

The Future of Innocence Work in Canada

Summary and Recommendations from an
Association in Defence of the Wrongly Convicted (AIDWYC) hosted
AD Hoc Strategic Advisory Group Meeting
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Preface

Many stakeholders involved in innocence work in Canada feel that, despite an accumulation of knowledge about the causes of wrongful convictions, only limited measures have actually been implemented to prevent and correct wrongful convictions and so wrongful convictions continue to occur. The Association in Defence of the Wrongly Convicted, a key participant in the field of Canadian innocence work feels that the time has come to examine the field of innocence work at a more strategic level to identify the issues that remain relevant and the many systemic changes which still need to be put in place to prevent and correct wrongful convictions.

The Association in Defence of the Wrongly Convicted arranged a one-day strategic planning session in order to bring together a selection of experts who are involved in Canadian wrongful conviction work. These experts discussed the history and evolution as well as the strengths and weaknesses of many aspects of wrongful conviction work in Canada and made recommendations on how to affect more long term change.

The following report highlights the priority issues in Canadian innocence work that were identified through this collaborative discussion. The report will also present the recommendations made by this esteemed group of experts with regard to addressing these issues and working toward long-term improvements in innocence work.

Background on AIDWYC

The Association in Defence of the Wrongly Convicted (AIDWYC), founded in 1993, is a Canadian non-profit organization with a mandate to identify, advocate for, and exonerate individuals convicted of a crime they did not commit and to work to prevent such injustices in the future through education and reform.

AIDWYC is the only organization of its kind working on a national level and it operates independently of any government agency. In the years since its inception, AIDWYC has secured the exoneration of 19 individuals who spent a cumulative total of more than 185 years incarcerated for crimes they did not commit:

- Richard Brant
- James Driskell
- Anthony Hanemaayer
- Leighton Hay
- Clayton Johnson
- Dinesh Kumar
- David Milgaard
- Gregory Parsons
- Guy Paul Morin
- Tammy Marquardt
- William Mullins-Johnson
- Romeo Phillion
- Sherry Sherrett-Robinson
- Thomas Sophonow
- Steven Truscott
- Kyle Unger
- Erin Walsh
- Jack White
- Robert Baltovich

In addition to our work to exonerate the wrongly convicted, AIDWYC has also participated, in various capacities, in a number of inquiries related to wrongful convictions:

- **Kaufman Commission on Proceedings Involving Guy Paul Morin:** AIDWYC got standing to intervene in the Morin Inquiry and called much of the evidence – including expert witnesses – during the final phase of the Inquiry devoted to systemic issues (Ontario, convened June 1996)
- **Inquiry into the Arrest and Prosecution of Thomas Sophonow:** AIDWYC was granted standing at the Sophonow Inquiry (Manitoba, convened June 2000)
- **Lamer Commission of Inquiry re: Parsons, Dalton and Druken:** AIDWYC assisted Commissioner Lamer as he delineated the scope of this Commission’s mandate and resolved constitutional questions raised by its terms of reference (Newfoundland and Labrador, convened March 2003)
- **Commission of Inquiry into the Wrongful Conviction of David Milgaard:** AIDWYC was granted full standing at the Milgaard Inquiry (Saskatchewan convened December 2003)

- **Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell:** AIDWYC was granted standing and Senior Counsel represented James Driskell (Manitoba, convened December 2005)
- **Inquiry into Pediatric Forensic Pathology in Ontario (Goudge Inquiry):** AIDWYC was granted standing at this Inquiry (Ontario, convened April 2007)

AIDWYC intervened at the Supreme Court of Canada in the following cases:

- *R. v. Biniaris*, 2000 SCC 15; *R. v. Molodowic* 2000 SCC 16; and *R. v. A.G.*, 2000 SCC 17
- *United States of America v. Burns*, 2001 SCC 7
- *Odhavji v. Woodhouse*, 2003 SCR 69
- *Hill v Hamilton Wentworth Regional Police Services et al.*, 2007 SCC 41
- *R. v. Hart*, 2014 SCC 52
- *Réjean Hinse v. Attorney General of Canada* – heard November 10, 2014
- *Ivan William Mervin Henry v. Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Attorney General of British Columbia, et al.* – heard November 13, 2014

However, despite the 19 successful exonerations and the other important innocence work conducted thus far, the demand for more innocence work continues to be high in Canada. AIDWYC is currently reviewing over 80 cases of possible innocence (13 of which are at a stage of review where AIDWYC is convinced of the client’s innocence) and new applications are submitted on an ongoing basis. Unfortunately, AIDWYC’s resources limit the work to only the most serious convictions – almost exclusively murder convictions although AIDWYC is also concerned about the lack of resources to address potential innocence in lower level convictions.

The Association in Defence of the Wrongly Convicted (AIDWYC) is in a unique position to host a strategic discussion of this nature because of the organization’s history and extensive involvement and leadership in the field of Canadian wrongful conviction work. AIDWYC plans to remain the leading organization assisting the wrongly convicted in Canada for as long as such an organization is needed.

