

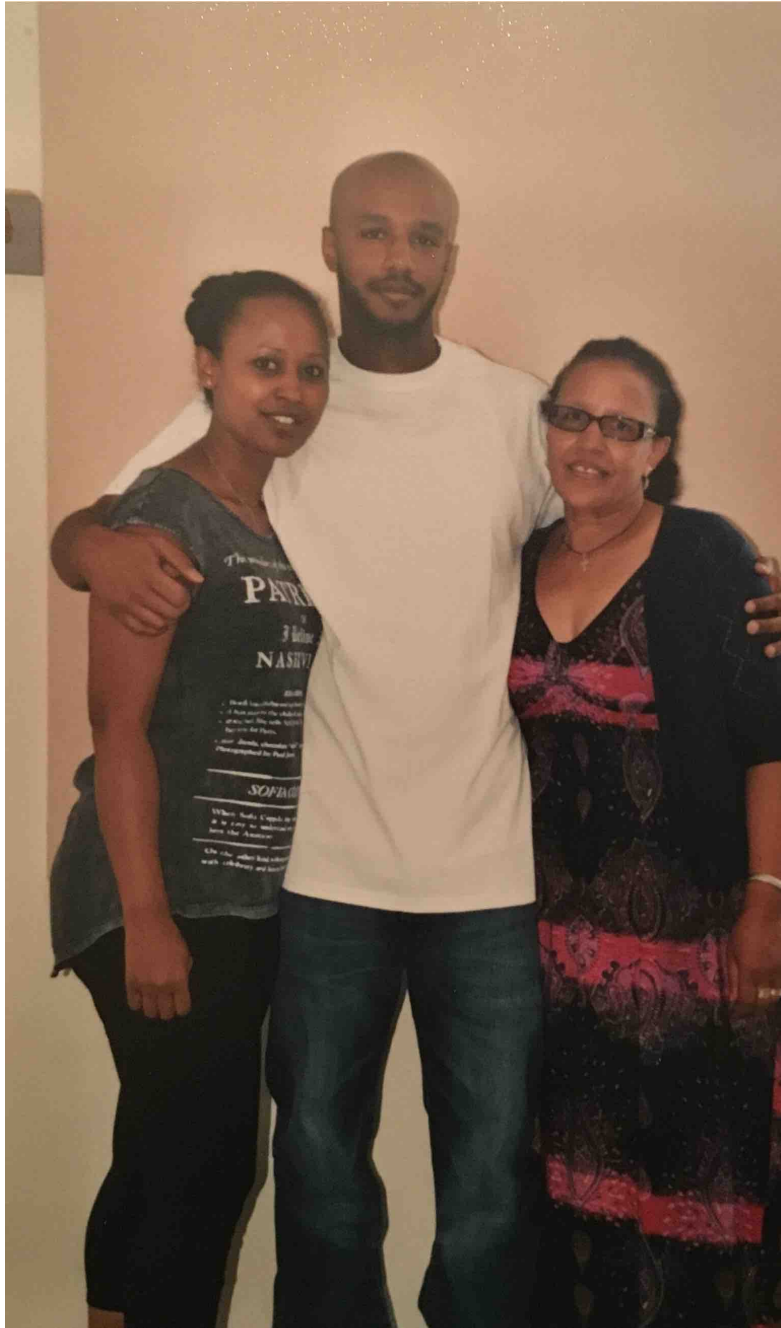
Post-conviction Claims of Innocence:

Investigating a Possible Miscarriage of Justice in the Case of Michael Kassa

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'It is better to light a single candle than to curse the darkness.'

A proverb

ABSTRACT

Many legal systems throughout the world have established out-of-court remedies to rectify miscarriages of justice and wrongful convictions. In Canada, this extraordinary remedy is served by a government minister, who is entrusted with the assessment of claims of innocence post-conviction. While researchers have already addressed various concerns over the current conviction review process (Braiden & Brockman, 1999; Walker & Campbell, 2009; Roach, 2012a), Roach (2012b) emphasized that little is known about the applicant's lived experience.

This thesis intends to explore the underlying rationale of the current regime under section 696.1 of the *Criminal Code* and shed light on how the Canadian government, through the Minister of Justice addresses claims and attempts to remedy wrongful conviction. A case study of Mr. Hailemikeal Fekade Kassa's criminal case file, an applicant who consented to this study of his second-degree murder conviction in 2009, will be used to explore the challenges faced by a Canadian claimant of innocence in preparation of his post-conviction review application. This research has revealed that: (1) the Canadian conviction review process implicitly removes the responsibility for error from the conventional justice system; and (2) despite significant evidence capable of raising doubt, the applicant under study encountered great difficulty in meeting the stringent eligibility criteria. A review of the literature provides the necessary contextual information to this critical examination through a comparative study of the post-conviction review schemes operating in North Carolina, the United Kingdom, Norway and Canada. Further, this project uses Foucault's (1991) theory of *governmentality* as its analytical framework to investigate the governmental technologies and rationalities securing the current objectives of the Canadian review process and to explore the effects of policy at the micro-level. Following a presentation of the major findings and brief discussions of the evidence discovered in Mr. Kassa's file, a final analysis situates the research findings within governmentality theory and highlights their broader implications.

Keywords: Foucault, governmentality, wrongful convictions, miscarriages of justice, post-conviction review, Criminal Conviction Review Group

ACRONYM LIST

NCIIC – North Carolina Innocence Inquiry Commission

NCAIC – North Carolina Actual Innocence Commission

CCRC – Criminal Cases Review Commission

SCCRC – Scottish Criminal Cases Review Commission

NCCRC – Norwegian Criminal Cases Review Commission

CCRG – Criminal Conviction Review Group

CJS – Criminal Justice System

CC – Criminal Code

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INTRODUCTION

As an active volunteer with *Innocence Ottawa* since 2014, a student pro-bono organization that reviews post-conviction claims of innocence, and prior to knowing that I would one day write a thesis on Mr. Kassa's case, I was unaware of the ambiguities in identifying someone as 'wrongfully convicted' and/or 'innocent'. While I initially assumed that they were one and the same, I have now come to realize that the meaning of innocence, in its definition of legal and/or factual innocence, can go beyond what is written in text and manifest itself differently in practice. In the case of Michael Kassa, the space between law and practice (which contributes to the inevitable subjective application of post-conviction review policy) may ultimately be a determining factor in the decision to refer his case back to the courts.

The purpose of this research study is to provide a critical analysis of Canada's post-conviction review policy and further illustrate its complexities and contestations by using the case study of an applicant, claiming to have been wrongly convicted, in pursuit of a formal remedy under section 696.1 of the *Criminal Code* of Canada. In accordance with single case study research methodology, this project will use a systematic approach by applying multiple qualitative research methods in the data collection and analysis process (Yin, 2014). The social phenomenon being studied, namely an applicant's journey in preparing a conviction review application, will be examined in its real-life context. The study will consider the greater social context relevant to the phenomena under study, including a comparison of different post conviction review schemes and theoretical propositions, ultimately shedding light on the exercise of power, and its effects, between claimants of innocence (post-conviction) and the Canadian regime as a 'site of governance' that targets applications for ministerial review (Dean, 2010; McKee, 2009). In line with Foucault's famous phrase "where there is power there is resistance"

(1979, p. 95), this thesis is an example of resistance by addressing the Canadian conviction review process and finding an alternative version of ‘the truth’ that ultimately rejects the regime’s notion of who is worthy of exoneration. The study's main research question asks: To what extent does Canada’s post-conviction review policy provide a remedy to wrongful convictions?

According to Roach (2012a), Canada’s first and significant response to wrongful convictions began in 1989 with the establishment of commissions of inquiries into high-profile wrongful conviction cases (e.g. Guy Paul Morin, David Milgaard, Donald Marshall, Jr., and Thomas Sophonow). Although these inquiries resulted in a multitude of recommendations being made, as provincial undertakings the recommendations were adapted (to a very limited degree) mostly on the provincial level and federal legislative change has thus far only been half-heartedly implemented (Ainslie, 2011; Denov & Cambell, 2005; Roach, 2012a). For example, one of the most cited criticisms in regards to Canada’s policy response to wrongful convictions remains the fact that the procedures for post-conviction review remain in the hands of the government and applications for a conviction review are assessed by the Minister of Justice (Braiden & Brockman, 1999). Although some adjustments to this process have been made in the early 2000’s, the crucial suggestion of each of the commissions of inquiry to establish an independent review body remains unanswered (Roach, 2012a). The system most often referred to as a model for Canada to adopt is that of an independent review commission as established in England and Wales, Scotland and Norway. However, the government response to this call has been the physical relocation of the Criminal Conviction Review Group (CCRG) office outside of previous government buildings and the addition of an advisory body to the Minister of Justice, currently served by a retired judge of the Court of Quebec (Bernard Grenier) (Campbell, 2009).

Scholars such as Denov and Campbell (2005) have stated that Canada is lacking systematic research into the issue of wrongful convictions and the post-conviction review process and even less is known about the challenges faced by the wrongly convicted who are seeking a formal remedy. A comparison of the existing literature on post-conviction review schemes and the policies put in place by different jurisdictions set out to deal with claims of innocence and wrongful convictions, that have not been rectified in the normal appeals process, can help in understanding Canada's current policy response. Moreover, comparative legal study of definitions of innocence, eligibility rules, the provision of adequate guidelines to applicants as well as the tests undertaken by review bodies to refer a case back to the courts can possibly shed light on the relatively low number of annual applications made to the CCRG in Canada. These low number of cases seeking review, as compared to other jurisdictions, raise concerns given that the incidence rate of wrongful convictions in Canada is likely similar, even when differences in population and other relevant criminal justice statistics are accounted for (Roach, 2012a).

The data used for this project are multi-faceted and come from primarily two sources: legislation and regulations concerning conviction review and case files collected from Mr. Kassa and his lawyers. The first source includes the applicable sections of the *Criminal Code* (s. 696.1 – 696.6); Regulations set out by the Minister of Justice (current to August 29th, 2016, and last amended on March 25th, 2011); the CCRG's most recent Annual Report (2016) outlining the responsibilities of the governing agency as well as the conviction review process; and, lastly, additional guidelines posted on the official website of the Department of Justice (n.d.) with respect to conviction review procedure. The second set of data from Mr. Kassa's files contain trial transcripts of the case, including transcripts of preliminary hearings, the trial and appeals process. In addition, private investigators' notes, from the original investigation occurring at the

trial, appeal and post-conviction review stage, are also part of the data set. The private investigators were hired by the applicant's law firm during the trial and appeal process as well as hired privately by the applicant, and Mr. Kassa's family, during the post-conviction review process. Moreover, police files (witness statements and summarized investigation briefings) pertaining to the applicant's case and investigation were assessed for fresh evidence (i.e. new and significant matters not previously considered by the courts) which constitute the main requirement for post-conviction review applications in Canada. The data was originally collected by the convicted person in preparation for appeal and, while holding ownership over his files, he then provided his written informed consent to the use of his files (and disclosure of his name) for the purpose of this research.

This thesis is divided into seven chapters and will begin by providing a review of the literature on the post-conviction review schemes currently operating in North Carolina, the United Kingdom, Norway and Canada. Chapter Two will look at the theoretical framework at the core of this research, namely Foucault's theory of 'governmentality' (1991), and the application of his concepts, put forth by Dean (2010), in an 'analytics of government'. A detailed explanation of the guiding research questions and the operationalization of major concepts will follow. Chapter Three establishes the methodology, addresses issues of epistemology, researcher reflexivity, and details the research design. Chapter Four reveals the major findings of a brief analysis of the Canadian conviction review process from a governmentality perspective. Chapter Five and Six provide an overview of the major trends in the data derived from Mr. Kassa's criminal case file, including individual analyses as to whether the evidence either did (Chapter Five) or did not (Chapter Six) represent 'new and significant matters' warranting post-conviction relief under the Canadian legal standard for review. Chapter Seven concludes this thesis by

situating the research findings within a governmentality framework, presenting its broader implications and by discussing limitations, directions for future research and concluding thoughts.

CHAPTER ONE:

REVIEW OF THE LITERATURE

In recent years, there has been “a lot of noise about miscarriages of justice” (Zalman, 2011, p. 1466). Whereas initial narratives on high-profile DNA-exonerations were considered ‘atypical travesties of justice’ (Gould, Carrano, Leo & Young, 2013), miscarriages of justice are now recognized as *systemic* failures (Devon & Campbell, 2005; Roach, 2012a) that emerge with some degree of ‘regularity’ in different legal systems throughout the world (MacFarlane, 2006). MacFarlane (2006) defines wrongful convictions as a “triple failure” of the justice system where an innocent individual is ‘wronged’, a guilty person is not held accountable and “allowed to go free” and tragedy marks the victim’s family and the witnesses who were involved in the conviction of the innocent person (p. 480). Errors in the justice system are said to range from mistakes made by the police in the investigative process (intentionally or unintentionally) to forensic errors, false testimony and ‘honest mistakes’ made by witnesses whose memory recall had proved unreliable (Gould & Leo, 2010). Moreover, a multitude of errors are often found to be connected “and exacerbated by tunnel vision”, which prevents the system from correcting itself (Gould, Carrano, Leo & Young, 2013, p. iii). Although the overall occurrence rate remains largely unknown, and the knowledge gathered on the surrounding circumstances of wrongful convictions is based on research into the most serious of high-profile exonerations (Roach, 2012a, p. 1470), estimates suspect a large number of undetected cases (Huff, Rattner & Sagarin, 1986, 1996; Holmes, 2001). The accepted error rate or estimate is thought to be 0.5 to 1% of all felony convictions in the United States, which translates into 5.000 to 10.000 convictions annually (Zalman, 2012).

In light of this recognition, various types of responses to the issue of wrongful convictions have emerged since the advent of DNA technology in 1998, which Zalman (2011) describes as the development of an “innocence movement” (p. 1468). This movement is said encompass a set of activities by legal professionals, social scientists and citizen advocates who have worked in an effort to free the wrongly convicted and rectify the identified causes of miscarriages of causes. Additionally, a large number of law-school based ‘innocence projects’ have dedicated student volunteers to review claims of innocence and different jurisdictions continue to develop out-of-court remedies to correct justice system errors. In terms of large scale initiatives, the most common measures to rectify wrongful convictions outside of the courtroom have been seen to take either one of two forms; they are aimed at reducing the risk of wrongful convictions through research and systemic reform or they operate as a quasi-judicial body charged with the authority to investigate active claims of innocence (Roach, 2010).

The most popular of the systemic reform models are *Public Commissions of Inquiry* or *Innocence Commissions*. These commission differ in their scope, transparency and expense, and range from the type of inquiry that can either examine a specific criminal case in the context of broader systemic issues (as in Canada¹), or start from a broader issue such as the death penalty (as in the United States²) in order to then move into the examination of a specific case (MacFarlane, 2006). Whereas the fully public model, such as the public inquiries seen in Canada, invite open hearings, testimonies and cross-examinations in the truth-seeking process, smaller

¹ Six such commissions examined the cases of eight individuals including: The Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations (1998); Commission on Proceedings involving Guy Paul Morin , Report (1998); Manitoba Justice, Inquiry regarding Thomas Sophonow (2001); The Lamer Commission of Inquiry pertaining to the cases of Ronald Dalton, Gregory Parsons, Randy Druken (2006) and Edward P. MacCallum, Report of the Inquiry into the Wrongful Conviction of David Milgaard (2008) as cited in Ainslie (2011)

² For example, the Commission of on Capital Punishment in Illinois (Report of the Governor’s Commission on Capital Punishment, 2002)

innocence commissions³ carried out the United States conduct their investigations upon official exonerations and examine the failings of the justice systems based on specific cases. In either model, the primary goal of the initiative is to investigate what went wrong and rectify it, to advise the government on legislative reform and to educate the public. Conversely, ‘error-correction models’ (Roach, 2010), or quasi-judicial bodies, complement the systemic reform bodies in their mission to address public distrust and concerns over the criminal justice systems’ ability to ‘get it right’. However, while (in some jurisdictions) they may engage in law reform work, legal systems have established these error-correction models with the primary goal of reviewing cases that have not been rectified within the normal appeals process. Whereas the appeal process may be viewed as a built-in mechanism to rectify wrongful convictions through remedial powers granted to the courts, error-correction models operate outside of court and act as extraordinary remedies.

In this chapter I intend to examine the extraordinary remedies to wrongful convictions through a comparative study of the post-conviction review bodies in North Carolina, England, Scotland, Norway and Canada. By post-conviction review, I refer to extraordinary measures (or systems) designed to review singular convictions outside of the regular criminal appeals process – usually (but not always) after the appeals process has been exhausted. Some jurisdictions have established systems where claims of innocence are either reviewed by government ministers (as seen in Canada) or by an independent criminal cases review commission (as seen in the United States, the United Kingdom and Norway). Although differential eligibility criteria and tests for referral make it difficult to compare post-conviction review schemes with respect to their

³ One such example is the ‘Avery Task Force’ in Wisconsin, as referred to in Tate (2012), which led to various legislative reforms including the improvement of eyewitness identification, issues related to the preservation of biological evidence and the mandatory recording of interrogations.

effectiveness, they can shed light on the criminal justice system context that ultimately informs but also limits their current scope of review (Roach, 2010).

In what follows, a review of the Canadian appellate courts' power to redeem miscarriages of justice provides the necessary context to understanding some of the strengths and limitations of Canada's current post-conviction review scheme.

1.1 - Remedying Wrongful Convictions Through Appeals

Canada's court system is 'unitary', meaning that its provincial and federal courts operate not independently but collaboratively under one single Canadian system. Therefore, the appeals process may, in some cases, cross various levels of court before a judicial agreement is reached. According to the Department of Justice of Canada (n.d.), when an innocent defendant is convicted of a crime he or she has a right to appeal to the provincial court of appeal on any ground that raises (A) a question of law alone, or (B) questions of mixed law and fact and other matters with the leave of the court of appeal (Roach, 2012a). Within the regular appeals process, the typical progression of a case includes a first appeal to a higher court (superior court or provincial appeal court) brought by either trial party, which can settle the process by majority decision of a three-judge panel, or a second appeal may be brought to the Supreme Court for final review. Supreme Court decisions on whether or not to grant leave for appeal are typically made by three justices and do not require further justification in written submission. If an applicant is granted leave for appeal, however, the Supreme Court justices' decisions must not be unanimous and rests upon a majority ruling of nine justices (Supreme Court of Canada, n.d.).

With that said, appeal rights afforded to defendants convicted of a crime in Canada are said to be fairly generous (Roach, 2012a). For example, although provincial courts of appeal

have the right to set their own restrictions on notices for appeal pursuant to subsection 482(1) and (2) of the *Criminal Code* (Code), and the *Ontario Court of Appeal Criminal Appeal Rules* state that the notice of appeal shall be served “within thirty days” (s. 4), courts of appeal may also extend the time within which notice of appeal is given under section 678.(2) of the Code in order to allow for ‘appeals out of time’. One such reason would be the admission of fresh evidence in cases where certain information had only become available some time after or even decades following trial. This includes cases where the defendant has died, as decided in *R.v. Smith*, where the Supreme Court referred to the admission of fresh evidence as grounded ‘in the interest of justice’ (*R.v. Smith*, 2004, para. 47).

Generally speaking, section 686 allows the admission of fresh evidence on three possible grounds: 1) a legal error caused harm to the accused; 2) the conviction was unreasonable or cannot be supported by the evidence; and 3) that there was a miscarriage of justice (*CC*, s. 686(1)(b)(iii)). However, the *Criminal Code* and related Caselaw provides appeal judges with some specific criteria and guidance on how to consider new information that only became available some time after trial. The four part test for admission of fresh evidence on appeal was set out by the Supreme Court of Canada in *R.v. Palmer* (1980) as follows:

- (1) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and,
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result (*R.v. Palmer*, 1980, p. 13).

Whereas ‘due diligence’, as referred to in the first part of the test, is crucial to the protection of the principle of finality⁴ to the trial process, the Supreme Court in *R.v. G.D.B.* (2000) supported the Palmer test, and its specific consideration of the criminal trial, by ruling that due diligence is not an essential element if “its rigid application would result in a miscarriage of justice” (para. 37). Further, within the consideration of new evidence and the courts’ power to investigate the circumstances of a case, appeal judges have the right to order the examination of a witness, who may or may not have testified at trial, and the production of “any writing, exhibit or other thing connected to the proceedings” (*CC*, s.683(1)(a)). Additionally, constituting a rather inquisitorial aspect to Canada’s adversarial system, the court may also decide to appoint a special commissioner who can conduct lengthier examinations of accounts, including “scientific or local investigations”, that would otherwise not be conveniently conducted before the court (*CC*, s. 683(1)(e)).

Within the broad powers granted to the Court of Appeal, set out under section 683, the *Criminal Code* refers to the admission of fresh evidence as a right of the court to be exercised *if* it considers it to be in the ‘interest of justice’. Specifically with respect to the prevention of miscarriages of justice, Justice Doherty for the Ontario Court of Appeal stated that “[...] the power to receive fresh evidence, and the court's wide remedial powers are all designed to maximize protection against wrongful convictions” (*R.v. Trotta*, 2004, para. 24). Although the existence of such remedial power has allowed courts to successfully address some of the issues known to place obstacles to the rectification of wrongful convictions in other jurisdictions, i.e.

⁴ Finality of litigation is the concept that legal proceedings should not be open-ended, a principle that is recognized as one of the essential values to the integrity of the criminal process: “The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. [...] Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record” (*R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), *per* Doherty J.A., at p. 411).

statutes of limitations in the United States, recommendations have been made to further amend Canadian laws in this area (Roach, 2012a). For example, unlike Britain or Australia, broad appeal rights in Canada do not explicitly authorize appeals based on the court's doubt about the safety of a verdict. Whereas section 686 speaks to the consideration of the reasonableness of verdicts, recommendations of provincial commissions of inquiry, such as the one conducted into the wrongful conviction of Guy Paul Morin, suggested that Canadian court of appeal rights should be amended to resemble the British model by allowing the courts to "set aside a conviction where [there exists] a 'lurking doubt' [...]" (Kaufman, *Morin Inquiry*, 1998, para. 1176). Although the Supreme Court has implied the possibility of convictions being overturned as unreasonable based on subjective reasoning, stating that appellate courts should examine a case 'through the lens of judicial experience' (*R.v. Biniaris*, 2000, para. 40), the lurking doubt standard has so far not been adopted. This reluctance may in part be connected to concerns over appellate courts acting "as a '13th juror'" (*R.v. W.H.*, 2013, para. 27). In other words, although the Supreme Court's decision in *R.v. W.H.* recognized that the consideration of reasonableness is a "powerful safeguard against wrongful convictions" (*ibid.*, para. 32), it was seen to be more important to prevent a reviewing court from serving as a 'second trial' by allowing appeal judges to give effect to a feeling of unease upon examination of the written record.

Applying a reasonableness analysis in judge alone trials is considered to be the 'safer' procedure (as opposed to jury trials) as the judge's written reasons for conviction can be reviewed, which circumvents the issue of the appellate court serving as a second trial or 13th juror (*ibid.*, para. 23). Based on the fact that jury trials do not provide the same record on reasons for conviction, Canadian appeal courts have been less inclined to overturn those verdicts. While this may be a positive development, the majority of Canadian cases are in fact concluded by

judge alone trials (Friedland & Roach, 1997), it may also be reason for concern considering that the most serious offences, albeit small in number, are often tried before a jury as seen in many of Canada's exonerations cases to date, including '*R.v. Milgaard* (1970), *R.v. Salmon* (1971), *R.v. Marquardt* (1995) and *R.v. White* (1995)', to name a few of the most recent (Innocence Canada, n.d.). Further, allowing appeals from convictions "on any ground that there was a miscarriage of justice" (*R.v. Khan*, 2001, para. 27), requires the reviewing court to conclude that an error at trial, be it procedural or substantive in nature, had (1) affected the verdict and (2), played an integral part in the "[...] 'reasoning process resulting in a conviction'" (*R.v. Lohrer*, 2004, para. 2); a rule that again places an emphasis on being able to review and determine the reasoning process at trial, requiring a judge alone verdict. On a positive note, both of these stipulations include that the term miscarriage of justice can refer to the denial of a fair trial based on either a legal error or the finding that new evidence presented on appeal put the reliability of the conviction in serious doubt. On this basis, the Canadian understanding of the legal term miscarriages of justice demonstrates a certain degree of flexibility by including cases of both legal and factual innocence. However, according to Roach (2012a), most appeals granted in Canada are not related to unreasonable verdicts or miscarriages of justice, but trial judges' having erred in law in "either their reasons or instructions to juries" (p. 1487).

With the provincial appeals courts' emphasis on errors in law, proviso or 'harmless error rules' appear to place a rather heavy reliance on appeal judges to be able to correctly determine that an error was 'harmful' or would have affected the final verdict (Roach, 2012a). Needless to say, this becomes more problematic when the reasoning process of twelve jurors is not documented in written text and therefore cannot be reviewed. Set out under section 686 of the *Criminal Code*, the appeal court is allowed to sustain a conviction if it concludes that no

substantial harm was done and, even if a major error of law occurred, a conviction can be sustained if it is clear that the error had no material bearing on the guilty verdict. Given that American researchers found appeal courts to have considered errors in law to be ‘harmless’ in 38% of their sample of 165 cases of DNA exonerees (Garrett, 2011), similar rules in Canada raise questions as to whether appeal courts are as effective in detecting wrongful convictions as currently thought (Roach, 2012a).

1.2 - Rectifying Wrongful Convictions Through Extraordinary Remedies

As previously discussed, alongside a growing recognition of the existence of miscarriages of justice, there has been a parallel development of extraordinary remedies as an avenue of redress outside of the ordinary court system. Roach (2010) used the term ‘error-correction model’ to distinguish these remedies, often referred to as innocence review commissions, from systemic reform or research-oriented *Innocence Commissions*. Error-correction models constitute post-conviction review schemes that offer an extraordinary recourse for the review of criminal convictions through a system outside of the regular appeals process. In the form of a ministerial review (with or without the assistance of an advisory body) or an independent review commission, post-conviction review bodies are not established to simply add another layer to the appeals process but are empowered to review a criminal conviction and refer a meritorious claim of innocence back to the courts for re-consideration. While the scope of the systems’ review and their powers of investigation, eligibility criteria and tests for referral may vary, all of the models discussed in the following review aim to rectify and ‘correct’ miscarriages of justice.

A comparative study of the systems retained in North Carolina, England, Scotland, Norway and Canada will highlight some of the variations in the jurisdictions’ legislative

frameworks which may affect the court's willingness to re-consider a claim of innocence. If the application of the concept of innocence varies from one jurisdiction to another (Burnett, 2002; Findley, 2010; Quirk, 2007), the type of legislative reform warranting post-conviction relief can be expected to vary as well. For example, while Canada and the United States share a similar legal system, and a constitution that protects individual rights enforced through an adversarial system, the one existing post-conviction review body in the US applies a more stringent standard to referred cases based on factual innocence than does the Canadian system. In fact, the Canadian system of post-conviction review has been found to more closely resemble the British system by providing rather generous admissibility criteria for fresh evidence on appeal and demonstrating a certain degree of flexibility in the application of the legal term miscarriage of justice.

Although the systems' restraints on matters relating to new trials, overturning convictions and the admission of fresh evidence have shown to make direct comparisons somewhat risky, the valuable lessons to be learned are rooted in exactly those systematic differences rather than in spite of them (Roach, 2012b; Tate, 2012). With that said, although Norway constitutes an inquisitorial system and might be considered somewhat of an outlier in this comparison, the system's progressive rationale and emphasis on discovering the truth (Stridbeck & Magnussen, 2011a, 2011b) may offer valuable insights.

1.2.1 - The United States: The North Carolina Innocence Inquiry Commission

This commission was established upon the advice of a systemic reform commission, the North Carolina Actual Innocence Commission, which recommended the establishment of an independent, non-governmental post-conviction review body. The North Carolina Innocence

Inquiry Commission (NCIIC) was charged with the investigation and evaluation of credible claims of factual innocence post-conviction by Article 92 of the *North Carolina General Statute (N.C.G.S.)* in 2006 (NCCIC Annual Report, 2016). Any applicant to the commission must be a living person, convicted of a felony in a North Carolina state court, and priority is given to claimants who are currently incarcerated (*N.C.G.S.*, Article 92, para. 15A-1460(1) & 1466(2)). Additionally, in what is said to be a safeguard against gratuitous applications, and serving as a reinforcement of the principle of finality in litigation (Maiatico, 2007, p. 1356), the NCIIC only reviews claims of factual innocence and not legal or procedural errors such as judges' misdirection or jury misconduct (Findley, 2010; Mumma, 2004; *N.C.G.S.*, Article 92, para. 15A-1466). According to the *N.C.G.S.* Article 92, the commission requires that any applicant eligible for review must assert complete innocence of the crime, including any reduced level of criminal responsibility relating to the offence. In other words, the crime must have either been committed by someone else or not have been committed at all (Bedau & Radelet, 1987; Burnett, 2002).

The NCIIC asks the defendant to provide "credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post-conviction relief" (*N.C.G.S.*, Article 92, para. 15A-1460(1)). Given this stringent criteria, Roach (2012b) suggests that the NCIIC restricts its review, albeit indirectly, to cases where physical evidence or scientific proof in the form of DNA is available to the defendant. With the exception of sexual assault cases, however, DNA evidence is unavailable in the vast majority of serious offences (Gould, 2004, p. 130). According to the commission's annual report of 2014, the NCIIC's review board consists of eight commissioners and includes a Superior Court judge, a prosecutor, a defence attorney and other discretionary members (NCIIC Annual Report, 2014). The membership's review process typically includes a preliminary investigation, an investigation

and final hearing stage (ibid.). While most applications are rejected in the preliminary stage due to the lack of fresh evidence, a meritorious case undergoes a “lengthy process that involves interviewing witnesses, obtaining affidavits, seeking court orders for evidence, testing of physical evidence, and compiling of documentation” (NCIIC Annual Report, 2009, p. 3). Within the commission’s powers of investigation, a recent amendment to the law authorized the NCIIC to grant immunity, similar to US prosecutors in criminal trials, if a witness wishes to plea “the Fifth”⁵ (*N.C.G.S.*, Article 92, para. 15A – 1468 (1a)). This important amendment was made in order to compel witness testimony on issues where the provision of sensitive information, including confessions of perjury, would otherwise lead to self-incrimination.

