simply amounts to a statement of prosecutorial power to decide whether and how to terminate a prosecution with vague references to the public interest and the proper administration of justice.

Similarly, Alberta's relevant guidelines also do not contain the crux of the recommendations even though other parts of the guidelines cite the *Lamer Inquiry* with approval.[88] British Columbia's Crown Counsel Policy Manual has many policies, but none that are specific to the use of prosecutorial stays and the alternatives of withdrawing charges or calling no evidence.[89] New Brunswick's prosecutorial guidelines also do not reference the recommendations of the three inquiries. They unhelpfully state that a "stay of proceedings should be entered only where there are exceptional circumstances" without addressing what those circumstances may be.[90] Nova Scotia has a more elaborate five-page directive last updated in 2011, but it also fails to reference or incorporate the recommendations of the three inquiries.[91] In short, only Newfoundland and Prince Edward Island reflect the recommended restrictions on the use of prosecutorial stays.

Some clue to the reluctance of most prosecutorial services to include the three inquiry recommendations in their guidelines can be found in reports by a subcommittee of the Federal, Provincial and Territorial (FPT) Heads of Prosecution on Wrongful Convictions. The 2011 version of the report provides the following selective review of the recommendations:

Lamer

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87 Saskatchewan, Ministry of Justice and Attorney General, *Termination of Proceedings: Stays, Withdrawals and Recommencements* (Public Prosecution Policy) online: <http://tinyurl.com/5x9akpr5> [perma.cc/LV5D-EDD8].

88 Alberta, Crown Prosecution Service, *Decision to Prosecute* (Prosecution Service Guideline), (4 May 2022) online: <http://tinyurl.com/2a2j3wt2> [perma.cc/6LMH-5Z56].

89 British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, online: <http://tinyurl.com/4748m2zm>. The same is true for Quebec's guidelines. Directeur Des Poursuites Criminelles et Penales, *supra* note 14.

90 New Brunswick, Office of Attorney General, *The Decision to Prosecute: Stay of Proceedings and Recommencement of Proceedings* (Public Prosecution Policy), No 15 (1 September 2015) online: <http://tinyurl.com/mr2zsjvp> [perma.cc/23DU-HDB6].

91 Nova Scotia, Public Prosecution Service, *Staying Proceedings and Recommencing Stayed Proceedings* (Director of Public Prosecutions Directive), (20 November 2013) online: <http://tinyurl.com/2sa4u86y> [perma.cc/F2TM-RBZR].

- Crown Policy should include direction on when withdrawal of charges, stays of proceedings, and elections to call no evidence and request an acquittal, are appropriate.

Driskell

- In the context of s. 696 cases, if "stay" is to be used, the decision should be made personally by the Attorney General.[92]

Notably absent from this account is any reference to the recommendations made by both inquiries that prosecutorial stays should only be used if there is a reasonable likelihood of a re-prosecution.

The 2018 edition of the FPT Heads of Prosecution Subcommittee Report, *Innocence at Stake*, did, to its credit, add chapters on both false guilty pleas and Crown advocacy.[93] Unfortunately, the chapter on Crown advocacy still did not include the recommendations about restricting the use of prosecutorial stays in the wrongful conviction context. Again, this is a striking omission in a report that otherwise relies very heavily on the reports by the seven public inquiries that Canada has held into wrongful convictions.

The PPSC's deskbook provides a separate prosecutorial directive on wrongful convictions[94] inspired by the FPT Heads of Prosecution's Subcommittee reports. Unfortunately, the federal deskbook also reflects the FPT Subcommittee's omission of the three inquiry recommendations restricting the use of prosecutorial stays.

D) Summary

The poor implementation of the three inquiry recommendations suggests that Canadian prosecutors have been reluctant to voluntarily place restraints on the ambit of their prosecutorial discretion. Hopefully, the eight Canadian prosecutorial services that do not address the three inquiry recommendations will be updated soon. Better late than never.

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92 PPSC, *Chapter 3—Canadian Commissions of Inquiry* (13 September 2011) online: <http://tinyurl.com/mr323bjt> [perma.cc/4SWK-VJBV].

93 *Report of the Federal/Provincial/Territorial Heads of Prosecution Subcommittee on the Prevention of Wrongful Convictions: Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (2018) at ch 9, online (pdf): <http://tinyurl.com/4tw527sz> [perma.cc/9GLH-ME7C].

94 PPSC, *Prevention of Wrongful Convictions* (Directive of the Attorney General), No 2.4 (1 March 2014) s 9, online: <http://tinyurl.com/52shtvbd> [perma.cc/GUU8-K9KR]. There also appears to be no specific directive in the Deskbook on the use of stays or the alternatives of withdrawing charges or calling no evidence.

The Newfoundland guidelines would be a good place to start because they reflect that many wrongful convictions in Canada are not remedied through the time-consuming process of seeking a Ministerial remedy after appeals have been exhausted.

6. Recent Uses of Prosecutorial Stays and the Alternative of Calling No Evidence

The failure of most prosecutorial services in Canada to incorporate the three inquiry recommendations in their guidelines leaves the decision whether to use a prosecutorial stay or the alternatives of calling no evidence to produce a not guilty verdict or withdrawing charges to unstructured prosecutorial discretion.