Methodology

A strategic planning session was held in Toronto on Friday, January 16, 2015. Session participants were selected by a designated AIDWYC Board member and AIDWYC’s Executive Director based on the following criteria:

- Being experts in their field
- Possessing significant experience in the field of wrongful convictions
- Having a long standing commitment to the innocence work of AIDWYC
- Being representatives from various jurisdictions in Canada

Care was given to ensure that the participants came from a variety of relevant backgrounds including:

- Legal (Criminal Defence, Crown Prosecutors)

- Academic (Psychology, Law, Forensic Science)
- Government (Department of Justice)

Participants

1. Advisory Group Chair: Jerome Kennedy – Chair of the AIDWYC Canadian Case Assessment Group, AIDWYC Board member and former Minister of Justice and Attorney General for Newfoundland and Labrador (Atlantic Canada and AIDWYC Board perspectives)
2. Tamara Duncan – Vancouver criminal lawyer and AIDWYC case reviewer (western perspective)
3. Bruce McFarlane- Law professor and former Deputy Attorney General in Manitoba(Crown and Prairie perspectives)
4. Kent Roach- Professor, University of Toronto, Faculty of Law
5. Dennis O'Connor- Retired Justice of the Ontario Court of Appeal, AIDWYC Foundation Board Member
6. Stephen Bindman –Special Advisor on Wrongful Convictions to the Department of Justice for Canada
7. Kirk Makin- Author and retired Globe and Mail justice reporter
8. Ron Dalton- Businessman, Exoneree and Co- President of the AIDWYC Board
9. Russell Silverstein- Co-President of AIDWYC Board and Criminal Defence Counsel
10. James Lockyer- AIDWYC Senior Counsel and one of the AIDWYC Founders
11. Alan Young – Associate Professor at Osgoode Law School and Director of the Osgoode Innocence Project
12. Jonathan Rudin- Program Director, Aboriginal Legal Services Toronto
13. Joanne MacLean – Criminal lawyer and Senior AIDWYC Case Reviewer
14. Tim Moore – Professor and Chair, Department of Psychology, Glendon College, York University
15. Debbie Oakley – Executive Director, AIDWYC & AIDWYC Foundation

An agenda was prepared by AIDWYC and discussion topics were assigned to each participant (please see Appendix A for agenda). Participants were given time to present their thoughts and time was allotted for group discussion following each presentation.

Topics included:

- Overview of wrongful conviction work done in the past 20 years – progress made and lessons learned
- Discussion of causes of wrongful convictions – lingering causes and emerging issues
- Reviewing wrongful conviction work in jurisdictions across Canada
- Discussing AIDWYC's role – past, present, and future
- Planning for the future of wrongful conviction work
 - Succession planning and engaging a new generation of Canadian lawyers
 - Examining alternative models for future work in wrongful conviction work in Canada
 - Recommendations – giving effect to change

Throughout the day's discussion, several issues emerged as clear priorities in wrongful conviction work¹. Many recommendations were made by the participants and these recommendations have been

¹ NOTE: The recommendations and opinions herein do not necessarily reflect opinions of all of those who participated in the strategic planning session, nor do they necessarily reflect options of AIDWYC or the AIDWYC Foundation.

consolidated and organized in this report according to these priority issues. The categories are not mutually exclusive and recommendations may relate to one or more themes.

Priority Issues in Canadian Innocence Work

The following themes emerged as priority issues in Canadian innocence work:

- Importance of defining and quantifying “wrongful convictions”
- Need to examine alternate models for wrongful conviction work
- Lack of consistent systemic “rules” including disclosure rules for post-conviction work
- Importance of public awareness and education
- The challenge of the evolving nature of science
- Concern for marginalized and vulnerable populations especially Aboriginal people, African Canadians, and people with mental disabilities given their well known overrepresentation in the criminal justice system
- Lack of human and financial resources and wrongful conviction “fatigue”

We will examine each of these themes below and highlight the group’s recommendations for improvements.

Defining and Quantifying “Wrongful Convictions”

There is one main distinction that the group felt was important be clarified – the difference between innocence and a miscarriage of justice. Confusion about this distinction can lead to misconceptions about the work being done in this field.

AIDWYC and the other like-minded organizations working in this field of the criminal justice system are concerned with the wrongful convictions of *innocent* individuals. A broader definition of a wrongful conviction would include those people who were wrongly convicted based on an error of law (e.g., procedural errors, evidence misuse, flawed jury instructions, inappropriate charge, etc.). Those individuals who are wrongly convicted based on an error of law may not be actually innocent of the crime, but are still classified as “wrongly convicted.”

There is a further distinction made within “innocence” work at AIDWYC that relates to the ability to establish proof of innocence – factual vs. actual innocence. AIDWYC recognizes that in some cases it is possible, with fresh evidence, to irrefutably establish an individual is factually innocent (e.g., with DNA testing). More often, however, the organization will become satisfied that an individual is actually innocent but there will never be a way to prove it without a doubt after careful consideration by AIDWYC’s Canadian Cases Assessment Group (CCAG) and the AIDWYC Board, both kinds of cases are of interest to AIDWYC.

The group felt that it is important to clarify this distinction for several reasons. The way in which wrongful conviction is defined impacts the compiling of statistics on Canadian wrongful convictions. Requiring factual innocence would distort the perceptions of how prevalent wrongful convictions are in Canada. An over-inclusive definition, on the other hand, that includes wrongful convictions (but not

actual innocence), might make fundraising for the cause even more challenging than it already is since fewer people might be inclined to support aiding a person who actually committed a crime.

