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A MESSAGE TO LAWYERS ABOUT WRONGFUL CONVICTION DAY

By John L. Hill, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Oct. 2, 2024, marks the 11th annual Wrongful Conviction Day. This year's theme is "The Pursuit of Truth." Setting aside a special day raises awareness of the causes of and remedies for wrongful convictions and recognizes the tremendous personal, social and emotional costs that innocent people's wrongful convictions impose on them and their families.

A journalist should declare a bias. I first became aware of exonerating innocent prisoners when I was asked to join the Board of the Association in Defence of the Wrongly Convicted, now called Innocence Canada. I met a dedicated and hardworking group there, such as Rubin "Hurricane" Carter and lawyers like James Lockyer and Daniel Brodsky. These people worked as tirelessly as have others in similar affiliations in Canada and the United States in providing pro bono legal and investigative services to individuals seeking to prove the innocence of crimes in which a miscarriage of justice had occurred, working to redress the causes of wrongful convictions and supporting the exonerated after they are freed.

Innocence Canada has chalked up 29 exonerations. But the work is ongoing. Recent news reports have painted a horrendous picture of the misery caused when the justice system gets it wrong. On Sept. 28, 2024, the Wisconsin Innocence Project announced that two brothers, David and Robert Bintz, both now in their late 60s, were exonerated for killing a woman in 1987. DNA evidence was able to uncover the identity of the actual killer.

Nevertheless, the killing of possibly wrongly convicted individuals goes on. Delays often worked to the advantage of those given the death penalty. The

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lack of appropriate chemicals for those states using lethal injection as the means of capital punishment allowed the time between sentence and carrying out the sentence to be used to explore improper verdicts. Yet delays will dwindle in future as speedier methods are adopted. On Sept. 27, BBC News reported that the state of Alabama used nitrogen gas to execute Alan Eugene Miller, who had been sentenced to die for the 1999 workplace murders of Lee Holdbrooks, Christopher Scott Yancy and Terry Jarvis. Miller was the second American to be subjected to this form of execution, a method deemed cruel when used for euthanizing animals.

That execution marked the sixth in a week, a rate unseen in 20 years. Even those who condone capital punishment find it reprehensible if it is imposed on one who was factually innocent. But once the accused is dead, there can be no reprieve. As horrible as accounts of the death penalty are, the physical, psychological and emotional turmoil of those who spend years in prison and who have done nothing wrong should be viewed as equally intolerable. A recent film featured at the Toronto International Film Festival, *The Freedom of Fierro*, documents how César Fierro’s life was changed by 40 years in prison, much of it in solitary confinement, and could not be put together again after he was exonerated and returned to his home country of Mexico.

What causes our justice system to make such mistakes? There are numerous ways a prosecution can go off course, including false confessions, eyewitness misidentification, lying informants, false testimony, prosecutorial misconduct, forensic errors, fabrication of evidence, false allegations, systemic discrimination, tunnel vision, the failure of police and prosecutors to make full disclosure and even torture. As criminal law practitioners, we must guard against a more common reason: bad lawyering, sometimes called the ineffective assistance of counsel. Lawyers must be well-trained and adequately financed, often through legal aid, to conduct a proper investigation.

As I write, two men I believe are factually innocent have had their businesses and family lives ruined for what I believe to be wrongful convictions. Vito Buffone and Jeffrey Kompon have been sentenced to life for what has been described as the largest cocaine bust in Canadian history. Unlike murder cases where DNA can come to the rescue, lawyers acting for these two gentlemen will have to work hard

to develop a case to convince the minister of justice that the courts did make a mistake. It is a job that could have been expedited had the Senate of Canada moved at a faster clip in approving Bill C-40, a law that would establish a commission to review such cases.

Our judicial system sometimes makes mistakes. It happens in adjudicating cases as serious as murder. It also occurs daily when our courts accept guilty pleas from individuals on lesser charges, even though they are innocent, "just to get it over with."

As lawyers, let us use Oct. 2 to remember that we are instrumental in ensuring that our judicial system's truth-finding objective is truly operable.

SASKATCHEWAN GIVING MONEY FOR FEMALE OFFENDER REINTEGRATION

By Terry Davidson, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Saskatchewan is spending money in a bid to improve the chances of female offenders reintegrating into society after leaving custody.

Over the next two years, Saskatchewan's government will be investing $330,000 into the Elizabeth Fry Society of Saskatchewan in efforts to "assist women as they navigate community services" and, in doing so, "reduce the likelihood" they will end up back in custody.

Details are laid out in a July 18 **news release**.