Following a formal investigation, the NCIIC compiles a case brief which provides a detailed case history, summaries of the trial transcripts, police investigations, witness statements and other relevant information that led to the discovery of fresh evidence, including unsuccessful or inconclusive leads (NCIIC Rules and Procedures, n.d.). Within the final evaluation, eight commissioners conduct a review of the material and are asked to make a decision on the merits of the case. In order to refer the case to a three-judge panel, which ultimately holds the authority to overturn the conviction or dismiss the claim, the commissioners need to believe that "there is sufficient evidence of factual innocence to merit judicial review" (*N.C.G.S.*, Article 92, para. 15A – 1468(c)). A final decision to refer the case back to the judiciary relies on the commission’s majority vote unless the applicant originally plead guilty to the charges, in which case the decision must be unanimous. Like the eight commission members, the three-judge panel is selected by the Chief Justice and cannot include a trial judge with “substantial previous

⁵ Note: “The phrase *take/plead the Fifth* refers to the Fifth Amendment of the U.S. Constitution, which says that citizens of the U.S. cannot be required to give testimony that could be used against them in a court of law” Merriam-Webster Dictionary, 2017).

involvement in the case” (ibid, para. 15A – 1468(a)). Further, to dismiss all charges against the defendant the panel must decide that, based on the evidentiary hearing, the defendant “has proved by clear and convincing evidence that the [defendant] is innocent of the charges” (ibid, para. 15A – 1468(h)). The NCIIC’s final decision is not subject to further judicial review but defendants may file additional claims of factual innocence with the commission if new or fresh evidence not previously considered by the commission is later discovered (NCIIC Rules and Procedures, n.d., p. 11). The commission has the option of holding public hearings and makes available all of its case brief on its official website whenever a case is referred to the courts (*N.C.G.S.*, Article 92, para. 15A – 1468(e)).

The NCIIC operates as an inquisitorial body where the onus is placed upon the defendant to prove his innocence. During this process, claimants are required to waive fundamental rights such as solicitor-client, spousal and other kinds of privilege (*N.C.G.S.*, Article 92, para. 15A – 1467; Roach, 2012b). However, any evidence related to the offence and discovered during the commission’s investigation, be it inculpatory or exculpatory, must be released to the prosecution as well as the defendant and his or her attorney (*N.C.G.S.*, Article 92, para. 15A – 1467(b) & 1468(d)). Although the commission rejects a relatively high number of its applications received, with ten out of eleven cases referred back to the judiciary for final review leading to the conviction being quashed, the NCIIC claims an overall success rate of 90% in their Case Statistics of 2016 (North Carolina Innocence Inquiry Commission, n.d.), when measured by cases referred and convictions quashed.

1.2.2 - The United Kingdom: The English & Scottish Criminal Cases Review Commissions

England, Wales, and Northern Ireland

The discovery of a series of unsafe convictions during the 1970's⁶, regarding terrorism cases, sparked an interest in the occurrence of miscarriages of justice and the need to address the growing public distrust in the UK's judicial system. The government responded to this perceived crisis by establishing the Royal Commission on Criminal Justice (RCCJ or the Runciman Commission), in 1993, which amongst some 352 recommendations⁷ included the establishment of an independent or non-governmental body to review claims of innocence post-conviction. Support for the establishment of this review body was the RCCJ's finding that many of the miscarriages of justice had been directly linked to the work of police and related processes. As a result the Criminal Cases Review Commission (CCRC) was established in an Act of Parliament under the *Criminal Appeals Act (CAA)* of 1995 (c. 35, para. 8) and charged with the impartial and accountable investigation of suspected miscarriages of justice in both convictions and sentencing in England, Wales, and Northern Ireland (CCRC Annual Report, 2016).

The CCRC is not concerned with innocence per se but is tasked with discovering and investigating both the frailties and successes of the judicial process based on clearly defined eligibility criteria (Schehr & Weathered, 2004, p. 123). Within this objective, investigations that do not lead to a referral back to the Court of Appeal Criminal Division (CACD) are also considered successes by way of validating the original conviction. In doing so, the CCRC aims to provide transparency and accountability regarding the criminal justice system in the eyes of

⁶ The Guildford Four (1974); The Birmingham Six (1975); The Maguire Seven (1976) and Judith Ward (1974) as referred to in MacFarlane (2006)

⁷ As per the Royal Commission on Criminal Justice, Report, Command 2263, 180-219 (HMSO 1993), the recommendations addressed police investigations, safeguards for suspects, the prosecution process, pretrial procedures, the trial process, forensic science, and other expert evidence and the appeals process.

the public. Whereas factual innocence is the basis for review through the NCIIC in the United States, the English system focuses on the safety and satisfactory standing of convictions (*CAA*, c. 19, s. 2(1)(a)). In order for the CACD to overturn a conviction, the courts must deem the conviction “unsafe” (Jason Lloyd, 1997) by entertaining a “lurking doubt” that the accused had been rightly convicted, as decided in *R.v. Cooper* (1969). Upon this finding, it is then up to the prosecution to defend the conviction. The CCRC’s main objective centers on the protection of the legally innocent and the fairness of trial by “righting miscarriages of justice” regardless of factual guilt (Griffin, 2009). For example, as the decision in *R.v. Davis* (2001) concluded, even if there is no doubt about the person’s guilt, a conviction will be considered unsafe if inadmissible evidence is found to have been wrongfully admitted.⁸

According to the *Criminal Appeals Act*, the CCRC’s membership consists of at least eleven commissioners, of which some must be lawyers and criminal justice professionals (c. 35, para. 8) but ‘lay’ persons are also included to add to a versatile team (Kyle, 2004, p. 663). By its own account, the CCRC presently employs around 90 staff, including 40 caseworkers and twelve commissioners. Under the referral test to the CACD, commissioners must conclude that there is a “real possibility” (*CAA*, c. 35, para. 13) that the conviction will not be upheld. This conclusion must be based on the impartial judgment of the commissioners and is generally supported by an argument or evidence not previously raised or other “exceptional circumstances” (*ibid.*). In broad terms, and purposely leaving it to the commissioners’ final discretion, the courts are said to have defined the “real possibility standard” as:

⁸ This legal meaning of the term miscarriage of justice does not necessarily correspond with the way it is understood outside the narrow confines of the law. For further readings and discussion on the issues related to the CCRC’s approach see Jenkins (2013): “Miscarriages of justice and the discourse of innocence: perspectives from appellants, campaigners, journalists, and legal practitioners”; or Roach (2012a): “Wrongful Convictions in Canada”.

“[...] more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld” (*R.v. Criminal Cases Review Commission ex parte Pearson* [1999] as cited in Kent, 2010).

The commission is entrusted with the power to make a decision on what constitutes a ‘valid exception’ as well as the threshold by which to judge a ‘real possibility’.

Whereas a final referral requires the vote of three commissioners, one commissioner can decide to reject a case. Moreover, even if a case fulfills statutory criteria, the CCRC holds the discretion to refuse to refer it to the Court of Appeal (*Westlake v. Criminal Cases Review Commission*, 2004). The CACD and CCRC entertain a reciprocal relationship in which questions of law and matters relating to the investigation can be exchanged (*CAA*, c. 35, para. 15). Reasons for referral or non-referral are not made public but are submitted to the person making the application. As opposed to its US counterpart, the CCRC’s decision can be subject to judicial review and applicants are allowed to raise any ground of appeal (“whether or not the ground is related to any reason given by the Commission for making the reference”) once a case has been referred back to the courts (*ibid*, para 14). Although criticisms have been brought forth regarding the CCRC’s true independence, allegedly undermined by its direct subordination to the CACD (Naughton, 2009; Nobles & Schiff, 2001/2005), the commission claims to conduct thorough and impartial investigations without the instruction of any external body. The CCRC has legal authority to obtain information from police forces, the Crown Prosecution Service, social and health services and local councils. However, the CCRC’s subpoena powers do not extend to witnesses other than persons from public bodies such as the police (*CAA*, c. 35, para. 17).

According to Schehr and Weathered (2004), although the CCRC’s case statistics have spawned international interest and its efficacy served as a role model to other error-correction

models, concerns have been raised about the due diligence of the commission's investigations. Given the pace at which caseworkers have been able to process a high volume of annual applications, concerns have been raised with respect to the quality of assessments. The latest statistics spanning from April 1997 to October, 2016, however, claim that the CCRC referred 626 of 20,470 completed applications (21,514 including ineligible cases) back to the CACD, of which 410 appeals were allowed and 181 dismissed (Criminal Cases Review Commission, n.d.). The commission processed 1,599 applications in 2014/2015 alone, according to their annual report for that year (CCRC Annual Report, 2014/2015).

Scotland

Upon the recommendation of the Sutherland Committee on Appeals Criteria and Alleged Miscarriages of Justice (1996), the Scottish Criminal Cases Review Commission (SCCRC) was established in 1999 by section 24 of the *Crime and Punishment (Scotland) Act 1997*, which inserted a new Part XA into the 1995 *Criminal Procedure (Scotland) Act (CPSA)*. Seeking the same separation of powers as its English counterpart, the SCCRC replaced the former post-appeal process under the Secretary of State⁹ by establishing an independent body in charge of reviewing alleged miscarriages in both convictions and sentences imposed by a Scottish court. However, the Scottish commission remains distinct from its English counterpart in its legislative framework, case review criteria and legal test for referral to the High Court. For example, appeal rights do not have to have been exhausted and a miscarriage-of-justice-claim can be done by someone, in respect of a deceased person, who has a legitimate connection to the convicted

⁹ Previously, the Secretary of State would refer the matter to the Appeal Court under section 124 of the Criminal Procedure (Scotland) Act 1995.

person and wishes to clear their name posthumously (*CPSA*, s. 194B(4)); *The Scottish Criminal Cases Review Commission v. Swire*, 2015).

Primarily rejecting the English grounds for appeal based on an ‘unsafe conviction’, Scotland’s legislative framework determines a case fit for referral if it is believed that a “miscarriage of justice may have occurred” and “that it is in the interest of justice that a reference should be made” (*ibid*, s. 194(c)). Similar to the English commission, the SCCRC is entrusted to use its own discretion, for example, in judging whether a referral would be ‘in the interest of justice’. According to Leverick et al. (2009), although it is unknown whether terminological differences carry any practical implications on referral rates, or the Court of Appeals’ willingness to set aside a conviction, a general consensus seems to exist that no criteria should be too restrictive as to limit the commissions’ ability to use discretionary powers (p.10). The SCCRC is not concerned with factual innocence, and all other accepted grounds for appeal set out in case law relate to some sort of procedural irregularity such as wrongful admission of evidence, judge’s misdirection or defective legal representation (Leverick et al., 2009, pp. 18-20).

However, unlike the English system, which accepts a residual element of “lurking doubt”, Scottish legislation requires the existence of exculpatory evidence not heard at trial or proof of error such as jury misconduct to support the belief that a “miscarriage of justice may have occurred” (*CPSA*, ss. 106(3)(a) - 106(3)(b) & s. 175(5)).¹⁰ In order to account for ‘changes of heart’ in new or prior witnesses post-conviction, Scotland opened its criteria for admissibility of ‘fresh’ evidence to include evidence that may have been raised at trial but only acquired

¹⁰ It is also possible to appeal against a conviction under summary procedure on the basis that the decision of a sheriff or lay justice was unreasonable, although this is not specifically provided for in the 1995 Act.

significance after the trial had unfolded (*Church v. HM Advocate*, 1995; Gordon, Renton & Brown, 1996, paras. 29-36). However, a reasonable explanation for the change of significance, or for earlier omission, and credible evidence to support any changes to previously admitted evidence is required (*CPSA*, ss. 106(3C) & (3D)). Representing only a small portion of the UK's overall population, the SCCRC is a scaled down version of the CCRC. Nine full-time legal officers (*ibid*, p. 49) are in charge of investigations with the legal power to compel information as they deem necessary (*CPSA*, ss. 194H, 194I, 194IA). For example, legal officers can oblige the Crown Office to disclose information without further reason or justification (*Scottish Criminal Cases Review Commission v. HM Advocate*, 2001). There has been an average of six to eight commissioners, of which one third are required to be lawyers and one third criminal justice practitioners (*CPSA*, s. 194A), as well as two lay members such as academics and/or church officials (Duff, 2009; SCCRC Annual Report, 2014/2015, p. 48). Research conducted by the SCCRC into its own performance from 1999 to 2008 suggests that its overall referral rate ranged from anywhere between six to eight percent. Leverick et al. (2016) report that, from year of inception until 2015, the SCCRC's approximate referral rate is 4.5% (71 convictions), with an overall success rate of approximately 48% (or 33 convictions quashed).

1.2.3 – Norway: The Norwegian Criminal Cases Review Commission

Norway was the third country in Europe to create an independent error-correction model with the authority to review possible wrongful convictions and/or excessive sentences outside of the regular appeals process (Stridbeck & Magnussen, 2011a). Given the inquisitorial legal system in that country, Norwegian courts are actively involved in investigating the facts of a case, as opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defense. The Norwegian Criminal Cases

Review Commission (NCCRC) was established in 2004 by revision of the *Criminal Procedure Act*, Chapter 27, of June 15, 2001 (NCCRC Annual Report, 2004). Although operating under the same substantive rules as the former court-based system, the NCCRC has the final authority to reopen a case and refer it to the applicable court of appeal for retrial (NCCRC Annual Report, 2015). The court of appeal will appoint a new court, of equal standing yet impartial to the original trial court, to hear the referred case (*CPA*, s. 400, as cited in Stridbeck & Magnussen, 2011a, p. 279). The NCCRC employs an average of eight commissioners and three deputies, which includes justice officials and legal professionals as well as lay persons who provide a “fresh non-legal eye” (Stridbeck & Magnussen, 2011a, p. 269). As of 2015, the secretariat consists of eight investigating officers with legal expertise and two officers with a background in policing (NCCRC Annual Report, 2015, p. 6).

The commission focuses on factual *and* process matters in their decision to reopen a case. No time restrictions are placed on applications and a petition can be filed by someone other than the convicted person to clear their name posthumously. According to an evaluation of the commission led by Stridbeck (2011a), performance measures for the year 2010/2011 indicate that most of the NCCRC’s reopened cases belonged to the categories of formal wrongs, such as unidentified mental disability of the defendant (40 percent), or procedural wrongs such as the lack of sufficient justification provided during the regular appeals process (22 percent). According to Chapter 27 of the *CPA* (1981), a convicted person may petition for the review of his or her legally enforceable conviction or sentence if ‘new evidence or circumstances’ seem likely to lead to (A) an acquittal, (B) the imposition of a more lenient penal provision or (C) a significantly more lenient sanction to be applied (para. 391(3), as cited in NCCRC Form for petitioning a review, n.d.). While new *evidence* may refer to a statement from a new witness not

heard before (NCCRC Annual Report, 2008, p. 13), new *circumstances* could include another person's confession (ibid, p. 20). Moreover, the commission is likely to reopen a case if evidence can be presented that suggests a criminal offence was committed by someone who has had crucial dealing with the case¹¹ and could have affected the trial outcome (ibid.). Similar to its European counterparts, the NCCRC is given discretionary powers in regards to the weighing of special circumstances and issues such as changes in legal interpretation, the disqualification of a trial party or a judge having become subject to review.

Section 397 of the *CPA* stipulates that the final decision to reject a case for retrial rests on the judgment of the chairperson or vice chair of the commission who can decide that the petition does not fit criteria or simply has no chance at succeeding if it were to be referred (NCCRC Annual Report, 2015, p. 6). If a case qualifies for review, the decision to reopen it is determined by majority rule. In assistance to the applicant and/or the victim, legal representation can be provided at public expense (*CPA*, 1981, ss. 101-107(d), as cited in Stridbeck & Magnussen, 2011a). This is reported to have always been the case if the convicted person may not have been criminally liable due to a mental disorder (*CPA*, s. 397) or, most often, in highly complex cases (NCCRC Annual Report, 2015, p. 12).¹² However, as is commonly practiced in other innocence commissions, petitioners are required to sign a waiver of solicitor-client privilege (NCCRC Form for petitioning a review, n.d.). Once a preliminary assessment moves a case into the formal investigation stage, the Norwegian system requires transparency towards all parties and typically includes an informal discussion sessions during which the petitioner and witnesses are summoned. The commission encourages open communication by phone as well as meetings with

¹¹ Persons of crucial dealing with a case may refer to legal officials, jury members, an expert witness or parties to the police investigation.

¹² In the year 2015, the commission appointed legal counsel at public expense in 26 of its 40 reopened cases. Extensions to this provision have been made in 2006 and 2008 to better support aggrieved persons and/or surviving next of kin who wish to clear the convicted person's name posthumously (NCCRC Annual Report 2015, p. 12).

the petitioner particularly in the absence of legal counsel (ibid.). During formal review, investigating officers are empowered to compel the production of evidence, nominate experts or ask the police to undertake further investigation. If supported by the full commission membership, the NCCRC can also conduct public hearings or hold inquiries. Although frequent use has been made of the authority to appoint expert witnesses from various fields (NCCRC Annual Report, 2015, p. 12), public hearings are reported to be a rare occurrence (NCCRC Annual Report, 2006, pp. 10-11). An evaluation by the Ministry of Justice in 2012 revealed that 82 percent of reopened cases, resulting in a new trial, led to the complete exoneration of the applicant (Stridbeck, 2012).

1.2.4 - Canada: The Criminal Conviction Review Group

An application for executive clemency to the Canadian Governor General under the Royal Prerogative of Mercy was the first option for criminal defendants to have their convictions revisited following unsuccessful appeals (Trotter, 2000). Although no longer a common practice, the Crown retains the power to pardon offenders, reduce the severity of sentencing, and correct miscarriages of justice. Following several legislative changes, however, the Royal Prerogative of Mercy eventually led to the creation of s. 690 of the *Criminal Code*¹³ in 1968, which remained in effect for almost 30 years until the establishment of the Criminal Conviction Review Group (CCRG) in 1993 (CCRG Annual Report, 2016). This section allowed, under a new provision which replaced the former ‘690 process’ with s. 696 of the Code in 2002, anyone who has exhausted all of their appeals on a conviction for a summary or indictable offence under the *Criminal Code* of Canada, the *Controlled Drugs and Substances Act*¹⁴, or anyone who has

¹³ *Criminal Code*, RSC 1985, c C-46, s. 690

¹⁴ *Controlled Drugs and Substances Act*, SC 1996, c 19

received a dangerous or long-term offender designation, to apply for a ministerial review (CC, s. 696.1(1)). In its review process, the CCRG is not concerned with a defendant's innocence *per se* but the onus is placed on the applicant to satisfy the Minister that a miscarriage of justice likely occurred (Walker & Campbell, 2009).

In the initial screening process the applicant is required to disclose his/her personal information, the case's trial/appeal history and is asked to explain how the alleged miscarriage of justice relates to the conviction in question. Further, a personal information disclosure form¹⁵ and a waiver of solicitor-client privilege must be signed by the applicant. Finally, the applicant must specify the grounds for the application and provide a "description of the new matters of significance that support the application" (*Regulations Respecting Application for Ministerial Review*, s. 2(1)(f)). Although not further specified in legislation, the CCRG provides examples of what would constitute 'new and significant matters', on their website discussing the conviction review process, and lists the evidence as falling into one of the following potential categories (Department of Justice, n.d.):

- (1) Information that would establish or confirm an alibi;
- (2) another person's confession to the crime;
- (3) information that identifies another person at the crime scene;
- (4) scientific evidence that can support another's guilt or the applicant's innocence;
- (5) proof of important yet undisclosed evidence;
- (6) information that shows that a witness gave false testimony;
- (7) or information that substantially contradicts testimony given at trial.

'New' evidence refers to information that has not been heard at the trial or appeal stage and is 'significant' by being reasonably capable of belief, relevant to the issue of guilt and able to demonstrate that it could have affected the original verdict (Department of Justice, n.d.).

Whereas the CCRG's legal admissibility test of fresh evidence is similar to that applied at the

¹⁵ A personal information disclosure form includes the transfer of rights to disclose personal information to a third party or public body in order to access supplementary information on the applicant if need be.

appeal stage, a post-conviction review places the additional burden of proof on the defendant to satisfy the Minister that “a miscarriage of justice likely occurred” (CCRG Annual Report, 2016, p. 6). Only if the Minister can reasonably conclude that a miscarriage of justice likely occurred based on the evidence before her, will the case be referred back to the courts for consideration. However, there are no statutory or regulatory guidelines on how this requirement may be fulfilled.

In order to conclude a preliminary assessment, the CCRG requires true copies of all pre-trial, trial and appeal transcripts, factums and other court material filed by the parties (Department of Justice, Application Form, n.d.). While critics, such as Roach (2011b), have attributed this requirement to slow processing times based on missing documents or incomplete application forms, most of the pre-trial and trial documents are essential to the appeal process and are presumed to be available to the applicant already. Upon receipt of these documents, a full case review would typically proceed in four stages. Based on the information gathered during the preliminary assessment, an investigation brief is compiled and handed to an investigating lawyer (CC, ss. 696.2(1) – 696.2(2)) who will then provide the applicant with the opportunity to respond to the brief. The same opportunity is provided before a final report is sent to the Minister and, again, prior to any closing decision. However, the CCRG does not appear to offer personal guidance or meetings with its applicants to the same degree as the British or Norwegian model and, according to Roach (2011b, p. 289), little is known about the applicants’ engagement in the investigative process.

However, according to Somji (2012), the CCRG’s powers of investigation surpass those held by the English CCRC (CC, ss. 696.2(2) – 696.2(3)). CCRG lawyers or additional external counsel are empowered, on behalf of the Minister, to conduct a thorough investigation that can

include the seizure or production of evidence, the issuing of subpoenas and obtaining assessments from forensics or social sciences specialists (*CC*, s. 696.2(3)). Unlike the NCCIC, however, the CCRG does not provide witness immunity but can force a witness to attend and disclose information if they refuse to do so. Generally, the duration of the investigation depends on the complexity of the case and the applicant has a maximum of one year to comment on the investigative report before its final submission to the Minister of Justice (*Regulations Respecting Application for Ministerial Review*, ss. 3-6). Once the Minister receives the investigative report, and the memorandum of legal advice prepared by the lawyer assigned to the case, there are three possible outcomes for the applicant (*CC*, s. 696.3(3)(a)-(b)). The Minister can order a new trial, refer the matter to the court of appeal or dismiss the application. In making this decision, the Minister can refer any question of law or opinion to a court of appeal and is empowered to bypass a full investigation if a decision can be reached without it. The applicant is given a one year timeframe to provide supplementary information before a provisional decision becomes final and is no longer subject to appeal.

The Minister's finding that there is a reasonable basis to conclude that a miscarriage of justice likely occurred is not equivalent to a declaration of innocence (*ibid.*). If the case is referred back to the court of appeal, to be dealt with as a regular appeal, Crown counsel of the originating province can either conduct a new trial, withdraw all charges, offer no evidence¹⁶, or enter a stay of proceedings - which would be least desirable outcome as the charges would be kept "on hold" and the Crown retains the power to recommence on the same indictment for a period not exceeding one year (Roach, 2007). As the best possible outcome to the applicant, the Minister of Justice orders a new trial allowing for the presumption of innocence to be restored,

¹⁶ Offering no evidence would result in a not guilty verdict

the conviction to be quashed and the individual to be acquitted of all criminal charges originally laid against him. The CCRG claims that a ministerial review does not serve as simply another layer on top of the existent appeal process but constitutes an independent out-of-court review on new matters of significance discovered post conviction (CCRG Annual Report, 2016, p. 4). However, similar to the English CCRC's relationship with the Court of Appeal which appears to involve a lot of 'guess-work' of what the courts would decide if a case were to be referred, research conducted on the CCRG's performance remarked a rather "risk adverse" decision-making process (Roach, 2011b, p. 290). Roach noted that in all but one of the 12 cases referred back to the courts did the applicant receive a favorable outcome (p. 290). Based on these numbers, the CCRG claims a 92% success rate despite a relatively low annual average of applications received. Research conducted by Levrick et al. (2016) suggests that, since the CCRG's legislative changes in 2002, the review body claims an annual application rate of 21 applications, out of a total of 272 applications received, and compares at an approximate referral rate of 5.8% (or 16 convictions).

1.3 - Lessons Learned

Although the top prosecuting officer or Minister of Justice/Attorney General's sole power to revisit criminal convictions dates back to 1892 and has since remained unchanged, the CCRG's regime currently set out in s. 696 of the Criminal Code has undergone several revisions. In recent years, the CCRG's lack of transparency and accountability was thought to jeopardize democratic values and dissatisfaction was expressed over bureaucratic delays (Braiden & Brockman, 1999). In an effort to address some of these concerns, legislative changes in 2002 led to the inclusion of summary offences in the CCRG's review criteria, the physical relocation of the main office outside of the department of justice and the appointment of a Special Advisor to

the Minister of Justice. The function of Special Advisor¹⁷ is currently served by a retired judge of the Court of Quebec (Bernard Grenier) who is meant to bring fairness and transparency to ministerial review. However, these modifications to the *Criminal Code* and the CCRG's operation were criticized for not having achieved any significant change to the existing process (Walker & Campbell, 2009, p. 199) and the federal Parliament of Canada has not enacted any additional laws to prevent or reduce the risks of wrongful convictions (Roach, 2012a).

Moreover, the CCRG differentiates itself significantly from all other post-conviction review bodies discussed in this review in the composition of the staff, i.e. lacking versatility, in its level of transparency and lack of clarity on review procedures, including public reasons for its decisions. Further, Canada continues to refuse to take a more 'holistic approach' to reducing wrongful convictions (Roach, 2011b). Whereas all of the other innocence commissions discussed above have broad and diverse membership, and have contributed to the consideration of some comprehensive and systemic changes to the criminal justice system, Canadian initiatives continue to be limited to provincial investigations that focus on the discovery of case-specific causes in high-profile wrongful convictions. With that said, rather than adding to a more versatile team of the CCRG's review staff, Roach (2011b) suggests that thought should be given to the establishment of a research-oriented innocence commission that has an advisory panel of experts that could increase federal responses to research findings and advocacy on wrongful convictions.

Another question to be considered is whether an inquisitorial or adversarial model is the best basis for review. On the one hand, according to Roach (2011a), aspects of the inquisitorial system could be helpful in preventing and rectifying wrongful convictions, especially within the

¹⁷ The Annual Report 2015 supra note 230 reads "The Special Advisor's position is an independent one and is not part of the Public Service of Canada, nor is it a position within the Department of Justice. The Special Advisor is appointed by Order-in-Council from outside the Department and the Public Service."

appeals process. He emphasizes that a commitment of the justice system to discover the truth would be demonstrated in the appointment of experts such as those appointed in the Norwegian's model of investigation. On the other hand, a strictly inquisitorial post-conviction review system would place lawyers and innocence projects "on the sidelines", who may have their own expertise, and could result in a lack of confidence in a process from which they are excluded (Roach, 2011a, p. 298). Based on this, although opinions may vary particularly in regards to the effects of legal representation and advice during adversarial post-conviction review procedures (Hodgson & Horne, 2009), Roach (2011b) suggests that a combination of the strengths of both systems are of advantage and should guide Canadian policy-makers.

Lastly, in regards to restricting post-conviction review to cases of factual innocence, arguments from both sides of the debate should be taken into account. Particularly in regards to the NCIIC's mandate, it becomes clear that factual innocence is appealing because of the indisputable injustice of convicting the innocent. In other words, the moral obligation of our criminal justice system to rectify the legal claim of the factually innocent cannot be denied. However, limiting eligibility criteria to claims of that nature would also deny the fact that, in most cases, DNA evidence is simply not available. Proving factual innocence as a legal matter, in the vast majority of cases that rely on circumstantial evidence, would be extremely difficult. With that said, given that the NCIIC rejects a high percentage of its applications based on a lack of fresh evidence that could establish factual innocence, and the CCRG shows a relatively low number of annual applications, an adaptation to such stringent criteria may lead to an even further decline of innocent Canadians applying for ministerial review. Detailed information on the case statistics of each of the post-conviction review bodies discussed in this review, including a table of comparison on the bodies' relative success rates, can be found in Appendix A.

1.4 - Contributing to the Field of Knowledge

Since very little is known about the CCRG's investigative process and review procedure, this project aims to shed light on an applicant's journey of applying for a ministerial review and some of the challenges that he may encounter in meeting current eligibility criteria. Given the lack of transparency of the CCRG, this case study made use of the limited publicly accessible information that could provide insights into the review body's criteria. Based on the examples of categories that would capture the CCRG's understanding of 'new and significant matters' published on the official website of the Department of Justice, the following case study employed a theoretical lens through which to de-construct this criteria and used an applicant's criminal case files to illustrate the challenges of meeting the CCRG's standard for review.

Choosing case study as the methodological approach to this project, I intend to address the current gap of knowledge on the 'real-life experience' of CCRG applicants. In addition to the vast majority of literature on, and investigations into, officially exonerated individuals, I wish to provide insights into an individual's claim of innocence, post-conviction, who is currently preparing a 696.1 application to the Minister of Justice of Canada.

CHAPTER TWO:

THEORETICAL FRAMEWORK

The purpose of the present chapter is to provide an explanation of the theoretical framework applied in this study and, while being mindful of its strengths and limitations, demonstrate how Foucault's (1991) theory of 'governmentality' can help make sense of the conviction review processes within the Canadian criminal justice system. This chapter will expand on the theoretical perspective guiding this research, by first offering a discussion of Foucault's (1991) theory of governmentality, its interpretations by Dean (2010), Rose (1996, 1999) and Rose et al. (2006), as well as other Anglo-American and European social theorists across diverse fields such as crime and criminal justice (Garland, 1997; Stenson, 1998, 2005, 2008), social policy (McKee, 2007, 2008) and social welfare (McDonald & Marston, 2005). A great deal of research across these disciplines has most frequently used governmentality as a context for framing criminal justice and social policy-making processes and analysis by conducting what Dean has coined as an 'analytics of government' (2010). This allows researchers to apply Foucault's ideas as conceptual tools to gain a greater understanding of power and rule in modern society, of the ways in which governmental action, its objectives and underlying rationale connect, and the affects and potential modes of resistance that occur at the micro-level.