Even with the distinction between innocence and wrongful conviction clearly defined and our focus only on the innocent victims, it is still impossible to know how many wrongful convictions of this nature there are in Canada. Some participants suggested that a conservative estimate of about 3% of homicide convictions across the country involve an innocent defendant. For lesser crimes (e.g., assault police), it was hypothesized that the number would be slightly higher.

Despite the difficulty of accurately assessing how many wrongful convictions there are in Canada, the importance of trying to quantify wrongful convictions in Canada was recognized. Without established statistics, stakeholders in some Canadian jurisdictions might deny or downplay the existence of wrongful convictions. In addition, it was noted that establishing well defined and accurate statistical evidence for wrongful convictions will allow more in depth analyses of past cases in order to determine factors that contribute most strongly to wrongful convictions. Once these factors can be identified in a systematic way, it will assist efforts aimed at prevention.

Participants discussed the University of Michigan's National Registry of Exonerations (<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>). It is seen as an important resource and the group was pleased to hear that AIDWYC's Case Management Counsel has been working with, inter alia, Professors David Tanovich (University of Windsor, Faculty of Law), Tamara Levy (University of British Columbia, Innocence Project) and Christopher Sherrin (University of Western Ontario, Faculty of Law) on a Canadian version of the Exoneration Registry. Case summaries and statistical analyses are underway and a website – modeled on the American Registry – is under construction. There was a suggestion and general agreement that that data for the Canadian Registry be peer-reviewed before they are made available to the public. This peer-review should include the lawyers involved in the exoneration as well as other lawyers, retired judges, and academics. Such a process would ensure the accuracy of the data and that AIDWYC does not risk losing its credibility.

Recommendation(s):

- 1. Establish peer review process to assess the cases proposed for inclusion in the Canadian Registry of Wrongful Convictions currently under development at AIDWYC.**

Examining Alternative Models for Wrongful Conviction Work

Participants discussed the following aspects of innocence work:

- The current Canadian legal structure in place to pursue a claim of innocence
- Legal structures in place for innocence claims in jurisdictions outside Canada
- Possible improvements to the Canadian system based on these other systems

Existing Structure for Post-Conviction Innocence Work in Canada

The existing governmental body in Canada charged with reviewing potential miscarriages of justice is the Criminal Convictions Review Group (CCRG).

The number of applications received by the CCRG has been declining annually.² Some believe the low number means that there are fewer wrongful convictions in Canada than there once were. It was suggested that a partial explanation for why this number is low lies in the fact that AIDWYC and other Innocence Projects try to avoid the Ministerial Review route because it is slow and arduous. If it is procedurally possible to have a case heard by an appeal court without having first to go to the CCRG, it is seen to be preferable. The Osgoode Innocence Project also finds working with the CCRG challenging in that the CCRG expects a case to be presented in a very extensive and formalized way which requires the work of very experienced lawyers and considerable financial resources – experience and resources that the Osgoode Innocence Project does not have.

A very significant problem with the way innocence work is currently carried out in Canada is that once a ‘cause’ of a wrongful conviction is identified, there is (typically) no subsequent systemic and nationwide review of the cases in which that ‘cause’ might have contributed to other convictions. An exception was the Driskell case in Manitoba where hair microscopy evidence was recognized as a ‘cause’ of a wrongful conviction. The Manitoba government very proactively did a systemic review of all cases in that jurisdiction where a conviction had relied on hair microscopy evidence. Other jurisdictions claimed to have done similar reviews however there is some concern that these reviews were not done thoroughly, if at all. .

Furthermore, other known causes of wrongful convictions have never been looked at in a systemic way. For instance, the risks of unreliable eyewitness identification evidence are well known and yet cases wherein the conviction rested wholly or in large part on such evidence have never been proactively and systematically reviewed. Likewise, following the Supreme Court of Canada’s recent decision in *R. v. Hart*, AIDWYC called upon the federal government to review cases where a confession in the context of a Mr. Big Sting was used to convict the accused. There has to date been no commitment by the federal Department of Justice to do so.

In the discussion of the current structure in Canada, some participants felt that there are significant barriers to innocence work because of the Crown’s resistance to accepting the existence of wrongful convictions. Some participants felt that this resistance and lack of acknowledgment also reflect the feelings of the federal government. Such resistance creates significant barriers for those wishing to carry out innocence work. By and large Crowns do not appear to be cooperating with innocence investigations.

Alternative Structures for Post-Conviction Review: International Perspectives

The participants also discussed relevant aspects of models in place in other parts of the world.

For example, the concept and practice of “Conviction Integrity Units” was discussed. These are groups within state and federal prosecutors’ offices in the United States set up with the intention of assuring the accuracy of convictions obtained by those offices. As of December 2014, sixteen such units existed. The nine units that existed in 2013 claimed to have reviewed a total of 7000 cases since their inception, resulting in 61 exonerations.

² According to the CCRG’s annual reports, in the following fiscal years (April 1-March 31), the applications to the Minister were as follows: 2009-2010 22 applications; 2010-2011 9 applications; 2011-2012 16 applications; 2012-2013 12 applications; 2013-2014 13 applications <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/>>.