Elizabeth Fry Society staff will work with women held at Pine Grove Correctional Centre, the correctional units at Saskatchewan Hospital North Battleford, the Whitebirch Remand Unit and Saskatoon's Women Reintegration Unit. A government spokesperson confirmed these institutions represent "all provincially administered adult female correctional facilities in the province."

"The Elizabeth Fry Society will connect with women prior to their release and help them throughout their reintegration process by connecting them with housing, mental health and addictions supports, transportation, income assistance and employment services," states the release.

Saskatchewan Minister of Corrections, Policing and Public Safety Paul Merriman spoke of challenges those leaving custody face in accessing resources useful in helping them reintegrate back into society.

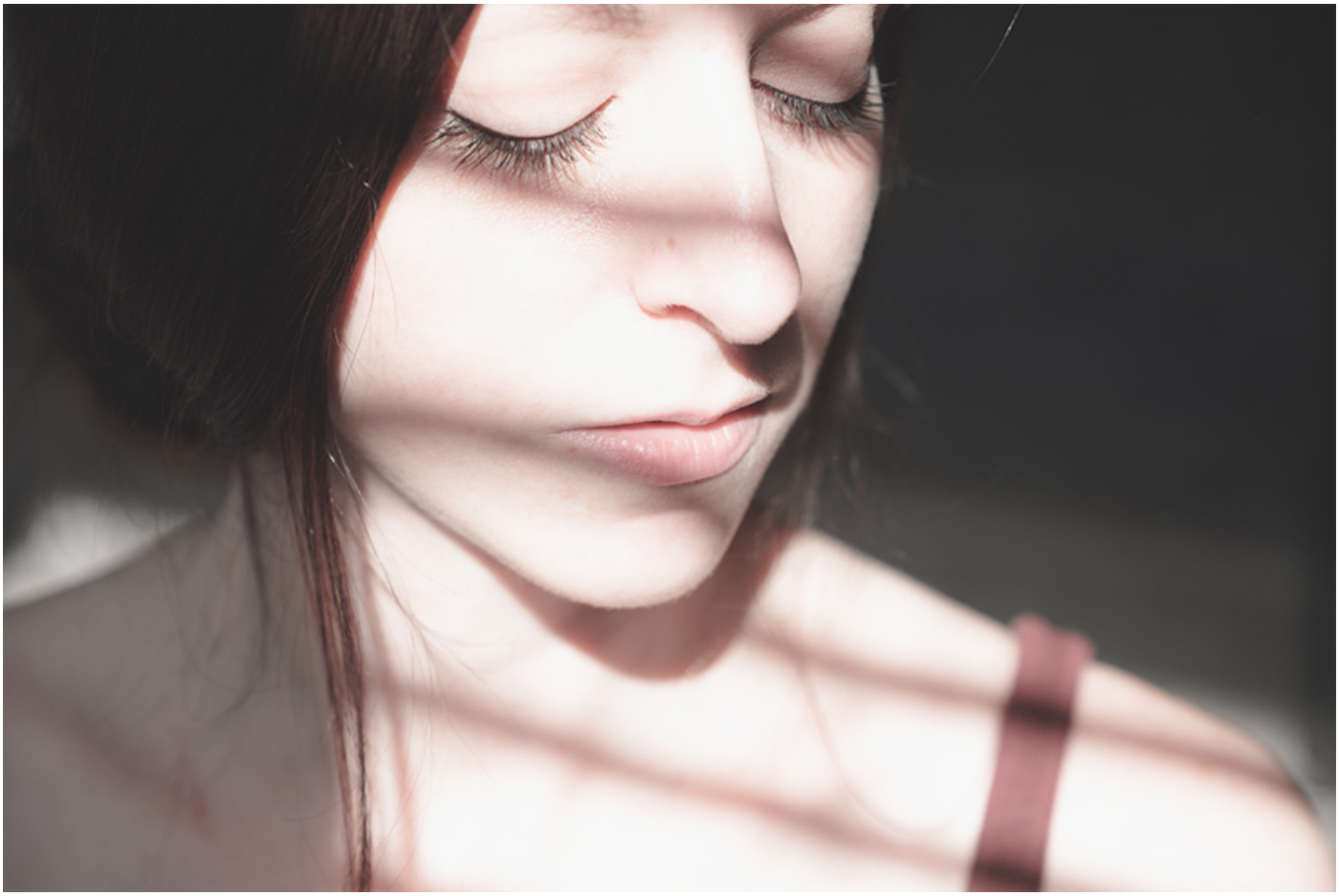
> “The Elizabeth Fry Society will connect with women prior to their release and help them throughout their reintegration process by connecting them with housing, mental health and addictions supports, transportation, income assistance and employment services,”

“Female offenders face additional challenges when securing housing and other supports necessary to reunite with their children and loved ones,” Merriman said in a statement. “This expanded service agreement will ensure more women in our facilities, including those on remand, can be supported by the Elizabeth Fry Society’s programming and services.”

