

# RULE OF LAW REPORT

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## THE EQUALITY EFFECT'S 160 GIRLS PROJECT: SYSTEMIC CHANGE TO ACHIEVE ACCESS TO JUSTICE FOR SURVIVORS OF CHILD RAPE AND CREATE A CULTURE OF ACCOUNTABILITY

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# THE EQUALITY EFFECT'S 160 GIRLS PROJECT: SYSTEMIC CHANGE TO ACHIEVE ACCESS TO JUSTICE FOR SURVIVORS OF CHILD RAPE AND CREATE A CULTURE OF ACCOUNTABILITY

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**The Equality Effect (e<sup>2</sup>)** uses human rights law to make the rights of girls and women real, so that they can be safe from sexual violence, access education, and fulfill their potential. The equality effect supports regional partners by initiating legal advocacy projects to achieve systemic change. This has included conducting research, collecting evidence, designing public legal education, and developing test case litigation.

In Kenya, e<sup>2</sup> coordinated a constitutional claim by 160 girls between the ages of 3 and 17 against the government for failing to protect girls who had been raped. In 2013, **Kenya's High Court agreed** that the police failure to enforce existing rape laws and protect the girls from rape was a violation of domestic, regional, and human rights law.

**The 160 Girls High Court decision** made legal history, setting a high watermark for girls' rights internationally. However, a court victory alone cannot ensure



victims receive justice. In Kenya, a culture of impunity for rape leaves women and girls vulnerable to sexual violence. This can only change if victims feel comfortable reporting assaults and if their cases are appropriately managed through the criminal justice system, so that perpetrators are held accountable for their sexual violence. With this in mind, e<sup>2</sup> has spent the last 8 years doing ground-breaking work in Kenya to implement the 160 Girls High Court decision so that the rights of girls and survivors recognized in the decision can be made real, the rule of law is strengthened, and the cycle of impunity and violence is broken.

The rule of law must include transparency of law, an independent judiciary, and an accessible legal remedy. Thus, e<sup>2</sup> has created the 160 Girls Project, an inter-disciplinary plan involving police, judiciary, schools, and communities to ensure the full implementation of the 160 Girls decision, create systemic change to hold perpetrators of sexual violence accountable, and end impunity for child rape. The 160 Girls Project includes robust public legal education through the 160 Girls Justice Clubs, as well as the 160 Girls Police Training Project and the 160 Girls Judicial Engagement Project. Together, these programs are designed to fill knowledge gaps and give all participants in the justice system the tools they need to ensure that justice is served. The equality effect works with measurement experts to monitor the impact of these public and legal education initiatives.

In order to achieve a transparent legal system, public legal education must be prioritized. The justice system cannot function unless survivors are empowered to report their assaults. Since 2016, e<sup>2</sup> has operated the 160 Girls Justice Clubs, a robust public legal education program, run on a student peer-to-peer basis in schools, which educates students about human rights laws, sexual and gender-based violence, and women's and girls' rights.

Facing COVID-19 related school closures and concerned about the increased vulnerability of children during pandemic lockdowns, e<sup>2</sup> quickly pivoted in 2020 to operationalize community-based **Virtual Justice Clubs (VJC)**. The digitization of the Justice Club curriculum has allowed this program to expand and reach many more Kenyan youth. The equality effect provides tablets to children aged 8-18 years old, through which they can access (only) the 160 Girls VJC curriculum, comprised of human rights videos, podcasts, games, quizzes, art, music and an interactive discussion section. The VJCs are endorsed by local community leaders and authority figures.

VJC leaders' written submissions are published in the 160 Girls Justice Journal, which is distributed to community members by teams of VJC leaders, teachers, rape rescue workers, and police. The Justice Journal is a human rights newsletter that educates community members about women and children's rights and sexual and gender-based violence. It includes contact information for local rape crisis centers, where survivors can seek essential support services. Through this initiative, young students become empowered justice leaders in their communities. They share their enthusiasm for children's rights and their knowledge of defilement laws and reporting pathways. Police presence during Justice Journal deliveries expands their reach in communities, which can deter rape and encourage defilement reporting. After the 6-month VJC pilot, 97% of participants shared that their peers now consider them to be leaders in their communities and 90% of participants agreed that the VJC promotes positive interactions with the police. The VJC lesson about defilement investigation steps, which focuses on content unique to the equality effect, was the most sought-after lesson and the second favourite overall. The favourite lesson was "Good Touch vs. Bad Touch," which promotes the importance of respecting children's bodies and boundaries and their right to reject perpetrators' advances.

Even with this public legal education, it is impossible for child victims of rape to access justice and ensure the rule of law is fulfilled without effective defilement investigations. Following the 160 Girls High Court victory, e<sup>2</sup> and the Kenya National Police Service (NPS) began an unprecedented collaboration to train Kenyan police officers about "prompt, proper, efficient and professional" defilement investigation protocols (the requirements set out in the 160 Girls High Court decision). This top-down support has ensured buy-in from officers throughout Kenya and promotes the importance of training police officers to ensure that defilement investigations are compliant with human rights law. The 160 Girls Police Training Project follows a train-the-trainer model through which e<sup>2</sup> and Senior NPS staff train police supervisors who are responsible for training their teams of frontline officers.

This 160 Girls defilement investigation curriculum is being integrated into every police training college in Kenya, ensuring systemic integration of crucial defilement investigation procedures. The equality effect and the NPS are now piloting a virtual extension of this training curriculum, which will eventually be accessible to all 80,000 frontline police officers. The 160 Girls police defilement investigation curriculum is child-centered, ensuring the prioritization of victims' human rights. As a result of 160 Girls police training, police treatment of defilement claims has improved greatly.

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Finally, to build on the success of the 160 Girls police training and public legal education initiatives, the Kenyan judiciary and prosecutors have invited e<sup>2</sup> to partner to develop and implement a 160 Girls judicial engagement project. This involves judicial training, policies, and technology that serve to educate the judiciary about defilement case best practices and to support progress

in upholding international legal standards. Defilement victims should never experience a breakdown of the rule of law or revictimization as a result of delayed trial dates, mismanagement of case files, unenforced subpoenas, or the introduction of gender-based myths and stereotypes into decision-making. Effective judicial decision-making relating to defilement claims ensures adherence to the rule of law and can prevent institutional betrayal and create deterrence through perpetrator accountability.

Improved judicial processes will increase public confidence in the criminal justice system. These training materials and improved policies will be developed in consultation with stakeholders, including judiciary, human rights and prosecution lawyers, police, rape rescue centres, Court Users Committees, the Office of the Director of Public Prosecutions, and the like. Digital materials will be used for continuing learning opportunities. Once developed and piloted, these improvements will set a gold standard for other judiciaries around the world.

Upholding the rule of law requires systemic and large-scale reforms to existing institutions to ensure that child rape victims are prioritized and can achieve access to justice. Sharing legal information in communities empowers youth and provides access to life-saving support resources and reporting pathways. A more transparent legal system benefits victims and encourages legal authorities to conduct proper, prompt, professional and effective investigations and prosecutions of child rapists. While excellent laws exist to protect children and hold child rapists accountable, these laws must be enforced and upheld through an inter-disciplinary and systemic approach, as modeled by the multifaceted 160 Girls Project.

In 2017, the United Nations recognized the 160 Girls Project as a best practice for advancing women's rights and empowerment and, in 2019, e<sup>2</sup> received the World Justice Award at the Hague. The equality effect appreciates the support of Lexis Nexis as we build on these successes. For more information about the equality effect, you can visit their website here: [\*\*the Equality Effect – Human Rights for Girls & Women in Africa.\*\*](#)

## HUMAN-CENTRED DESIGN STARTS 'WITH PEOPLE WHO FACE THE MOST BARRIERS,' B.C. TRIBUNAL CHAIR SAYS

By Amanda Jerome  
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As the COVID-19 pandemic continues to challenge the legal system, access to justice in an increasingly virtual world has become a prevalent issue.

Canada's first online tribunal, the Civil Resolution Tribunal (CRT) in British Columbia, has been using human-centred design from the start in its approach to resolving disputes. The tribunal's chair believes that human-centred design can help address access to justice issues if "access to justice" means that "we need to, as a society, provide people with affordable, timely, fair ways for them to resolve everyday legal problems."

In that case, "human-centred design, I think, is really the only way to effectively do that because the rest is speculation and assumption," said CRT chair, Shannon Salter.

"Mapping the process from the perspective of people who have everyday legal problems, who come from a whole variety of different backgrounds, and then designing to account for those as much as possible and level the playing field and to mitigate the systemic inequalities that we know we have," she said, "requires us to centre the experience of those folks."

"And the only way to centre that experience is to ask people, to test with them, to keep checking back, to be iterative, to be humble, to not get too attached to one idea or another," she stressed.

Salter noted that the CRT was started in 2016, so it had to be built "from the ground up," which gave the CRT team the "opportunity to use human-centred design to make sure that we were doing as good a job as possible at meeting our mandate."

The mandate in the Civil Resolution Tribunal Act, Salter explained, “is to provide people with an accessible, informal, flexible, timely and affordable way to resolve their everyday legal disputes.”

The CRT resolves “vehicle accident disputes, small claims disputes up to \$5,000, strata property (condominium) disputes of any amount, societies and cooperative associations disputes of any amount,” the website notes.

Salter emphasized that the “mandate in the statute is very focused on the needs of the parties,” so the CRT “took that opportunity of a blank slate to ask ourselves ‘well, how would we design something if you’re really focused on making it easy to use and meeting the needs of the people that we need to serve?’ ”

She explained that the CRT “made a commitment to use data wherever possible; to gather as much evidence and research as we could in designing the processes around the tribunal.” Where it didn’t have evidence to rely on, it “engaged in what’s now known as human-centred design,” Salter added.

The CRT’s goal for its design was to “be humble and curious and we should prioritize the expertise of people about what they need.”

“The way we did that was by user testing everything that we developed that was public facing,” she said, explaining that user testing was done on everything from the tribunal, its rules, the website content, e-mail templates and “for the decisions that we write at the end of the process.”

“The idea is that anything that is public facing, anything that people have to engage with, should be tested with them and designed with them and their needs in mind,” she added.

Salter noted that “when the pandemic struck, it certainly helped that we were primarily online, and we didn’t have to do a lot of pivoting. But it also helped that we already built-in accommodations for people who have other accessibility challenges, like having a low income, mobility challenges, having



health-care concerns, having mental health issues, things that a lot more of us are experiencing during the pandemic.”

She stressed that human-centred design allows the CRT “to account for that variety of different needs and then build that flexibility into the equation.”

When The Lawyer’s Daily asked how an existing institution could be retrofitted to use human-centred design as the justice system continues to weather the pandemic, Salter said to “start right now with what you have.”

🗨️ You don’t need to wait until there’s an enormous technology budget or until there’s a giant design review. Human-centred design can mean starting small. ”

“You don’t need to wait until there’s an enormous technology budget or until there’s a giant design review. Human-centred design can mean starting small. It can mean taking your existing forms that you know people have difficulty filling in and going outside into your court registry lineup and asking people, with a pencil and clipboard (or I guess in a pandemic, doing a virtual form of that) to fill in your forms and to provide feedback and then to design around what that feedback is,” she said, noting that’s just one example, but if “you multiply that

by a million different processes, there’s a huge opportunity to make all of this better for people.”

Salter added that there are three key best practices for courts or tribunals considering a human-centred design approach.

First, she noted that while “it’s commendable when jurisdictions and courts decide that this is what they want to do,” they will typically have “an advisory committee made up of lawyers and judges and court personnel, and they will design something that they think will meet the needs of the public.”

However, in Salter's experience "that's always a red flag and almost always results in failure because our status quo was designed by lawyers, judges and court personnel."

So, the first best practice, she explained, is "to dissolve those committees and start with a multidisciplinary group of self-represented people, their advocates who are on the front lines, health-care and mental health workers, mediators, [and] really take a 360-degree approach to figuring out where you can get the best ideas."



"I guarantee you what those folks will come up with will look very different from your original advisory committee," she said, noting that it is still "important to have lawyers and judges and court administrators involved" because they're the experts in the law, but there should be an opportunity for "other people to share their expertise, the realities of their geographical challenges, their

educational or income challenges, their accessibility challenges, their literacy challenges, [and] their language challenges."

"Bringing all of those into the equation, and then designing around them, and checking back in an iterative way is really what human-centred design is all about," she said, noting that "it's not a one-time commitment, it's an enduring obligation."