Drawing on cases from 2016 that have been included in the recently launched Canadian Registry of Wrongful Convictions,[95] it can be concluded that prosecutors continue in many, but by no means all cases, to employ prosecutorial stays in cases where new trials have been ordered on the basis of new evidence relevant to questions of innocence or guilt. All these cases confirm the criminological insight that prosecutors—more than judges—play the key role in the accused's disposition and have the most power to recognize and correct—or to not recognize and not fully correct—wrongful convictions.[96]

A) Four Recent Cases Where Prosecutors Called No Evidence

1) Glen Assoun

In 2019, David Lametti, then federal Minister of Justice ordered a new murder trial for Glen Assoun on the basis of new evidence related to alternative suspects (including a serial killer) in the murder of Mr. Assoun's former girlfriend. The information was not disclosed to Mr. Assoun when he represented himself in his 1999 murder trial or when he unsuccessfully appealed to the Nova Scotia Court of Appeal in 2006.

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[95] See "The Canadian Registry of Wrongful Convictions", online: <www.wrongfulconvictions.ca> [perma.cc/GM28-MPW8]. I co-founded this registry with Amanda Carling. We, along with a few University of Toronto law graduates, maintain the registry.

[96] For arguments that prosecutors play key direct and indirect roles in causing and correcting wrongful convictions and that softer internal accountability measures may be more effective than professional discipline or attempts to impose civil or criminal liability see Kent Roach "Regulating the Prosecutorial Role Wrongful Convictions" in Victoria Colvin and Philip Stenning, eds, *The Evolving Role of the Public Prosecutor* (New York: Routledge, 2019) at 256–262.

The same day that the Minister of Justice ordered a new trial, Nova Scotia prosecutors called no evidence noting that "there is no realistic prospect of conviction." Mr. Assoun, who had been assisted by Innocence Canada, then received a not guilty verdict and told reporters, "I prove my innocence here today, after twenty-one years" while noting he would "never get back my health and the freedom they took for me."[97] A national television news story noted that Mr. Assoun "got more than a pardon today … his murder conviction was overturned" while others accurately recorded his acquittal.[98] Mr. Assoun also subsequently received compensation for the near 17 years he spent in prison before his death in 2023 at 67 years of age.

2) Tomas Yebes

Tomas Yebes was convicted by a Vancouver jury in 1983 of murdering his sons despite maintaining his innocence. In 1987, the Supreme Court of Canada rejected his appeal in a case that remains a leading case limiting the ability of appellate courts to "second guess" jury verdicts even when assessing the reasonableness of their verdicts. The Supreme Court's decision remains an influential precedent even though it is now clear that Mr. Yebes was wrongly convicted.[99]

In late 2020, then federal Minister of Justice David Lametti ordered a new trial for Mr. Yebes on the basis of new evidence that undermined expert evidence given at trial that the fire that killed Mr. Yebes' sons was deliberately set. The s. 696 application had been assisted by the work of the UBC Innocence Project. Shortly after the new trial was ordered, a British Columbia prosecutor called no evidence and Mr. Yebes received an acquittal. The prosecutor explained in court, "[t]he prosecution service is presenting no evidence and inviting the court to enter acquittals on both charges for Mr. Yebes."

Mr. Yebes' lawyer stressed the importance of the acquittal, "[f]or 37 years, Mr. Yebes has lived under the shadow of the stigma of the most terrible of crimes, murder of his own children … Today is the day that he

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97 See Roach, *Wrongfully Convicted*, *supra* note 5 at 180; "NS man's 1999 murder conviction thrown out", *Globe and Mail* (2 March 2019) A2.

98 "Glen Assoun pardoned", *CTV National News* (1 March 2019); "Video plans and items as of 5:00 pm", *Canadian Press* (1 March 2019).

99 *R v Yebes*, 1987 CanLII 17 (SCC). This precedent has been cited over 2,000 times. The Supreme Court of Canada has cited the decision in *R v Biniaris*, 2000 SCC 15 at para 42 as a reason for not adopting a lurking doubt approach to appeals and in *R v WH*, 2013 SCC 22 at para 27 as a reason for appellate courts not to act as "13th juror". The Court has continued to cite the case with approval *in R v CP*, 2021 SCC 19 after Mr. Yebes' acquittal in late 2020.

spoke about at his sentencing hearing, 37 years ago, the day he never lost faith would come, the day when the justice system has recognized what he and those close to him have always known—that he is an innocent man."[100] As with Glen Assoun's case, the not guilty verdict affirmed Mr. Yebes' innocence and provided some degree of closure to the case.

3) Brian Anderson and Allan Woodhouse

Brian Anderson and Allan Woodhouse were Indigenous teenagers when they were convicted in 1974 by an all-white all-male Winnipeg jury of murder. There was no evidence linking them to the crime, but they were convicted on the basis of confessions they made to the police when they were custody and did not have access to a lawyer. They claimed that their confessions were involuntarily obtained, but this was rejected at trial.