The spokesperson elaborated on this, saying imprisonment “can be disruptive to the living and family arrangements of offenders” and that they “often must re-establish those connections while also trying to find a safe and affordable place to live.”

Elizabeth Fry executive director Nicole Obrigavitch said her organization is grateful for the cash.

“This funding will significantly bolster our efforts to provide tailored assistance, ensuring a seamless transition from custody to community and underscoring our commitment to reducing recidivism and fostering positive outcomes for those re-entering the community,” she said.



The release goes on to state that the "programs and services will help clients succeed in their communities and ensure better outcomes" for both them and their families.

This is not the first time Saskatchewan's government has done this.

In late 2022, the government **partnered** with the Saskatoon Tribal Council (STC) to "design and deliver" a transition program for Indigenous women exiting custody.

As part of this initiative, the government gave the STC $1.2 million toward the development of the program, which would provide up to 18 months of "intensive support to female offenders who are reincarcerated on minor offences."

COURT CERTIFIES CLASS ACTION AGAINST FEDERAL PRACTICE OF HOLDING IMMIGRATION DETAINEES IN PRISONS

By Karunjit Singh, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The Ontario Superior Court has certified a class action against the federal government over the use of provincial prisons to hold immigration detainees between 2016 and 2023.

In *Richard v. The Attorney General of Canada*, 2024 ONSC 3800, released on July 5, Justice Benjamin Glustein rejected arguments that claims alleging the practice violated immigration detainees' Charter rights were bound to fail.

"Detainees were incarcerated in provincial prisons and encountered the same conditions as criminal inmates, including co-mingling with violent offenders, use of restraints such as shackles and handcuffs, strip searches, and severe restrictions on contact and movement," the judge wrote.

The representative plaintiffs, Tyron Richard and Alexis Garcia Paez, were two of 8,360 persons detained by the Canadian Border Services Agency (CBSA) and incarcerated in 87 provincial and territorial prisons across Canada.

These individuals were detained under provisions of the *Immigration and Refugee Protection Act* (IRPA), which permits the arrest and detention of non-citizens for identity verification, public protection and ensuring their appearance at future immigration proceedings.

According to the CBSA's enforcement manuals, immigration detention is an administrative detention and must not be punitive in nature.

However, the plaintiffs alleged that they were subjected to the same rules, conditions and treatment as the general criminal population.

These conditions were not imposed on immigration detainees at immigration holding centres (IHCs), which are considered the default detention facility for immigration detention. The CBSA only runs three IHCs with a combined total capacity of 406 persons.

Starting with B.C. in 2022, provinces began announcing that they were ending their agreements with CBSA to hold immigration detainees in provincial prisons. All such agreements with provinces will end by Sept. 18, 2024.

In an affidavit, Richard described his life in prison as "a living hell" and that visits with his friends and family were conducted in booths through glass, using a telephone and limited to only 15 to 20 minutes.

He submitted that he was subjected to dozens of strip searches while in prison.

"I was required to strip off my clothes, turn around, bend over, spread my buttocks, and undergo an inspection of my anus by a guard with a flashlight, and to undergo a visual inspection under and next to my genitals," Richard said in an affidavit.

Garcia Paez described his experience in prison as "very traumatizing" with a "violent" atmosphere. He submitted that he was also subjected to strip searches.

Richard and Garcia Paez brought an action alleging that the practice of holding immigration detainees in prisons violated their rights under ss. 7, 9, 12, and 15 of the Charter and was a breach of a duty of care owed by Canada to the immigration detainees.

They brought an action on behalf of immigration detainees who were held in prisons during the relevant period, seeking damages and other declaratory relief restraining the alleged unlawful behaviour.

They also sought to certify a subclass of additional claims on behalf of immigration detainees with mental health conditions.

Canada objected to the proposed certification, arguing that the plaintiffs' pleadings did not disclose a cause of action under the relevant sections of the Charter or for a claim of negligence.

With respect to allegations that the practice violated the plaintiffs' right to liberty under s. 7 of the Charter, Canada submitted that the detention scheme was carefully tailored to safeguard public safety

and the integrity of Canada's immigration and refugee protection regime.

The Crown argued that detention may be justified under certain circumstances, such as border security, public safety or ensuring compliance with immigration laws, provided it is conducted in accordance with principles of fundamental justice.