As the following review will show, I align myself with scholars who have made an explicit attempt to 'return' to Foucault's own writing, rather than provide adaptations thereof. Further, their definitions of key terms focus on original meanings and avoid subject-specific interpretations. The key tenets of 'governmentality' will primarily be based on Dean (1999,

2010) and Rose (1999) who offered both concise and intelligible summaries of Foucault's main ideas and a detailed description of his *analytics of government* as a methodological endeavor. Whereas some scholars such as O'Malley and Valverde (2014) have criticized certain disciplines for 'misreading' or failing to see Foucault's theoretical propositions in their entirety, they have praised Dean's most cited text on governmentality, *Power and Rule in Modern Society* (2010), as doing just the opposite: "Dean's work is popular because it explains Foucault better than Foucault" (O'Malley & Valverde, p. 331). Drawing from the works of a range of twentieth century social thinkers in the contemporary humanities and historical studies such as Durkheim (1992) and Weber (1927, 1968, 1972, 1985), or Hadot (1995) and Skinner (1989), Dean (2010) appears to have provided a nuanced approach for many contemporary researchers and students, such as myself, who wish to employ a qualitative governmentality approach to their methods of inquiry.

As Rose et al. (2006) posit, contemporary governmentality studies conduct an analysis of government that seeks to identify:

"different styles of thought [embedded in the act of government], their conditions of formation, the principles and knowledges that they borrow from and generate, the practices they consist of, how they are carried out [as well as] their contestations and alliances with other arts of governing" (p. 84).

Encompassing these analytical elements, the first section of this chapter will explore Foucault's basic concepts and themes in an effort to illustrate how Canadian post-conviction review processes constitute an *art of government* which employs particular *rationalities* and *governmental technologies* designed to address the problem of wrongful convictions and miscarriages of justice. Second, I hope to speak to some of the criticisms of Foucault's theory, highlight its benefits to the analysis of social policy within criminology and criminal justice scholarship and explain my further alignment with the recently emerged 'realist

governmentality' approach. Relevant to my investigation into the effects that post-conviction review policy has on wrongfully convicted individuals, 'realist governmentality' offers a suitable perspective by going beyond questions of 'how governing is done' (Flint, 2002). It incorporates micro-level effects of various governmental regimes and returns to the constitutive role that Foucault had provided to resistance and regulated freedom (McKee, 2009). Finally, this chapter concludes by laying out the guiding theoretical propositions and analytical questions relevant to the object of this study.

2.1 - Foucault's Governmentality: Basic Concepts and Themes

According to Dean (2010), Foucault's definition of the term 'government' referred to the phrase 'the conduct of conduct' (Foucault, 1982, p. 220-1; Gordon, 1991, p. 2) and implied three main areas of interest inherent in his theory of the 'art of governing' (Foucault, 2003a, p.138). First, in the sense of the concept as a verb, 'to conduct' can either mean 'to lead, to direct or to guide' or, as its reflexive counterpart, imply an ethical or moral dimension as in 'to conduct oneself' as a more general reference to the exercise of self-governance. Secondly, in the sense of the word as a noun, 'conduct' links the act of government to specific sets of behaviours, actions or even attitudes and manners (Dean, 2010, p. 16). Taken together, Foucault's art of government extended from the exercise of authority over others, individuals or populations, to the governing of the self and the way in which either the individual or governing authority can problematize a specific behaviour and make a calculated attempt at directing it towards particular ends. As the ethical or moral dimension of 'conducting oneself' is meant to imply, the art of government assumes an element of self-regulation and evaluative characteristics which presuppose a set of desirable norms or ideals. In a Foucauldian sense, a 'knowledge-base' or mentality of presupposed norms and ideals informs the 'righteousness' of the measures taken by a governing

entity to secure a specific goal and can legitimize political agendas advanced by the ‘governer’ (Dean, 2010, p. 17-19).

Foucault’s term ‘governmentality’ then, was defined as a combination of these elements by focusing on the *technologies* of governmental intervention, the ways of thinking or *rationalities* supporting the actions of government and the ‘truths’ on which these mentalities are built (Garland, 1997). Based on these elements, an analytics of government approach starts by asking what various authorities or ‘governers’, i.e. government agencies (Dean, 2010, p. 18), “want to happen” in regards to a specifically identified problem (Rose, 1999, p. 20). According to Gilling (2010, p. 1143), the *primary* focus of governmentality studies has so far been the analysis of the different rationalities or ‘truths’ on which technologies of government are based. Two main functions of these ‘truths’ have been said to form the moral dimension of government rationalities and become subject to extensive analysis. On the one hand, a set of epistemological assumptions or theories of knowledge are said to reveal how a certain problem is made knowable to the ‘governer’, i.e. statistical data and/or qualitative research evidence. On the other hand, Rose and Miller (1992, p. 181-2) argue that regimes of government employ a particular ‘idiom’ to make sense of the identified problem (i.e. a social space or population) and turn the political ambition of solving it into something more practical. In other words, to analyse the mode of expression of a political ambition is to try and understand how a problem is translated into language, i.e. government document, with the intention of making it governable and open to intervention (Rose, 1999).

However, to make a clear distinction between Foucault’s theory of governmentality and discourse analysis, Rose *et al.* (2006, p. 89) stressed that language or other signifying systems are only one of the many elements used by governing actors to render reality amenable to

intervention. Further, as much as governmentality is not restricted to the analysis of the political power of the state, but addresses a much greater network of power relations, it is also not concerned with the truth or falsehood of governmental rationalities. Contrary to an investigation into the 'Reason' or a sort of collective consciousness of the state, the Foucauldian idea of rationalities of government refer to 'taken-for-granted' ways of thinking which are not typically open to questioning by practitioners, but are explicit and 'embedded in language and other technical instruments' (Dean, 2010, p. 25). In short, an analytics of government poses questions that ask how rationalities are constructed as objective knowledge without making attempts to evaluate them as being 'right or wrong' (Burchell, 1993, p. 277). By exposing the 'naturalness of ways of thinking' through specific sets of questions, governmentality offers a unique perspective that can 'draw attention to tensions and conflicts' within governmental institutions and provide a space for alternative ways of doing things (Garland, 1997; Gilling, 2010, p. 1137).

It is important to note that there are two general meanings of 'governmentality', both connected to the other. Whereas the first general meaning describes all activities of government motivated by the self-preservation of the sovereign, or king, the emergence of a particular rationality of rule in early modern Europe was shaped by the rise of the economy and political ambitions that fostered society's economic strengths (Foucault, 2003b, p. 202). As summarized by McKee (2009), Foucault observed a shift in the activity of government that separated itself from preserving the sovereign and re-directed its efforts towards 'optimizing the well-being of the population; an observation that Foucault named a change from 'deduction to production – right to death and power over life' (p. 466). In his lectures from the College de France in the 1970's, Foucault introduced the term 'biopolitics' to refer to a mode of power that functioned through the administration of life, individuals and the population: "[...] their health, sanitation,

procreation, mental and physical capacities and so forth” (Foucault, 2003b, p.202). Within this new reality and the population as its target, apparatuses of security were now seen as the essential mechanism of governmental technologies (Foucault, 2007). Moreover, modern governmentality suggests that to govern properly, the governor must ensure the well-being and happiness of the population through means that must be economical, “both fiscally and in the use of power” (Dean, 2010, p. 29).

However, Foucault did not merely focus on a shift of state control but expanded the more general meaning of governmentality to the interplay of different actors including the notion of co-governance through disciplinary institutions such as schools and hospitals. Co-governors were seen to work alongside government in a political strategy to secure particular ends (Rose, 1999). Foucault labelled this trend the ‘governmentalization of the state’ (Foucault, 2003c, p. 244), which on the one hand explores government beyond the state but, on the other, suggests that the art of governing is increasingly encapsulated in the state apparatus. In other words, the ‘idea of regulated freedom in the neo-liberal state’ (Rose, 1999) posits that, in order to secure its objectives, the state remains a key figure in the conceptualization of the ‘problem’ and its proposed solutions but does so in a less visible fashion. By responsabilizing or ‘empowering marginalized subjects’ to care for themselves, through institutions that share similar political agendas, the state not only dissipates some of its obligations but also extends its influences across our social fabric (Sharma, 2006, p. 69). Despite accusations that governmentality may be guilty of ‘homeostasis’ by providing rigid models of government, Foucault’s analysis of government technologies and ways of thinking intended to do just the contrary (Rose et al., 2006, p. 98). Instead of viewing the art of government as connected to a mainstream sociological category such as the ‘risk society’ or postmodernity, Foucault rejected any ‘totalizing’

approaches and considered rationalities to be undergoing continuous modification. In other words, this governmentality approach serves as a theoretical perspective to understanding governmental operations specific to a particular place and time period (O'Malley & Valverde, 2014).

To emphasize this point, as well as the applicability of 'governmentality' to this project, I align myself with Rose et al.'s theorizing (2006) who stressed that while contemporary governmentality has indeed helped in rendering neo-liberalism visible in new ways, it would be a mistake to simply view all contemporary 'arts of government', or government programs and interventions, as mere manifestations of neo-liberal ideologies that carry as their sole objective the advancement of political agendas (p. 97). As Rose et al. (2006) emphasized, government bodies maintain a certain degree of independence in their formulation of program-specific goals and objectives that step outside of an overarching state ideology. Further, critical inquiries must be sensitive to government rationalities that do not necessarily relate to the greater political climate. English contemporary governmentality studies have most often applied Foucault's analysis of resistance to an analysis of the neo-liberalist rationality of government and attempted to counter Cohen's (1985) *Visions of Social Control* (Rose et al., 2006), a social theorist who was thought to suggest a lack of or even absence of freedom in neoliberal societies. Apart from a common acknowledgment that the existence of freedom itself constitutes a crucial part of governing free societies (or social spaces), the element of freedom and resistance, in a Foucauldian sense, had a far greater reach than merely providing a reason to oppose Cohen's ideas on social control. With that being said, it holds true that Foucault's interest in relations of power was sparked by a desire to understand liberalism (Foucault 1997, pp. 74/75), but his project resulted in a political endeavour only insofar that sovereign rule and society served as a

suitable framework for an analytics of government that could be applied to various other ‘sites of governance’.

Through his theory of modern governmentality, Foucault observed that technologies of the self evolved alongside calculated strategies of domination, such as discipline, meaning that government ‘creates’ subjects who would produce the ends of government by fulfilling themselves rather than being merely obedient or passive (Rose, 1989). Based on this understanding, government is essentially seen as a productive exercise, both from the perspective of the governor and the governed, and the analytical tools developed in governmentality studies are ‘flexible and open-ended’, ‘rather than hard-wired to any political perspective’ (Rose et al., 2006, p. 101). Freedom and resistance, then, is also not seen as an opposition to coercive forces but rather as a part of the governed’s exercise of power, which follows a similar pattern to that of the governor in the production of alternative ‘truths’. According to Dean (2010), there are four distinct aspects involved in self-governance that are applicable to the governor and the governed. First of all, Dean (2010) proposed the presence of an ontological aspect in the act of ‘self-governance’, an element that is concerned with ‘*what we seek to govern*’ which is understood as the ethical substance, such as the ‘soul of the criminal’ (Foucault, 1977, p. 16-31). Secondly, self-governance is considered to include deontology, the study of the nature of duty and obligation, which is concerned with ‘*who we are when we govern*’ and how authority constitutes itself. Thirdly, deontology encompasses ‘modes of subjectification’ as well as the process of identification within the governable subject (Dean, 2010, p. 25-26). In simple terms, Dean refers to a governing entity’s exercise of self-regulation, the effort to control one’s own actions and the way the governable subjects perceive themselves in terms of their personal attributes, qualities and status’ within a particular context. And last but not least, Dean speaks to the aspect of

teleology, an element that explains ‘*why we govern or are governed*’, the ends sought and the reality we hope to create through the means of intervention (Dean, 2010, p. 27).

Further, borrowing from Dean’s (2010, p. 19) understanding that government constitutes an ‘intensely moral activity’, this project intends to explore the notion that policies and practices of government presume to know, by use of specific forms of knowledge, what constitutes appropriate and responsible conduct of individuals or populations. For that reason, in what follows, I am hoping to situate governmentality more accurately within criminal justice scholarship, while acknowledging its limitations and providing a more detailed explanation of ‘realist governmentality’ as a perspective that can extend research efforts into micro-level affairs.

2.2 - Governmentality Studies in Law and Criminology

Foucault’s concept of governmentality has primarily been described as a political project and the meaning of his key terms were thought to be essentially non-sociological (McKee, 2009, p. 468; O’Malley & Valverde, 2014). Despite this fact, Foucault’s ideas spread through various disciplines including (or perhaps most prominently) the social sciences for their methodological (rather than theoretical) implications. Particularly since the publication of the ‘Foucault Effect: Studies in Governmentality’ (Burchell, 1991), there has been a large increase in sociological governmentality studies referring to Foucault as a ‘methodological authority figure’ (Soyland & Kendall, 1997). Gordon (1991), on the other hand, explains that this perceived emphasis on methodology was the result of a general lack of understanding, and resulting scepticism, of Foucault’s theoretical implications. Adding to this point, O’Malley and Valverde (2014) argued that possible ‘misreadings’ (p. 325) or limited interpretations of Foucault’s concepts, particularly

in criminology and criminal justice scholarship, led to a denial of what his original writings had to offer.

O'Malley and Valverde (2014) propose that Foucault-influenced criminological scholarship and such adaptations can be viewed as being in either one of two different directions that were considered to have 'pushed things too far' and moved away from the philosopher's original ideas (p. 324). First, influential scholars such as Cohen (1985) were said to have developed a near-obsession with 'discipline' in the 1980s that failed to recognize the greater implications that Foucault had intended in his diagram of 'strategic knowledge' presented in *Discipline and Punish* (1977). Although many interpreted it, and still interpret it in this way, Foucault's key aim was not to provide a general theory or logic explaining the rise of the prison as a system of control but rather to map out a governmental strategy that could be applied to multiple sites of governance beyond the traditional boundaries of the state apparatus (McKee, 2009). Second, as a result of the publication of the *Foucault Effect* (1991), a similar obsession over 'risk' in the 1990s and early 2000s pushed for an interpretation of all government as operating through notions of risk (O'Malley & Valverde, 2014). For example, scholars such as Feeley and Simon (1992) in their work on actuarial justice and Ericson and Haggerty (1997) in their publication on policing took a nearly extreme stance on the frequency and scope of risk techniques with respect to criminal law and penal policy - even suggesting the development of a 'risk society'.

O'Malley and Valverde (2014, p. 325) ascribed this failure to appreciate Foucault's theorizing in its entirety, and 'misreading' of his actual rejection of 'pure types of power' that do not undergo transformation, to socio-legal scholars' delayed access to English translations and a consequent inability to follow the progression of Foucault's thought. In fact, Foucault responded

to historical changes by integrating societal and structural transformations, from how he perceived them, into his understandings of power and rule. The types of 'pure power' or static interpretations of power as put forth by criminological scholars did not account for these changes and failed to grasp the essential element of Foucault's concept of power as being dynamic, complex and undergoing continuous modification (Rose et al., 2006).

Particularly interesting for this project, however, is the treatment or consideration of the law through a Foucauldian lens whenever researchers attempted to answer questions related to criminal justice and penal policy. In connection to the observations reviewed above, according to Tadros' (1998) modern governmentality perspective, the succession from sovereignty to discipline had led to a transition of how the law operates. In other words, as Rose and Valverde (1998) argued, the law had extended its reach over time by operating more as a norm than as a command. In keeping with Foucault's original proposition that a complex set of power relations can only be effectively understood if considered in its specific context of time and space, Rose and Valverde (1998) suggested that a modern governmentality perspective assesses the way in which authorities make use of the law through careful considerations of other societal factors that further influence its function. Focussing on context, governmentality situates the law alongside other mechanisms of the state that also exhibit change.

As opposed to viewing its function as uni-dimensional, the law is seen as part of a complex web of power relations through which it continuously transforms itself and consequently the disciplinary network to which it is connected. Consistent with Rose and Valverde's (1998) observations, Tadros (1998) explained that modern law is not only juridical but operates between the concepts of government and discipline - extending its reach into the complete lives of individuals rather than functioning just to prevent certain actions - and thereby

stands in direct accord with what Foucault coined “bio-power” (p. 91). Tadros suggested that modern law is connected to the disciplinary network through the mechanisms of trial, common law and statute, where adjustments made to legislation can affect various institutions or sites of governance in the same manner as other governmental technologies (1998, p. 99-100). Although Tadros’s (1998) viewpoint puts the emphasis on the government’s powers of intervention, Foucault considered power to be a productive network, one that runs through the ‘whole social body’ and one that does not coerce but rather is accepted because it ‘traverses things, [...] and produces discourse’ (Foucault, 2003d, p. 307). In other words, contrary to traditional notions of power, Foucault redirects the focus on coercion to productivity and thereby places the importance of discussion on interactions between the ‘governer’ and the ‘governed’, where both are seen to engage in an exercise of power that produces and communicates knowledge. Whereas the governmentality perspective does, on the one hand, aim to provide a deeper understanding of strategic mechanisms of the state, as illustrated in Tadros’s (1998) Foucauldian conception of an existent link between the function of law and the disciplinary network, Foucault’s most famous phrase “where there is power, there is resistance” (1979, p. 95) echoes throughout all of his works and maintains a strong recognition of the position of the governed. Foucault’s propositions open up a critical space for exploring resistance in the formation of counter-discourse. Unlike mainstream governance literature, from a criminological standpoint resistance is seen as an opportunity to come up with alternative ways of doing things and not only as an act of overthrowing an existent regime: “[...] freedom is not be defined as the absence of restraint, but as a rather diverse array of invented technologies” (Rose et al., 2006, p.100). .

Whereas many considered Foucault’s opening of a critical space for inventing alternatives to an existent state of affairs in any given governmental program or regime as a

benefit to his approach, allowing for creativity and flexibility in researchers' applications of his theory (Garland, 1997; Rose et al., 2006; Rutherford, 2007; Gilling, 2010), other scholars have highlighted it as one of governmentality's limitations (Cooper, 1994; O'Malley et al., 1997). For example, Cooper and O'Malley et al. argue that governmentality fails to provide normative guidance or solutions and does not offer a clear picture of the type of resistance viable enough to make a difference within the entrenched network of power relations that Foucault suggested. As Sawicki (1996) pointed out, however, it is precisely the value ascribed to critical thought that is truly Foucauldian; the proposition that we must go beyond questions of *why* certain things are the way they are (in an attempt to evaluate them from a particular point of view) and instead, develop an 'ethos of investigation' (Rose et al., 2006, p. 101) that curiously seeks to understand *how* things happen (or come to be). Investigating this way allows us to render visible the 'inventedness of our world' (Burchell, 1993, p. 277), to interrogate the supposed natural order of things, and think of alternatives in those areas that have been taken for granted, were accepted as certainties but offer room for change.

Burchell (1993) used the metaphor of recognizing the contours of the 'goldfish bowl' we inhabit (p. 277) in order to prompt us to unsettle the familiar and dislodge the certainties that govern our present. The idea behind this metaphor is to make us aware and question the aspects of our world and, the realities we live in, that seem most obvious or certain to us but are, in fact, open to interpretation as they are inherently 'invented' and based on constructed knowledge. Whereas the underlying constructivist lens in this perspective will be discussed in greater detail in relation to the methodological approach taken in this study, it is important to keep in mind that Foucault, in his critical 'ethos of investigation', directly referred to the type of inquiry that would question the constructed knowledges perceived as 'truths' by government practitioners. In

support of this call for critical inquiry into present states of affairs, Tadros (1998) makes a crucial remark to the law, as governmental technology, that is said to have undergone considerable expansion and entered relations with scientific ‘knowledges’ such as criminology, economics and psychiatry (Ewald, 1990): “But by connecting itself to both of the poles of bio-power law, in justifying itself, it masks the need of each of these forms of power to legitimate themselves” (p. 79). In saying this, Tadros not only underlines the ‘interconnected-ness’ of modern power relations but also highlights the importance of questioning that which is commonly accepted as the norm.

Lastly, I want to speak to some of the critiques that described Foucault’s applications as ‘fuzzy’ and lacking in the type of rigorousness expected of social sciences research (O’Malley & Valverde, 2014, p. 332). Although it may be true that governmentality constitutes a generic analytical tool rather than a closed theoretical framework, as noted by O’Malley and Valverde (2014), the scientific contributions of ‘analytics of government’ (the term used by Dean (2010, p. 28) to describe the study of regimes of practices of regimes of government) in disciplines where social or penal policy was concerned should be of note (Newman, 2001; Raco & Flint, 2001; McKee, 2009). In an attempt to strengthen the link between my own research and Foucault’s concepts, and provide for the necessary rigor in the categorization of my data, I borrowed definitions and fixed categories from other post-Foucauldian theorists that could counteract the ‘tactically variable’ meanings of Foucault’s original terms (Rose et al., 2006; Dean, 2010). The following section intends to address the lack of attention paid to the aspect of resistance by ‘post-Foucauldian’ scholars and the unforeseen consequences of geo-historical context that can affect policy (Edwards & Hughes, 2005). Outlining the advancements put forth by the recently emerged ‘realist governmentality’ (Parr, 2009), I hope to further illustrate how Foucault’s

original writings constitute a suitable framework to exploring the effects of post-conviction review policy at the micro-level.

2.3 - Realist Governmentality

As previously mentioned, some researchers made use of Foucault's ideas in a way that 'belie(s) its original formulation' and, in fact, produced analyses that were 'decidedly "un-Foucauldian"' (Rutherford, 2007, p. 292). Due to this criticism and additional observations such as Dean's (1995), who described analytics of government as being "diagnostic rather than descriptive" (p. 570), empirical researchers with an interest in ethnographic/social policy settings have advocated for a return to Foucault's own thinking. In doing so, a 'realist' governmentality orientation (Parr, 2009) sought to re-emphasize Foucault's outward rejection of 'top-down' analytical approaches and offered an alternative to the dominant examination of 'governmental technologies' by reviving a focus on the effects of power at the micro-level (Philo, 2000).

Despite the 'realist' label, Stenson (2005), the forerunner of this new approach, did not explicitly position himself within the philosophy of critical realism but rather intended to focus governmentality on the empirical world and the active agents within it (Bhaskar, 1998). The main idea was to re-emphasize Foucault's importance of local variation and context (connection between space and time) when exploring different sites of governance. Following Stenson's (2005) lead, and in response to Foucault's alleged neglect of 'transformative agency' (Cooper, 1994; O'Malley et al., 1997), several social policy researchers drew from his original proposition that politics must be seen as a matter of contestation and the consequence of any political initiative should therefore not simply be 'read off' from government text. As governmental actions were considered to stand in relations of contest themselves, the outcome of certain

strategies were thought to be unforeseeable and should always be supported by empirical evidence as they are directly linked to how resources are deployed and realized (Clarke et al., 2007; McDonald & Marston, 2005). This alternative or advanced approach was meant to compliment rather than contradict traditional governmentality approaches by extending their scope of investigation and ultimately strengthening the validity of their results. For example, McKee's (2009) research into community ownership of social housing illustrated that, although strategies of empowerment were aimed at maximizing the tenant's knowledge and participation, it turned out that governmental agendas were not realized, based on contestation "between, and within, governmental rationalities as interpreted by different actors" (p. 478).

Realist governmentality's key principles, emerging from within criminology that emphasize the struggle for sovereign control of "deviants" (Stenson, 2005; 2008) carry an interest in the concrete art of governing and therefore intend to show, through localized empirical accounts, how governing practices seek to regulate specifically targeted populations. In trying to overcome the narrow focus on 'text-as-evidence', it pays attention to 'the inevitable gap between what is attempted and what is accomplished' (Li, 2007, p. 1). With an extended focus on the strategies 'from below', the hope is to provide a greater insight into the resources employed by the 'governed' who may wish to resist governmental ambitions. Within the 'realist' perspective, I therefore aligned myself primarily with Marston and McDonald (2006) who proposed that power does not always realize its effects and it would be a mistake to 'read off' consequences from what government's state as their objectives (Clarke et al., 2007, p. 22). Clark's contention refers to 'the dominant approach within Post-Foucauldian governmentality studies' (Stenson, 2005, p. 266), namely 'discursive governmentality', which tends to neglect material practice and draws (potentially) premature conclusions on how the effects of policy play out in 'real life'.

2.4 - Applicability of Governmentality Theory to Criminal Justice Policy: Conviction

Review

Although it was Foucault (1991) who first introduced the concept of governmentality, it is important to re-iterate that the analytical framework applied in this study is based on developments, expansions, interpretations and reinterpretations of scholars who made Foucault's ideas applicable to their own historical context and subject matter (Dean, 1999). For example, Dean (1999, 2010) made use of the governmentality perspective to examine the nature of reform initiatives in neoliberal societies, and Rose et al. (Miller & Rose, 2008; Rose & Miller, 1992; Rose, 1999; Rose et al., 2006) investigated economic, social, and political issues in modern welfare societies from this perspective. Considering this wide applicability of the governmentality perspective to different sites of governance, I attempt to embrace Foucault's ideas as an instrument and tool for other intellectuals to use, rather than as a grand theory of the social world (Kritzman, 1988, p. 197). Hence, the following analytical framework draws heavily from conceptualizations put forth by Dean and Rose et al., and represents an integration of various governmentality studies and their applications.

First and foremost, the applicability of governmentality theory to criminal justice policy and Canadian post-conviction review rests upon the concepts and methodological choices used in English-speaking governmentality studies. Post-conviction review herein is conceptualized as a form of government that is not understood as a "definite and uniform group of institutions" but rather an "inventive, strategic, technical and artful set of 'assemblages'" that are "rationalized in relation to governmental objectives and goals" (Dean & Hindess, 1998, p. 9). According to Dean and Hindess, government presents itself in "the medium of thought, of mentalities and rationalities of government" (p. 9) where the *thought of government* refers to discursive

formations and the discourses of governing. Accordingly, post-conviction review can be understood as a practice of governing in which justice officials, acting as the agents of governing, undertake a review of criminal convictions through various activities under the theme of rectifying miscarriages of justice through the application of Canadian post-conviction review policy. This form of government is thereby rationalized as the objective of the “proper” administration of justice.

Conceptualizing government this way directly links to Foucault’s account of governmentality, which asks to consider government as a form of art that operates in terms of specific rationalizations and is directed towards certain ends (Rose et al., 2006). Art in this concept refers to taking an interdisciplinary approach to investigating how the governing of human conduct is thought about and acted upon by authorities and individuals who make use of and generate particular ‘truths’ and resources (Miller & Rose, 2008). Appreciating Foucault’s concept of government as an art allows me to analyse Canadian post-conviction review procedures from a critical perspective that questions the knowledge through which certain eligibility criteria are constructed, based on an investigation into the available literature, and enables me to theorize about how these rationalities and their manifestations in specific criteria may affect the Criminal Conviction Review Group’s (CCRG) targeted entity. By adopting a single case study methodological approach, the effects of the CCRG’s review procedures on its targeted entity are analyzed through the use of an illustrative example: a CCRG’s applicant’s file and the case’s specific legal and factual circumstance.

The governmentality analysis of this study is primarily concerned with gaining a greater understanding of the kinds of knowledge that ultimately lead to the construction of certain eligibility and review criteria, and the ways in which this particular knowledge-base is made

practical for directing claims of innocence post-conviction in Canada. More broadly, and in relation to its particular context, the governmentality perspective allows me to situate the CCRG, under the direction of the Minister of Justice alongside other regimes of practice, or ‘governers’, established to address a specific societal problem (Rose, 1999; O’Malley & Valverde, 2014). Hence, understanding criminal justice policy as a technology of government, I further conceptualize post-conviction review policies as one of many ‘calculated strategies’ of government (McKee, 2009, p. 466) that were established with specific objectives in mind (Garland, 1997). In the example of the CCRG, these types of strategies and techniques would be located within the review body’s legislative framework and policy guidelines primarily set out under section 696.1 of the *Criminal Code*. The primary objective of applying these laws to a ministerial post-conviction review is to (1) identify that a miscarriage of justice likely occurred and if so, (2) rectify the situation through the court system.

Drawing from the works of Tadros (1998, p. 78), who re-examined the meaning of criminal law in modern governmentality theory, legislation such as a federal statute regulating a ministerial review of miscarriages of justice would constitute a technique of power directed at making adjustments in a given population. From this perspective, the creation of legislation governing certain regimes of practice, such as the CCRG, is an example of the way in which governmentality can be seen to direct and adjust relations established in what Foucault calls the disciplinary network, which Tadros (1998) identified to be taking place in the mechanisms of trial. Applying this aspect of the ‘art of governing’ (Foucault, 2003a, p. 138) to miscarriages of justice contexts, then, would allow me to explore current Canadian post-conviction review policies through a theoretical lens that questions not only the underlying assumptions supporting their existence but more specifically the way in which text-based regulations for ministerial

review can provide insights into the existent discourse that makes wrongful convictions a governable subject.

Further, Foucault would view laws that act as the bonding mechanism between government and the disciplinary network as one of many areas where power is able to constitute itself without much questioning from practitioners. In relation to the this project, the regime set out in s. 696.1 of the *Criminal Code* connects the CCRG's review procedure to the criminal justice system, representing the disciplinary network according to Tadros (1998), in the final stage of the post-conviction review process before the courts. To conduct a critical analysis of Canadian post-conviction reviews as a technology of government would then be anticipated to not only offer alternatives to the current regime, but also illuminate possible contestations within the CCRG's review procedure and the way in which the disciplinary network or the court's final re-consideration of a case is affected by the CCRG's legislation.

Taking all of these elements into account, the focus of this study, in accordance with other contemporary governmentality studies, is to analyse and provide a critique of the different ways in which the CCRG governs claims of innocence post-conviction (as the ethical subject) *and* itself, according to the various truths that inform what Dean (2010) calls 'regimes of practices of regimes of government' (p. 28). For example, in relation to the work of investigative lawyers, the Minister of Justice and/or the appeal judges, Foucault's governmentality would suggest that the CCRG's policy guidelines seek to engage with how both the 'governed' and 'governer' regulate themselves (Dean, 2010, p. 19). This provides a suitable perspective for examining how this particular ministerial post-conviction review body, in comparison to other jurisdictions, presumes to make fair and impartial judgments on claims of innocence. Although Foucault's theoretical tenet of 'self-governance', or the way in which a governing entity

regulates itself based on their own ‘truths’, may further be useful to exploring the CCRG applicant’s conduct, I narrowed the focus of investigations into the world of the ‘governed’ (or CCRG applicant) on elements of ‘regulated freedom’ (McKee, 2008). More specifically, rather than exploring how the applicant regulates him or herself in pursuit of a s. 696.1 conviction review, this project intends to shed light on integrated modes of resistance that can speak to the *effects* of governmental intervention at the hands of the CCRG at the micro-level.