Mr. Anderson and Mr. Woodhouse, assisted by Innocence Canada, applied to the federal Minister with new evidence that suggested that their confessions did not correspond with their speech patterns or skills in English which was their second language. In June 2023, then Minister of Justice David Lametti ordered a new trial. The next month, a Manitoba prosecutor called no evidence. She stated in open court, "[s]ystemic racism impacted the investigation, the prosecution and the adjudication of this case. There is no question that there is not credible or reliable evidence to proceed … Our justice system failed. They were wrongfully convicted. For that I am sorry."[101] Chief Justice Joyal told the men in court, "[y]ou are innocent. You deserve acquittals. I'm now happy to enter them."[102]

As with the calling of no evidence in the Glen Assoun and Tomas Yebes cases, the Manitoba prosecutors followed the recommendations of all three wrongful conviction inquiries in these s. 696 cases. After he was acquitted, Brian Anderson told reporters, "it's what I wanted to hear. I've been waiting for that the last 50 years." Allan Woodhouse added, "I feel

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100 Ian Mulgrew, "Surrey father acquitted, decades after double-murder conviction" Vancouver Sun (13 November 2020). See also Canadian Registry of Wrongful Convictions, "Tomas Yebes", online: <http://tinyurl.com/44df4rwc> [perma.cc/3PSW-8NZH].

101 See Katrina Clarke, "A half-century later: 'you are innocent'", *Winnipeg Free Press* (18 July 2023); Kathleen Martens, "Two Indigenous men acquitted of murder after 50 years", *APTN* (18 July 2023). See also Canadian Registry of Wrongful Convictions, "Brian Anderson", online: <http://tinyurl.com/3c8tzez5> [perma.cc/PED4-5B3R]; Canadian Registry of Wrongful Convictions, "Allan Woodhouse", online: <http://tinyurl.com/5n7zycvu> [perma.cc/7Z26-SZP3].

102 See Martens, *supra* note 101.

free."[103] Again, the not guilty verdict quite properly affirmed the men's innocence which was widely reported in the national media.

4) Robert Mailman and Walter Gillespie

In early 2024, New Brunswick prosecutors called no evidence after federal Minister of Justice Arif Virani had ordered new murder trials for Robert Mailman, aged 76-years-old, and Walter Gillespie, aged 81-years-old. This meant that the two men received an acquittal.

Chief Justice DeWare who entered the not guilty verdict commented that while both men "entered this courtroom today innocent in the eyes of the law as a result of Minister Virani's order" they would leave "the court today with that presumption of innocence intact and forever confirmed by the fact that they had been found not guilty of this charge".[104] In her written judgment, she elaborated that the wrongful convictions deprived the two men of "decades of their liberty" and resulted in "the shame of a murder conviction. Hopefully, their acquittals to the charges will provide Mr. Mailman and Mr. Gillespie with a sense of peace and public recognition that they have been found not guilty of this crime."[105] These statements rightly acknowledge that while in a technical sense, a prosecutorial stay would not have altered the presumption of innocence enjoyed by all, it was the decision to call no evidence and the subsequent acquittals that had the practical effect of publicly affirming the presumption of innocence given that the men had previously suffered the "shame" of being convicted of a brutal murder. In addition, the not guilty verdicts provided the two men "peace" or repose provided by protections against double jeopardy.

All four cases involve older people who had waited between 20 and 50 years to have the wrongful convictions corrected by the Minister of Justice ordering the extraordinary remedy of a new trial. As such, they involve sympathetic characters who all to some degree attracted favourable media attention and are widely accepted as wrongfully convicted.

The next five cases, however, show continued use of prosecutorial stays contrary to the recommendations of the *Lamer Inquiry* in cases where wrongful convictions were corrected by new evidence but, except in one case, without exhausting appeals and requiring extraordinary Ministerial

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[103] Brittany Hobson, "'Courage and resistance': Judge acquits two men convicted in 1973 killing in Winnipeg", *Canadian Press* (18 July 2023).

[104] Aidan Cox, "Saint John men acquitted of murder almost 40 years after their wrongful conviction", *CBC News* (4 January 2024).

[105] *King v Gillespie and Mailman*, 2024 NBKB at para 4 [*Gillespie*].

relief. As will be seen, these five cases are not as widely recognized as wrongful convictions.

B) Five Problematic Uses of Prosecutorial Stays

One referee of an earlier version of this article raised concerns that the following five cases were not cases where the accused's innocence was "clear-cut". This may be so, but this raises a chicken and egg question of the degree to which the use of prosecutorial stays in these cases make the overturned convictions in these cases seem less wrongful and promote the suspicion demonstrated by the reviewer.

The process of exonerating an accused is a complex one that involves the law, the media and social processes including how prosecutorial discretion is exercised.[106] The use of prosecutorial stays to place a prosecution permanently on hold invites continued suspicion stemming both for the original conviction and the prosecutor's decision to place the prosecution on hold. Prosecutorial stays deprive the accused of the closure of a not guilty verdict, protection against further prosecution and a realistic chance to obtain compensation.

In any event, all five of the following cases have been included in the Canadian Registry of Wrongful Convictions on the basis that they involve cases where convictions were overturned on the basis of new evidence relevant to guilt or innocence, rather than procedural claims or legal errors. The Canadian Registry follows the American National Registry of Wrongful Convictions in rejecting a restrictive proven innocence approach to defining wrongful convictions because the criminal justice system does not make determinations of innocence.[107]

The use of prosecutorial stays in the next five cases creates two classes of the wrongfully convicted: those who have been acquitted and those who are in legal limbo. The fact that it is the same prosecutorial service implicated in the wrongful convictions that makes such momentous

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[106] I examined the complexity of the exoneration process in Roach, "Exonerating the Wrongfully Convicted", *supra* note 13 and Roach, "Reforming and Resisting Criminal Law", *supra* note 6. On the important role played by the media see Richard Nobles & David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000) ch. 4.