Justice Glustein noted that the Crown cited no authority that detention by incarceration of an individual does not engage rights to liberty and security of the person under s. 7.

"The common issues judge can consider the merits of Canada's position on whether incarceration (rather than detention) is 'carefully tailored' or 'justified,'" noting that it wasn't plain and obvious that the claim of deprivation of the right to liberty and security of the person would fail.

Canada also argued that the plaintiffs' s. 9 claim was bound to fail, citing *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, in which the Federal Court of Appeal held that the immigration detention scheme, when carried out in a manner consistent with fundamental principles of justice and proportionality, was not in breach of s. 9 of the Charter.

Justice Glustein rejected this argument, noting that it was not beyond doubt that the analysis in Brown applied to the case at bar.

"[I]n the present case, the plaintiffs do not challenge the constitutionality of the immigration detention system. Rather, the plaintiffs challenge the CBSA practice of incarcerating Immigration Detainees in provincial prisons," the judge wrote.

The court noted that the plaintiffs had alleged material facts to support a claim that the impugned incarceration was not authorized by IRPA, the regulations or international law and that they had argued

that the practice of incarcerating immigration detainees in provincial prisons is contrary to Charter rights *ab initio*.

The court held that the plaintiffs' claim disclosed a cause of action for the breach of s. 9 of the Charter.

Canada also argued that the plaintiffs' claim does not disclose a cause of action under s. 12 of the Charter, which provides the right to not be subjected to cruel or unusual punishment.

The court rejected Canada's argument that the punitive treatment of immigration detainees incarcerated in provincial prisons did not rise to the level of being "grossly disproportionate," concluding that it was a merits-based argument that should be determined on a full record.

Canada also argued that the plaintiffs' claim that CBSA practice constituted discrimination under s. 15, both based on citizenship and mental disability disclosed no cause of action.

The Crown argued that it was beyond doubt that there could be no distinction based on citizenship because the immigration detention process, by definition, applies only to non-citizens.

The plaintiffs submitted that their claim was not rooted in differential treatment regarding the right to remain in Canada but in differential treatment regarding the circumstances in which one may be detained in a penal institution.

Justice Glustein observed that the material facts alleged by the plaintiffs supported a claim that the CBSA practice of incarcerating immigration detainees in provincial prisons was not related, in effect or practice, to the administrative detention required under the IRPA.

Canada also submitted that there was no discrimination based on mental stability as the decision to place an immigration detainee in a provincial prison was rationally connected to the capacities of the different kinds of facilities in terms of ensuring the safety of the detainee and others and the kinds of medical care that are available in each facility.

The court held this was a merits-based position and that factual issues would need to be resolved at trial on a full evidentiary record.

Justice Glustein held that the s. 15 claim disclosed a cause of action based on citizenship and mental disability.

Canada also argued that the plaintiffs' claim did not disclose a cause of action in negligence as it was plain and obvious that the CBSA decision to incarcerate immigration detainees in provincial prisons was a core policy decision and was immune from liability.

The Crown argued that the CBSA practice was a core policy decision because the agreements were signed by high-level officers whose official responsibility required them to assess and balance public policy considerations.

The court held that the determination of whether the CBSA practice was an operational or policy decision would depend on the evidence at a common issues trial and the application of any factual findings to the relevant legal principles.

The court held that it was not plain and obvious that the CBSA practice was a core policy decision.

Justice Glustein certified the action as a class proceeding for the proposed class and subclass pursuant to s. 5 of the *Class Proceedings Act*.

A spokesperson for the CBSA, Karine Martel, said that the decision that leads to placement in a provincial facility is limited to the most difficult cases when there are serious concerns about danger to the public, or to other detainees or staff.

"This often means the person has been convicted of an offence in Canada or abroad, such as sexual offences, violence, weapons, or drug trafficking," Martel told Law360 Canada in an email.

The spokesperson noted that when someone is held for being unlikely to appear, they may also have prior convictions and outstanding charges for violent crimes, such as attempted murder and aggravated sexual assault, or may have demonstrated violent, noncompliant and unpredictable behaviour that places them, other detainees, the guards and medical personnel at risk.

"The CBSA assessment of these individuals is that they are likely to continue to carry out activities related to serious criminality and possibly disappear to avoid removal," she added.

Martel noted that as the provinces have indicated that they are no longer willing to support immigration detention in their facilities, the CBSA is taking steps to house higher-risk individuals in its own facilities.

"Our priority remains to remove inadmissible individuals from Canada as soon as possible, with a particular focus on individuals who are inadmissible for reasons such as serious criminality," she said.