The model for post-conviction review in the United Kingdom, Criminal Cases Review Commission (CCRC), was also discussed. The significant aspects of this comparison to Canada lie in the following facts:

- it is a completely independent body and does not represent the prosecution or the defence
- it is funded by the government
- it has approximately 90 staff including approximately 50 caseworkers supported by administrative staff

The CCRC was established in March 1997. As of November 30, 2014, the UK CCRC had received 18,627 applications, was reviewing 744 cases, had 688 cases that were awaiting review, and had completed review of 17183 cases. Of the 543 cases that were sent back to the Court of Appeal for review, 374 convictions were quashed and 153 were upheld by the court.³

Despite the fact that the CCRC employs a broader definition of wrongful conviction than AIDWYC, it is obvious from its funding that the government explicitly acknowledges the possibility of wrongful convictions.

Possibilities for Improvement

Many other suggestions were put forward based on using the existing system in conjunction with ideas from other jurisdictions:

- broadening rights of appeal on the basis of new evidence to bypass the need for a CCRC body
In Australia there was a systemic change after a private member's bill was proposed for the creation of a CCRC-like body. The bill was rejected on the grounds that it would, ostensibly, be too resource intensive for such a small jurisdiction. As a result of the bill's rejection, however, South Australia now has a new second right of appeal after conviction if there is fresh and compelling evidence. This new right of appeal was successful in the first case that it was used but resulted in the appellate court ordering a new trial in a long standing murder conviction believed by many to be a wrongful conviction caused by faulty forensic pathology. Unfortunately, there remains an apparent lack of awareness and recognition of wrongful convictions in Australia.
- thorough post-exoneration reviews should routinely be conducted to examine the causes of the wrongful conviction

Participants discussed the alternatives available should the government not order an inquiry. One possible option is to use section 683 of the criminal code to have the Court of Appeal order an inquiry.

- the possibility of a Canadian CCRC-like body
Historically AIDWYC has lobbied for the creation of a body similar to the UK's CCRC by meeting with representatives of the federal government in the early 2000s when Anne McLellan was the Minister of Justice. Later, when Irwin Cotler was the Minister of Justice, AIDWYC had further discussions about the UK approach. The shift in the government priorities has not encouraged AIDWYC to feel that it was the right time to pursue this option since that time.

³ <https://www.justice.gov.uk/about/criminal-cases-review-commission>

The participants discussed the possibility of promoting the idea anew by means of a private member's bill. Participants suggested that a small group would be established to work with a Member of Parliament in order to eventually table a private Member's Bill that would set out the process, procedure, and evidence necessary to undertake post-conviction work. In other words, work towards a Bill that would create a Rule of Law framework for post-conviction reviews and exoneration.

- collaboration between existing groups

There was a suggestion made that the current Federal Provincial Territorial (FPT) working group meet with AIDWYC to discuss the future of the innocence movement. The goal of the former, like AIDWYC's, is to prevent wrongful convictions from happening and to rectify them when they occur.

- Crown "swapping"

There was a suggestion that wherever there is a claim of wrongful conviction that seemed to have merit (one person suggested a very low threshold like 'not frivolous'), an independent Crown from another jurisdiction be brought into the office that prosecuted the case to deal with the post-conviction review.

- increased accountability for those who contribute to wrongful convictions

The example of a Texas prosecutor recently sentenced to 30 days in prison for a Brady violation was discussed. Canada does not have similar accountability. For example, George Dangerfield – a retired prosecutor in Manitoba who prosecuted four AIDWYC clients – was never held accountable for the role he played in at least 4 wrongful convictions.

- creation of Conviction integrity Units (CIU)

It was suggested that CIU, like those that exist in many district attorney's offices in the United States, be set up in Canada, not to duplicate or replace the 696 process, but to support it. At present nothing like the American CIU exists in Canada.

Recommendation(s):

2. The following systemic changes were proposed:

- a. use section 683 of the Criminal Code to have Courts of Appeal order inquiries where a government is unwilling to do so**
- b. Identify a Member of Parliament who would be prepared to introduce a private member's bill proposing the creation of a CCRC-like Independent Tribunal in Canada and work with that individual to draft the Bill**
- c. Increase collaboration between existing innocence working groups**
- d. Establish a regime to bring Crown attorneys from other jurisdictions to deal with claims of wrongful conviction**
- e. Increase accountability for justice system personnel who contribute to wrongful convictions**
- f. Establish Conviction Integrity Units to support the existing post-conviction Ministerial review process**

Lack of Consistent Systemic "Rules" for Post-Conviction Work

In addition to the systemic problems discussed above, participants discussed many issues that arise from the lack of legislated rules pertaining to the process of innocence work in Canada. One of the most

frustrating issues in post-conviction investigative work is the lack of systemic “rules” governing disclosure. In order to properly investigate a possible wrongful conviction, disclosure of the client’s records from the Crown is vital. . Unfortunately, obtaining disclosure is not uniform across all jurisdictions and the procedures are not regulated. Furthermore, sometimes the requirements for obtaining disclosure are illogical and difficult to meet.