[107] See *Mullins-Johnson*, *supra* note 46. On some of the implications of the definition of wrongful convictions used by the American Registry of Wrongful Convictions compared to the proven innocence approach used by Innocence Projects that focus on DNA exonerations see Richard Leo, "Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence" in Daniel Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (New York: Cambridge University Press, 2017).

decisions and that their decisions are not subject to appeal or effective judicial review absent clear evidence of abuse only aggravates the dangers of abuse.

1) Wendy Scott and Connie Oakes

Casey Armstrong was brutally murdered in his trailer home in Medicine Hat, Alberta in 2011. A witness testified that the day after Armstrong was last seen alive, he saw two women placing a bag into the trunk of a red car in front of Armstrong's home. The witness described the women as white with one having red hair.

The Medicine Hat police investigated the murder for eight months without success. They found a size 11E bloody boot print. The owner of what they thought was the red car seen in front of Armstrong's home told them that she had, by the time of Armstrong's murder, sold the car to a female drug dealer called "Ginger".

In response to a confidential tip, the Medicine Hat police interrogated Wendy Scott, who has an IQ of 50. They falsely told her that her DNA had been discovered in Armstrong's home, whereas no DNA or fingerprints had been discovered. Ms. Scott made inconsistent statements to the police, including one implicating "Ginger", the woman with the red hair and red car. Ms. Scott eventually told the police that Connie Oakes had killed Armstrong in her presence. Both Wendy Scott and Connie Oakes were charged with first-degree murder.

In 2012, Ms. Scott pled guilty to second-degree murder. This meant that she would be eligible for parole after 10 years as opposed to the mandatory 25 years if she had been convicted of first-degree murder. The next year, Ms. Scott was the Crown's star witness in Ms. Oakes' first degree murder trial.

Ms. Scott admitted under oath at Connie Oakes's trial that she had previously lied under oath and had mental health and learning issues. The trial judge warned the Medicine Hat jury, with no visibly Indigenous members, that they should not rely on Ms. Scott's uncorroborated evidence. A knife owned by Connie Oakes was admitted into evidence, but it was not connected with the crime.

Ms. Oakes maintained her innocence. She provided the police with three alibi witnesses, two of whom would not co-operate with the police and the third was characterized by the police as an unreliable drug user. Ms. Oakes did not testify in part because her extensive criminal record likely would have been admitted to impugn her credibility. The jury convicted

Ms. Oakes of second-degree murder with half of the jury recommending that Ms. Oakes receive the harshest sentence possible. The jury's guilty verdict was greeted by cheers in the courtroom.

Ms. Scott appealed her guilty plea to the Court of Appeal of Alberta. On October 16, 2015, the Court overturned her conviction and ordered a new trial. No published judgment can be found for this decision. Furthermore, Ms. Scott remained detained and it was not until January 13, 2017 that a senior Alberta prosecutor not involved in the original conviction stayed her new murder trial. A spokesperson for Alberta Justice explained that the senior prosecutor reviewed "the file from the ground up" and concluded that a stay "was in the best interests of justice."[108]

Ms. Oakes appealed her murder conviction to the Court of Appeal of Alberta relying on the court's own decision to overturn Ms. Scott's conviction as new evidence. In 2016, a majority of the Court overturned Ms. Oakes' murder conviction noting the importance of Ms. Scott's testimony and guilty plea to murder to Oakes' murder conviction. The two judges noted that the prosecutor in Ms. Oakes' trial had relied on Ms. Scott's guilty plea as "vouching for her testimonial truthfulness."[109] One judge in dissent would have maintained Ms. Oakes conviction arguing that it did not depend on Ms. Scott's conviction.

Soon after the Court overturned Ms. Oakes murder conviction and ordered a new trial, Alberta prosecutors entered a prosecutorial stay with respect to Oakes' new murder trial. In a "prepared statement, Alberta Justice confirmed the charge was stayed, but noted it could be reactivated at a later date."[110] The CBC reported, "Oakes may be free but she's not quite free and clear. Crown prosecutors have the option to reactive the murder conviction for up to a year."[111]

As discussed in the last part, Alberta's prosecutorial guidelines do not advert to the recommendations of the three public inquiries that a prosecutorial stay only be used when there is a reasonable likelihood of the prosecution starting again. There has been no re-prosecution of either

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108 "Alberta stays murder charge amid doubts about police tactics", *Globe and Mail* (19 January 2017) A4. See also Canadian Registry of Wrongful Convictions, "Wendy Scott", online: <http://tinyurl.com/bdf34xr8> [perma.cc/D4X9-DGYA].

109 *R v Oakes,* 2016 ABCA 90 at para 25. See also Canadian Registry of Wrongful Convictions, "Connie Oakes", online: <http://tinyurl.com/3cpvder5> [perma.cc/WWE4-VNN9].

110 "Charges stayed in trailer park stabbing", *Calgary Herald* (29 April 2016) A8.

111 "Second degree murder charge against Crown prosecutor stayed by Crown prosecutor", *CBC World* (29 April 2016). After a year, a prosecution could also be launched but would require a new indictment.