This orientation applies the type of analysis proposed by Stenson’s (2005) ‘realist governmentality’, as discussed earlier, and embraces its valuable contribution to research interests in micro-level effects of policy and the governed’s exercise of resistance. According to Naughton (2007, p. 85), one such avenue of inquiry would consider how wrongfully convicted individuals’ share their experiences and produce a form of counter-discourse, as a mode of resistance, with the ultimate objective of providing an alternative truth to the governmentally-directed knowledge on the causes of miscarriages of justice. While, on the one hand, this project constitutes a production of counter-discourse in and of itself, by making Mr. Kassa’s case and his claim of innocence an illustrative example of the experience of the governed, my investigation into the effects of post-conviction policy primarily seeks to explore possible contestations between the CCRG’s rationalities that support review criteria and the applicant’s possibilities of negotiating that power at the micro-level. Through this lens, this project intends to avoid normative assumptions about how the CCRG, as a government institution, should or should not operate but seeks to surpass moral judgments by offering a constructive critique in the analysis of *both* the applicant’s and the institution’s exercise of power.

Combining Foucault’s original ideas on the art of government and interpretations put forth by theorists supporting a realist governmentality orientation allowed me to substantiate the

analysis of a CCRG applicant's journey in applying for post-conviction review. It serves as an illustrative example of the effects of policy, and offers this research a conceptual basis to its investigation into government practice in what Stenson (1998) calls the 'real'. Hence, the theoretical propositions laid out in the conclusion of this chapter are relevant to the discussion and analysis of both Canadian policy currently governing post-conviction review procedure, in key (government) documents, *and* the data collected from an ongoing post-conviction review application which I selected as the 'case' for my case study.

2.5 - Research Inquiries and Questions

Borrowing from Dean's (2010) description of how to conduct an analytics of government, I chose to follow his proposal of 'at least four dimensions' to be addressed by researchers who wish to understand how a regime of government governs others and itself. Dean's four dimensions were meant to provide a simplified framework to the structured investigation into governmental regimes that respects their practices as owning a "reality, a density and a logic of their own" (p. 33). In other words, the formulation of specific 'how' questions aims to avoid reducing regimes of practice to any premature reduction of them, or to 'an order or level of existence that is more fundamental or real' (p. 33), such as a specific ideology. As previously mentioned, an analytics of government underlines Foucault's original rejection of 'totalizing tendencies' (Rose et al., 2006, p. 98) that would neglect a regime's independence and fall into some form of reductionism or determinism. Resting on the work of Deleuze (1991), Dean (2010) lays out the four dimensions to be addressed through 'how questions' as follows:

1. "Characteristic forms of visibility, ways of seeing and perceiving;

2. Distinctive ways of thinking and questioning, relying on definite vocabularies and procedures for the production of truth (i.e. those derived from the social, human and behavioural sciences);
3. Specific ways of acting, intervening and directing, made up of particular types of practical rationality ('expertise' and 'know-how'), and relying upon definite mechanisms, techniques and technologies;
4. Characteristic ways of forming subjects, selves, persons, actors and agents" (p. 33).

In analysing regimes of government based on Foucault's basic concepts and themes discussed earlier, most governmentality studies begin by asking questions of how activities of governing come to be called into question. According to Dean, this process is called the 'identification of problematizations' which concerns the examination of specific situations where one is to ask how we direct our own and others' conduct. For the current research, and the CCRG conceptualized as the 'governer', my examination would start by asking how the issue of wrongful convictions and miscarriages of justice are problematized and therefore legitimized as a problem to be fixed (Rose, 1999). As part of this exploration, and in line with case study methodology, I will answer questions relating to how the *art of governing* is conducted by the CCRG within my review of the existent literature and policy. For example, these questions encompass aspects such as the 'administrative structure', the 'integration and coordination of various departments of state and other agencies', the 'training and expertise' of the professionals working within the CCRG, the 'layout and location of offices' and most importantly, the 'procedures for the reception of clients' such as eligibility criteria and the way in which clients are interviewed or assessed through 'the use of forms' (Dean, 2010, p. 39). The review of the literature and of the policy therefore constitute an integral part to my analysis by providing important contextual information that is necessary to gaining an understanding of how the issue of wrongful convictions is problematized by the 'governer' in Canada. Most crucial, however, and related to this element of analysis, are the relationships drawn between how these activities are '*thought*', as in 'thought of' with respect to their objectives, and 'thought about' as a

calculated strategy to achieve a specific goal; the aspect that incorporates Foucault's idea of rationalities of government.

In addressing the first dimension, Dean (2010) suggests that analyses of government pose questions that allow for a 'mapping' of 'fields of visibility' that build the foundation to the operation of any regime of power. Using Latour's (1986) phrase to 'think with eyes and hands', the act of drawing a road map or visualization of the objectives of a particular institution is thought to allow researchers to see the gaps between 'what is attempted and what is accomplished' (Li, 2007, p. 1). With respect to the current research, these types of questions would connect the definition of objectives, or goals implicitly or explicitly set out in the CCRG's regulations, policies and/or legislative documents, and the way in which these objectives are thought to be accomplished. The second dimension, on the other hand, asks directly by what "means, mechanisms, procedures, instruments, tactics, techniques, technologies and vocabularies authority is constituted and rule accomplished" (Dean, 2010, p. 42), an element that Dean (1995) coined the *techne* of government. The third dimension of an analytics of government is founded on Foucault's second major concept, namely mentalities or rationalities of government. In regards to the object of my study, the guiding research questions addressing the CCRG's 'rationalities' would center on exploring which forms of knowledge arise from Canada's post-conviction review body and the kind of 'truths' that inform its existence. Dean (1995) termed this aspect the *episteme* of government, referring to the set of epistemological assumptions thought to underlie governmental institutions (Rose, 1999). Within this exercise, Dean (2010) underlines that questions exploring this domain of governmentality should avoid a sort of sociological realism that would not simply describe what exists but attempt go beyond that and extract the 'intrinsically programmatic character' of government (p. 43).

Rather than gaining access to these rationalities through interviews or direct questioning of CCRG agents, I would seek to identify how the CCRG unifies and rationalizes its techniques in relation to particular sets of objectives that are manifested in the review body's legislative documents, policy and guidelines. To re-iterate, Dean (2010) refers to 'rationality' in this context to a form of systematic reasoning and thinking about a problem, which might draw upon formal bodies of knowledge or expertise in which the governor is immersed (pp. 24-25). These ways of thinking involved in practices of government are 'explicit and embedded into language and other technical instruments' (Dean, 2010, p. 25). In other words, a governmentality perspective questions the way in which the CCRG 'thinks' about exercising its authority by drawing upon expertise, vocabulary, theories and other forms of knowledge that are given and available to its governing actors. Analyzing their review procedures from this perspective, and using Mr. Kassa's case as an illustrative example, will allow me to highlight possible challenges and obstacles to what is 'given' or taken for granted in the current regime.

The final dimension to be addressed relates to the forms of individual and collective identities through which regimes of practice operate. As the review of Foucault's concepts revealed, this aspect of an analytics of government does not refer to the researcher's identification of the governor and governed in a binary sense (such as oppressor/oppressed), but relates to the exercise of investigating the different processes of identification. Researchers are asked to explore how a particular regime elicits or promotes various capacities and statuses to its agents, which in turn makes certain agents experience themselves through such capacities.

Narrowing the focus of this investigation, and applying an adaptation of the 'realist' governmentality perspective, a related theoretical proposition guiding this research would suggest that the CCRG's realization of its powers, by meeting its objectives in the governance of

miscarriages of justice, would equally mean that factually (or legally) innocent individuals are able to successfully navigate eligibility criteria for review. In other words, if the purpose of the CCRG is to conduct an impartial review of criminal convictions with the ability to differentiate credible from non-credible claims of innocence, a realization of this power would mean that non-credible claims are successfully screened out. On the other hand, it also contends that, if credible claims fail to fit eligibility criteria and are consequently screened out, the CCRG does not actually realize its powers as expressed in their strategic objectives. Governmentality perspective, therefore, would further posit that the CCRG's applicant and review authorities' (as representative of the governor) conduct themselves in a way that is in alignment with their own sense of 'truth' or their underlying assumptions. Based on this understanding, the aspect of self-governance in a Foucauldian sense would propose that both the governor and its target population engage in independent constructions of what becomes perceived as an objective truth and their respective conduct is guided and informed by this knowledge. Taking this element into account, both parties are expected to govern themselves differently according to various truths and any contestation is likely to present itself somewhere within this realm of power relation.

CHAPTER THREE:

METHODOLOGY AND PROCESS OF INQUIRY

This chapter introduces the methodological approach taken in this study, which includes the data collection process, data analysis, and research procedure. This chapter aims to demonstrate how the chosen methodology, case study, has proved to be a suitable approach for this research and how, by following a hypothetico-deductive paradigm, a single case study can produce valuable results as a social sciences endeavor (Mitchell, 1983; Danziger, 1990). More specifically, I intend to explain how I utilized an *instrumental* single case study design in my effort to describe and expand on the current understanding of post-conviction review policies in the Canadian criminal justice context (Stake, 1995). The previous chapter provided a detailed explanation of Foucault's theory of governmentality, as the theoretical/analytical framework to this project, and concluded with a number of guiding research questions and propositions. The following discussion articulates the integral role that theory plays within this methodological approach and its practical relevance.

As Shavelson and Towne (2002, pp. 99-106) suggest, whether a case study design should be used as the appropriate method to investigate a particular social phenomenon can most easily be determined by the type of research question being asked. As a qualitative research endeavor, this study, first and foremost, aims to *explore* an under-researched phenomenon in its real-life context and, secondly, describe and explain the object of this study through the support of theoretical concepts drawn from Foucault's governmentality perspective. In accordance with Yin (2014), the case study method is "primarily used to answer 'how' and 'why' questions" but also addresses descriptive and explanatory questions such as "What is happening or has happened?"

and “How or why did something happen?” (p. 14). Based on this finding, the current research attempts to answer the question of to what extent Canada’s post-conviction review policy provides a remedy to wrongful convictions. To begin, I will discuss case study research as a qualitative method and outline the particularities of ‘single’ case studies in order to demonstrate my acknowledgment of its benefits and limitations. In light of these considerations, I then build my methodological approach with a detailed description of: (1) research design; (2) data selection; (3) ethical issues; and lastly, (5) data analysis.

3.1 - Case Study Research as a Qualitative Methodology

Case study research has faced some harsh criticisms from within the social sciences, and the method itself, despite some unique benefits, is said to have posed many challenges to researchers in achieving valid and worthwhile results. For example, Maoz (2002) suggested that “the use of the case study absolves the author from any kind of methodological considerations” and “case studies have become in many cases a synonym for freeform research where anything goes” (pp. 164-165). Due to these criticisms, I will demonstrate careful consideration of case study criteria and how I addressed some of its possible limitations within my own research. Further, I intend to emphasize that the evolution of case study research suggests that some of the criticisms of the method were not concerned with the method itself but rather, according to case study research pioneer, Robert K. Yin (2014), researchers’ failure to apply the necessary rigor and systematic procedure to their process of inquiry. To appreciate and understand case study methodology as it is being applied today, it is important to both contextualize this project and review how its method has evolved over the past few decades.

According to Johansson (2003), the second generation of case studies was rooted in the emergence of Grounded Theory and led to the development of a more systematic approach that merged qualitative field study methods from the Chicago School of sociology with quantitative methods in data analysis (Glaser & Strauss, 1967). Johansson (2003) described this merger as the birth of inductive methodology which used detailed procedures to analyse data and was aimed at the generation of new theory from qualitative data. Whereas inductive methodology has, on the one hand, helped bridge the gulf between qualitative and quantitative approaches, it has also allowed for experimental logic to be introduced into the field of natural inquiry (Yin, 1984/1994). Although this project primarily follows a deductive paradigm in the process of data analysis, as will be explained in a later section, the introduction of experimental logic and, more explicitly, the merger of inductive and deductive approaches proved to be a significant step towards greater acceptance of case study methodology as a scientific enterprise. Yin (2014) understood that increased quality can be achieved by applying systematic procedure to natural inquiry. According to his work, by combining various methodological approaches in the testing of hypotheses, which he referred to as one type of ‘triangulation’ technique, researchers would be able to produce quantifiable results that could counteract the method’s long criticised lack of rigor. Most importantly, this technique was seen to enable case study methodology to test hypotheses through theory and produce analytical generalizations without the requirement of statistical representativeness.

Denzin (1978) spoke to the technique of triangulation as primarily relating to data collection methods and involved multiple data sources or theoretical perspectives to strengthen research validity. With respect to the current research, I consulted multiple and different sources of data that, through the support of various theoretical perspectives, could yield theoretically

generalizable results by using a hypothetico-deductive reasoning approach. According to Halkier (2011), qualitatively working researchers have countered this criticism by producing results that were said to be transferrable to other “situations on the basis of analytical claims” (Yin, 2003, p. 19). In this sense, through analytical generalizations, qualitative researchers are able to base the generalizability of their findings on *a priori* theoretical concepts and conclude on a more “general perspective” on the patterns identified in their data (Kvale, 1996, p. 233). In regards to possible limitations to my own qualitative research, I would like to note that most qualitative methodological literature has shown a general disregard for the generalizability of research findings because it is widely considered to be “unimportant, unachievable or both” (Schofield, 2002, p. 202). The aim of this research was not to generalize findings but rather to produce “an adequate description, interpretation, and explanation of [the subject]” (Maxwell, 2012, p. 79).

Stake (1998) states that, fundamentally, case study research is defined by an interest in (and of) a particular case, and not by the methods used in inquiry. Further, Platt (2007) stressed the importance of the role of the researcher in choosing his or her object of study and, aside from having to respect the basic characteristics of what constitutes ‘the case’ in social sciences research, Platt suggested that the researcher’s intent and purpose of the study is crucial to the identification of a case. In other words, only the researcher can know why or for what purpose a particular case is chosen. While this flexibility, and the amount of creativity afforded to the researcher, may have been grounds for criticisms in the past, it can nevertheless also be interpreted as one of the major strengths of case study methodology. As the following section will demonstrate, the case chosen in this research project did dictate the method of inquiry adopted and the appropriateness of the case and its value to the purpose of the research will become evident.

3.2 - The Single Case Study

As the name implies, every research using this method must have a ‘case’ which is the object of the study. For the present research, I chose Mr. Hailemikael Kassa’s criminal conviction as the subject of my study, making it an embedded unit of analysis alongside the CCRG’s legislative framework and policies. Further, it was my prior involvement in his case, as an active volunteer at the innocence project (“Innocence Ottawa”) overseeing this case, which provided me with a unique opportunity to study Mr. Kassa’s files, in seeking a conviction review for his alleged miscarriage of justice. In recognition of this privilege, it was my ethical obligation as the primary investigator of this research to adequately address issues of self-reflection and my engagement with Mr. Kassa’s files. Within my consideration of potential ethical concerns, I specifically focussed on how I would deal with my previous involvement in the case and acknowledged how my involvement may affect the process of inquiry as a researcher. Moreover, as the following sections will demonstrate, I carefully considered the purpose of this project and identified potential limitations to its findings within the early stages of my research process.

In regards to the purpose set out by the researcher, Stake (1995) described two main categories of case study, one being instrumental and the other an intrinsic case study. The term instrumental refers to research that is set out to investigate a particular case with a clear objective in mind. Typically, then, if a researcher chooses a case study the underlying intent is to be able to generalize the study’s findings. However, the intention is not to generalize findings towards other cases of similar kind but rather, to achieve *analytical generalizability* - which either informs previous theory or produces results that are transferrable to other situations based on analytical claims. Moreover, case studies which are purposefully or analytically selected, such as this one, are often characterized as not only information-rich but also revelatory or even

extreme (Patton 1990; Stake, 1995). An investigation into the application process of Mr. Kassa's post-conviction review, under s. 696.1 of the *Criminal Code*, constitutes a revelatory case study as the project was the result of 'special' access granted to the researcher and involved a phenomenon that is not conventionally subject to scientific scrutiny (Mills, Durepos & Wiebe, 2010). While the selection of Mr. Kassa's case may also have carried an intrinsic element, focusing on the virtue of the case as such, the purpose of the research went beyond the information or insight that could have been gained from the case itself. The ultimate value of the case came to be seen, on the one hand, in its ability to inform Foucault's theoretical concept of governmentality but, potentially more so, in its contribution to the current lack of knowledge regarding the process of Canadian post-conviction review based on real-life evidence.

As Bromley (1986) states, case study research can refer to the investigation of one or a small number of cases. Although some scholars argued for the added advantage in having more than one case of study, I aligned myself with Platt (2007) and Yin (2014) who claim that the quality of case study research does not depend on the number of cases studied. Further, despite historical claims of the method being merely a preliminary exploratory tool to support other scientific methods, Yin stated that the case study is a complete, all-encompassing method "covering the logic of design, data collection techniques, and specific approaches to data analysis (Yin, 2014, p. 17)." Ragin and Becker (1992) support the claim of the single case's research quality by stating that *the case*, as a phenomenon, does not have to be verifiable by observation but can be either theoretical, empirical or both. The method of inquiry chosen in this case study did not involve qualitative methods such as interviewing or field observation but rather focused on the collection and analysis of text-based evidence from various data sources. This choice, and the emphasis on a suitable theoretical framework, was based on two primary factors with respect

to the research purpose and the reliability of its findings. While time-efficiency was a factor to be considered, I also sought to produce verifiable results that could remain unaffected by (1) my personal involvement in the case and (2) Mr. Kassa's personal point of view. As the main purpose of this thesis was to provide a critical analysis of Canada's post-conviction review policy, the selection of Mr. Kassa's case as the object of this study did not rest on an intent to provide a description of his personal account or history. Rather, the case was chosen for the purpose of analysing the process of applying for a ministerial post-conviction review based on an investigation into his case files, as written documents, that could highlight contestations between the lived reality of the 'claimant of innocence' (the 'governed') and the CCRG's legislative framework (the 'governer'), based on Foucault's theory of governmentality.

In fact, Yin's (2014) general definition of case studies in *Case Study Research: Design and Methods* was often modified by researchers to suit the purpose or intent of their respective studies. However, the critical features of the case study method, according to Yin, include an added emphasis on contextual information and the fact that all case studies aim to study present-day phenomena, and in this case, a post-conviction review application: "An empirical inquiry about a contemporary phenomenon (e.g., a "case"), set within its real-world context" (Yin, 2009a, p. 18 as cited in Yin, 2012). Yin arrived at this definition by building upon Bromley's reasoning on why a researcher would select one or a small number of cases in their scientific method: "All case study research starts from the same compelling feature: the desire to derive a(n) (up-)close or otherwise in-depth understanding of a single or small number of "cases," set in their real-world contexts" (e.g., Bromley, 1986, p. 1).

The case study method requires the researcher to purposefully consider *context* to acquire a deep understanding of the phenomenon specific to its time and space (Yin, 2014, p.16).

Moreover, the component of investigating the real-life context of a contemporary case differentiates case studies from its related method, namely case histories. Yin (2014) suggests that guidance from theoretical propositions to deepen the understanding of the case and its context are an advantage. With that said, Johansson (2003) deemed case study research a meta-method seeking to illuminate a case from various angles to achieve an in-depth, insightful understanding of a contemporary phenomenon. Further, a case should be a contemporary, complex functioning unit which is to be investigated in its natural context with a multitude of methods (Johansson, 2003, p. 4). Although scholars have debated over the definition of *the case*, Johansson referred to Ragin and Becker's (1992) propositions in order to emphasize its most important elements to be encompassing the case's specificity to time and space, and the possibility of it being a relatively bounded object or a process observable in its natural setting. In this regard, my process of inquiry into Mr. Kassa's case took into account the larger Canadian post-conviction review context, including an analysis of the current CCRG policy and regulation.

3.3 - Research Design

According to Yin (2014), every empirical research study has a research design that sets out the logical plan for “getting from here to there [...] where *here* may be the initial sets of question(s) [...] and *there* is some set of conclusions about these questions” (Yin, 2014, p. 28). In the Yin tradition, five main components are relevant to a case study's research design: (1) the case study's question(s); (2) its theoretical propositions; (3) its unit of analysis; (4) the logic linking the data to the propositions; and lastly, (5) the criteria for interpreting the findings. In this research, the study's questions and theoretical propositions were both relevant to the chosen unit(s) of analysis and the criteria for interpreting the findings. In simplified terms, whereas the *R. v. Kassa* case constituted the overall object of this study, in order to focus the investigative

process, his case must be viewed as an embedded unit of analysis, alongside the CCRG's legislative framework and guidelines.

While, on the one hand, Mr. Kassa's case files provide a more extensive picture of the context of miscarriages of justice and the handling of claims of innocence post-conviction, more importantly, his case served as an illustrative example of how post-conviction review policies may affect claims of innocence before the Minister of Justice. Adopting this perspective allowed me to apply greater rigor to the structure of my process of inquiry by conceptualizing Mr. Kassa as the 'governed' and allowing the empirical data derived from his files to speak to the effects of post-conviction review, constituting a type of investigation supported by researchers of the 'realist governmentality' perspective, and the CCRG's review criteria as the 'governer'. The criteria for interpreting the findings, then, were rooted in the aforementioned theoretical propositions of Foucault's governmentality perspective and the application of this conceptual framework to a particular site of governance, namely the operation of the CCRG. The findings from the case study were meant to show how the empirical results support or challenge the theory, rather than *test* it, by illustrating potential contestations in the power relations between Mr. Kassa, as the 'governed', and the CCRG as the 'governer'. Consequently, my investigation demonstrated how theoretical advances can be of advantage to a researcher's ability to generalize findings to other but similar situations to those examined in this study based on analytical claims (Johansson, 2003).

I chose a qualitative approach in representing my study's data because it is descriptive in nature and focuses on questions of "how". The paradigm of constructivism (ontology and epistemology) as well as Foucault's theoretical perspective of governmentality further informs my methods design. By adopting such an approach, two elements are significant and have

affected my general process of inquiry. First, this approach views research as a process and not as an event and secondly, the researcher is cognizant of his/her own beliefs that can affect the outcomes of the study. The previous chapter on Foucault's 'analytics of government', as described by Dean (2010), already implied a constructivist lens adopted in the analysis of government and the types of questions researchers are prompted to ask when adopting Foucault's particular 'ethos' of investigation. The epistemology of constructivism maintains that research "findings" are "created as the investigation proceeds" and are not simply discovered but generated (Guba & Lincoln, 2004, p. 27). Constructivists view the world as "something that is actively constructed, deconstructed, and reconstructed on an ongoing basis (Palys & Atchison, 2008, p. 12). While this does not mean to deny the 'existence' of phenomena, in a realist sense, constructivists focus on context and believe that, to truly understand why and how phenomena exists, we must understand how something is constructed and comes to 'be' within its particular context or environment. Consequently, this project seeks to understand the effects of post-conviction review policy not only by looking for answers within the *R. v. Kassa* case and his claim of innocence, but also by shedding light on the greater context of miscarriages of justice. Investigating the CCRG's policies and regulations reflects an attempt to understand the context of how miscarriages of justice are constructed as a reality and how the construction of this phenomenon affects the individual at the micro-level.

As opposed to a realist paradigm, which would take the criminal justice system and the Canadian Criminal Code as a given, constructivists would see "the law" and those it deems "wrongly convicted" as socially constructed entities. In this sense, the constructivist paradigm is complementary to qualitative approaches by emphasizing processes as opposed to cause and effect relations, or the measurement of outcomes in positivist/quantitative research (Palys &

Atchison, 2008). Particularly relevant to this research and embedded in its theoretical framework, the qualitative approach based on a constructivist paradigm corresponds in its greater attention paid to “processes by which constructions arise and, by implication, the processes by which constructions can be changed” (Palys & Atchison, 2008, p. 12). Ultimately, this project provides a critical analysis of post-conviction review policies and intends to emphasize room for alternatives to the current operation of the Canadian post-conviction review scheme based on the study’s empirical results. On that note, Yin (2014) claims that epistemological orientations are directly linked to the theoretical arguments made by the researcher. Most case study research is said to have taken on realist orientations but he proposes that this method is equally suited for both realist and relativist or, in this case, constructivist paradigms. An analytics of government and Foucault’s concepts of governmentality are complemented by a constructive lens and, in fact, the philosophical assumptions underlying this paradigm, as described above, are exemplified in Michel Foucault’s (1926-84) writings throughout the 20th century.

3.4 - Data Selection

Prior to collecting the data for this project, it was important to establish a concise plan of how to organize the large amounts of data available from Mr. Kassa’s case file. As this case study used governmentality as its analytical framework, it was most appropriate to seek data in accordance with propositions and study questions that arose from a combination of both, the review of the literature on governmentality as well as the literature compiled on miscarriages of justice and post-conviction review schemes. The ultimate objective was to collect the appropriate evidence that could provide answers to questions about the ‘governor and the governed’ in Canadian post-conviction review processes. The data were to be used to shed light on the governmental techniques and rationalities employed within post-conviction review processes and

evidence that could speak to micro-level effects and possible forms of resistance. In order to address questions of the ‘governer’, and gather additional information on contextual conditions, I collected documentary evidence on the CCRG’s legislative framework and policy guidelines. More specifically, the laws and regulations guiding the CCRG’s conviction review consist of two essential pieces of legislation: (1) Sections 696.1 to 696.6 of the Criminal Code of Canada (Part XXI. 1), and (2) Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice (SOR/2002-416) as set out by the Minister of Justice. The documents were available in print but could be accessed on the official website of the Government of Canada/Department of Justice¹⁸. In addition to the legislation, the CCRG provided relevant data on eligibility criteria and conviction review procedure within the applicable sections of their website, which have been referred to in Chapter One, as well as within the review body’s Annual Reports. Given that the CCRG’s legislative framework consists of only two key documents, I expanded my data collection on contextual information to include parliamentary documents in support of Bill C-15A, which ultimately led to the creation of the current regime of s. 696.1 – 696.6, and could provide insights into the objectives of the legislation as it stands today.

Organizing the data collected from Mr. Kassa’s case file constituted a more challenging endeavor due to the large quantity of files and data sources as well as the need to make decisions about their relevance to the project’s overall objective. To re-iterate, the objective in regards to the investigation into the position of the ‘governed’ was based on analytical propositions that conceptualize the CCRG’s applicant as an entity exercising a certain degree of self-governance and potential forms of resistance. Most importantly, according to Foucault, resistance is thought to be contributing to a productive power relation between the governer and governed in the

¹⁸ Available at: <http://justice.gc.ca/eng/cj-jp/ccr-rc/index.html>

creation of discourse and alternative ‘truths’. Following this, the insight sought was centered on the application process, the applicant’s attempt to meet eligibility criteria and the challenges he may have encountered within this exercise. Considering that Mr. Kassa had not yet submitted a s. 696.1 application to the Minister of Justice at the time of writing, the raw data available from his file had to be organized according to a sort of ‘investigation brief’. This type of brief would be similar to those compiled by innocence commissions, as referred to Chapter One, and would simplify my access to evidence that is directly relevant to Mr. Kassa’s attempt to meet CCRG eligibility criteria. The data was divided into four main branches covering: (I) Factual Background of the Case; (II) Timeline of Events; (III) Evidence Presented at Trial; and lastly, (IV) Investigations Conducted by the Claimant. The last section was further divided into (1) investigations that led to new and significant matters (or fresh evidence), and (2) investigations that did not meet the standard of new and significant matters. The collection of data that may not have met the CCRG standard of ‘new and significant matters’ was considered crucial information as it could shed light on the ‘truths’ of the claimant outside of concerns of eligibility criteria and, hence, provide insights into possible areas of contestation between the ‘governer and the governed’. The approach taken to the data collection process was documented by the researcher within a case study protocol, for organizational purposes and planning, and the production of the investigation brief formed the foundation of the case study’s database (Appendix B).

3.5 - Ethical Issues

The present research carries a low risk of potential harm to participants. However, in an effort to protect and ensure the safety of my participants, I applied for the type of review that would take into account the use of information that is not publicly accessible and supported my

application with consent forms/letters of agreement from Mr. Kassa, his former appeal lawyer Mrs. Catriona Verner and the director of Innocence Ottawa, Professor Kathryn Campbell. I submitted an application form for research based on secondary use of data to the University of Ottawa Office of Research Ethics and Integrity (REB), which took between three to four weeks to receive feedback. Secondary use of data is defined in the Ethics Board's application form as "the use of information or human biological materials collected for a purpose other than the current research purpose" (University of Ottawa, n.d., para 1). An 'Ethics Approval Notice' by the Social Sciences and Humanities REB was issued to me on August 11th, 2016 (Appendix C). To support this process and ensure the full protection of Mr. Kassa's participation and use of personal files, I sent a letter of consent outlining the specific nature of the project, including potential risks such as harm or discomfort, as well as how his participation contributes to the project's objectives, for him to sign and return to me. I also provided Mr. Kassa with an additional copy to keep for his personal records (Appendix D). Following a consultation with Mr. Kassa's former appeal lawyer, Mrs. Catriona Verner, and the director of Innocence Ottawa, Professor Kathryn Campbell, I additionally sought written statements of permission from both parties, who thereby agreed to my use of Mr. Kassa's personal files for the purpose of this research, *once* Mr. Kassa had given his informed consent. In order to protect the identity of individuals referred to in Mr. Kassa's court records and police files, I specified within my application that names and personal identifiers, other than those of Mr. Kassa, would be kept confidential. To ensure this confidentiality, witnesses or other relevant persons to this study are referred to in regards to their role or position in the case, i.e. "witness (1), witness (2), crown or defence witness, investigating officer/detective" and so forth.

Further, as part of the application form, I provided the University of Ottawa REB with a conflict of interest disclosure in which I recognized, disclosed and assessed the existence of a potential conflict of interest. I recognized that as a member of Innocence Ottawa, I would be using our client's (Mr. Hailemichael Fekade Kassa) case as the foundation of my case study research. Further, working closely on this case as a researcher, in addition to my role as a case worker/volunteer, I acknowledged that this would inevitably benefit the case's progression with the Innocence Ottawa team. However, in my assessment of this potential conflict of interest, I stated that the benefit resulting from my extended role as a researcher into the case rested exclusively on additional hours spent on organizing files, documenting leads of fresh evidence and the structure of arguments that may be both useful in a potential s. 696.1 post-conviction review application to the Minister of Justice and the analysis of post-conviction review processes as part of this study. Although the aspect of "reflexivity" (Watt, 2007) as referred to in social sciences research does not directly apply here, I believe it is important to address my degree of self-reflection exercised throughout the research process due to my prior and current involvement in Mr. Kassa's case as a volunteer of Innocence Ottawa. Berger (2015) defines self-reflection as:

"[...] a process of a continual internal dialogue and critical self-evaluation of researchers' personality as well as active acknowledgment and explicit recognition that this position may affect the research process and outcome (p.220)."