For example, case reviewers in British Columbia who wish to obtain disclosure must often first meet requirements similar to those of section 696.1 of the Criminal Code, making the situation a Catch-22. Although the disclosure is needed to advance the investigation into a client’s possible innocence, the lawyer who is requesting disclosure is sometimes required to prove their client’s innocence in order to obtain the disclosure – an impossible task in the absence of the requested disclosure. Unfortunately, similar disclosure issues exist across Canada.

Another significant issue in post-conviction work is the lack of regulated standards for preservation of evidence. For example, in some cases, where forensic science has progressed since the original conviction, it may be possible to find evidence to support a client’s innocence (e.g., hair microscopy, DNA, etc.) however, in some cases the evidence has not been preserved by the Crown and the opportunity to reexamine the evidence is lost forever.

Policies and common law reform are needed to standardize the procedures regulating access to and preservation of exhibits, information, and documents.

Recommendation(s):

3. Establish a “rule of law” based system for post-conviction work specifically for rules of preservation of evidence and disclosure.

Importance of Education

Participants discussed the following topics:

- Need for legal education on wrongful convictions
- How the media could assist in further public education

Legal Education

Participants felt that education is “the key” for all stakeholders. Education was an important discussion topic throughout the session. Participants continually referred to the need for education in various forms for many reasons. Some of the proposed educational initiatives included:

- Continuing professional development for lawyers

The need for training lawyers was identified as an important issue. Very few lawyers across the country have the necessary experience to do innocence work. The skill set to carry out this work is very unique and many lawyers don’t understand it. Unlike other types of legal work, innocence work requires lawyers to focus on factual issues rather than legal issues – this is not something they are trained to do. Most lawyers are trained to present legal arguments but innocence work requires the written presentation and careful consideration of the facts of the case. The subtleties of the facts and how those facts are presented and interpreted in written submissions are of the utmost importance in

wrongful convictions work. Therefore, many lawyers who wish to become involved in innocence work would benefit greatly from specific training.

Participants felt that The AIDWYC conference in Toronto in November 2013 was valuable and it was suggested that this conference be an annual event and that there should be conferences in other regions of the country as well. Other types of continuing professional development opportunities are recommended.

- Student essay/article contest

Relationships must be forged with academics, journal editors, and students. It was recommended that there be an annual prize for the best Canadian articles and best Canadian essays on a topic related to wrongful convictions. Further suggestions included the need for a criminal law journal to release special editions addressing specific issues in wrongful conviction work.

- Annual lecture

It was suggested that AIDWYC organize an annual lecture with a high profile speaker. It would attract the media and might be held in association with Wrongful Conviction Day.

- Educating the Judiciary

It was suggested that AIDWYC work with the National Judicial Institute (NJI) to increase education of the bench on topics related to wrongful convictions especially given the fact that there is a new generation of judges on the bench that could benefit from education. Further it was proposed that AIDWYC identify 2-3 judges that can act as ambassadors on their behalf in dealing with the judiciary, which has been historically difficult for AIDWYC to effectively access.

It was also suggested that appeal judges might go even further to try to rectify wrongful convictions at trial through their appellate decision making. Appellate courts should be encouraged to extend their jurisdiction beyond the present *unreasonable verdict* standard. As senior counsel for AIDWYC, James Lockyer offered to provide a lecture to appellate judges about their role in sustaining wrongful convictions. This lecture would be used as a stepping stone to encourage discussion at the appellate level

Improving Education: Engaging the Media

Participants felt that AIDWYC could more proactively and effectively engage the media to ensure that they stay interested in wrongful convictions. AIDWYC could do more to pursue legitimate story angles and should have an extensive contact list of reporter contact information. The “angle” of the story provided to the media is important. Moreover the story need not necessarily have to focus on a specific case, but rather, it could also be a story about an issue (e.g., Mr. Big sting, shaken baby syndrome, problems with Crown disclosure, etc.). Participants felt that the story of the innocence movement in Canada and the January 16, 2015 meeting is worthy of reporting in and of itself as it addresses how the movement has evolved to include many stakeholders in the justice system (e.g., lawyers, judges, media, academics, etc.).

Participants felt that AIDWYC has lagged behind many others in their use of the media, particularly social media which require very fast and immediate reporting. It was felt that AIDWYC should use social media more effectively. Unfortunately, AIDWYC faces challenges with available resources to address this issue and suggestions were made on how the organization as a whole can work together to prioritize improved communication

Recommendation(s):

4. **Increase education on wrongful convictions through the following media: annual lecture with high profile speaker, regular conference, essay contest for law students, courses for defence counsel, crowns, police, judges and law students**
5. **Focus on forging contacts and engaging with the media to publicize wrongful convictions and improve the use of social media**

The Challenge of the Evolving Nature of Science

There is a significant lack of connection between current scientific knowledge and its influence in the criminal justice system. Science, particularly the forensic sciences, is constantly evolving but the law and procedures related to forensic evidence have not kept up with these changes. Unfortunately, this can have dire consequences because individuals may have been convicted and imprisoned on the basis of forensic evidence that is now known to have been invalid.

By virtue of the evolving nature of science and the fact that lawyers are not often even aware of these evolutions, there will always be a gap between science and the law. Participants felt that it was very important that efforts be undertaken to try to narrow this gap as much as possible.