Wendy Scott or Connie Oakes. In May 2018, Alberta rejected calls for a public inquiry into both wrongful convictions. In the same year, the *Medicine Hat News* commented that the murder had "been left hanging … shrouded in all sort of assumptions" that "become as good as fact in the public's mind" including Ms. Oakes' "bad character, with criminal convictions before this case and since."[112] In 2019, Ms. Oakes' malicious prosecution suit was dismissed.[113] Casey Armstrong's murder remains unsolved.

Because of the prosecutorial stays, both Ms. Scott and Ms. Oakes could be re-prosecuted for Armstrong's murder. Both are disadvantaged persons who live at the margins, but that does not mean that they could not suffer from continued suspicion and stigma from their overturned murder convictions enhanced by the use of a prosecutorial stay. There is also some evidence that the Medicine Hat police believe that they have done a good job in investigating Armstrong's murder.[114] As in the Randy Druken and Gregory Parsons wrongful convictions examined above, it is possible that the use of prosecutorial stays in these two Alberta cases may represent a form of confirmation bias or tunnel vision that is resistant to considering that Ms. Scott and Ms. Oakes may not be guilty of the brutal murder of Mr. Armstrong.

The prosecutorial stays in these cases were entered in 2016 and 2017. Despite the inquiries' recommendations that prosecutors should, as in the Gregory Parsons case, revisit any decision to use prosecutorial stays , there is no evidence that this has been done with respect to the stays in the Wendy Scott or Connie Oakes prosecutions or any of the other problematic stays discussed in this article. Nothing, however, would stop prosecutors from returning to court and calling no evidence so that Scott and Oakes receive not guilty verdicts. This is another example of prosecutorial neglect of the considered recommendations made by the eminent jurists who wrote the reports of the three inquiries.

2) James Turpin

In 2015, James Turpin of the Eel River First Nation was charged with the murder of his girlfriend's daughter though the two-year-old girl had died in a bathtub in 2004. Mr. Turpin, who sought medical assistance for the girl, told police that the child had fallen in the tub and consistently maintained his innocence. A 2004 autopsy could not determine the precise manner of the child's head injuries. Murder charges were, however, laid

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112 "The Search for truth continues", *Medicine Hat News* (3 May 2018) 3.

113 "Connie Oakes' lawsuit dismissed", *Medicine Hat News* (16 May 2019) 1.

114 Roach, *Wrongfully Convicted*, *supra* 5 at 163–169.

in 2015 after another pathologist opined that the injuries to the deceased child could not have been caused by a fall in the tub.

In 2016, Mr. Turpin was convicted of second-degree murder by a Fredericton jury with no visible Indigenous representation. The Court of Appeal of New Brunswick overturned his conviction in 2019 and ordered a new trial on the charge of manslaughter. The Court found that the murder conviction was unreasonable given that none of the experts "were able to offer a definitive explanation of how she was injured … No one conclusively believed she died from being shaken, with many experts saying just the opposite."[115] The five-judge panel also concluded that the jury was likely to be confused and overwhelmed by the 12 expert witnesses that the prosecution had called.

The new manslaughter trial was started on March 8, 2021, before a judge alone. One expert called by the prosecutor said she could not rule out that the child died from falling in the bathtub, especially given the child's previous fall and vomiting. On March 31, 2021, the prosecutor stayed proceedings against Mr. Turpin on the basis that there was no reasonable prospect of conviction. The prosecutor told reporters that the decision "was not made lightly or hastily … it is a cornerstone of the Canadian criminal justice system that the Crown act fairly and impartially based on its assessment of the evidence." Mr. Turpin's lawyer, Nate Gorham, stated that while he was pleased with this outcome, "the public and all parties involved could've benefited from a final determination of the case in terms of an acquittal."[116]

As outlined in the last part of this article, New Brunswick's prosecutorial guidelines do not advert to the recommendations by the three inquiries that prosecutorial stays should only be used if there is a reasonable likelihood of re-prosecution. Instead, they unhelpfully declare that a prosecutorial stay should only be used in "extraordinary circumstances".

Although James Turpin's trial, successful appeal and aborted re-trial received extensive local media coverage, the coverage was never favourable to him. The press focused on the child and her mother, and the testimony presented by the prosecutors. Nevertheless, Mr. Turpin is included in the Canadian Registry of Wrongfully Convictions on the basis that his murder conviction was reversed on the basis of indicia of wrongful

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115 *Turpin v R*, 2019 NBCA 78 at para 83. See also Canadian Registry of Wrongful Convictions, "James Turpin", online: <http://tinyurl.com/2nk3f9av> [perma.cc/DJJ6-L2LM]; Roach, *Wrongfully Convicted*, *supra* note 5 at 80–84.

116 Elizabeth Fraser, "Crown sees no chance of conviction for man accused in toddler Kennedy Corrigan's death", *CBC News* (1 April 2021), online: <http://tinyurl.com/44hjjphm> [perma.cc/4D6L-3F72].

convictions related to disputed pediatric forensic pathology relating to short falls and shaken baby syndrome. The prosecutor subsequently determined that there was no reasonable prospect of convicting him of manslaughter. In such a circumstance, Mr. Turpin's murder conviction should be considered wrongful. The *Lamer Inquiry*[117] would suggest that with no reasonable prospect of prosecution, the prosecutor should have called no evidence to allow an acquittal to be entered. This would mean that the presumption of innocence, as in the cases of Mr. Mailman and Mr. Gillespie, also from New Brunswick, would practically be confirmed.[118] As of this writing, Mr. Turpin has not been re-prosecuted and remains in a legal limbo.

3) Sean and Mariah Hosannah

Sean and Maria Hosannah, who are Black and Muslim, were charged with manslaughter. The allegations were that the parents, who for religious reasons have a largely vegetarian diet, had failed to provide their daughter with the necessities of life before she died in 2011.[119]

Mr. and Ms. Hosannah were charged after an autopsy by Dr.Pollanen, Ontario's chief forensic pathologist, who at trial "gave evidence that the deceased died of a combination of asthma and malnutrition which led to a failure of blood circulation and death."[120] After a jury convicted them of manslaughter, Ms. Hosannah told the judge "[m]y husband and I were wrongly convicted."[121] The couple was sentenced to two years in prison. Their surviving children were taken into the custody of the Childrens' Aid Society.

In 2020, the Court of Appeal for Ontario, with the Crown consent's, accepted new expert evidence from another forensic pathologist and an expert in pediatric bone disorders that the child's cause of death was heart

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117 The case does not involve Ministerial relief for a miscarriage of justice. As such, the case is not subject to the more limited recommendations of the *LeSage* and *MacCallum Inquiries*.

118 Thoughtful commentators who have worked with Innocence Projects have concluded that no workable or realistic definition of innocence can ignore the presumption of innocence as a fundamental legal principle. See Keith A Findley, "Defining Innocence" (2011) 74 Alb L Rev 1157 at 1160.

119 *R v Hosannah*, 2020 ONCA 617 at para 6 [*Hosannah*]. See also Canadian Registry of Wrongful Convictions, "Maria Hosannah", online: <http://tinyurl.com/27p4ydsm> [perma.cc/G93C-26ZW].

120 *Hosannah*, *supra* note 119 at para 10.

121 "Brampton parents convicted in death of their daughter speak out", *Brampton Guardian* (1 April 2015) 1.

failure from anemia and deficiencies of vitamins D and B12.[122] The Court admitted the new evidence on the basis that it constituted "opinions of well-qualified experts on issues within their respective fields of expertise" that are "reasonably capable of belief" and "could reasonably be expected to have affected the result at trial."[123] The Court stated, "[a]lthough the jury could have concluded that reasonable parents would be aware of the absence of protein in their child's diet and the risk that it posed, a jury could conclude that a reasonable parent may not realize that their child's diet lacked adequate vitamins D and B12."[124] The manslaughter conviction was overturned and a new trial ordered.

The prosecution started a new trial process with a hearing to qualify Dr. Pollanen's expert evidence. On cross-examination at the hearing, Dr. Pollanen conceded that a "cascade" of events involving genetics and other factors could not be ruled out but that he had not "read the relevant literature closely enough to be able to make an informed opinion" about this possibility.[125]

Ontario prosecutors then entered a prosecutorial stay. They maintained that Dr. Pollanen's evidence was still admissible and there was still a reasonable prospect of conviction. Nevertheless, it was no longer in the public interest to prosecute Sean and Maria Hosannah "given the passage of time and given the fact that the Hosannahs have been otherwise" held accountable "for the death of their daughter."[126]

The prosecutorial stay on public interest grounds begs the question of why the new prosecution was even started if a prosecutorial stay was justified because of the time that had passed since the child's death and the time the Hosannahs had been imprisoned. The prosecutors seemed to offer mercy, but the couple who have always maintained their innocence likely wanted justice and a verdict on the merits.

The Ontario directive does not explicitly address prosecutorial stays based on public interest considerations but also states that stays should only be used "with an expectation of recommencing within one year."[127] In this case, the Ontario prosecutors maintained that there was still a reasonable

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122 *Hosannah*, *supra* note 119 at para 21.

123 *Ibid* at paras 31–32.

124 *Ibid* at para 35.

125 Rachel Mendleson, "An expert opinion sent two parents to jail for their daughter's death. Now the case has fallen apart and Ontario's top pathologist is under scrutiny—again", *Toronto Star* (5 April 2023), online: <http://tinyurl.com/55rsj4er> [perma.cc/W52C-BFFW].

126 *Ibid*.

127 Government of Ontario, *Charge Screening Directive*, *supra* note 83.

prospect of conviction, thus perhaps avoiding the restrictions on stays in the Ontario directive. Nevertheless, their conclusions only increase the suspicion and stigma promoted by the use of a prosecutorial stay. The prosecutorial stay has placed the Hosannahs in a very difficult position. They cannot appeal a prosecutorial stay. Any lingering suspicions about them as parents has a potential to influence the conduct of child welfare officials. Moreover, their overturned manslaughter convictions have not been widely recognized as wrongful convictions even though their case involved the overturning of a conviction on the basis of new evidence relevant to the question of guilt or innocence.

4) Joshua Dowholis

Joshua Dowholis was convicted by a Toronto jury of three counts of aggravated sexual assault and two counts of forcible confinement with respect to male complainants that he had met at a Toronto bathhouse. At trial, Mr. Dowholis argued that there was consent to the sexual encounters and that he disclosed to the complainants that he was HIV-positive. After being convicted, Mr. Dowholis was sentenced to six years imprisonment including two years of pre-trial detention when he was denied bail.

On appeal, the Court of Appeal admitted new evidence that the jury foreperson had made derogatory remarks about gay people on a talk radio show both during and shortly after the trial. The Court quashed the convictions and ordered a new trial. The majority admitted the juror's remarks as new evidence and ruled that the remarks created a reasonable apprehension of bias. Another judge overturned the conviction because of the trial judge's failure to warn the jury about the dangers of allowing one complainant's testimony to influence the case involving the others.[128]

The Ontario prosecutor then issued a prosecutorial stay in January 2017. Similar to the case involving Mr. and Mrs. Hosannah, the prosecutor justified the use of the stay on public interest grounds related to the fact that Mr. Dowholis had already served five years imprisonment and had been granted parole.

As with the Hosannahs' case, the Ontario prosecutors were more comfortable entering a prosecutorial stay rather than calling no evidence to produce an acquittal. But whether the decision to enter a prosecutorial stay is made because a prosecution is not justified in the public interest or not justified on evidential grounds, the *Lamer Inquiry* suggests that

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[128] *R v Dowholis*, 2016 ONCA 801. See also Canadian Registry of Wrongful Convictions, "Joshua Dowholis", online: <http://tinyurl.com/22ehwzmf> [perma.cc/GWG4-DKGN] [CRWC, "Joshua Doholis"].

the recommended exercise of prosecutorial discretion would have been to call no evidence so that a not guilty verdict could be entered. This was not an ordinary use of prosecutorial stay but one made after a new trial was ordered after new evidence relevant to guilt or innocence had been admitted on appeal.

Mr. Dowholis seemed to regret that he would not obtain a verdict on the merits given his claims that there was consent and disclosure of his HIV status. He told reporters that he was "pleased with the outcome today, but at the same time, I was a little disappointed I didn't get an opportunity for a fair trial."[129] Again, these comments suggest that a not guilty verdict would have provided more closure to Mr. Dowholis than the prosecutorial stay he received.

5) Gerald Klassen

On December 16, 1993, Julie McLeod, a 22-year-old Indigenous woman, was found partly undressed and submerged next to a boat ramp. The forensic pathologist who performed an autopsy concluded that she had died from "a combination of trauma to the head resulting from assault, acute intoxication, and hypothermia."[130] He also opined that McLeod's head trauma could not have occurred accidentally.[131] Gerald Klassen was arrested and charged with first-degree murder on the theory that he had killed McLeod while sexually assaulting her. He maintained his innocence and stated that he had consensual sex with Ms. McLeod and that after he pushed her, she had struck her head on the boat ramp. He maintained that she was alive and fully clothed when he left her on the night in question.

Based on the forensic pathologist's expert opinion, the trial judge gave the jurors the instruction that Ms. McLeod's head trauma had resulted from a beating: "There can be little question but that Ms. McLeod was physically assaulted, beaten, and suffered considerable injuries."[132] The jury found Mr. Klassen guilty of first-degree murder. He was sentenced to life imprisonment without the possibility of parole for 25 years. Mr. Klassen was denied parole "in large part because he … maintained his innocence" and thus "refused to participate in programs for sexual

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[129] David Bruser & Jesse McLean, "Gay man who was mocked by juror on radio has charges stayed", *Toronto Star* (6 January 2017), online: <http://tinyurl.com/unrj985p> [perma.cc/CDQ8-3EFS]. See also CRWC, "Joshua Doholis", *supra* note 128.

[130] *R v Klassen*, 2020 BCSC 2288 at para 7 [*Klassen*]. See also Canadian Registry of Wrongful Convictions, "Gerald Klassen", online: <http://tinyurl.com/57c3zze7> [perma.cc/YJL3-S8FA].

[131] *Klassen*, *supra* note 130 at para 7.

[132] *Ibid*.

offenders."[133] Mr. Klassen's counsel conceded that Klassen's conduct on the night Ms. McLeod died was "reprehensible … but it was not sexual assault nor was it murder."[134]

On April 1, 2022, then Minister of Justice David Lametti ordered a new trial on the basis of new evidence from four different forensic pathologists who disagreed with the forensic pathologist who had testified at trial that the cause of death could not have been an accidental blow to the head.[135] In late April 2023, British Columbia prosecutors stayed Mr. Klassen's new trial concluding "that the charge against Mr. Klassen no longer meets the standards required pursuant to Crown policy to proceed with a prosecution."[136]

The decision to enter a prosecutorial stay seems contrary to all three public inquiry recommendations. Mr. Klassen was successful in persuading the federal Minister of Justice based on new evidence relating to guilt and innocence that a miscarriage of justice was probable. There was no realistic possibility that a new trial would be held 30 years after Ms. McLeod's death and after Mr. Klassen had served 26 years in prison. There was no public attempt by British Columbia prosecutors to distinguish why it was not appropriate to call no evidence and provide Mr. Klassen with a not guilty verdict, as they had done two years earlier after Minister of Justice Lametti ordered a new trial for Tomas Yebes. In both cases, the men had been assisted by the UBC Innocence Project.

The inconsistent treatment of the Yebes and Klassen cases suggest that the exercise of prosecutorial discretion should be subject to more guidance and transparency. As suggested above, British Columbia, like most Canadian prosecutorial services, would do well to start with the Newfoundland guidelines that reflect Chief Justice Lamer's 2006 recommendations that prosecutors not use prosecutorial stays to place charges on hold when there is no reasonable prospect of re-prosecution.