She stressed that the CRT is "always checking back on the stakeholders."

“We still test any changes, or features, or new rules with frontline advocates and their clients,” she added.

The second best practice, she noted, is “to start with people who face the most barriers.”

“We find people who are the most marginalized, who have the most access to justice challenges, and we also find their advocates who are on the front lines, who are often community legal advocates, sometimes health-care advocates, and we get them to test first and foremost. We prioritize that group. They’re at the heart of all our user testing. And only once we’re pretty convinced we’re not going to let any of them fall through the cracks, and only once we’ve incorporated all of their feedback, do we expand to do testing with everyday average users,” she explained of the CRT’s approach to human-centred design.

“Last, but not least,” she added, “we test the legal stakeholders. But if you do that in reverse it just doesn’t work because you really cannot scale the status quo up or down to meet the needs of vulnerable parties. You have to design something completely different.”

An overarching issue Salter identified is the tendency for people to fall victim to “system blindness” where they have “a really hard time doing a process different from the one we’re using and the one we’re used to.”

“That’s one of the advantages of bringing in these outside voices because they’ll come up with things that are completely surprising and often very brilliant that’s harder for us to recognize,” she explained, noting that the third best practice is: “let’s not think about the justice system as necessarily even a court based ... or even more acutely, a trial centred thing.”

“If we think about people having justice problems, which they might not even identify as justice problems, they typically start far more upstream months, even years earlier,” she said, noting that “only a tiny fraction of them actually end up at a court and only a tiny fraction of those end up in a trial.”

“By the time you end up in a trial you are so downstream you’re pretty much at the mouth of the river. So, if you view human-centred design and creative problem solving as an upstream, downstream issue, focusing more of our attention upstream is going to be better for people,” she added, stressing that “the earlier we can help them with their problem, the quicker they can have it resolved, the less stressful it will be for them, the less money it will likely cost them, the less disruption in their lives.”

She noted that there is a tendency to focus on courthouses, courtrooms and trials when discussing human-centred design, but she encouraged all justice professionals to “zoom out and view people’s legal problems as a much more upstream phenomenon,” which “really expands the opportunities to help people resolve them.”

Salter noted that a lot of discussions on access to justice panels at this time centre around “what do we keep from the pandemic and what do we leave behind in terms of changes to the system?”

“I don’t know if that’s the right question,” she said, “but I do know that the answer to that is not to try to revert to the mean as much as possible.”

“A lot of the reports and commentary coming out in different jurisdictions about this is designed to make the new normal look much more like it did before the pandemic. So, let’s have more in-person hearings; let’s have more duty counsel right at the courthouse on the day of the hearing; let’s have more kiosks in the courthouse. None of those are necessarily wrong, but they get to this downstream problem that people don’t need legal help only on the day of the hearing. They don’t even necessarily need more in-person hearings,” she said, adding that what people need is “a justice system that steps back and says ‘uh, the pandemic has taught us we can do things in many different ways.’ ”

Salter stressed that now is the time to “ask people what worked and what didn’t work and what else we can do to make things better for them.”

“It’s not about reverting to the mean, it’s about challenging everything and pulling on all the threads and unravelling what doesn’t work, looking for data to support making changes and really centring the

experience of the people who have to use those systems. And I think it is telling that in a lot of these discussions the big voice that you don't hear on those panels are people who have had to navigate the system during the pandemic and before," she said, noting that this could be an example of system blindness.

Salter noted that it's "tempting to say that human-centred design should only be applied in certain contexts or certain areas of the justice system, but I don't think that's true."

"I think human-centred design can be applied across the entire justice system whether your clients are very large corporations or whether you're talking about everyday small claims, or whether you're talking about criminal law. Where human-centred design will lead you will be completely different in each of those contexts, but the process will be the same, which is to ask, 'what is it that people need in order to get the outcomes that we want to see as a society and that they need in terms of navigating the justice system?'"

She said that process "will lead us to have in-person hearings or online hearings or maybe a combination of both, or something else completely."

"In the criminal context, it may lead us to do things differently as well in order to minimize trauma to accused persons and victims and others, for example. It's an approach, it doesn't dictate outcomes and there's really no area of the justice system that wouldn't benefit from that lens," she concluded.