The downside of the adversarial system is that it spawns a certain amount of chronic distrust both within the legal community and between the legal community and professionals outside it. Professional development courses in the sciences are typically infrequent and expensive, with most attendees being police officers, then defence counsel, and only a handful of Crowns. Participants discussed that information related to psychology, memory, interrogation techniques, and tunnel vision are not taught in law schools, despite their applicability to the reliability of evidence tendered in the criminal justice system.

Furthermore, it was suggested that expert evidence is not the panacea to close the gap in understanding the sciences in the criminal justice system. Rather, better education of justice system stakeholders is a better route to bridge the gap. Participants suggested that increased activity on the part of academics and social scientists should be encouraged and cultivated. Law journals should publish more scientifically oriented articles, perhaps even having special editions addressing a particular issue relevant to the justice system.

There was also discussion of the judge acting as “gatekeeper” in that the reliability of the evidence can be addressed by the judge’s instructions to the jury. However, there was some suggestion that while better education of the judiciary might ameliorate the problem in part, judicial education is not a cure all and a little bit of information in the hands of judges has the potential to be harmful if it provides a judge with a false sense of complete knowledge of the issue at hand.

There is also a significant challenge involving what may be legally admissible versus what is scientifically valid. In some cases, evidence may be *legally* admissible to the case but that evidence may have only a

weak (or no) scientific basis. In other words, the admissibility of scientific evidence is not a matter of law alone. It is vital that those involved in the process (judge, defence, and Crown) keep up with the changes in science so that convictions are not based on now discredited evidence. For example, it has recently come to the forefront that the 'science' that was thought to support the conclusions of arson investigators is, in fact, incorrect. Other examples of changing science relevant to wrongful convictions include hair microscopy, shaken baby syndrome, finger print matching, bite marks, hand writing analyses, and more.

Unfortunately, the gap between science and the law is also of much concern for those individuals already in prison. Individuals in prison may not have the sophistication to track changes in science and they certainly would not have access to resources that would inform them the science related to their conviction has changed. Participants discussed this issue and who should be responsible for tracking convictions based on evidence that has been since discredited.

In order to address these problems, it is necessary that the legal community work with the forensic community. One suggestion was that Canada adopts what is known in Australia as 'hot-tubbing.' Hot-tubbing is a practice where the scientists, not the lawyers, determine the evidence that should be presented in the case.

Recommendation(s):

- 6. Establish and engage methods to forge relationships between the scientific community and the legal community to ensure that the legal community is kept up to date on current scientific advances**

Concern for Marginalized and Vulnerable Populations

Individuals involved in wrongful conviction work know that marginalized and vulnerable populations are at a higher risk of falling victim to many of the causes of wrongful convictions. Participants noted that those individuals who are least likely to bring their case to AIDWYC (or an Innocence Project) are the people who, even before being wrongly convicted, are marginalized and vulnerable. Unfortunately, these are also the people who are most at risk. The relevance of marginalization and vulnerability to wrongful conviction was discussed using the Aboriginal experience as an example. Other vulnerable populations include other racial minorities and mentally challenged populations who face many of the same issues. Participants specifically discussed the following:

- Marginalized populations – the Aboriginal example
- What could be done to improve access to justice for the marginalized populations

Marginalized Populations: The Aboriginal Experience

It is a fact that Aboriginal people in Canada are drastically overrepresented in the criminal justice system. There is reason to believe that there are disproportionately more wrongful convictions amongst these marginalized people. There is not, however, a corresponding overrepresentation of Aboriginal clients in AIDWYC's roster. Participants discussed the specific question of why AIDWYC has not helped more Aboriginal people. The following points were made.

- The AIDWYC application form

The AIDWYC application form is very long and detailed. It would be difficult for someone with limited literacy skills to complete it. Some Aboriginal people do not speak, read or write English.

- The offence

AIDWYC's focus on reviewing murder convictions might also exclude many Aboriginal people. People who are designated dangerous offenders go to jail for the longest amounts of time. Aboriginal people are overrepresented in prison generally but they are further overrepresented among those who were designated dangerous offenders. While Aboriginal adults comprise about 3% of the Canadian population, about 30% of those designated dangerous offenders are Aboriginal.

- Interpreters

There are many Indigenous languages spoken in Canada and within those languages, a wide variety of dialects. The quality of interpretation in Canadian courts is not peer reviewed and bad interpretation could lead to wrongful convictions.

- Guilty pleas

Guilty pleas are a troublesome issue when it comes to Aboriginal populations. For example, there are disturbing cases in Canada where a client has taken a guilty plea in the face of systemic pressures and sentencing advantages.

Suggestions for Improvements

We do not fully understand all the ways marginalized people are more at risk of a wrongful conviction. Very little has been published on the topic in Canada.

There was a suggestion that AIDWYC adopt a theme for 2015 –work with a special focus on locating and advancing potential cases of racial minority applicants. Given the national attention there has been on race and justice in Canada and the United States, it was suggested people would be interested in such a theme. AIDWYC has a duty to show that injustice is colorblind.

As with many topics discussed, one of the remedies suggested was education. For example, it was proposed that a continuing professional development lecture be organized to help lawyers whose clients need translation services.

AIDWYC does some outreach to potential clients and is planning to reach out in prisons across the country in 2015. It was suggested that the focus in those prison visits should be to talk to racialized prison populations. There might be media opportunities surrounding the prison visits as well.

Recommendation(s):

7. Improve and increase AIDWYC outreach initiatives

- a. Change the AIDWYC application form to be more user friendly**
- b. Research effective approaches to reach out to marginalized populations**
- c. Lobby for guilty plea reform to ensure both voluntariness and factual accuracy of the guilty plea**

Lack of Human and Financial Resources and Wrongful Conviction “Fatigue”

Another core theme discussed by participants was the availability of resources to carry out innocence work in Canada and to implement any recommendations that might be made – from the perspective of both human and financial resources.

Human Resources

At present, almost all post-conviction review work done in Canada is done on a *pro bono* basis. In Canada, recruiting lawyers to work for free on claims of wrongful conviction is challenging for several reasons. To begin, although there is the potential for tremendous personal satisfaction in wrongful conviction work, there is no monetary reward. The work is intensive and time-consuming; more so than with single appeals. The pursuit of social justice and personal glory may not be a sufficiently strong motivator for a lawyer to take on a wrongful conviction case simply because of the time involved in addressing the volume of materials in the case, as well as the funds and requirements necessary to mount a re-investigation. Although Legal Aid certificates are occasionally obtained, the certificates never cover the full amount of work – often thousands of hours – that is required for a successful wrongful conviction case. Although criminal defence lawyers are best equipped to take on wrongful conviction cases, the profession does not pay well and many lawyers simply cannot afford to take on such a huge volume of free work. Law students may be able to assist in furthering wrongful conviction cases but there is a challenge of continuity of their efforts. Once the academic year ends, the student inevitably moves on.

A further recruitment challenge is geographic. Not only is it necessary to find lawyers willing to work for thousands of hours pro-bono, this workforce need also be based in all Canadian jurisdictions, some of which are pretty remote. The convenience of having a case reviewer working in the jurisdiction where the asserted miscarriage of justice happened cannot be understated. Case reviewers often need to have contact with witnesses, former counsel, the local Crown’s office and private investigators in the area where the case was tried.

It was suggested that in order to combat the jurisdictional challenge and the more general problem of trying to recruit and retain skilled probono counsel, AIDWYC and the Innocence Projects across Canada should meet annually. These meetings would facilitate improved communication, create a more standardized approach to innocence work in Canada, and ensure that no innocence organizations in Canada are working redundantly. A jurisprudential database needs to be created to shorten the amount of time spent on formulating arguments that may positively impact innocence work in this country. For example the <http://fasdjustice.ca/> website contains a wealth of useful information and case law relevant to anybody needing information about the plight of FASD persons who are caught up in the justice system. There may be other comparable websites serving the needs of other marginalized groups.

Wrongful Conviction “Fatigue”

Throughout the day, wrongful conviction “fatigue” was a common theme. In other words, there is a general slowing of interest, effort, and enthusiasm in addressing the issue of wrongful convictions. The following examples reflect the need for increased awareness and education on wrongful convictions for all Canadians:

- Unwillingness on the part of Government to order further inquiries:

In the past, when someone was exonerated, there would be an inquiry and the responsible government(s) did not appear to be overly concerned with the costs. That is no longer the case. One person suggested that there is a perception in government that inquiries tend to get “out of control” and that lawyers use them as an opportunity to make large amounts of money.

- Law school education on wrongful convictions:

Wrongful convictions courses are not being taught regularly at many law schools and, in some schools, there is no course at all.

- Crown/Defence liaison committee has dissolved:

One of Commissioner Justice Cory’s recommendations emerging from the Sophonow Inquiry was the creation of a Crown-Defence Committee that might break down the adversarial tension between the defence bar and Crown lawyers in Manitoba. It was formed and for twelve years it ran very successfully. They held an annual conference that grew every year and was attended by judges, academics, police and lawyers. They attracted strong speakers. In the last year the committee has disbanded. One person’s sense as to a partial explanation was that the Crowns felt “under siege.”

- A sense that the problems are already known and have been fixed:

There have been six inquiries related to wrongful convictions in Canada. Some people may believe that we already know the nature of the problems. However, as we know, new people are entering the justice system every day – new police, new lawyers, new judges – there need to be structures in place to ensure that all of the new players are not repeating the last generation’s mistakes. In addition, there is the question of whether the suggestions of the inquiries have been implemented and in all jurisdictions.

However, participants suggested that there might be a perception in some jurisdictions in Canada that wrongful convictions are unique to the jurisdictions where people have been exonerated. Specifically, it was mentioned that when the Report of the Kaufmann Inquiry on Proceedings Involving Guy Paul Morin was tabled with the suggestion that all jurisdictions implement the recommendations, many saw the issues as specific to Ontario and thus concluded that only Ontario need worry about the recommendations.

It was mentioned specifically that some Crowns in British Columbia are under the mistaken belief that they work in a wrongful conviction free zone because of the implementation of charge screening and the highest threshold test in the country – a ‘substantial likelihood of conviction’ – for laying charges. Although pre-charge screening is a great tool, it does have flaws, including but not limited to investigative authorities or the prosecution being invested in pursuing the charge. The use of specific tools within the criminal justice system to curb wrongful convictions should not be believed to be perfect, or to mean that wrongful convictions simply do not exist in the jurisdiction in question.

- Fatigue in the media

It was suggested that there has been a shift in the media’s perspective as well. Participants felt that the three major news stories that AIDWYC had at the end of November 2014 should have received greater publicity. It was suggested that editors and the public aren’t as interested in wrongful conviction stories as they were in the past. Further, AIDWYC doesn’t have relationships with leading reporters that it once did and there are fewer, if any, expert ‘justice beat’ journalists in Canada.

- Fatigue on the part of the individuals leading the innocence movement in Canada

Even for those who make the decision to pursue innocence work, their resolve and efforts may begin to decline with time and “fatigue” may set in. Innocence work is notoriously difficult emotionally for several reasons – the work is without a definable timeline, with many systemic challenges (e.g., disclosure), no financial incentive, and often with uncertain hope of success.

Working with the wrongly convicted as well as their families involves appreciating the profound pain trauma of those affected by a wrongful conviction. The wrongly convicted have often lost the support of their friends and family and they are desperate and alone.

Participants felt that the judiciary might constitute an exception to the observation of a general onset of fatigue. There seems to be support from the Canadian Judiciary for the work AIDWYC does. In *R v Hart* we also saw a willingness on behalf of the Supreme Court of Canada to break away from precedent with the express acknowledgment of wrongful convictions. More generally the term “wrongful conviction” appears in judicial reasons now more than ever, especially at the Supreme Court level. However, it was suggested that the acknowledgement would not be meaningful unless there are implications of the decision that actually help prevent or rectify wrongful convictions.

Financial Resources

Despite the fact that there is some amount of good will towards AIDWYC and innocence work from the judiciary, the criminal bar, and civil firms, financial resources are in short supply. AIDWYC and other innocence organizations routinely struggle for sufficient funds to carry on its important work beyond the pro-bono services offered by lawyers. Funding is needed to further many of the cases of innocence through investigations, forensic testing, court filing fees, etc.

Much has been done in recent years to attempt to raise funds for AIDWYC’s innocence work. For example, a charitable foundation was set up to fund AIDWYC’s charitable work providing legal services and legal education. The ability to issue charitable tax receipts has increased donations and grants from other foundations. In addition, AIDWYC has entered into an agreement with a limited number of its clients that AIDWYC will receive a portion of any civil compensation to offset funds expended on the cases. AIDWYC continues to organize and participate in fundraisers and is considering new marketing and branding approaches. Despite these efforts, funding and fundraising for innocence work continues to be a serious challenge.

It was suggested that AIDWYC start planning now for its 25th anniversary – in 2018 – as a means of raising a significant amount of money. It was suggested that AIDWYC should speak to the Canadian Civil Liberties Association (CCLA), who compiled a book for their 50th anniversary as a fundraising device.

Recommendation(s):

8. Address both financial and human resource issues with specific efforts:

- a. Work to improve fundraising efforts by clarifying the work of AIDWYC as innocence work, so as to make it clear to the public that our cases are cases of innocent clients.**
- b. Work to implement “rules” for post-conviction investigation (recommendations stated above) so that investigations move more quickly with clear parameters so as to combat pro-bono reviewer’s “fatigue”**

Conclusion

After a very productive day of extensive discussion regarding many of the key concerns in contemporary innocence work, many significant recommendations were made (as outlined in detail above). A summary of these recommendations is found below:

insert final recommendations...

This report is intended to provide summary advice to the AIDWYC Board. Discussion must be held at the Board level regarding prioritizing and then further strategizing about how to move forward.

Appendix A

Agenda
AIDWYC Strategic Planning
Advisory Group Meeting
Friday January 16, 2015

1. Introductions & Opening Remarks by Advisory Group Chair – Jerome Kennedy

WHAT HAVE WE LEARNED?

2. Review of the Key Lessons Learned/ Progress Made over the Past 20 plus years - Presentation and Discussion led by James Lockyer

WHERE ARE WE TODAY?

3. Discussion of Lingering Issues and Emerging Causes of Canadian Wrongful Convictions and Discussion leaders
 - expert evidence/police qualifications- Kent Roach
 - wrongful conviction fatigue- Bruce McFarlane
 - improving relationships with the Crown - Stephen Bindman
 - minorities/ marginalized people in the criminal justice system- Jonathan Rudin
 - engaging and building capacity other Canadian jurisdictions (west & Quebec) - Tamara Duncan
 - gap between science and the criminal justice system- Tim Moore

WHERE ARE WE GOING? SHORT TERM & LONGER TERM

4. Succession Planning: Engaging a New Generation of Canadian Lawyers – presentation and discussion led by Alan Young
5. Review of the Models in place in Other Jurisdictions: Strengths and Weaknesses- presentation and discussion led by Kent Roach
6. A Future Model for Wrongful Convictions Work in Canada: - Discussion led by Russell Silverstein
 - a. What do we want? (Discussion of the Framework of a model)
 - b. How do we get there? (Brainstorming a practical strategy to get what we need)
7. How AIDWYC and Others Can do Better in the Interim – Discussion led by Debbie Oakley

NEXT STEPS

8. Giving Effect to it: Communicating, Engaging Key Stakeholders, Lobbying for Reform- Kirk Makin
9. Summarizing the Day's Discussion and the key Elements of the Strategy – Jerome Kennedy