The use of a prosecutorial stay in Gerald Klassen's case is also contrary to the recommendations of the *LeSage* and *MacCallum Inquiries* because Mr. Klassen convinced the federal Minister of Justice that new evidence established a probability of a miscarriage of justice and there appears to be no reasonable prospect of a new trial ever being held.

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133 *Ibid* at para 6.

134 *Ibid*.

135 *Ibid* at paras 9–10.

136 Michael Potestio, "Crown drops retrial of man originally convicted of murder", *Kamloops This Week* (1 May 2023), online: <https://issuu.com/kamthisweek/docs/20230503> [perma.cc/C7NG-L2NY].

Mr. Klassen is free, but remains in a legal limbo that he cannot effectively challenge. After 26 years in jail and a successful s. 696 application, Mr. Klassen has not received a not guilty verdict. This resolution of his case received almost no media coverage.[137] Perhaps this was because his behaviour on the night in question was not admirable even though corrections officials subsequently characterized him as "good inmate" who was not violent during his 26 years in prison and the Crown acknowledged in 2020 that his detention was not necessary.[138] Nevertheless, the lack of a not guilty verdict may make it even more difficult for Mr. Klassen to be re-integrated into society despite family support or to receive any compensation despite serving a longer time in prison than David Milgaard.

7. Conclusion

Despite the important work of three public inquiries between 2006 and 2008, prosecutorial stays are still what passes for justice for too many but fortunately not all of Canada's wrongfully convicted. The three inquiries concluded that David Milgaard, Randy Druken, Gregory Parsons and James Driskell all suffered continued suspicion and stigma as a result of prosecutorial stays.

Although they can be justified in other cases not involving wrongful convictions and even after a wrongful conviction has been overturned if there is a reasonable likelihood of a re-prosecution, prosecutorial stays leave a previously convicted person in a legal limbo between their overturned guilty verdict and the not guilty verdict that the prosecutor has denied them. Trial judges must accept prosecutorial stays absent a proven abuse of process. The accused cannot appeal from the entry of a prosecutorial stay. Moreover, they do not have the double jeopardy protections or "sense of peace" that comes from acquittal or the "public recognition" of their innocence.[139]

As an exercise of prosecutorial discretion, the entry of a prosecutorial stay is only reviewable on abuse of process grounds. In practice, however, it is extremely difficult, if not impossible, to establish an abuse of process.

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137 The only discussion of the stay in the Canadian Newsstand data base is my op-ed Kent Roach, "The wrongfully convicted deserve acquittals, not prosecutorial holds", *Vancouver Sun* (12 May 2023). This reminds me of the famous quote by Jerry Garcia of the Grateful Dead: "Somebody has to do something. It just seems incredibly pathetic that it has to be us." See "Somebody Has To Do Something … It Seems Pathetic That It Has To Be Us", online: <http://tinyurl.com/4b9t5xwx> [perma.cc/HG8W-9VXT].

138 *Klassen*, supra note 130 at paras 15–16.

139 *Gillespie*, *supra* note 105 at para 4.

This is especially so when the vast majority of prosecutorial guidelines do not place the restrictions on the use of prosecutorial stays recommended by three public inquiries between 2006 and 2008.

At its very best, present prosecutorial practice is arbitrary. In 2020, BC prosecutors called no evidence after the federal Minister of Justice ordered a new trial for Tomas Yebes. In similar circumstances, they entered a prosecutorial stay three years after the same Minister of Justice ordered a new trial for Gerald Klassen. One purpose of this article is to urge all prosecutorial services to adopt Newfoundland's guidelines restricting the use of prosecutorial stays—guidelines that reflect Chief Justice Lamer's 2006 recommendations.

Another purpose of this article is to suggest that it is not too late for prosecutors to do "the right thing"[140] by the seven wrongfully convicted persons that they have placed in legal limbo by prosecutorial stays since 2016. Prosecutors can return to court and call no evidence so that these seven persons receive both the closure and protections of a not guilty verdict. Because of their experiences, the wrongfully convicted may fear re-prosecution even when others, including prosecutors, recognize that it is not likely or possible. Prosecutorial discretion should not be influenced by concerns about possible civil liability.[141]

The failure of many prosecutors to voluntarily embrace the three inquiry recommendations restricting how they exercise their prosecutorial discretion to enter a prosecutorial stay is not an academic or theoretical matter. It has harmed real people who suffer many intersecting disadvantages. Prosecutorial stays may result in those who have been wrongfully convicted and had their convictions overturned on the basis of new evidence relevant to guilt and innocence not recognized as such. Those harmed by prosecutorial stays include Connie Oakes and James Turpin who are Indigenous, Wendy Scott who has cognitive challenges, Joshua Dowholis who is gay and HIV-positive, Sean and Mariah Hossanah who are Black Muslims and Gerald Klassen who served 26 years in prison as a convicted first-degree murderer even though four forensic pathologists now dispute the expert evidence used to convict him. Prosecutorial stays add both insult and continued suspicion to the irreparable injuries caused by wrongful convictions.

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140 *Lamer Inquiry*, *supra* note 8 at 315.

141 Truth and Reconciliation Commission, *The Legacy* (Montreal: McGill Queens Press, 2015) at 192, recommending the affirmation of police independence, a similar constitutional principle to prosecutorial independence recognized in *R v Cawthorne*, 2016 SCC 32 at para 42, when the government is "a potential or real party in civil litigation."