## PROBLEM OF 'UNJUSTIFIED' CONVICTIONS RAISED AS APPEAL COURT ORDERS RETRIAL IN MURDER CASE: LAWYER

By Christopher Guly  
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published in  
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James Lockyer was able to secure a new trial for his client from the Ontario Court of Appeal. But the veteran Toronto criminal defence lawyer wished the court had the power to acquit Miguel Chacon-Perez in his appeal of the second-degree murder conviction he received at a jury trial in 2018.

In *R. v. Chacon-Perez*, 2022 ONCA 3, released on Jan. 7, the appellate court held that Ontario Superior Court Justice Michael McArthur erred when he denied the jury's request for testimony from four witnesses.

The trial judge told the jury that no transcripts were available and that playing audio recordings of their evidence could take "some hours and maybe some days," according to the summary in the Court of Appeal ruling.

"When a jury asks a question during their deliberations they are entitled to a timely, correct, and comprehensive answer. This is because, by their question, the jury has identified an area or subject about which they require assistance," wrote now-former Justice David Watt in his reasons, agreed to by Justices Lois Roberts and Benjamin Zarnett.

"Where a jury question requests a read back or replaying of evidence, they are entitled to receive it."

Justice Watt said that Justice McArthur "should have invited the jury to be more specific about the portions of the evidence they wished to have read out or replayed. The trial judge's failure to seek a more specific description of what was required meant that the jury got no assistance at all. To make matters worse, the nature of the response eliminated the prospect of any further questions from

the jury.”

Jurors returned their verdict the next day, “almost 24 hours after they had asked their only question.”

Justice Watt noted the appellant’s argument that “the substance of the information required by the jury’s question aggravated the prejudice inherent in the trial judge’s failure to answer it.”

“The witnesses whose evidence the jury sought were those whose testimony related to the identity of the person who stabbed the deceased. This included Jaimini Panday, the defence witness who identified [Miguel] Chicas [a friend of Chacon-Perez since high school], not the appellant, as the killer. Identity was the only contested issue at trial. As a result, a new trial is required.”

It’s a small victory for Lockyer, who had hoped that the Court of Appeal had the power to consider whether Chacon-Perez’s conviction was “unsafe.”



A specific word, twice used in the court’s decision, also caught 72-year-old Lockyer’s attention and reminded him of a systemic problem within the justice system that he has been trying to resolve since 1993, when he established the Association in Defence of the Wrongly Convicted (AIDWYC), now known as Innocence Canada.

In his reasons, Justice Watt wrote that section 686(1) (a) (i) of the *Criminal Code* “permits a court of appeal to allow an appeal from conviction on the basis that the conviction is unreasonable or cannot be supported by the evidence adduced at trial. The question framed by s. 686(1) (a) (i) is whether the verdict is unreasonable on the

evidence received at trial, not whether the verdict is unjustified.”

He reiterated that point when he wrote that “the issue that requires determination is whether the jury’s verdict was unreasonable ... not whether the verdict is unjustified.”

It’s the last word that bothers Lockyer, founding partner of Lockyer Posner Craig.

“Essentially, it means that verdicts are upheld, even though an appeal court is concerned that the person convicted may well be innocent,” he explained.

In his reasons, Justice Watt cited *R. v. Yebes*, [1987] 2 S.C.R. 168 in which the Supreme Court of Canada, relied on one of its previous rulings, *Corbett v. R.*, [1975] 2 S.C.R. 275, which said an appeal court “must satisfy itself not only that there was evidence requiring [a] case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable.”

“This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is ‘unreasonable,’ not ‘unjustified,’” the country’s high court held in *Corbett*.

Tomas *Yebes* was convicted in 1983 of second-degree murder in a case in which his two adopted sons were found dead a year earlier after a fire broke out in the family’s townhouse.

Following a ministerial review as to whether *Yebes*’s case involved a miscarriage of justice, federal Justice Minister David Lametti announced on Nov. 5, 2020, that he was exercising his greatest power under the *Criminal Code* and quashing the convictions and ordering a new trial for the Spanish-born father of two daughters.

The proceedings began, nine days later, in British Columbia’s Supreme Court, and lasted 20 minutes after the Crown called no evidence and the judge declared *Yebes* not guilty of both charges for which he was convicted 37 years earlier.