Co-counsel for the class, Cory Wanless of Waddell Phillips PC, said that the vast majority of the immigration detainees held in prisons during the class period were detained by the CBSA based solely on concerns that they may not appear at future immigration proceedings.

"In fact, 80 per cent of immigration detainees in prisons were held on the ground of 'flight risk' alone. The representative Plaintiff Tyron Richards is a prime example of this," he told Law360 Canada in an email.

> “80 per cent of immigration detainees in prisons were held on the ground of ‘flight risk’ alone. The representative Plaintiff Tyron Richards is a prime example of this, ”

He added that it was not acceptable to hold immigration detainees in prisons, regardless of the reason, noting that any issues regarding criminality can be and are dealt with by the criminal justice system in Canada.

“Canada must stop the harmful practice of incarcerating immigration detainees in prisons — whether provincial or federal — for once and for all,” said Cory Wanless of Waddell Phillips PC, co-counsel for the class,” he said in a release.

Jonathan Foreman and Jean-Marc Metrailler of Foreman & Company and Subodh Bharati also acted as counsel for the plaintiffs.

Counsel for Canada were David Tyndale, Rishma Bhimji, Nimanthika Kaneira, and Jazmeen Fix of Justice Canada.

NOVA SCOTIA APPEAL COURT TAKES TRIP TO CAPE BRETON

By Terry Davidson, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Nova Scotia's Court of Appeal has left its nest in Halifax and hit the road in a bid to make itself more accessible to the public.

For its first-ever venture away from the Halifax Law Courts building, the province's highest court will sit in the Sydney area, on Cape Breton Island, for the week of Sept. 23.

During that time, the court will hear three appeals while sitting in the community of Membertou. According to a news release, a "courtroom and related facilities" have been set up in the Membertou Trade and Convention Centre.

Sept. 24 marked the event's kick-off, which included a welcoming ceremony by Membertou First Nation, a speech from its chief and remarks by Nova Scotia Chief Justice Michael Wood, who is also chief justice of the Court of Appeal.

In a recent statement, Chief Justice Wood called the Cape Breton visit a "unique sitting" for the court — a chance to break down barriers between it and the public.

> “This sitting marks the first time the Court of Appeal has sat outside of Halifax and is part of our efforts to introduce more people to the work of the Court.”

“We greatly appreciate the warm welcome and interest we have received from the local community,” said Chief Justice Wood. “This sitting marks the first time the Court of Appeal has sat outside of Halifax and is part of our efforts to introduce more people to the work of the Court.”

The week will also include education sessions and “engagement opportunities” for the judges, as well as a chance for them to connect with the Cape Breton Barristers’ Society and the local Mi’kmaq community.

In an email to Law360 Canada, Nova Scotia Judiciary communications director Andrew Preeper said the court’s trip was “motivated by a commitment to greater transparency, visibility and accessibility” around what it does.

“It is the court’s hope that this visit will help advance a better understanding of the role of the Judiciary and the courts in our society and introduce more people to the work of the Court of Appeal,” said Preeper. “Sitting in Membertou is a unique opportunity for local residents to visit the court and attend a hearing in person that otherwise would be held elsewhere.”

Preeper said the Sydney area was chosen “because it is the second-largest urban centre in Nova Scotia, a fair distance from Halifax, and the busiest courthouse outside Halifax.”

Also, the three appeals being heard on this trip come out of Cape Breton.

On Sept. 25, the appeal court is hearing *Nova Scotia Board of Registration of Embalmers and Funeral Directors v. Joseph Curry*, a much-publicized case involving the misidentification of cremated remains and whether a local funeral director is responsible for the mix-up.

Later that day, the court will hear arguments around whether Nova Scotia's Department of Community Services (DCS) had an obligation to tell an injured employee that her workers' compensation benefits would be cut if she resumed work at a moonlighting job during her time off with the DCS.

On Sept. 26, the court will hear a child support dispute involving a dad objecting to a trial judge's assessment of his income.

The event is not being live-streamed. Preeper was asked why.

"The working group that planned this visit did consider livestreaming throughout the planning but opted to keep this an in-person session. While the Court of Appeal does, at times, provide livestreaming for cases of provincial interest or of appeals for matters in communities that are far away from Halifax, the three appeals being heard in Membertou are of more local interest to Cape Breton. Ultimately, we didn't receive feedback requesting a livestream option and expect a good turnout from local residents."

Members of the public looking to attend the court's Cape Breton siting are reminded that standard rules apply when in a courtroom, including requirements that visitors remove hats and sunglasses, not talk while court is in session and refrain from recording the proceedings.

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