Essentially, reflexivity refers to one's own acknowledgment of how external influences such affiliation and personal experience, preference or personal belief systems may impact on a research project and its findings (Berger, 2015). Applying this understanding to myself as the primary investigator of this thesis, I am aware that my involvement with Innocence Ottawa and a general passion for advocacy work in defence of the wrongly convicted may affect the process of

inquiry. During my investigation into Mr. Kassa's file, it is important that I do not let my personal feelings interfere with my ability to engage with the data in a non-exploitative manner and do not allow 'opinion' to guide the presentation and/or analysis of my findings. To ensure that this does not occur, it is my obligation as a researcher to present the evidence of Mr. Kassa's file, as well as the data collected from the CCRG, with accuracy and sufficient reliability. For this reason, I carefully documented my data collection process.

3.6 - Data Analysis

As it is the case for most case study research (Mills, Durepos & Wiebe, 2010), this project produced a vast amount of data from many different sources. Whereas the text evidence of the CCRG's legislative framework was limited to two primary texts, as discussed above, Mr. Kassa's case file, and consequent case study database, consisted of raw data from trial/appeal transcripts, information from witness interviews conducted by private investigators and various police records pertaining to their investigation. To enable me to present the findings and answer the research questions, the data needed to be "dissected, rearranged, organized and interpreted" (Evers & AnneLoes van Staa, n.d., p. 749). My data analysis, then, will consist of reducing and reconstructing the data in a continuous and ongoing process. Essentially, and in accordance with other qualitative methods, my interest in the case was 'intrinsic' (ibid.) by aiming to understand what is important to the case, and its separate units of analysis, from within. Given that I used many different sources of evidence, the case study method proved to be the most suitable way of approaching my data as it provided me with the advantage of being able to analyse the data using triangulation techniques (Yin, 2014).

Although several different definitions and interpretations of triangulation with respect to data collection, number of investigators, theory application and methodology have been proposed (Denzin, (1998); Miles & Huberman, 1994), the most important aspect of triangulation with respect to the current research refers to data type and analysis. According to Yin (2014), using multiple sources of evidence presents an advantage by allowing the researcher to develop converging lines of inquiry, ultimately making the conclusions of the case study more convincing. Within the analytical process, my primary goal will be to validate meaning in the data by investigating different levels (i.e. contextual information) and units of analysis (Mr. Kassa's as the embedded unit) to enhance the breadth and accuracy of what I come to see in my data (Evers & AnneLoes van Staa, n.d., p. 750). To gain a more in-depth understanding and enhance completeness in my findings, I will attempt to apply a combination of both Coffey and Atkinson's (1996) proposed procedural correctness *and* creativity in the process of analysis. In doing so, I refrain from establishing a strict coding scheme or categorization prior to commencing analysis but will remain creative in my approach by emphasizing interpretation and establishing relations between the different pieces of evidence. Marshall (2000), described this type of analysis as that of the 'artist', in her researcher typologies of 'bookkeepers, alchemists and artists' (as cited in Evers & AnneLoes van Staa, n.d.). The artist is said to combine analytical creativity and scientific rigor and precision. Particularly in regards to the current project, I have applied Dean's (2010) advancement of a Foucault-inspired 'analytics of government' to my data, which produced *a priori* ideas as well as analytical concepts and theoretical propositions to guide me in the process. Whereas this approach implies that I derived categories and themes from my data deductively – at the beginning of the analysis – it is important to mention that I intend to keep an open mind and a certain degree of flexibility.

As discussed in Chapter Two, while themes and categories derived from theoretical propositions did indeed establish my systematic approach at the onset of analysis, i.e. concepts of the ‘governer’, the ‘governed’ and government ‘technologies’ as well ‘rationalities’ articulated in governmentality perspectives, given the vast amount of data and emphasis on contextual information further requires me to remain flexible throughout the process. Flexibility herein refers to keeping an open mind to the exploration of themes and categories that arise from the data gradually, or inductively, throughout the process, as this could ultimately enhance the depth of my findings (Evers & AnneLoes van Staa, n.d.). Further, I decided to work in an iterative, or cyclical, process from more general to more specific observations; similar to an approach taken by other researchers, such as Shen (2013), who used governmentality as their analytical framework and inspired my own selection of this particular lens towards understanding policy. For example, I will begin my analysis with an examination of the CCRG’s legislative framework, presented in Chapter Four, and continue my investigation into elements of Mr. Kassa’s criminal case file that either did or did not meet current eligibility criteria. Chapter Five and Six are therefore meant to divide the analysis of evidence collected from Mr. Kassa’s file in their relevance to his attempt to meet the CCRG’s standard for review, with the former examining the discovery of ‘new and significant matters’ that moved closer to meeting CCRG standards and the latter extending my investigation into elements that were significant yet ineligible.

Moreover, rather than ‘testing’ Foucault-inspired theoretical propositions, I made use of the governmentality perspective as an analytical framework to guide my inquiry into the CCRG’s operation and the effects of its policy on individuals who claim to have been wrongfully convicted. In an iterative process, using the logic of Dean’s (2010) proposed analytics of

government, I was able to structure my analysis using the language of governmentality and applying its concepts to the object of my study.

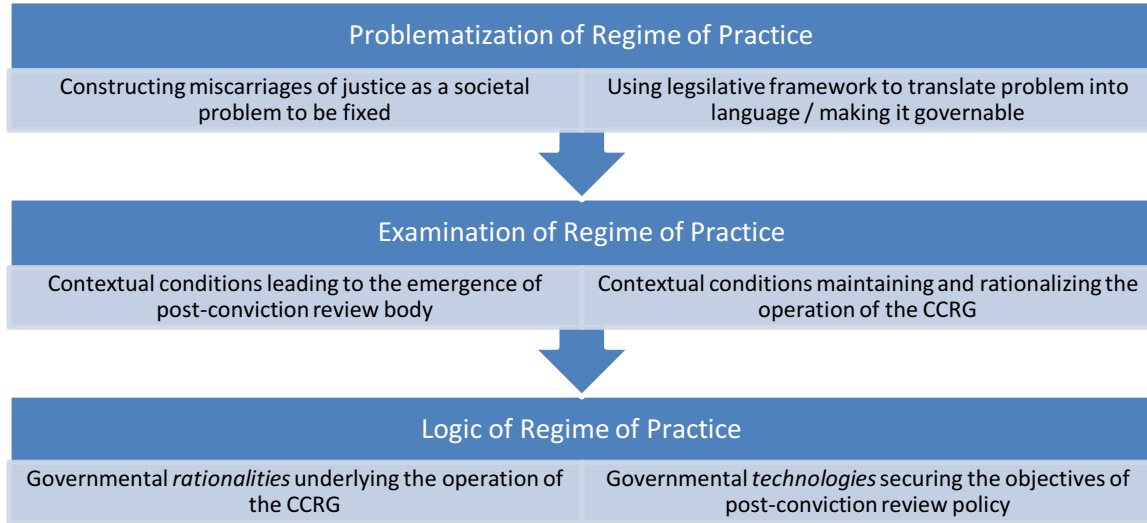


Figure 4.1 Approach for the governmentality analysis of Canadian post-conviction review policy.

As Figure 4.1 broadly illustrates, using Foucault’s theory of governmentality as an analytical framework allowed me to structure my analysis from more general questions, related to the target to be governed by the CCRG. Further, I was able to contextualize conditions that led to the emergence of post-conviction review polices in Canada, to the specific reasons for governing, and the strategies used for governing. The logic inherent in the operation of the CCRG and post-conviction review policies, conceptualized as the regime of practice, further included the constitution of its subjects.

The concept of self-governance, as explained in Chapter Two, refers to *who we are when we govern* and directs attention to the body of principles or established precedents according to which a governing entity, applicable to both the governer and the governed in exercising their

powers, acknowledges itself. Moreover, it entails how governments seek to constitute its target. Within my analysis, then, I will examine my data in regards to the logic of regimes of practice by linking the act of governing to ways of thinking about the act of governing itself, and investigate the subjects that government seeks to constitute. In doing so, the data derived from Mr. Kassa's case file allows me to gain an in-depth understanding of the challenges that CCRG's applicants face in pursuit of a post-conviction review. In investigating the position of the governed, I use a descriptive framework that would capture the case's specific circumstances, including the factual background and leads that either did or did not represent new matters of significance that could support the likelihood that a miscarriage of justice occurred. An attempt will also be made towards presenting possible findings on how Mr. Kassa's legal circumstance, aspects of his conviction and eligibility for post-conviction review, relate to other jurisdictions and their criteria according to the review of the existent literature. A governmentality analysis is suitable in this endeavor as it does not only examine rules and law but also focuses on different micro-effects of government, or the ways in which government regulations are carried out in practice by different actors. This type of analysis is different from an evaluation of government, and it was not my attempt to explain the failures or successes of governance per se but, instead, investigate the ways in which the CCRG realizes and achieves governance over claims of innocence, post-conviction.

Employing a governmentality framework, the works of educational reform researchers, such as Fimyar (2008) and Shen (2013), provided tremendous guidance and inspiration towards my understanding of how to approach this type of analysis. Rizvi and Lingard (2010) summarized the four general perspectives taken in policy research as positivist, post-positivist, interpretivist, and critical, to which I identify myself with the interpretivist position: "[...]

interpretivism emphasizes the social construction of reality and seeks to provide explanations of human behaviour in terms of intentionality” (p. 47). Although, according to Rizvi and Lingard, the approach taken in policy analysis is not only determined by the research purpose but also by the researcher’s theoretical and political orientation, as an academic researcher, I adopt no political stance. My primary goal is to explore Canadian post-conviction review policies and I chose a theoretical orientation that provided me with a lens through which to investigate governmental rationalities and technologies without the reliance on “presupposed knowledge or predictable hypotheses” (Shen, 2013, p. 112). Analysing my data deductively, I did not attempt to *test* theory or justify the “process of meaning-making” through a governmentality perspective (Shen, 2013, p. 112) but rather sought to provide an adequate interpretation of the subject.

CHAPTER FOUR:

GOVERNING POSSIBLE MISCARRIAGES OF JUSTICE

An investigation into the criminal case file of Hailemikael Fekade Kassa revealed that preparing a post-appeal conviction review application can pose various challenges to the applicant. The current chapter aims to contextualize my investigation into Mr. Kassa's case file, and his attempt to meet current eligibility criteria, by briefly analyzing the law and procedures governing applications for ministerial review (miscarriages of justice). As this first part of my analysis focused on the legislative framework of the Canadian Criminal Conviction Review Group (CCRG), I gathered information and text-as-evidence from: the applicable sections of the *Criminal Code* (s. 696.1 – 696.6); Regulations set out by the Minister of Justice (current to August 29th, 2016, and last amended on March 25th, 2011); the CCRG's most recent Annual Report (2016) outlining the responsibilities of the governing agency as well as the conviction review process; and, lastly, additional guidelines posted on the official website of the Department of Justice with respect to conviction review procedure.

Whereas the subsequent part of my investigation, discussed in Chapter Five and Six, presents the findings from my research into Mr. Kassa's case-specific elements that either did or did not represent new matters of significance (required to meet current eligibility standards), the following will shed light on the 'governer's' perspective with respect to Canadian post-conviction review procedure. More specifically, using Foucault's 'governmentality' theory as my analytical framework, this chapter aims to explore the governmental technologies implemented and 'thought' (by the governing agency) to address possible miscarriages of justice in the Canadian criminal justice system. Chapter Seven will provide an analysis and conclusion on

what is intended and ultimately accomplished by the governor in this process, based on my research into Mr. Kassa's criminal conviction as an illustrative example. In analyzing the CCRG as a regime of practice or particular 'site of governance' (McKee, 2009) and exploring the question of 'to what extent Canada's post-conviction review policy provides a remedy to wrongful convictions', the following sub-questions guided my analysis:

1. How does the Canadian post-conviction review scheme problematize wrongful convictions, and thereby legitimize miscarriages of justice as a problem to be fixed?
2. What are the objectives of the current post-conviction review regime and how does the CCRG's legislative framework intend to accomplish them?
3. What are some of the rationalities underlying Canada's post-conviction review procedure as a technology of government, and how does this rationalized technology affect claims of innocence brought before the Minister of Justice?

As I chose Mr. Kassa's criminal conviction as the primary subject of my study and, in line with 'realist' governmentality perspective, decided to focus on the *effects* of government policy on the governed, the examination of the position of the governor in post-conviction review legislation and policy constitute only one part of my overall analysis. Therefore, rather than presenting a comprehensive governmentality analysis of post-conviction review policy, the current chapter intends to add to the necessary contextual information allowing me to situate all of my findings within governmentality theory and to answer the study's main research question.

4.1 - Problematization of Regimes of Practice: Fixing 'Miscarriages of Justice'

Sections 696.1 – 696.6 of the *Criminal Code* (Code) outline the federal legislation governing applications for ministerial review – miscarriages of justice (Part XXI.1). Section 696.4, specifically, refers to the elements that the Minister of Justice shall take into account when making her determination on a post-conviction claim of innocence and provides insights into how miscarriages of justice are understood as a problem that is made governable through

legislation. Whereas a certain degree of discretion is afforded to the Minister in making her judgment by stipulating that she “shall take into account all matters” that the Minister “considers relevant”, miscarriages of justice are thought to be identifiable within the confines of the law. In identifying a miscarriage of justice, the Code explicitly outlines the matters to be considered, including:

- (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;*
- (b) the relevance and reliability of information that is presented in connection with the application; and*
- (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.*

Within these considerations, the Code translates the problem of miscarriages of justice into language by, first, defining miscarriages of justice as justice system errors that have not been rectified through the regular appeals process. In fact, a miscarriage of justice only becomes a ‘problem’ to the governer, in this particular context, once all conventional courtroom remedies have been exhausted. Secondly, under point (a) of section 696.4, the above considerations stipulate or presuppose that new matters of significance are required for the governer to be able to determine that a justice system error likely occurred. On this basis, the underlying rationale or assumption appears to be that (A) any matter previously considered by the courts is no longer relevant as it has already been addressed, and (B) as an extraordinary measure, post-conviction review is not only meant to be removed from the conventional justice system in its operational context but, also, is not meant to serve as a mechanism to question previous judgment or overrule former opinion. In other words, the basic requirement for new matters of significance presupposes that, with respect to matters that the conventional justice system already considered, the system did not err but rather, new matters that “either were not considered by the courts or

occurred or arose after the conventional avenues of appeal had been exhausted” (CCRG Annual Report, 2016) may or may not put the original verdict into question.

The governer’s problematization of the phenomenon of miscarriages of justice, legitimizing state intervention, is further supported in the general principles concerning the exercise of ministerial discretion that have been established through previous ministerial decisions (CCRG Annual Report, 2016, p. 5-6):

“1. The remedy contemplated by section 696.1 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted (p. 5) [...] 3. [...] Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were put before the trial and appellate courts. Applicants under section 696.1 who rely solely on alleged weaknesses in the evidence, or on arguments of the law that were put before a court and considered, can expect to find their applications refused” (p.5).

While these additional guidelines are not stipulated in federal legislation, the general principles applied by the Minister are significant in that they can provide insights into the review process’ underlying rationale. It becomes evident that miscarriages of justice are made ‘governable’ in their clear distinction from any error that may have occurred during the appellate process. Rather than including possible errors in reasoning or other errors in law in previous decision¹⁹, the governer narrows its criteria for intervention (and therefore its definition of miscarriages of justice) to cases where new matters warrant a re-examination of the conviction, taken together with the evidence adduced at trial. Implicitly, this approach removes the error and responsibility from the conventional justice system and places the burden of proof on the applicant. Moreover, the applicant is not asked or given the opportunity to argue that the justice system erred in previous consideration but, in order to demonstrate that a miscarriage of justice likely occurred,

¹⁹ This refers to errors that presumably would have been caught by a Court of Appeal

the burden of proof is restricted to new evidence that is “reasonably capable of belief” and “relevant to the issue of guilt” (CCRG Annual Report, 2016, p. 6).

From this perspective, the governing entity legitimizes its intervention through a clear problematization of the phenomenon in question but, at the same time, uses government technology in the form of law and procedure to responsabilize the governed in addressing it.

4.2 - Examination of Regimes of Practice: Rationalizing and Maintaining the Status Quo

As discussed in Chapter One, the CCRG was established in response to criticisms of the former conviction review process that had been fraught with questions of potential biases and lack of independence. Whereas the review body was established in 1993, further legislative changes in 2002 repealed and replaced the former 690 process by section 696.1 to 696.6 of the *Criminal Code*. The new section was aimed at improving transparency and addressed related administrative deficiencies (CCRG Annual Report, 2016, p. 3). In rationalizing its current operation, and intention to improve the process, the structure of the governing agency and its main responsibilities are highlighted as the focal point of the current legislative framework. While increased transparency was addressed through additional clarification on ‘how the review process works’, the issue of independence is explicitly addressed in the review body’s relationship with the Minister, rather than in the CCRG’s relationship with the applicant. According to the CCRG’s Annual Report (2016), the review body is meant to provide “objective and independent legal advice to the Minister on the disposition of applications for ministerial review” (p.3).

As opposed to other independent review commissions, the establishment of the CCRG (while stated to be “a separate unit of the Department of Justice”) neither significantly changes

the status quo, nor is it independent of the review process itself, but instead appears to fulfill an administrative function to increase efficiency:

“As a practical matter, the Minister is not personally involved in the preliminary assessment, investigation, and preparation of the investigation report stages. These stages are usually carried out on behalf of the Minister. The Minister does, however, personally decide on all applications for ministerial review that proceed to the investigation stage” (CCRG Annual Report, 2016, p. 5).

This may further relate to the fact that federal legislation does not directly speak to the powers of the CCRG but to the powers afforded to the Minister in making determinations on ‘new and significant matters’, under section 696.2 of the *Criminal Code*, by delegating her powers:

“in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation” (CC, s. 696.2).

Based on these policy guidelines, and the law and procedure governing ministerial reviews, it becomes evident that the issue of independence in the Canadian conviction review process is not addressed given the power relationship that exists between the governor and the applicant (or governed) but, instead, is placed within the structure of the governing agency and relates to the relationship between the CCRG (as an administrative body) and the Minister of Justice (as governor of decisions about review). In other words, while independence in other review bodies is meant to ensure a separation between the conventional justice system and the review process, the Canadian review body represents (in the eyes of the governor) an independent advisory body providing “advice and recommendations” (CCRG Annual Report, 2016, p. 5) to a representative of the traditional justice system (in form of a government minister) who ultimately holds the power to make final decisions on post-conviction claims of innocence.

While addressing the concept of independence was clearly problematic in comparison to how it is interpreted by other existing post-conviction review schemes, the current conviction review process improved transparency to a degree and addressed long-standing criticisms of administrative deficiencies through the enforcement of additional legislation. Namely, pursuant to subsection 696.1(2) and section 696.6 of the *Criminal Code*, the Governor in Council is empowered to make annexed Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice on the recommendation of the Minister of Justice (2002) with the underlying objective of enhancing transparency and making the review process more understandable to the applicant. Accordingly, the regulations contained in this document are divided into sections of 1) Interpretation; 2) Application, 3) Review of the Application; 4) Annual Report and, 5) Coming into Force. Within the ‘Application’ section, an outline on the required documents, ranging from personal information, to information on the conviction, and a list of required transcripts and other relevant records, are provided in order to guide the applicant in his or her preparation for an application. Despite the fact that it constitutes the most crucial factor in support of an application to the Minister, however, the regulations do not further specify what kind of information would warrant post-conviction relief. The only additional insights provided on the threshold by which the Minister judges new and significant matters can be found on the official website of the Department of Justice (n.d.), which listed the following examples of new and significant information that would support a conviction review application in 2003:

1. *Information that would establish or confirm an alibi;*
2. *another person’s confession to the crime;*
3. *information that identifies another person at the crime scene;*
4. *scientific evidence that can support another’s guilt or the applicant’s innocence;*
5. *proof of important yet undisclosed evidence;*
6. *information that shows that a witness gave false testimony;*
7. *or information that substantially contradicts testimony given at trial.*

Further, with respect to the relevance and reliability of information as referred to in s. 696.4 of the *Criminal Code*, the Annual Report (2016) clarifies that:

“[...] one of the important questions will be whether there is new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably have affected the verdict” (p.6).

While this added clarification merely rephrases federal legislation and may provide examples of cases where newly discovered evidence falls into one of the categories listed above, it becomes evident that these guidelines are hardly concrete and do not constitute regulations for which the governor could be held accountable. On the other hand, if measured by the explicit attempt to ‘address former deficiencies’, the governor’s new implementations (whether through legislative reform or other regulatory techniques) constitute a limited change to the former process.

4.3 - Logic of Regime of Practice: Securing the Objectives of Post-conviction Review Policy

As a criminal justice issue, the overarching objective of post-conviction review policy can be reasonably understood as the fair administration of justice. However, targeting post-conviction claims of innocence, in this particular context, the governor’s main objective may be seen as (A) the correct identification of meritorious claims and (B) the successful dismissal of gratuitous applications. From a governmentality perspective, then, in realizing its powers, policy would have to achieve this objective in practice and in its effect on the governed.

Moreover, within its legislative framework, the CCRG (connected to the Department of Justice) makes explicit its objective of providing an extraordinary remedy to miscarriages of justice post-conviction that is to be removed from the conventional justice system and does not serve as an additional appeal. As the above findings revealed, however, the governmental rationalities underlying the operation of the CCRG, as a regime of practice, are distinct from

other post-conviction review schemes in other jurisdictions despite this stated similarity in the structure of the operation. The Canadian post-conviction review body is meant to constitute a separate commission working on behalf of the Minister of Justice (as opposed to a free-standing and independent review commission), a government minister representative of the traditional justice system who delegates some of her powers to the governing agents of the CCRG.

Further, a less explicit yet important aspect to this particular regime of practice is the underlying rationale that, while identifying as a ‘remedy’ or “legal means to recover a right or to prevent or obtain redress for a wrong” (Merriam-Webster Dictionary, 2017), it is the responsibility of the applicant to sufficiently support their allegations through new matters of significance. More specifically, in addition to presenting evidence that is relevant, reasonably capable of belief and could reasonably be expected to have affected the verdict, the applicant must also satisfy the Minister that there is a reasonable basis to conclude that “a miscarriage of justice likely occurred” (CC, s. 696.3(3)(a)). Within this premise, an interesting power dynamic becomes visible in the problematization of the issue of miscarriages of justice and the legitimized means of intervention, ultimately securing the objectives of post-conviction review policy. From the perspective of government, it is reasoned that the governing entity charged with the correction of the problem should maintain resolutions within the traditional jurisdictions of the courts, through a representation of the same powers to make legal decisions (represented in the government minister and his delegates), which in turn allows the justice system to restore its reputation and demonstrate accountability. From the applicant’s viewpoint, however, as possible victims of wrongful conviction, he or she is ultimately responsibilized to make use of a final safety net emerging from the same disciplinary power of the state that caused his or her suffering in the first place. With that said, as opposed to other regimes of practice of a similar kind, the

governer operating in this particular jurisdiction demonstrates its own ‘intrinsically programmatic character of government’ (Dean, 2010, p. 43) despite sharing a similar overall objective that is secured through its specific governmental rationalities and technologies.

4.4 - Discussion

In order to reach a greater understanding of the current legislative framework of the Criminal Conviction Review Group, I applied Foucault’s theoretical lens of governmentality and a ‘critical ethos of investigation’, proposed by Dean (2010), which allowed me to examine the available government text in regards to the governing entity’s objectives, procedural and administrative measures put in place to achieve the objectives, and the intended outcomes of governmental technologies designed to effectively intervene in the problem of miscarriages of justice.

In accordance with other post-conviction review bodies discussed in Chapter One, the Canadian government can be said to view miscarriages of justice as an issue that presents a reality essentially contradicting the primary objective of the fair administration of justice: protecting the innocent and holding guilty offenders accountable for their actions. Although Canada thereby recognizes that no justice system is infallible and needs to be held accountable for inevitable errors in human-decision making, the Canadian Department of Justice offers an extraordinary remedy that is substantially different from other jurisdictions. Although the governor appears to supports the same objective of providing a remedy to miscarriages of justice at this level of the criminal justice system process, there appears to exist some contestation with respect to its underlying rationale.

Firstly, albeit not different to all but only some of the review commissions discussed in Chapter One, the governor in the Canadian context problematizes and defines miscarriages of justice as a judicial error post-appeal and incorporates this definition through rather stringent review criteria that removes responsibility from the justice system and places it upon the applicant. While the requirement of having to have exhausted all options for appeal is not uncommon, in addition to meeting the admissibility test of new and significant matters (which is similar to that used by the courts in determining the admissibility of fresh evidence on appeal), the applicant must also satisfy the Minister that a miscarriage of justice likely occurred. Although the CCRG is meant to provide independent advice and recommendations to the Minister in an attempt to address potential prosecutorial bias, final determinations remain within the Minister's discretion and thereby with a government minister who is a representative of the conventional justice system and functions as the top prosecuting officer of the country.

Secondly, within the legislative framework, the governor appears to equate transparency with an applicant's ability to understand the review process. Based on this interpretation, additional legislative regulations enforced in 2002 provided instructions on document requirements, time lines within which to respond to an investigative report and enhanced clarity through terminological changes in the Minister's test for referral. On the one hand, as previously established, the literature on terminological differences in tests for referral suggests that this is an element unknown to carry any practical implications on referral rates (Leverick et al., 2009). While on the other hand, it appears questionable to assume that an applicant would find more clarity in the current process, whereby the Minister bases her decision on the reasonable conclusion that a miscarriages of justice likely occurred, rather than in the former 690 process which determined whether there was an "air of reality" to the applicant's claim (Department of

Justice, 1998). In the same vein, although greater accountability was the desired outcome of this terminological modification (Goetz & Lafreniere, 2001, p. 20), questions arise in regards to whether the Minister's change in test for referral have met this goal.

Whereas matters of accountability in other post-conviction review schemes are often addressed through the possibility of subsequent judicial reviews or are ensured through majority votes on referral decisions made amongst more than one commissioner, decisions on referral in the Canadian system rest solely with the Minister. Moreover, all of the post-conviction review schemes (discussed previously) have established commission memberships of various backgrounds, a system of different levels of decision-making and varying powers of referral or rejection of a case at different stages of the review. Although valid arguments may be made against adopting a system which originated in a jurisdiction that presents some fundamental differences to Canada (i.e. the United Kingdom), the absence of and refusal to provide impartial oversight may speak to the governor's reluctance to examine its own practices and the potential systemic flaws known to occur with some degree of regularity in various legal systems throughout the world (MacFarlane, 2006).

The way in which Canada governs post-conviction claims of innocence is somewhat controversial, considering what is already known about the nature of wrongful convictions and, most importantly suggests the underlying assumption that the conventional justice system typically 'gets it right'. A denial of an independent review that could provide impartial oversight of the traditional jurisdiction of the courts implies that, while conviction reviews should focus on all aspects of the criminal justice system process, Canada's post-conviction review places an emphasis on matters outside of the courtroom. It appears somewhat contradictory to state that, on the one hand, in cases of wrongful convictions "our entire justice system finds itself in disrepute"

(McLellan, Criminal Law Amendment Act, Second Reading, 2001a, para. 1630), including systemic failures occurring in trial, appeal *and* post-appeal conviction review processes (MacFarlane, 2006), but also to propose that the most efficient measure of reviewing these failures is to provide a remedy that is represented by an extension of the traditional jurisdiction of the courts.

It is my observation that regardless of whether the Canadian context is better suited for a review of claims of innocence by a government minister, the present findings as well as the arguments (or lack thereof) in support of the current state of affairs, are of concern. Despite recent changes, the continued low level of engagement provided to applicants and related lack of transparency towards the Canadian public regarding the current review process, makes one question whose best interest is truly served in maintaining the current status quo. The power relationship between the CCRG and its applicants is evidently one in which the applicant is provided with little room for agency and the ability to enter into a productive dialogue is diminished by the governer's current administration. Most importantly, this is maintained despite the vast knowledge available on possible alternatives, as seen in other post-conviction review schemes, that could possibly be implemented without disturbing the status quo.

CHAPTER FIVE:

DISCOVERING ‘NEW MATTERS OF SIGNIFICANCE’

Innocence Ottawa (IO), a student-volunteer organization which assists individuals who claim to have been wrongfully convicted seek a formal remedy under section 696.1 of the *Criminal Code*, received an application from Mr. Kassa in the early months of 2015. Following a preliminary assessment of his application, a decision was made that Mr. Kassa fit the official mandate of IO²⁰. Upon this finding, volunteer members commenced a thorough investigation into the case in search of ‘new and significant matters’ that would warrant post-conviction relief. Therefore, part of the following illustration and analysis of the findings relating to Mr. Kassa’s preparation for a post-conviction review application includes investigation leads discovered by Innocence Ottawa. As previously discussed, the findings and analysis of Mr. Kassa’s criminal conviction case file was separated into sections of information regarding relevant factual background, followed by a presentation of both investigation leads that appeared to more closely fit the eligibility criteria of the CCRG and leads that, while having discovered significant information that may put his conviction into question, did not constitute ‘new matters of significance’ in a legal sense. This had either been determined by the fact that the information had already been considered (in detail) by the courts or the information gathered rested on the mere observation of the researcher. Although the latter refers to evidence directly taken from Mr. Kassa’s case file, it would be beyond the scope of this research to confirm with certainty that the evidence is ‘reasonably capable of belief’ and ‘could have affected the trial verdict’. The following provides a brief description on the factual background of the case and includes any relevant evidence considered by the trial and/or appeal court.

²⁰ For more information on *Innocence Ottawa* visit their official website at: <https://innocenceottawa.wordpress.com/>

5.1 - Evidence Presented at Trial and Relevant Background Facts

Sometime in the early morning hours of January 5th, 2005, someone strangled a 54 year old woman to death in her apartment, and later a fire was set to her apartment. There was no sign of forcible entry and the living room was filled with heavy smoke. An autopsy concluded that she had died of “ligature strangulation”²¹. According to the pathologist’s testimony, the only blood found at the scene were small droplets of the victim’s own blood on her nightgown, suggesting a struggle, and “blood that’s trickled down the left side of her face”. Also, the pathologist concluded that he could not “with any degree of accuracy” determine the victim’s time of death. “A small amount of DNA from an additional male”, which was found on her nightgown, was never identified.