“We continue to rely on a case [*Yebe*s] where the Supreme Court of Canada in 1987 upheld a wrongful conviction for murder,” said Lockyer. “Under it, you can’t quash a conviction unless it’s one that no reasonable jury, properly instructed, could have come to — and that’s a technical test.”

“The fact that evidence is highly suspect is irrelevant to the test. You could have the most lying individual, who gives evidence that forms a basis for the elements of the offence charged — and a conviction entered at trial stands, even if it’s an ‘unjustified’ verdict,” he said.

However, Lockyer was heartened by Lametti’s announcement last March that the federal government planned to establish an independent commission to address cases of wrongful conviction.

Harry LaForme, a former justice of the Ontario Court of Appeal, and Juanita Westmoreland-Traoré, a former Quebec Court judge, were named to lead public consultations on the creation of the Miscarriages of Justice Commission.

Lockyer participated in that process and highlighted to the two retired judges that appeal courts should be allowed to quash convictions — as they do in his native United Kingdom — when they have “a lurking doubt” or “a sense of unease” that the person found guilty was wrongly convicted.

Last December, LaForme and Westmoreland-Traoré released **their recommendations**.

Among the recommendations was that in addition to the existing grounds for appeal under *Criminal Code* s. 686, appeal courts should be allowed to quash convictions on the basis that they were “unsafe.”

The “technical test” for whether a verdict is “unreasonable,” as reflected in *Yebe*s, “will not always achieve justice in all cases,” said Lockyer. “It’s not a test as to whether a case is a wrongful conviction.”

“If an appeal court upholds a conviction, it means someone was convicted with proper process. It doesn’t always mean the conviction is sound — and that’s the problem.”

☞☞ If an appeal court upholds a conviction, it means someone was convicted with proper process. It doesn't always mean the conviction is sound — and that's the problem."

He said that while the *Criminal Code* empowers appellate courts to allow an appeal of a case involving a miscarriage of justice, "it has not been interpreted by the Supreme Court of Canada and appeal courts to include cases where the appellate court has a sense of unease about the verdict."

"This means that a wrongful conviction can be upheld in an appeal court, even though

the court has a sense of unease. In my opinion, the law needs to be changed. If the law were otherwise, a number of Canada's celebrated wrongful convictions, such as those involving David Milgaard, Donald Marshall and Tomas Yebes, could have been caught much earlier," Lockyer said.

Lockyer said that in *R. v. Biniaris*, 2000 SCC 15, a case in which he appeared on behalf of intervener AIDWYC, the Supreme Court said, in its ruling, that "the test set out in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence."

He believes that Chacon-Perez had a strong defence. "There was a witness who didn't know the deceased or the accused, and who testified that he saw a stabbing and that the person who did it was not Chacon-Perez. And no one said that they saw Chacon-Perez commit the murder," as Lockyer argued.

"I wanted the Court of Appeal to reflect on whether it had a sense of unease about the conviction. But the court doesn't have the power to do that."

"I have always found that to be very troubling for our justice system," he said. "I believe we need to adopt the proposal that the two retired judges have made to the justice minister that will allow appeal courts to quash 'unsafe' convictions."

Crown counsel Roger Pinnock, who represented the respondent in the Chacon-Perez appeal, did not respond to a request for comment on the ruling.

Lockyer highlighted that *Criminal Code* s. 686.1 (a) (iii) allows a court of appeal to quash a conviction on any ground that was a miscarriage of justice, but “that has not been interpreted to include a potential wrongful conviction.”

He said that AIDWYC had three goals when it was formed nearly 30 years ago.

“We wanted the creation of a commission to investigate claims of wrongful convictions; a broadening of court of appeal powers to include a lurking doubt; and systemic changes made to prevent wrongful convictions in the future,” Lockyer explained.

“If you look at the jurisprudence over the past 20 years and the number of murder verdicts that have been found to be unreasonable, I’d be surprised if it’s as many as 10 across Canada.”

“How many wrongful convictions in murders have been discovered over that time? I don’t know – 20, 25 – most of which have been missed by appeal courts, including the Supreme Court of Canada.”

## RULE OF LAW REPORT

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