The Crown’s theory relied primarily on the evidence of the defendant’s former girlfriend who testified that Mr. Kassa left her apartment between the hours of 2:00 and 3:00 a.m. on January 4th, “angry” and “very intoxicated”, following an argument. She further stated that he returned “closer to five”, with blood on his shirt and pants, and that she witnessed him washing significant amounts of blood off of his hands while stating that “something bad” or “something terrible happened to [the victim]”. While Kassa admitted to having known the victim, and formerly sold drugs to her, his former girlfriend confirmed this relationship by saying that the victim used to call her on her cell phone and ask for him in relation to drugs. She also testified that she was unaware of any contact between Kassa and the victim from 2003 to the time of her death.

²¹ All of the following quotes were taken from preliminary, trial and/or appeal transcripts

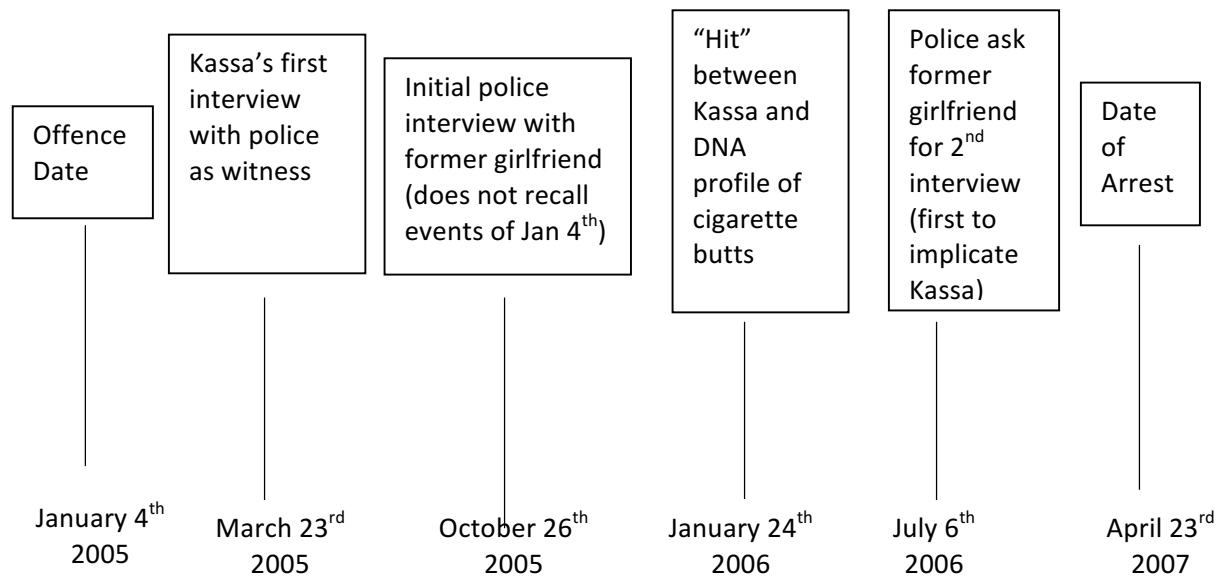
When Mr. Kassa met with the police for the first time on March 23rd, 2005, as a witness, he allegedly volunteered the following statement: “I guess this is about the [...] murder”. Although this statement circulated in the media on December 8th, 2009, and was presented as a crucial element to the Crown’s case, Mr. Kassa told Innocence Ottawa that, when confronted by investigators, he was in a meeting with his probation officer²² who allegedly informed him that “people from the homicide unit are here to talk to you”. The Crown also relied on two other pieces of circumstantial evidence: cigarette butts containing Mr. Kassa’s DNA which were found in an LCBO bag at the victim's apartment; and a video showing a man wearing clothing similar to the clothing worn by Kassa, according to his girlfriend’s testimony, who entered the lobby of the victim's building at 2:11 a.m. on January 5th.

Mr. Kassa did not provide any evidence in his defence as he contended that the Crown's case would at most show that he was present in the victim's apartment. However, on December 17th, 2009, a jury found Kassa guilty of second degree murder. On April 12th, 2010, he was sentenced to life imprisonment with no eligibility for parole for 13 years. Following his conviction, the main crown witness recanted a crucial part of her trial testimony by claiming that he did not say "something terrible happened to [the victim]". However, she later retracted this recantation and told the police that her trial testimony was true. On appeal, in 2013, Mr. Kassa submitted that this piece of fresh evidence concerning the recantation be admitted and a new trial ordered as it provided substantial impeachment value in what was a tenuous prosecution case at best. The Crown opposed this, theorizing that Kassa’s former girlfriend fabricated her recantation in an attempt to help Mr. Kassa after they had rekindled their relationship. It was the Crown’s contention that Mr. Kassa had influenced the witness into recanting and admitting the

²² At the time, Mr. Kassa was serving a probation order with respect to a domestic assault charge against his former girlfriend (the main Crown witness)

fresh evidence would not be in the interest of justice. Both of Mr. Kassa’s attempts to have his conviction appealed before the Ontario Court of Appeal and the Supreme Court of Canada were dismissed.

The timeline provided below illustrates the dates on which the main prosecution evidence was discovered by the police during their investigation. A more detailed description of the significant events pertaining to the investigation is attached in Appendix E.



5.2 - Investigations leading to the Discovery of Potential ‘New and Significant Matters’

The following presentation of investigation leads regarding ‘new and significant matters’ in the case of Halemikael (Michael) Kassa constitutes an analysis of the evidence derived from official police records, Innocence Ottawa investigative summaries and material evidence such as crime scene photos within the context of CCRG eligibility criteria. While each piece of evidence

presents its own challenges regarding Mr. Kassa's attempt to file a successful application, it is the position of the researcher that the evidence is 'reasonably capable of belief', 'relevant to the issue of guilt' and is able to demonstrate that it 'could have affected the original verdict' (Department of Justice, n.d.). Moreover, examining the evidence from a critical yet 'non-legal' perspective, the new information revealed from Mr. Kassa's file is capable of producing a sense of doubt in investigators' minds that would question Mr. Kassa's involvement in the murder.

5.2.1 - Defence Evidence Not Presented at Trial

On November 30th, 2009, the main crown witness who later testified in Mr. Kassa's trial, met with a police detective to make an official statement regarding a discussion that had taken place in the crown attorney's office earlier that day. The investigating detective was present during said discussion and conducted a follow-up interview with the witness, which was recorded in hand-written notes. According to this record, the witness stated that she had had a recent visit from Mr. Kassa's mother who was "trying to fish information out of her" and asked her "if Michael strangled a woman how would you see blood on his clothes then". In response to the mother's questioning the record states that the witness expressed the following:

"I told her that Michael was violent and I recalled a time when he mentioned about stabbing someone in the shoulder and that the time he told of this stabbing was either the same night of January 4th or 5th or could have been a week before or a week after that. She asked me why I never told the police about this and I told her because I wasn't sure of when it happened or what exactly he said regarding that. I basically told her that he was [illegible content] something like that when I was in my sleep and I don't remember exactly when it was. The reason why I even told her that was to prove a point."

When probed by the officer, in an attempt to identify whether Mr. Kassa had allegedly told her this "the night [the victim] was killed", she continued to respond: *"It was around the time frame I can't be sure exactly when but I think it was after that date"*. Further, in response to questions of why she had never told the police, the record states that she replied: *"It wasn't*

relevant to me because Mike talked shit and I thought he was lying". The evidence provided within this statement had not been adduced at trial but presents significant information related to the witness's testimony and may, at the very least, speak to her credibility. Although brought up as additional fresh evidence to be considered on appeal, the courts focused on another, main issue and did not give further consideration to this statement.

"Information that substantially contradicts testimony given at trial?"

Placing this pre-trial statement of the crown's main witness into the context of Canadian post-conviction review legislation, two aspects become evident: it is *significant* by substantially contradicting testimony given at trial and, therefore, the evidence could be reasonably assumed to have affected the trial outcome. Further, from the perspective of the 'governer' of criminal conviction reviews in Canada, the evidence partially fulfills eligibility criteria by casting doubt on the credibility of trial testimony through the submission of an additional statement that "asserts or implies both the truth and falsity of something" (Merriam-Webster Dictionary, 2017). In other words, as the witness could not ascertain on which date Mr. Kassa had told her something about "stabbing someone", a reasonable doubt can be entertained as to whether her testimony or statement regarding "blood on [Mr. Kassa's] clothes" that she allegedly witnessed on the night of the murder, was in fact related to the victim's death.

However, given that defence counsel made the decision not to adduce the evidence at trial, a challenge arises for the applicant to support this evidence in post-conviction review as 'significant', particularly in regards to whether the information is 'reasonably capable of belief'. While this part of the criteria may in some instances be very clear, such as in cases where a new witness who did not previously testify comes forwards with new information not considered at

trial, it becomes increasingly difficult to meet if it concerns, as in this context, neither ‘a change of heart’ (considered reasonable grounds under Scottish legislation) or recantation but rather constitutes contradictory information provided by a witness that has already been questioned on her credibility during the trial and appeal process. In Mr. Kassa’s case, this additional piece of information only further obscures testimony of a witness who, on the hand, has played a crucial role in his conviction but also suffered from some serious concerns of general credibility.

In fact, in attempting to meet the integrated criterion of new evidence ‘not having been considered’ previously, the applicant does not have access to any guidelines in post-conviction review legislation that would explain whether ‘not considered previously’ includes information that may have been raised alongside other various issues on appeal but was not granted a full assessment. More significantly, in Kassa’s case, the courts had already addressed but dismissed the potential occurrence of perjury in reference to the crown witness’s retracted recantation post-trial. The only option for the applicant within the post-conviction review process in Canada appears to further neutralize the witness’ testimony, rather than attempt to support his application through evidence that may suggest ‘false testimony’ as a contributing factor to his wrongful conviction.

Based on this, it can be concluded that the standard for admitting fresh evidence (of this kind) in support of a post-conviction review application, particularly with respect to the necessity of it being reasonably capable of belief and not previously considered, becomes a higher standard than that applied during appeal processes. This clearly reflects the principle of finality in litigation and the legislation’s explicit interpretation of ministerial reviews as an extraordinary measure that is not intended to serve as an additional appeal. However, in light of this, the applicant’s ability to prove his ‘truth’ on matters such as witness ‘perjury’, if previously

considered but dismissed on another issue presented on appeal, becomes near to impossible. In Mr. Kassa's case, this is concerning if one comes to the conclusion that, had the evidence been adduced at trial through means such as a different defence strategy, the evidence provided in the findings above may have affected the original verdict.

5.2.2 - A New Witness comes forward in Private Investigations

In preparation for trial, Mr. Kassa's legal counsel retained a private investigator to work on his behalf. According to the information contained in an interim investigative report sent to Kassa's counsel, on January 23rd, 2008, a canvass of the building where the homicide took place was conducted by the investigator. Based on a lead from another resident of the building, the investigator noted the following in regards to a witness who lived on the same floor as the deceased:

“Apartment [number] is located to the south of apartment [number of the deceased] directly across the hall from the elevator entrance and is occupied by [name of witness]. He stated that he had been questioned by the police and that he had not received a subpoena to be a witness. He was familiar with [the victim] and that she had had a number of black male visitors to her apartment. He further stated that he heard and seen a black male arguing with [the victim] around 4:00 p.m. or 5:00 p.m. on January 4, 2005 and that he had seen the same young black male go into [the victim's] apartment about once a week. Apparently, the male was always alone.”

In addition to this, *Innocence Ottawa* had conducted a similar canvass of the building in 2016. Volunteers deposited cue cards for residents, prompting anyone who may have information on the murder to contact their main office. In response to this, IO received a telephone call and had a phone interview with a resident who identified himself by the same name as the man who had spoken to the private investigator in 2008. The interview was recorded in computer typed notes and, aside from confirming the above information, discovered the following details:

“(A “few” days before the murder) [the witness] noticed a tall “coloured guy” (later referred to him as a black guy) getting mad at [victim] in a demanding way and was imposing himself on [victim] and was upset with her for ‘policy of seeing others’, and thinks this episode was caused by jealousy.... [Witness] later heard commotion from [victim’s] apartment that night. [...] Stated that he thought the murder was a crime of jealousy [...] [Witness] stated the ‘Coloured Guy’ was 6 feet tall (reasoning that he is 5’8 and the ‘Coloured Guy’ was a few inches taller than him), he was heavyset, wide shoulders and athletic, and that he came to the building and [the victim’s] apartment frequently to see her [...]”

In talking to volunteers, the witness stated that he never made an official statement to the police as he did not *“want to be involved in the process”* and be asked *“to testify”*. The police records contained in Mr. Kassa’s file do not make any mention of a witness by the same name being interviewed. Based on a conversation between Mr. Kassa and IO volunteers, and in contrast to the person in question described above, Mr. Kassa described himself as *“skinny, 150lbs, short hair, no facial hair, wearing baggy clothes and young-looking”* in 2005. A ‘subject profile’ of Mr. Kassa pertaining to his police file (including a recorded description and ‘mug shot’), as well as a personal photograph (in a social setting) which were disclosed to the Innocence Ottawa team, can provide further description of his appearance (Appendix F).

“Important yet undisclosed evidence?”

From the list of examples of potential fresh evidence provided by the CCRG, the above finding may most closely fall under ‘important yet undisclosed evidence’, and reflects the type of witness information that was not used or followed up on as potential evidence to the defence. While clearly meeting the standard of ‘new’ matters, given that the witness’s statement had not been considered previously by the courts (or the Minister), the information pertained in both statements raises questions on the capability of belief. To the private investigator, the witness stated he had spoken to police but was never subpoenaed while during the interview with IO, the individual specified not having spoken to the police because he did not want to be asked to

testify. Moreover, there is a clear discrepancy between the witness' memory recall on the time that he allegedly witnessed the "*coloured guy*" on either 'January 4th between the hours of 4:00 and 5:00pm' or 'a few days before the murder'. More importantly, however, this type of evidence poses a further challenge to Mr. Kassa's application by lacking additional or corroborating evidence to substantiate the claims made by the witness. It can reasonably be assumed that the witness' expressed reservation on speaking to authorities would require the CCRG to compel the witness to testify. Albeit constituting a 'new matter of significance', without further corroborating evidence that can substantiate 'other suspect' evidence, the witness's information may not be considered 'enough' to pursue as an investigative effort, especially if it were to require some additional steps such as having to legally force someone to attend who appears uncooperative.

It appears that in highly complex cases, such as this one, various witnesses of a lengthy police investigation may raise eyebrows or ultimately become persons of interest but, without corroborating evidence, lose their significance and unsupported leads are terminated (by the handling police force) due to more damning evidence which surfaced in pursuit of others. Hence, without further legislative guidance on the issue, given the large amount of uncorroborated circumstantial evidence in Mr. Kassa's case, it becomes rather challenging to determine what kind of evidence would be cogent enough to warrant moving a case past the preliminary assessment stage and having the CCRG launch their own inquiry into the details of such leads. On this note, recent social sciences research conducted by Gould et al. (2013), who investigated the nature of wrongful convictions in a sample of 460 erroneous convictions and 'near miss' cases, found that many wrongful convictions are based on a weak or tenuous prosecution case. Relating these findings to Mr. Kassa's case, it can be said that the lack of indisputable physical

or DNA evidence on the prosecution's side, and the presence of a large pool of circumstantial evidence and unreliable witnesses discovered in a two-year police investigation, proves to be a major obstacle in producing any one truly convincing 'new and significant matter'.

Moreover, given that one applicant does not have the same resources as a homicide unit of a city's police force, finding new leads constitutes an exercise that has against it not only the passage of time, and the known problems related to the reliability of eyewitness testimony and memory recall (Miguelles & Garcia-Bajos, 1999; Smalarz et al., 2016), but also presents a challenge when attempting to substantiate loose leads on unknown individuals such as the one described by the witness above. Ultimately, it comes as no surprise that, if the prosecution had faced a significant shortage of reliable witnesses that could testify to '*who done it*', an applicant attempting to 'prove' his innocence post-appeal would encounter the same or even worse obstacles.

Presenting this particular statement with confidence, or any other eyewitness account of another potential suspect for that matter, is difficult as there are no guidelines on whether the CCRG would even consider 'other suspect evidence', alone and uncorroborated. Further, it remains unknown to what extent investigating lawyers consider a 'comprehensive picture' or a variety of potentially unrelated matters of significance in their totality when making decisions on whether to investigate. According to existing Caselaw, 'other suspect evidence' is a 'delicate' issue, and is considered with a great deal of caution before the courts, and would no doubt be handled similarly if such evidence was to be presented to the investigating lawyers at the CCRG. Broadly speaking, the defence can adduce evidence that an offence was committed by a third-party suspect (*R.v. McMillan*, 1975), but it typically must be substantiated by evidence that is sufficient in relevancy and probative value (turning on general questions of sufficiency

considered in evidence admissibility) and a link between the other suspect and the offence cannot simply be ‘speculative’ (*R.v. Grandinetti*, 2005; *R.v. Labbe*, 2001). Given these considerations, although the above finding appears quite significant from a layman’s perspective, the absence of a diverse membership and sole reliance on legal professionals at the CCRG makes it questionable that such new information would even make it past their scrutiny. In the specific context of the CCRG, it is uncertain whether the information could be considered with some degree of impartiality, and possibly natural curiosity, that could affect the ‘truth-seeking’ process in such a way that it does not only rely on matters of the law.

5.2.3 - A Crime Scene Photo Contradicts Crown’s Theory

A crime scene photo taken of the interior of the victim’s apartment on January 6th, 2005, substantially contradicts the Crown’s theory with respect to the potential motive that Mr. Kassa had in murdering the victim. The Crown’s theory posited that the victim in question had an outstanding drug debt and, in light of other testimony substantiating that Mr. Kassa had sold drugs to her in the past, the defendant had allegedly murdered the victim in a moment of rage when she would not pay him. However, a picture showing a black pouch located on the victim’s dresser to the right side of her bed (Appendix G) was shown to have contained a 20 dollar bill. The item and its content were tagged by the police as evidence but the picture was not adduced as evidence at trial. Mr. Kassa told Innocence Ottawa, a conversation which was recorded in hand-written notes, that the “*picture and money was brought up when [he] spoke with [his] first lawyer, [name of lawyer], but then it got never brought up in trial by [the counsel] who took over*”. The notes further specified that the “former lawyer was appointed judge” after the preliminary hearing and e-mail transactions of the law firm suggest that the trial date was

postponed for the end of the following year once the case was taken on by another lawyer of the same firm.

“Facts that prove the absence of motive?”

The element of motive has been defined in the case of *R.v. Lewis* (1979) as an “ulterior intention” (p. 822) that is *not* considered part of the crime and does not have any relevance to criminal responsibility. However, although not constituting an essential element to the prosecution as a *matter of law*, proving the absence of motive is “always an important fact in favour of the accused” (*ibid.*) and, as a matter of *fact*, it is commonly worthy of note to the jury. For the Crown, on the other hand, proving the presence of motive may be important particularly “on the issues of identity and intention, when the evidence is purely circumstantial” (*R.v. Lewis*, 1979, p. 823). In the *R.v. Kassa* (2009) case, the Crown’s circumstantial evidence rested upon the facts that Mr. Kassa knew the victim as a former client and acquaintance of his, who he used to sell drugs to and who, in the theory of the prosecution, was unable to pay an outstanding debt. Anticipating the Defence to argue that there was an absence of proved motive in this case, the Crown did not seek to adduce evidence of ‘motive’ but rather evidence of ‘opportunity’ to “counterbalance the assertion that there was an absence of motive”. In the words of the prosecutor:

“Opportunity is a crucial issue in this case [...] I am not asking for the inference that because he sold drugs he is more likely to have killed her, but I am seeking and my friend is saying that I am characterizing this as evidence of motive and I’m not. I am characterizing it as evidence of opportunity. It proves – it helps prove, it has probative value to prove that he was there on January 5th with [the victim] [...].”

The Defence’s position to this submission was that the Crown attempted to have the court’s assistance in establishing grounds for motive.

However one may want to interpret the issues surrounding motive or opportunity and ‘reason’ in the Kassa case, the new piece of evidence presented above may render the Crown’s theory questionable on several matters of *fact*, not *law*: (1) the victim was in possession of money before her death; (2) she would have been able to pay a part of her debt and, (3) there was no sign of visible disarray that would suggest that the person responsible attempted to ‘rob’ the victim or retrieve other valuables from the scene prior to leaving in order to compensate for the alleged debt owed. Whichever evidence the Crown used, to present the theory that Mr. Kassa had reason to kill the victim, counsel’s opening statement clearly indicated the idea that the victim’s murder may have been the result of her having “*ripped someone off*” and evidence was adduced to show that Mr. Kassa had recently sold drugs to her.

The newly discovered evidence appears to fit the CCRG’s criteria on ‘new and significant matter’ by being reasonably capable of belief and constituting information that could have affected the trial verdict, had it been brought before the jury. However, it is unclear to what extent the new evidence speaks to ‘the issue of guilt’. The presence or absence of motive is not relevant to the element of criminal responsibility. In Canada, two primary conditions must be satisfied to prove criminal responsibility, the ‘actus reus’ (proving that the person committed the proscribed act) and the ‘mens rea’ (the ‘intent’ with which the defendant acted when committing the criminal act). Mens rea, or to commit an act with or in the proscribed “state of mind” (Verdun-Jones, 2014), however, does not equate to motive or a possible reason for why the accused committed the offence. In other words, in Kassa’s criminal trial, the burden of proof required of the prosecutor did not include proving beyond a reasonable doubt that the defendant had motive or a reason to murder the victim.

The aspect of motive was merely presented as part of other circumstantial evidence. Based on this finding, and in the absence of further insights into the review process, it can be concluded that the applicant does in fact meet the new and significant matters criteria on its primary elements but it is unclear whether the evidence is sufficient to warrant post-conviction relief by being able to speak to the issue of guilt. As the following chapter will reveal, while additional relevant information discovered from Mr. Kassa's criminal case file may draw a more comprehensive picture with respect to his professed innocence, it would require a review commission to make connections between several unrelated matters of significance and launch an investigation that could potentially uncover the 'truth'.

5.3 - Discussion

In an attempt to discover and present new and significant matters in the *R.v. Kassa* (2009) case, several conclusions can be drawn on the effects that the current 696.1 legislation has on claims of innocence brought before the Minister of Justice. First of all, any potential fresh evidence discovered in Mr. Kassa's criminal case file led to issues regarding the degree of confidence with which the applicant is able to present his supporting evidence. While all three of the new pieces of evidence presented above (evidence contradicting witness' testimony; a third-party suspect not matching Mr. Kassa's description; and, lastly, a crime scene photo contradicting Crown theory) appear to cast some degree of doubt on Mr. Kassa's guilt, each piece of information led to more unanswered questions than definite proofs that would support his professed innocence. Within the objective of filing a successful application, the applicant would 'hope' that the CCRG considers the new evidence cogent enough and proceeds by using its superior powers of investigation to 'discover the truth'. The current lack of insight into determinations made on 'new and significant matters', however, makes it difficult to place any

degree of certainty regarding the sufficiency of the evidence discovered to launch such an investigative effort.

As the analysis of the above findings indicated, not only does the applicant face challenges in meeting each required element of CCRG eligibility criteria, but resource restraints and the ability to support uncorroborated leads makes it difficult to ascertain that the evidence could make it past the scrutiny of the 'legal eye'. Particularly with respect to the standards applied in admissibility tests on appeal, the question arises whether the same or even more stringent standards are applied in post-conviction review. It becomes evident that in the case of Michael Kassa, the circumstantial evidence presented here, and its connection to elements that were partially but not entirely considered by the courts in previous proceedings, would require an investigating body to consider errors in reasoning at the appeal stage and/or potential issues dating back to the very early stages of the police investigation. Moreover, from the perspective of the applicant, who bears the burden of proof in 'satisfying the Minister of Justice that a miscarriage of justice likely occurred', being forced to leave it up to the delegates of the Minister to piece together loose ends, may only exacerbate a potential sense of distrust in the impartiality of the review process itself.

CHAPTER SIX:

DISCOVERING ‘SIGNIFICANT’ YET ‘INELIGIBLE’ MATTERS

The following presentation of investigation leads that did not result in the development of ‘new and significant matters’ constitutes a crucial aspect to the analysis of Mr. Kassa’s file as it provides further insight into the applicant’s ‘truths’, without the constraints of legislative criteria. By drawing a more comprehensive picture of the case’s interrelated circumstances, certain evidence presented in the previous chapter will gain further significance when considered from the perspective of the applicant. Similar to the preceding discussion on ‘new matters of significance’, this chapter presents findings from court transcripts but, more importantly, focuses on elements of the early stages of the criminal justice process. While, again, each piece of evidence presents its own challenges to Mr. Kassa’s attempt to file a successful application, it is the position of the researcher that the evidence presented herein is ‘reasonably capable of belief’, ‘relevant to the issue of guilt’ and is able to demonstrate that it ‘could have affected the original verdict’ (Department of Justice, n.d.). Moreover, examining the evidence from a critical yet ‘non-legal’ perspective, the new information revealed from Mr. Kassa’s file is capable of raising doubts in investigators’ minds regarding Mr. Kassa’s involvement in the murder, even though the evidence constitutes ‘ineligible’ matters in the eyes of the CCRG.

6.1 - ‘Other Suspect Evidence’ Not Heard by the Jury

A witness that had been called by the Crown to testify at the preliminary hearing provided evidence on an alternative suspect. According to the person’s testimony, a male party accessed the building and pushed the elevator number for the same floor, on which the victim resided, during the early morning hours of January 5th, 2005. According to trial transcripts, and a

factum regarding ‘other suspects’, different arguments were made by the Crown and Defence with respect to the admissibility of the evidence, ultimately leading to the evidence not being adduced at trial. As summarized in the factum regarding ‘other suspects’, based on the preliminary hearing transcript of January 21, 2008, the witness in question testified to the following chain of events:

“While in the lobby of [the building] [the witness] encountered an individual who told her that she ‘smelled nice’ and ‘was pretty’, and whom she indicated gave her the ‘heebie-jeebies’. When [the witness] was buzzed in to the building this individual followed behind her [...]. [The witness] pressed the number for the eleventh floor and he pushed the number for the [number of victim’s floor]. [...] after being shown surveillance video [...] [the witness] indicated that [Mr. Kassa] was not the person that she had encountered that evening. [The witness] stated, ‘I know that the person that night is not that person there’ [...] the Crown observed, ‘Okay. And you’re pointing to the accused at this point’.”

The arguments pursuing this testimony revolved around whether the Defence should be allowed to adduce the evidence as “evidence that helps establish the specific narrative of events that occurred [at the building] on January 5, 2005, as well as the more general narrative of the commonalities of life”. The Crown argued against its admissibility as such based on the reasoning that the evidence clearly constitutes ‘other suspect’ evidence and the Defence would therefore “lead evidence tending to show that a third person may have committed the alleged crime in an effort to show that the police investigation was inadequate”. If the Defence were to make such a claim, the Crown reasoned that by “seeking to attack the integrity of the police investigation”, the prosecution should in turn be allowed to adduce “evidence of the total extent of the investigation carried out”, within “of course, limits”. This would lead to the raising of bad character evidence and given the background of Mr. Kassa, and his volatile relationship with the main crown witness, as well as other prior discrediting conduct, the Defence appears to have decided not to adduce the evidence at such a risk.

“Information that identifies another person at the crime scene?”

Whereas the above testimony could be construed as exculpatory evidence, it can hardly be identified as falling within the CCRG’s criteria of ‘new matters’ that have not been ‘previously considered by the courts’. However, as previously established, this particular criterion would require further clarification which, unfortunately, cannot be identified in the current legislative documents provided by the Canadian review body. Whether or not evidence had been ‘considered’ by the courts, poses several questions in the mind of the applicant when seeking to support his claim of innocence. If one defines ‘consideration’ in its most general sense of the word, the applicant would understand this criterion to relate to whether the court had “a matter weighed or taken into account when formulating an opinion” or given it “thoughtful and sympathetic regard” (Merriam-Webster Dictionary, 2017). Moving forward from this definition, the applicant may have questions such as: “Does the criterion of ‘consideration’ include or exclude matters that may have been considered by the judge, but not by the jury as the ‘trier of fact’?” or in a similar manner, “Does this criterion lead to the complete disregard of evidence that was never granted *full* consideration because, presented as only an additional piece of fresh evidence on appeal, other or more pertinent information lowered its probative value and consequent point of consideration?” In the case of Michael Kassa, this element of CCRG criteria is crucial and, in the absence of further clarification, has posed a major challenge to the applicant in specifying his grounds for an application to the Minister.

It is important to note that, in Mr. Kassa’s original application to Innocence Ottawa, the potential fresh evidence presented (without having been further investigated) referred to elements that had been either already mentioned to the appeal court (such as the main Crown witness’s statement on Mr. Kassa having allegedly stabbed someone sometime on the day

of/around the time frame of the murder) or were discussed amongst the Defence, the Crown and presiding judge but ended up not being admitted as evidence on trial (as the evidence presented here). It is upon this observation that I conclude that, from the perspective of the applicant, some of the matters that may have been considered (to some extent) previously are still relevant in representing significant information on his perception of the 'truth'. However, it is also my contention that, as a researcher analyzing the legislative framework of the CCRG, the current legislation does not offer clarification on this point and, based on existent guidelines, leaves the applicant with very little opportunity to demonstrate and support his own opinion on elements of his case that can prove that 'a miscarriage of justice likely occurred'. In fact, if all previously considered matters are disregarded, none of the quite damning and exculpatory evidence presented here would be taken into account.

6.2 - Observations suggesting potential of 'Tunnel Vision'

According to police records, and the investigation meeting/briefing summaries, the police received an anonymous crime stoppers report on December 19th, 2006, indicating that three persons were responsible for killing the victim and burning the victim's apartment:

"S1 - 'Rizzo', male, mulatto, 38-40yrs, 5'7", 120lbs, dark hair, goatee, dressy clothing, ha[n]gs around 181 Jackson (girlfriend's apt), gang member, possesses gun, S2 - (possibly ring leader) 'JR', male black, 38-40yrs, 5'5", 120lbs, blk hair, casual clothing, sunglasses, Montreal Que., gang member, possesses gun, S3 - "Little Rich", male, black, no further description."

Based on the review of the records available to me, no further leads were discovered on the identity of the three persons described by the anonymous caller. However, certain conclusions were drawn (in spite of this 'tip') following an additional statement made by another witness who recalled that the victim owed money to a person who went by the name of 'Rizzo'. The

homicide unit's narrative, dated April 2nd, 2007, on Michael Kassa's alleged involvement in the murder stated the following:

“[The witness] recalled that there was one dealer known as ‘Rizzo’ who [the victim] had a problem with. Apparently he accused her of stealing from him and ripping him off. She described him as a tall black guy, approximately 5’8”, short haired, narrow faced, clean-cut, always wearing updated clothing. [...] [The witness] was shown a photograph of Michael KASSA and she indicated that it looked like ‘Rizzo’ at a younger age. Investigators have determined that one of the Street Names or Nick Names that KASSA would use when he was trafficking in crack cocaine was ‘Rizzo’”

It is important to note that the above information was discovered *after* the second interview between the main Crown witness and the police had taken place, during which she gave a full statement on what she had allegedly witnessed following Mr. Kassa's return to her residence ‘the night of’. Initially, Kassa's former girlfriend (Crown's main witness) denied any knowledge of the murder during a first interview with police.

An additional piece of information was revealed during my investigation into the case, which had also been discussed between members of Innocence Ottawa and Mr. Kassa, according to the organization's computer typed notes on internal investigations. Firstly, as recorded in police meetings/briefing summaries, Mr. Kassa was arrested on April 23rd, 2007, over a year past the date that the main Crown witness's statement had been recorded on July 5th, 2006. Secondly, almost two years past the launch of the investigation, but only approximately 5 months before his date of arrest, a Detective (who had crucial dealings in the case) made a damning statement that would further speak to Mr. Kassa's alleged involvement in the murder, on December, 1st, 2006:

“[The Detective] advised that either on the day of the murder or shortly after, KASSA had called, wanting to meet with [him]. KASSA was upset and crying, but was evasive when asked by [the Detective] what was wrong. [The Detective] did meet with KASSA, who blamed his emotional state on the consumption of crack cocaine.”

Based on the chronological order of the statements retained, a Detective who can be assumed to have been aware of the investigation, by having worked for the same department and having known Mr. Kassa for some time before the murder occurred, had not provided such ‘incriminating’ evidence up until a year and half after Mr. Kassa became one of many persons of interest. Moreover, according to conversations that had taken place between Innocence Ottawa volunteers and Mr. Kassa, Mr. Kassa maintains that this alleged phone call had not taken place.

“Tunnel vision?”

Without placing too great an emphasis on the admissions made by Mr. Kassa, the potential for tunnel vision has been discussed in the literature as one of the primary contributing factors to wrongful convictions (Ainslie, 2011; Denov & Campbell, 2005; MacFarlane, 2006; Roach, 2013). Commissioner Kaufmann, serving on the inquiry into the wrongful conviction of Guy Paul Morin²³, referred to tunnel vision as a ‘mind-set’ and defines it to mean “the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to that information” (Kaufman, *Morin Inquiry*, 1998, para. 1134). While being discussed as one of the more difficult causes to prove or substantiate, it should come as no surprise that this element in Mr. Kassa’s case does not fall under any of the CCRG’s examples of potential fresh evidence. However, its significance is rather self-evident and, in the context of the CCRG’s legislative framework, poses an obstacle to the applicant when attempting to file for successful review.

²³ Ontario, The Commission on Proceedings Involving Guy Paul Morin, Report (Toronto: Ontario Ministry of the Attorney General, 1998) at 1 (The Honourable Fred Kaufman, C.M., Q.C., Commissioner), online: Ministry of the Attorney General https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html [Executive Summary of the Morin Commission].

Up until this point of my examination of Mr. Kassa's criminal case file, I have come across evidence that may be possible to substantiate *if* superior powers of investigation are employed. However, the above findings present a different sort of challenge to this task. Whereas 'other suspect' evidence appears compelling to the non-legal eye but might not make it past a lawyer's interpretation of sufficient evidence, 'tunnel vision' remains at the mere observation and the opinion of the agent investigating. More importantly, it faces the challenge of turning a 'hunch' into fresh evidence that would affect the judiciary's willingness to reconsider a conviction. With respect to the findings above, it appeared to be a rather 'interesting' conclusion for the investigators to draw that a witness's opinion on a (then current) photograph of Mr Kassa, which "looked liked a younger version of Rizzo", indicates that the person who the victim owed money to was in fact Mr. Kassa. Particularly, because this conclusion was based on no more than the simple finding that Kassa was also known by the nickname 'Rizzo'. Alternatively, a more compelling conclusion would result from connecting the same witness' statement to the three unknown individuals described in the crime stoppers report, given that A) the same nickname was allegedly used by one of the individuals described, B) this individual fit more closely the description given by the witness regarding the actual age of the (unknown) 'Rizzo' who the victim owed money to (as opposed to Kassa who looked like a younger version of him), and C) it appears significant that the witness made a similar observation of the unknown Rizzo wearing 'updated clothing', which the anonymous crime stoppers caller referred to as 'dressy clothing'.

Further, although not related to this finding per se, it is interesting that a rather significant statement made by another Detective, who stated that Mr. Kassa had called him crying the day of or after the murder, which can be assumed to have meant to imply a guilty conscience, was only

mentioned in police briefing summaries but did not become part of the official narrative. It would be reasonable to question, then, whether this rather incriminating evidence was left unattended because it could not be supported through official records or did not gain further recognition for some other reason that rendered it unreliable. Regardless of whether it became part of the official narrative, however, such information could be ‘speculated’ to have affected the police’s final decision to arrest Mr. Kassa.

In conclusion, reasoning on behalf of Mr. Kassa, questions regarding when, and upon which concrete finding, the police decided that Mr. Kassa was no longer a person of interest (amongst other individuals) but became a suspect and was finally arrested would arise from all of these pieces of evidence combined. However, with respect to post-conviction review eligibility criteria, while the findings may be crucial to Mr. Kassa, the evidence remains a mere observation and its relevance would have to be determined by an investigating agent.

6.3 - Another Suspect Abandoned during Police Investigations

Another person of interest who was never identified but referred to in witness statements was said to have gone by the name of “Ice”. This individual allegedly confessed to the murder and gave a piece of jewelry, that had been handed to the victim as a gift from her parents the night of her death, to a sex worker who went by the name “Shakira”. According to police records, in a follow-up on notes of one of the investigating Detectives, a witness to be re-interviewed was expected to state the following:

“[The witness] is a resident of [the victim’s building]. [Witness] contacted police [name of Detective] as he had information about the homicide. [...] On Saturday after the murder (January 7, 2005), he had observed the male party from apartment [number] dealing drugs with a black male in the lobby of the building. He heard the black male state that he got away with first degree murder and arson. The black male told the tenant from apartment [number] to tell other tenants to keep their mouth shut or he would finish

them off. [Witness] knows that the black male goes by the name of 'Ice', has dreadlocks, is 20-30 years old, average height, medium build and has a 'Ghetto Like' accent."

Whereas the individual by the name of "Ice" was never identified, police made significant attempts in trying to locate the person as, according to police records, a "media release was prepared [...] and disseminated appealing for witnesses who may know the identity of a male known as 'Ice'". Further, an interim report of private investigators retained by the Defence, revealed the following:

"We have been unable to locate this person with the limited information provided. [Another witness] and a prostitute by the name of Shakira are reported by you as at one time dating each other and that Shakira may have in her possession a gold chain that originally belonged to a girl killed in the building that she had obtained from Ice."

The sex worker referred to in this report was also never identified but police records indicate that on January 4th, 2005, the victim "met her parents in the lobby of the building where they provided her with some chocolate, clothes, a radio and a gold bracelet."

"Information that questions the police investigation's integrity?"

On the one hand, it seems to make sense for investigating Detectives to abandon certain leads that, at first may have appeared promising, but were later found to have either been based on unreliable information, or the involvement of a person of interest could be ruled out through the use of techniques such as polygraph tests; a common practice in the police investigation pertaining to Mr. Kassa. On the other hand, from the perspective of an applicant to the CCRG, a valid question to ask would be what happens to leads that seemed highly relevant and may have pointed towards a potential suspect throughout the investigation, but remained unsolved or unconfirmed, after the applicant (in this case Kassa) was arrested for the crime committed?

In Mr. Kassa's search for the 'truth' or evidence that could support his innocence, it would be logical to begin by examining the early stages of the criminal justice process and include considerations of investigation leads that were not concluded by the police. Particularly in the absence of potential fresh evidence that represents irrefutable new facts, such as a provable alibi or DNA, the only alternative to adequately support an application to the Minister of Justice would be to present evidence that either points towards the guilt of another, or away from his own. As the preceding discussions revealed, however, both of these options are, in this particular case, problematic. Attempting to point towards the guilt of a third party would start by investigating into the existing police record and, as the evidence presented above can attest to, any promising leads are very likely to relate to an individual who had never been found or spoken to, or else they would have either been ruled out by the police or had possibly turned attention away from Kassa and towards that individual. Based on this, Mr. Kassa would have to go beyond the efforts of the police and the work of his defence team who were similarly unsuccessful in locating potential exculpatory evidence. In other words, Mr. Kassa would have produce evidence that, while having been incomplete and insufficient at the time of the police investigation and trial, can now be supported through additional (new) evidence. Under any jurisdiction, it would be surprising to see a post-conviction review body consider formerly insufficient evidence, lacking corroborating information from within the existent record, as reasonable grounds for launching a new investigation that would be believed to discover the truth.

At the time of writing, neither the search for leads on the individual "Ice" or the sex worker Shakira, conducted by Innocence Ottawa (IO), had led to the discovery of any new information. However, Kassa had informed members of IO that his first defence lawyer, who

was later appointed to the bench²⁴, had questioned the homicide Detectives' point of determination at which Mr. Kassa had moved from a 'person of interest' to becoming a 'suspect' (whose involvement in the murder was substantiated). According to Kassa, the homicide investigation had been deemed a "cold case", which was only re-opened when a new "supervisor [at the homicide unit] reviewed the case and decided that the existing evidence was sufficient for the Detectives to make an arrest". Although I was unable to confirm Mr. Kassa's claim that the homicide unit determined the investigation a "cold-case", police briefing/meeting summaries indicated that a new Detective Sergeant had commenced the duties of case manager after the former Detective in charge was reassigned to Uniform Patrol. Moreover, the record states that on February, 22nd, 2007, only a month and a half following the receipt of the crucial crime stoppers report (which identified 3 possible suspects as discussed above) that had not yet been investigated, a case conference decided that:

"[...] there were reasonable grounds to arrest Hailemikael KASSA for the murder of [victim's name]; however, several follow up actions to assist with the investigation and prosecution were identified."

Taken into account the evidence presented previously, the potential issue of tunnel vision, and the final steps identified in police records as having taking place prior to Mr. Kassa's arrest, are of concern and certainly significant in support of Mr. Kassa claim. However, the findings presented here do not constitute definite proof of guilt, or innocence, per se and would have to be left to the interpretation of investigating agents and their own subjective reasoning during the conviction review process.

²⁴ To take position or rank of a judge

6.4 - Witness Statements that Add or Detract from the ‘Picture’

Police records indicate that two additional witnesses, who were roommates living in the same building as the victim, were interviewed in regards to their knowledge of the murder. Despite some general inconsistencies in their statements on what transpired the night of January, 4th, 2005, both of the witnesses shared that the victim had called one of the witness’s cell phone repeatedly, up until the early morning hours of January 5th between 2:00 and 2:30am, in attempt to sell a bottle of Vodka:

“She didn’t say anything else about anything or anybody, but she really wanted to sell it. Normally, she would ask if you want it okay, if you don’t that’s fine, but on this night it seemed like she really needed the money.”

Police was able to confirm the time of these phone calls from the victim’s apartment to the cell phone through the seizure of phone records from the witness’s cell phone provider. One of the witness’s, other than the owner of the cell phone, stated that he used to buy alcohol from the victim in the amount of “\$20 per bottle”.

With regard to the witness’ statements, and the victim’s alleged “desperate” search for a buyer of the Vodka bottle only hours before her death, it is important to note that the victim appeared to have had ‘unusual’ money troubles throughout the day of January 4th, 2005. Namely, another witness who described herself as the victim’s best friend testified having been to the victim’s apartment earlier that day and recalled being asked for money. The following is an excerpt from the witness’s testimony and the answers given to questions posed by the Crown during examination in-chief:

“Q. So you left at approximately four-thirty. Did you talk to [the victim] about anything else in her apartment? [...] A. She said, [name of witness], she said, do you have any money, and I said, [victim’s name], I said, you know I don’t usually have money. [...] And that kind of surprised me because she wasn’t a selfish person. Q. Did [the victim] specify

the amount of money she wanted? A. No, she did not. Q. Was that unusual or commonplace for her to ask you for money? A. It's unusual."

Despite this alleged 'money trouble' described here, evidence previously discussed suggests that the victim acquired money or was in possession of money at approximately 8:30 or 9:00pm when she asked for a bottle of wine from an alcohol delivery service, which she later purchased in the amount of "approximately twenty to twenty-five dollars" and paid for in what was "mostly – there was bills but there was mostly change she had", according to witness testimony.

Taken together, these findings can lead to the assumption that, while the victim was without money or in need of money at around 4:30pm, she had or had acquired money before her purchase of a wine bottle at approximately 9:00pm, although she may not have been able to pay the delivery person "the full amount of money" and was again in search of money after 2:00am when she attempted to sell a bottle of Vodka. Interestingly, in connection to this chain of events, however, as previously presented in evidence, crime scene photos provide proof that the victim did in fact have a 20 dollar bill in her possession sometime before her death. Keeping this in mind, a Detective, who was one of the first to arrive at the scene, testified to the following when asked questions by the Defence on items found at the apartment:

"Q. Just while we are waiting for a view of the kitchen, you didn't look for any other plastic bags, in general, or LCBO bags, in particular, did you? A. No. Q. You didn't imagine at the time it was important to the investigation. A. No. Q. And again, while we're waiting, you didn't find any liquor bottles in the... A. No. [...] Q. Okay. And no wine, liquor, any alcohol. A. Yes."

This line of questioning by the Defence can be assumed to have primarily been aimed at counter-balancing the Crown's theory that the LCBO bag found at the crime scene, containing Mr. Kassa's DNA on cigarette butts, was in fact the same LCBO bag that was used to deliver the wine in on the night of the murder. The Crown attempted to suggest that Mr. Kassa had been present in the apartment that night based on this evidence. To argue that there could have been

other similar bags, since no inventory was taken of other LCBO bags in the apartment, the Defence proceeded to refer to a “large” garbage receptacle which, as confirmed by the Detective (based on a picture presented to him at trial), contained towels but also other items that “*could be plastic bags*”. While this examination by the Defence was certainly of substance in itself, the Detective’s response that no liquor bottle or wine bottle was found at the scene gains even greater relevance in connection to the two residents who stated that the victim was ‘desperate’ to sell a Vodka bottle. Police briefing/meetings summaries further confirmed that a search of the garbage outside of the residence, which connected to the building’s garbage chutes including the chute located on the victim’s floor, did not discover any wine or liquor bottles.

“Evidence that suggests additional ‘truths’?”

The findings presented above certainly raise more questions with respect to what transpired at the victim’s apartment on the night of January 4th. Moreover, the evidence does not contradict the prosecution’s ‘truth’, presented at trial, *or* Mr. Kassa’s claim of innocence. However, while it appears that none of the pieces of evidence presented are ‘significant or new’ if considered in isolation, in connection to other elements of the case they can help draw an additional or extended picture of the ‘truths’ that have so far been presented by the prosecution *and* Mr. Kassa. How did the victim obtain 20 dollars? Is there a link between the 20 dollars left behind at the crime scene and the absence of any liquor bottle that she allegedly attempted to sell? Did someone buy the bottle sometime after 2:30am and, if so, who did? What happened to the wine bottle that the victim bought at around 9:00pm? Did her alleged guests, that the delivery person testified to, take the bottle with them?

As these questions illustrate, the findings point to certain unknown truth about the case that were never answered or addressed; neither by the prosecution, who provided one possible version of the truth, nor by the police, who started an investigation without one particular suspect but rather an array of different persons of interest, who later became possible suspects. Despite the additional ‘gaps’ revealed in this review of what may have occurred that night, particularly during the hours of 2:30am and roughly 7:00am, the question remains whether or not those missing elements are considered relevant or significant enough to be investigated by a post-conviction review body. In isolation, the answer could reasonably be assumed to be negative, however, from the perspective of the applicant, the evidence perceived as a whole broadens the scope of possible ‘truths’ and may ultimately demonstrate that the prosecution’s case against Mr. Kassa provided just one of many possible realities of the events that took place in the morning of January 4th, 2005.

Based on this, and if the CCRG were to take the many unanswered questions into account (an approach that legislation does not provide any clarification on), one could possibly come to the conclusion that the evidence presented (as a whole) leaves a certain degree of doubt. A doubt that could affect a reasonable person’s belief that Mr. Kassa was in fact guilty as charged. Unfortunately, however, even if an investigating agent at the CCRG were to experience a feeling of “unease” regarding the conviction, legislation does specify eligibility criteria and a ‘hunch’ or personal opinion of one lawyer’s assessment may not be enough to make it past the preliminary stage. Whereas the English legislative framework accepts standards of a “lurking doubt”, the CCRG’s discretionary powers are a lot less transparent or easily identified within legislation.

6.5 - Discussion

An examination of evidence considered significant, yet ineligible, in the context of Canadian post-conviction review legislation led to the construction of an alternative ‘truth’ of Mr. Kassa’s conviction. While the discovery of additional ‘gaps’ of what is assumed to be ‘known’ about the homicide in question does not stand in direct support of Mr. Kassa’s professed innocence, it is the presentation of arguable new ‘facts’ that are equally ‘reasonably capable of belief’, and ‘not previously considered’, that may cast doubt on what the prosecution was able to construct in their trial version of the ‘judicial truth’ (Le Masson, 1998).²⁵

Le Masson referred to ‘judicial truth’ as a ‘truth’ held by trial through judicial *syillogism* (1998, p. 21), which can be defined as “a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion”, or simply be referred to as “deductive reasoning” (Merriam-Webster Dictionary, 2017). The ‘truth’ constructed at trial is different from the “one sought out in other fields [...] as it implies the application of a rule of law to contentious facts” (Le Masson, 1998, p. 21). This is to say that, in accordance with Volk (2000, p. 106), who argues that the truth is constructed and cannot simply be equated with a reconstruction of ‘reality’, my findings derived from Mr. Kassa’s criminal case file are not a representation of the ‘reality’ of what occurred on the night of January 4th, 2005. Rather, the combination of the evidence presented herein must be seen as being no more and no less than an alternative account of *arguable* facts, which can be viewed as the construction of an equally valid (or not) ‘truth’ held by another actor in the ‘truth-seeking’ process.

²⁵ An analysis of Foucault’s work on *Wrong-doing, truth-telling : The function of avowal in justice* (2014) may provide an alternative approach to the author’s conveyance of Mr. Kassa’s data with respect to the quest for truth, and ‘alternative truths’.

Whether Mr. Kassa's 'truth' as presented here, and in pursuit of a formal remedy under section 696.1 of the *Criminal Code*, is perceived or interpreted as valid, however, ultimately depends on the CCRG's application of "a rule of law to contentious fact" (Le Masson, 1998, p. 21). Within this, and given that 'facts' are arguable or debatable, matters of discretion become crucial. Based on my analysis into the 'governmentality' of the Canadian Criminal Conviction Review Group, however, the discretionary powers given to investigating agents are made less explicit than in the legislative frameworks of other jurisdictions. England and Scotland appear to have placed a greater emphasis on matters of discretion in their provisions based on an explicit commitment to providing impartial assessments of claims of innocence post-conviction. For example, England's application of the 'real possibility standard' is defined as 'more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty' (*R.v. Criminal Cases Review Commission ex parte Pearson* [1999] as cited in Kent, 2010). Canada, on the other hand, does not provide such insight into the reasoning process that would support the Minister's 'satisfaction' that a 'miscarriage of justice likely occurred' (CCRG Annual Report, 2016, p. 6). Based on the lack of transparency and public access to previous determinations, it is difficult to speculate how the Minister arrives at a final decision.

As previously discussed, Leverick et al. (2009) suggest that it is unknown whether terminological differences carry any practical implications on referral rates but a general consensus seems to exist that no criteria should be too restrictive as to limit the commissions' ability to use discretionary powers (p.10). Relating this finding to the Canadian context, it is debatable whether the 'vagueness' in terminology is meant to serve as a safeguard against rigid applications of review criteria or if the absence of further definition on the Minister's discretion serves as a measure to maintain the governor's power to exercise discretion without oversight

and with less external scrutiny. Given the lack of transparency on the CCRG's review process, at this moment in time, I am more inclined to reason that the absence of clarification is connected to the government's underlying rationale that Canada does not experience the same 'conflict of interest', as the one experienced by the former English review process (under the Home Secretary), and therefore does not require enhanced independence or impartial governance of claims of innocence post-conviction. Based on my findings and discussion of Mr. Kassa's challenges in attempting to adequately support his application, the fact that very little confidence could be placed in whether or not the governing agent would consider his discoveries as significant matters, leads me back to the conclusions drawn from an analysis into the governmentality of the CCRG.

Prior to having investigated the effects that CCRG regulations carry on its applicants, my findings on government rationalities, and the technologies implemented to meet certain objectives, indicated a power imbalance where the applicant is responsabilized to prove his innocence with very few guidelines and under a status quo that may create a sense of distrust in the impartiality of the review process itself. Relating these findings back to the above discussion, it becomes evident that the vagueness in terminology and lack of clarification regarding the Minister's reasoning process or her application of discretionary powers exacerbates rather than alleviates this problem of potential distrust. In other words, if the objective were to provide a formal remedy that offers a high level of agency to the applicant in discovering the truth and an impartial referee to judge potential failings of the conventional justice system, one would expect the reviewing agent to explicitly state how such objectives are met, as has been the case in every other post-conviction review discussed within this research. However, this does not occur under the current regime in Canada.

Without further guidelines on how strictly criteria are applied or to what extent the Minister exercises powers of discretion, presenting evidence in support of one's innocence poses a difficult task. Regardless of one's belief in Mr. Kassa's guilt or innocence, the consequences of a rejected application are dire for individuals who receive a criminal conviction of the same gravity as Mr. Kassa and an applicant would want to support his or her application with a high degree of confidence, especially if no further appeal options are available. While two and half years of a lengthy investigation, conducted by volunteers who worked on Mr. Kassa's behalf, has led to discoveries that would simply require greater powers of investigation and for a review body to 'see' beyond matters of law, Mr. Kassa is ultimately left with the decision of whether he 'trusts' that the current evidence would be assessed from an objective, thorough and impartial perspective.

CHAPTER SEVEN:

ANALYSIS AND CONCLUSION

The purpose of this thesis was to critically investigate the criminal conviction review process in Canada and, based on Mr. Kassa's criminal conviction as an illustrative example, explore to what extent the current ministerial review policy provides a remedy to wrongful convictions. This was accomplished through briefly analysing the governance of possible miscarriages of justice in Canada, from a 'governmentality' perspective, and investigating the criminal case file of an innocence project's client in search for 'new and significant matters' that could warrant post-conviction relief under section 696.1 of the *Criminal Code*. From this investigation, seven major themes emerged during the search for evidence relevant to Mr. Kassa's attempt to support his post-conviction claim of innocence to the Minister of Justice: evidence of information that substantially contradicts trial testimony, important yet undisclosed evidence, facts that prove the absence of motive, information that identifies another person at the crime scene, tunnel vision, information that questions the police investigation's integrity and evidence that suggests additional 'truths'.

The present chapter will provide a more detailed analysis of the research findings with respect to the analytical framework that guided this research, in addition to a comparison of significant themes from the literature. This will be conducted as follows: beginning with a short discussion of the major findings, followed by a brief overview of the major trends in the data and comparison to the literature, next is a discussion on the extent to which the theory guiding this research was applicable, an overview of the strengths and limitations of the research, and lastly, a discussion of directions for future research.

7.1 - Major Findings Revisited: The CCRG and the Case of Michael Kassa

The first set of findings relate to a brief analysis of the current Canadian post-conviction regime, under section 696.1 of the *Criminal Code*, from a governmentality perspective. Analyzing the current conviction review process based on the way in which this particular regime of practice problematizes the issue of miscarriages of justice, the basis upon which it rationalizes and maintains the status quo, and the logic behind the governmental technologies and rationalities employed by the ‘governer’ resulted in a number of conclusions. In particular, the current law and procedure implicitly removes the responsibility for errors from the conventional justice system, in fact the status quo remains the same despite various legislative changes and, lastly, the current logic supporting the regime’s ‘governmentality’ (as an extraordinary remedy) responsabilizes the applicant to meet its primary objective.

By defining miscarriages of justice as a judicial error post-appeal and restricting the eligibility criteria to new and significant matters not previously considered by the courts, the current regime makes explicit its refusal to consider systemic flaws that are known to occur at trial, appeal and during the post-conviction review process (MacFarlane, 2006). Despite various legislative changes in the past, the Canadian post-conviction review scheme continues to demonstrate a certain degree of resistance towards establishing a more independent and impartial review process and appears to find ‘band-aid’ solutions to circumvent a thorough investigation into the greater governing structure of the process as it stands today. Whereas the establishment of the Criminal Conviction Review Group (CCRG) aimed at creating a separate unit of investigating lawyers that could counteract criticisms of potential prosecutorial bias, the final decision to reject or refer a case back to the courts remains the sole power afforded to the Minister of Justice. Moreover, an explicit commitment towards greater independence and

impartiality (in policy and procedure) is only made with respect to the relationship between the CCRG and the Minister, not between the governing agency and the applicant. Based on this, legislative initiatives to date aimed at changing the status quo have done little but temporarily silenced long-standing criticisms by implementing new governmental regulations that appear to achieve common objectives but only half-heartedly support these objectives in its underlying rationale. Examining the logic of this regime of practice further, the CCRG applicant, or 'governed' in this context, is responsiblized to secure the overall objective set out in post-conviction review policy to provide a remedy to his or her own wrongful conviction.

The second set of findings relate to my investigation into the criminal conviction of Michael Kassa in 2009. Adopting a 'realist governmentality' perspective, the primary purpose of this investigation was to study the effects of policy at the micro-level, or in what Stenson (1998) calls 'the real'. The first theme that emerged during this investigation with respect to matters that can more closely be understood as new and significant in a legal sense, and thereby fit the CCRG's eligibility criteria, relates to *information that contradicts testimony given at trial*. In this instance this refers to the fact that Kassa's former girlfriend referred to an alleged stabbing of another victim shortly before trial which could have raised doubts as to whether her testimony at Mr. Kassa's trial regarding blood on his clothes was in fact related to the death of the victim in question. Although this evidence represents an example of a potential 'new and significant matter(s)', this finding demonstrates that, in order to fully meet the criteria, some additional challenges arise and make the admission of such evidence (during conviction review) unlikely. In Mr. Kassa's case, while the witness' credibility had been questioned at trial, the possibility of perjured testimony had already been raised and dismissed on appeal, which would make it unlikely for conviction review agents to re-consider her testimony or any additions made to it at

this stage of the process. Similarly, the second theme regarding *important yet undisclosed evidence* represented another example, as listed by the CCRG as ‘new and significant matters’ but could not be substantiated through additional evidence. In this instance, a new witness was discovered during both private investigations and by the Innocence Ottawa team, who described another potential suspect who was allegedly involved in an argument with the victim prior to her death. This finding could be described as uncorroborated ‘other suspect evidence’ that, if compared to admissibility tests applied at trial has a limited chance of being considered during conviction review given the absence of additional evidence that can sufficiently substantiate information on the alleged suspect.

The third and last finding, representing new and significant matters (in a legal sense), relates to material evidence in form of a crime scene photo. This evidence led to the emergence of another theme, namely *facts that prove the absence of motive*. In this instance a crime scene photo from the victim’s apartment indicates money on the table substantially contradicts the Crown’s theory which posited that the victim was murdered as a result of being unable to pay an outstanding drug debt). Again, albeit new and significant, this evidence poses challenges to the applicant in meeting legal eligibility criteria. Dissecting the legal criteria of new matters of significance, the evidence must be reasonably capable of belief, and may have affected the trial verdict (if brought before the jury), but it is unclear to what extent it would speak to the ‘issue of guilt’. Generally speaking, under Canadian law, the presence or absence of motive is not relevant to the element of criminal responsibility.

The concluding set of themes that emerged during this investigation relate to matters that, while adding significant information to Mr. Kassa’s case, lack legal relevance. Similar to a previous finding, the first theme referred to *information that identifies another person at the*

crime scene. In this instance another witness described an unknown male individual entering the building prior to the victim's death and also testifying that this individual allegedly took the elevator to the same floor as the victim's apartment. Again, given that the evidence was previously considered on appeal, it could not be raised during conviction review. This stringent eligibility criterion may (in some cases such as this one) present a major road block to the applicant and is inconsistent with the main objective of post-conviction review policy to uncover the truth. Two additional themes that emerged during this investigation relate to the police investigation leading to Mr. Kassa's arrest: potential evidence of *tunnel vision* and the premature abandonment of significant leads. Although tunnel vision has been widely recognized as one of the contributing factors to wrongful convictions (Ainslie, 2011; Denov & Campbell, 2005; MacFarlane, 2006; Roach, 2013), even in cases where it clearly exists, these findings have demonstrate the difficulty of proving or substantiating such possible miscarriages of justice through post-conviction review policy based on tunnel vision. In the same vein, the last finding, which uncovered *additional 'truths'* to what had been presented at trial, demonstrates significance from a layman's perspective but not from a legal standpoint.

To re-iterate, it is important to remember that in exploring to what extent post-conviction review policy provides a just remedy to wrongful convictions, the combination of the evidence presented in these findings (as much as evidence presented at trial) is not a representation of reality (Volk, 2000, p. 106) but an alternative account of arguable facts. Based on this, results from an investigation into Mr. Kassa's criminal conviction should be viewed as the construction of an equally valid (or not) 'truth' held by another actor in the 'truth-seeking' process. The problem is to ascertain to what extent Canadian post-conviction review policy allows for an

applicant to navigate eligibility criteria, present his version of the truth, and to provide him with a just means of remedying wrongful conviction.

7.2 - 'Where there's Power, there's Resistance': Proposing Alternative Ways of Doing

Things

In order to adequately address the main research question, it is important to situate the findings from my investigation into the Canadian post-conviction review scheme, and the effects of the current policy on Mr. Kassa's attempt to file a successful application for ministerial review, within the greater context of my research. Situating the research findings within the review of the literature on conviction review schemes operating in other countries, some significant conclusions can be drawn with respect to how the Canadian regime of practice compares to other legislative bodies or formal remedies that are essentially aimed at addressing the same problem: miscarriages of justice emerging from similar systemic flaws and similar contributing factors to wrongful convictions found within various criminal justice systems in varying jurisdictions.

First and foremost, despite the fact that the Canadian conviction review scheme shares the similar underlying rationale to revisit miscarriages of justice at this level, it continues to remain distinct from other jurisdictions in its governmental technological approach and the current regime, established in 2002, reflects this contestation. In her presentation of the omnibus bill of criminal law amendments in 2002, Bill C-15A, which ultimately led to the creation of the current regime of s. 696.1 – 696.6 of the *Criminal Code*, the former Minister of Justice (Anne McLellan) recognized the fallibility of all justice systems and the need for a 'safety net' for victims of wrongful convictions. However, and more significant to this discussion, she also

expressed her contention that these are “exceptional cases that have somehow fallen through the cracks” (McLellan, Standing Senate Committee, 2001b, para. 1450). Against reform possibilities proposed in a public consultation paper previously presented (Department of Justice, 1998), the former Minister defended the essence of the current status quo, and thereby the logic behind the regime, in stating that Canada’s review process does not experience the same ‘conflicts of interest’ that had led to the establishment of a more independent and impartial innocence review commission in the United Kingdom (McLellan, Standing Senate Committee, 2001b). In examining post-conviction review policy and the CCRG (on behalf of the Minister of Justice) as a regime of practice, the findings of this research reflect a similar rationale.

From a (realist) governmentality perspective, however, the goal of this research is not to judge how the current regime should or should not operate but, instead, extract and examine its ‘intrinsically programmatic character’ (Dean, 2010, p. 43) and explore how the implemented technology (securing its objectives) can affect its targeted population, herein claimants of innocence post-conviction conceptualized as the ‘governed’. Based on the findings of my investigation into Mr. Kassa’s criminal conviction, my first observation is that, in comparison to other review bodies such as the one currently operating in North Carolina (which limits its scope of review to claims of factual innocence), the CCRG offers a much more flexible standard to its applicants. Additionally, given that the term ‘miscarriage of justice’ is rather generously applied during the Canadian appeal process, and the fact that the CCRG does not focus on matters of factual innocence per se, Mr. Kassa’s presentation of primarily circumstantial evidence in support of his application may prove to be a more hopeful endeavour within the Canadian legislative context. On the other hand, the Norwegian model offers a more explicit dedication towards ‘discovering the truth’ within their application, which is directly reflected in the

commission's impartial and inquisitorial nature. This would allow for applicants facing similar challenges as Mr. Kassa's in that jurisdiction to be able to place greater confidence in the commissioners' efforts to investigate uncorroborated yet significant information.

On this note, regarding my analysis of specific elements in the case of Michael Kassa, my research findings suggest that, although his alternative account of the 'truth' appears capable of raising doubts in investigators' minds with respect to his involvement in the murder, each piece of evidence (viewed in isolation) demonstrates great difficulties in meeting CCRG criteria. Whereas it may be possible that the Minister's discretionary powers to investigate extends to some of the evidence that is significant yet not (legally) cogent, the current general principles set out in the review body's policy documents (CCRG Annual Report, 2016) do not suggest such an approach. In comparison, and relevant to Mr. Kassa's case specifically are provisions in other jurisdictions such as the granting of immunity in the North Carolina model (*N.C.G.S.*, Article 92, para. 15A – 1468 (1a)) or the Scottish legislation accounting for 'changes of heart' in new or prior witnesses post-conviction (*Church v. HM Advocate*, 1995; Gordon, Renton & Brown, 1996, paras. 29-36), essentially incentivize witnesses to tell the truth without fear of repercussion and allow for the consideration of evidence that may have been raised at trial but only acquired significance after the trial had unfolded. For Mr. Kassa, given that his conviction was based on a tenuous prosecution case at best, a similar legislative approach in Canada would be crucial when dealing with questionable witness' statements that constitute circumstantial evidence.

Previous discussions established that Mr. Kassa's criminal case file and conviction lacked indisputable facts such as DNA evidence or direct circumstantial evidence (i.e. testimony of another person having witnessed the crime) that would link him to the offence. Moreover, any 'new' evidence uncovered in this research was either insufficient (in a legal sense) or could not

be substantiated through additional information that would be capable of connecting various loose ends. Kassa's tenuous prosecution case was the result of a police investigation that did not uncover concrete evidence and consequently Mr. Kassa was left with very little evidence to investigate in preparation for his trial, appeals and later his post-conviction review application. Current eligibility criteria, however, focus on new matters of significance outside of previous courtroom proceedings and the greater part of the new evidence presented in the current research relates to the police investigation, matters that were 'known' to the authorities at the time of the investigation and were either abandoned (i.e. two additional suspects that remain unidentified) or constitute questionable conclusions drawn from unrelated investigative leads. The conclusion of Kassa's involvement appears to have been drawn based on "the single-minded and overly narrow focus on a particular investigative or prosecutorial theory" (Kaufman, *Morin Inquiry*, 1998, para. 1134) and ultimately supported his involvement in the murder. This type of fresh evidence indicates that, from the applicant's perspective and his account of the 'truth', partial responsibility of his alleged wrongful conviction must be ascribed to criminal justice officials' misconstruction of 'known information'. The result is that Mr. Kassa is forced to rely on the independent and impartial post-conviction review of investigating agents. Agents would have to be (A) sensitive towards and cognizant of systemic flaws when considering the presented evidence as a whole and (B) assess the presented evidence as a comprehensive picture and not in isolation. Based on this, the underlying rationale uncovered in this research, using legislation and policy as text-as-evidence, becomes an integral part in understanding to what extent the Canadian regime provides a just remedy to wrongful convictions.

In rejecting an independent review commission for Canada, the former Minister of Justice asserted that Canada does not experience the same conflict of interest as the United

Kingdom. She was referring to the former review process in that country where the Home Secretary was also responsible for policing and prisons (Naughton, 2009) and would have difficulty finding error in ministries within his or her purview. However, the findings of this research support that another possible underlying reason for rejecting a body of impartial oversight may very well be connected to the government's unwillingness to examine its own practices. The finding of the current research project regarding the rationalities of the Canadian regime, which remove the responsibility for error from the conventional justice system, sheds light on why Mr. Kassa has experienced such difficulty in meeting current eligibility criteria, a great deal of the evidence presented here, specifically those relating to flaws in the police investigation, did not come close to meeting the current standard for review. Therefore, based on Mr. Kassa's criminal conviction as an illustrative example, Foucault's famous phrase "where there is power, there is resistance" (1979, p. 95) applies in this context only insofar as to speak to the reality of the 'governed' retaining the freedom to produce counter-discourse (Naughton, 2007), or the production of knowledge that could propose alternative ways of doing things (Garland, 1997; Gilling, 2010, p. 1137). The discourse produced by this project through establishing Mr. Kassa's case and his claim of innocence is an illustrative example of the experience of the governed. At the same time, this project also demonstrates that Canadian post-conviction review policy is restrictive and does not offer much room for agency with respect to the applicant's presentation of his account of the 'truth', especially when this 'truth' emphasizes potential systemic flaws and would require criminal justice system officials' to be held accountable. Without greater flexibility in matters of the law, judicial opinion, post-conviction review investigation and, most importantly, the necessary recognition of inevitable errors in

human-decision making, applicants such as Mr. Kassa experience insurmountable obstacles in having his conviction re-considered.

7.3 - Research Limitations

As discussed in Chapter Three, one rather obvious limitation to this research may be the fact that its major findings are based on the experience of only one applicant to the Minister of Justice for conviction review. However, it is neither the goal of this project, nor does it constitute the aim of qualitative research as a social sciences endeavour overall, to be able to generalize the results (Schofield, 2002, p. 202). A more significant limitation to this research and the brief analysis of the Canadian regime governing applications for ministerial review relates to the fact that the data findings on the operation's underlying rationalities were based on text-as-evidence. In accordance with critiques of other governmentality analyses (Stenson, 2005, 2008), this research did not address the aspect of necessary empirical inquiry that Foucault had originally emphasized (McKee, 2009). In order to truly examine the rationalities underlying government technologies, Foucault had envisioned empirical research that could question practitioners and uncover some of the 'taken for granted' ways of thinking, and application of knowledge, at different sites of governance (Garland, 1997).

Although it would have been beyond the scope of this research, and would have directed its focus towards another end, interviewing investigating agents on behalf of the Minister of Justice would have allowed for greater insights on aspects such as discretionary powers, flexibility regarding the application of matters of the law and the willingness to investigate previously considered evidence on a case-by-case basis. Moreover, although this had been an initial thought with respect to the current project, in order to truly capture the experience of the

governed, interviewing Mr. Kassa could have yielded additional and worthwhile results. Based on time constraints and feasibility, I abandoned both possibilities early on in my research. Further, as stated in previous chapters, in examining to what extent Canada's current regime provides a remedy to wrongful convictions, it was not my intention to present Mr. Kassa's personal account of the truth but rather let the record speak for itself.

Lastly, I had considered examining parliamentary debates with respect to the Criminal Amendments Act proposed in 2001 (omnibus Bill C-15A that ultimately led to the creation of the current regime) in order to broaden my understanding of the governor's underlying rationalities. Although it is my opinion that such further exploration is warranted, a comprehensive governmentality analysis with a focus on the position of the governor would have overshadowed the lived experience of the governed as discussed in this project.

7.4 - Directions for Future Research

While I generally disagree with some critics of case study methodology, who have defined its method as merely a preliminary tool for subsequent and more 'complete' projects (Yin, 2014), I believe that the various examinations conducted in this thesis highlight important directions for future research. For example, the review of the literature on the different post-conviction review schemes operating in North Carolina, the United Kingdom, Norway and Canada (as presented here) warrants further investigation and comparative study. Potential findings from large-scale governmentality analyses of post-conviction review policies in Canada, and elsewhere, could affect legislative change and raise policy-makers' (and practitioners') awareness on the underlying rationalities that may continue to place obstacles to the establishment of efficient and *just* remedies to wrongful convictions.

As a concluding thought to this thesis, and in relevance to future directions, I want to emphasize the essence of the ideas expressed in Naughton's *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (2007), which underline the value of creating counter-discourse and knowledge. Whichever form future qualitative research in this field may take, i.e. interviewing claimants of innocence post-conviction or volunteers who work in their defence, Mr. Kassa's story stresses the need for the production of knowledge on behalf of the governed. Although his fate is yet to be determined, the findings of this research support that in order for the governed to enter a productive dialogue with the governor, and exercise their power of resistance, creating knowledge that steps outside the confines of government is essential.

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APPENDIX A: CASE STATISTICS

The North Carolina Innocence Inquiry Commission:

Based on the commission's annual reports between its year of inception in 2007 and the most recent statistical update on December 30, 2016, the NCIIC had closed 1946 of the 2005 claims it has received - at an annual average of 223 cases²⁶, with its most recent year of operation having received 198 applications (NCCIC Annual Report, 2016). Although the commission rejects a relatively high number of its applications, in fact ten out of eleven cases it has referred back to the judiciary for final review lead to the conviction being quashed; the NCIIC claims an overall success rate of 90% (NCIIC Case Statistics, n.d.). In terms of general typology of criminal cases, the commission lists homicide referrals at 18% and sex offences involving child or adult victims at 24%. According to the NCIIC, the main reason for rejection (in 28% of its applications) is based on the lack of new evidence, followed by 20% of cases in which innocence had "no way" to be proven or the applicant simply did not claim complete factual innocence (NCIIC Case Statistics, n.d.).

The English Criminal Cases Review Commission:

The CCRC accepts applications from the Crown Court and Magistrates' Courts. While Muncie and Wilson (2004) state that nearly all cases are concluded in lower or Magistrates' Courts (approximately 97%), most applications to the CCRC involve more serious offences with only eight percent having been the result of a magistrate's conviction in 2004 (Kyle, 2004, p. 662). Moreover, although the nature of offences brought before the CCRC covered a broad range with equal percentages for homicide and drug offences, serious sexual offences took a significant

²⁶ The average number of annual applications was calculated dividing the total number of applications received by the commission's number of years of operation and it is an approximate number

lead by 39% (ibid, pp. 662-663). The latest statistics spanning from April 1997 to October, 2016, claim that the CCRC referred 626 of 20,470 completed applications (21,514 including ineligible cases) back to the CACD, of which 410 appeals were allowed and 181 dismissed (CCRC Case Statistics, n.d.). According to Schehr and Weathered (2004), although the CCRC's statistics have spawned international interest and its efficacy served as a role model to other error-correction models, concerns have been raised about the due diligence of the commission's investigations. Given the pace at which caseworkers have been able to process a high volume of annual applications, approximately 1132 per annum²⁷ (1,599 in 2014/2015) (CCRC Annual Report, 2014/2015), concerns have been raised with respect to the quality of assessments. Further, the fact that the decision to refuse a case for referral requires the sole judgment of one commissioner has been met by opposition. However, according to CCRC guidelines, caseworkers always maintain open communication with their applicant, encourage the advice of legal counsel and invite feedback or an opportunity for clarification before a final decision is reached (The Criminal Cases Review Commission, n.d.).

The Scottish Criminal Cases Review Commission:

Between April 1st, 1999, and March 31st, 2016, the SCCRC had concluded 2136 of 2166 applications received. While 76 out of 116 cases referred to the High Court were successful on appeal, 40 remained unsuccessful and 11 were abandoned by the courts. Research conducted by the SCCRC into its own performance from 1999 to 2008 suggests that its overall referral rate ranged from anywhere between six to eight percent (Leverick et al., 2009). Accounting for different variables, Leverick et al. (2016) report that, from year of inception until 2015, the

²⁷ The average number of applications received per year was calculated dividing the total number of applications received by the commission's total number of years of operation – this is an approximate guess.

SCCRC's approximate referral is 4.5% (71 convictions), with a success rate of approximately 48% (or 33 convictions quashed). While research evidence shows a wide array of offence categories, the SCCRC lists homicide and sexual offences for both sentence and conviction referrals at its highest (SCCRC Annual Report, 2014/2015).

The Norwegian Criminal Cases Review Commission:

Between 2004 and 2015, the NCCRC received a total of 1,973 petitions, of which 1,861 cases were concluded and 251 reopened. An evaluation by the Ministry of Justice in 2012 revealed that 82 percent of reopened cases, resulting in a new trial, led to the complete exoneration of the applicant (Stridbeck & Magnussen, 2011a). Further, independent research from the University of Oslo (Dullum, as cited in Stridbeck & Magnussen, 2011b, p. 1385) found that the most frequent ground for reopening a case was based on new evidence or new circumstance at a rate of 85 percent. While 380 petitions (18%) have been disallowed and 278 (10%) did not qualify for a full review, just about half of the NCCRC's concluded cases (952 or 44%) were rejected by the chair or vice chair based on the decision that they "obviously could not succeed".

The Canadian Criminal Conviction Review Group:

At the time of writing, the Department of Justice (2016) did not provide publications of the CCRG's annual reports from the time of its most recent legislative reform in 2002 to 2009. Therefore, statistical information on the CCRG was derived from a combination of both, research conducted by Roach (2011b) and the available annual reports from 2012 up until 2016 (Department of Justice, n.d.). Based on Roach's sample, the CCRG received a total of 88 applications in the years between 2007 and 2011, but concluded that between 2002 and 2011, the

group was able to complete only 86 of all applications received during that time frame. Of these, Roach also found that the Minister of Justice referred 13 out of the 86 cases back to the courts for re-consideration.

In regards to his observation of the Minister's "risk adverse" decision-making process (Roach, 2011b, p. 290), Roach noted that in all but one of these 12 cases did the applicant receive a favorable outcome. In addition to these findings, the statistical information provided in the review body's Annual Reports (2012-2016) concludes that, since its most recent legislative changes, the CCRG concluded a total of 90 cases between 2002 and 2016. This demonstrates a rather slow processing time considering that only 4 cases were concluded and decided upon within a five-year time frame. However, the Minister did refer 16 out of the 90 cases back to the courts. Based on these numbers, the CCRG claims a 92% success rate despite a relatively low annual average of applications received. Research conducted by Levrick et al. (2016) suggests that, since the CCRG's legislative changes in 2002, the review body claims an annual application rate of 21 applications, out of a total of 272 applications received, and compares at an approximate referral rate of 5.8% (or 16 convictions).

Table of Comparison:

Post-Conviction Review Bodies	Applications to date		Annual Applications		Applications referred	Success rate
	Received	Concluded	Average (approx.)	Applications in 2016		
NCIC <i>(2007-2016)</i>	2005	1946	223	179	11	10 out of 11 (90%)
CCRC <i>(1997-2016)</i>	21,514	20,470	1132	1,599	626	412 out of 608 (67%)
SCCRC <i>(1999-2016)</i>	2,166	2,136	127	148	127	76 out of 116 (65%)
NCCRC <i>(2004-2016)</i>	1,973	1,861	164	152	251 (re-opened)	Full exonerations (82%) <i>(2012)</i>
CCRG <i>(2002-2016)</i>	147 <i>(2007-2016)</i>	90 <i>(2002-2016)</i>	16 <i>(2007-2016)</i>	7	16	12 out of 13 (92%) <i>(2007-2011)</i>

APPENDIX B: INVESTIGATION BRIEF

R.v. Hailemikael Fekade Kassa (2009)

- I. Factual Background
- II. Timeline
- III. Main Evidence Presented at Trial
 - a) Summary
 - b) Main Prosecution Evidence:
 - i. Former Girlfriend's Testimony
 - ii. Pathologist's Testimony
 - iii. Expert Testimony on DNA (Cigarette Butts)
 - iv. Fire Marshall
 - v. Several Investigators' Testimony
 - vi. Witness on wine delivery to victim
 - c) Defense Evidence
 - i. NONE
 - d) Verdict: Guilty of second-Degree Murder (life imprisonment; no parole eligibility for 13yrs)
- IV. Investigation in Preparation of s. 696.1 Application to the Minister of Justice
 - a) Investigation that did not lead to the discovery of 'new and significant matters' as per CCRG criteria
 - i. Investigator stating he had a phone conversation with Kassa "upset and crying" around the time of the murder
 - ii. Crime Stoppers Report
 - iii. Witness statements regarding victim's attempt to sell Vodka bottles
 - iv. Main Crown witness' retraction of recantation (coupled with no evidence of communication of influence/fear of repercussions/perjury threat/private investigator's report) – appeal dismissed claims
 - v. Failure to inventory all LCBO bags/no liquor bottle found in victim's apartment or in garbage
 - vi. Stewart Jackson statement
 - vii. 'Rizzo' statements by witness (police connects Kassa & Crime Stopper Report)
 - viii. Gold Necklace given by parents of victim/Shakira (sex worker) claimed to have worn it, that it was given to her by her "pimp" ICE
 - ix. Witness identifying another person entering the building and taking the elevator to the victim's floor sometime before the murder
 - x. Kassa's loss of employment explaining his sudden unwillingness to cooperate
 - xi. Statement of Probation Officer explaining how Kassa knew that Detectives were investigating a homicide – states in police statement that he had heard about it on the news, never concealed having known the victim

- b) Investigation that led to the discovery of ‘new and significant matters’ as per CCRG criteria
 - i. Additional Statement of Crown Witness short before trial/not adduced at trial
 - ii. \$20 bill in crime scene photo
 - iv. Witness statement regarding unknown “black guy” having imposed himself on victim sometime around the murder – never provided statement to police
- V. Conclusions

APPENDIX C: ETHICS APPROVAL NOTICE

File Number: 05-16-27

Date (mm/dd/yyyy): 08/11/2016



Université d'Ottawa **University of Ottawa**
Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

Ethics Approval Notice **Social Sciences and Humanities REB**

Principal Investigator / Supervisor / Co-investigator(s) / Student(s)

First Name	Last Name	Affiliation	Role
Kathryn M.	Campbell	Social Sciences / Criminology	Supervisor
Sina	Menz	Social Sciences / Criminology	Student Researcher

File Number: 05-16-27

Type of Project: Master's Thesis

Title: Post-Conviction Review: A critical Analysis.

Approval Date (mm/dd/yyyy)	Expiry Date (mm/dd/yyyy)	Approval Type
08/11/2016	08/10/2017	Approved

Special Conditions / Comments:

N/A



Université d'Ottawa **University of Ottawa**
Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

This is to confirm that the University of Ottawa Research Ethics Board identified above, which operates in accordance with the Tri-Council Policy Statement (2010) and other applicable laws and regulations in Ontario, has examined and approved the ethics application for the above named research project. Ethics approval is valid for the period indicated above and subject to the conditions listed in the section entitled "Special Conditions / Comments".

During the course of the project, the protocol may not be modified without prior written approval from the REB except when necessary to remove participants from immediate endangerment or when the modification(s) pertain to only administrative or logistical components of the project (e.g., change of telephone number). Investigators must also promptly alert the REB of any changes which increase the risk to participant(s), any changes which considerably affect the conduct of the project, all unanticipated and harmful events that occur, and new information that may negatively affect the conduct of the project and safety of the participant(s). Modifications to the project, including consent and recruitment documentation, should be submitted to the Ethics Office for approval using the "Modification to research project" form available at: <http://www.research.uottawa.ca/ethics/forms.html>

Please submit an annual report to the Ethics Office four weeks before the above-referenced expiry date to request a renewal of this ethics approval. To close the file, a final report must be submitted. These documents can be found at: <http://www.research.uottawa.ca/ethics/forms.html>

If you have any questions, please do not hesitate to contact the Ethics Office at extension 5387 or by e-mail at: ethics@uOttawa.ca.

Signature:

Germain Zongo
Responsable d'éthique en recherche
Pour Barbara Graves, Présidente du CÉR en Sciences sociales et humanités

APPENDIX D: LETTER OF CONSENT (PARTICIPANT)

Consent Form

Post-Conviction Review: A Critical Analysis²⁸

Primary Investigator: Sina Menz, M.A. Candidate

Supervisor: Professor Kathryn Campbell, E-mail: _____, Tel. _____, Department of Criminology, University of Ottawa, 120 University, Ottawa, Ontario, K1N 6N5

I _____ have been invited to participate in the abovementioned research study (M.A. Thesis) conducted by Sina Menz under the supervision of Professor Kathryn Campbell.

The purpose of the study is to shed light on the post-conviction review process in Canada and explore whether the current system in place provides a just means of rectifying wrongful convictions. The study of my case will highlight the challenges faced by applicants who are applying for a conviction review by the Minister of Justice and are asked to establish their innocence post conviction/outside of the regular appeal process.

My participation will consist essentially of allowing the researcher to have access to the full extent of my files initially provided to Innocence Ottawa. I am allowing the researcher to use the information from my files to meet the purpose and objectives of the research project.

My participation in this study will entail that I volunteer the use of documented personal information pertaining to my criminal trial, appeal process and police investigation. This may cause me to feel uncomfortable. I have received assurance from the researcher that every effort will be made to minimize these risks by using only a necessary degree of detail on personal information contained in my documents in order to meet the objectives of this research project. Moreover, apart from my own identification by name, the researcher will not directly identify any other individual referred to in my documents.

My participation in this study will benefit me by “giving voice” to my experience of applying for a post-conviction review in Canada and possibly help other (future) applicants who are undergoing the same process. My participation will also contribute to raising awareness on the issues of wrongful conviction and miscarriages of justice more generally. Further, I hope this study will contribute to the advancement of knowledge on the challenges encountered by wrongly convicted individuals who are going through the post-conviction review process, potentially benefiting future policy making and individuals or organizations that work in defence of the wrongly convicted.

I have received assurance from the researcher that the information I will share will remain strictly confidential. I understand that the contents will be used only for the purpose of illustrating the process undergone by applicants seeking post-conviction review and that my confidentiality will be protected. More specifically, the data used for this project will focus on information that can speak to the establishment of innocence post conviction in the form of discovery of fresh evidence or new and significant matters that were not previously used in trial. I understand that access to the entire extent of my files will only be given to the primary researcher Sina Menz and her supervisor Professor Kathryn Campbell, in addition to the current access I have consented to and provided the Innocence Ottawa team with.

²⁸ The title of this thesis was modified before submission

I am consenting to the disclosure of my own name, and my identity as a participant, which will be revealed in publications. The anonymity of other individuals referred to in my file (the project's dataset) will be protected in the following manner: Any names are substituted for with descriptors such as "main witness", "person of interest" or "investigating officer" in publications. Any other information that may identify others involved in my case will also be kept confidential.

The data collected, trial transcripts/police files and private investigator reports/notes, will be kept in a secure manner. The original data will continue to be stored in its current location, namely the Innocence Ottawa office. The documents pertaining to my file are kept in a locked office, to which access by key is only provided to researcher Sina Menz and Innocence Ottawa member Jordan Bateman. The data will be conserved in the possession of the Innocence Ottawa team for the duration of this project and until my involvement as a client with Innocence Ottawa comes to an end.

I am under no obligation to participate and if I choose to participate, I can withdraw from the study at any time and/or refuse to answer any questions, without suffering any negative consequences. If I choose to withdraw, all data gathered until the time of withdrawal will remain in the authorized possession of Innocence Ottawa at the University of Ottawa.

I, _____, agree to participate in the above research study conducted by Sina Menz of the Department of Criminology, Faculty of Social Sciences, at the University of Ottawa, which research is under the supervision of Professor Kathryn Campbell.

If I have any questions about the study, I may contact the researcher or her supervisor.

If I have any questions regarding the ethical conduct of this study, I may contact the Protocol Officer for Ethics in Research, University of Ottawa, Tabaret Hall, 550 Cumberland Street, Room 154, Ottawa, ON K1N 6N5

Tel.: (613) 562-5387

Email: ethics@uottawa.ca

There are two copies of the consent form, one of which is mine to keep.

Participant's signature:

Date:

Researcher's signature:

Date:

APPENDIX E: TIMELINE OF IMPORTANT DATES

January 4th, 2005: Offence Date²⁹

March 23rd, 2005: Kassa 1st interview with police (as witness only; states he does not know anything about the death of the victim; agrees to polygraph & DNA sample)

April 20th, 2005: Phone conversation between investigator and Kassa (Kassa appears upset and refuses polygraph; records indicate he lost his employment after investigators contacted employer in order to get in contact with him)

May 5th, 2005: Kassa 2nd approach by police at Parole Office (as witness only; continues to state he knows nothing; states he would think about providing polygraph and DNA again)

October 26th, 2005: Kassa's arrest for unrelated domestic assault against former girlfriend

October 26th, 2005: Main Crown witness (former girlfriend) 1st interviewed by police (she states she would "genuinely try to remember what Kassa did that day" [date of offence] but says she does not know anything)

January 24th, 2006: Kassa is compelled to provide involuntary DNA sample as a result of assault conviction (leading to "hit" between Kassa and DNA profile of cigarette butts)

July 5th, 2006: Police come to see Crown witness to ask her to give another statement (witness tells private investigator of the defence that she "never gave it voluntarily"; Kassa is out of jail but witness states Kassa had stopped contacting her since November 2005 and she was alone caring for their two children)

July 6th, 2006: Main Crown witness 2nd interview with police (first time she implicates him; states she "knew he was involved" but "did not believe he could do this by himself"; provides detailed account of her version of what transpired the night of January 4th)

August 15th, 2006: Kassa arrest for breach of probation (investigators confirmed DNA results and tell Kassa they are aware that he was at victim's apartment, however, Kassa stated in previous interviews that he was at the victim's apartment last in November, 2004)

November 24th, 2006: Kassa interviewed by police again (advises investigators that he is planning to leave his home town [confirmed with probation officer] as he was arrested three times the previous year and wants to make a change in his life)

December 1st, 2006: Investigator at homicide unit discloses that he recalls a conversation with Kassa on the day of the murder ('or sometime after') where Kassa called him "upset and crying" but "was evasive when asked what was wrong"

January 2nd, 2007: Police receives Crime Stoppers Report identifying three individuals as "responsible for killing the victim"

²⁹ The information presented herein (including direct quotes) are based on police records, records prepared by the appeal lawyer and transcripts of relevant proceedings

February 21st, 2007: Change of Case Management of the investigation


February 22nd, 2007: New Case Manager determines that there are reasonable grounds to arrest Michael Kassa for the murder

April 23rd, 2007: Kassa's arrest for the murder of the victim in Montreal

APPENDIX F: SUBJECT PROFILE

‘Subject profile’ pertaining to Mr. Kassa’s police file including a ‘mug shot’ (picture of equal quality in original document) as well as a description of his person³⁰ current to February 17th, 2004:

Subject Profile

Picture		Identification	
	Picture: 608.5728743	HWRP:	
	View: Front	FPS:	
	Date: 2004/02/17	AFIS:	
	By:	ND:	
		Internal:	
Name			
KASSA, HAILEMIKAEL FEKADE		Sex: Male	DOB:
POB:	Port entry:	Date:	Citizen:
Aliases			
KASSA, MICHAEL		Sex: Male	DOB:
POB:	Port entry:	Date:	Citizen:
Address			
			Entered:
			(Res)
Phone:			
Description			
			Entered: 2004/02/17
Height: 178 cm	Weight: 62 kg	Build: Thin	
App age: 20	Race: Black	Complex: Dark	
Eye color: Brown	Eye defect: No glasses/No cast/None missing/Not blind		
Hair color: Black	Style: Above ears/Curly		
Facial hair: No beard/No moustache/Sideburns			
Dental: Gd up/Gd low/Own up/Own low			
Misc: Rt handed/Normal sexual/Accent/Brown			
Cautions: Violent			
Marital: Never	Occ/employer/gang: UNEMPLOYED		
Remark: PALMS 2001/10/02			
Next of kin			
			Entered:
			(Parent)
Phone:			

³⁰ Description: 178 cm, 62kg, built – thin, apparent age – 20, race – black, complexion – dark, eye color – brown, hair color – black (style: above ears/curly), facial hair – no beard/no moustache/sideburns | Note: Additional personal information contained in this document was redacted to protect the privacy of the research participant and the privacy of others.

A personal photograph of Mr. Kassa (in a social setting) taken on April 29th, 2006:



APPENDIX G: CRIME SCENE PHOTOS

Photo of interior of victim's apartment taken on January 6th, 2005, at 11:02am showing black pouch placed next to other items on dresser to the right side of the bed:



Photo of interior of victim's apartment taken on January 6th, 2005, at 6:44pm showing black pouch (opened) to the right side of evidence tag #45 on top of \$20:

