



The Path to Justice: Preventing Wrongful Convictions

THE PATH TO JUSTICE: PREVENTING WRONGFUL CONVICTIONS

Report of the Federal/Provincial/Territorial Heads of Prosecutions
Subcommittee on the Prevention of Wrongful Convictions

Fall 2011

“No criminal justice system is, or can be, perfect. Nevertheless, the manner in which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilization is measured.”

*Justice Report on Miscarriages of Justice (1989),
The British Section of the International Commission
of Jurists*

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Prevention of Wrongful Convictions

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EXECUTIVE SUMMARY

In the fall of 2002, the Federal/Provincial/Territorial Heads of Prosecutions (HOP) Committee established a Working Group on the Prevention of Miscarriages of Justice in response to a number of wrongful convictions that had been identified and studied across the country. The mandate of the Working Group was to develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions, and to recommend proactive policies, protocols and educational processes to guard against future miscarriages of justice.

Two years later, the Working Group, composed of senior police and prosecutors from across the country, completed and presented the *Report on the Prevention of Miscarriages of Justice* (the “*Report*”). It was released to the public by Federal, Provincial and Territorial Ministers Responsible for Justice on January 25, 2005.

The 165-page *Report* comprehensively explored common causes of wrongful conviction. In addition, the findings and recommendations made by commissions of inquiries into wrongful convictions throughout Canada and internationally were collected and examined. Most importantly, the *Report* provided clear, comprehensive and practical recommendations for improvements to the criminal justice system which were designed to reduce the likelihood of wrongful convictions.

The Ministers lauded the strong collaboration that produced the *Report*, viewing it as “a clear signal that prosecutors and police take the issue of wrongful convictions seriously.” The Canadian Association of Chiefs of Police (CACP) issued a news release welcoming the *Report* and asking all police agencies to review their policies and procedures to ensure consistency with the *Report*’s recommendations. Then CACP President Edgar Macleod stated:

It is important that all players in the justice system – police, prosecutors, the judiciary and defence bar – work together and thereby effectively reduce the risk of wrongful convictions.

Following release of the *Report*, each prosecution service (federal and provincial) conducted an in-depth review of its policies to assure compliance with the recommendations. Several services are now adding separate chapters in their policy manuals on preventing wrongful convictions.

Similarly, many police forces conducted in-depth reviews of the recommendations. As a result, a number of police departments have developed training modules that focus on the common causes of wrongful convictions and the best practices to prevent them in the conduct of criminal investigations.

Nationally, the *Report* has been cited at all levels of Court, including the Supreme Court of Canada. The National Criminal Justice Section of the Canadian Bar Association appreciated the *Report's* "many practical suggestions" and commended the Working Group on its recommendations. It has been studied at conferences in several countries, and is now part of the curriculum in several law school courses dedicated to the study of wrongful convictions.

In short, the *Report* has had a significant influence and has been an important catalyst in shedding light on the causes and circumstances leading to wrongful convictions. While such cases are mercifully infrequent, the troubling number of Canadians convicted of crimes of which they are factually innocent has heightened the urgent need for implementation of the *Report's* recommendations.

The *2005 Report* suggested that its recommendations be continually reviewed and updated in order to incorporate developments in the law and technology and recommendations made by subsequent commissions of inquiry. It was recommended that, at a minimum, a full review should take place five years after the *Report's* publication.

Even before the *Report* was released by Ministers, the HOP Committee did indeed establish a permanent committee on the prevention of wrongful convictions. The Subcommittee generally meets twice a year to share information and best practices, and the latest developments, educational activities, cases and emerging issues. It reports to the HOP Committee at each of its twice-yearly meetings. Thus, there now exists an established network of senior police and prosecution officials with expertise in these issues, which meets regularly to discuss best practices on the prevention and detection of wrongful convictions.

One of the Subcommittee's major projects has been the completion of this updated Report.

As will be seen in this update, the prevention of miscarriages of justice remains an overarching goal in criminal justice. The format of this update mirrors the original report: it provides a summary of developments in the law and reports on efforts to implement the 2005 recommendations. Those recommendations are re-examined in light of events over the past six years and, where appropriate, modifications are suggested. It also highlights international developments since 2005 and summarizes the key findings of Canadian commissions of inquiry held since the *2005 Report*.

The update canvasses the latest information on the most important causes of wrongful convictions, as described in the *2005 Report*, including tunnel vision; eyewitness mis-identification; false confessions; use of in-custody informers; and inappropriate use of forensic evidence and expert testimony. Each of these issues is discussed in the context of what has been learned since 2005, through research and commissions of inquiry, for example.

For example, the update notes that following a recommendation in the 2007 *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, all Canadian jurisdictions have conducted reviews in different forms of their use of hair microscopy evidence to determine if any cases should be reopened, as occurred in Manitoba. The most formal reviews were in Ontario and British Columbia.

Importantly, since release of the *2005 Report*, the Subcommittee has been able to track developments across the country in relation to the issue of preventing wrongful convictions. It is pleased to report that one of the most important developments as a result of the *2005 Report* has been the focus of all justice system participants on education.

As set out in Chapter 10, there has been a phenomenal level of educational activity among police and prosecutors about the causes of wrongful convictions. Today there is a higher level of awareness than ever before among Canadian police and prosecutors about the causes of wrongful convictions and what can be done to prevent them, as the issue of wrongful convictions has achieved an unprecedented prominence in discussions at the highest level of police and prosecution organizations. Education about the phenomenon of miscarriages of justice is now a staple of training for rookie and senior officers and prosecutors alike.

There is now a wealth of resources available to police and prosecutors on wrongful convictions. For example, a select list of Web sites is attached at Appendix A. Through this Subcommittee and its expert members, it is now clear that Canadian police, prosecutors and even the judiciary know where to turn for information and expertise on wrongful convictions.

That said, of great concern is that in this era of fiscal restraint and new pressures on the justice system, there is a danger that this promising new level of activity will inevitably diminish. Thus the central message of this report must be the need for continued vigilance.

The Subcommittee strenuously urges a continuing national commitment at a senior level to focus attention on the issue of wrongful convictions. The HOP Committee, federal, provincial and territorial governments and the Canadian Association of Chiefs of Police can sustain and support this initiative. Much progress has been made in understanding and addressing the causes of wrongful conviction. But “victory” cannot be claimed until the risk of a factually innocent person being convicted of a crime in Canada is eliminated – continued vigilance and much work remains to be done to reach that important goal. Innocent lives depend on it.

The Subcommittee does not believe it is necessary to conduct another five-year review. However, the Subcommittee will continue to monitor police and prosecution activities and continue to act as an advocate for change and concerted action in this area. It believes it would be more useful to issue reports on specific issues as they arise rather than to conduct another complete review. And it is recommending a national conference, following on the success of “*Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction*,” held in Winnipeg in 2005, to canvass the developments over the past five years, together with the latest issues in relation to wrongful convictions.

The *2005 Report* stated that it “should not be viewed as a beginning or a starting point, but as another stop along a well-established road.” As this update illustrates, much progress has been made along that road. Nevertheless, the Subcommittee recognizes that, as a quintessentially human endeavor, the investigation and prosecution of crime brings with it the possibility of error. Therefore, constant awareness of the risk factors common in wrongful conviction cases and continued vigilance by key criminal justice players in guarding against them is crucial to ensuring the integrity of the criminal justice system. The human cost of one wrongful conviction cannot be tolerated. Our society cannot afford to let justice fail.

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CHAPTER 1 – INTRODUCTION

In the fall of 2002, the Federal/Provincial/Territorial Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice in response to a number of wrongful convictions that had been identified and studied across the country. The Working Group was given the mandate to develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions, and to recommend proactive policies, protocols and educational processes to guard against future miscarriages of justice.

Two years later, the Working Group, composed of senior police and prosecutors from across the country, completed and presented the *Report on the Prevention of Miscarriages of Justice*.¹ It was released to the public by Federal, Provincial and Territorial Ministers Responsible for Justice at their annual meeting on January 25, 2005.

The 165-page *Report* comprehensively explored common causes of wrongful conviction, including tunnel vision, faulty eyewitness identification and testimony, the phenomenon of false confessions, the use of in-custody informers, the limits of forensic evidence, and the frailties of “expert” testimony. The findings and recommendations made by commissions of inquiries into wrongful convictions throughout Canada and internationally were collected and examined. Most importantly, the *Report* provided clear, comprehensive and practical recommendations for improvements to the criminal justice system which were designed to reduce the likelihood of wrongful convictions.

The Ministers lauded the strong collaboration that produced the *Report*, viewing it as “a clear signal that prosecutors and police take the issue of wrongful convictions seriously.” Every prosecution service across the country provided its prosecutors with a summary of the *Report*. The Canadian Association of Chiefs of Police (CACP) issued a news release welcoming the Report and asking all police agencies to review their policies and procedures to ensure consistency with the *Report’s* recommendations.² Then CACP President Edgar Macleod stated:

1 Hereafter referred to as the *2005 Report*.

2 At its 2006 annual meeting, the CACP passed a resolution recommending that the *Report* be adopted by all CACP member police agencies and that the recommendations specific to law enforcement be endorsed and implemented.

It is important that all players in the justice system – police, prosecutors, the judiciary and defence bar – work together and thereby effectively reduce the risk of wrongful convictions.

Nationally, the *Report* has been cited at all levels of Court, including the Supreme Court of Canada, the Ontario Court of Appeal,³ Ontario Superior Court of Justice,⁴ Quebec Superior Court,⁵ British Columbia Provincial Court⁶ and Manitoba Provincial Court.⁷ It has been studied at conferences in several countries, and is now part of the curriculum in several law school courses dedicated to the study of wrongful convictions.

Following release of the *Report*, each prosecution service (federal and provincial) conducted an in-depth review of its policies to assure compliance with the recommendations. For example, the Federal Prosecution Service (now Public Prosecution Service of Canada) amended several chapters of its Deskbook to incorporate the findings of the *Report*. In Ontario, the Attorney General established the Ontario Criminal Conviction Review Committee (OCCRC) to advise and develop proactive strategies to prevent miscarriages of justice and to look into specific allegations of wrongful convictions. Also in Ontario, the Justice Excellence portfolio was created to, among other things, develop Crown policy and an education plan to ensure Ontario prosecutors have the most current understanding of issues contributing to potential wrongful convictions. The Office of the Attorney General in New Brunswick established the Prevention of Wrongful Convictions Committee. In Alberta, the Standing Committee on Prosecutions and Enforcement (SCOPE) established a sub-committee to review the Report and recommend to what extent the recommendations should be implemented by police and prosecution services in Alberta. Several services are now adding separate chapters in their policy manuals on preventing wrongful convictions

Similarly, many police forces conducted in-depth reviews of the recommendations. The Vancouver Police Department (VPD), for example, developed a half-day training module titled “Preventing Wrongful Convictions through Excellence in Investigations” that is taught as part of its Investigators’ Program. The module is entirely focused on the common causes of wrongful convictions and the best practices to prevent them in the conduct of criminal investigations. The Calgary Police Service created an e-learning module on Miscarriages of Justice, which is mandatory for all members to complete.

3 *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, (2005) 33 C.R. (6th) 269 (Ont. C.A.), affirmed [2007] S.C.R. No. 129.

4 *R. v. Gonsalves* [2008] O.J. No. 2711; 56 C.R. (6th) 379 (Ont.S.C.)

5 *Réjean Hinse c. Procureur Général du Québec et Procureur Général du Canada*, 500-05-032707-976.

6 *R. v. Leach* [2006] B.C.J. 3616.

7 *R. v. Wirffel*, (2006) 221 Man.R. (2d) 277.

In his detailed review of the recommendations,⁸ Professor Christopher Sherrin observed that the *Report* included “very commendable and enlightened recommendations that will, if followed, lead to more accurate fact-finding and determinations of guilt and innocence.” Sherrin observed that one of the most positive aspects of the *Report* was its very existence: “The fact that the prosecutorial arm of the criminal justice system would devote significant time and energy towards the prevention of miscarriages of justice can only be applauded.”

He concluded:

The *Report on the Prevention of Miscarriages of Justice* is a highly welcome document that should make a positive contribution to the fight against wrongful convictions. Indeed, some of the available criticisms are over what it does not include rather than what it does. However these omissions are important and the remaining imperfections must be addressed. The Report has the chance to become a key standard by which the actions of police and prosecutors are judged. Amendments are necessary to make sure that it is worthy of that designation.

The National Criminal Justice Section of the Canadian Bar Association appreciated the *Report*’s “many practical suggestions” for achieving the goal of avoiding miscarriages of justice and commended the Working Group on its recommendations.

The Supreme Court of Canada cited the *Report* in the important case of *Hill v. Hamilton-Wentworth Regional Police Services Board*,⁹ where it observed that “even one wrongful conviction is too many, and Canada has had more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.”

In short, the *Report* has had a significant influence and has been an important catalyst in shedding light on the causes and circumstances leading to wrongful convictions. While such cases are mercifully infrequent, the troubling number of Canadians convicted of crimes of which they are factually innocent has heightened the urgent need for implementation of the *Report*’s recommendations.

⁸ Christopher Sherrin, *Comment on the Report on the Prevention of Miscarriages of Justice* (2007) 52 C.L.Q. 140. University of Western Ontario.

⁹ *Hill*, *supra*.

The *2005 Report* suggested that its recommendations be continually reviewed and updated in order to incorporate developments in the law and technology and recommendations made by subsequent commissions of inquiry. It was recommended that, at a minimum, a full review should take place five years after the *Report's* publication.

As will be seen in this update of the *2005 Report*, the prevention of miscarriages of justice remains an overarching goal in criminal justice. The format of this update mirrors the original report: it provides a summary of developments in the law and reports on efforts to implement the 2005 recommendations. Those recommendations are re-examined in light of events over the past six years and, where appropriate, modifications are suggested.

An important theme that was emphasized in the *2005 Report* was vigilance by all justice system participants in seeking to prevent wrongful convictions from occurring. It stated:

Everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice and must be provided with appropriate resources and training to reduce the risk of wrongful convictions. Indeed, the Working Group believes that individual police officers and prosecutors, individual police forces and prosecution services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.¹⁰

There now exists a higher level of awareness than ever before among Canadian police and prosecutors about the causes of wrongful convictions and what can be done to prevent them. The issue of wrongful convictions has achieved an unprecedented prominence in discussions at the highest level of police and prosecution organizations. Through the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, there is now a network of senior police and prosecution officials with expertise in these issues, which meets regularly to discuss best practices on the prevention and detection of wrongful convictions. As set out in Chapter 10, there has been a phenomenal level of educational activity among police and prosecutors about the causes of wrongful convictions. New recruits and veterans alike now receive regular training on the factors that contribute to wrongful convictions.

10 *2005 Report*, p. 154

The *2005 Report* stated that it “should not be viewed as a beginning or a starting point, but as another stop along a well-established road.”¹¹ As this update illustrates, much progress has been made along that road. Nevertheless, the Subcommittee recognizes that, as a quintessentially human endeavor, the investigation and prosecution of crime brings with it the possibility of error. Therefore, constant awareness of the risk factors common in wrongful conviction cases and continued vigilance by key criminal justice players in guarding against them is crucial to ensuring the integrity of the criminal justice system. The human cost of one wrongful conviction cannot be tolerated. Our society cannot afford to let justice fail.

¹¹ *Ibid.*, p. 3.

CHAPTER 2 – INTERNATIONAL REVIEW

I. INTRODUCTION

The disturbing truth is that wrongful convictions are an international phenomenon. The *2005 Report* included a summary of a review of the international studies and inquiries on wrongful convictions by Bruce A. MacFarlane, Q.C., a former deputy Attorney General of Manitoba and currently a law professor at the University of Manitoba.¹² The *Report* noted that some problems, themes and mistakes arise repeatedly in these wrongful conviction cases, regardless of where the miscarriage of justice occurred. These errors relate to the conduct of police, Crowns, defence lawyers, judges and forensic scientists, and they are not confined to proceedings in the courtroom. Following his review of international studies in the United States, Britain, Australia and New Zealand during the past century, MacFarlane concluded that “chilling and disconcerting” patterns and trends¹³ as well as scientific developments, such as DNA, have forced Anglo-based criminal justice systems to “grapple with the stark *reality*... that wrongful convictions have occurred on a significant scale.”¹⁴

II. INTERNATIONAL DEVELOPMENTS SINCE 2005

Since the *2005 Report*, there have been numerous initiatives, reports, inquiries and legislative reforms at the international level related to the prevention of wrongful convictions. The United States has emerged as the leader in this field, and has become the international centre of knowledge and expertise,¹⁵ largely through its

12 The paper on which the summary is based is entitled: “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 *Manitoba Law Journal* 403. Mr. MacFarlane updated some of the key issues in the paper for the 2008 *Inquiry into Pediatric Forensic Pathology in Ontario*. The updated paper is called “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System.” It can be accessed at <http://www.goudgeinquiry.ca>.

13 *Ibid.*, p.406.

14 *Ibid.*

15 For a recent overview of wrongful convictions in the United States, see the comprehensive article by Jon B. Gould and Richard A. Leo, “One Hundred Years Later: Wrongful Convictions After a Century of Research” (2010) 100 *Journal of Criminal Law and Criminology*, No. 3, University of San Francisco Law Research Paper, No. 2010-28. The authors analyze the research into wrongful convictions during the past century, identify the lessons learned, and point to fruitful areas deserving of future research and attention. Among the salient points the authors make is that, unless criminal justice players, policy makers and politicians are open to the findings of researchers and act on the lessons learned from decades of study into the causes of wrongful convictions, the research will be nothing more than an academic exercise. In addition, see Brandon

New York-based Innocence Project. The following discussion is not meant to be exhaustive but rather to provide a window into the array of international initiatives and cases related to wrongful convictions since the publication of the *2005 Report*.

A. United States

The Innocence Project is a national litigation and public policy organization founded in 1992 and associated with the Benjamin N. Cardozo School of Law of Yeshiva University in New York City. It assists prisoners who can be proven innocent through DNA testing but also works to reform the criminal justice system to prevent wrongful convictions.¹⁶ By May 2011, the Project was reporting 271 post-conviction DNA exonerations in the United States; about 70 per cent of those exonerated were people of color. The Project has identified eyewitness misidentification as the single greatest cause of wrongful convictions nationwide, indicating that it plays a role in more than 75 per cent of the convictions overturned through DNA testing. Unverified or improper forensic science contributed to the wrongful conviction in more than 50 per cent of DNA exonerations. In about 25 per cent of DNA exonerations, innocent defendants made incriminating statements, falsely confessed or pleaded guilty, and in more than 15 per cent of wrongful convictions that were overturned by DNA testing, an informant or jailhouse snitch testified against the defendant, the project reports.¹⁷

The Innocence Project is a wealth of information, studies, research¹⁸ and statistics concerning the causes of wrongful convictions, ongoing cases and exonerations, as well as initiatives across the United States designed to reduce and overturn wrongful convictions. For example, its web site contains information concerning legislative initiatives both nationally and at the state level aimed at reducing wrongful convictions. The Project has developed model legislation in various areas that it makes available online for review by jurisdictions that are considering legislative reforms to help prevent wrongful convictions, such as changes aimed at preventing eyewitness misidentification and false confessions.

L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, (Cambridge, Mass.: Harvard University Press, 2011). Another notable book recently published in the U.S. is an examination of the Central Park Jogger case. Author Sarah Burns seeks to understand the convictions and imprisonment of five black and Latino teenagers, who confessed to the 1989 rape and beating of a woman in Central Park, quickly recanted, but ended up serving their complete sentences before another man confessed to the crime and was connected to it by DNA testing. See Sarah Burns, *The Central Park Five* (New York: Alfred A. Knopf, 2011).

16 There is a network of similar organizations across the United States and in Canada, the UK, Ireland, Australia and New Zealand, but none of them has the stature of the New York-based Innocence Project referred to above, founded by Barry C. Scheck and Peter J. Neufeld.

17 The figures in this paragraph come from the web site of the Innocence Project, which was accessed on 19/05/11. See <http://www.innocenceproject.org>.

18 For example, in July 2009, the Innocence Project released a report concerning eyewitness misidentification called: *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification*. The report discusses reforms that have already been implemented in some states.

Different levels of government have introduced significant legislative reforms designed to reduce wrongful convictions since the publication of the *2005 Report*. For example, in February 2011, Virginia Senator Jim Webb introduced the National Criminal Justice Commission Act of 2011. Among other things, it would create a national commission composed of experts from across the criminal justice system to examine all aspects of the criminal justice system in the United States.¹⁹ Innocence Project representatives have expressed hope that the commission will examine the causes of wrongful convictions and recommend improvements to help prevent them.

A dozen states, including New York, Texas, Florida, California, and Virginia, have also created commissions, sometimes referred to as innocence commissions, to examine cases of wrongful convictions and to recommend reforms as a result of them. While the state commissions vary in structure and mandate, they all serve as vehicles to enable states to review cases of wrongful convictions, identify the causes and recommend reforms to prevent future cases.²⁰

The Innocence Commission for Virginia, for example, has done a comprehensive study aimed at reducing the risk of wrongful convictions in that state. In March 2005, it released a major study entitled “A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia.”²¹ More recently, in 2008, the New York State Bar Association established a Task Force on Wrongful Convictions, bringing together jurists, prosecutors, defence lawyers, members of law enforcement, government groups, other criminal justice practitioners and academics, to examine wrongful conviction cases from across the state and to make recommendations. The Bar Association’s Final Report was issued in April 2009, outlining a course of action for the State of New York to prevent future wrongful convictions.²² In June 2010, the Louisiana Legislature directed its State Law Institute to study and make recommendations regarding changes to the law and to explore other issues relating to the finality and accuracy of criminal convictions. The Institute is to report its findings and recommendations to the legislature by January 2013.

19 The federal *Justice For All Act of 2004* became law in October 2004. This Act includes the *Innocence Protection Act*, which among other things, enables federal inmates to petition a federal court for DNA testing. It also encourages states to enact measures to preserve evidence and make post conviction DNA testing available to inmates. Regarding ongoing reform in this area in the United States, see in particular Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, (Cambridge, Mass.: Harvard University Press, 2011), Chapter 9, “Reforming the Criminal Justice System.”

20 Information about these commissions is available on the Innocence Project web site at: <http://www.innocenceproject.org>.

21 The report can be accessed at <http://www.icva.us>.

22 This final report is available on the web site of the New York State Bar Association at: <http://www.nysba.org>.

North Carolina was the first state to create a commission to investigate claims of actual innocence by convicted persons. The North Carolina Innocence Inquiry Commission investigates cases where new evidence of complete factual innocence has emerged since conviction. The eight-member commission was created in 2006 and began operating in 2007. It has reviewed hundreds of innocence claims and conducted multiple hearings. On February 17, 2010, Gregory Taylor was the first person to be exonerated by this unique process. Mr. Taylor was declared innocent by a panel of three judges after serving 17 years for a murder that he did not commit. The Commission is separate from the appeals process. A person exonerated by the Commission process is declared innocent and cannot be retried for the same crime. Most claims are initiated by the convicted person, but many come from a friend or a family member of the convicted person. Claims may be initiated by a witness, victim, law enforcement officer, defense attorney, or anyone that has new information about evidence of innocence.²³

Other major initiatives are under way in various states throughout the United States. For example, in June 2010, a special master appointed by New Jersey's top court called for a major overhaul of the legal standards for the acceptance of eyewitness testimony in court. The opinion of retired judge Geoffrey Gaulkin was released publicly in a 64-page report on June 21, 2010, following an unusual hearing on eyewitness identification science and law. Among its findings, the report concluded that the test used by 48 states and the federal courts to determine the reliability of eyewitness testimony is flawed and inadequate, and should be replaced.²⁴ Barry Scheck, co-director of The Innocence Project, characterized the report as the "most extensive record to date on the scientific and legal standards that should be applied to eyewitness evidence."²⁵ The report findings could serve as a blueprint for other states that wish to revamp witness identification protocols and the rules regarding the use of such evidence in court. The report was precipitated by the 2004 conviction of Larry Henderson, who was sentenced to 11 years in prison for reckless manslaughter and weapons possession relating to a fatal shooting in January 2003. Henderson challenged the photo line-up procedure used in his case because the police had failed to follow state guidelines for conducting such procedures. The appeal court agreed and ordered a new hearing based on the admissibility of the photographic identification of Henderson. Prior to that hearing, the state appealed and the New Jersey Supreme Court ordered a full-scale inquiry into witness identification procedures used by the police.²⁶

23 <http://www.innocencecommission-nc.gov/>.

24 The report can be found on the Innocence Project web site, *supra*, under press releases.

25 Press Release by the Innocence Project, "Special Master Appointed by NJ Supreme Court Calls for Major Overhaul of Legal Standards for Eyewitness Testimony," Innocence Project Website, *supra*.

26 Innocence Project Website, *supra*.

In the area of forensic science, the National Academy of Sciences released a comprehensive report in February 2009, called *Strengthening Forensic Science in the United States: A Path Forward*.²⁷ The report advocated significantly strengthened oversight, research and support so that forensic science can be more reliable in identifying perpetrators of crime, protecting the wrongly accused and ensuring public safety. The Academy also recommended the creation of an independent, science-based federal entity that would direct comprehensive research and evaluation in the forensic sciences, establish scientifically validated standards and oversee their national application. The report was released by a group of scientific and legal experts after two years of study and public hearings.

Finally, in September 2010, the U.S. Department of Justice's National Institute of Justice conducted a two-day workshop to examine alternative international practices to prevent and correct wrongful convictions. The purpose of the workshop was to hear how other countries, as well as states and counties in the U.S., are handling wrongful convictions and to determine possible best practices that could be adapted for the U.S. system to prevent and correct wrongful convictions. The multidisciplinary expert working group brought together U.S. and international researchers, academics, advocates, law enforcement and legal practitioners. The workshop addressed the needs for research, research gaps and new potential research areas in the field of wrongful convictions in light of international best practices.²⁸

B. Britain

While Britain has several Innocence Projects, these organizations are less established than the Innocence Project in the United States. Thus, the Criminal Cases Review Commission remains the focal point in Britain for cases involving potential miscarriages of justice. It is the independent public body established in 1997 to investigate possible miscarriages of justice in England, Wales and Northern Ireland. In fact, the CCRC was the first statutory body in the world created to examine possible wrongful convictions and to refer cases to the appeal court where necessary.²⁹ The Commission determines whether convictions or sentences should be referred to a court of appeal. The Commission referred 31 cases to various courts, but most to the Court of Appeal for England and Wales, during 2009/2010, received 932 applications, and had 406 cases under review at the close of the year. Of the 30 cases heard by the appeal courts involving 29 individuals, 17 resulted in quashed convictions and six others in sentence

27 *Strengthening Forensic Science in the United States: A Path Forward* (Free Executive Summary) <http://www.nap.edu/catalog/12589.html>.

28 The report is available at: <http://nij.gov/nij/topics/courts/sentencing/international-perspective-on-wrongful-convictions.pdf>.

29 Criminal Cases Review Commission Annual Report and Accounts 2009/2010 (London: The Stationary Office), Introduction, p. 10, at: <http://www.ccr.gov.uk>.

variance.³⁰ In total, including the 31 referrals in 2009/2010, the Commission has referred 454 cases out of the 11, 871 cases closed between 1997 and March 31, 2010. That is an overall referral rate of 3.8 per cent.³¹

One of the most recently publicized cases of wrongful conviction in Britain is that of Warren Blackwell. Mr. Blackwell spent more than three years in prison for a sexual assault he did not commit before the Commission's investigation and referral led to the quashing of his conviction by the Court of Appeal in 2006.³² New evidence regarding the reliability of the complainant, her propensity to make false allegations, and whether in fact she was assaulted at all, were issues on appeal.³³ As the CCRC notes in its 2009/2010 annual report, the Independent Police Complaints Commission subsequently conducted an inquiry into the matter and was critical of the original police investigation and the handling of the prosecution.³⁴ The report cites, among other shortcomings of the police, its failure to disclose information of subsequent false allegations by the complainant.³⁵ Mr. Blackwell consistently denied his guilt; he twice sought leave to appeal his conviction and sentence but was refused.³⁶

The case of Sean Hodgson is another British case that has been the subject of attention in recent years. The CCRC referred his case to the Court of Appeal in March 2009. As the CCRC reported in its 2008/2009 annual report, he was freed from prison after serving 27 years for the 1981 murder of Teresa De Simone after DNA tests exonerated him. In another recent case, Barry George spent seven years in prison before being acquitted in July 2008 following his re-trial for the murder of prominent broadcaster Jill Dando. The Court of Appeal had quashed the original conviction following a referral by the Commission.³⁷ The Commission had referred the case to the Court of Appeal on the grounds that new evidence called into question the firearms discharge evidence at trial and the significance of that evidence.

30 *Ibid.*, Section Three Casework, pp. 25-26.

31 *Ibid.*, Section Three Casework, Referrals, p. 21.

32 *R. v. Blackwell* [2006] EWCA Crim 2185.

33 *Ibid.*, at para. 6.

34 *Criminal Cases Review Commission Annual Report and Accounts 2009/2010* (London: The Stationary Office), Chair's Foreword, p. 6, at: <http://www.ccr.gov.uk>. The *Independent Police Complaints Commission Report* is available through the IPCC web site at: <http://www.ipcc.gov.uk>.

35 *Independent Police Complaints Commission Report concerning complaints made by Mr. Warren Blackwell against officers from Northamptonshire Police ("Blackwell Investigation")*. See, for example, paras. 238-240 and 268-278 of the redacted for publication copy available on the IPCC web site at: <http://www.ipcc.gov.uk>.

36 *Ibid.*, p. 6

37 *Criminal Cases Review Commission Annual Report and Accounts 2008/2009* (London: The Stationary Office), Chair's Foreword, <http://www.ccr.gov.uk>. See also *R. v. Hodgson* [2009] EWCA Crim 490 and *R. v. George* [2007] EWCA Crim 2722.

Despite these referrals, there has been a growing chorus of criticism of the Commission. For example, Michael Naughton, director of the Innocence Network UK and a senior law lecturer at Bristol University, has published a collection of essays on the Commission, in which he concludes that the CCRC “is not the solution to the wrongful conviction of the innocent.”³⁸ The Commission, which has about 100 employees, has also seen its budget cut in recent years.

Among other significant developments, Britain has taken steps to strengthen the quality of its forensic science services to the criminal justice system through the establishment in 2007 of a Forensic Science Regulator within the Home Office. The goal of this body is to establish and enforce quality standards for forensic science used in the investigation and prosecution of crime. The Regulator is advised and supported by the Forensic Science Advisory Council, which is a multi-disciplinary group including professionals within the forensic science community and other criminal justice professionals, such as judges, prosecutors, defence counsel and the police.³⁹

However, in December 2010, the Home Office announced that it would shut by March 2012 the Forensic Science Service (FSS), which provides forensic science services to the police forces and government agencies of England and Wales but which it said had been losing 2 million pounds a month. Ministers said they hoped that large parts of the operation could be sold off to the private sector before the government-owned company is wound up. Thirty-three leading forensic scientists, including Professor Sir Alec Jeffreys, who pioneered DNA fingerprinting, signed a public letter condemning the move.⁴⁰

C. Australia

In Australia, a number of significant public inquiries have been released since 2005 concerning wrongful conviction cases, and another review is under way.

1. Farah Abdulkadir Jama

Farah Abdulkadir Jama received more than \$500,000 (Australian dollars) in compensation from the Victorian state government in 2010 for his wrongful rape conviction and incarceration based on contaminated DNA evidence. In May 2010, Victoria released the report of former Justice F.H.R. (Frank) Vincent into Mr. Jama’s 2008 wrongful conviction and imprisonment. A young Somali man,

38 Naughton, M (Ed.). *The Criminal Cases Review Commission: Hope for the Innocent?* (Great Britain: Palgrave Macmillan, 2009).

39 This is discussed in more detail in Chapter 9, “Forensic Science and Expert Testimony.”

40 <http://www.telegraph.co.uk/science/science-news/8227706/Justice-system-threatened-by-closure-of-Forensic-Science-Service.html>.

he spent 15 months in prison before his conviction was set aside and an acquittal entered by the Court of Appeal.⁴¹ Mr. Jama had been convicted on the basis of a single piece of DNA evidence, which scientists attributed to him, based on an exceptionally high level of mathematical probability.⁴² The verdict against Mr. Jama was set aside after it came to light that the swab and slide were collected in the same unit and by the same doctor as forensic samples taken from another woman, who had had sexual contact with Mr. Jama. Vincent concluded that the sample taken from the alleged rape victim may have been contaminated.⁴³ “I have concluded that the possibility that there was a transference of a microscopic amount of material containing the DNA of Mr. Jama from B. (the first woman) to a swab and slide obtained in the examination of M. (the second woman) as a consequence of the presence and examination of the two women in an environment where that might easily have occurred is quite high.”⁴⁴

2. Mallard Inquiry

Andrew Mallard received \$3.25 million (Australian dollars) from the West Australian government in 2009 in compensation for his 1995 wrongful conviction for the murder of Pamela Lawrence, who died of extensive head wounds after being bludgeoned to death in her jewelry shop. Mr. Mallard, who was homeless at the time of the murder and a petty thief, was in the area at the time, and had no alibi. No forensic link was ever established between him and the crime scene but Mr. Mallard, who suffered from mental illness, made various inculpatory statements to police and eventually admitted to police that he had hit Mrs. Lawrence with a wrench. He later said he had not murdered Mrs. Lawrence. He was charged with her murder following a two-month police investigation, convicted after a jury trial and sentenced to life in prison. Mr. Mallard unsuccessfully appealed to the Court of Criminal Appeal of Western Australia. He petitioned for clemency after serving eight years but the Court of Criminal Appeal dismissed the appeal.

Mr. Mallard had served 12 years of his life sentence before the Australian High Court quashed his conviction in 2005 and ordered a new trial.⁴⁵ There were various issues in the appeal, including the unreliability of his admissions during three police interviews, only one of which was recorded. The lack of disclosure of relevant information was also a significant issue.⁴⁶ Following the court ruling, the Crown did not proceed with a new trial due to changes to the law regarding the

41 See the *Report: Inquiry into the Circumstances that Led to the Conviction of Mr. Farah Abdulkadir Jama*, p. 9. The report can be found online at The Department of Justice web site for the State of Victoria in Australia, <http://www.lawreform.vic.gov.au>.

42 *Ibid.*

43 *Ibid.*, p.10

44 *Ibid.*, p. 24.

45 *Mallard v. The Queen* [2005] HCA 68.

46 *Ibid.*

admissibility of interviews that had not been video-recorded.⁴⁷ Mr. Mallard was released from prison in 2006.

A subsequent review by the police exonerated him and pointed to another killer, Simon Rochford. Mr. Rochford was serving a sentence for the murder of his girlfriend at the time. He was found dead in his cell the morning after he was named in the media as a new suspect in the Lawrence case. A coroner's inquest later determined he had committed suicide.

The West Australian Corruption and Crime Commission subsequently launched an inquiry into the investigation and prosecution of Mr. Mallard and released its report in 2008.⁴⁸ The inquiry made findings of misconduct against two police officers involved with the murder investigation, as well as findings of misconduct against the Deputy Director of Public Prosecutions who had prosecuted Mr. Mallard at his 1995 trial. The findings against the *Ibid.* police officers included causing witnesses to alter their statements and reports, and failing to disclose prior statements and the results of forensic tests to the Crown. The Commission also found that the Crown had engaged in misconduct by failing to disclose to the defence the results of forensic tests related to the possible murder weapon and by also conducting the trial on the basis that the murder weapon was a wrench as drawn by the accused, when in fact the Crown knew that the pattern of some of the injuries was not consistent with the murder weapon being a wrench.⁴⁹

3. Leanne Holland

In May 2010, the Queensland Police launched an inquiry into the September 1991 murder of 12-year-old schoolgirl Leanne Holland. It is described as a comprehensive review of the case, involving four senior police officers.⁵⁰ Graham Stafford, who was the boyfriend of Holland's older sister at the time, was convicted of the murder by a jury in 1992, on the basis of circumstantial evidence, and sentenced to life. He maintained his innocence. Mr. Stafford twice appealed to the Queensland Court of Appeal but both appeals were dismissed.

47 See the *Corruption and Crime Commission Report on the Inquiry Into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs. Pamela Lawrence, the Prosecution and Appeals of Mr. Andrew Mark Mallard, and Other Related Matters*. This report can be accessed at: <http://www.ccc.wa.gov.au/Publications/Reports>. The West Australian Innocence Project and news reports also provide information about this case. The Innocence Project can be accessed at http://www.innocenceprojectwa.org.au/andrew_mallard.html.

48 *Ibid.*

49 *Corruption and Crime Commission Report, supra*, , pp. 163-165. See also some discussion of the *Mallard* case in Lynne Weathered, "Does Australia Need A Specific Institution to Correct Wrongful Convictions?" (2007) Vol. 40, Number 2, *The Australian and New Zealand Journal of Criminology*, 179 at 187-188.

50 The re-investigation was still ongoing as of May 2011.

Two applications for special leave to the High Court of Australia also failed. Mr. Stafford was released on parole in 2006.

In April 2008, in an unusual second request for a pardon, the Queensland Attorney General referred the case to the Court of Appeal. The Court of Appeal quashed Mr. Stafford's conviction in December 2009, ordering a new trial. The concerns of the Court focused on a finding that Mr. Stafford had not received a fair trial because the jury was misled in a material way regarding the case that could fairly be made out by the Crown.⁵¹ In March 2010, the Crown decided not to re-try Mr. Stafford, who had served his sentence in any event. Key circumstantial evidence had been called into question over the years, largely through the work of a criminologist and a former police officer and private investigator, who wrote a book about the case.⁵² The defence team also challenged the reliability of forensic evidence used to estimate the time of death. The case generated a lot of media interest over the years.⁵³

4. Roseanne Catt

Roseanne Catt is seeking compensation from the New South Wales Government for her 1991 conviction. She served 10 years in prison after being convicted of malicious wounding, administering poison to endanger life and conspiracy to commit the murder of her ex-husband. The case was re-opened at the request of the Attorney General after fresh evidence came to light. An investigation revealed that Ms. Catt's ex-husband and the police officer in charge of the case were close friends. There was evidence to suggest she had been framed. A witness came forward and confessed to giving false evidence against Ms. Catt because of threats from the investigating police. In 2005, the New South Wales Court of Criminal Appeal quashed six of the convictions against her, including the convictions for soliciting the murder of her ex-husband and endangering his life by attempting to administer a noxious substance. The Court ordered Ms. Catt to be re-tried on five of the convictions, including those of soliciting his murder, but acquitted her of the charge of possessing a pistol without a licence for which she had already served her sentence.⁵⁴ In the judgment, McClellan AJA considered fresh evidence and held that, *inter alia*, there was evidence regarding unreliable civilian witnesses. Justice McClellan also found that there was evidence regarding the propensity of an investigating police officer to secure the conviction of Ms. Catt by means that might include the manufacture or arranging for the giving of evidence known to be false, and fresh evidence implicating the police officer in the creation of evidence by planting a revolver.

51 *R. v. Stafford* [2009] QCA 407. See, for example, the discussion at paras. 140-150.

52 Graeme Crowley and Paul Wilson: *Who Killed Leanne Holland? One girl's murder and one man's injustice*, (Sydney: New Holland Publishers, 2007).

53 *Stafford*, *supra*.

54 *Regina v. Catt* [2005] NSWCCA 279.

Justice McClellan held that it was up to the DPP to decide if a new trial should take place. The Crown did not re-try Ms. Catt. Ms. Catt had almost fully served her prison sentence and was about four months away from her release on parole.⁵⁵ Ms. Catt has always maintained she was the victim of a conspiracy and has written a book entitled *Ten Years*, which documents her story.⁵⁶

D. New Zealand

New Zealand has also documented cases of wrongful convictions,⁵⁷ and has established an Innocence Project,⁵⁸ similar to those in other countries. The Project investigates possible cases of wrongful convictions in New Zealand and is also a member of the Innocence Network.⁵⁹

In addition, in 2006, Sir Thomas Thorp, a retired New Zealand High Court judge, completed a two-year-study called *Miscarriages of Justice*, concerning the nature and incidence of miscarriages of justice in that country.⁶⁰ His research included a review of 53 applications to the Justice Ministry claiming miscarriages of justice from 1995 to 2002. Sir Thorp concluded that 26 per cent of them raised issues that required investigation.⁶¹

55 For a full appreciation of the facts and evidence in this case, the 156-page decision should be carefully reviewed.

56 More information about Catt can be found on the Innocence Project web site for West Australia at <http://www.innocenceprojectwa.org.au>. Another wrongful conviction case recently in the news is that of Darryl Beamish, who was awarded \$425,000 (Australian dollars) from the Western Australian government in 2011 for the 15 years he spent in prison for the 1959 murder of a rich socialite. He was 18 at the time of the murder, convicted and sentenced to death. His sentence was later commuted to life. His appeal was dismissed and a subsequent application for special leave to appeal to the High Court was also dismissed. Serial killer Eric Edgar Cooke confessed to the crime in 1963 and was hanged in 1965; nevertheless Beamish's subsequent appeal and special leaves for appeal were also dismissed. Mr. Beamish ended up serving his sentence until being released on parole. The Court of Appeal, while acknowledging that the case against Beamish was very strong, set aside Mr. Beamish's conviction in 2005 in part on the basis of fresh evidence in the form of a confession by Cooke just prior to his 1964 execution. See *Beamish v. The Queen* [2005] WASCA 62 (1 April 2005).

57 The case of Mike Silva, who served 285 days in prison after being wrongly convicted of arson in 2004, is discussed on the Innocence Project New Zealand web site at <http://www.victoria.ac.nz/ipnz>. The Court of Appeal quashed the conviction in 2005; Silva was formally discharged in 2007. The New Zealand government also announced in May 2011 that it would pay compensation to Phillip Johnston and Jaden Knight for their wrongful convictions and imprisonment in 2004 for arson. Their convictions were quashed by the Court of Appeal in 2005 and re-trials ordered. Johnston was found not guilty during a re-trial in 2006. Evidence that came to light after the re-trial revealed that neither man was responsible. Knight was discharged in 2007 before his re-trial began. Both men had spent almost 10 months in prison.

58 See web site address, *ibid*.

59 Information about the Innocence Network can be found on its web site at: <http://www.innocencenetwork.org>.

60 This paper is available for purchase from the New Zealand Legal Research Foundation.

61 Phil Taylor, *New Zealand Herald News*, January 21, 2006.

One of the most recently-publicized wrongful conviction cases in New Zealand was the 2005 rape conviction of 33-year-old Aaron Farmer, who was awarded \$351,575 (New Zealand dollars) in compensation in 2011.⁶² Mr. Farmer spent more than two years in prison before the Court of Appeal quashed his conviction in 2007 and ordered a new trial. The Court found that the Crown's case rested almost entirely on the accuracy of the complainant's identification of her attacker, and that Mr. Farmer's trial lawyer had failed to contact and call a potential alibi witness.⁶³ During the trial, the complainant, who had picked Mr. Farmer as the assailant after being shown a photo montage of eight photographs, testified during her evidence-in-chief that she was 90 per cent sure he was the assailant.⁶⁴ Mr. Farmer was discharged in April 2008 before the second trial after DNA testing, which was not available at the time of the original trial, confirmed that he was not the perpetrator. The complainant was also unwilling to give evidence at a re-trial. The Crown chose not to proceed with a new trial.⁶⁵

62 New Zealand Government press release, 14 April 2011. The Government also released cabinet papers and a report concerning the case.

63 *R. v. Farmer* [2007] NZCA 229 at paras. 4, 63-72.

64 *Ibid.*, at para. 18.

65 The New Zealand government has released publicly redacted cabinet documents in relation to the case.

CHAPTER 3 – CANADIAN COMMISSIONS OF INQUIRY

Recent Canadian commissions of inquiry continue to uncover and denounce the now recognizable themes that are often present when innocent people have been imprisoned for crimes they did not commit.

The importance of these case-specific inquiries cannot be overstated – they have helped to enlighten all justice system participants, and indeed the public at large, that miscarriages of justice are a part of our justice system and not as rare as previously believed. More importantly, they point to a number of converging themes that must be addressed in efforts to prevent miscarriages of justice in Canada. The reports are cautionary tales for all justice participants and are required reading for those who would prevent these sad histories from repeating themselves.

Since the *2005 Report*, four Commissions of Inquiry have issued their reports.

The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken

In June 2006, the Government of Newfoundland and Labrador released the report of the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, into the cases of Gregory Parsons, Ronald Dalton and Randy Druken.⁶⁶

66 On December 15, 1989, Ronald Dalton was convicted following a jury trial of second degree murder in the death of his wife Brenda. Twelve days later, he filed a notice of appeal but his case was not heard by the Court of Appeal until January 1998 – some eight years later. The murder conviction was overturned and a new trial ordered. On June 24, 2000, Dalton was acquitted at his second trial. Lamer's mandate was limited to inquiring into why it took eight years for Dalton's appeal to be heard by the Court of Appeal.

Gregory Parsons was convicted in February 1994 of second degree murder in the death of his mother Catherine Carroll. On December 3, 1996, the Court of Appeal overturned his conviction and ordered a new trial. On January 26, 1998, testing confirmed that DNA found at the murder scene was not Parsons'. A few days later, a stay of proceedings was entered on the murder charge. On November 5, the Crown called no evidence and Parsons was acquitted. Brian Doyle, a childhood friend and former next-door neighbor, was subsequently charged and convicted of the murder.

Randy Druken was convicted on March 18, 1995 of murdering Brenda Young and sentenced to life imprisonment, with no eligibility for parole for 14 years. The only direct evidence linking him to the murder was the testimony of a jailhouse informant. On August 10, 1998, the

The Report⁶⁷ made more than 40 recommendations on all aspects of the criminal justice system, from legal aid to police investigations to Crown culture.

The report is available at <http://www.justice.gov.nl.ca/just/publications/lamerreport.pdf>.

Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell

In February 2007, the Manitoba Government released the report of the *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*,⁶⁸ headed by the Honourable Patrick LeSage, former Chief Justice of the Ontario Superior Court of Justice.

On June 14, 1991, Mr. Driskell was convicted of the first-degree murder of Perry Harder and sentenced to life imprisonment without eligibility for parole for 25 years.

On March 3, 2005, the federal Minister of Justice quashed his conviction and ordered a new trial. The same day, the Government of Manitoba stayed the murder charge.

In his report, Commissioner LeSage concluded there had been a number of “serious breaches of basic disclosure obligations at an institutional level”⁶⁹ which contributed to the miscarriage of justice suffered by Mr. Driskell. “It is not in serious dispute that Driskell was incarcerated for 13 years, one month and seven days for a crime for which he was wrongfully convicted.”⁷⁰

informant sent a statement to the Minister of Justice alleging that he had been coerced to give false testimony by members of the Royal Newfoundland Constabulary and Crown prosecutors. The Director of Public Prosecutions asked the Ontario Provincial Police to conduct an independent investigation into these allegations. The report of the OPP investigation outlined a prolonged pattern of deceit on the part of the informant, including his faulty testimony at Druken’s trial. The informant was charged, convicted and sentenced to a five-year prison term for the attempt to obstruct justice.

In light of the OPP report, the RNC arranged for forensic testing which revealed the presence of a male other than Druken at the scene of the murder. On June 17, 1999 the Court of Appeal allowed an application to introduce fresh evidence and ordered a new trial. In light of the OPP report on the informant and the DNA evidence, the RNC launched a second investigation into the murder. As a result a stay of proceedings was entered on August 20, 2000 and a third RNC investigation was launched. The stay expired one year later.

67 *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (2006), hereafter referred to as the *Lamer Inquiry Report*.

68 Hereafter referred to as the *Driskell Inquiry Report*.

69 *Driskell Inquiry Report*, p. 112

70 *Ibid.*, p. 1

Commissioner LeSage made a series of recommendations relating to police note-taking, post-conviction disclosure, unsavoury witnesses, direct indictments, hair microscopy evidence, and the use of stays of proceedings.

The report is available at http://www.driskellinquiry.ca/pdf/final_report_jan2007.pdf.

Commission of Inquiry into the Wrongful Conviction of David Milgaard

In September 2008, the Government of Saskatchewan released the *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*.⁷¹

In 1970, Mr. Milgaard was convicted of non-capital murder for the 1969 slaying of nurse's aide Gail Miller in a snow-covered Saskatoon alley. On December 28, 1988, Mr. Milgaard applied to the Minister of Justice for a review of his conviction pursuant to then section 690 of the *Criminal Code*. On February 27, 1991, the Minister of Justice dismissed Mr. Milgaard's first application, but after a second application, the Governor in Council referred the case to the Supreme Court of Canada on November 28, 1991.

On April 14, 1992, after the Supreme Court recommended to the Minister of Justice that she set aside the conviction and direct that a new trial be held, the Minister directed that a new trial should be held for Mr. Milgaard. On April 16, 1992, the Attorney General of Saskatchewan entered a stay of proceedings on that indictment. DNA evidence eventually exonerated Mr. Milgaard and was used to convict Larry Fisher of the murder of Gail Miller. Mr. Milgaard was eventually compensated \$10 million.

In February 2004, the Government of Saskatchewan called a commission of inquiry into Mr. Milgaard's wrongful conviction, headed by Mr. Justice Edward P. MacCallum of the Alberta Court of Queen's Bench.

The Inquiry ran from January 2005 to December 2006, sitting a total of 191 hearing days. In total, 114 witnesses were called and over 3,200 documents were introduced in evidence.

The Commissioner made 13 recommendations, dealing with issues such as the retention of trial exhibits and police and prosecution files, statements taken from young persons, compensation of the wrongfully convicted, and the secrecy of jury deliberations.

71 Hereafter referred to as the *Milgaard Inquiry Report*.

The report is available online at <http://www.milgaardinquiry.ca/>.

Inquiry into Pediatric Forensic Pathology in Ontario

In October 2008, the Government of Ontario released the report of the *Inquiry into Pediatric Forensic Pathology in Ontario*.⁷²

The Inquiry, headed by Mr. Justice Stephen Goudge of the Ontario Court of Appeal, made 169 recommendations to improve the pediatric forensic pathology system in Ontario.

The Inquiry was appointed in April 2007 after the Office of the Chief Coroner of Ontario released the results of a review into 45 cases of suspicious child deaths between 1991 and 2002 where forensic pathologist Dr. Charles Smith either performed the autopsy or provided an opinion as a consultant.

In 20 cases, a panel of internationally respected experts in forensic pathology did not agree with the opinions given by Dr. Smith in a written report or court testimony, or both. In a number of these cases, the experts felt that Dr. Smith “had provided an opinion regarding the cause of death that was not reasonably supported by the materials available for review.” Twelve of those cases had resulted in criminal convictions, and one in a finding of “not criminally responsible.”

The Inquiry’s mandate was to conduct a systemic review and an assessment of the policies, procedures, practices, accountability and oversight mechanisms, quality-control measures, and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings. The Commissioner was to make recommendations to address systemic failings and restore and enhance public confidence in pediatric forensic pathology in Ontario.

The Inquiry heard 47 witnesses, conducted 16 roundtable meetings, and reviewed 36,000 documents.

Commissioner Goudge concluded that there was “failed oversight” at all levels: “The oversight and accountability mechanisms that existed were not only inadequate to the task but were inadequately employed by those responsible for using them.”⁷³

⁷² Hereafter referred to as the *Goudge Inquiry Report*.

⁷³ *Goudge Inquiry Report*, p. 20

Since the release of the report, the Ontario Court of Appeal has heard several appeals in cases in which Dr. Smith testified and quashed at least five convictions.

The report is online at: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge>.

The following chart compares the key recommendations made by the four recent inquiries, as well as the three reports discussed in the *2005 Report*. As well, each of the following chapters reproduces those inquiry recommendations relevant to the subject discussed in the chapter.⁷⁴

The purpose of this report is clearly not to respond to each and every inquiry recommendation, nor is the Subcommittee necessarily endorsing them simply by reproducing them. However, these recommendations serve as a useful point of departure for discussion and have been carefully considered in the Subcommittee's deliberations. As well, in many jurisdictions, much has been done to respond to, and implement, these recommendations and that too is highlighted in each chapter.

74 A recently-published book by Gary Botting, *Wrongful Conviction in Canadian Law* (Markham: Butterworths LexisNexis, 2010), examines each of the recommendations of the seven inquiries and analyzes them under the following headings:

- Commentary
- Rationale
- Cross-reference (to other inquiry recommendations)
- Action taken
- Incorporated into legislation?
- Incorporated into policy?
- Caselaw

The book also contains the recommendations of the *2005 Report*.

RECOMMENDATIONS BY COMMISSIONS OF INQUIRIES

1. Forensic Evidence

MORIN⁷⁵

- Limitations on Forensic evidence has to be appreciated by all the parties in a court proceeding and explained to the jury
- Forensic material should be retained to allow for replicate testing
- Scientists should be working to challenge or disprove a hypothesis rather than to prove one
- Defence should have access to forensic experts
- Scientists should be trained in testifying so their evidence isn't misinterpreted

SOPHONOW⁷⁶

- All reasonable tests should be performed on the evidence (duty on Prosecution and Police)

DRISKELL

- "Positive" conclusions should be reviewed and verified by another medical examiner
- Different examiner should be used to guard against "confirmation bias"
- Microscopic hair evidence should be received with great caution and when received, jurors should be warned of the inherent frailties of such evidence.
- Where hair microscopy evidence remains admissible, any conclusions should be expressed in "exclusionary" rather than "inclusionary" terms
- Judges must scrutinize the proposed evidence and weigh its probative value against its prejudicial effect

75 *The Commission On Proceedings Involving Guy Paul Morin*, <http://www.ontla.on.ca/library/repository/mon/10000/201163.pdf> (hereafter referred to as the *Morin Inquiry Report*).

76 *The Inquiry Regarding Thomas Sophonow* (hereafter referred to as the *Sophonow Inquiry Report*), <http://www.gov.mb.ca/justice/publications/sophonow/index.html?/>

1. Forensic Evidence (cont'd)

GOUDGE

- Professionalization of forensic pathology through legislative change, forensic pathology education, training and certification; recruitment and retention of qualified forensic pathologists; and adequate, sustainable funding to grow the profession.
- Reorganize the Ontario Forensic Pathology Service, reorganize relationships and strengthen service agreements between OFPS and regional units, teamwork between forensic pathologists.
- Forensic pathologists rather than pediatric pathologists should take the lead in criminally suspicious cases.
- Expand the number of pediatric forensic pathologists as quickly as possibly.
- Create Registry of Pathologists, consisting of “approved” pediatric forensic pathologists to conduct all criminally suspicious cases.
- Pathologists must recognize the limits of their expertise, be aware of the dangers of being misinterpreted, and effectively communicate their opinions and confidence levels within the criminal justice system.
- Enhance oversight, accountability and quality control / assurance through clear lines of responsibility for oversight and accountability, an institutional commitment to quality, development of a peer review process, and external standards and review mechanisms.
- Current best practices guidelines for forensic pathologists, as developed since 2001, should be followed and developed further.
- A Code of Practice and Performance Standards to reflect a consensus on how levels of confidence should be calculated.
- Specially trained and educated police officers, the creation of a Crown Child Homicide Team, and increased Legal Aid tariffs for defense counsel with the necessary skills to defend pediatric death cases.
- Regular joint courses for Crown and defense counsel for education in forensic pathology and law school courses in basic scientific literacy and the interaction of science and the law.

1. Forensic Evidence (cont'd)

GOUDGE (cont'd)

- Judges should be continuously educated on and vigilantly exercise their gatekeeper roles: defining the limits of the expertise and confining the witness's testimony to it and ensuring that all evidence meets the test of threshold reliability.
- Development of a Code of Conduct for expert witnesses who testify in criminal cases.
- The Province of Ontario should provide adequate resources to ensure coronial and forensic pathology services in Northern Ontario.

- Coroners should receive training on cultural issues, particularly surrounding death, to facilitate the performance of their responsibilities.

MILGAARD

- Dedicated medical examiner's facilities should be established in one or more major centers where autopsies in cases of sudden death would be performed by qualified forensic pathologists in the service of the province

2. In-Custody (Jailhouse) Informants

MARSHALL⁷⁷

- Limited use

LAMER

- Recommendations from the Sophonow Report should be incorporated into Crown Policy Manual

SOPHONOW

- Prohibited except in rare circumstances (e.g., kidnapping where witness knows whereabouts of Victim)

⁷⁷ Royal Commission on the Donald Marshall, Jr., Prosecution (hereafter referred to as the *Marshall Inquiry Report*), http://www.gov.ns.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf.

2. In-Custody (Jailhouse) Informants (cont'd)

DRISKELL

- Recognition of the fact that their evidence may be suspect
- Policies should be revised to specifically provide that *all benefits* requested, discussed, or provided or intended to be provided *at any time* in relation to any “central” witness be recorded and disclosed

a) Prosecution procedure for using in-custody informers

MORIN

- Crown policy should reflect dangers of such evidence
- Reliability of evidence is key (lists 13 criteria on assessing reliability)

LAMER

- Recommendations from Sophonow should be applied

SOPHONOW

- 3 criteria from Morin are focused on: [(1) information could only be known by one who committed the offence; (2) information is detailed and revealing; (3) confirmed by police investigation as correct and accurate] AND the other 10 are also noted

(b) Jury warning

MORIN

- Warning stronger than a *Vetrovec* should be given

LAMER

- Recommendations from Sophonow should be applied

SOPHONOW

- Very strong direction as to the unreliability of the evidence

3. Police

a) Training of Officers

MARSHALL

- More intensive training for cadets involved with high profile crimes
- Training should be monitored by parties outside the police force
- Evaluation of investigative capabilities
- Training with respect to sensitivity on visible minority issues

MORIN

- Setting of minimum standards respecting initial and on-going training

SOPHONOW

- Attendance at annual lecture/course for all officers on tunnel vision

DRISKELL

- Policies and steps taken in August 2006 by the Canadian Association of Chiefs of Police in regard to the prevention of miscarriages of justice are recommended

LAMER

- Policies and protocols should be established to assist officers in obtaining independent expertise
- Policing standards should be developed with respect to qualifications, initial and ongoing training and criminal investigation
- Provide improved training on note taking

(b) All interviews conducted with suspects should be video/audio-taped

MARSHALL

- Recommended

MORIN

- Recommended
- If not videotaped, trial judge can draw negative inference

SOPHONOW

- Recommended
- If not videotaped, general rule is should be inadmissible

DRISKELL

- Recommended

LAMER

- Recommended
- (field interviews should be audio-taped)

MILGAARD

- Recommended

(c) Police should be encouraged to videotape interviews with witnesses whose testimony may be challenged in court

MORIN

- Recommended
- Training for police interview techniques to enhance reliability

LAMER

- Recommended

SOPHONOW

- Interviews with Alibi witnesses should be video/audio taped and inadmissible if not transcribed

MILGAARD

- Recommended

(d) Special care to be given for certain categories of witnesses when interviewing

MARSHALL

- Recommended for youth or mentally unstable witnesses/suspects

LAMER

- An expert should be “on-call” to assist in the interviewing of child witnesses

SOPHONOW

- Recommended for youth or mentally unstable witnesses/suspects

(e) Alibi witnesses: officers other than officers involved in investigation of Accused should investigate alibi of accused

MORIN

- Recommended

SOPHONOW

- Recommended

(f) Avoidance of tunnel vision

MORIN

- Education of police officers on how to identify and avoid tunnel vision
- Status of investigating officers should not be elevated for pursuing “best” lead/suspect

SOPHONOW

- Attendance at annual lecture/course for all officers on tunnel vision

MILGAARD

- Mandatory sharing of investigation reports between all police forces assisting in major cases
- Reports should be directed to file manager to become part of the major case management file

(g) Use of polygraphs**MORIN**

- Police should be instructed as to the proper use and limitations of polygraphs

SOPHONOW

- Not a substitute for a full and complete investigation
- Caution must be exercised to ensure that too much reliance is not placed on results and that the investigation is not misdirected as a result
- Polygraph test should always be videotaped
- Must NOT be conducted after an interview with an investigator
- Investigator must not fulfill role as polygraph examiner

(h) Limited Use of Criminal Profiling**MORIN**

- Police should use as an investigative tool only

(i) Must be a comprehensive and consistent retention policy for police notebooks**MORIN**

- Notebooks should be easily located
- Ultimate goal should be towards computerization

LAMER

- Recommended

SOPHONOW

- Notebooks should not be stored by individual officers
- Should be stored by the municipality (might be preserved on microfiche)
- Kept for 20-25 years

(i) Must be a comprehensive and consistent retention policy for police notebooks (cont'd)

DRISKELL

- Recommended
- (Disclosure to Crown of all information relating to the investigation whether relevant or not)

MILGAARD

- Indictable offence cases:
Notebooks in original form should be retained for a year, then scanned into permanent, secure electronic record

(j) Preservation of exhibits

MILGAARD

- In all homicide cases, all trial exhibits capable of yielding forensic samples should be preserved for a minimum of 10 years. (Convicted persons should be given notice of impending destruction allowing for applications for extensions.)

- In all indictable offences cases, documentary exhibits should be scanned and stored electronically

SOPHONOW

- Exhibits should be kept for 20 years

(k) Eye Witness Identification

SOPHONOW

- Lays out additional procedure for live line-up identification
- Lays out additional procedure for photo-pack line-up identification
- Strong and clear directions to jury on frailties of eye-witness identification
- Expert evidence on accuracy of eye-witness identification should be readily admitted

(l) Missing person investigations

MORIN

- Police should be mindful that it may escalate into major crime investigation and must take appropriate measures to preserve evidence
- Lists proper procedure to employ in a body site search

(m) Note Taking

MORIN

- Implement a province wide policy for police note taking and note keeping. Financial and other resources must be provided to ensure that officers are trained to comply with such policies;
- Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities;
- There should be a comprehensive and consistent retention policy for notes and reports. Original notes must be retained to enable their examination by the parties at trial and their availability for ongoing proceedings;
- A policy should establish practices to enable counsel and the police themselves to easily determine what notes and reports do exist;
- The pages of all notebooks, whether standard issue or not, should be numbered;
- Policies should be clarified, and enforced, respecting the location of notebooks;
- The use of the standard issue “3” by “5” notebook should be revisited by all police forces. It may be ill suited to present day policing;
- The computerization of police notes must be the ultimate goal towards which police forces should strive;

(m) Note Taking (cont'd)**MORIN (cont'd)**

- Policies should be established to better regulate the contents of police notebooks and reports reinforcing the need for a complete and accurate record of interviews conducted by police, their observations, and their activities.
- Policies should be established to ensure real supervision of note taking practices, including spot auditing of notebooks.

LAMER

- Adopt and incorporate the recommendations for interviewing, note-taking and statement-taking as outlined in the *Morin Inquiry Report*.

4. Crown**LAMER**

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

DRISKELL

- In the context of s. 696 cases, if “stay” is to be used, the decision should be made personally by the Attorney General

(a) Training**MARSHALL**

- Programs to identify and reduce system discrimination

(a) Training (cont'd)**MORIN**

- Crown should be educated on identification and avoidance of tunnel vision
- Evidence of other suspects should be revisited

LAMER

- Senior Crowns should mentor junior Crowns on matters relating to critical analysis of evidence and the limits of Crown advocacy

DRISKELL

- Senior Crowns should foster critical thinking in their younger counterparts

MILGAARD

- Crown attorneys should be educated regarding tunnel vision and should avoid leaving the impression that they are heavily interested in a case on a personal level

(b) Strength of evidence**MORIN**

- Crown duty not to raise evidence that is reasonably considered to be untrue

LAMER

- Director of Public Prosecutions should establish a failsafe system to ensure the evidence in every major case is critically assessed by a Crown attorney, at the latest, upon completion of the preliminary inquiry
- Crown Policy should be in place to guard against Crown calling inherently unreliable evidence.

SOPHONOW

- Will render trial unfair if Crown raises prejudicial issues without adequate evidence

DRISKELL

- Direct indictment only where exceptional circumstances justify such a procedure (due to the loss of opportunity for accused to test the Crown's case)
- Accused's counsel should be invited to make submissions to the Attorney General in cases where there has not been a preliminary inquiry

(c) Interviewing Techniques**MORIN**

- Lists criteria for increasing reliability of interviews including taping of interviews

LAMER

- Crown Policy should provide clear guidelines for the interviewing of child witnesses

(d) Crown advocacy**MORIN**

- Crowns should be trained on limits of crown advocacy including being prevented from appealing jury acquittal

DRISKELL

- Experienced Crown attorneys should foster critical thinking and independence in younger counterparts

LAMER

- Crown Policy should provide clear guidelines as to the limits of Crown advocacy
- Senior Crowns should mentor junior Crowns relating to appropriate limits of advocacy

(e) Crown disclosure**MARSHALL**

- Amendments to Criminal Code re: disclosure

MORIN

- Creation of committee to review and discuss disclosure issues

(e) Crown disclosure (cont'd)**DRISKELL**

- Paramount
- Recommended that pre-trial disclosure policy be extended to include post-trial disclosure.
- Revised policy must incorporate a procedure by which Manitoba Justice receives this information from the police and then discloses it to the accused or counsel

5. Lack of independent review of wrongful convictions**MARSHALL**

- Independent board to review wrongful convictions

MORIN

- Independent board to review wrongful convictions

SOPHONOW

- Independent board to review wrongful convictions

LAMER

- Independent review of the Office of the Director of Public Prosecutions with a view to ensuring that “Crown culture” that contributes to wrongful convictions is eliminated

DRISKELL

- Where person comes forward claiming a wrongful conviction, Manitoba Justice should direct an independent external review of the case

MILGAARD

- Independent board to review wrongful convictions
- Review agency would report directly to the Court of Appeal of the province or territory which registered the conviction
- Complaints to police calling into question the safety of a conviction should be referred to the Director of Public Prosecutions

6. Relationship between Crown and Defence

MORIN

- Provincial government should provide funding for criminal bar to discuss relevant issues

SOPHONOW

- Atmosphere of suspicion as between crown and defence bar should be alleviated by regular meetings to discuss issues

LAMER

- A Criminal Justice Committee should be established to identify problems, engage in dialogue and to seek improvements to the administration of justice on an ongoing basis

7. Lack of disclosure of Alibi defence

MORIN

- Legislative amendments should be made to permit an accused's exculpatory statement made upon arrest in certain conditions

SOPHONOW

- Disclosure by the defence should be within a reasonable time

8. Lack of sensitivity of the Criminal Justice System to visible minorities

MARSHALL

- All levels of the Administration of Justice (Judiciary, Counsel, Corrections, etc) should make efforts in this regard
- Creation of separate community controlled Justice system for Aboriginal peoples

9. Treatment of the accused

MORIN

- Person charged with crime should be treated neutrally in court

10. Jury Charge

MORIN

- Jury should be cautioned that evidence may be coloured by the criminal charges or other external factors such as the notoriety of the case

SOPHONOW

- Jury should be cautioned with respect to eye-witness fallibility and unreliability of in-custody informants

11. Limited powers of the Court of Appeal

MORIN

- Court of Appeal should be allowed to entertain “lurking doubt” when deciding whether to set aside a conviction
- “Fresh evidence” powers of the Court of Appeal should be expanded/changed

LAMER

- Rules of the Court of Appeal should be reconsidered with a view to authorizing the Court to intervene sooner

12. Procedure in laying of charges

MARSHALL

- Sets out additional recommendations for Police and Crown

13. Lack of clarity of public interest considerations

MARSHALL

- Lists criteria related to the public interest with respect to continuing a prosecution

14. Amendments to the Criminal Code

LAMER

- Amendments to permit jurors to be interviewed, subject to stringent conditions, by commissioners conducting inquiries into wrongful convictions, should be pursued
- Amendment to raise the threshold criterion for directing a verdict of acquittal should be pursued

MILGAARD

- Amendments to allow for academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence. (Amendments to s. 9 of the *Canada Evidence Act* should then be considered)

15. Judiciary

LAMER

- When vacancies occur in superior courts, the Chief Justices and the Minister of Justice should be vigilant in identifying the need for criminal law experience and expertise
- Chief Justices must be cautious in the assignment of judges to complex criminal trials

16. Compensation

MILGAARD

- Factual innocence as sole criteria for paying compensation is unduly restrictive. Door should not be closed for lack of proof of factual innocence.

CHAPTER 4 – TUNNEL VISION

I. INTRODUCTION

Tunnel vision distorts the perception of evidence. It is one of the contributors to wrongful convictions and is seldom caused by malice. It is “insidious”⁷⁸ and may infect police, prosecutors, and judges.

Tunnel vision has been described as “... a 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 the information.”⁷⁹ When evidence is incorrectly “filtered” a biased approach develops.⁸⁰ Quite often this is “reinforced” as police and prosecutors assigned to a case interact without critically assessing the evidence or testing the investigative theory.⁸¹ The results can be devastating.

A wrongful conviction forces the justice system to seek answers. The tunnel vision “malaise”⁸² infects police and prosecutors in different places, and at different times. Institutional pressure on the police to solve the crime and various pressures on prosecutors to win those cases can lead to flawed conclusions.⁸³ The prosecutor’s role must be well understood by the community and the justice system participants, including, most importantly, the prosecutor.

A prosecutor must never over-reach to obtain a conviction. Evidence gathered by the police must be scrupulously evaluated and assessed to confirm it meets evidentiary rules for admissibility. The prosecutor’s quasi-judicial function “excludes any notion of winning and losing.”⁸⁴ Prosecutors must be fair. They must have courage, exercise contrarian thinking, and be able to make unpopular

78 *Sophonow Inquiry Report*, “Investigation of Suspects”, p. 37.

79 *Morin Inquiry Report*, Volume 1, Chapter 3, p. 479.

80 Melvyn Green, “Crown Culture and Wrongful Convictions: A Beginning” (2005) 29 C.R. (6th), 262 at 269.

81 *Lamer Inquiry Report*, p.71.

82 *Ibid.*, p.71.

83 Keith A. Findley & Michael S. Scott, “The Multiple Dimensions Of Tunnel Vision in Criminal Cases,” (2006) *Wisconsin Law Review*, 291 at pp. 327-330. See also “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/index.html, where Bruce MacFarlane comments at p.14 on “[T]he hydraulic pressure of public opinion, and media commentaries, to charge swiftly and then secure a conviction”

84 *Boucher v. The Queen*, [1955] S.C.R. 16.

decisions.⁸⁵ Prosecutors “may have to poke and prod the investigators to ensure that they were not afflicted by tunnel vision. Hard questions must be asked and firm measures taken to ensure the integrity of the administration of justice.”⁸⁶

Tunnel vision and noble cause corruption are closely related. Once the police are convinced they have identified the perpetrator then dubious investigative practices may be utilized to achieve their ends.⁸⁷

Prosecutors, too, may be susceptible to the same systemic factors which can result in tunnel vision such as: public pressure, a weak circumstantial case, relying on questionable evidence, maligning a suspect who is a societal outcast or a member of a minority, close association with the investigative police team, and the improper use of prosecutorial practices to achieve the desired outcome.⁸⁸

II. 2005 RECOMMENDATIONS

The following practices should be considered to assist in deterring tunnel vision:

1. Crown policies on the role of the Crown should emphasize the quasi-judicial role of the prosecution and the danger of adopting the views and/or enthusiasm of others. Policies should also stress that Crowns should remain open to alternate theories put forward by defence counsel and other parties.
2. All jurisdictions should consider adopting a “best practice,” where feasible given geographic realities, of having a different Crown Attorney prosecute the case than the Crown Attorney who advised that there were grounds to lay the charge. Different considerations might apply with mega-cases.
3. In jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable.
4. Second opinions and case review should be available in all areas.
5. There should be internal checks and balances through supervision by senior staff in all areas with roles and accountabilities clearly defined and a lead Crown on a particular case clearly identified.

⁸⁵ *Lamer Inquiry Report*, pp.136-137.

⁸⁶ Robert J. Frater, “The Seven Deadly Prosecutorial Sins” (2002) 7 *Can. Crim.L.Rev.* 209 at 218.

⁸⁷ See MacFarlane, “Wrongful Convictions: The Effect of Tunnel Vision,” *supra*, at pp. 20-26 where he suggests using the term “noble cause distortion” in place of “noble cause corruption” since there is no deliberate attempt to thwart the cause of justice.

⁸⁸ *Lamer Inquiry Report*, pp.71, 136.

6. Crown offices should encourage a workplace culture that does not discourage questions, consultations, and consideration of a defence perspective by Crown Attorneys.
7. Crowns and police should respect their mutual independence, while fostering cooperation and early consultation to ensure their common goal of achieving justice.
8. Regular training for Crowns and police on the dangers and prevention of tunnel vision should be implemented. Training for Crown Attorneys should include a component dealing with the role of the police, and training for police should include a component dealing with the role of the Crown.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

A. Gregory Parsons

Less than 24 hours after Catherine Carroll's body was discovered, the main investigator had concluded that Gregory Parsons had murdered his mother. Commissioner Lamer found "the investigators were securely ensconced in the tunnel."⁸⁹ There was no critical analysis of the evidence. The hearsay statements of the victim, despite the internal inconsistencies and complexity of the maker, were accepted as reliable. Key witnesses were poorly interviewed, with the police taking no, or few, notes. The police used heavy-handed tactics to influence witnesses to give evidence favouring the police theory.⁹⁰ The police regarded Mr. Parsons' demeanour as "suspicious." Commissioner Lamer commented that "to interpret meaningless 'demeanour' as proof of guilt is, rather, proof of tunnel vision."⁹¹ He also identified "a common feature of tunnel vision" which "is to treat innocuous evidence as incriminating and to exaggerate the significance of marginally suspicious evidence."⁹² Contradictory evidence and important evidence were ignored.

89 *Lamer Inquiry Report*, p. 79.

90 *Ibid.*, pp. 110-123.

91 *Ibid.*, p. 125.

92 *Ibid.*, p. 123.

Commissioner Lamer recommended the Royal Newfoundland Constabulary consider incorporating into its policies the recommendations of the *Morin Inquiry* regarding “note-taking, interviewing and statement-taking.” Developing police standards for qualifications, “initial and ongoing training and criminal investigation” were encouraged.⁹³

Crown counsel, who was to provide legal advice to assist the investigators, may have been too close to the investigation and did not perform the “challenge function.” Crown counsel at trial also had this responsibility.

Commissioner Lamer found “... the DPP’s office demonstrated a Crown culture that accepted and supported the police tunnel vision.”⁹⁴

He recommended, among other things, establishing a “failsafe system” for critical assessment of files, encouraging mentoring by experienced prosecutors with those who are junior, providing clear guidelines to avoid tendering inherently unreliable evidence, and developing and maintaining a “Crown culture that is sensitive to the opportunities to avoid injustice as well as to obtain convictions.”⁹⁵

B. Randy Druken

Brenda Young was murdered in 1993. The police investigation occurred about 2½ years after the investigation into the murder of Catherine Carroll. The lead investigator concluded a short time after the murder that Randy Druken was responsible. There was no critical assessment of the case by the police or the prosecutor. Key witnesses were approached by the police to either change or bolster their statements. This was a “clear reflection of tunnel vision.”⁹⁶ Tunnel vision drove the investigation and led to mistakes in conducting the polygraph and in using the results. The police and prosecutor shared the view that the murder occurred in the kitchen, the body was moved into the living room and that a clean-up occurred. There was no forensic evidence to support this theory. The child witness had been manipulated by adults. Her story changed with subsequent interviews. She eventually implicated Mr. Druken. The Commissioner commented that “the vulnerability of children is increased when tunnel vision is at play...”⁹⁷ He found the police had no oblique motive but were driven by systemic forces. Tunnel vision was also exhibited by the prosecutor who led the evidence of the jailhouse informant, Mr. X, despite knowing that Mr. X had failed a polygraph test. Crown culture was responsible for accepting and advocating

93 *Ibid.*, p. 327.

94 *Ibid.*, p. 169.

95 *Ibid.*, p. 328.

96 *Ibid.*, p. 202.

97 *Ibid.*, p. 235.

the police tunnel vision. This continued when a stay of proceedings was filed and then expired. The Crown was criticized for seeking “to prolong that tunnel vision.”⁹⁸

Commissioner Lamer recommended a new policy for prosecutors on the termination of proceedings and that the recommendations with respect to jailhouse informants contained in the *Sophonow Inquiry Report* be incorporated into the Crown Policy Manual.

b) Inquiry into Pediatric Forensic Pathology in Ontario (2008)

Commissioner Goudge discussed the danger of “confirmation bias” as a result of pre-autopsy communications between the police and forensic pathologist. He said police officers must be equally vigilant against confirmation bias in their own investigative work and even in casual unguarded conversations must objectively present the evidence.

Specifically, he recommended:

Recommendation 75

The forensic pathologist should remain vigilant against confirmation bias or being affected by extraneous considerations. This is best done through increased professionalism and education, an enhanced awareness of the risks of confirmation bias, the promotion of an evidence-based culture, complete transparency concerning both what is communicated and what parts of it are relied upon by the pathologist, and a cautious approach by the pathologist to the use of circumstantial or non-pathology information.⁹⁹

Recommendation 110

The police should be trained to be vigilant against confirmation bias in their investigative work generally, and for pediatric forensic cases in particular. This training is best accomplished through increased professionalism, an enhanced awareness of the risks of confirmation bias, the promotion of an evidence-based culture, and complete transparency regarding what is communicated between the police and the forensic pathologist.¹⁰⁰

98 *Ibid.*, p. 311

99 *Goudge Inquiry Report*, p. 605

100 *Ibid.*, p. 616

IV. LEGAL DEVELOPMENTS AND COMMENTARY

Robert J. Frater, in his article “The Seven Deadly Prosecutorial Sins,” opines of prosecutorial autonomy that “despite the fact that the independence principle remains significant, it has probably been eclipsed in importance at this moment in time by a principle of accountability.”¹⁰¹ Prosecutors are responsible for the decisions they make and may be required to articulate the reasons for these decisions. They are accountable, ultimately, to the public. This introspective look is necessary and desirable. A Crown culture which focuses on winning runs the risk of losing sight of its public responsibility, and will inevitably fall into tunnel vision.

Tunnel vision is the antithesis of an open mind. It causes prosecutors to overreach to save a weak case. But tunnel vision may also be present post-conviction. In “Crown Culture and Wrongful Convictions: A Beginning,” Melvyn Green, a former president of the Association in Defence of the Wrongly Convicted and now a judge of the Ontario Court of Justice, concludes that the Crown’s power to stay proceedings and its resistance to admitting mistakes may demonstrate tunnel vision.¹⁰² He recommends that police and prosecutors admit errors and take such measures to “identify and inoculate themselves against the risk of error” and endorses implementing regular training for prosecutors and police on identifying and eliminating tunnel vision.¹⁰³

“The Multiple Dimensions of Tunnel Vision in Criminal Cases” is one of the most significant papers on this subject.¹⁰⁴ Although the case studies discussed are from the United States, they highlight the universal feature of this legal malady. The paper identifies cognitive biases and institutional pressures as the sources of tunnel vision and discusses numerous ways to correct its effects. Professors Findley and Scott identify the psychological phenomenon of cognitive biases: confirmation bias, hindsight bias, and outcome bias. These biases occur naturally in our everyday living when we seek to affirm what we already thought was the case (confirmation bias), look into the past with the belief that we “knew it all along” (hindsight bias), or apply future knowledge into the past to evaluate the quality of a decision (outcome bias). While acknowledging that tunnel vision is “to an extent inevitable” it must be guarded against.

But the innateness of these cognitive biases and distortions does not absolve actors in the criminal justice system from responsibility to try to overcome tunnel vision; to the contrary, it demands that we become aware of these cognitive processes and the tunnel

101 Frater, “Seven Deadly Prosecutorial Sins”, *supra*, pp. 221-222.

102 Green, “Crown Culture and Wrongful Convictions”, *supra*, pp. 270-271.

103 *Ibid.*, pp. 272-273.

104 Findley and Scott, “Multiple Dimensions of Tunnel Vision”, *supra*.

vision they produce, and that we search for ways to neutralize them. Unfortunately, the criminal justice system fails to do that. Rather both institutional pressures inherent in the adversary system and explicit policy choices reinforce and exacerbate the natural tendencies toward tunnel vision.¹⁰⁵

The adversary system creates institutional pressure “to win” and contributes to tunnel vision. Police face public pressure to solve crimes quickly, an unrealistic expectation that crimes will be solved, sheer volume of cases, and performance evaluations based on minimal standards such as reasonable and probable grounds.¹⁰⁶ Prosecutors, too, can succumb to the desire to obtain a conviction. They may be isolated from the entire investigative file and not see alternate police theories which were discounted too quickly. Prosecutors may also think they are serving the interests of justice.¹⁰⁷

Systemic choices can enforce tunnel vision. The Reid police interrogation technique used by many forces is premised on the police theory that the suspect can be broken down and will consequently confess. Evidentiary rules employed at trial may prevent the admission of exculpatory evidence. The appellate process may also place limitations on the ability of the wrongfully convicted to seek redress.¹⁰⁸

Professors Findley and Scott recommended considering doctrinal reforms to ensure legal rules allow evidence relevant to innocence.¹⁰⁹ Education and training for police and prosecutors “to place greater value on neutrality, emphasizing the need to postpone judgment and to develop all the facts rather than merely building a case against a suspect.”¹¹⁰ Judges as well as police and prosecutors should be informed about the dangers of tunnel vision.¹¹¹ Improved procedures for collecting physical and testimonial evidence were also suggested.¹¹² Other recommendations included the factors to be considered in selecting the investigative team, with emphasis on the crucial role of the investigative supervisor, ensuring the prosecutors have access to the entire case materials, employing multiple levels of case review, greater transparency, more independence between the forensic labs and the police and prosecution services, and external review panels.¹¹³

105 *Ibid.*, p. 322.

106 *Ibid.*, pp. 322-327.

107 *Ibid.*, pp. 327-331.

108 *Ibid.*, pp. 333-354.

109 *Ibid.*, pp. 354-370.

110 *Ibid.*, p. 372.

111 *Ibid.*, pp. 374-375.

112 *Ibid.*, pp. 375-380. This includes an explanation of the PEACE model (Preparation and Planning, Engage and Explain, Account, Closure and Evaluate) which is a less coercive investigative interviewing technique.

113 *Ibid.*, pp. 380-396.

Bruce MacFarlane, in his paper entitled “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” identifies tunnel vision as one of the two critical factors leading to wrongful convictions. He found noble cause corruption and tunnel vision to be closely linked. Once investigators think the suspect is the perpetrator, they may use questionable methods to achieve their goals.¹¹⁴ They become willfully blind at an institutional or personal level, or both.¹¹⁵ Societal demands, resource constraints, emotional attachments, and the strength of the victims’ rights movement, all contribute to institutional pressure on the police.¹¹⁶ Similarly, prosecutors face the pressure to convict, think they must “believe in their case,” are given only the evidence implicating the accused, and forge close ties with the police.¹¹⁷ The importance of keeping an open mind and an institutionalized model for contrarian thinking for police, prosecutors, and forensic pathology are recommended in this review.¹¹⁸

Early stage investigative review was advocated by Professor Christopher Sherrin in his Comment on the *2005 Report*.¹¹⁹ In complex cases, before the decision has been made to focus on a particular suspect, he recommends an independent person review the material gathered by the police. He suggests that this person could be a prosecutor or even someone with investigatory experience who works within the police agency but is detached from the investigation.¹²⁰

Canadian courts have also commented on confirmation bias or tunnel vision. The Manitoba Court of Appeal¹²¹ discussed the approach taken by Commissioner Goudge which promotes objectivity in pediatric forensic pathology. The appellant had argued that the forensic pathologist was “thinking dirty,” thus demonstrating confirmation bias and presuming abuse. The Court, however, rejected this argument and found that the forensic evidence and the autopsy report had considered the possibilities which had been raised by counsel and were transparent in their findings. In the Supreme Court of Canada, Mr. Justice Binnie has expressed his concern over the “growing platoon of the wrongfully convicted” which stems from police tunnel vision and flawed investigations.¹²²

114 McFarlane, “Wrongful Convictions: The Effect of Tunnel Vision,” *supra*, pp. 23-24.

115 *Ibid.*, p. 31.

116 *Ibid.*, pp. 45-51.

117 *Ibid.*, pp. 51-55.

118 *Ibid.*, pp. 58-66.

119 *Criminal Law Quarterly* [Vol. 52, 2007] at p. 172.

120 *Ibid.*, p. 174.

121 *R v. Thomas*, 2010 MBCA 91.

122 *R v. Sinclair*, 2010 SCC 35, [2010] S.C.J. No. 35.

V. STATUS OF RECOMMENDATIONS

Across the country, all prosecution services have policies which clearly articulate the role of the Crown and the importance of on-going critical assessment of cases to prevent tunnel vision.

For example, Newfoundland and Labrador prosecutors have a new policy manual which incorporates the recommendations of the *Lamer Inquiry Report*. This *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* devotes an entire chapter to the “Duties and Responsibilities of Crown Attorneys.” It reminds prosecutors that they have a duty to be fair “by carefully guarding against the possibility of being afflicted by ‘tunnel vision’ and of practicing ‘overzealousness’ or ‘overreaching advocacy’ through close identification with the investigative agency and/or victim, or through pressure by the media and/or special interest groups or to ‘shore up’ a weak case.”¹²³ Critical assessment of charges, the role of the prosecutor, and the relationship between the police and the prosecutor are emphasized. A stay of proceedings is never permitted to expire without the prosecutor taking action to either terminate the proceedings or to continue with the prosecution.

The policy manual for the Public Prosecution Service of Canada, known as the Deskbook, was revised after the release of the *2005 Report* in keeping with the *Report*’s recommendations. Several Deskbook chapters now include specific guidance to federal prosecutors aimed at the prevention of wrongful convictions. For example, in the chapter concerning The Duties and Responsibilities of Crown Counsel,¹²⁴ federal prosecutors are reminded to remain attuned to the factors that can lead to wrongful convictions, such as false confessions and mistaken eyewitness identification. The chapter also advises prosecutors that tunnel vision has been identified as a leading cause of wrongful convictions and warns prosecutors to zealously guard against the possibility of being afflicted by it through close identification with the investigative agency and/or victim, or through pressure from the media and/or special interest groups. Federal prosecutors are also advised to remain open to alternative theories of the case advanced by the defence. Similar advice is included in other chapters, such as the chapters concerning The Relationship between Crown Counsel and the Police,¹²⁵ and The Decision to Prosecute.¹²⁶ For example, the former chapter warns Crown Counsel that, in assessing the strength of the case at the end of the police investigation, they must guard against the possibility that they have fallen victim to tunnel vision and, for example, have lost the ability to conduct an objective assessment of the case through contact with the investigative agency.

123 Chapter 6-6, http://www.justice.gov.nl.ca/just/prosecutions/pp_guide_book.pdf.

124 <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html>, Chapter 9. It is important to note that the Deskbook was under major revision at the time of the writing of this report.

125 *Ibid.*, Chapter 11.

126 *Ibid.*, Chapter 15.

The new PPSC Deskbook will include a separate chapter concerning the Prevention of Wrongful Convictions.

In British Columbia, Crown Counsel have the responsibility to make a charge assessment decision which determines whether or not a prosecution will proceed. The charge assessment standard continues to apply throughout the prosecution.

Prosecutors in Quebec follow a specific directive which requires them to keep an open mind after they have been granted the authority to proceed with a prosecution. They must re-evaluate all new facts to determine whether there is sufficient evidence to continue with the prosecution.

Alberta's Policy *The Decision to Prosecute Policy* reminds prosecutors that consultation is critical:

Consultation, including the seeking out of second opinions and discussions regarding legal, practical and advocacy strategies, can be an important aspect of prosecutorial decision-making. Such consultation can, for example, help Crown prosecutors avoid succumbing to so-called tunnel vision. While consultation may not be necessary or appropriate for every case, or even for every serious case, the responsible exercise of prosecutorial discretion, including deciding whether to prosecute, often requires consultation with colleagues uninvolved in the prosecution of the case, with superiors and/or with investigators. Indeed, in cases involving the most serious of offences -- particularly homicides -- and those involving novel arguments or unusual circumstances, consultation with colleagues uninvolved in the prosecution of the case may be critical to the decision to proceed (or not) with the prosecution. In respect of such cases, this consultation ought to take place early on in the process, but no later than on completion of a preliminary inquiry.

Most Canadian police forces now use the Major Case Management (MCM) methodology for managing major investigations. The process provides structure, accountability mechanisms, clearly defined goals/objectives, defined procedures, consistency, and efficient use of available resources.

The development of the model has arisen, in part, as a result of many of the miscarriage of justices that have occurred due to failed investigations. Errors in the management, structure and leadership of these cases have contributed to the failures. As a result, MCM has been used in Canadian police forces as a methodology for planning, organizing, structuring and leading major cases to varying degrees. The goal of MCM is to ethically and lawfully conduct complete, competent and high quality investigations which support successful prosecutions.

The role of the Devil's Advocate or Contrarian is included in the MCM model when the Command Triangle conducts brainstorming sessions and investigational briefings. This "role" can be assigned to any one person or it can be a mindset for the investigative team. The main purpose for this role is to prevent or attempt to prevent tunnel vision from occurring in an investigation by using critical thinking skills.

The Canadian Police College, which provides advanced and specialized professional development, training and education to law enforcement officers from across Canada, offers a Major Case Management-Team Commander training course. It has a full day-long segment on strategic decision making, using critical thinking skills to assist future Team Commanders in recognizing the onset of tunnel vision.

VI. DISCUSSION OF RECOMMENDATIONS

Tunnel vision can be treated once it is accepted that it exists. A police or Crown culture which refuses to acknowledge that it can be infected loses sight of its ultimate goal and perpetuates this error. Education sessions which emphasize the role of these two justice system participants lay the foundation for building strong and healthy organizations. Interaction between the police and prosecutors should be carefully understood. Prosecutors must play the challenge function. This can be done in various ways in the pre-and post-charge assessment of the case. The police, during the investigatory phase, must establish a process to ensure that all of the evidence gathered is considered and not discarded prematurely. In major investigations, an experienced and detached police officer and/or a prosecutor could be tasked with sifting through the investigative materials and providing advice and direction to the investigative team to ensure all leads are being pursued. Evidence should be obtained in a manner consistent with the search for the truth. Prosecutors must continuously critically assess the prosecution once the charge has been laid. This responsibility continues where an appeal has been filed.

Understanding that nature predisposes us, through cognitive biases, to be affected by tunnel vision should make us more vigilant. Institutional pressures also make us more susceptible to be trapped within the tunnel. It is imperative that through educational awareness, police and prosecutors understand the nature and causes of tunnel vision so they can take preventative measures to avoid its deleterious effects.

VII. SUMMARY OF RECOMMENDATIONS

While the *2005 Report's* recommendations remain valid, the Subcommittee recommends slight refinements as follows:

1. Crown policies on the role of the Crown should emphasize the quasi-judicial nature of the position and the inherent danger of adopting the viewpoints or enthusiasm of others without thorough analysis. Policies should encourage prosecutors to remain open to alternate theories proffered by defence counsel or other credible parties.
2. Where geography and resources permit, jurisdictions should consider implementing a best practice whereby a prosecutor who had significant pre-charge involvement is replaced by another prosecutor to maintain carriage of the file post-charge.
3. In jurisdictions without pre-charge screening, charges should be reviewed by prosecutors as soon as practicable and an ongoing critical assessment must be made.
4. Second opinions and case reviews should be available in all areas.
5. Internal organizational accountability should be clearly defined and understood. Prosecutors must understand their role in each prosecution and the respective role of their supervisors.
6. A Crown culture which encourages discussion and contrarian thinking should be cultivated in Crown Law offices.
7. Law enforcement agencies and prosecutors play complementary roles in the criminal process. While they both enjoy institutional independence at their respective stage of the process, it does not preclude cooperation and mutual assistance to strive for justice.
8. Training for prosecutors and police on the prevalence and prevention of tunnel vision should be implemented. Prosecutors and police should have a clear understanding of each other's role in the criminal justice system.

CHAPTER 5 – EYEWITNESS IDENTIFICATION AND TESTIMONY

I. INTRODUCTION

Eyewitness identification is a critical tool for investigating and prosecuting criminals. This type of evidence is among the most persuasive testimony that can be used in a courtroom. A positive identification of an accused in court is an essential element for any successful prosecution. It is powerful and compelling evidence often given by confident and positive witnesses. It allows a police agency the opportunity to focus its attention and efforts on a specific suspect.

However, we know that mistakes have happened. Well-meaning, honest and credible people can and have been wrong and the consequences have been devastating – an innocent person is wrongly targeted and wrongly convicted while the real perpetrator freely walks the streets.

Eyewitness misidentification has long been regarded as the leading, if not overwhelming, cause of a wrongful conviction.¹²⁷ In *R. v. Hanemaayer*, Mr. Justice Marc Rosenberg, speaking on behalf of the unanimous Ontario Court of Appeal, commented on “how flawed identification procedures can contribute to miscarriages of justice and the importance of taking great care in conducting those procedures.”¹²⁸

A 2008 study by the United States-based Innocence Project of 250 post-conviction DNA exonerations found that a staggering 75% of those wrongfully convicted involved erroneous eyewitness identification.¹²⁹

Eyewitness misidentification can set in motion a chain of irrevocable errors from the police precinct to the courtroom – deterring police officers from discovering the real perpetrator, raising criminal charges against an innocent person, and compelling the jury toward a guilty verdict. It is the criminal justice system’s responsibility to help eyewitnesses make the most accurate identification possible. Eyewitnesses, law enforcement

127 *R. v. Hanemaayer*, (2008) 234 C.C.C. (3d) 3 (Ont. C.A.).

128 *Ibid*, at para. 29. The *Hanemaayer* decision is discussed in greater detail later in this report.

129 The Innocence Project, “Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification” (July 2009) *Benjamin Cardozo School of Law*.

and the public at large, will benefit from identification procedures that are designed according to scientific research and conducted consistently nationwide.¹³⁰

While some commentators have suggested the issue is not as prevalent in Canada because of safeguards built in to our trial system,¹³¹ it has been universally accepted that the inherent frailties of eyewitness identification have been a real and substantial cause of wrongful convictions.

As Mr. Justice David Doherty of the Ontario Court of Appeal has stated:

[T]he spectre of erroneous convictions based on honest and convincing but mistaken eyewitness identification haunts the criminal law.¹³²

II. 2005 RECOMMENDATIONS

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:
 - a) If possible, an officer who is independent of the investigation should be in charge of the lineup or photospread. This officer should not know who the suspect is to avoid the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.
 - b) The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore the witness should not feel that they must make an identification.
 - c) The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.
 - d) All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.
 - e) If the identification process occurs on police premises, reasonable steps

130 *Ibid.*, at p. 25

131 Lee Steusser, "Experts on Eyewitness Identification: I just don't see it" (2006) 31 *Man. L.J.* 543.

132 *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.) at 389

should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.

- f) Show-ups¹³³ should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.
- g) A photospread should be provided sequentially, and not as a package, thus preventing 'relative judgments'.

2. For prosecutors, the following practical suggestions should be considered:

- a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
- b) Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.
- c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.
- d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.
- e) Never tell a witness that they are right or wrong in their identification.
- f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances,

133 A 'show-up' is the act of presenting a solitary suspect in person to the witness, at some point in the pre-trial investigation, for identification - for example, inviting a witness to attend a court hearing where the accused is appearing in person and then asking if the witness recognizes the individual.

it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.

- g) Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it, e.g. the composition of the photospread.
 - h) Be wary of prosecutions based on weak single-witness identification. While not required by law to secure a conviction, ascertain whether there is any corroboration of an eyewitness's identification in order to overcome any deficiencies in the quality of that evidence.
3. The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.
 4. Workshops on proper interviewing should be incorporated in regular and ongoing training sessions for police and prosecutors.
 5. Presentations on the perils of eyewitness misidentifications should be incorporated in regular and ongoing training sessions for police and prosecutors.

The purpose of the recommendations was to reinforce the need to be diligent and vigilant in preserving the integrity of the identification process. Furthermore, they would also serve as a constant reminder of the potential abuse by otherwise faulty or tainted eyewitness testimony should the mandated safeguards be relaxed.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

None of the inquiries since 2005 have dealt specifically with the problem of eyewitness identification.

IV. LEGAL DEVELOPMENTS AND COMMENTARY

The need for a direction warning the jury of any specific weaknesses in the evidence, particularly when dealing with identification evidence, has long been recognized.¹³⁴

¹³⁴ *R. v. Turnbull*, [1976] 3 All E.R. 549 (Eng. C.A.); see also *R. v. Baltovich*, (2004) 191 C.C.C. (3d) 289 (Ont. C.A.).

Where the prosecution's case depends substantially on the accuracy of eyewitness identification evidence, a trial judge must instruct jurors about the need for them to be cautious in dealing with eyewitness testimony. The charge must deal with the inherent frailties of eyewitness identification due to the unreliability of human observation and recollection. The trial judge should explain to the jury the myriad factors that can affect the reliability of eyewitness identification testimony given by perfectly honest witnesses and remind jurors that mistaken identifications have been responsible for miscarriages of justice because persons who have been mistakenly identified by one or more honest witnesses have been wrongly convicted.

In *R. v. Candir*,¹³⁵ Mr. Justice David Watt of the Ontario Court of Appeal dealt with the issue of when a more specific instruction to the jury on eyewitness identification was mandated:

Sometimes a general warning about the risks of error inherent in eyewitness identification testimony will be sufficient to caution jurors about reliance upon it. In other instances, more detailed and specific instructions will be required because of specific frailties that emerge as the witnesses are questioned at trial. Trial judges have considerable latitude in deciding how best to apprise the jurors about the frailties of eyewitness identification testimony.¹³⁶

Examples of specific frailties that require specific instruction include:

- In-dock identifications;¹³⁷
- Voice identification;¹³⁸
- Photospread line-ups;¹³⁹
- Post-hypnosis evidence of identification;¹⁴⁰
- Dissimilarities between the description provided by the witness and the appearance of the accused - resemblance vs. identification.¹⁴¹

How far should these general or specific cautions go? In *R. v. Sokolov*,¹⁴² Mr. Justice Melvyn Green of the Ontario Court of Justice, noting "eyewitness misidentification is probably the greatest single cause of factually wrongful convictions," stated:

135 (2009) 250 C.C.C. (3d) 139 (Ont. C.A.).

136 *Ibid*, at para. 110

137 *R. v. Samuels*, [2009] O.J. No. 4177 (Ont. C.A.)

138 *R. v. Quidley*, (2008) 232 C.C.C. (3d) 255 (Ont. C.A.)

139 *R. v. Jones*, [2004] O.J. No. 1236 (Ont. C.A.)

140 *R. v. Baltovich*, (2004) 191 C.C.C. (3d) 289 (Ont. C.A.)

141 *R. v. Ryback*, (2008) 233 C.C.C. (3d) 58 (Ont. C.A.)

142 [2009] O.J. No. 1941 (Ont. C.J.)

Its inherent frailties demand that special care must be taken in the assessment of such evidence. Such care, however, does not translate into a rule of exclusion or complete probative negation. It is most certainly not the rule that eyewitness identification evidence — even standing alone — can never ground a proper conviction. The rule, rather, is that the exercise of adjudication in this type of case must be especially cautious.¹⁴³

A proper instruction should warn and inform not chill.

A concern has arisen by the increasingly common practice of defence counsel referring in their submissions to juries to the growing number of wrongful convictions, often by case name and history. How far should counsel be permitted to go in making such submissions and what response if any, should be made by the prosecution? The potential effects of these types of submissions are further compounded in matters where eyewitness evidence is material and the court is mandated to provide strong instructions to a jury.

In *R. v. Horan*,¹⁴⁴ Mr. Justice Marc Rosenberg identified this concern:

Moreover, it is now a standard part of the jury instructions relating to identification evidence to expressly draw to the jury's attention that there have been past miscarriages of justice and wrongful convictions because of mistakes by eyewitnesses. On the other hand, reference in a jury address to a parade of wrongful convictions outside a relevant context, such as the established phenomenon of eyewitness identification, risks inviting the jury to take into account irrelevant considerations and imaginary dangers... The invitation to avoid convicting so as not to add to the list of the wrongfully convicted is a form of intimidation that can be compared to the "timid juror" instruction disapproved of by this court.¹⁴⁵

The concern in the case was the submission by defence counsel to the jury and its potential prejudicial effect on the proceedings:

Relying on the evidence of the McPhails, without more, in my respectful submission, would risk yet [another] wrongful conviction in *Canada's parade of wrongful convictions*. Those were

143 *Ibid.*, at para. 80

144 (2008) 237 C.C.C. (3d) 514 (Ont. C.A.) ; see also *R. v. Lane*, (2008) 240 C.C.C. (3d) 16 (Ont. C.A.), leave to the Supreme Court of Canada refused October 15, 2009

145 *Ibid.*, at para. 67.

the witnesses for the prosecutor. That's the best he had. [Emphasis added]¹⁴⁶

Justice Rosenberg held that while counsel should not have made the comment, the trial was not rendered unfair as a result. Justice Rosenberg then went on to outline guidelines on the parameters and limitations that should be placed on submissions of this nature:

1. A passing reference to the potential of wrongful conviction in any criminal case is not beyond the bounds of legitimate argument. For example, reminding the jury that they stand between the accused and the state to prevent the conviction of an innocent accused or that their responsibility is to protect persons from the possibility of a wrongful conviction is well within the bounds of legitimate argument;
2. Ordinarily, a reference to the history in Canada of demonstrated wrongful convictions will not assist the jury in their task. The jury is to reach its verdict on the evidence adduced in the case before them. In particular, defence counsel should not overstate the problem of wrongful convictions. For example, there is nothing in our legal history to support the suggestion that there has been a “parade” of wrongful convictions as a result of complaints by drug users, which essentially was the submission made by defence counsel in this case;
3. Counsel ought not to refer to specific cases such as the wrongful convictions of Guy Paul Morin or Thomas Sophonow or attempt to draw parallels with those cases. The circumstances that led to the miscarriages of justice in those cases were complex and multifaceted. Those circumstances will almost inevitably be quite different from the circumstances of the case the jury must deal with. For example, the wrongful convictions in Morin and Sophonow were the result, in part, of a particular type of unreliable witness, jailhouse informants. To refer to specific cases by name simply risks introducing irrelevant considerations and may draw counsel into giving evidence;
4. In eyewitness identification cases it is not improper for defence counsel to refer to the fact that there have been wrongful convictions because of mistaken eyewitness evidence.¹⁴⁷

Many of the decisions discussed above involved cases heard before a judge and jury. Are there any specific issues that arise in matters that are dealt with in judge-alone trials? In *R. v. Bigsky*,¹⁴⁸ Justice Georgina Jackson of the Saskatchewan

146 *Ibid*, at para. 65.

147 *Ibid*, at para. 69.

148 (2006) 217 C.C.C. (3d) 441 (Sask. C.A.).

Court of Appeal conducted an extensive review of cases from across the country to develop a series of guidelines and factors that should be considered by judges sitting without a jury in cases involving eyewitness identification:

- (i) whether the trial judge can be taken to have instructed himself or herself regarding the frailties of eyewitness testimony and the need to test its reliability;
- (ii) the extent to which the trial judge has reviewed the evidence with such an instruction in mind;
- (iii) the extent to which proof of the Crown's case depends on the eyewitness's testimony or, in other words, the presence or absence of other evidence that can be considered in determining whether a court of appeal should intervene;
- (iv) the nature of the eyewitness observation including such matters as whether the eyewitness had previously known the accused and the length and quality of the observation; and
- (v) whether there is other evidence which may tend to make the evidence unreliable, i.e., the witness's evidence has been strengthened by inappropriate police or other procedures between the time of the eyewitness observation and the time of testimony.¹⁴⁹

She then stated:

In those judge-alone cases where a conviction based on eyewitness testimony has been upheld, the court of appeal found that the trial judge has instructed himself or herself properly on the appropriate standard of proof and the frailties of eyewitness testimony and applied those standards in the analysis; the eyewitness has either known the accused; or the evidence formed a part only of evidence of guilt; and there has been no suggestion that the eyewitness identification has been contaminated or weakened by some sighting after the incident. It is also relevant, in the appellate context, whether the accused testified. Where courts of appeal have found error, the reasons have been insufficient, the eyewitness identification rests on a "fleeting glance" or some improper procedure took place after the incident which may have inappropriately strengthened the witness's testimony.¹⁵⁰

149 *Ibid.*, at para. 41.

150 *Ibid.*, at para. 42.

There is a significant difference in cases in which a witness is asked to identify a stranger never seen before the crime, and cases in which a witness recognizes a person previously known to them. While caution must still be taken to ensure that the evidence is sufficient to prove identity, ‘recognition evidence’ is generally considered to be more reliable and carry more weight than identification evidence.¹⁵¹

V. STATUS OF RECOMMENDATIONS

In the preparation of this update, nine police services and agencies from across the country¹⁵² were surveyed to gauge their implementation of the recommendations in the *2005 Report*. The following questions were posed:

1. How are photo-pack viewings conducted (sequentially or otherwise);
2. How are the comments and statements of witnesses captured and/or recorded;
3. If an officer conducts the photo-pack viewing or other lineup, are efforts made to ensure independence of the investigator from the current investigation.

There was virtual unanimity in the responses received. All police services agencies confirm that photo-pack viewings are conducted sequentially and never as a package. All agencies confirm that at the very least, all comments and statements made by a witness are recorded in writing, with preference given to recording by video or audio, if possible.

Finally, all but one of the services mandated that an officer, independent of the investigation and unaware of the identity of the suspect, conduct the photo-pack viewing.¹⁵³ All of these responses are in accordance with the original recommendations in the *2005 Report*.

151 See *R. v. Bob*, (2008) 63 C.R. (6th) 108 (B.C.C.A.); *R. v. Arbutto* (2008) BCCA 78; *R. v. Meier* [2009] S.J. No. 131 (Sask. Prov. Court).

152 The police agencies contacted were: Sureté du Québec, R.C.M.P. (four divisions), Ontario Provincial Police, Vancouver Police Department, Calgary Police Service, Edmonton Police Service, Toronto Police Service, Peel Regional Police, and the Halifax Regional Police Service.

153 Halifax Regional Police amended its photo-pack identification policy in 2006. However, it is less stringent than some of the other police agencies. It does stipulate the photo-pack be conducted by way of single photograph presentation sequentially and requires that the officer, on the line up form, record all details. However, it is silent on the topic of video or audio recording. It does define blind testing and states that it may be appropriate to use it, but does not mandate the use of an independent officer to present the photographs. It allows for other investigators to be present during the presentation of the photographs, but they are to be instructed not to do anything that could influence the witness.

Furthermore, since the *2005 Report*, presentations on the frailties of eyewitness identification have been given to various stakeholders in the justice system, in particular to prosecutors across the country. Among them: Unlocking Innocence: International Conference on Wrongful Conviction (October 2005, Winnipeg, Manitoba); Understanding Wrongful Convictions (November 2005, Saint John, New Brunswick); B.C. Crown Counsel Conference, (May 2006, Whistler, British Columbia); Western Canadian Robbery Investigators Conference (May 2008, Winnipeg, Manitoba); 7th Annual Crown Defence Conference (September 2009, Winnipeg, Manitoba); PPSC-RCMP presentation to prosecutors and police (October 2009, Iqaluit, Nunavut); PPSC-RCMP presentation to prosecutors and police (April 2010, Yellowknife, Northwest Territories); B.C. Continuing Legal Education Society workshop “Preventing Wrongful Convictions” (October 2010, Vancouver, B.C.); Newfoundland and Labrador Annual General Meeting of Prosecutors (October 2010, St. John’s, Newfoundland and Labrador); Session intensive de formation des substituts du procureur general du Québec (April 2006, Québec); and PPSC-RCMP presentation to prosecutors and police (October 2010, Whitehorse, Yukon).

The *2005 Report*’s recommendations were designed to preserve the integrity of identification evidence, reinforce the notion that identification-based prosecutions can be undertaken with confidence and maintain balance and fairness in the justice system.

Three general concerns were raised about the recommendations:

1. Failure to gauge the witness’s certainty of identification;
2. Recording of comments by audio or videotaping; and
3. Use of expert evidence on the frailties of eyewitness identification.

1. Certainty of Identification

Professor Christopher Sherrin noted that no recommendation was made about ascertaining and recording the witness’s level of confidence in the identification, arguing that it may be “one of the most important pieces of information to be gleaned from the identification procedure.”¹⁵⁴ He does note that the “relationship between confidence and accuracy is still uncertain”¹⁵⁵ but that there is an important correlation between “accuracy and the witness’s confidence level at the time of initial identification, not at the time of trial. If jurors are going to place such weight in confidence, they need to know its level at the most relevant period of time.”¹⁵⁶ The Subcommittee does not believe the recommendation should be amended as suggested by Sherrin.

154 Christopher Sherrin, *Comment on the Report on the Prevention of Miscarriages of Justice* (2007) 52 C.L.Q. 140. University of Western Ontario, p. 149.

155 *Ibid.*

156 *Ibid.*

The *2005 Report* outlined these best practices:

1(b) The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore the witness should not feel that they must make an identification;

1(d) All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim;

2(g) Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it;

4 Workshops on proper interviewing should be incorporated in regular and ongoing training sessions for police and prosecutors.

The *Report* recommended that all comments made by the witness be recorded in their entirety. This is mandatory for the identification to have any merit. Implicit in this recommendation is that the witness would be interviewed by the police as part of the investigation. The witness would be told the reasons for their attendance, that the perpetrator may or may not be present, that they need not make an identification and that everything they say would be recorded. All of that information would be part of the interview process. Each interview with each potential witness will be different and conducted differently depending on the nature of the charge, level of sophistication and circumstances of the witness's involvement. A recommendation was not made as to how a specific interview should be conducted.

Secondly, the confidence level of an eyewitness, even at the early stage of the process, does not necessarily correlate with accuracy. The tragic case of *R. v. Hanemaayer*¹⁵⁷ is illustrative of this point.

On September 29, 1987, at about 5:00 a.m., a man broke into a residence in Scarborough and went to the bedroom of the owner's 15-year-old daughter. He jumped on her back, put his hand over her mouth, threatened her, and told her that he had a knife. Fortunately, the homeowner was awakened by the noise in her daughter's room. The homeowner told police that she stared at the intruder for forty seconds to a minute and could identify him again. The homeowner provided a description of the intruder. She testified the intruder stood inches from her and that she studied his face very closely. She believed that she was particularly adept at remembering faces because of her work as a teacher. She decided that the

157 *Hanemaayer, supra*.

perpetrator must have been keeping watch on the house and likely was working on construction in the area. She telephoned one of the companies working in the area. She provided her description to a woman in the personnel department and the woman gave her the accused's name as someone who fit the description. Two months after the break-in, the police showed the homeowner a photo line-up and she picked out Mr. Hanemaayer's photograph. He was arrested on December 18, 1987. Mr. Hanemaayer gave a statement in which he denied knowing anything of the crime.

The victim and her mother testified on the first day of Mr. Hanemaayer's trial. On the second day of the trial, after the homeowner had completed her testimony, Mr. Hanemaayer changed his plea to guilty. In short, he lost his nerve. He found the homeowner to be a very convincing witness and he could tell that his lawyer was not making any headway in convincing the judge otherwise. He was sentenced to two years less one day imprisonment in accordance with a joint submission.

On October 17, 2005, Paul Bernardo's lawyer sent an e-mail to a police officer with the Toronto Police Sex Crimes Unit listing 18 sexual assaults and other offences that he believed had not been solved. One of the crimes was the break-in to which Mr. Hanemaayer had pleaded guilty. The police interviewed Bernardo in April 2006 and then conducted a further investigation. They were satisfied that Bernardo, not Mr. Hanemaayer, committed the crime. At the time, Bernardo lived two blocks from the victim's home. He, of course, was the so-called "Scarborough Rapist." In the course of the re-investigation, the police interviewed Mr. Hanemaayer and the homeowner. He reaffirmed his innocence, but the homeowner told the investigators that she had been sure at the time that the perpetrator was not Bernardo and remains convinced to this day that she identified the right person.

In admitting the fresh evidence, allowing Mr. Hanemaayer's guilty plea to be withdrawn and then entering an acquittal, Mr. Justice Rosenberg stated:

I wish to make a few comments about the identification evidence in this case. We now know that the homeowner was mistaken. No fault can be attributed to her. She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses. Even the appellant, who knew he was innocent, was convinced that the trier of fact would believe her. **The research shows, however, that there is a very weak relationship between the witness' confidence level and the accuracy of the identification. The confidence level of the witness can have a "powerful effect on jurors":** see Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation*,

Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Manitoba Justice, 2001) at 28; see also *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.), at 148 (emphasis added)¹⁵⁸

2. Audio or Videotaping the Witness's Comments

Recommendation 1(d) of the *2005 Report* stated:

All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.

Some have suggested that audio- or videotaping should be mandatory in all cases where lineups are conducted.

However, as previously stated, many of the recommendations were directed at all Canadian police agencies, large and small, urban and rural, to provide best practice guidelines for safeguarding the identification process. The *Report* recognized as well that there will be circumstances when the best practice directives may not be feasible to follow. The ultimate goal was that as police agencies become more familiar with the recommendations, coupled with appropriate training and suitable technology, all interviews could be recorded by video, if feasible. Cost is not the only issue. Access to equipment, staff and locale are also valid considerations. One cannot expect an interview with a witness occurring in a remote northern setting to be conducted in the same fashion as one held in a large metropolitan police service's dedicated video room. There was a need to be flexible if circumstances were such that full compliance could not be achieved.

In light of these considerations, the Subcommittee therefore believes that recommendation 1(d) should be maintained and not altered.

3. Expert Evidence

Recommendation 3 stated:

The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.

158 *Ibid.*, at para. 21

This recommendation was made in accordance with the prevailing law in Canada on the use of expert witnesses. Recommendation 3 should be maintained and not altered.

Professor Sherrin argues that the standard views that triers of fact are already aware of the factors relevant to the reliability of eyewitness evidence and otherwise can be directed by the trial judge is placed in doubt by social science research.¹⁵⁹ General instructions on the frailties of eyewitness identifications can have the opposite effect of inducing skepticism towards such testimony. While this will result in the acceptance of fewer inaccurate identifications, it will be at the cost of the rejection of accurate ones. He further states that research has shown that expert evidence may lead triers of fact to adopt a more “nuanced approach.”¹⁶⁰ He does acknowledge, however, that Canadian jury instructions may be more effective than the American versions.

On the other hand, Professor Steusser believes that:

[O]ur existing trial safeguards are sufficient to caution jurors about eyewitness identification. Call me naive, but I believe that effective cross-examination, strong submissions and thorough jury instructions are the best means to prevent wrongful convictions... Canadian judges instruct the jury on the applicable law and go further to apply the law to the evidence. The judges carefully review the evidence of the eyewitnesses. A perfect example of such a charge to the jury is found in *R. v. McIntosh*. The charge in that case was extremely detailed and the concerns about eyewitness identification were applied to the specific circumstances as found in that case. In my view, these specific instructions are much clearer and stronger for the jury.¹⁶¹

He suggests the model jury charge¹⁶² developed by the Canadian Judicial Council should be followed by judges:

[1] Identification is an important issue in this case. The case against (*NAME OF ACCUSED*) (or, the persons charged) depends entirely, or to a large extent, on eyewitness testimony.

[2] You must be very careful about relying on eyewitness

159 Sherrin, “Comment on the Report”, *supra*, pp. 149-150.

160 *Ibid.*, at p. 150.

161 Steusser, “Experts in Eyewitness Identification,” *supra*, pp. 549-550.

162 Canadian Judicial Council, *Model Jury Instructions in Criminal Matters*, see section 11.24 “Eyewitness Identification Evidence”, online: <http://www.cjc-ccm.gc.ca>.

testimony to find (*NAME OF ACCUSED*) (or, anyone) guilty of any criminal offence (or, the offence charged). There have been cases where persons have been wrongfully convicted because eyewitnesses made mistakes. It is quite possible for an honest witness to make a mistake in identification. Even a number of witnesses can be honestly mistaken about identification.

[3] You may wish to consider several factors that relate specifically to the eyewitness and his/her identification of (*NAME OF ACCUSED*) as the person who committed the offence charged:

(The circumstances in which the witness made his/her observations)

Did the witness know the person before s/he saw him/her at the time?
Had the witness seen the person on a previous occasion?
How long did the witness watch the person s/he says is the person on trial?
How good or bad was the visibility?
Was there anything that prevented or hindered a clear view?
How far apart were the witness and the person whom s/he saw?
How good was the lighting?
Did anything distract the witness's attention at the time s/he made the observations?

(Review relevant evidence about circumstances)

(The description given by the witness after s/he made the observations)

How specific was the description?
Was the description close to the way (*NAME OF ACCUSED*) actually looked at the time?
Did the witness give another description of this person?
Was the other description similar to or different from the first?
How certain was the witness about the other description?

(Review description provided by witness)

(The circumstances of the witness's identification of (NAME OF ACCUSED) as the person whom s/he saw)

How long was it between the observation and identification?
Did anybody show (*NAME OF ACCUSED*)'s picture to the witness to assist in the identification?
Were photographs of other people shown at the same time?

Was anyone else present when the witness made the identification?
 What did the witness say when s/he identified ((NAME OF ACCUSED))?
 Did the witness ever fail to identify (NAME OF ACCUSED) as the person whom s/he saw?
 Has the witness ever changed his/her mind about the identification?
 Has the witness ever expressed uncertainty about or questioned his/her identification?
 Is the identification the witness's own recollection of his/her observations or something put together from pictures shown or information received from a number of other sources?

(Review relevant evidence about circumstances of identification)

[4] Remember, the Crown must prove beyond a reasonable doubt that it was (NAME OF ACCUSED) who committed the offence charged. Consider the evidence of the identification witness along with the other evidence you have seen and heard in deciding that question.¹⁶³

This instruction, Stuesser says, "...is a far more detailed and 'evidence specific' examination than an American judge would ever undertake."¹⁶⁴

In the *Sophonow Inquiry Report*, Commissioner Cory recommended that judges favourably consider and readily admit properly qualified expert evidence pertaining to eyewitness identification. In his opinion, "the testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial."¹⁶⁵ Professor Steusser argues that this threshold of admissibility is too low. "The admissibility of expert testimony requires that it be necessary... Mere 'relevance' or 'helpfulness' is not enough."¹⁶⁶

The National Criminal Subsection of the Canadian Bar Association also supports the conclusion that expert evidence on the frailties of eyewitness identification is unnecessary as it is not "...in accordance with the Supreme Court of Canada ruling in *R. v. Mohan* and the use of expert evidence at trial. A proper charge by the trial judge about such frailties would be sufficient to address any concerns."¹⁶⁷

163 While this model jury charge on eyewitness identification was designed to assist judges in crafting consistent instructions, this template would also serve as a very useful checklist for prosecutors in preparing their case, tendering identification evidence, and preparing submissions.

164 Steusser, "Experts in Eyewitness Identification," *supra*, p. 551.

165 Online at www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html#trial

166 Steusser, "Experts in Eyewitness Identification," *supra*, p. 547.

167 *Report of the Working Group on the Prevention of Miscarriages of Justice*, National Criminal Justice Section, Canadian Bar Association, August 2006 at p. 7.

There are two recent judgments from Manitoba that should be considered in this regard.

In *R. v. Henderson*,¹⁶⁸ the accused was charged with first degree murder in the shooting death of a victim at a house party. The prosecution's case rested almost entirely on eyewitness evidence on the issue of the identification of the accused as the shooter. Photo pack line-ups were used with the eyewitnesses. After a motion by the accused to exclude the eyewitness testimony was denied, a second motion was made seeking permission to call expert testimony on the issue of eyewitness identification. The Crown conceded the qualifications of the expert but was opposed to the calling of this witness. The issue for the Court was whether the proposed expert testimony met the requirements in law.

Mr. Justice Murray Sinclair of the Manitoba Court of Queen's Bench, noting that no reported decision was brought to his attention in which evidence as proposed to be called had been permitted before a jury,¹⁶⁹ conducted an extensive review of jurisprudence, legal commentary and reports of inquiries, and made the following observations:

1. Expert evidence in respect of eyewitness identification cannot be called for the purpose of impeaching or supporting the credibility of an eyewitness;
2. Courts have been reluctant to admit expert evidence on eyewitness identification where the proposed testimony merely reminds jurors of what they already know;
3. Where the proposed evidence can be shown to be necessary because it lies outside common experience, overcomes myth or provides scientifically sound counter-intuitive information, then the evidence is necessary and can be admitted for these limited purposes.

Justice Sinclair stated:

It seems ironic to me, however, given the inherent frailties of eyewitness evidence, and its acknowledged overwhelming impact on a jury, that an accused should be denied a valid tool on which to challenge it. This is all the more so, considering the fact that research has shown that erroneous eyewitness evidence has occurred more than it should in the criminal justice system and wrongful convictions have directly resulted.¹⁷⁰

168 (2009) 239 Man. R. (2d) 69 (Man. Q.B.).

169 *Ibid.*, at para. 17.

170 *Ibid.*, at para. 51.

Justice Sinclair held that there were some issues on which the expert opinion would not only benefit the jury but on which they definitely would require assistance:

- dispelling commonly held myths;
- unconscious transference;
- effect of darkness on the ability to distinguish detail;
- effect of alcohol impairment on eye muscle control;
- the effects of stress on perception;
- detection and understanding of bias in line-up procedures;
- concept of unconscious cuing;
- effect of prior contact and knowledge of the accused and witness;
- effect of post-event information.¹⁷¹

He further held that the court needs to be clear as to the limits and extent to which experts may testify and must retain an overriding discretion on what the expert may be asked.

Justice Sinclair allowed the expert to testify, but restricted the extent of his testimony as follows:

1. The expert may not comment on the correctness or reliability of any witness;
2. The expert may not comment on any factors at play the night of the offence other than general comments and hypothetical questions;
3. Any hypothetical question must be reduced to writing, first setting out particular facts or factors with each ending “what assistance can you provide to the jury as to what considerations should go into evaluating those factors?”;
4. The expert will not be permitted to sit through the testimony of any eyewitness;
5. The expert may not express an opinion on the validity, reliability, or bias of the actual photo pack line-up used in this case. The expert may be permitted to testify on the issues to be assessed in weighing photo pack line-up identifications generally.¹⁷²

171 *Ibid.*, at para. 53.

172 *Ibid.*, at para. 55.

Part of the difficulty of this ruling is that while some of the limited topics are potentially counter-intuitive and outside of common experience (such as unconscious transference), most are matters of general knowledge and therefore should be subject to a strong jury instruction only.¹⁷³

One week later, on April 29, 2009, the Manitoba Court of Appeal released its decision in *R. v. Woodard*.¹⁷⁴

The first issue on this conviction appeal related to the trial judge's refusal to admit defence expert evidence on the frailties of eyewitness identification. The accused, with two others, was originally charged with second-degree murder in the beating death of the victim. Nine witnesses who observed portions of the beating were called to testify. The versions were highly inconsistent respecting the number and descriptions of the attackers and how many actually participated. The accused and his co-accused also testified. The accused requested that an expert witness on eyewitness identification (the same witness as offered in *Henderson*) be permitted to offer an opinion on the inherent frailties of such testimony. He also sought to have the expert testify on counter-intuitive fallacies and myths associated with identification evidence.¹⁷⁵ It was conceded by the expert that he could not testify:

1. as to the specific effects that certain environmental factors (lighting, sobriety etc.) played in this particular case;
2. that the environmental factors influenced or failed to influence the memory or perception of any witness's identification;
3. as to whether or not any witness's recall or identification is accurate.

The trial judge refused to admit the expert opinion. The accused was convicted of manslaughter.

Mr. Justice Richard Chartier, speaking on behalf of the Court of Appeal in dismissing the appeal, reviewed the prevailing law on experts and eyewitness identification, finding that the refusal to permit the expert to testify was justified, as the evidence to be offered was unnecessary and a superfluity:

The necessity criterion relates to expert opinion evidence that provides information likely to be outside the experience and knowledge of the trier of fact. Here, the purpose of the expert

173 In the end, *Henderson* was convicted of murder and as a result, the Crown chose not to appeal Justice Sinclair's ruling on the admissibility of the expert witness.

174 (2009) 240 Man. R. (2d) 24 (Man. C.A.).

175 Another coincidence - the trial judge in *Woodard* did not allow the defence to call the very same expert witness that was permitted to testify in *Henderson*.

evidence, when stripped to its bare essence, is not to make the testimony of a particular witness clearer and more comprehensible to the trier of fact, but rather to remind the jury of the many frailties of eyewitness identification.¹⁷⁶

Mr. Justice Chartier found that the proposed testimony could only ‘red-flag’ general concerns relating to the frailties of eyewitness identification. “Educating the jury on the frailties of eyewitness identification is generally best left with the trial judge through strong jury instructions... ‘judges can remind just as well as experts’.”¹⁷⁷

It would therefore appear that in light of the decision of the Manitoba Court of Appeal, the influence of the *Henderson* ruling will be short-lived. The issue is still open, however, if in an exceptional case the necessity criterion for admitting expert evidence can be met and a limited admission of this type of evidence may occur.

Professor Steusser also suggests that

[T]he expert studies on memory and eyewitness identification be used to improve our identification gathering practices--outside of the courtroom...they...provide useful studies to help the legal system fashion ‘best practices’ for eliciting eyewitness identifications by the police.¹⁷⁸

This suggestion is in keeping with Recommendation 5 of the *2005 Report* that presentations on the perils of eyewitness misidentifications should be incorporated in regular and ongoing training sessions for police and prosecutors. It may be appropriate in this respect to amend this recommendation to include a specific reference to this type of expert study.

The revised recommendation should now read:

5. Presentations on the perils of eyewitness misidentifications, **including presentations by experts in the field of memory and eyewitness identification**, should be incorporated in regular and ongoing training sessions for police and prosecutors (emphasis added).

176 *Woodard, supra*, at para. 30.

177 *Ibid.*, at para. 41.

178 Steusser, “Experts in Eyewitness Identification,” *supra*, p. 552.

VI. SUMMARY OF UPDATED RECOMMENDATIONS

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:
 - a) If possible, an officer who is independent of the investigation should be in charge of the lineup or photo-pack presentation. This officer should not know who the suspect is, avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.
 - b) The witness should be advised that the actual perpetrator may not be in the lineup or photo-pack, and therefore the witness should not feel that they must make an identification.
 - c) The suspect should not stand out in the lineup or photo-pack as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.
 - d) All of the witness's comments and statements made during the lineup or photo-pack viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.
 - e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.
 - f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.
 - g) A photo-pack should be provided sequentially, and not as a package, thus preventing 'relative judgments'.
2. For prosecutors, the following practical suggestions should be considered:
 - a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
 - b) Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing

features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.

- c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.
 - d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.
 - e) Never tell a witness that they are right or wrong in their identification.
 - f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.
 - g) Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but also all the circumstances involved in obtaining it, e.g. the composition of the photo-pack.
 - h) Be wary of prosecutions based on weak single-witness identifications. While not required by law to secure a conviction, ascertain whether there is any corroboration of an eyewitness's identification in order to overcome any deficiencies in the quality of that evidence.
- 3. The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.
 - 4. Workshops on proper interviewing should be incorporated in regular and ongoing training sessions for police and prosecutors.
 - 5. Presentations on the perils of eyewitness misidentifications, including presentations by experts in the field of memory and eyewitness identification, should be incorporated in regular and ongoing training sessions for police and prosecutors.

CHAPTER 6 – FALSE CONFESSIONS

I. INTRODUCTION

Though it may be difficult to understand, it remains that innocent individuals sometimes confess to crimes they have not committed. As noted by Justice Binnie of the Supreme Court of Canada, in dissent, in *R. v. Sinclair*:

It bears repeating that persons detained or arrested may be quite innocent of what is being alleged against them. Canada's growing platoon of the wrongfully convicted, including the by now familiar roll call of Donald Marshall, David Milgaard, Guy-Paul Morin, Thomas Sophonow, Ronald Dalton, Gregory Parsons, Randy Druken, and others attest to the dangers of police tunnel vision and the resulting unfairness of their investigation. See *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken*, by the Right Honourable Antonio Lamer (St. John's, 2006), at p. 171-73. Convinced (wrongly) of the detainee's guilt, the police will take whatever time and ingenuity it may require to wear down the resistance of the individual they just know is culpable. As this Court recognized in *R. v. Oickle*, 2000 SCC 38 (S.C.C.), innocent people are induced to make false confessions more frequently than those unacquainted with the phenomenon might expect.¹⁷⁹

As this chapter highlights, considerable progress has been made in implementing the *2005 Report's* recommendations which called for a review of investigation standards respecting the interviewing of suspects and witnesses, and training about false confessions.

II. 2005 RECOMMENDATIONS

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. Video recording should not

179 *R. v. Sinclair* [2010] 2 SCR 310 at para. 90.

be confined to a final statement made by the suspect, but should include the entire interview.

2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.
3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

Since the release of the *2005 Report*, two Commissions of Inquiry have delivered reports in which recommendations were made regarding the recording of police interviews of both suspects and witnesses:

- a) ***The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, and Randy Druken (2006)***

Recommendation 5(b)

In all major crime investigations, police station interviews should be videotaped and field interviews should be audiotaped.

- b) ***Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008)***

Recommendation 4

Police should ensure that every statement taken from a young person in a major case, whether as a witness or a suspect, is both audio recorded and video recorded.

IV. LEGAL DEVELOPMENTS AND COMMENTARY

a) Confessions rule and the right to silence

In *R. v. Singh*,¹⁸⁰ the Supreme Court of Canada considered the scope of a detainee's pre-trial right to silence under s. 7 of the *Charter* as defined in *R. v. Hebert* and the common law confessions rule as defined in *R. v. Oickle*. During police questioning, the accused repeatedly asserted his right to silence and advised police he did not wish to speak to them or participate in the interview. Police persisted in questioning him and ultimately obtained incriminating admissions.

The Supreme Court of Canada upheld the trial decision that the statements were voluntary and in so doing rejected the suggestion that the police "...should be required to inform the detainee of his or her right to silence and, absent a signed waiver, to refrain from questioning any detainee who states that he or she does not wish to speak to the police" because that approach "ignores the state interests at stake . . . [and] overshoots the protection afforded to the individual's freedom of choice both at common law and under the *Charter*. Under the *Charter*, the right to counsel, including an informational and implementational component, is provided for expressly. No such provision appears in respect of the right to silence."¹⁸¹ The Court further noted that the right to silence is within the control of an accused who has an operating mind and who has been advised of his or her rights.¹⁸²

The Court noted that there is considerable overlap between the confessions rule and the right to silence under s. 7 of the *Charter*; that the confessions rule is "largely informed by the problem of false confessions" and that "[t]he parameters of the rule are very much tailored to counter the dangers created by improper

180 *R. v. Singh* [2007] 3 SCR 405. The accused was arrested for second-degree murder in relation to the death of an innocent bystander who was killed by a stray bullet while standing inside the doorway of a pub. He was advised of his right to counsel under s. 10(b) of the *Charter* and privately consulted with counsel. During the course of two subsequent interviews with a police officer, the accused stated on numerous occasions that he did not want to talk about the incident, that he did not know anything about it, or that he wanted to return to his cell. On each occasion, the officer would either affirm that the accused did not have to say anything and state that it was nonetheless his duty or his desire to place the evidence before the accused, or he would deflect the accused's assertion and eventually engage him again in at least limited conversation. During the course of the first interview, the accused did not confess to the crime but made incriminating statements by identifying himself in pictures taken from the video surveillance inside the pub in question and in another pub. Before the accused was shown the photographs in question and made the impugned admissions, he asserted his right to silence 18 times.

181 *Ibid.*, at paras. 42-43.

182 Note that young persons have been found to be particularly vulnerable to the coercive effects of detention and police questioning. Where the accused is a young person, a court may well come to different conclusion respecting the voluntariness of a statement or respecting whether the accused's right to silence had been violated. See, for example: *R. v. C.K.* (2005) O.J. No. 4853. (C.J.).

interrogation techniques that commonly produce false confessions.”¹⁸³ The Court held that “[i]n the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the two tests for determining whether the suspect’s right to silence was respected are functionally equivalent.”¹⁸⁴ Thus, “[a] finding of voluntariness will... be determinative of the s. 7 issue.”¹⁸⁵

In *R. v. Spencer*,¹⁸⁶ the Supreme Court of Canada upheld the trial judge’s ruling that the accused’s statement was voluntary. The accused was arrested while driving his girlfriend’s vehicle and charged with 18 counts of robbery. His girlfriend was arrested a day later. During an eight-hour interview following the girlfriend’s arrest, the accused confessed to the robberies. At trial, it was argued that he was induced to confess by a hope of leniency for his girlfriend and the promise of a visit with her. The trial judge found that the interviewing officer did not offer lenient treatment for the accused’s girlfriend in exchange for a confession. Rather, the accused attempted to broker this deal, and the interviewing officer advised that no such deal could be made. The trial judge found that allowing the accused to visit his girlfriend only after he “cleaned his slate” was an inducement but not a sufficiently strong one to overbear the accused’s will. The Supreme Court agreed with the trial judge, stating that a “*quid pro quo* is an important factor in establishing the existence of a threat or promise, [but] it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused’s statement.”¹⁸⁷ The trial judge did not err in concluding police did not offer leniency for the accused’s girlfriend and that withholding a visit to her until at least a partial confession was made was not a strong enough inducement to render the accused’s statements inadmissible. Relevant to the voluntariness analysis was the fact that the accused had not lost control of the interview to the point where he and the interviewing officer were no longer playing on a level field, and the accused was an aggressive, mature and savvy participant in the interview who tried to secure deals with the police.

It is noteworthy that the Court’s voluntariness analysis in these two cases has been met with some critical academic commentary. It has been argued that these two decisions fail to adequately protect against the risk of false confessions. Professor Dale Ives, Faculty of Law at University of Western Ontario, argues that the Supreme Court’s decision in *Singh* “strips the right to silence of any real meaning. Suspects have no right to be formally informed of their right to remain silent, nor is there any obligation on the police to stop questioning except seemingly in the most extreme circumstances,” which creates a risk of false confessions because

183 *Ibid.*, at para 29.

184 *Ibid.*, at para 39.

185 *Ibid.*, at para. 37.

186 *R. v. Spencer* [2007] S.C.R. 500.

187 *Ibid.*, at para. 15

“the right to silence adds nothing to the voluntariness rule” and does not assist in regulating police interrogation practices.¹⁸⁸ Ives also argues that *Spencer* “narrows the voluntariness rule and the protection it affords to the innocent” because it allowed a statement that was the result of an inducement, which is often a factor in false confessions.¹⁸⁹

Professor Timothy Moore, Chair of the Psychology Department at York University, similarly argues that “the protection that the right to silence is supposed to provide is largely spurious” because there is no absolute requirement that police provide detainees with the standard caution, and “[t]he caution is not well understood in the first place.”¹⁹⁰ Further, he says allowing police to continue to question a suspect who has asserted the right to silence is dangerous because it creates a coercive situation and the suspect could reasonably infer that he or she has no choice but to answer the questions. Suspects, he asserts, should have the right to have counsel present during any interview and to have interrogation terminated upon assertion of the right to silence.¹⁹¹

Assistant Professor Lisa Dufraimont, Faculty of Law at Queen’s University, argues that given that some false confessions are likely to be admitted into evidence under the confessions rule, particularly as a result of the Supreme Court’s ruling in *Spencer*,

[c]ourts should develop a practice of instructing juries on the danger of false confessions. At the very least, a jury confronted with a retracted confession should be warned that innocent suspects have been known to confess to crimes under the pressure of police interrogation . . . Depending on the case, it might also be appropriate for the judge to outline the types of false confessions and the circumstances . . . that contribute to the problem.¹⁹²

When considering academic concerns regarding the right to silence and the confessions rule, and whether the Supreme Court has struck the proper balance between an accused’s rights and the societal interest in investigating crime, it must be kept in mind that while police are not required to advise detainees of the right to silence, whether police provide the standard police caution has always been a factor in assessing voluntariness.

188 Ives, Dale, “A Meaningless Right to Silence with Dangerous Consequences” (2007) 51 C.R. (6th) 250 at 3-4 on Westlaw printout.

189 *Ibid.*, pp. 4 and 6 on Westlaw printout.

190 Moore, Timothy, “‘You can talk if you want to’: Is the Police Caution on the ‘Right to Silence’ Understandable?” (2007) 51 C.R. (6th) 233 at p. 9 on Westlaw printout.

191 *Ibid.*, p. 10 on Westlaw printout. See also Moore, Timothy, (2006) 33 C.R. (6th) 316; Yau, Benissa *Making the Right to Choose to Remain Silent a Meaningful One* (2006) 38 C.R. (6th) 226.

192 Dufraimont, Lisa, “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?” (2008) 33 *Queen’s Law Journal* 261 at 323.

In *R. v. Grandinetti*,¹⁹³ the Supreme Court of Canada maintained that the confessions rule applies when a statement is made to a person in authority and that a person in authority is someone who is perceived to be acting on behalf of police or prosecuting authorities, but does not include a police officer who is purporting and perceived to be acting on behalf of a criminal organization: the “Mr. Big” scenario.

The accused was convicted of first degree murder in the death of his aunt. During the investigation, the accused made inculpatory statements to undercover officers pretending to be members of a criminal organization. The accused thought he was dealing with a large international organization involved in drug trafficking and money laundering. He was led to believe that this organization was moving to Calgary, that he had been chosen as its Calgary contact, and that he could potentially make hundreds of thousands of dollars by participating in the organization’s criminal activities. Police engaged the accused in criminal activities, including money laundering, theft, receiving illegal firearms, and selling drugs. The undercover officers convinced the accused to confess to the murder by telling him that they had corrupt contacts in the police department who could influence the investigation and steer it away from the accused, that the ongoing murder investigation could be a liability to the criminal organization, and that he should come clean to them (one of whom was represented to be Mr. Big, the head of the criminal organization) to protect the criminal organization from possible police interference. Defence argued that the undercover officers should be considered persons in authority because the accused “believed they could influence the investigation into the murder of his aunt through corrupt police officers they claimed to know.”

The Supreme Court upheld the trial judge’s ruling that the officers were not persons in authority because a person in authority is someone who the accused believes “...to be ‘an agent of the police or prosecuting authorities’, and ‘acting in concert with the police or prosecutorial authorities, or as their agent,’” not someone who seeks to sabotage the investigation.¹⁹⁴ The Supreme Court agreed with the trial judge that “reason and common sense dictate that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating.”¹⁹⁵

193 *R. v. Grandinetti* [2005] S.C.R. 27.

194 *Ibid.*, at paras. 43-44.

195 *Ibid.* at para. 39.

In affirming that the trial judge made no error in admitting the statements, the Supreme Court did not address the issue of whether the admission of the statements would amount to an abuse of process as a result of the way in which they were obtained, i.e., through an undercover “Mr. Big” operation. The Court noted that though the “abuse of process” argument was made at trial, it was rejected both at trial and on appeal, and was not argued before the top court. This is perhaps not surprising. While there has been much extra-judicial criticism of this technique, statements obtained by the typical “Mr. Big” operation would appear to be neither a violation of the *Charter* nor an abuse of process at common law: see, *R v McIntyre*, [1994] 2 S.C.R. 480; *R v Osmar*, [2007] O.J. No. 244, 217 C.C.C. (3d) 174 (C.A.), leave to appeal refused [2007] S.C. A. No. 157; and *R v Bonisteel*, [2008] B.C.N. No. 1705 (BCCA).

In *R. v. L.T.H.*,¹⁹⁶ the Supreme Court of Canada held that the requirement in s. 146 of the *Youth Criminal Justice Act* that the rights in s. 146(2)(b)¹⁹⁷ be clearly explained to the young person in language appropriate to his or her age and understanding, requires the Crown to prove beyond a reasonable doubt that “the necessary explanation was given in appropriate and understandable language.”¹⁹⁸ Waiver must also be proven beyond a reasonable doubt. Section 146 is premised on “the generally accepted proposition that procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators.”¹⁹⁹ The proof beyond a reasonable doubt standard is based, in part, upon a desire to prevent false confessions.

b) Recording of interviews

The law remains clear that the contemporaneous recording of a police interview/interrogation is not a requirement of the common-law confessions rule.²⁰⁰ Nor has Parliament legislated such a requirement. However, such a practice continues to be strongly encouraged by the courts, commissions, and academics. For instance, the British Columbia Court of Appeal has noted that:

196 *R. v. L.T.H.*, 2008 SCC 49.

197 Section 146(2) of the *Youth Criminal Justice Act* (“YCJA”) provides that statements made by young persons to persons in authority are not admissible unless, among other things, the person taking the statement clearly explains in language appropriate to the age and understanding of the young person that the young person has certain rights enumerated in s. 146(2)(b), including that the young person is not obligated to make the statement; that it may be used in evidence against him or her; the right to consult with counsel or a parent; and that the statement is required to be made in the presence of counsel or a parent unless the young person desires otherwise. The right to counsel and to have counsel or a parent present when a statement is being made may be waived.

198 *Ibid.*, at para. 5-6, per Fish J. for himself and three other members of the Court.

199 *Ibid.*, at para. 3.

200 *R. v Narwal* (2009), 248 C.C.C. (3d) 62 (B.C.C.A.), at pp. 75-76; and *R. v Ducharme* (2004), 182 C.C.C. (3d) 243 (Man. C.A.), leave to appeal to S.C.C. refused [2004] 1 S.C.R. viii.

Although the contemporaneous recording of a police interview/interrogation of a suspect is highly desirable, and is a practice that has been both recommended and encouraged by courts and commissions of inquiry, it is not a requirement of the common-law confessions rule. Indeed, in *R. v. Richards* (1997), 87 B.C.A.C. 21 (B.C. C.A.), extension of time and leave refused, [2003] S.C.C.A. No. 100 (S.C.C.), Mr. Justice Braidwood opined that any change in this regard is for Parliament, not the courts: paras. 36 -38. Most recently, Chief Justice Finch in *R. v. Quinn*, 2009 BCCA 267 (B.C. C.A.), reiterated that an unrecorded statement is not automatically inadmissible:

The Supreme Court of Canada has ruled in the context of formal police interviews that there is no legal requirement that a police interview be videotaped: *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38. The failure to record electronically a formal police interview, when there is no good reason not to, may raise suspicion and present obstacles to the Crown in its efforts to prove beyond a reasonable doubt that a statement given to a person in authority was voluntary. But whether such suspicion is warranted depends on the facts of each case: *R. v. Ducharme*, 2004 MBCA 29, 182 C.C.C. (3d) 243; *R. v. Groat*, 2006 BCCA 27.²⁰¹

Academic commentary invariably supports electronic recording of custodial interrogations. Thomas Sullivan, a former U.S. Attorney and co-chair of the Illinois Commission on Capital Punishment, after a study in which detectives and prosecutors from 450 police stations across the United States were interviewed, found that police, prosecutors and judges prefer electronically recorded interrogations. Electronic recording creates an objective record, decreases false claims of police abuse, makes fact finding easier, and increases guilty pleas where a confession is made.²⁰² The Justice Project (Washington, D.C.) has found similar benefits, saying electronically recording interrogations creates an “objective record of a critical phase in the investigation of a crime,” protects police from “false claims of abuse or coercion,” provides strong evidence of guilt in the case of confessions and enhances the fact-finding function of the trier of fact.²⁰³ Timothy Moore argues that “[a]ll police interviews conducted in Canada” should be video recorded to protect against inappropriate police questioning.²⁰⁴

201 *R. v. Narwal*, *supra*, at para. 37.

202 Sullivan, Thomas P., “The time has come for law enforcement recordings of custodial interviews, start to finish” (2006) 37 *Golden Gate U. Law. Rev.* 175 at 178-79.

203 The Justice Project, “Electronic Recording of Custodial Interrogations: A Policy Review” at p. 2.

204 Timothy Moore, *supra*, p. 190. See also Yau, Benissa, *Making the Right to Choose to Remain Silent a Meaningful One*, (2006) 38 C.R. (6th) 226, where Yau says that mandatory videotaping of entire interrogations is beneficial because it averts disputes about whether coercive tactics were used.

Most importantly, it is suggested that an electronic record of an interrogation may reduce the risk of wrongful convictions based on false confessions:

A comprehensive electronic record of interrogations helps prevent wrongful convictions stemming from false confessions by providing courts with the information necessary to accurately assess whether a defendant's statement is reliable and voluntary. Additionally, an electronic record allows law enforcement and prosecutors to review the interrogation later, to observe the suspect's demeanor and watch for inconsistencies. This allows for a more informed decision about whether to charge a suspect on the basis of a statement, thus helping to prevent the prosecution of an innocent individual.²⁰⁵

Many jurisdictions have electronic recording requirements,²⁰⁶ and most academic commentators support legislative requirements for electronically recording custodial interrogations in defined circumstances. Sullivan states, with respect to the situation in the United States, that given the obvious benefits of electronic recording, "state and federal legislators should give serious consideration to legislation requiring that custodial interrogations be recorded, thus bringing law

205 *Supra* note 203 at p. 7.

206 A number of states in the United States, a number of states in Australia, and the United Kingdom require, either through legislation or court decisions, that custodial interrogations for serious cases be electronically recorded. Texas and Illinois have state legislation requiring electronic recording in defined circumstances. Maine has legislation requiring law enforcement agencies to adopt written policies on recording procedures for serious crimes. In Alaska courts have interpreted the state constitution's due process clause as requiring police to electronically record suspect interrogations if the suspect is taken into a place of detention and recording was feasible because arbitrary failure to record affects an accused's ability to present a defence and recording is necessary to protect the right against self-incrimination and the right to a fair trial. In Minnesota courts have created an electronic recording requirement and held that failure to record may result in inadmissibility if the failure to record was a substantial violation of the rule. In Massachusetts electronic recording is a factor in assessing voluntariness, and even if the statement is admitted the trial judge should give the jury a cautionary instruction on the failure to record. A number of federal courts have also commented on the desirability of electronic recording and held that cautionary instructions are required in the face of failure to electronically record in defined circumstances. In Australia the Australian High Court has characterized non-electronically recorded interrogations as suspect, thereby making recording a practical necessity for purposes of prosecution. In addition, several states have legislation requiring that confessions be videotaped if police suspect that a serious crime has been committed, making evidence of a non-recorded admission inadmissible unless a reasonable excuse exists for the failure to record. In the United Kingdom whether a confession was electronically recorded is a factor in the voluntariness analysis. The *Police and Criminal Evidence Act* requires that "all interviews at police stations with persons suspected of offences that are triable on indictment must be tape recorded." Failure to record when required may lead to inadmissibility of the statement where admission would have an adverse effect on the fairness of the proceedings. See also: *The Justice Project Report, supra*, where it is noted that in addition to the states mentioned above that New Jersey, New Mexico, Maine and Wisconsin have electronic recording requirements.

enforcement personnel into line with best practices, which will result in savings of public funds and greatly assist in accurate, efficient law enforcement.”²⁰⁷

The Justice Project Report recommends that electronic recording requirements be implemented, and that they be implemented by legislation in order to ensure “uniformity and comprehensive guidance” on when and where electronic recordings are required, exceptions to requirements, and consequences for non-compliance with requirements.²⁰⁸

On the other hand, those arguing against a legislated mandatory rule note that it would be difficult for any mandatory rule to not be over or under inclusive. Exceptions will always be required, and to date all legislative and judicial electronic recording requirements have exceptions. Further, adopting a mandatory electronic recording requirement would necessarily move Canada’s voluntariness analysis away from its current contextual approach (“totality of the circumstances”), reduce some trial judge discretion and leave one factor predominant over others when determining the voluntariness of a statement.

As noted previously, in Canada there is no legislation mandating the recording of police interviews/interrogations.

c) Expert evidence and jury instructions

Canadian courts of appeal have considered whether to admit expert evidence tendered by the defence in support of the theory that the accused’s purported confession was false or unreliable. Central to the admissibility of such evidence is the question of whether the topic may be adequately addressed by a comprehensive jury instruction. This issue has not been resolved. As noted by the Ontario Court of Appeal, the admissibility of such evidence is “anything but obvious and should be approached with considerable caution.”

In *R. v. Phillion*,²⁰⁹ the Ontario Court of Appeal ordered a new trial for Romeo Phillion, who was convicted in 1972 of murdering a firefighter in Ottawa on August 9, 1967. There was fresh evidence in the form of a police report that suggested the accused may have been in Trenton between 12:00 and 1:00 p.m., on the date of the murder, thereby making it impossible for him to have been in Ottawa at 2:45 p.m., when the murder occurred.

207 Justice Project “Electronic Recording of Custodial Interrogations,” *supra*, pp. 180-81.

208 *Ibid.*, at p. 15.

209 *R. v. Phillion* [2009] O.J. No. 849 (C.A.).

In addition to the fresh alibi evidence, the defence sought to introduce fresh evidence related to a claim that Mr. Phillion's confession was false. He confessed to the crime approximately four years after it occurred when he was arrested on an unrelated matter. The confession was made to a police officer who had not been involved in the original homicide investigation and who had not solicited information about the murder. Mr. Phillion also confessed to his friend, Neil Miller, several days earlier. Mr. Phillion recanted his confession the same day he made it and told another officer that he had nothing to do with the murder. He said that he confessed so that Miller could report it and he and Miller could share the reward and to send police on a wild goose chase. Both confessions and the recantation were tendered in evidence at the original trial. Dr. Arboleda, a psychiatrist, and Dr. Girodo, a psychologist, testified that the confession was inherently unreliable because Mr. Phillion's psychological profile was such that he had a propensity to lie and to invent stories to make himself feel important.

The alleged fresh evidence in relation to the confession was evidence from Dr. Gisli Gudjonsson, a world expert on false confessions, and Dr. Graham Turrall, a psychologist. Both were of the opinion that the confession was unreliable due to Mr. Phillion's personal characteristics. Dr. Turrall described him as "a dependent and depressive individual with a tendency for attention-seeking behaviours and impulsivity" and as being "immature, intellectually limited . . . and antisocial" and stated that his "[p]ersonality functioning is suggestive of an individual who needs to be seen by others as important and special." Dr. Turrall opined that Mr. Phillion was the "type of person who could confess to a crime that he did not commit, especially a serious and high profile crime like the unsolved murder of Mr. Roy" and that his statements to Miller and the police would have been suspect as an attempt at self-aggrandizement.²¹⁰

Dr. Gudjonsson concurred in Dr. Turrall's assessment of Mr. Phillion's personality and opined that his confession was inherently unreliable and probably false and likely the result of his "desire and need to enhance his vulnerable self-esteem by becoming somebody important . . . while at the same time also possibly taking . . . revenge on the police" by sending them on a wild goose chase.²¹¹ Dr. Gudjonsson testified with respect to the accuracy of Phillion's confessions when tested against the known facts surrounding the murder and the possibility that his knowledge about the crime resulted from contamination from outside sources. He also compared and contrasted features of Mr. Phillion's case that were analogous to other cases of false confessions.

210 *Ibid.*, at para. 201.

211 *Ibid.*, at paras. 204, 207.

The Ontario Court of Appeal held that “in cases such as this where the reliability of a confession is in issue, expert evidence regarding an accused’s personality traits that is relevant to and probative of the issue will be admissible,” but the evidence in question was not fresh evidence because this type of evidence was led at trial.²¹²

The Crown had argued that, while there is nothing wrong with leading evidence of a person’s personality defects to suggest that he lied when confessing, an expert cannot, under the guise of science, “state whether a confession is reliable or not” because there is “no scientific foundation for such an assertion.” In other words, an expert should not be allowed to tell a jury that he can identify a reliable confession simply because he is an expert. The Crown also argued that “much of Dr. Gudjonsson’s proposed evidence related to matters that ordinary people can understand and form a correct judgment about without the assistance of an expert” and that a jury instruction would be sufficient to alert the jury to the fact that false confessions do occur and to dispel the view that people do not confess to serious crimes that they have not committed.²¹³

The Court declined to rule on these arguments, saying that the Crown’s objections to the evidence were set out in detail because “...at the very least, they show that the admissibility of expert evidence on false confessions is anything but obvious and should be approached with considerable caution. Of particular concern is whether the proposed evidence reaches the level of scientific reliability required by *Mohan* to warrant its reception.”²¹⁴

In *R. v. Bonisteel*,²¹⁵ the accused confessed to the murder of two teenage girls to an undercover officer during a Mr. Big operation. On appeal, the accused argued, among other things, that the trial judge erred in “disallowing defence expert evidence concerning the inherent unreliability” of the confession.²¹⁶ The accused also took issue with the instructions given to the jury and argued generally that the confession was inherently unreliable because the undercover operation was “designed to produce powerful psychological pressures on the appellant to falsely confess.”²¹⁷

The British Columbia Court of Appeal found no grounds for excluding the confession. It held that the trial judge did not err in refusing to admit expert evidence on false confessions because the expert evidence was being offered to “educate the jury about false confessions” and was not specific to the accused.

212 *Ibid.*, at para. 218.

213 *Ibid.*, at paras. 214-216.

214 *Ibid.*, at para. 217.

215 *R. v. Bonisteel* [2008] B.C.J. No. 1705 (B.C.C.A.).

216 *Ibid.*, at para. 25.

217 *Ibid.*, at para. 217.

Thus, it was unnecessary. It found that the trial judge's instructions to the jury were sufficient. In the case of statements made during a Mr. Big operation, "there is no particular form of warning that the trial judge must follow in warning the jury about false confessions" other than explaining that an accused may have a motive to lie.²¹⁸ The jury was warned of "the danger of false confessions, with particular reference to confessions produced by an undercover operation such as this" and warned that resulting statements are "inherently unreliable."²¹⁹ The trial judge "discussed the known risk in criminal law of false confessions, and warned the jury that it is wrong to assume that people confess only to crimes they have actually committed. He spoke of the 'manipulation of the target during an undercover sting' and instructed the jury to take 'great care' in considering the 'veracity or credibility' of the [confession]."²²⁰

In *R. v. Osmar*,²²¹ the accused confessed to the murder of two men to an undercover officer, again during a Mr. Big operation. At trial, he denied committing the murders and testified that he lied to the undercover officer so that he could get a job with the criminal organization. On appeal the accused argued, among other things, that admitting the statements into evidence would violate the principle against self-incrimination as guaranteed by s. 7 of the *Charter*; that the trial judge erred in excluding expert evidence in relation to false confessions and that the trial judge did not adequately caution the jury about the danger of relying upon the accused's statements to the undercover officers.

The Ontario Court of Appeal held that admitting the confession did not breach s. 7 of the *Charter* because in *Hebert* the Supreme Court of Canada held that "the right to silence guaranteed by s. 7 of the *Charter* is not infringed by undercover police operations where the suspect is not detained" and in *McIntyre* the Supreme Court affirmed the application of *Hebert* in a Mr. Big-type case.²²²

The Court of Appeal held that the expert evidence in question was properly excluded because it did not meet the necessity requirement for admission of expert evidence. The defence proposed to call Dr. Richard Ofshe, a social psychologist and a leading expert on the phenomenon of false confessions, to testify to three things. First, he was to testify to the fact "that there is a bias among lay people against the idea that someone who is indeed innocent might falsely confess."²²³ Second, he was to testify about what motivates a person, including an innocent person, to confess to a person in authority. This testimony was unnecessary because "the motive for a possible false confession was obvious, as was the fact that there was no downside to confessing to men the [accused] believed

218 *Ibid.*, at para. 73.

219 *Ibid.*, at para. 66.

220 *Ibid.*, at para. 76.

221 *R. v. Osmar* [2007] O.J. No. 244 (C.A.).

222 *Ibid.*, at paras. 25, 47.

223 *Ibid.*, at paras. 56, 69.

were criminals. . . . Dr. Ofshe would simply be describing what was obvious from the testimony of the police officers and, indeed, from the [accused's] own evidence."²²⁴ Third, he was to testify "about the way to evaluate whether or not a confession is false."²²⁵ But Dr. Ofshe's method of determining whether the confession was true or false was to compare it to the known facts about the crime, and the "jury did not need help understanding this point."²²⁶

The accused also argued that the trial judge should have warned the jury "in the strongest terms as to the unreliability of the [accused's] confessions and the risk that they were false, especially since he did not admit Dr. Ofshe's evidence" and that "a correct instruction would contain the following elements:

- Although a confession may appear to be convincing evidence of guilt, there are cases known to the law where suspects have falsely confessed leading to miscarriages of justice.
- If the statement was obtained by an inducement, the jury should be cautious about accepting it and little if any weight should be attached to it.
- The jury should determine whether the statement contains details consistent or inconsistent with the known facts and evinces knowledge only available to the perpetrator with a pointed warning about the danger of contamination."²²⁷

The Court of Appeal held that such a warning was not required in this case and noted, with respect to the first desired instruction, that the risk of bias in not believing that an innocent person would falsely confess is greatest in cases of formal police interrogation. With respect to the second desired instruction, unlike in *Hodgson* where the Supreme Court suggested a warning regarding the weight to be placed on confessions obtained by inhumane or degrading treatment, there was no such treatment in this case. The jury was given instructions with respect to the third instruction.²²⁸

d) Police Interrogations

A significant number of crimes are regularly – and quite properly – solved with the assistance of the offender's confession. Such confessions are often the result of an in-custody police interrogation. The strategies that are effective in obtaining confessions from a guilty suspect may also on occasion produce false confessions from innocent people. Certain aspects of an interview (in particular, excessively

²²⁴ *Ibid.*, at paras. 56, 70.

²²⁵ *Ibid.*, at para. 56.

²²⁶ *Ibid.*, at para. 71.

²²⁷ *Ibid.*, at para. 73.

²²⁸ *Ibid.*, at paras. 74-77.

long interviews) and/or the personal characteristics of the subject (e.g., low intelligence, youth, emotional instability, mental health issues) may heighten the possibility of a false confession. This heightens the need for police and prosecutors to look for internal consistency in a purported confession, external consistency with known facts and corroboration (so that a prosecution is not based on a confession alone).

Also quite properly, appellate courts have instructed trial judges to closely scrutinize such confessions in the context of voluntariness *voir dire*s. In the result, police training programs typically provide officers with instruction and guidance respecting the various components of an effective police interrogation. And increasingly, such training programs are also instructing officers to remain attendant to the possibility that an interrogation may elicit a false confession. While there are many interrogation methods, going under a variety of names, the nature of a particular interrogation is as much dependant on the style of the police officer as it is dependent upon the method(s) taught to the particular officer.

That said, some interrogation methods have attracted particular scrutiny. For instance, courts have considered the admissibility of confessions elicited using the so-called Reid Technique.²²⁹ The Reid Technique is an interrogation style that is widely used by police agencies – and has been for years – but has more recently been the subject of increasing criticism as the process and steps involved are becoming more widely known. While often effective in eliciting incriminating statements from suspects, the Reid Technique raises concerns about unreliable confessions and wrongful convictions. Confessions obtained using the Reid Technique have been repeatedly found to be admissible; however, there are examples where courts have ruled statements inadmissible and have criticized aspects of the Reid Technique as too coercive.

The technique, in short, is one of many techniques that are based upon moral justification. The interrogator presents a monologue in which the suspect is discouraged from making denials or offering explanations. While weak denials are discouraged during the interrogation phase, the interviewer is advised to evaluate any denials. The suspect is offered alternative or contrasting questions with two choices, one of which is less morally challenging than the other. If the suspect acknowledges a choice the interrogation moves to non-leading questions to draw out the full confession.

229 *R. v. Viszlai* [2010] B.C.J. No. 2697 (B.C.S.C.); *R. v. Grant*, [1992] M.J. No. 641 (Prov. Ct.); *R. v. Giroux*, [1995] B.C.J. No. 1982 (S.C.); *R. v. S.L.S.*, 1999 ABCA 41, [1999] A.J. No. 69; *R. v. Whalen*, [1999] O.J. No. 3488 (C.J.) [*Whalen*]; *R. v. M.J.S.*, 2000 ABPC 44, [2000] A.J. No. 391; *R. v. Minde*, 2003 ABQB 797 [*Minde*], [2003] A.J. No. 1184; *R. v. Barges*, [2005] O.J. No. 5595 (S.C.J.); and *R. v. N.*, [2005] O.J. No. 357 (S.C.J.). *R. v. Peters*, [2000] O.J. No. 4223 (Ont.C.J.).

Some decisions have criticized the Reid Technique²³⁰ and in particular the minimization aspect of the technique and the atmosphere of oppression created by an intense, focused and unrelenting interrogation.²³¹ For example, in *R v. Peters* the Court stated:

- [the investigator] then interrogated [the suspect, Mr. Peters] for about forty minutes, using the ‘Reid Interviewing and Interrogation Technique,’ a system used widely for many years by Canadian and some American police authorities.
- The videotape evinces an intense, focused and unrelenting interrogation. The officer is seen to persistently cut Mr. Peters off from speaking in order to minimize or prevent his numerous denials, and to force him to listen to the themes she was presenting. She agreed with counsel’s suggestion that so long as the accused was in the denial stage, she would let him speak only to make admissions. She did not think this coercive approach had any impact on him. She is seen to sit extremely close to him, but does not believe that such physical proximity had the effect, in the circumstances of such an intense interrogation, of intimidating him.
- [The investigator’s] methods included ignoring, deflecting or overriding any objections or denials on his part. She often raised her voice, demeaned him and physically crowded him. She forcefully required him to listen to themes she presented that, in my view, were inducements encompassing both promises and threats in relation to himself and his family. These and other circumstances presented, in my view, as oppressive.²³²

As the *2005 Report* emphasized, vigilance is key. Police and prosecutors must be constantly on guard against the aspects of an interrogation that can lead to a false confession. The ongoing training of these key participants in the criminal justice system will help ensure that false confessions are avoided and that any such confessions are identified as such.

230 The Reid Technique actually consists of two parts: the Reid Behaviour Analysis Interview and the Reid Nine Steps of Interrogation. During the Reid Behaviour Analysis Interview, the interviewer is non-confrontational, asks for the subject’s version of the events, and asks probing questions. Much of the criticism of the Reid Technique is focused on the Reid Nine Steps of Interrogation.

231 *Peters, supra*.

232 *Peters, supra*, at paras. 14, 15, 66 respectively.

V. STATUS OF RECOMMENDATIONS

The *2005 Report* noted that it was already the norm for police services to video record police station interviews of suspects in major crime investigations. For many police forces now, video recording routinely extends beyond custodial interviews of suspects in major crime investigations to all custodial interviews of suspects at police facilities.

The other recommendations, calling for a review of investigation standards respecting the interviewing of suspects and witnesses and training about false confessions, have also been implemented in jurisdictions. For instance, in 2005 the Vancouver Police Department reviewed its policies and changes were made to ensure that they were consistent with the *2005 Report*. In particular, the VPD's Investigators' Level II Program includes a segment "Preventing Wrongful Convictions through Investigative Excellence." A component dealing with the issue of false confessions includes, *inter alia*, reasons for false confessions, avoiding them, and ensuring that in-custody suspect interviews are always video-recorded. The Sûreté du Québec keeps its standards up to date by their Behaviour Analysis Division, which includes a forensic psychologist who is a renowned expert on the subject of police interviews of suspects. Members of the Behaviour Analysis Division provide investigation interview training and seminars that include psychology of confessions, factors associated with confessions, avoidance of false confessions, etc.

Since the release of the *2005 Report*, the recommended training for prosecutors has been provided as well. For instance, in 2009-10, the PPSC, in collaboration with the RCMP and Department of Justice Canada, conducted a series of day-long training days for prosecutors and RCMP officers in the three northern Territories. The training included sessions on eyewitness identification, false confessions and tunnel vision. At the October 2005 Winnipeg conference Unlocking Innocence, Gisli Gudjonsson, Professor of Psychology at the Institute of Psychiatry in London, spoke about his examination of the phenomenon of false confessions, and highlighted psychological vulnerability and police impropriety as the two main causes for false confessions. Chapter 10 highlights other educational initiatives, which included sessions on false confessions.

VI. DISCUSSION OF RECOMMENDATIONS

The first 2005 recommendation suggested the video recording of interviews of suspects in "investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.)." A number of suggestions have been made as to how this recommendation might be improved. One prosecution service has recommended that the list of examples be expanded to include offences of sexual

assault and domestic violence; another prosecution service has recommended that the limitation be broadened to include “other significant criminal offences (such as drug trafficking) as identified by the police investigators based on the circumstances and seriousness of the offence;” and the Canadian Bar Association has suggested that the terminology be replaced altogether by “major crime investigations,” which is the terminology used by the *Lamer Inquiry Report*.²³³ Christopher Sherrin suggests eliminating the limitation altogether, that the limitation “offences of significant personal violence” is under-inclusive and vague and that interviews of all suspects at police stations should be video recorded, regardless of the offence being investigated.²³⁴

In considering these comments it should be recalled that the *2005 Report* noted that,

The Working Group’s recommendations are aimed primarily at the most serious of offences, particularly homicides. These are the cases where the risk of long-term incarceration, and hence the consequences of wrongful conviction, are the greatest. However, we recognize that some of our suggestions are applicable to other offences as well, when feasible (bolding in original).

Further, in making the original recommendation in the *2005 Report*, the advisability of limiting the video recording requirement by offence type was specifically canvassed. That discussion need not be repeated here. The working model that was used contained the limitation, “in a serious case such as homicide.” This was considered too general and that clearer direction should be provided. The same might be said of “major case investigation.” What is a “major case”? The phrase “offences of significant violence,” together with examples, more clearly articulates when the video recording requirement is to be met. As to providing further examples, it must be kept in mind that the list of examples given is open-ended and not exhaustive: clearly offences of sexual assault and domestic violence can be considered and usually are “offences of significant personal violence.”

The Subcommittee also believes the phrase “offences of significant personal violence” should remain as is. It is meant as a minimum requirement and adding “other significant criminal offences (such as drug trafficking) as identified by the police investigators based on the circumstances and seriousness of the offence,” would add undue complexity.

²³³ *Lamer Inquiry Report*, p. 109.

²³⁴ Christopher Sherrin, *Comment on the Report on the Prevention of Miscarriages of Justice* (2007) 52 C.L.Q. 140. University of Western Ontario, at 161-162.

The current video recording recommendation requires the video recording of suspect interviews “at a police facility.” It has been suggested that this be extended to require the audio-taping of interviews in the field, as recommended by the *Lamer Inquiry Report*. In fact, it would appear that the recommendation of the *Lamer Inquiry Report* is that all interviews of all persons, whether a suspect or a witness, be recorded in some fashion. It reads:

In all major crime investigation, police station interviews should be videotaped and field interviews should be audiotaped.

While this recommendation would certainly be a good, if not best, practice to enhance accuracy of recollection, it is not clear that it is currently feasible or that making it a requirement is needed to prevent false confessions.

The Subcommittee concludes, therefore, that the first recommendation need not be changed at this time.

VII. SUMMARY OF RECOMMENDATIONS

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. Video recording should not be confined to a final statement made by the suspect, but should include the entire interview.
2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.
3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

CHAPTER 7 – IN-CUSTODY INFORMERS

I. INTRODUCTION

Jailhouse informers are notorious as a class of self-serving and unreliable witnesses. Widespread recognition of their inherent unreliability has grown in the aftermath of public inquiries into wrongful convictions where jailhouse informers figured prominently (see the *Morin* and *Sophonow Inquiries* recommendations reviewed in the *2005 Report*). As of today, most provinces have taken significant proactive steps to deal with the issues associated with jailhouse informers, such as the introduction of specific provisions in Crown Policy Manuals and Policy Directives. As a result of increased awareness, education and strong Crown policy direction, prosecutors take a very cautious approach to the use of these potential witnesses.

The recommendations by these inquiries have also led to important changes in the use and treatment of this type of evidence by the courts. Courts now recognize, and generally accept, that jailhouse informers, who are often waiting to be dealt with by the same criminal justice system that they offer to “assist,” have major credibility issues and may be concerned only with advancing their own interests. It is not surprising, therefore, that jailhouse informers as a category of witnesses continue to prove themselves inherently unreliable.²³⁵

However, this fact is balanced with the reality that jailhouse informers are sometimes considered necessary to the justice system because of their unique position to acquire potential information directly from the accused. Despite obvious reliability problems, they are sometimes still relied on to provide persuasive confessions, most notably in the context of high profile murder cases.²³⁶ Given that there is no legislative or common law basis to disallow jailhouse informer testimony from a jury’s consideration, courts attempt to maintain balance by trying to control the reliability issues associated with this type of witness with a warning to juries about relying on the informer’s unsupported testimony (the “*Vetrovec*” warning). Recent developments in the law continue to give trial judges latitude and discretion regarding whether to provide a *Vetrovec* warning in a given case. The Supreme Court of Canada, however, has provided some guidance recently on what needs to be included to constitute an adequate *Vetrovec* warning.

235 *Morin Inquiry Report*, p. 599.

236 Some would argue that it isn’t surprising that informants may come forward with information in high profile murder cases, given the availability of media information and discussions that can be overheard concerning these types of cases.

An “in-custody informer” or “jailhouse informer” is defined as an inmate who approaches the authorities with incriminating information about an accused – most often an alleged confession from the accused – that was obtained while they were incarcerated together.²³⁷ Specifically, the inmate:

- (a) allegedly receives one or more statements from an accused;
- (b) while both are in custody;
- (c) where the alleged statements relate to offences that occurred outside of the custodial institution.

This definition does not include someone the authorities have intentionally placed near the accused for the specific purpose of acquiring evidence, nor does it include a confidential informer who provides information that is used solely for the purpose of furthering a police investigation.

II. 2005 RECOMMENDATIONS

1. Cross-sectoral educational programming should be provided to ensure that all justice professionals are aware of:
 - a) the dangers associated with in-custody informer information and evidence;
 - b) the factors affecting in-custody informer reliability;
 - c) policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.
2. Policy guidelines should be developed to assist, support and limit the use of in-custody informer information and evidence by police and prosecutors.
3. Provincial in-custody informer registries should be established so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. The creation of a national in-custody informer registry should be considered as a long-term objective.
4. A committee of senior prosecutors unconnected with the case should review every proposed use of an in-custody informer. The in-custody informer should not be relied upon except where there is a compelling public interest in doing so. The In-Custody Informer Committee’s assessment should take into account, among other things, factors affecting the reliability of the information or evidence proffered by the informer. That reliability

237 Often, the informer has shared a cell or a neighbouring cell with the accused.

assessment should begin from the premise that informers are, by definition, unreliable. Any relevant material change in circumstances should be brought to the In-Custody Informer Committee's attention to determine whether the initial decision regarding the compelling public interest in relying on the in-custody informer should be revisited.

5. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.
6. In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

The use of in-custody informers at trial continues to be identified as a significant contributing factor in cases of wrongful convictions.

a) The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons, and Randy Druken (2006)

Commissioner Lamer stated the following about jailhouse informants:

Jailhouse informants are notorious for fabricating confessions alleged to be made by an accused awaiting trial, while the two of them were in prison together. Often the informant seeks some reward such as leniency in return for testifying against the accused. The courts have long recognized the dubious reliability of their testimony. However, it was only with the more recent Morin and Sophonow inquiries that their role in contributing to wrongful convictions was fully exposed.²³⁸

Commissioner Lamer adopted Commissioner Cory's recommendations in the *Sophonow Report*,²³⁹ finding that they provided the best approach to the

238 *Lamer Inquiry Report*, p. 200.

239 Please see *2005 Report*, Chapter 7 – In-Custody Informers, pp. 89-90, which details the recommendations found in the Sophonow Report in relation to this issue.

potential testimony of jailhouse informants. He recommended that Commissioner Cory's recommendations be incorporated into the Crown Policy Manual of Newfoundland and Labrador for dealing with jailhouse informers.²⁴⁰

b) Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007)

The Crown's case against Mr. Driskell rested largely on the evidence of two of his associates. The central issue at the Inquiry was the failure to fully document and disclose relevant information with respect to the credibility of the two unsavoury witnesses.²⁴¹ Commissioner LeSage made the following recommendation:

...the (Winnipeg Police Service) policies and Manitoba Justice policies be revised to specifically provide that *all benefits* requested, discussed, or provided or intended to be provided *at any time* in relation to any "central" witness be recorded and disclosed.²⁴²

IV. LEGAL DEVELOPMENTS AND COMMENTARY

a) Introduction

Concerns that innocent people may be convicted on the basis of unreliable evidence from jailhouse informers are most acute in the context of jury trials. The *Kaufman Commission Report* has reviewed in detail how and why a jailhouse informer can lie so convincingly to the police, prosecutors, judges and juries. They are capable of inventing plausible confessions based on information they have pulled together from other sources, including media reports, disclosure they manage to review, and case-related conversations they participate in or have overheard. They repeatedly con seasoned criminal justice officials with ease. How can jurors, therefore, who generally lack the experience and knowledge required to evaluate the evidence, be expected to detect a jailhouse informer's perjury?

Recent case law endorses the established view that trial judges retain the discretion whether or not to offer a *Vetrovec* warning. The current trend, however, suggests that appellate courts are more willing to intervene and to overturn criminal convictions on the basis that the warning was not offered or, if offered, its content was inadequate. Recognizing the danger associated with this group of witnesses as highlighted by cases where there have been miscarriages of justice,

²⁴⁰ *Lamer Inquiry Report*, p. 271.

²⁴¹ *Driskell Inquiry Report*, p. 6.

²⁴² *Ibid.*, p. 121. Emphasis in the original.

the Supreme Court of Canada released *R. v Khela*²⁴³ – a decision that offers guidance to trial judges who offer a *Vetrovec* warning, setting out the general characteristics that must be included.

Trial judges continue to be required to weigh the reasons to suspect that the informer may be untruthful and the importance of the informer's testimony to the prosecution's case. It is generally accepted that the more untrustworthy the witness and the more crucial the evidence, the more likely that a *Vetrovec* warning will be required. Ultimately, the quality and weight of the informer's evidence continues to be determined by the jury.

b) The Vetrovec Warning

In *Vetrovec*, Justice Dickson held that a trial judge has the discretion to issue a clear and sharp warning to the jury to warn it about the reliability of the testimony of certain “unsavoury” witnesses – no particular category of witnesses was identified as requiring such a warning, no need to frame a warning in technical or formulaic language, and no need to include any legal definition of “corroboration” to explain to the jury the type of evidence capable of supporting the testimony of an unsavoury witness. Justice Dickson made it clear that a common sense approach, rather than “empty formalism,” should be employed.²⁴⁴

The decision to apply a common sense approach to “unsavoury witnesses” at trial on a case-by-case basis was a welcome change from the rigid, cumbersome “pigeon-hole” approach previously employed. Decisions since *Vetrovec* have supported this common sense approach, and herald the importance of preserving the trial judge's discretion on when to offer and what to say in a warning.

Since the *2005 Report*, there have been a number of decisions that focus on whether the trial judge should have offered a warning and/or the adequacy of the warning offered. Appellate courts remain sensitive to the pre-*Vetrovec* era of “blind and empty formalism” and do not want to prescribe a formula, preferring instead to defer to the trial judge's discretion on both issues. However, they are more likely than previously to intervene when a trial judge has not offered a warning with respect to certain witnesses. One explanation for this shift is the fact that courts are more aware of the inherent danger in relying on certain classes of witnesses, such as jailhouse informers, as evidenced by increased references in their judgments to findings from the public inquiries.

243 *R. v Khela*, [2009] 1 S.C.R. 104, [2009] SCJ No. 4.

244 *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811.

c) Clarification by the Supreme Court of Canada:

In January 2009, the Supreme Court of Canada released *Khela*,²⁴⁵ a decision focused exclusively on how much deference trial judges must be shown in crafting the form and content of *Vetrovec* warnings.²⁴⁶ Most notably, the majority of the Supreme Court upheld the tradition of deference to trial judges to craft a caution appropriate to the circumstances of the case, while finding it necessary to provide guidance regarding the general characteristics of a sufficient warning.²⁴⁷ Ultimately, the majority proposed a framework to be adhered to when crafting a *Vetrovec* warning,²⁴⁸ created in part as a response to recognition of the dangers associated with jailhouse informers:

Since the decision of this Court in *Vetrovec*, the very real dangers of relying in criminal prosecutions on the unsupported evidence of unsavoury witnesses, particularly “jailhouse informers,” has been highlighted more than once by commissions of inquiry into wrongful convictions (see, for example, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) and *The Inquiry Regarding Thomas Sophonow* (2001)). The danger of a miscarriage of justice is to be borne in mind in crafting and in evaluating the adequacy of a caution.²⁴⁹

The majority of the Supreme Court emphasized that the central purpose of a *Vetrovec* warning was “...to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses *and* to explain the reasons for special scrutiny of their testimony” [emphasis added].²⁵⁰ Put another way, in order to assess the risk of accepting testimony from an unsavoury witness, the jury must understand the reasons for special scrutiny. To assist with that understanding, the trial judge should identify for the jury the characteristics of the witness that bring his or her credibility into serious question.²⁵¹ The Court added the importance, in appropriate cases, of having the trial judge “also draw the attention of the jury to

245 *R. v. Khela, supra*. See also *R. v. Smith*, [2009] S.C.R. 146, the companion case to *Khela*.

246 *Ibid.*, at para. 27.

247 *Ibid.*, at paras. 13-14.

248 This approach did not escape criticism by Deschamps J., who concurred in part with the majority, but voiced her concern about the “step back” from the trend towards more flexible rules (see *Khela, supra*, at paras. 99, 100).

249 *Ibid.*, at para. 12.

250 *Ibid.*, at para. 11. The Supreme Court used the terms “unsavoury,” “untrustworthy,” “unreliable” or “tainted” interchangeably to include all witnesses who cannot be trusted to tell the truth, and referred to “especially but not only ‘jailhouse informants’” as a category of unsavoury witnesses who “can be convincing liars and can effectively conceal their true motives for testifying as they have” (see paras. 3-4).

251 *Smith, supra*, at para. 14. The explanation need not be exhaustive, however, there are situations where it may be useful for the trial judge to explain how and why the witness would be able to concoct a particularly compelling story that falsely implicates the accused.

evidence capable of confirming or supporting the material parts of the otherwise untrustworthy evidence.”²⁵²

The proposed framework created by the majority includes the following four main foundation elements:

- (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny;
- (2) explaining why this evidence is subject to special scrutiny;
- (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and
- (4) the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.²⁵³

Even though the Supreme Court developed the above framework, the majority of the Court maintains the position that there is no particular formula for a proper *Vetrovec* warning, and that trial judges remain vested with significant discretion to craft an instruction in accordance with the circumstances of the trial.²⁵⁴

d) Confirmatory Evidence

The majority in *Khela* points to the fourth component (above) as providing “guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness.” This component refers to independent evidence “that can provide comfort to the trier of fact that the witness is telling the truth.”²⁵⁵ To be confirmatory, the evidence does not have to implicate the accused; however, it “should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence.”²⁵⁶

The majority explained that the absence or presence of confirmatory evidence “plays a key role in determining whether it is safe to rely on the testimony of an unsavoury witness.”²⁵⁷ Therefore, the trial judge’s caution must make clear the

²⁵² *Khela*, *supra*, at para.11.

²⁵³ *Ibid.*, at para. 37. The majority referenced *Kehler*, [2004] 1 S.C.R. 328 at paras. 17-19, in relation to the last point. This framework, adopted and amplified by the majority, comes from the Ontario Court of Appeal’s proposed framework in *Sauve* (2004), 182 C.C.C. (3d) 321 (Ont.C.A.), at para. 82.

²⁵⁴ *Smith*, *supra*, at para. 16.

²⁵⁵ *Khela*, *supra*, at para. 38-39. Note that in her dissent, Deschamps J. made clear her belief that *Vetrovec*’s legacy of flexibility, which eliminated the requirement of corroborating evidence independent of the witness, should be maintained (see para. 89).

²⁵⁶ *Ibid.*, at paras. 40, 42.

²⁵⁷ *Ibid.*, at para. 46.

type of evidence capable of offering support; “it is not sufficient to simply tell the jury to look for whatever it feels confirms the truth of a witness’ testimony.”²⁵⁸

A truly functional approach must take into account the dual purpose of the *Vetrovec* warning: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses.²⁵⁹

e) Appellate Review

The majority in *Khela* addressed the fact that where a *Vetrovec* caution contains the four components outlined above, appellate courts generally will be expected to find the caution adequate. Failure to include any of the four components, however, may not prove fatal where the judge’s charge, when read as a whole, otherwise serves the purposes of a *Vetrovec* warning.²⁶⁰

In *R v. Smith*, a companion case to *Khela* that dealt with the sufficiency of a caution by a trial judge in relation to two unsavoury witnesses, the same majority of the Supreme Court emphasized the following with respect to appellate review:

...appellate courts must not measure the sufficiency of a caution against the ruler of perfection. Instead, the inquiry should focus on whether the instruction achieved its purpose: To warn the jury of the danger of relying on the impugned witness’ testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused’s involvement in the crime. The caution should also direct the jury to the type of evidence capable of providing such comfort.²⁶¹

f) Post-Khela Decisions

It can be expected that trial judges will rely on the framework set out by the majority in *Khela* and will craft future *Vetrovec* warnings accordingly. In the interim, however, appellate courts asked to consider the sufficiency of a *Vetrovec* warning in a given case will look to the charge to determine whether it, as a whole, has achieved the purpose of a *Vetrovec* warning.

258 *Ibid.*, at para. 46.

259 *Ibid.*, at para. 47.

260 *Ibid.*, at paras. 44-45.

261 *Smith, supra*, at para. 2.

One such example is found in *R. v. Tymiak*,²⁶² a post-*Khela* decision by the British Columbia Court of Appeal. The Court held that the use of descriptors such as “danger” or “dangerous” are not necessary when cautioning the jury about an unsavoury witness, especially when the jury would have understood from the entirety of the charge that it needed to scrutinize the witness’s testimony carefully.²⁶³ In addition, the Court held that the trial judge was not obligated to review all of the evidence that amounted to potentially confirmatory evidence.²⁶⁴

*R. v. Hurley*²⁶⁵ involved the evidence of a jailhouse informant whose evidence was critical to the Crown’s case. The appellate court followed the analysis in *Khela* and looked to the charge to determine whether, as a whole, it met the purposes of a *Vetrovec* warning. The Court concluded:

...in my opinion, a jury’s application of a judge’s warning about relying on the testimony of a particular witness will necessarily reflect the reasons offered for the warning. In this case, a cautionary approach mandated by general indications of bad character rooted in two criminal convictions and drug abuse is surely quite a different thing than a cautionary approach inspired by the much more troubling possibility that [the witness’s] evidence was specifically motivated by the prospect of securing a reward. This, no doubt, is why the Supreme Court in *R. v. Khela*, *supra*, said that a proper *Vetrovec* warning must not only caution the jury about the danger of convicting on the unconfirmed evidence of an unsavoury witness but must also explain *why* the witness’s testimony should be subject to special scrutiny. The trial judge must provide the framework for the jury to use in assessing the testimony of the witness.²⁶⁶

g) The Bottom Line

The Supreme Court of Canada’s seminal decision in *Khela* resolves some of the issues that have arisen in recent years in relation to the use of jailhouse informers at trial. It seems clear that the Court felt the need to provide clear advice with respect to crafting *Vetrovec* warnings, given the present unease about the testimony of unsavoury witnesses in general, and jailhouse informers specifically, and their role in relation to wrongful convictions.

262 *R. v. Tymiak*, [2009] B.C.J. No. 465 (C.A.).

263 *Ibid.*, at paras. 34, 36.

264 *Ibid.*, at paras. 37-38.

265 *R. v. Hurley*, [2009] S.J. No. 462 (C.A.).

266 *Ibid.*, at para. 53.

In summary, crafting the appropriate caution to the particular circumstances of each case is best left to the trial judge. While there is no particular mandatory formulation, the caution should include the four components outlined in *Khela*. However, failure to include any of these basic four components may not be fatal if the charge as a whole otherwise meets the purposes of a *Vetrovec* warning.

As a result, appellate intervention is unwarranted absent the failure to give a cautionary instruction where one is required, or where the instruction fails to serve its intended purpose. Appellate courts are expected to focus on the content of the caution, not its form.

Criticism of the majority of the Supreme Court of Canada's "guided" approach with respect to *Vetrovec* cautions includes the minority's concern that it requires jurors to look for "material" and "independent" corroboration of unsavoury witnesses' testimony, which detracts from what jurors really should be doing – assessing the witness' credibility in a rational and flexible manner.²⁶⁷

V. IN-CUSTODY INFORMER POLICIES CURRENTLY IN PLACE

Most provincial prosecution services today have issued policies and guidelines on the use of in-custody informer evidence in response to the *Morin* and *Sophonow Inquiries*. The *2005 Report* reviewed the policies in place at the time. This section provides an update on new policies and changes made since then.

Public Prosecution Service of Canada

The PPSC's policy in relation to in-custody informers is found in the Federal Prosecution Service Deskbook, chapter 35. The chapter was updated following the release of the *2005 Report* to recognize that the use of in-custody informers has been identified as a significant contributing factor in cases of wrongful convictions.

The policy specifies that in cases where the Chief Federal Prosecutor (CFP) believes there is an appropriate case for the use of an informer, the CFP should seek the advice of the Major Cases Advisory Committee before making a final decision. If the parties disagree, the matter should go to the appropriate Deputy Director of Public Prosecutions for a final decision.

267 See Deschamps J.'s dissent in *Khela*, *supra*, at paras. 67-68.

The policy on in-custody informers is being revised as part of a full review of the PPSC Deskbook now that the PPSC is an entity separate and distinct from the federal Department of Justice. The PPSC plans to post the revised Deskbook on its website.

British Columbia

British Columbia's Ministry of the Attorney General issued a policy regarding in-custody informer witnesses on November 18, 2005, which was updated on Oct. 2, 2009.²⁶⁸

POLICY

The purpose of this policy is to avoid miscarriages of justice in cases involving in-custody informer witnesses.

As with other similar provincial policies, it includes an extensive list of factors to be considered when assessing the reliability of an in-custody informer witness. The policy makes clear that Crown Counsel should presume the evidence of an in-custody informer is unreliable "unless other evidence confirms the evidence of the witness and clearly addresses concerns about reliability." Similar to other provinces, a committee process has been put in place, where prior approval of the committee is required to present the evidence of an in-custody informer.

Alberta

The Alberta Department of Justice and Attorney General released an updated In-Custody Informant Evidence guideline on May 20, 2008 regarding the procedure and criteria governing the use of in-custody informants. Similar to its 1999 predecessor, the guideline confirms that "[t]his kind of evidence should only be adduced where there is a compelling public interest in doing so and after the matter has been thoroughly reviewed."

The guideline sets out a number of principles to consider when determining whether it is in the public interest, including the background of the witness, the feasibility and appropriateness of requesting the informer's consent to a wiretap to attempt to confirm the information, the gravity of the offence, the repeated use of the same informer, confirmatory evidence, and the personal safety of the in-custody informer which "must underlie all decisions made by Crown prosecutors in their dealings with in-custody informers."

268 All of the B.C. Ministry of the Attorney General's policies are accessible online at <http://www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm>.

The guideline refers to a number of factors to assist the Crown prosecutor in assessing the reliability of the informer as a witness prior to submitting the matter for review. If satisfied, the Crown prosecutor will refer the matter to an Outside Director, who considers the same factors in the determination of whether there is a compelling public interest in calling the informer as a witness. The guideline lists the materials to be submitted and considered by an Outside Director in a review. Any disagreement will be referred to the Assistant Deputy Minister, Criminal Justice Division for decision.

Agreements with in-custody informers should comply with the requirements of Alberta's guideline regarding immunity agreements.²⁶⁹

Complete disclosure must be made. The timing of disclosure remains within the discretion of the Crown prosecutor in accordance with the personal safety of the in-custody informer.

Alberta has an in-custody informer registry which tracks those who have previously requested and/or received from the Crown consideration in exchange for his or her testimony. Such information is an important factor in the Crown's assessment of whether or not to enter into an immunity agreement with that person and in the assessment by the Crown, police and/or trier of fact of the reliability of the person's testimony or information.

Saskatchewan

Saskatchewan issued a practice memorandum regarding in-custody informers, dated November 6, 2009. Its guiding principle is that in-custody informants "will only be tendered as prosecution witnesses where this evidence is justified by a compelling public interest, based on an objective assessment of reliability."

To call an in-custody informant as a witness either at a preliminary inquiry or trial, the prosecuting Crown must obtain prior approval from the "In-custody Informant Witness Committee." The Committee, comprised of three senior Crown trial prosecutors, the Executive Director of Public Prosecutions or the Director of Appeals, and the Regional Crown Prosecutor of the region submitting the referral, assesses the public interest and reliability criteria as set out in the practice direction to determine whether the informant can testify on behalf of the Crown.

269 See the guideline "Immunity from Prosecution and Other Consideration for Witnesses and Informants" at http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/immunity_from_prosecution.aspx

Crown prosecutors must continually assess the reliability of the informant's testimony throughout the prosecution. Where circumstances change (e.g., where the informant is charged with additional criminal offences prior to the completion of his or her testimony), the Crown prosecutor must resubmit the matter to the Committee for reconsideration. And, where a prosecution is based solely on the unconfirmed and uncorroborated evidence of an in-custody informer, the Crown prosecutor seeking to rely on it must ensure the Committee is aware of this fact and is advised to proceed cautiously.

The practice memorandum lists the factors to be considered by Crown prosecutors and the Committee as part of their assessment regarding whether the informant's anticipated evidence is justified by a "compelling public interest." Crown prosecutors are encouraged to consult with police to obtain the necessary information to address the factors they must consider. These include, but are not limited to, the following: confirmation, corroboration, the detail provided by the informant, the circumstances regarding how the alleged statement was communicated to the informant, any access to external sources of information accessible to the informant, any requests for consideration, the informant's general character, previous attempts or claims by the informant to exchange information for consideration, previous reliability as an informant, any other known indicia that might diminish the credibility of the informant and safety issues.

The informant's name and information will be entered into an In-custody Informant Registry by the police so that prosecutors and the Committee can access this information in future cases. Prosecutors should consult the registry and include any results in the information to be reviewed by the Committee.

The practice memorandum deals with the issue of consideration, notably that no consideration is to be offered in relation to any future or as yet undiscovered criminality of the in-custody informant, and police should deal with the informant regarding any consideration issues. Accurate notes of all dealings with the informant by the prosecutor and the police must be maintained. The memorandum also sets out the parameters regarding disclosure obligations.

The rationale for the memorandum is identified as:

Experience has demonstrated substantial risks to the proper administration of justice may arise from the use of in-custody or "jailhouse" informants as witnesses. Crown prosecutors must be aware of the dangers of calling jailhouse informants as witnesses and that such witnesses are not treated in the same manner as other witnesses...

In-custody informant evidence requires a rigorous, objective assessment of the informant's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the informant's general reliability. Remember that judges will always be required to give a *Vetrovec* warning to juries to be cautious in their treatment of the evidence of a jailhouse informant.

A principal purpose of this policy is to help prevent miscarriages of justice, which can occur when jailhouse informants falsely implicate accused persons.

Manitoba

Since 2001, Manitoba has not called any in custody informers as witnesses. The Manitoba Department of Justice issued an In-Custody Informer Policy Directive on November 5th, 2001 which states: "Except in the unusual circumstances as permitted by this policy directive, in-custody informers *should not* be called to testify on behalf of the Crown."²⁷⁰ The Manitoba Department of Justice drafted a new policy on disclosure in March 2008 in accordance with the *Driskell Inquiry Report* recommendations that "recognizes the suspect nature of the evidence of unsavoury witnesses generally." Among other obligations, the policy refers to the obligation to disclose "all benefits requested, discussed, or provided or intended to be provided for any central witness, at any time, in relation to that central witness" as recommended by the *Driskell Inquiry Report* and clarifies that "benefits" should be interpreted broadly "to include any promises or undertakings, between the witness and the Crown, police or correctional authorities."

The policy includes the following:

Copies of the notes of all police officers and corrections authorities who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by the witness, should also be disclosed.

In consideration of the continuing Crown disclosure obligation, any information, relating to such a witness, that would raise doubts in regard to a conviction, or show the innocence of the accused, must be disclosed, whenever that information arises.²⁷¹

²⁷⁰ This policy was reviewed in detail in the *2005 Report*.

²⁷¹ Manitoba Department of Justice, Prosecutions, Policy Directive: Guideline No. 2: DIS:1, March 2008.

Ontario

The dangers presented by in-custody informers were targeted by the Ontario Ministry of the Attorney General as a major area of reform in 1998, resulting in a number of initiatives, including the creation of the Ontario In-Custody Informer Committee to review all in-custody informers proposed by the Crown as witnesses in criminal proceedings. A revised Ontario Crown Policy Manual was published in March 2006.

Today, the Ministry continues to refer cases to the In-Custody Informer Committee where the testimony of a jailhouse informer is sought by the prosecution. A senior Crown counsel appointed by the Assistant Deputy Attorney General serves as Chair of the Committee. The policy provides for a minimum of three Crown counsel to review each case, although in the majority of cases the Committee consists of five members to ensure a wide variety of independent opinions. The Committee includes representation from outside the region in which the trial is to take place and invites input from the defence on whether or not the Committee should approve the informer as a witness. The Committee applies a rigorous set of criteria and insists on a thorough and complete investigation of the credibility and reliability of the in-custody informer's evidence.

Ontario maintains an In-Custody Informer Registry containing information relating to potential in-custody informer witnesses. This information is available to Crown counsel who wish to consider a particular in-custody informer as a possible witness in future proceedings.

The cumulative effect of the procedures in place since 1998 has resulted in a greater degree of screening and vetting by trial Crown counsel before applications are made to the Committee, as well as greater sophistication with respect to the applications made to the Committee. The process, and greater awareness of the dangers of relying on the testimony of these witnesses, has significantly reduced the number of in-custody informers called in Ontario.

The function of the In-Custody Informer Committee has evolved over the years. In addition to its duties in relation to the approval of informers as witnesses, it acts as an important advisory group and is considered a respected resource for counsel on evidentiary issues.

New Brunswick

The Department of Justice in New Brunswick issued a guideline entitled “Public Interest Agreements” in March 2003, stating: “Given the high propensity for harm in relying on an in-custody informant careful consideration must be given in making an assessment as to whether the in-custody informant should be called as a witness for the Crown.”

The process for deciding whether to call an in-custody informer includes a comprehensive assessment of the potential testimony. In difficult cases, a Senior Crown Prosecutor from an office not involved in the prosecution should assess the potential testimony against an established checklist of issues. Upon receipt of the assessment, the Regional Crown Prosecutor shall, after consultation with the Director of Public Prosecutions, prepare a recommendation and forward it to the Director.

If the trial Crown is prepared to rely on the in-custody informer’s testimony for a conviction, the Regional Crown Prosecutor must be satisfied that a thorough and exhaustive review of the informer has been undertaken, that the evidence is credible, and that the public interest consideration is compelling. Ultimately, the standard to be met is that it is reasonable to anticipate that the decision is not likely to bring the administration of justice into disrepute.

Newfoundland and Labrador

In October 2007, the Office of the Director of Public Prosecutions released its *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*. The section dealing with jailhouse informants refers to Commissioner Lamer’s conclusion that Commissioner Cory’s recommendations with respect to the use of jailhouse informants in the *Sophonow Inquiry Report* should be incorporated into the policy and practices of Crown Attorneys in Newfoundland and Labrador.

As a result, the present policy covers issues relating to credibility, the relationship between the informant and the police, approval for the use of jailhouse informants, and informant benefits. They are premised on Commissioner Kaufman’s recommendations in the *Morin Inquiry*, as adopted and expanded on by Commissioner Cory in the *Sophonow Inquiry Report*.

Also included are a number of “mandatory considerations” to guide Crown attorneys with respect to the use of a jailhouse informant in a given case, starting with a general rule that jailhouse informants should be prohibited from testifying. The considerations include examples of the types of rare cases in which a jailhouse informant may be permitted to testify. They outline the procedure police

should follow when considering the use of this type of witness, and what to look for when reviewing the information provided by the prospective witness. If the intention remains to consider the jailhouse informant as a prospective witness, the testimony will only be admitted if it meets the requirements suggested by Commissioner Kaufman. In particular, the trial judge will have to determine on a *voir dire* whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Commissioner Kaufman.

The guidelines point out that because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used in a single case. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should be instructed, with a very strong direction in the clearest of terms, about the unreliability of this type of evidence and the dangers of accepting it. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.

After the Crown attorney has addressed the factors set out in the guideline and is satisfied that the informant evidence is credible, the Crown attorney can make a recommendation to the Director of Public Prosecutions that the informant be called as a witness. The DPP may, after consultation, form an ad hoc committee to consider the issues and make a recommendation. Ultimately, “no such witness may be called without the written approval of the DPP.”²⁷²

Prince Edward Island

In November 2009, the Attorney General adopted a comprehensive Guidebook on the Conduct of Criminal Prosecutions. Included is a policy on In-Custody Informants which mirrors that of Newfoundland and Labrador.

Nova Scotia

In May 2004, Nova Scotia’s Public Prosecution Service distributed a policy document entitled “In-Custody Informers.” It was patterned on the Ontario policy and incorporated many of the *Morin Inquiry* recommendations.

The policy states that in-custody informer evidence “should only be adduced at trial where there are sufficient indicia of reliability and a compelling public interest in doing so.” Ultimately, an In-Custody Informer Committee will determine (by a majority of 4 out of 5) whether there is a compelling public

272 The Guide Book is available on-line at <http://www.justice.gov.nl.ca/just/prosecutions/index.html>.

interest to allow the in-custody informer to testify.

The policy refers to a number of principles to consider in determining whether there is a compelling public interest in relying on the evidence of an in-custody informer. Also included are a number of factors to consider in assessing the reliability of the in-custody informer as a witness.

The policy details the role, composition of, and materials to be submitted, to the Committee. It also reminds prosecutors of their “heavy onus” to provide complete disclosure about the informer. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must be fully documented in writing. As in other provinces, the point is made that the prosecutor who deals with the informer should not be the prosecutor who conducts the trial in which the informer testifies.

VI. STATUS OF RECOMMENDATIONS

Great strides have been made in understanding the frailties associated with in-custody or jailhouse informers. This increased awareness – through continuing education *and* as a result of the policies and procedures that have been developed for the screening, vetting and limiting the use of in-custody informer information and evidence by police and prosecutors – has led to a dramatic decrease in the number of cases in which an in-custody informer will be permitted to testify. This causal connection reveals the importance of continuing education on this issue which, in turn, will undoubtedly go a long way to help prevent wrongful convictions in the future. Therefore, in-custody informer educational programming, policies, and protocols must be maintained across the country to ensure that in-custody informers will testify only in the clearest and rarest of cases where it is safe to rely on their testimony. Only this level of scrutiny can effectively reduce potential miscarriages of justice that may result from the use of this type of witness.

The police, too, have an important role in ensuring that unreliable evidence from in-custody informers does not contribute to a wrongful conviction. Various commissions of inquiry have been clear in concluding that all statements from in-custody informers must be treated with a high level of suspicion. Police must ensure that when an in-custody informer provides a statement, the most stringent protocols are in place to reduce the likelihood of introducing fabricated evidence to a judicial proceeding. Every police agency should have a policy that sets out the importance of treating the statements of in-custody informers with a high degree of suspicion because of their demonstrated skills in manipulation and the ulterior motives that may exist. The policy should also set out the steps that must be taken to attempt to assess the credibility of the informant and statement.

For example, a model policy should make clear that in custody informer statements must be carefully analyzed as to their internal consistency, their consistency with known facts, and the degree of confidence that the informer couldn't have obtained "holdback" information from a source other than the suspect. (i.e., police must assess if it is truly unique hold back information.) In addition, the informer should be interviewed by an expert police interviewer. All opportunities to corroborate or discredit the statement must be vigorously pursued and the results of those efforts provided to Crown. Every opportunity to obtain the information provided by the informer from a reliable source should be explored, including using the informer as a police agent and seeking a covertly obtained taped statement from the suspect. Finally, it is preferable that rather than using the evidence of an in custody informer, police use an undercover police officer to seek admissions from the suspect in a "cell mate" operation if the suspect is in custody (this will generally be extremely difficult if not impossible except in a police lock-up situation), or an out of custody undercover operation.

Before submitting a statement from an in custody informer, the police agency should consider having the statement and all related investigative analysis critically reviewed by a person not connected to the investigation. This person should have extensive source handling experience and should regard his or her role as that of a "contrarian" (as described in the Major Case Management model) and put his or her mind to the questions of whether it is necessary to use this informant or are there safer alternatives.

If any statement of an in custody informer is provided to Crown, in addition to the steps summarized above, an analysis providing the following information should be submitted as well so Crown is able to make a fully informed decision as to whether the in custody informer should be allowed to give evidence:

- what consideration, if any, the potential incarcerated informant is requesting;
- an exhaustive background investigation of the potential incarcerated informant;
- the extent to which the intelligence is corroborated;
- the amount of detail of the information forwarded by the incarcerated informant, with particular attention given to unusual details or lack thereof and the discovery of information known only to the perpetrator;
- the degree of access that the incarcerated informant may have had to external sources of information, such as media or police reports, Crown Counsel briefs and/or other sources;
- the incarcerated informant's general character, as evidenced by his/her past conduct known to the police;

- any request the incarcerated informant has made, whether agreed to or not, for consideration in connection with providing the information;
- whether the incarcerated informant has in the past, given reliable information and whether that information was utilized in past investigations; and
- whether the incarcerated informant has given reliable evidence in court in the past and any judicial findings in relation to the accuracy and reliability of that evidence.

It is also recommended that each province develop and maintain an in-custody informer registry. Presently, Ontario, British Columbia, Manitoba and Alberta have established and maintain in-custody informer registries. It is recommended that the other provinces and territories establish these registries in the near future. In this way, police and Crown attorneys who are considering the use of an in-custody informer will be able to access useful information to help in their assessment of whether or not to call the in-custody informant as a witness.

In addition to establishing provincial and territorial in-custody informer registries, it is recommended that strong links among the provinces be developed to ensure that police and Crown attorneys have access to any history of the informer, should it exist in another jurisdiction, to help in their assessment of whether or not to call a potential in-custody informant as a witness.

Each jurisdiction should appoint a contact person who will have access to its own registry and will contact the other jurisdictions to determine whether *any* information on the proposed witness exists elsewhere.

VII. SUMMARY OF RECOMMENDATIONS

In addition to the recommendations in the *2005 Report*, the following recommendations are made by the Subcommittee:

1. Police must ensure that when an in-custody informer provides a statement, the most stringent protocols are in place to reduce the likelihood of introducing fabricated evidence to a judicial proceeding.
2. Every police agency should have a policy that sets out the importance of treating the statements of in-custody informers with a high degree of suspicion because of their demonstrated skills in manipulation and the ulterior motives that may exist. The policy should also set out the steps that must be taken to attempt to assess the credibility of the informant and statement.

3. Before submitting a statement from an in custody informer, the police agency should consider having the statement and all related investigative analysis critically reviewed by a person not connected to the investigation.
4. If any statement of an in custody informer is provided to a Crown prosecutor, an analysis providing the following information should be submitted as well so the prosecutor is able to make a fully informed decision as to whether the in- custody informer should be allowed to give evidence:
 - what consideration, if any, the incarcerated informant is requesting;
 - an exhaustive background investigation of the incarcerated informant;
 - the extent to which the intelligence is corroborated;
 - the amount of detail provided by the incarcerated informant, with particular attention given to unusual details, or lack thereof, and the discovery of information known only to the perpetrator;
 - the degree of access that the incarcerated informant may have had to external sources of information, such as media or police reports, Crown Counsel briefs and/or other sources;
 - the incarcerated informant's general character, as evidenced by his/her past conduct known to the police;
 - any request the incarcerated informant has made, whether agreed to or not, for consideration in connection with providing the information;
 - whether the incarcerated informant has provided reliable information in the past and whether that information was utilized in previous investigations; and
 - whether the incarcerated informant has given reliable evidence in court in the past, as well as any judicial findings in relation to the accuracy and reliability of that evidence.
5. Strong links among the provinces should be developed to ensure that police and Crown Attorneys have access to any history of the informant in another jurisdiction, to help in the assessment of whether or not to call the informant as a witness.
6. Each jurisdiction should appoint a contact person who will have access to its own registry and will liaise with other jurisdictions to determine whether *any* information on the proposed witness exists.

CHAPTER 8 – DNA EVIDENCE

I. INTRODUCTION

DNA analysis provides the criminal justice system with powerful and persuasive evidence to investigate and prosecute crimes. It has great potential to convict the guilty and exonerate the innocent. It is clear that “the courts have overwhelmingly accepted the utility of DNA (evidence) in the criminal justice system.”²⁷³

Since the *2005 Report* was released, there have been significant legislative changes which have substantially expanded the DNA framework that guides the Canadian justice system and consequentially the workload of the DNA Data Bank. A number of commissions of inquiry have acknowledged that DNA analysis has become an integral part of the criminal justice system and one Inquiry issued recommendations that supplemented those that were included in the *2005 Report*. Finally, the Parliamentary review of the original legislative framework by the Standing Committee of the House of Commons on Public Safety and National Security was completed in June 2009 and the Review by the Senate Committee on Legal and Constitutional Affairs was completed in June 2010.

II. 2005 RECOMMENDATIONS

1. **Promotion of DNA sampling** - Strong policies and procedures for Crown counsel should be implemented in all jurisdictions to ensure that the DNA Data Bank provisions are being used to their full potential.
2. **Establishment of a Tracking system** - Provincial tracking systems should be developed to better understand the use and effectiveness of DNA in the criminal justice system, with the ultimate goal of establishing a national tracking system.
3. **Education of Justice System Participants** - The significance of the national DNA Data Bank to both convicting the guilty and preventing the conviction of the innocent should be included in any educational programs for Crowns and police and should be considered for inclusion in the National Judicial Institute curriculum for judges. A research package for Crowns on DNA Data Bank applications and the use of DNA evidence should be developed and kept current.

273 Greg Yost, Counsel, Criminal Law Policy Section, Department of Justice, *Evidence*, House of Commons Standing Committee on Public Safety and National Security, February 24, 2009.

4. **Implementation of Policies to Allow for Access to DNA for Independent Forensic Testing** - Protocols and procedures should be developed by law enforcement agencies and justice departments to facilitate and release of forensic materials for independent testing upon the request of the defence.
5. **Expansion of the DNA Data Bank** - The expansion of the DNA Data Bank should be considered. Any expansion of the list of primary and secondary designated offences must take into account important Charter protections to ensure that individual rights and freedoms are respected in the collection and use of DNA information.
6. **Post-Conviction DNA Testing**--The issue of access to post-conviction DNA testing should be studied.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

Since the publication of the *2005 Report*, there have been a number of commissions of inquiry which have touched on the value of DNA testing and have demonstrated why the analysis of DNA has become an integral part of the criminal justice system. Only one inquiry, however, made specific recommendations which impacted on the role of DNA in criminal cases.

a) *Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008)*

Commissioner MacCallum made the following recommendations:

Retention of biological samples suitable for DNA profiling should be mandatory in all cases of forensic investigation of sudden death. Quality control standards must be set and maintained for the taking and analysis of body tissue and fluid samples. Such standards are difficult to maintain when autopsies are performed in various hospital settings. I recommend that dedicated medical examiners' facilities be established in both Regina and Saskatoon where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the Province. Samples not currently testable should be retained on the chance that scientific advances might make them useful.²⁷⁴

274 *Milgaard Inquiry Report*, p. 317.

Although retention poses a significant storage problem, I would recommend that in all homicide cases, all trial exhibits capable of yielding forensic samples be preserved in their original form for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.²⁷⁵

IV. LEGAL DEVELOPMENTS AND COMMENTARY

a) EXPANSION OF THE DNA DATA BANK FRAMEWORK

i) BILLS C-13 and C-18

On January 1, 2008, Bills C-13 and C-18 came into force. They expanded the scope of existing DNA legislation and improved the collection and management of DNA evidence contained in the National DNA Data Bank (NDDB). The legislation significantly expanded the list of designated offences that qualify for inclusion in the NDDB's Convicted Offenders Index (COI). It added over 150 new offences to the list, changed the characterization of some existing offences and created a new subcategory of primary designated offences.

In terms of making a DNA order for the NDDB, there are now four categories of offences, which for simplicity can be described as:

- **Primary mandatory** – the court is compelled to make the order;
- **Presumptive primary** – the court shall make the order unless the offender convinces the court that the impact on privacy and security is 'grossly disproportionate' to the public interest;
- **Listed secondary** – the Crown must apply and the court has broader discretion than with primary offences;
- **Generic secondary** – the Crown must apply and the offence must be tried on indictment and be punishable by a sentence of at least five years.

Of the primary offences, the 16 deemed to be most serious fall into the new primary mandatory category, including murder, sexual assault with a weapon, kidnapping and extortion. In these instances, the court has no discretion whatsoever and must issue a DNA order for the NDDB. The increase of designated primary offences includes ones that were re-categorized from secondary to primary, such as those relating to child pornography and breaking and entering into a dwelling house. Other primary offences, such as sexual

²⁷⁵ *Ibid.*, p. 319.

exploitation of a person with a disability and intimidation of a justice system participant or journalist, are new additions.

The list of secondary designated offences was also expanded to include all offences prosecuted under the *Criminal Code* – and most under the *Controlled Drugs and Substances Act* – that are tried by indictment and carry a maximum sentence of five or more years. Uttering threats and criminal harassment represent new additions to the secondary offences list.

In addition, the legislation enhanced the ability of law enforcement to solve crime and of the courts to administer justice by:

- Permitting DNA sample collection orders to be made against a person who has committed a designated offence but was found not criminally responsible on account of mental disorder;
- Expanding retroactive provisions to make DNA sample collection orders available for those convicted of one murder or one sexual assault offence before the DNA data bank legislation came into force on June 30, 2000;
- Including “historical” sexual offences, such as indecent assault and gross indecency, under the retroactive provisions;
- Creating the means to compel an offender convicted of a designated offence or subject to a judicial order to appear at a certain time and place to provide a DNA sample;
- Allowing for a DNA sample collection order to be made after sentencing.

In the 10 1/2 years since the National DNA data bank came into existence, it has made 17,776 offender hits (matching a crime scene to an offender) and 2,412 forensic hits (matching a crime scene to another crime scene). As of January 17, 2011 the data bank has 209,981 DNA profiles from convicted offenders in its Convicted Offender Index, and 62,412 DNA profiles in its Crime Scene Index.

The expansion of DNA offences means more convicted offender samples will qualify for entry into the COI. An increase in entries for the Convicted Offenders Index ultimately means that more crimes will be solved and more offenders brought to justice. The NDDB has assisted in more than 17,776 investigations and it receives 600 to 700 samples per week for a current total of 227,719 samples received. As the number of DNA samples in the National DNA data bank continues to increase, the chances of guilty parties being identified and held responsible for the crimes they commit will improve, and importantly, the likelihood of innocent persons being wrongly convicted will be reduced.

ii) A Statutory Review of the *DNA Identification Act* – House of Commons

In June 2009, the House of Commons Standing Committee on Public Safety and National Security (SECU) released its review of the *DNA Identification Act*, which was mandated by section 13 of the *Act* when the legislation was originally proclaimed in force in two stages in May and June of 2000. The review was to have occurred within five years of enactment; however, the delay in the review allowed for a broader consideration of the impact of the legislation over a nine-year period.

The Committee heard from 14 witnesses from eight different agencies impacted by the use of the *DNA Identification Act*. In addition to recommending more funds for all the laboratories, SECU made the following recommendations that would require legislative change to implement:

- That the *DNA Identification Act* and related laws be amended to systematically require the taking of a DNA sample upon conviction for all designated offences;
- That a DNA sample be taken from a Canadian citizen convicted of an offence abroad that is the equivalent of one of the designated offences in s. 487.04 of the *Criminal Code*;
- That a DNA sample be taken from all offenders serving a sentence for a designated offence committed at any time; and
- That a Missing Persons Index and a Victims Index be established.

The federal government's response in October 2009 stated that:

The recommendations made by the Standing Committee are acceptable in principle to the Government. The Government will therefore consult with the provinces, law enforcement and other stakeholders on a priority basis with a view to developing a consensus on how best to proceed.

iii) Public Protection, Privacy and the Search for Balance: A Statutory Review of the *DNA Identification Act*, Final Report – Senate

In June 2010, the Final Report of the Standing Senate Committee on Legal and Constitutional Affairs was released on the Statutory Review of the *DNA Identification Act*. This review was also mandated by section 13 of the *Act*.

After hearing from more than 30 witnesses from 19 different agencies impacted by the use of the *DNA Identification Act*, the Committee issued a report including 22 recommendations to improve the use of the *DNA Identification Act* and the DNA Databank. Specifically, 7 of the 22 recommendations address issues that impact the reliability and expansion of the use of the DNA Databank:

Immediate and Automatic Collection:

The *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any adult who has been convicted in Canada of a designated offence as defined in section 487.04 of the *Criminal Code*.

Retroactive Collection:

The *Criminal Code* be amended to allow for collection of a DNA sample from an adult convicted of a designated offence in Canada who has not previously been the subject of a post-conviction collection order, but who is still serving a sentence for a designated offence at the time that the *Criminal Code* amendment outlined in Recommendation 1 comes into force.

International Offences Equivalent:

The *Criminal Code* be amended to allow for the collection of a DNA sample from an adult who is a Canadian citizen, or who ordinarily resides in Canada, if he or she is convicted outside of Canada of an offence that, if committed in Canada, would constitute a designated offence, provided that the conviction occurs at any time after the *Criminal Code* amendment outlined in Recommendation 1 comes into force.

Immediate Collection from Young Person:

The *Criminal Code* be amended to allow for the immediate and automatic collection of a DNA sample from any young offender convicted in Canada of a designated offence as defined in part (a) of the definition of a primary designated offence found at section 487.04 of the *Criminal Code*.

Criminal Code Amendment Regarding Impact on Young Offenders:

In the case of young offenders convicted of primary and secondary designated offences for which a DNA collection order upon conviction is not mandatory, the *Criminal Code* be amended to require courts, before issuing a DNA collection order against a young offender convicted of such offences, to determine whether the impact of the collection order on the young offender's privacy

and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice.

Statistics Collection:

The National DNA Data Bank work cooperatively with law enforcement organizations to collect statistics describing the specific nature of the assistance it provides in police investigations through matches to the convicted offenders index (COI), and the National DNA Data Bank publish these data, including data on exoneration, in its annual reports to Parliament.

Removal of DNA Sample from Bank

The *DNA Identification Act* be amended to clarify that, in circumstances where there has been a final determination of an accused offender's successful appeal of his or her conviction for a designated offence, no other further opportunities of appeal are available to the Crown or to the accused offender, and the accused offender has no other convictions for designated offences on his or her criminal record, the offender's information should be immediately removed from the convicted offenders index (COI) after the expiry of all appeal periods, and the DNA samples taken from the offender and stored at the National DNA Data Bank should be immediately destroyed.

Stated Purpose

Section 3 of the *DNA Identification Act* be amended to state that the purpose of this Act is to establish a national DNA data bank to assist law enforcement agencies in identifying persons alleged to have committed designated offences, including those committed before the coming into force of this Act, as well as to assist in the exoneration of the innocent.

In addition to these recommendations, the Committee considered the impact that the recommendations will have on the justice system and more specifically on the DNA Data Bank and highlighted the need for sufficient funding if the Data Bank is to operate reliably and efficiently.

In its response, the Government stated:

The Government of Canada recognizes that the National DNA Data Bank is a vital component of the criminal justice system that contributes to the safety and security of Canadians by identifying perpetrators of crimes and exonerating those who have been wrongly suspected of committing crimes.

b) AMERICAN DEVELOPMENTS

On October 30, 2004, the *Justice for All Act of 2004* was signed into law by President George W. Bush. The Act included the *Innocence Protection Act*, a package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Specifically, the legislation allowed greater access to DNA testing by convicted offenders, and helped states improve the quality of legal representation in capital cases.

The Act established rules and procedures governing applications for post-conviction DNA testing by inmates in the federal system. It stated that a court shall order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent of the qualifying offence, and the proposed DNA testing would produce new material evidence that supports such assertion and raise a reasonable probability that the applicant did not commit the offence. Penalties were established where the testing inculpatates the applicant. Where the results are exculpatory, the Act stated that the court shall grant the applicant's motion for a new trial or re-sentencing if the test results and other evidence establish by a preponderance of the evidence that a new trial would result in an acquittal.

The Act also prohibited the destruction of biological evidence in a federal case while a defendant remains incarcerated, absent a knowing and voluntary waiver by the defendant, or prior notification to the defendant, that the evidence may be destroyed.

The Act authorized substantial federal grants over five years to help states defray the costs of such post-conviction DNA testing.

On February 1, 2011, Senate Judiciary Chairman Patrick Leahy introduced legislation to re-authorize the *Justice for All Act of 2004*. If enacted, the legislation would direct more resources to improving the quality of representation in state death penalty cases and would also enable more states to apply for grants for the purpose of post-conviction DNA testing.

Notwithstanding the enactment of the *Justice for All Act of 2004*, offenders convicted under state legislation are required to resort to state legislation for post-conviction relief, including access to DNA testing.

In 2009, the United States Supreme Court ruled²⁷⁶ there was no absolute constitutional right to DNA testing, holding that the state prisoner had no substantive due process right to state's evidence so he could apply for new DNA-testing. Notwithstanding that Alaska was only one of three states without legislation enabling DNA testing, it was held that the Alaska law governing procedures for post-conviction relief was not unconstitutional. The decision reaffirmed that state legislatures and state courts should determine how and when people who have been convicted of crimes can get access to DNA testing that can prove their innocence. In essence, the Court ruled that Alaska's post-conviction relief procedures and methods for applying them to persons seeking access to evidence for DNA testing were not constitutionally inadequate.

However, in March 2011, the United States Supreme Court provided some relief for those offenders whose requests for DNA testing have been denied by State prosecutors. In *Skinner v. Switzer*, 562 U.S. __ (2011), the Court ruled that an inmate was entitled under existing legislation to bring a federal civil rights action against State officials for a post-conviction claim for DNA testing.

Wrote Justice Ginsberg for the majority:

(The dissenters) predict a proliferation of federal civil actions “seeking post conviction discovery of evidence [and] other relief inescapably associated with the central questions of guilt or punishment.” These fears are unwarranted. In the Circuits that currently allow §1983 claims for DNA testing, no evidence tendered by Switzer shows any litigation flood or even rainfall. The projected toll on federal courts is all the more implausible regarding DNA testing claims.

c) RECENT DEVELOPMENTS IN TECHNOLOGY AND CASE LAW

While the admissibility of a series of nuclear DNA technologies and of the corresponding statistical analyses of it have been widely recognized by Canadian courts for over twenty years, it is only recently that some courts have ruled that experts' evidence relating to mitochondrial DNA (mtDNA) was admissible.

276 *District Attorney's Office for Third Judicial District v. Osborne*, 129 S.Ct. 2308.

Most cells in the human body contain DNA. The vast majority of DNA in any cell is stored in the nucleus. This nuclear DNA is the result of the contribution of two different sets of DNA inherited from the subject's mother and father. Another type of DNA is found in a different part of the cell called the mitochondria. It is a much smaller molecule and different from nuclear DNA in its location, sequence and mode of inheritance. Mitochondrial DNA is obtained only from the subject's mother.

The earliest reported Canadian case in which Mitochondrial DNA was found to be admissible appears to have been a 1999 decision of the British Columbia Supreme Court in *R. v. Murrin*.²⁷⁷ The Court examined the four criteria set out in the Supreme Court of Canada decision in *R. v. Mohan* as the basis upon which the admission of expert evidence depends: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert. The Court concluded that the evidence before the court satisfied the Mohan criteria and established a threshold level of reliability with respect to the field of forensic mtDNA examination and analysis.

In *R. v. Woodcock*,²⁷⁸ the Ontario Superior Court of Justice, engaged in a similar analysis with the same result.

Notwithstanding, the admissibility of such evidence, the Crown must be aware of the limitations of mitochondrial DNA testing and cautious in its use. There are significant differences between nuclear DNA and mtDNA. Although mtDNA is vastly more abundant and much less degradable than nuclear DNA, it is much smaller and inherited maternally only. Only two regions of mtDNA are known to be variable and while nuclear DNA testing involves consideration of 23 discrete "markers," mtDNA is considered as one marker. This has considerable significance in terms of the rarity of a match. In terms of "uniqueness," no two candidates are expected to have the same nuclear DNA profile apart from identical twins. With respect to mtDNA, all maternal relatives are expected to have the same DNA profiles, except for cases of "mutation." While nuclear DNA can be used as a "unique identifier," mtDNA cannot because all maternal relatives have the same mtDNA type.

Accordingly, while mtDNA is potentially valuable circumstantial evidence of identity, expert evidence relating to mtDNA testing and analysis must be used with caution and with a clear understanding of its limitations.

277 *R. v. Murrin*, [1999] B.C.J. No. 2715, Vancouver Registry No. CC971114.

278 *R. v. Woodcock*, [2006] O.J. No. 5186.

Furthermore, it should also be kept in mind that scientific research and development continues in the field of DNA analysis and prosecutors must be vigilant in keeping abreast of such innovation.

Recently, In *R. v. K.M.*, 2011 ONCA 252, the Court of Appeal for Ontario upheld the constitutionality of sections 487.051(1) and (2) of the *Criminal Code* as they relate to young persons. The ruling reversed a decision of the Ontario Court of Justice which read down s. 487.051 to require all primary designated offences for youth to be treated as if they were secondary designated offences, i.e., DNA data banking on an application by the Crown and where it is in the best interest of administration of justice. Given the priorities of the *Youth Criminal Justice Act*, the Crown must always be diligent in assessing the application of federal legislation including the *Criminal Code* to young persons.

Finally, Crown are reminded that DNA testing results are valuable only when they are accurate. In 2001, Gregory Turner was acquitted in Newfoundland of the first degree murder of a 56-year-old woman. The only substantial evidence against the accused was DNA found on the accused's wedding ring. On the ring, DNA from another contributor, believed to be an accomplice, was also found. Determination and diligence by defence counsel ultimately uncovered that the second DNA profile belonged to a lab technician who had been working on the victim's fingernail clippings which were stored in close proximity to the wedding ring, raising a strong possibility of primary and secondary DNA transfer and contamination. In 2009, a U.S. study conducted by a University of Virginia law professor and a co-founder of the Innocence Project found that three of 156 individuals exonerated of serious crimes had been wrongfully convicted based on DNA errors. In one case a technician grossly overstated evidence, in another a senior analyst knowingly gave false evidence and in a third lab contamination was discovered. Contamination issues and lab errors have also been identified as wrongfully linking suspects to murder investigations in Australia and England.²⁷⁹ These examples are a sobering reminder that the Crown must always be vigilant to ensure that the forensic testing and analysis on which the Crown rely are accurate and reliable in order to prevent further miscarriages of justice.

Another scientific development that has caused some concern is the discovery of individuals who have two distinct nuclear DNA strands in their bodies. Known as chimeras, they have unusual DNA profiles that can come about either because of blood transfusion or because two embryos merged in the mother's uterus.²⁸⁰ Prosecutors must be alive to this and any other scientific developments to ensure that DNA evidence does not contribute to miscarriages of justice.

279 See James Careless, "An Imprecise Science", (March 2011) 20 *The National, Canadian Bar Association*, p. 29.

280 *Ibid.*

V. POLICIES

Most prosecution agencies have not implemented formal policies regarding the use of the DNA legislation but have provided education to promote the use of the DNA Databank. In addition, the PPSC, Ontario and British Columbia have developed written guidelines for Crown counsel.

British Columbia

British Columbia has issued a Practice Bulletin which strongly supports the use of DNA to assist in the identification of individuals who commit crimes, exonerate individuals wrongfully suspected of committing crimes and to focus investigative resources. Crown Counsel are encouraged to seek DNA orders from all eligible offenders.

Ontario

Ontario has developed strongly-worded policy advice that sets out the value and benefits of the DNA Databank. DNA assists law enforcement in identification of offenders, but also serves to exclude innocent persons who are wrongfully suspected. In addition, Ontario has developed a practice document which highlights arguments that might be made about the value of DNA and directs Crown counsel to seek samples for DNA testing in all appropriate cases as defined by the *Criminal Code*.

VI. STATUS OF RECOMMENDATIONS

1. Promotion of DNA sampling

Most jurisdictions have provided training and instructed Crown counsel to ensure that the DNA data bank provisions are being used to their full potential. Alberta and Manitoba have introduced a number of innovative procedures including placing charts in each courtroom showing the primary and designated offences. British Columbia's Criminal Justice Branch intranet site contains a webpage listing resource counsel, DNA law and policy, and relevant links. Ontario's intranet site provides policy and practice direction as well as up-to-date law and charts to use as quick in-court reference material.

2. Establishment of a Tracking System

Alberta, British Columbia and Ontario have developed provincial tracking systems which provide information concerning whether DNA data bank orders were requested and whether they were granted or refused by a judge. These

tracking systems allow for follow up and provide the basis of education programs for Crown counsel and the judiciary.

3. Education of Justice System Participants

Virtually all jurisdictions have provided instruction to Crown Counsel concerning the availability of DNA access, the law relating to applications for DNA orders as well as encouraging Crown Counsel to make application in all appropriate cases.

Private education facilities in Ontario, such as Osgoode Professional Development, have also offered educational programs to all members of the justice system. These programs are often attended by members of the justice system from other provinces.

4. Implementation of Policies to Allow Independent Forensic Testing

Several jurisdictions are in the process of developing protocols and procedures to establish the release of forensic materials for independent testing upon the request of the defence. In the interim, exhibits have been released for independent testing at the request of the defence on a case by case basis.

In 2006, Ontario developed protocols for defence applications for independent scientific testing of evidence which had been made an exhibit or was in possession of the Crown. The recommended procedures integrate the rules of court and statutory provisions to develop methods consistent with maintaining the integrity of the evidence and fact-finding process throughout the trial and appeal process and beyond.

Section 605 of the *Criminal Code* provides for either Crown or defence counsel to make an application for the release of evidence which has been made an exhibit for testing thereby leaving it to a judge to put terms on the order to safeguard the item. Some of the factors to be considered include:

- Relevance of the testing to issues in case;
- Whether testing would delay or disrupt trial;
- Whether testing would destroy or alter item;
- Whether the facility has consented to performing tests and whether they would allow a prosecution representative to be present during tests;
- Whether the facility will protect the continuity and integrity of the item; and
- Whether they have the expertise in the particular scientific field.

In these applications, formal notice is required to the other party and affidavits must be submitted from the agency or person responsible for the testing.

In situations where the potential exhibit is still in the control of the Crown, the Crown can consent to the release of the items without a court order; however Crowns are still urged to consider a number of factors including those set out above.

After the completion of the appeal process requests for additional or further testing should be referred to the Director of the Crown Law Office - Criminal.

A convicted person may apply under section 696.1 of the *Criminal Code* for a Ministerial Review by the federal Minister of Justice. These reviews may be based on a wide range of factors, including challenges to the factual validity of the conviction or fresh evidence applications.

5. Expansion of the DNA Data Bank

The Statutory Review of the *DNA Identification Act* completed in June 2010 recommends a significant change to the process of collections. The new process would have all individuals convicted of a criminal offence sampled. This change will substantially increase the number of samples being sent to the DNA Data Bank and would dramatically increase their workload. The result of this type of legislative change would be the expansion of the Data Bank. The federal government is currently reviewing these recommendations.

6. Post-Conviction DNA Testing

No known studies of post-conviction access to DNA testing have been conducted.

VII. ADDITIONAL RECOMMENDATIONS

Designated DNA Coordinators in each Province. To provide a consistent contact for the DNA Data Bank and ensure that province-wide issues are managed consistently, a Provincial Coordinator should be considered for each province. Although some jurisdictions currently do this on an informal basis, these Crowns generally perform many other functions, which prevents the full development of a provincial strategy with respect to DNA.

CHAPTER 9 – FORENSIC EVIDENCE AND EXPERT TESTIMONY

I. INTRODUCTION

It is clear that the expert witness has become a fixture in our criminal justice system. As trials become increasingly more complicated, expert witnesses often are called upon to assist triers of fact by offering expert opinions based on their acquired “specialized knowledge.” Unquestionably, this movement towards increasing reliance on expert witnesses parallels the more relaxed approach to the admission and acceptance of this type of evidence by all parties involved in the criminal justice system.

We need to rethink our approach to expert witnesses and expert testimony. The very reason that courts rely on expert witnesses – for their specialized knowledge – makes it difficult to challenge their expertise and opinions. Checks and balances are required to overcome this frailty and the danger of creating “battles of the experts.” The recommendations from the *Inquiry into Pediatric Forensic Pathology* highlight the need for all participants in the criminal justice system to exercise vigilance and caution in assessing expert opinion evidence to ensure that it meets the standards of excellence required to guard against wrongful convictions. Indeed, the testimony at the *Inquiry* revealed with stark clarity that the role of the expert may not be fully understood by justice system participants, especially the expert, Dr. Charles Smith,²⁸¹ previously hailed as Ontario’s top pathologist in pediatric death cases, testified that he never received formal instruction on giving expert evidence; he believed that his role was to act as an advocate for the Crown and to “make a case look good.”²⁸²

It is clear from these developments that the following premise bears repeating: regardless of who retains the expert, the expert witness’ role is not to take sides, but to provide an objective and balanced opinion. As noted by Commissioner Goudge, “[t]he role is a neutral one, at all stages of involvement, not just when testifying... [They] must understand that their role as experts in the criminal justice system is to provide the police, the Crown, the defence, and the court with

281 Dr. Charles Smith had his licence to practice medicine revoked by the Ontario College of Physicians and Surgeons in 2011.

282 *Goudge Inquiry Report*, p. 179. Charles Smith testified that he came to recognize his role as expert was to be impartial by the mid-1990s. However, he sometimes failed to respect this boundary.

a reasonable and balanced opinion, and to remain independent in doing so. The expert cannot become a partisan.”²⁸³

Understanding this principle will assist experts greatly as they interact with other players in the criminal justice system. It is the first step towards clearly defined boundaries and limits that, in turn, help courts identify and assess reliability issues associated with proffered expert opinion evidence within the context of the criminal justice system.

Although these themes were discussed in the *2005 Report*, they have gained prominence as a result of recent inquiries and court decisions.

II. 2005 RECOMMENDATIONS

1. Prosecutors should receive training on the proper use, examination and cross-examination of expert witnesses during ongoing and regular education sessions.
2. The Heads of Prosecutions Committee should consider the feasibility of establishing a national central repository to catalog and track, among others:
 - case law;
 - newsletters and articles;
 - reliability of current techniques,
 - the latest developments and advancements in specific fields of expertise;
 - sources of literature and study guides;
 - directories of professional organizations from across the country (including criteria for the qualifications of specific experts);
 - prosecution policies;
 - teaching aids.

This applies to all Web-based models permitting online access to the data and regular updating of information to maintain currency.
3. Prosecutors should not shy away from the use of and reliance on novel scientific technique or theory in the appropriate situation, providing there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value does not exceed the potential prejudicial effects.
4. Prosecutors should be reminded of the existence of Section 657.3 of the *Criminal Code* which sets out the requirements and reciprocal obligations of disclosure imposed on all parties to a proceeding intending to tender expert evidence at trial.

283 *Goudge Inquiry Report*, p. 189.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

As identified in the *2005 Report*, some of the primary focuses of the *Morin* and *Sophonow Inquiries* included the mishandling and improper testing of forensic evidence, reliance on unreliable scientific data, and tainted expert opinion testimony. These issues remain at the core of the controversies surrounding the use of forensic evidence and expert testimony today.

Since the *2005 Report*, there have been a number of inquiries that have considered issues in relation to forensic evidence and expert testimony:

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

This Inquiry examined the criminal justice system's response to three discredited murder convictions. A number of the 45 recommendations pertain to the Royal Newfoundland Constabulary (RNC), made in response to the serious shortcomings with police investigations into two of the three cases.

Recommendation #6:

(a) The RNC should establish a policy and protocol to assist officers in obtaining independent expertise.²⁸⁴

Although there are issues with respect to the scientific validity of polygraph evidence and Supreme Court of Canada has ruled it inadmissible at trial, some of the recommendations highlight the frailties associated with the procedures regarding its use as a forensic tool.²⁸⁵

b) Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007)

One part of this Inquiry focused on the hair microscopy evidence at Mr. Driskell's trial and the systemic issues arising out of this evidence. Commissioner LeSage heard from panelists with expertise in forensic science and laboratory management and oversight issues, before ultimately making the following comments and recommendations in relation to this issue:

284 *Lamer Inquiry Report*, p. 117.

285 *Lamer Inquiry Report*, p. 215, Recommendation #20.

I therefore recommend that microscopic hair comparison evidence should be received with great caution and, when received, jurors should be warned of the inherent frailties of such evidence. As with any evidence, judges must scrutinize the proposed evidence and weigh its probative value against its prejudicial effect...²⁸⁶

I am concerned that the problems identified relating to hair microscopy evidence in Driskell's case are not unique to his case or unique to Manitoba. I accept that a more extensive review of cases from across the country would be advisable, and encourage the Attorneys General of the Provinces and Territories to work together to examine how a case review similar to that conducted in Manitoba might be performed on a national level, and consider the appropriate parameter of such a review.²⁸⁷

c) Inquiry into Pediatric Forensic Pathology in Ontario (2008)

Commissioner Goudge made 169 detailed recommendations that aim to restore and enhance public confidence in pediatric forensic pathology and its future use in the criminal justice system. A number of the recommendations focus on education, training, and oversight of the forensic pathologist and his/her role within the criminal justice system. Others focus on the roles of the police, Crowns, and courts as they contend with the intersection of forensic pathology and the criminal justice system.²⁸⁸ Those most essential to justice system participants fall into the following categories and are discussed in detail within these chapters:

- *Best Practices (Chapter 15)* – see specifically recommendations 73, 74, 75, and 76, which address the interaction between police and pathologists;
- *Effective Communication With the Criminal Justice System (Chapter 16)* – see recommendation 87 which addresses the legal standard of proof and issues associated with compelling experts to express opinions in terms of this standard;
- *The Roles of Coroners, Police, Crowns, and Defence (Chapter 17)* – see specifically recommendations 105, 115, 116, 118, 124, 125, 126, and 127, which, in the main, provide guidance to justice system participants in their communications and transactions with expert witnesses; and

286 *Driskell Inquiry Report*, p. 181.

287 *Driskell Inquiry Report*, p. 182.

288 *Goudge Inquiry Report*. For a complete listing of all the recommendations, please see Volume 1, Executive Summary, pp. 53-94 – not all of the recommendations for the police, Crowns, and courts with respect to expert witnesses and expert testimony are included here.

- *The Role of the Court (Chapter 18)* – see specifically recommendations 129, 130, 131, 133, 138, and 139, which, in the main, address issues the court must be cognizant of when dealing with a witness proffering expert opinion evidence.

IV. INTERNATIONAL DEVELOPMENTS

Canada is not alone in examining the interplay between forensic science and its legal system. Much work has been done in the United Kingdom and is underway in the United States aimed at improving the forensic science disciplines to reduce the risk of wrongful convictions and wrongful exonerations, among other issues.

In the United Kingdom, a number of cases over the last few decades have brought to the fore numerous issues relating to weaknesses within the forensic science community and its interface with the criminal justice system. The Home Office recognized the need for a central authority to establish common quality standards in the provision of forensic science services to the police and to the wider criminal justice system. Since 2007, this function has been discharged by the newly created Forensic Science Regulator, operating within the Home Office and accountable to the Home Secretary: “By establishing, and enforcing, quality standards for forensic science used in the investigation and prosecution of crime, the Regulator will reduce the risk of quality failings impeding or preventing the identification, prosecution and conviction of offenders. This will contribute to the Home Office objective of preventing, detecting and deterring crime and improving public confidence in the police and other CJS agencies.”²⁸⁹ The Regulator is advised and supported by the Forensic Science Advisory Council (“FSAC”), a multi-disciplinary group that includes, among others, professionals within the forensic science community, a member of the judiciary, crown prosecutors, defence counsel, and the police.

In the United States at the request of Congress, the National Research Council established the “Committee on Identifying the Needs of the Forensic Sciences Community.” The Committee publicly released its report, *Strengthening Forensic Science in the United States: A Path Forward*, in February 2009.²⁹⁰ As noted by The Honorable Harry T. Edwards²⁹¹ in his statement before the U.S. Senate upon release of the Report, the multi-disciplinary committee examined the “complex maze” of science, law, and policy issues and concluded that a “massive overhaul” of the forensic science system in the United States was necessary, both to improve the scientific research supporting the disciplines and to improve the practices of the forensic science community. Among its recommendations, the Committee

289 www.homeoffice.gov.uk/police/forensic-science-regulator/.

290 The Report can be accessed on-line at www.nap.edu/catalog.php?record_id=12589#orgs.

291 Co-Chair, Committee on Identifying the Needs of the Forensic Science Community, The Research Council of the National Academy.

urged Congress to create and fund a new and independent federal agency, the National Institute for Forensic Science (“NIFS”), to support and oversee the forensic science community.

Concurrent Evidence

An international development that deserves specific mention is the use of concurrent evidence in the courtroom. The presentation of concurrent evidence, colloquially known as “hot-tubbing,” has become an established practice in Australian courts and arbitration proceedings and is quickly gaining acceptance in Canada, the United Kingdom and, to a lesser degree, the United States. “Hot-tubbing” solicits the viewpoints of multiple experts at the same time, which can be of great assistance to all justice participants in identifying both key issues and common ground among the experts in cases that involve unusually complex technical issues.

The concept involves expert witnesses testifying together on a panel before a court or tribunal. The court or tribunal effectively chairs a discussion between them, asking questions and seeking clarification of the issues, followed by questions from counsel. The process allows the experts to challenge each other’s evidence directly and helps ensure the experts provide honest, measured and complete pronouncements.²⁹²

The concept of presenting concurrent evidence or “hot-tubbing” was developed as a means to address three main concerns identified by the judiciary in Australia: the prevalence of adversarial bias or partisanship among expert witnesses, lengthy court proceedings, and the resulting associated costs. Initially, the process was used intermittently in tribunals and, on occasion, in the Federal Court of Australia. It gained acceptance as a method that was able to reduce some of the problems associated with traditional adversarial methods regarding the testimony of expert witnesses, while effectively reducing hearing time.²⁹³ The practice has since been formally adopted in the Federal Court of Australia,²⁹⁴ the Administrative Appeals Tribunal, the Supreme Courts of New South Wales and the Australian Capital Territory, the Land and Environment Court of New South Wales, and some superior courts of New Zealand.²⁹⁵ Many Australian courts also require experts to

292 The theory is that when experts testify with their colleagues, they will be less prone to exaggeration or errors knowing that their colleague will address them immediately.

293 “Hot-tubbing” has been known to reduce court time and affiliated costs by virtue of having the witnesses testify together on a panel, instead of the usual direct, cross-examination, and re-examination process per expert witness.

294 Federal Court Rules, *Federal Court of Australia Act*, 1976 (current as of January 1, 2011), Order 34A.3, applies to cases where two or more parties intend to call expert witnesses to give opinion evidence about the same, or similar question. The rule allows the judge or Court to direct, among other things, that the expert witnesses confer, and sets out the procedures for the process.

295 Gary Edmund, “Merton and the Hot Tub: Scientific Conventions and Expert Evidence

meet prior to trial to try to narrow and resolve issues, to identify the extent of their agreements/disagreements and, often, to commit their positions to writing in a joint report they are required to endorse.²⁹⁶

Justice participants in both Canada and the United Kingdom share the concerns identified by the Australian judiciary. Both jurisdictions have pointed to the impact of expert evidence on the length of proceedings and the corresponding cost of litigation to the parties that, in turn, have led to concerns about the accessibility of the court system to litigants with limited means. They also recognize the dangers associated with expert witnesses who misapprehend their role and advocate on behalf of a party.²⁹⁷

In the United Kingdom, following a review into the costs of civil litigation in England and Wales, Lord Justice Jackson recommended (among other recommendations) that the procedure of “concurrent” evidence should be piloted in cases where all parties consent and, if the results of the pilot are positive, consideration should be given to amending the civil procedure rules to provide for its use in appropriate cases.²⁹⁸ Jackson LJ based his recommendation on the fact that a number of experts, practitioners, and judges expressed to him their support for the use of concurrent evidence in appropriate cases.

In Canada, the *Federal Courts Rules* relating to expert witnesses were amended in 2010 to address some of these issues.²⁹⁹ The stated purpose of the amendments was to provide judges with the necessary tools to ensure that expert evidence is adduced in the most efficient, least costly, and most fair manner. The new rules allow judges to order some or all of the expert witnesses in a case to testify as a panel. The experts are expected to provide their views, and may be directed to comment on the views of other expert panel members as well. On completion of the panel’s testimony, the experts may, with leave of the Court, pose questions to the other panel members, following which the members of the panel may be cross-examined and re-examined in a sequence directed by the Court. The Rules stipulate that an expert witness who is ordered to confer with another expert witness must (a) exercise independent, impartial and objective judgment on the issues addressed; and (b) endeavour to clarify with the other expert witness the positions on which they agree, and the points on which their views differ. The new

in Australian Civil Procedure,” (Winter 2009) 166 *Law and Contemporary Problems* 71:159. In addition to the *Federal Court Rules*, see also the *Supreme Court Rules*, 2006 (Austl. Cap. Terr.), and the *Uniform Civil Procedure Rules*, 2005, Para.31.35 (N.S.W.)

296 Gary Edmund, *supra*, p. 166.

297 For example, this issue was at the forefront of the *Goudge Inquiry*.

298 The *Jackson Report*. Justice Jackson of the Judiciary of England and Wales was responsible for a fundamental review into the costs of civil litigation in England and Wales. Please see The Right Honourable Lord Justice Jackson. *Review of Civil Litigation Costs: Final Report*. Norwich: The Stationary Office (December 2009).

299 Sections 282.1 and 282.2, as well as section 52.6(1) of the *Federal Court Rules*.

rules require experts to adhere to a Code of Conduct, which establishes that the overriding duty of an expert witness is to assist the court. The rules also allow the Court to order the experts to confer with each other in advance of the hearing to narrow the issues.

Ontario's *Rules of Civil Procedure* also include provisions which came into force on January 1, 2010 that allow judges to order pre-trial "hot-tub" meetings between the experts to identify areas of agreement and disagreement and to prepare a joint statement.³⁰⁰

The process of experts testifying together in the "hot-tub" is intended to make their evidence more accessible, less adversarial and, ultimately, more useful to the trier of fact. Advantages include the potential to save court time and associated costs, as well as the likelihood that the expert will provide an honest opinion before colleagues. Misleading answers, confusing positions or uncertainties can be clarified immediately. There are perceived disadvantages as well, including a widespread concern of loss of control, and a fear that one's expert may make concessions in a group they would not otherwise make. At present, the concept of "hot-tubbing" is not a staple in criminal trials. As noted by Jackson LJ in his *Final Report*, it remains to be seen which types of cases respond well to the concurrent evidence approach, what costs are saved, and whether the parties involved perceive the process as enabling each side's case to be properly considered. There is little doubt, however, that successfully soliciting the viewpoints of multiple expert witnesses at the same time by allowing them to discuss complex, difficult issues together can be very useful for any trier of fact.

V. LEGAL DEVELOPMENTS AND COMMENTARY

A) CASELAW

*"Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many cases, including very serious criminal cases, could not be tried without expert opinion evidence. The judicial challenge is to properly control the admissibility of expert opinion evidence, the manner in which it is presented to the jury and the use that the jury makes of that evidence."*³⁰¹

300 Ontario's *Courts of Justice Act*, Rules of Civil Procedure, Rules 50.07(1)(c) and 20.05(2) (k). See also Rule 4.1.01, which sets out the duty of the expert witness.

301 *R. v. Abbey*, [2009] OJ No. 3534 (CA) at para. 73.

The *2005 Report* discussed the Supreme Court of Canada's decision in *R. v. Mohan*,³⁰² which continues to be relied on for its four-part test regarding the admission of proposed expert evidence. Also reviewed were the Supreme Court's decisions in *J.-L.J.* and *D.D.*³⁰³ Since the *2005 Report*, there have been several other decisions related to expert evidence.

R. v. Trochym³⁰⁴

In *R. v. Trochym*, the accused was convicted by judge and jury of the second degree murder of his former girlfriend. One of the issues was the admissibility of a neighbour's recollection of the accused at the deceased's apartment at the relevant time. The neighbour originally told police she had seen the accused at the apartment on Thursday (the day after the murder). After undergoing hypnosis at the request of the police, the neighbour stated she had seen the accused at the apartment on the Wednesday afternoon (day of the murder). Ultimately, her testimony at trial was the result of post-hypnosis evidence.

In determining the admissibility of the post-hypnosis evidence, the Supreme Court of Canada expanded the framework it established in *J.-L.J.* for assessing scientific opinions to include scientific techniques, and reiterated the importance of reliability as an essential component of admissibility to be determined by the judge as gatekeeper: [O]nly scientific opinions based on a reliable foundation are put to the trier of fact (*J.-L.J.*, at para. 33), and the same principle applies to scientific techniques...post-hypnosis memories must be demonstrated to be sufficiently reliable before being put to the trier of fact. The 'gatekeeper function' of the courts referred to in *J.-L.J.* (at para. 1) is thus as important when facts extracted through the use of a scientific technique are put to the jury as when an opinion is put to the jury through an expert who bases his or her conclusions on a scientific technique."³⁰⁵

The Supreme Court appreciated the fact that "the scientific community continues to challenge and improve upon its existing base of knowledge. As a result, the admissibility of scientific evidence is not frozen in time."³⁰⁶ Therefore, "even if it has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions."³⁰⁷

302 [1994] 2 S.C.R. 9.

303 *J.-L.J.*, [2000] 2 SCR 600; *D.D.* (2000), 148 C.C.C. (3d) 41 (SCC).

304 *Trochym*, [2007] 1 S.C.R. 239.

305 *Ibid.*, at para. 24.

306 *Ibid.*, at para. 31.

307 *Ibid.*, at para. 32.

While some forms of scientific evidence become more reliable over time, others may become less so as further studies reveal concerns. Thus, a technique that was once admissible may subsequently be found to be inadmissible...

Since *Clark*, this Court has had the opportunity to consider the admission of novel science in courtrooms. In *J.-L.J.*, it built on *Mohan* to develop the test governing the admissibility of such evidence. Under this test, a party wishing to rely on novel scientific evidence must first establish that the underlying science is sufficiently reliable to be admitted in a court of law. This is particularly important where, as here, an accused person's liberty is at stake. Even though the use of expert testimony was not in itself at issue in the present case – this appeal concerns the application of a scientific technique to the testimony of a lay witness – the threshold reliability of the technique, and its impact on the testimony, remains crucial to the fairness of the trial.³⁰⁸

As expressed by Commissioner Goudge in his *Report*, the Supreme Court's approach above "is consistent with both the evolving nature of science and the responsibility of the trial judge as gatekeeper to exclude expert evidence that is insufficiently reliable. The justice system should place a premium on the reliability of expert evidence if it is to maximize the contribution of that evidence to the truth-seeking function and be faithful to the fundamental fairness required of the criminal process."³⁰⁹

Reference re: Truscott³¹⁰

On June 9, 1959, 14-year-old Steven Truscott was seen riding with his 12-year-old classmate Lynne Harper on his bicycle. Later that evening, Ms. Harper's father reported her missing. Two days later, her body was found in a wooded area; she had been sexually assaulted and strangled. The following day, Steven Truscott was charged with her murder. He was convicted by a jury on September 30, 1959 and sentenced to death by hanging as required by the *Criminal Code* at the time. In 1960, his appeal to the Ontario Court of Appeal was dismissed unanimously, following which the Governor General in Council ordered that his death sentence be commuted to life imprisonment. His application for leave to appeal his conviction to the Supreme Court of Canada in 1960 was dismissed.

308 *Ibid.*, at paras. 32, 33.

309 *Goudge Inquiry Report*, p. 484.

310 *Reference re: Truscott* (2007), 225 C.C.C. (3d) 321 (Ont.C.A.).

Mr. Truscott was released on parole in 1969. In November 2001, he applied to the federal Minister of Justice under section 690 (now section 696.1) of the *Criminal Code* to review his conviction to determine whether there was a reasonable basis to conclude that a miscarriage of justice likely occurred. He argued that numerous documents in existence in 1959 that undermined the Crown's theory of the case were not disclosed to the defence, and that there was fresh evidence (apart from the undisclosed documents) that undermined the reliability of the medical evidence against him.

The fresh evidence included, among other things, the evidence of experts in pathology, gastroenterology, and entomology. In 2004, the federal Minister of Justice referred this case to the Ontario Court of Appeal.

The Ontario Court of Appeal applied an "evidence-based" reliability test to two well-established scientific disciplines, forensic pathology and entomology.

The Court in *Truscott* noted the need for courts to cautiously apply threshold standards of admissibility to proposed expert evidence. Scientific opinions not grounded in research may not meet *Mohan* standards. Commissioner Goudge in his *Report* commented on this aspect of the Truscott reference: "[I]n my view, the jurisprudence is clear that exclusion of such expert opinions on this basis may be required to avoid the danger of a jury simply accepting expert evidence of a 'witness of impressive antecedents' as 'virtually infallible and as having more weight than it deserves'."³¹¹

R v. Chalmers³¹²

In *R v. Chalmers*, the accused appealed his conviction for the second degree murder of his wife, who died in 1986. The police originally concluded that she died as a result of an accidental fall from her horse. In 2001, the original investigating officer came across photos of the deceased that "piqued the curiosity" of one of his colleagues and the case was re-opened as a homicide investigation.

On appeal, the accused sought to introduce fresh evidence consisting of a report prepared by a professor emeritus in kinesiology. The appellant attempted to have the professor qualified to provide expert opinion evidence about the movement of horses and people, and about the mechanisms of how a person may fall off a horse and sustain injuries by striking the ground. Relying on the test for admission of expert evidence as articulated by the Supreme Court in *Mohan*, and

311 *Goudge Inquiry Report*, pp. 485-487.

312 *R. v. Chalmers*, [2009] O.J. No. 1254 (C.A.).

refined in relation to “novel science” in *L.-J.L.* and *Trochym*, the Ontario Court of Appeal concluded that the professor’s evidence, even if it had been tendered at trial, would not have been admissible.³¹³ The Court’s analysis revealed that “forensic kinesiology” was not a recognized sub-discipline of kinesiology, and the professor’s knowledge was based solely on his practical experience gained over 25 years ago while filming his wife’s riding activities, together with the fact that he and his wife stabled her horse for many years.³¹⁴ Therefore, the professor was not a properly qualified expert, and the innovative scientific theory and technique he advanced did not survive the “special scrutiny” required of novel science in order to ensure its reliability.³¹⁵

R. v Baptista³¹⁶

The accused, unhappy with his city councillor, wrote a poem expressing his sentiments and posted it on five mail and newspaper boxes. The contents were interpreted as threatening and the accused was charged with uttering a death threat. The Ontario Court of Appeal set aside the conviction and entered an acquittal on the basis that the words in the poem did not meet the legal definition of a threat.

One issue raised on appeal was whether the trial judge erred in excluding the expert opinion proposed by the defence to provide an academic understanding of satire on the basis that without it the trial judge could not understand a reasonable person’s view of the meaning and intent of the poem. The Court held that given the trial judge correctly set out the test identified in *Mohan*, it was open to the trial judge to conclude the expert opinion was not necessary to assist him in this case.³¹⁷

In a subsequent case, the Court of Appeal referred to the *Baptista* decision for the proposition that expert opinion evidence that brings no added benefit to the process will be excluded.³¹⁸

R. v Bonisteel³¹⁹

In this case, the defence proposed to call at trial a psychologist to provide expert opinion evidence on false confessions. The expert’s opinion was based on a

313 *Ibid.*, at para. 69.

314 *Ibid.*, at para. 79.

315 *Ibid.*, at para. 78.

316 [2008] O.J. No. 4788 (C.A.).

317 *Ibid.*, at para. 46.

318 *R. v. Abbey*, [2009] O.J. No. 3534 (C.A.) at para. 94.

319 [2008] B.C.J. No. 1705 (B.C.C.A.).

review of the relevant literature and did not deal with the specifics of the case. The trial judge ruled that the expert evidence was inadmissible because it was not necessary.

The British Columbia Court of Appeal agreed with the trial judge's finding that the proposed expert evidence was not necessary, given that it did not deal with the specific nature of the evidence in the case, but only with matters about which jury members could form their own judgments based on their own experiences.³²⁰

This case has been referred to since by the Ontario Court of Appeal as standing for the proposition that "where the proffered opinion evidence falls somewhere between the essential and the unhelpful... the trial judge will have regard to other facets of the trial process – such as the jury instruction – that may provide the jury with the tools necessary to adjudicate properly on the fact in issue without the assistance of expert evidence."³²¹

G.(P.)³²²

The accused was convicted by a jury of sexual offences against his four-year-old daughter. The daughter had been placed in foster care for unrelated reasons and disclosed to her foster parents that the appellant had sexually assaulted her. The Crown sought to introduce the complainant's statements to the foster parents as proof of the truth of their contents. The Crown expert testified (a) that the complainant should not testify, and (b) that it was his expert opinion that she had been sexually abused - an opinion based on his acceptance of the veracity of the foster parents' reports to the CAS.

The Ontario Court of Appeal found that the expert (who testified before the jury) strayed outside the boundaries of permissible expert testimony by indicating he believed the out- of-court statements of the complainant and the foster parents. Specifically, the expert's opinions were not properly elicited – because he treated his factual premise as established fact, the effect of his evidence was to provide his views regarding the veracity of the complainant and the foster parents.³²³

320 *Bonisteel, supra*, at para. 69. See also *Woodward*, [2009] M.J. No. 132 (C.A.) where the Court concluded the foundation for the trial judge's ruling was that the proffered expert evidence did not meet the necessity criterion, it was "unnecessary – it was a superfluity," and that the preferred route to address concerns over the reliability of eyewitness identification is generally through the charge to the jury.

321 *Abbey, supra*, at para. 95.

322 [2009] O.J. No. 121 (C.A.).

323 *Ibid.*, at paras. 13, 21, 24.

The Court concluded that the trial judge erred by permitting the expert “to indicate a clear and impermissible view of the veracity of other witnesses.”³²⁴ It held that this result could have been avoided if the expert’s testimony had been elicited by hypothetical questions that incorporated all of the factual premises upon which his opinion was based. If this had been done, the jury would have been left with the task of deciding whether or not to believe the foster parents’ reports of the circumstances.³²⁵

R. v. Abbey³²⁶

In *R. v. Abbey*, the Crown appealed the accused’s acquittal of the first degree murder of a rival gang member. The issue at trial was identity. At issue on appeal was whether the trial judge erred in excluding an expert’s opinion on the meaning of a teardrop tattoo engraved on the accused’s face within months of the murder.

The Court of Appeal’s analysis began with the importance of delineating the scope of the expert’s opinion:

Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert’s opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.³²⁷

The trial Crown had raised two bases on which the trial judge could admit the expert opinion evidence. The Court of Appeal found that, in the first, the trial Crown had urged a connection between the expert’s opinion evidence and the ultimate issue of identification, a connection that “misconceived the true nature of [the expert’s] opinion and the role he could legitimately play in assisting the jury.”³²⁸ In fact, the expert’s evidence was clear – he could not speak to the reason *why* the accused placed a teardrop tattoo on his face, but he could speak to the culture within urban street gangs and the potential meanings to be taken from the inscription of this type of tattoo on the face of a member of that culture.

324 *Ibid.*, at para. 33.

325 *Ibid.*, at para. 29.

326 [2009] O.J. No. 3534 (C.A.); leave to appeal refused [2010] SCCA No. 125.

327 *Ibid.*, at para. 62.

328 *Ibid.*, at para. 68.

The trial Crown’s proposed secondary use of the expert evidence at trial involved limiting the expert’s evidence “...to the introduction alone of the possible meanings for the tattoo without providing his analysis of the specific meaning attributable to [the accused’s] tattoo.” The Court of Appeal found this secondary use of the expert evidence permissible – it reflected the proper limits of the expert’s opinion because it “did not go directly to the ultimate issue of identity and did not invite the jury to move directly from acceptance of the opinion to a finding of guilt” – as such, it would become “part of a larger evidentiary picture to be evaluated as a whole by the jury.”³²⁹

The Court suggests a two-step process that distinguishes between the preconditions to admissibility and the trial judge’s exercise of the “gatekeeper” function, to facilitate the admissibility analysis and application of the *Mohan* criteria.³³⁰ Logical relevance, a precondition to admissibility, is distinguished from the broader concept of legal relevance, which is reserved for the “gatekeeper” phase of the admissibility analysis, because it involves a limited weighing of the costs and benefits associated with admitting evidence that has already been shown to be logically relevant.³³¹ Ultimately, at the conclusion of a *voir dire* to determine the above, the trial judge “must identify with exactitude the scope of the proposed opinion that may be admissible.”³³² In so doing, the trial judge “may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion.”³³³

New Trend – Back to the Basics

The trial judge’s role as gatekeeper has been a part of Canadian jurisprudence for years. Perhaps the scrutiny necessary to perform that function has effectively diminished because of the belief that forensic evidence, like all other evidence, will be accorded the appropriate weight at the end of the day. As a result, in many cases forensic evidence and expert testimony has not been scrutinized to the level expected *before* the evidence is heard by the trier(s) of fact.

Following the decision in *Trochym* where the Supreme Court of Canada reiterated basic principles regarding the acceptance and admission of experts and forensic evidence, and the *Goudge Inquiry* where the evidence exposed the fact that the “expert” witness and his testimony were admitted time and again based on his

329 *Ibid.*, at paras. 68, 70.

330 *Ibid.*, at para. 76.

331 The relevance criterion for admissibility in *Mohan* is legal relevance – to be relevant, the evidence must not only be logically relevant, but must be sufficiently probative to justify admission. *Ibid.*, at paras. 82-84.

332 *Ibid.*, at para. 63. The Court refers to the importance of properly defining the limits and nature of proposed expert opinion evidence as one of the “valuable lessons learned from the *Inquiry into Pediatric Forensic Pathology in Ontario*.”

333 *Ibid.*, at para. 63.

reputation only, trial judges will likely approach their task as gatekeeper with greater understanding and scrutiny.

For example, in the recent case of *R. v. Teepell*,³³⁴ the trial judge took care to craft a decision to reveal her analysis regarding the proffered expert opinion evidence. In the case, the accused was charged with sexually assaulting a young girl at a party at which both consumed alcohol. The complainant testified that she was intoxicated and fell asleep. The accused maintained he had no memory of these events, and that he had experienced an episode of “sexsomnia” (described as sexual behaviour during sleep).³³⁵

The trial judge began her analysis by restating Commissioner Goudge’s recommendations regarding the trial judge’s burden of “being the ultimate gatekeeper in protecting the system from unreliable expert evidence.” She dealt with the admissibility of the novel science of “sexsomnia,” as well as the evidence of the experts who testified about it, in a manner that demonstrated an understanding of her role as gatekeeper. She scrutinized the proffered opinion and the science upon which it was based, and concluded that it was of no scientific value and had no evidentiary foundation because it included assumptions and speculation, was without a scientific basis, and was outside the expert’s area of expertise. “The juxtaposition of the testimony of the two sleep disorder experts demonstrates the extent to which this area is, indeed, a ‘novel science.’ It also underscores the importance of carefully scrutinizing the reliability of opinions based on novel science and/or the novel application of a clinical technique in a forensic setting.”³³⁶

Detailed analytical reasons, while not required in law, demonstrate the reasoning process employed by the trial judge to reach his or her conclusion, in keeping with the role as gatekeeper.

B) COMMENTARY

Linking the world of forensic evidence and experts to the courtroom in a way that works for both disciplines has become an increasingly complicated task over the years. Some of the contemporary issues concerning the intersection of forensic science and the law are addressed below.

334 *R. v. Teepell*, [2009] O.J. No. 3988 (O.C.J.).

335 Ultimately, the accused abandoned “sexsomnia” as a defence and argued consent by the complainant to the sexual activity.

336 *Teepell*, *supra*, at paras. 213-225.

Evidence-Based Culture

Over the last decade, the global movement towards an evidence-based culture in the forensic sciences has gained momentum in Canada. This approach compels the expert to clearly and accurately identify both the relevant empirical evidence relied on to support the opinion, and the reasoning process that led to the expert's ultimate conclusion. Incorrect assumptions and other problematic issues become apparent when the reasons behind the opinion are stated clearly. This approach also helps the expert identify and clarify his or her level of confidence in the opinion.

As noted by Commissioner Goudge, the evidence-based culture works to avoid “confirmation bias” – a pitfall closely related to “tunnel vision” that occurs when the expert (or anyone else) seeks out evidence to confirm his or her opinion, and excludes other possible opinions or theories. Evidence-based opinions identify both supporting and contradicting critical evidence. Ultimately, an evidence-based culture will greatly assist the role of the court in protecting the legal system from the effects of improper or flawed scientific evidence.³³⁷

Judicial Gatekeeping Function

The evidence at the *Goudge Inquiry* demonstrated the vulnerability of the Canadian legal system to unreliable and flawed expert evidence. One of the issues Commissioner Goudge addressed in relation to this concern was the judge's role as gatekeeper to ensure that expert evidence is sufficiently reliable to be admitted as evidence. A number of recommendations have been made to help address these concerns and have been referred to above.

Of critical importance is the need for the judge to define precisely the nature of, and the limits of, the expert witness' expertise at the outset of each trial. Without doing so, the opportunity exists for expert witnesses to stray from their expertise:

This description [of the nature and limits of expertise] gives clarity to what the experts can properly opine on and allows the court to curtail the “roaming expert”...

The challenge of roaming expert witnesses for the criminal justice system is substantial. All the admissibility safeguards...to ensure the relevance, necessity, and reliability of expert scientific evidence are for naught if experts are allowed to stray beyond their field of expertise and offer, under the guise of expertise, what are, in

337 *Goudge Inquiry Report*, pp. 424-426.

essence, only lay opinions that have no scientific value.³³⁸

While Commissioner Goudge made a number of recommendations related to the trial judge's gatekeeping function, he also strenuously advised that all participants in the justice system share the important role in ensuring that only properly qualified witnesses, with relevant, necessary evidence, provide expert opinion evidence with neither more nor less than their legitimate force and effect.

Jury Instructions with Respect to Expert Evidence

The Canadian Judicial Council has published the following model jury instructions on expert opinion evidence (general):

You heard the evidence of NOW,³³⁹ an expert witness. S/he gave an opinion about some technical matters that you may have to consider in deciding this case. S/he is qualified by his/her training, education and experience to give an expert opinion.

Remember, the opinions of experts are just like the testimony of any other witnesses. Just because an expert has given an opinion does not require you to accept it. You may give the opinion as much or as little weight as you think it deserves. You should consider the expert's education, training and experience, the reasons given for the opinion, the suitability of the methods used and the rest of the evidence in the case when you decide how much or little to rely on the opinion. It is up to you to decide.

NOW was asked to assume certain facts. What an expert assumes or relies on as a fact for the purpose of offering his or her opinion may be the same or different from what you find as facts from the evidence introduced in this case.

How much or little you rely on the expert's opinion is up to you. But the closer the facts assumed or relied on by the expert are to the facts as you find them to be, the more helpful the expert's opinions may be to you. How much or little you rely on the expert's opinion is entirely up to you. To the extent the expert relies on facts that you do not find supported by the evidence, you may find the expert's opinion less helpful.³⁴⁰

338 *Goudge Inquiry Report*, pp. 471, 472.

339 "NOW" refers to "name of witness."

340 Canadian Judicial Council, Model Jury Instructions – Instruction 10.3, Expert Opinion

Effective Communication

A lack of effective communication between the expert and the criminal justice system is problematic. Recent inquiries have brought to light the dangers that may occur when expert evidence is communicated in ways that promote misinterpretation or misunderstanding on the parts of police, prosecutors, defence counsel and the courts.

Commissioner Goudge emphasized that expert witnesses are called to serve the justice system, and to be effective in this role they must be able to communicate their opinions very clearly:

... it is important to remember that the main purpose of forensic pathology is to serve the justice system. When the opinions of forensic pathologists, including their limitations, are not properly understood, the justice system operates on misinformation. This breakdown in communication may have serious and sometimes disastrous consequences for the administration of justice and those most affected by it, including accused persons and families of the deceased. The innocent should not be charged or convicted, or the guilty go free, on the basis of expert opinions that are misunderstood.³⁴¹

Although these references focus on forensic pathologists, the premise applies equally to all expert witnesses – effective communication is of the utmost importance in the expert’s role to assist the administration of justice.

A related issue is how, and the extent to which, an expert witness communicates his or her level of confidence or certainty in his or her opinion. Our criminal justice system demands certainty and often pushes expert witnesses to communicate their level of certainty. As noted by Commissioner Goudge, “... of greatest concern is the possibility that the criminal justice system, in its search for certainty, will interpret a pathology opinion as reflecting a higher level of confidence than the expert intended.”³⁴² Indeed, if not recognized, this issue can lead to wrongful convictions based on misinterpreted expert witness opinions.

Yet another issue involves misplaced reliance on non-pathology information that can lead to bias. Often the extent of this reliance is not readily apparent in either written or verbal accounts of the expert’s opinion. Furthermore, the reliance by experts on circumstantial evidence is itself a controversial area. Commissioner

Evidence (General Instructions), www.cjc-ccm.gc.ca.

341 *Goudge Inquiry Report*, p. 406.

342 *Goudge Inquiry Report*, p. 406.

Goudge has included a number of recommendations to help guard against this potential bias.³⁴³

A similar issue relates to reliance by experts on other expert opinions. Expert witnesses should be encouraged to consult with fellow colleagues and other experts – the caveat is to ensure that all such consultations are documented.³⁴⁴

Testimony

Testifying is a significant aspect of the duties of many experts. It is obvious to those familiar with the criminal justice system that triers of fact are easily impressed with the credentials of most experts. Much literature has been devoted to the “aura of infallibility” that accompanies the expert in the witness stand.

It is very important that expert witnesses fully understand the culture they represent, a task best achieved through ongoing education. It is also important for those involved in the criminal justice system to remain cognizant of, and understand, this culture. Joint continuing education seminars can address the concerns associated with expert witnesses, and better prepare Crown Attorneys, defence lawyers, and police to understand the potentially problematic dynamics associated with expert witnesses. The goal is to improve communication between experts and others involved in the justice system – during the processes that lead to a trial, during trial preparation, and during testimony. An example of a successful joint educational opportunity was the “Pediatric Head Injury and the Law” conference hosted by the Ministry of the Attorney General in Ontario in March, 2010. Crown attorneys, defence counsel, members of the judiciary and pathologists attended to focus on issues related to pediatric forensic pathology and wrongful convictions.

Particularly encouraging is the recent creation of the Centre for Forensic Science and Medicine at the University of Toronto, an interdisciplinary initiative dedicated to advancing teaching and research in the forensic disciplines. Of particular importance to the Centre is recognition of the interface between the law and the social sciences. As well as offering inter-professional education for students of medicine and law, the Centre offers continuing professional development initiatives for the medical and legal communities, and intends to facilitate research into areas of controversy and debate in forensic medicine and science, among other educational endeavours. The Centre is currently developing symposia and workshops for continuing professional development for lawyers and the judiciary.

343 See, for example, Recommendations # 73, 75, 87, 105, among others.

344 *Goudge Inquiry Report*, see Chapter 16 – “Effective Communication with the Criminal Justice System,” pp. 406-423, for a detailed discussion of these issues.

As observed by Commissioner Goudge, the more interaction there is between these groups, the more each will develop a common understanding of each other's roles and limitations, which will surely serve to improve the administration of justice.³⁴⁵

C) PROSECUTION SERVICES RESPONSE TO DRISKELL INQUIRY RECOMMENDATION ON HAIR MICROSCOPY CASE REVIEW:

In the 2007 *Driskell Inquiry Report*, Commissioner LeSage made the following recommendation:

I am concerned that the problems relating to hair microscopy evidence in Driskell's case are not unique to his case or unique to Manitoba. I accept that a more extensive review of cases from the across the country would be advisable, and encourage the Attorneys General of the Provinces and Territories to work together to examine how a case review similar to that conducted in Manitoba might be performed on a national level, and consider the appropriate parameters of such a review.³⁴⁶

Since then, all Canadian jurisdictions have conducted reviews in different forms. The most formal were in Ontario and British Columbia.

In B.C., the review, under the supervision of Regional Crown Counsel Oleh S. Kuzma, QC, examined all cases of culpable homicide, sexual assault, robbery and other indictable offences including the use or attempted use of violence that fit within the following parameters:

- they were prosecuted in B.C. during the past 25 years;
- the Crown tendered and relied on microscopy hair comparison evidence;
- the accused pleaded not guilty at trial, asserting factual innocence but was found guilty; and
- the accused appealed the conviction to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed.

The reviewers considered whether there was a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place. In mid-December 2009, the Advisory Committee appointed by the Assistant Deputy Attorney

345 *Ibid.*, p. 436. See also Recommendation # 100.

346 *Driskell Inquiry Report*, p.181-2.

General submitted its report. The committee consisted of a retired Justice of the Supreme Court and Court of Appeal of British Columbia, a defence counsel nominated by the UBC Law Innocence Project, a Deputy Chief of the Vancouver Police Department and Mr. Kuzma. After preliminary screening, the committee reviewed two homicide and two sexual assault cases. It unanimously concluded that there was no reasonable basis to believe that, by virtue of the hair microscopy evidence, a miscarriage of justice has taken place in the convictions against the four individual accused persons.

In Ontario, a preliminary search was conducted of forensic lab databases (RCMP and Center of Forensic Sciences) and police and prosecution files in which hair samples were gathered. The review considered murder and manslaughter convictions from 1985 to 2000. In each case, the evidence was reviewed to determine whether hair comparison evidence was used and played a significant part in the decision in an individual case.

The Ontario Criminal Conviction Review Committee, with advice from The Honourable Patrick LeSage, oversaw the review. Criteria and an implementation plan for the review were developed. The review was conducted in two phases. A small working group of counsel completed the initial two phases of the review by firstly applying the following criteria to determine whether further review of individual cases was warranted:

- 1) the case occurred during the 15 year time frame between 1985 and 2000;
- 2) the conviction was for culpable homicide;
- 3) the accused pled not guilty and asserted factual innocence;
- 4) the accused appealed to the Ontario Court of Appeal and the appeal was dismissed;
- 5) hair evidence was tendered at trial; and
- 6) hair is available for testing.

Cases which met the criteria in phase 1 were subject to further review in phase 2 to determine the importance of the hair evidence to the conviction in the case. The OCCRC is now reviewing the cases to determine whether there is a reasonable basis to conclude that a miscarriage of justice may have occurred in any of the cases. If any case raises a concern on this basis, it will be referred for mitochondrial DNA testing.

Other jurisdictions consulted Crown counsel in a less formal way. Most jurisdictions reported that their reviews did not reveal any cases in which microscopic hair comparison evidence was used or played a factor in the conviction.³⁴⁷

347 Quebec identified and reviewed two cases involving microscopic hair comparison evidence, and New Brunswick identified and reviewed one case. The conclusions in each of these cases were that the introduction of microscopic hair comparison evidence did not support a claim of wrongful

VI. POTENTIAL PITFALLS TO AVOID

The *Goudge Inquiry* highlighted the ten most egregious ways in which Charles Smith, the pathologist at the heart of the *Inquiry*, failed in his role as an expert witness. These reflect common pitfalls that must be avoided by the expert witness and, in turn, illustrate what others involved in the criminal justice system must be cognizant of to help prevent future miscarriages of justice.

- a. *The Expert as Advocate* – the expert’s role does not include advocacy on behalf of the party that called the expert; it is to convey his or her scientific findings, his or her opinion, and the level of certainty to which he or she holds the opinion.³⁴⁸
- b. *The Inadequately Prepared Expert* – “...expert witnesses can be of assistance only when they have a complete understanding of the case and the basis of their expert opinion. They can have such an understanding only with proper preparation.”³⁴⁹
- c. *The Overstated Expertise of the Expert* – “When expert witnesses testify, they have a responsibility to make the court aware of the limits of their expertise. A failure to do so prevents the court from fully assessing whether the person should be permitted to give the opinion evidence. Expert witnesses are not expected to be knowledgeable in every substantive area. When they lack knowledge or experience in an area that informs their analysis, they are expected to be candid about it.”³⁵⁰
- d. *The Expert and Unscientific Evidence* – “Expert witnesses are retained to provide opinions because they are experts in a particular area. While reference to personal anecdotal evidence might assist the court in understanding a particular point, it should not form the basis of the opinion on a particular matter.”³⁵¹
- e. *The Expert and Unbalanced Evidence* – “An expert must ensure that the controversies in the discipline are understood by the trier of fact.” Providing an opinion based on his or her interpretation of the scientific findings and the literature is not enough. “This approach makes a proper assessment of the opinion very difficult and leaves the criminal justice system ill served.”³⁵²

conviction.

348 *Goudge Inquiry Report*, p. 180.

349 *Ibid.*, p. 180.

350 *Ibid.*, p. 182.

351 *Ibid.*, pp. 182-183.

352 *Ibid.*, p. 184.

- f. *The Expert's Attacks on Colleagues* – “Although an expert may criticize the work of another expert, a reason must be given for the criticism.” Disparaging, arrogant, unjustified and uncharitable remarks are “unprofessional and entirely unhelpful to the court.”³⁵³
- g. *The Expert and Evidence Beyond His Expertise* – “Expert witnesses are called to the court to speak to the issues that involve their expertise. They are not given free rein to discuss other matters on which they happen to have an opinion.” ... “Experts have a positive obligation to identify and observe the limits of their particular area of expertise... They should not offer any opinions outside their specialty and, when testifying, should clearly state when particular questions or issues fall outside their expertise.” ... “Although experts must always recognize the limits of their expertise and stay within those limits, judges and counsel also play an important role in ensuring that those boundaries are respected.”³⁵⁴
- h. *The Speculating Expert* – “[Experts] provide [scientific] opinions. I do not see how [experts] can believe that, when there is no [scientific] evidence, it is open to them to speculate on what could have happened. Although I appreciate that [experts] want to be helpful to the court, speculating about the various possibilities without any [scientific] evidence is unhelpful and potentially prejudicial. I also accept that the court and counsel have a duty to ensure that the [expert] does not give inappropriate evidence. When the court or counsel realizes that the [expert] is speculating, either one should object and put an end to that line of questioning. [Experts], however, are in the best position to ensure that the evidence that they provide is not speculative and is substantiated by the necessary evidence. The [expert] must be responsible for doing just that.”³⁵⁵
- i. *The Expert and Casual Language* – “Expert witnesses’ use of language is an important part of their role. How the expert communicates an expert opinion to the court affects how the court will perceive and weigh the opinion.” For example, at times Dr. Smith attempted to “convey technical concepts in non-technical terminology that resulted in an appearance of casualness that was inappropriate in the circumstances... although I understand that it can be very difficult for experts to express the degree of certainty with which they hold their opinions, it is unscientific and inappropriately inexact for an expert witness to use betting terminology. In many of these instances, the language masked the real problem with the testimony – it was speculative.”³⁵⁶

353 *Ibid.*, pp. 185-186.

354 *Ibid.*, p. 419.

355 *Ibid.*, pp. 187-188. In this excerpt, the word “pathologist” has been replaced with “expert,” and “pathology” has been replaced with “scientific,” as evidenced by the []. The original text focuses on “pathologists” and “pathology evidence” when discussing the speculating expert, but the importance of the point made by Commissioner Goudge applies equally to all expert testimony.

356 *Ibid.*, p. 188. The reference in the quotation to “betting terminology” refers to instances

- j. *The Expert Who Misleads* – “It goes without saying that an expert witness giving evidence under oath should do so with complete candour and honesty. False and misleading statements should form no part of an expert witness’s evidence.”³⁵⁷

Avoiding these pitfalls will go a long way to assisting all participants in the criminal justice system throughout the entire process – from the moment the expert is engaged, until the final disposition of the case. For example, it is expected today that expert witnesses will acknowledge existing controversies within their realm of expertise or science. The importance of communicating the existence of controversial issues is vital at each stage of an investigation and prosecution, as explained by Commissioner Goudge:

...this approach enables the police to make fully informed decisions about the direction of their investigation, the need for additional expertise, and the existence of reasonable and probable grounds. It permits prosecutors to make informed evaluations about the reasonable prospects of conviction. When charges are laid, this context educates the defence and makes an informed and independent assessment of the strength of the Crown’s case more likely. Ultimately, this information is clearly relevant for the judge or the jury as they try to understand and evaluate the quality of the positions of the Crown and the defence. In those cases where the [expert] expresses an opinion as well as the context of the relevant controversy, the judge or the jury is better able to appreciate where the opinion falls within a spectrum of views in the forensic pathology community and, therefore, to evaluate it properly. Without this context, misunderstandings can easily arise.³⁵⁸

VII. STATUS OF RECOMMENDATIONS

In light of increasingly complex prosecutions, growing caseloads, and constraints on time and resources, it is difficult today for participants in the criminal justice system to keep abreast of significant forensic developments, especially when new or novel areas of expertise arise. Education seminars conducted by a variety of experts and incorporated into regular and ongoing education sessions will best assist police and prosecutors in their cases. This type of intensive training will provide insight into the various forensic disciplines and acquaint prosecutors and police with new developments and procedures.

where Dr. Smith used these references in his testimony to convey his level of certainty – for example, if he were a betting man, he would prefer explanation “A” over “B.”

357 *Ibid.*, p. 189.

358 *Ibid.*, pp. 417-418.

Of great benefit is an inter-disciplinary approach to education among the bar, the judiciary, and the forensic science disciplines. This approach has been used in other areas of the law with great success. In the area of forensic evidence and expert testimony in particular, an inter-disciplinary approach will work to the advantage of all participants, will facilitate the trial process in complex cases and, invariably, will assist the administration of justice.

As recommended in the *2005 Report*, the Subcommittee considered the feasibility of establishing a national central repository to catalog and track case law, newsletters and articles, the latest developments and advancements in specific fields of expertise and the like. Although a central repository has not been created, the Subcommittee functions as a conduit for the exchange of this sort of information among all prosecution services and police agencies represented on it. The federal government has taken the lead in ensuring a fulsome exchange of information takes place, not only on forensic information, but on all issues related to wrongful convictions. It will continue in this role.

VIII. ADDITIONAL RECOMMENDATIONS

The Subcommittee makes the following additional recommendations:

1. Continuing multi-disciplinary legal education among the bar, the judiciary, and the scientific disciplines and police is of utmost importance and will assist all participants in becoming literate with respect to basic scientific concepts, developing scientific areas, methods, and techniques.
2. There should be continuing education for prosecutors on the proper use of, and how to examine and cross-examine, expert witnesses.
3. The federal government should continue its role in updating the provinces and territories with current, relevant information in this area, including press releases, reports, etc. This recommendation effectively and efficiently implements recommendation 2 in the *2005 Report*.
4. Each province or territory should encourage an appropriate network, both within the province/ territory and with other provinces/ territories, when searching for expert witnesses for their cases.
5. Case conferences between Crown experts and defence experts should be encouraged to try to narrow and/or potentially resolve the scientific issues in a given case. Crown and defence counsel should encourage these case conferences and request that issues relevant to the case be addressed.

6. Some international jurisdictions have rules relating to reciprocal disclosure of expert evidence. The *Criminal Code* addresses this issue in a limited way. Consideration should be given to strengthening the *Criminal Code* provisions to provide for reciprocal disclosure well in advance of trial. This greatly enhances a full consideration of scientific issues affecting the soundness of prosecutions and convictions.

CHAPTER 10 – EDUCATION

I. INTRODUCTION

The *2005 Report* focused on the connection between the education of justice system participants and the prevention of wrongful convictions. It suggested that education designed to help prevent future miscarriages of justice must be multi-faceted and directed at all participants in the justice system to be effective, because the errors that lead to wrongful convictions are multi-layered and are often the result of a combination of events.

This ideal has clearly found voice across Canada – the message to educate *all* justice participants about the causes and prevention of wrongful convictions is echoed in recommendations from recent Canadian inquiries and has led to the creation of continuing education courses and seminars for justice participants. It has even found a home in many Canadian law schools. Education continues to be recognized as one of the most direct routes to proactively preventing miscarriages of justice in this country. While there is more work to be done to ensure the continuation of newly created educational initiatives, especially in light of the present economy, the fact that a number of educational opportunities have been offered in recent years suggests that great strides have been taken across the country to guard against future wrongful convictions. The educational initiatives that have taken place across the country since the release of the *2005 Report* represent our country's best course to prevent miscarriages of justice.

II. 2005 RECOMMENDATIONS

1. A National Forum on the Prevention of Wrongful Convictions, co-sponsored by the Heads of Prosecutions Committee and the Canadian Association of Chiefs of Police, should be held to provide national leadership and direction.
2. The following options for educational venues should be considered :
 - a) joint educational sessions involving Crowns, police, defence and forensic scientists;
 - b) specialized conferences, courses and educational materials for police;
 - c) specialized conferences for Crowns, as well as segments in continuing education programs;

- d) judicial information sessions;
- e) law school courses;
- f) bar admission course; and
- g) education opportunities for the defence bar.

3. The following educational techniques should be considered:

- a) presentations of case studies of wrongful convictions and lessons learned;
- b) small group discussions and role-playing, demonstrations of witness interviews, and conducting photo-lineups;
- c) on-line training for Crowns and police;
- d) distribution of educational materials/policies on CD-ROM;
- e) video-linked conferences;
- f) participation of psychologists, law professors and criminologists in educational conferences;
- g) guest speakers, including the wrongfully convicted; and
- h) regular newsletters on miscarriage of justice issues.

4. The following educational topics should be considered:

- a) role of the Crown and Attorney General;
- b) role of the police;
- c) tunnel vision;
- d) post-offence conduct and demeanour evidence;
- e) frailties of eyewitness identification;
- f) false confessions;
- g) witness interviews;
- h) alibi evidence;
- i) jailhouse informants;

- j) ineffective assistance of defence counsel;
 - k) forensic scientific evidence and the proper use of expert evidence;
 - l) benefits of DNA evidence;
 - m) disclosure;
 - n) charge screening;
 - o) conceding appeals / fresh evidence.
5. Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.
 6. Any educational plan for the prevention of miscarriages of justice should include a public communication strategy to advise the public that participants in the criminal justice system are willing to take action to prevent future wrongful convictions.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

Recent Canadian public inquiries continue to make recommendations about the important role of education in the prevention of wrongful convictions. Many of the recent recommendations are not new, and endorse those of the earlier inquiries. The inquiries themselves provide significant educational case studies.

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

The following are some of the recommendations aimed at police officers and Crowns that involve an educational component as part of a systemic response to the risk of wrongful convictions:³⁵⁹

³⁵⁹ For the purposes of this paper, the recommendations aimed at the defence bar are not included here.

Number 8

The excellent RNC Training Program with Memorial University should receive strong support and recruits should be encouraged to obtain the degree and diploma as well as the certificate of completion of training.

Number 9(a)

The RNC should develop policing standards with respect to qualifications, initial and ongoing training and criminal investigation.

Number 9(b)

The Government of Newfoundland and Labrador should adopt such standards by legislation.

Number 10

Greater financial resources should be allocated to the development of the RNC through: acquiring and improving equipment; utilizing technology; arranging secondments for experience and training; increasing manpower; bringing salary scales into line with other comparable police forces.

Number 19

A Criminal Justice Committee should be established with representatives of the Chief Justice, Minister of Justice, Defence Bar, DPP, Legal Aid Commission, RNC and RCMP, to identify problems, engage in dialogue and seek improvements to the administration of justice on an ongoing basis.

b) Inquiry into Pediatric Forensic Pathology in Ontario (2008)

The Report notes that all participants in the criminal justice system have important roles to play in protecting the public against the introduction of flawed or misunderstood pediatric forensic pathology into the system which can lead to wrongful convictions.

Given the systemic nature of the inquiry and the breadth of its mandate, its recommendations focused on forensic pathologists in particular, the oversight of the discipline, and the role of forensic pathologists in the criminal justice system. Education plays a key role in the recommendations: the education of forensic pathologists in the science and the justice system and, ultimately, of all justice system participants about forensic science and its limitations, is most important

to providing a system that reduces the potential of wrongful convictions.³⁶⁰ Of particular note are the familiar themes in the following recommendations:

- Number 6: all medical students should be educated about the importance of the criminal justice system in medico-legal education, and the RCPSC³⁶¹ should ensure that accredited fellowship programs for forensic pathologists provide education in relation to expert evidence, the justice system, and the relevant aspects of evidence law and criminal procedure;
- Number 105: participants at case conferences should understand the respective roles of coroners and forensic pathologists, and how those roles affect the scope and nature of the opinions they can render, so police and Crowns don't place unwarranted reliance on non-expert opinions and don't pressure forensic pathologists to change their opinions to conform to a coroner's determination of cause or manner of death;
- Number 107: The Ministry of Community Safety and Correctional Services, police colleges, and the OFPS³⁶² together should provide specialized training for select police officers with respect to pediatric forensic death investigations, as well as basic training for officers with respect to forensic pathology;
- Number 110: police officers should be trained to be vigilant against confirmation bias in their investigative work, especially in relation to pediatric forensic cases;
- Number 112: ongoing education should be provided to ensure that members of the Child Homicide Team³⁶³ are knowledgeable about the scientific method generally and pediatric forensic pathology in particular;
- Number 127: the Ministries of the Attorney General and Community Safety and Correctional Services should fund regular joint courses for Crowns and defence counsel dealing with forensic pathology generally and pediatric forensic pathology in particular, to assist lawyers in developing the specialized knowledge necessary to act as counsel in pediatric forensic pathology cases;
- Number 127 (cont'd): the materials from these courses should be web-based so that lawyers may access them as a resource when the course is not being offered;

360 *Goudge Inquiry Report*. Please see the *Executive Summary* (Volume 1) for a complete list of all the recommendations, and chapters 16-19 for recommendations relating to participants in the criminal justice system.

361 Royal College of Physicians and Surgeons of Canada.

362 Ontario Forensic Pathology Service.

363 The Child Homicide Team is a group of experienced Crown attorneys with the requisite knowledge and experience who can assist other Crowns with pediatric homicide prosecutions across the province.

- Number 128: law schools should offer courses in basic scientific literacy and the interaction of science and the law;
- Number 134: the National Judicial Institute should develop programs for judges on threshold reliability and the scientific method in the context of determining the admission of expert scientific evidence.

IV. LEGAL DEVELOPMENTS AND COMMENTARY ON PROVINCIAL AND TERRITORIAL EDUCATION INITIATIVES

This non-exhaustive review sets out a number of recent educational initiatives that have taken place across Canada since the release of the *2005 Report*.

Public Prosecution Service of Canada (PPSC)

In 2006, the PPSC was established as a separate federal government organization to replace the Federal Prosecution Service which was part of the Department of Justice Canada.

The annual PPSC School for Prosecutors has provided training to federal prosecutors concerning the prevention of wrongful convictions since the release of the *2005 Report*. The School includes a panel on this subject as a routine aspect of its Level I course. Federal prosecutors also have the opportunity to attend conferences from time to time where education in relation to this issue is featured.

In addition, in 2009-10, the PPSC, in collaboration with the RCMP and Department of Justice Canada, conducted a series of day-long training sessions for prosecutors and RCMP officers in the three northern Territories. The training included presentations on eyewitness identification, false confessions and tunnel vision. In total, about 75 police and prosecutors attended the interactive sessions. The PPSC prosecutes all criminal offences in the North, including murder, whereas in the provinces, provincial prosecution agencies generally prosecute offences under the *Criminal Code*.

The PPSC continues to consider other ways and means to provide ongoing education and training to federal prosecutors in this important area. For example, the Service's Deskbook was updated after the release of the *2005 Report* to ensure that the lessons contained in the Report were incorporated into relevant Deskbook chapters. However, the Deskbook is currently undergoing substantial revision. The new edition will include, for the first time, a separate chapter on the Prevention of Wrongful Convictions. The inclusion of this chapter in the new Deskbook will enable the PPSC to draw greater attention to this matter and to provide basic

education on this topic to all federal prosecutors.

British Columbia

Since the release of the *2005 Report*, British Columbia has made concerted efforts to increase the awareness of wrongful convictions within the Criminal Justice Branch. Most notably, it has expanded educational and professional development opportunities in relation to this issue.

The topic of avoiding wrongful convictions has been highlighted in many of BC's internal training events. There is an annual conference held every calendar year, attended by most of the Crown counsel from around the province. In 2005, the conference included a one-day plenary session on the topic of Wrongful Convictions. Included amongst the speakers were Thomas Sophonow and his counsel. In 2006, the half-day plenary session was "Preventing Wrongful Convictions: Understanding Eyewitness Identification" and speakers included Jennifer Thompson (the victim of a violent rape in 1984 who incorrectly identified Ronald Cotton as her assailant; he served 11 years in prison before being exonerated by DNA.) The 2008 conference offered a half-day session educating Crown about false confessions, in an effort to assist them in identifying problem cases and preventing wrongful convictions. This was attended by 200 Crown attorneys. In 2009, the morning plenary session focused on Trial Fairness and preventing wrongful convictions. Also offered at this conference was a half-day session on charge assessment, which included focused discussion regarding identifying factors which may lead to wrongful convictions. In 2010, the annual conference plenary focused on Expert Evidence and included as a keynote speaker and panel member Commissioner Goudge, who provided an overview of his work with the *Goudge Inquiry*.

Other internal educational events include advocacy training workshops for junior (1-5 years experience) mid level (5-12) and senior (over 12) Crown counsel, all of which involve case studies which focus on the appropriate exercise of Crown discretion, and each of which considered various factors which could lead to wrongful convictions. For the past five years, every new Crown counsel has attended a three-day conference to educate them on the role of the Crown. Included is a session on avoiding wrongful convictions and avoiding tunnel vision, with Crown counsel watching a recorded version of Jennifer Thompson's presentation on eyewitness identification. In 2006, 130 B.C. Crowns attended an internal leadership conference, which included a half-day session on lessons learned from the *Lamer Inquiry*.

The Criminal Justice Branch has provided funding for a number of Crown counsel to attend various learning events provided by external organizations. A number of Crowns attended the "Unlocking Innocence: Avoiding Wrongful Convictions" international conference in Winnipeg, Manitoba in 2005, following

which a working committee was formed to develop internal training on this issue for the rest of the Criminal Justice Branch. Crowns from B.C. attended seminars at Osgoode Hall Law School in Toronto in 2005 (Expert Evidence in Criminal Proceedings: Strategies for Avoiding Wrongful Convictions and Acquittals), 2006 (Eyewitness Identification & Testimony: Strategies for Avoiding Wrongful Convictions and Acquittals) 2007 (Expert Evidence) and 2009 (Good Science, Bad Evidence: New Perspective on the Reliability of Evidence in Criminal Proceedings). In addition, the Continuing Legal Education Society of British Columbia has provided sessions dealing with aspects avoiding wrongful convictions, as well as one in 2009 entitled “Preventing Wrongful Convictions.” A number of Crown counsel both taught at, and attended, this course. All Crowns have branch-funded access to all archived CLE webcasts.

British Columbia continues to examine changes in policy and procedures and is committed to the education and training of its prosecutors on issues related to wrongful convictions and miscarriages of justice.

Alberta

Alberta Justice held a conference for all Alberta prosecutors in May 2004, entitled “Preventing Miscarriages of Justice – Role of the Crown.” Featured speakers at the conference included Jennifer Thompson. Bruce MacFarlane, QC, then Manitoba’s Deputy Minister of Justice, spoke about how wrongful convictions occur and what the Crown can do to avoid them.

In October 2005, approximately twenty prosecutors from Alberta Justice attended the Unlocking Innocence conference in Winnipeg.

Alberta Justice held a conference for all its prosecutors in May 2009, two days of which were devoted to “Just Outcomes.” Topics included: Eyewitness Misidentification; In-Custody Informant Evidence; Disclosure and Addressing Wrongful Convictions. The keynote speaker was James Lockyer, who presented an “Overview of Wrongful Convictions in Canada and Factors that Lead to Wrongful Convictions.”

Alberta Justice holds a Crown School each year. Every third year, the theme of the Crown School is Advocacy. Topics covered include: identification evidence and photo lineups; expert evidence and witnesses; and disclosure. In addition, formal orientations (five-day programs) are held for newly hired prosecutors. Topics covered during formal orientation programs include: the role of the Crown prosecutor; ethics and decision making; and plea negotiations.

Many of the police services in Alberta have implemented new policies and procedures, or have amended existing ones, to address causes of wrongful convictions. More importantly, training is offered in relation to the new policies and procedures that focus on this area.

Saskatchewan

Since 2005, Saskatchewan has made particular efforts to educate prosecutors on how to avoid tunnel vision and prevent miscarriages of justice. The annual prosecutor conferences for the past several years have included at least one component that is related to these issues. These sessions have included:

- 2007: Avoiding Miscarriages of Justice: What we have learned from the *Driskell Report* and *Lamer Inquiry*;
- 2009: Forensic Pathology Opinion Evidence;
- 2010: Avoiding Miscarriages of Justice: RCMP Sgt. Kathy Hartwig.

The conferences have also included panel discussions on ethical dilemmas facing Crown prosecutors.

The 2011 conference will feature a segment on eyewitness testimony and the frailties that are associated with this kind of evidence.

There have also been training sessions aimed at junior lawyers (less than five years' experience) specifically on the topics of prosecutorial discretion and the decision to prosecute.

Manitoba

Manitoba was a partner in organizing the highly successful October 2005 conference “*Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction.*”

Manitoba held its eighth Annual Crown-Defence conference in September 2010. Founded on the recommendations of Commissioner Cory in the *Sophonow Inquiry Report*, the conference began as a cooperative effort between prosecutors from Manitoba Justice and members of the defence bar. Soon afterwards, prosecutors from the former Federal Prosecution Service joined the organizing committee, who were then followed by representatives of the Winnipeg Police Service and RCMP, D Division. In 2008, the judges of the Provincial Court of Manitoba were welcomed as full participants in the conference. In 2010, it was announced that the Judges of the Court of Queen's Bench would also be represented on the organizing

committee. This annual event, now in its ninth year, has developed into a truly unique conference in Canada where Crown, defence, police and the judiciary have cooperated in developing and conducting a continuing education event.

Issues related to wrongful convictions and the prevention of miscarriages of justice have been a main focus of the conference since its beginning. In addition to in-depth panel discussions on the Thomas Sophonow, James Driskell and Goudge inquiries, many distinguished speakers from across Canada and the United States have attended to offer their views and insights into this significant area of concern to the justice community, including:

Mr. Justice John Major
 Professor Bryan Stevenson
 David Asper
 James Lockyer
 Senator Larry Campbell
 Mark Sandler
 Professor Lee Steusser
 Jerome Kennedy
 Dr. Janice Ophoven
 Wally Opal, Q.C.
 Mr. Justice L. LeBel

Bruce MacFarlane, Q.C.
 Richard Wolson, Q.C.
 Rob Finlayson
 Mr. Justice Stephen Goudge
 Dr. Michael Pollanen
 Professor J. Don Read
 Robert Wright, Q.C.
 Mr. Justice Michael Moldaver
 Professor David Paciocco
 Mr. Justice Michael Code

Ontario

Ontario remains committed to providing continuing education for its Crowns and encourages participation in educational opportunities with the police, defence counsel, and others for an interdisciplinary approach to understanding the phenomena of wrongful convictions. As a result, a number of developments have occurred since the release of the *2005 Report*.

In May 2006, the Ontario Criminal Conviction Review Committee (OCCRC) was established to look into specific allegations of wrongful convictions, as well as to develop proactive strategies to prevent miscarriages of justice. The OCCRC, which is composed of six senior Crown counsel, who represent the appellate, policy and trial perspectives from across the province, was originally advised by the Honourable Michel Proulx, former Justice of the Quebec Court of Appeal, and is currently being advised by the Honourable Patrick Lesage, former Chief Justice of the Superior Court of Justice in Ontario.

In the spring of 2008, the Justice Excellence portfolio (JE) was established to:

- conduct the review of 129 cases in the Shaken Baby Death Review arising out of the *Goudge Inquiry*;

- conduct the review of approximately 146 cases involving hair microscopy evidence, as a result of a recommendation in the *Driskell Inquiry*;
- review emerging issues associated with wrongful convictions; and
- develop Crown policy and an education plan to ensure Ontario prosecutors have the most current understanding of issues contributing to potential wrongful convictions.

a) Continuing Education

Ontario's Ministry takes an active role in providing ongoing education for its Crowns. The following education and training continues to occur on an annual basis:

- A four-week series of educational sessions is held every summer and includes Crown summer school on Expert Evidence;
- an educational conference is held every spring;
- specific conferences and training sessions are held throughout the year where Ontario's Crowns are encouraged to share experiences and best practices, and to learn from other jurisdictions;
- Ontario Crowns attend conferences offered by the Law Society of Upper Canada, Ontario Bar Association and Federation of Law Societies of Canada, as well as private organizations such as Osgoode Continuing Legal Education to update legal knowledge and meet mandatory continuing education requirement of the law society.

b) Education on the Recommendations of the Goudge Inquiry

- Spring Conference 2009-2010 included panels on the recommendations of the *Goudge Inquiry*;
- Summer school 2005-2010 included lectures on pediatric forensic pathology;
- Education Session in 2010 attended by Crowns, defence lawyers, pathologists, judiciary, focused on child homicides and included international medical experts as speakers and panel members;
- Spring Educational Conference 2005-2010 – three-day Crown conference included ethical issues, forensic updates, and expert evidence issues.

c) Training on the Causes and Prevention of Wrongful Convictions

Training on the causes and prevention of wrongful convictions since the release of the *2005 Report* includes:

- Spring 2005: The Annual Spring Educational Conference included a comprehensive, multi-disciplinary training session on eyewitness identification;
- October 2005: Several delegates attended the international conference in Winnipeg;
- November 2005: approximately ten Crown attorneys were funded to attend a program at the Osgoode Professional Development Centre on expert evidence, which focused on preventing wrongful convictions and wrongful acquittals;
- Spring 2006: the Annual Spring Educational Conference, “Prosecuting in 2006 and Onward,” included topics such as consideration of the accuracy of verdicts and eyewitness identification, both of which are directly related to the prevention of wrongful convictions. Panels included a number of presentations on the appropriate use and limitations of scientific evidence, and speakers highlighted the necessity of all participants in the criminal justice system to work vigilantly to avoid wrongful convictions. There was also a presentation on the creation of the Ontario Criminal Conviction Review Committee and its mandate as well as other updates on the work currently underway in this area.
- Spring 2008: the Annual Spring Educational Conference included a multi-disciplinary presentation on the use of Confidential Informants, as well as updates on the *Goudge Inquiry*, Evidence of Co-Conspirators and regular topics such as Drinking and Driving, Charter Updates, and Sentencing Updates.
- Spring 2009: The Annual Spring Educational Conference included presentations on the *Goudge Inquiry*, Lesage-Code Report, Dealing with the Under-represented Accused, and Youth Justice in the context of the Review of the Roots of Youth Violence Report.
- Spring 2010: The Annual Spring Educational Conference included Investigative Detention and Right to Counsel issues, an update on the *Goudge Inquiry* recommendations and the use of Expert Evidence and Crown Ethics issues.

All conferences and training sessions cover a variety of issues related to miscarriages of justice. The proper role of the Crown and prosecutorial ethics have featured prominently at bi-annual Ontario Crown Attorney training

conferences, as well as at the annual Crown summer school courses.

Quebec

Since 2005, at the annual Prosecutor School, the Director of Criminal and Penal Prosecutions (DCPP) has ensured that all new prosecutors have been educated about the prevention of wrongful convictions. In April 2006, SIF (le congrès des procureurs du Québec) offered a full-day course on the prevention of wrongful convictions, attended by 460 prosecutors. In 2008 and 2009, all Quebec prosecutors received two training sessions on amendments made to the guidelines regarding the prevention of wrongful convictions.

New Brunswick

Following the release of the *2005 Report*, New Brunswick created a standing committee called the “Prevention of Wrongful Convictions Committee,” now known as the “Conviction Review Committee.” Following a thorough review of the *2005 Report*, the Committee prepared and presented its report to the Assistant Deputy Attorney General (Public Prosecutions) in November 2004.

In October 2005, three Crowns attended the Winnipeg international conference. In November 2005, The Saint John Police Force and the Office of the Attorney General of New Brunswick hosted a two day conference entitled, “Understanding Wrongful Convictions.” The conference explored various topics that have been identified as critical in the prevention of wrongful convictions. Approximately 100 people attended the conference, including Crown prosecutors, defense counsel, police, as well as public safety employees. The topics presented were eyewitness identification, tunnel vision, AIDWYC and more.

The *Lamer Inquiry Report* became mandatory reading for all provincial Crown prosecutors. Regional meetings were held in early 2007 in all regions of the province to discuss the many aspects of the *Lamer Inquiry Report* and its implications for Crown prosecutors. These meetings were facilitated by the members of the Conviction Review Committee and included the viewing of recorded speakers from the Winnipeg conference.

Nova Scotia

The Nova Scotia Public Prosecution Service held numerous internal professional development programs for its Crown Attorneys prior to and after 2005. Many of these education programs involved a component(s) that related to recognition of the causes of wrongful convictions or the prevention of wrongful convictions. The following is a summary of these education efforts to prevent wrongful convictions since 2005:

1. Nova Scotia Public Prosecution Service, 2005 Fall Conference – included a presentation on “Wrongful Conviction Issues – Eyewitness Identification and Tunnel Vision.” It was attended by all Crown attorneys in Nova Scotia who were not required to attend court.
2. Nova Scotia Public Prosecution Service, 2006 Fall Conference – included a presentation on the role of, and services offered by, the RCMP Forensic Laboratory with emphasis on DNA issues. It was attended by all Crown attorneys in Nova Scotia who were not required to attend court.
3. Nova Scotia Public Prosecution Service, 2007 Fall Conference – included a presentation by a psychologist on the possibilities and causes of an accused providing false confessions to the police. It was attended by all Crown attorneys in Nova Scotia who were not required to attend court.
4. Nova Scotia Public Prosecution Service, 2008 Fall Conference – included presentations on the revised “Disclosure Protocol” and on the use and benefits of DNA evidence. It was attended by all Crown attorneys in Nova Scotia who were not required to attend court.
5. Nova Scotia Public Prosecution Service, 2009 Fall Conference – included a presentation on when Crown Attorneys could face civil lawsuits for the tort of malicious prosecution. It was attended by all Crown attorneys who were not required to attend court.
6. Nova Scotia Public Prosecution Service, 2010 – newly hired Crown Attorney Orientation / Professional Development Program included a presentation on the proper role of the Crown, Chapter 17 of the *Code of Ethics*, and the *Krieger* and *Miazga* decisions of the Supreme Court of Canada, as well as a presentation on “Best Practices in Prosecutions.” These presentations were attended by approximately 15 newly hired Crown attorneys.

Newfoundland and Labrador

The *Lamer Inquiry* has entrenched the phenomena of wrongful convictions and miscarriages of justice into the consciousness of prosecutors in the province. As a result, there has been much activity in relation to wrongful convictions since the release of both the *2005 Report* and the *Lamer Inquiry Report*. Increased awareness that wrongful convictions occur has resulted in greater education and training in this area. The Department of Justice currently provides training sessions for prosecutors in the areas of eyewitness identification, interviewing children and child witnesses, and expert witnesses (especially pathologists and experts in behavioural sciences). On a broader perspective, these sessions are aimed at reminding prosecutors of the proper role of the Crown and the proper limits to Crown advocacy, and offer ways to identify and prevent tunnel vision.

Additional funding continues to be allocated for training and education sessions and conferences out of province as well, such as the annual Criminal Law Conference and Ontario Crown School.

The province's newly-established Criminal Justice Committee is assessing the viability of hosting a conference in the next two years on preventing wrongful convictions.

There have also been changes in the Royal Newfoundland Constabulary (RNC), which now incorporates lectures on wrongful convictions for new recruits. From 2008 to 2010, there were 45 RNC members trained in the investigative interviewing technique known as the PEACE model. All officers will receive some form of this training. Officers who are currently, or will soon be, performing the duties of a team commander attend an eight-day course in Major Case Management. Topics such as applying a critical thinking methodology, involving prosecutors in the delivery of legal and strategic advice throughout the investigation, and presenting a major case management submission to a Joint Management Team, are canvassed.

Prince Edward Island

The *2005 Report* was distributed to all Crown attorneys in the province and discussed at various Crown meetings. All PEI Crown attorneys attended the Nova Scotia conferences in 2005, 2006, 2007, 2008 and 2009 described above.

The recommendations from the *Report*, as well as recommendations of the various commissions of inquiry, were discussed and debated at meetings of the Associations of Chiefs of Police. Recommendations directed at police investigative techniques have been incorporated into the curriculum at the Atlantic Police Academy.

V. DEVELOPMENTS IN EDUCATIONAL INITIATIVES IN CANADIAN LAW SCHOOLS

Many Canadian law schools are currently addressing the issue of wrongful convictions in their law school curricula:

- University of British Columbia Law School (UBC Law) – offers a course entitled, “Preventing Wrongful Convictions;”
- University of Alberta Law School – offers an “Advanced Evidence” course that includes a segment on the evidential causes of wrongful convictions (e.g., eyewitness identification evidence, jailhouse informant evidence, false confessions and the voluntariness rule, the role of expert evidence and new science in wrongful convictions);
- University of Manitoba Law School – Bruce MacFarlane, QC, offers a course entitled, “Miscarriages of Justice” that examines the causes of wrongful convictions, how to avoid them, detection mechanisms and remedies that should be provided when a miscarriage of justice has occurred;
- Osgoode Hall Law School – offers a course entitled, “Forensic Science and the Law,” which introduces students to the interdisciplinary nature of forensic science and the law and includes an examination of wrongful convictions to highlight the utility and frailties of forensic science. Osgoode also offers participation in its Innocence Project as a credit course;
- Osgoode Hall Law School Professional Development Program, LLM – a required course, “Wrongful Convictions,” explores both causes and remedial approaches adopted by different jurisdictions;
- Osgoode Hall Law School Professional Development Continuing Legal Education Program (OPD) – OPD continues to offer programs, seminars and lectures to working lawyers and other professionals that are specifically related to wrongful convictions; many of their programs are web cast, and/or offered via “Distance Learning,” allowing those who wish to participate the opportunity to do so using web-stream technology;
- Specifically, Osgoode’s OPD Program has held five programs directly in response to the *2005 Report*:
 1. **Expert Evidence in Criminal Proceedings**, Strategies for Avoiding Wrongful Convictions and Acquittals, December 3, 2005
 2. **Eyewitness Identification and Testimony**, Strategies for Avoiding Wrongful Convictions and Acquittals, April 8, 2006
 3. **Second National Forum on Expert Evidence in Criminal Proceedings**, Strategies for Avoiding Wrongful Convictions and Acquittals, November 3, 2007

4. Expert Forensic Evidence in Criminal Proceedings: Avoiding Wrongful Convictions, May 9, 2009

5. Good Science, Bad Evidence? New Perspectives on the Reliability of Evidence in Criminal Proceedings, December 5, 2009

- University of Toronto Law School – has offered courses that deal with wrongful convictions. In addition, the university is home to the newly created Centre of Forensic Medicine and Science, an interdisciplinary Centre created, in part, to provide ongoing education for medical and legal students, as well as professionals, involved in the justice system;
- University of New Brunswick’s Law School – offers a “Wrongful Convictions Workshop” consisting of two phases. The first phase involves students familiarizing themselves with the general issue of wrongful convictions, focusing on systemic causes and examples from well-known cases; the second phase involves working with AIDWYC counsel on two suspected cases of wrongful conviction from New Brunswick. The course has a waiting list.
- The University of Ottawa Faculty of Common Law offers an upper level course entitled “Studies in Criminal Law: Wrongful Convictions.”

In addition to the above courses, several law schools have established “Innocence Projects” which offer law students first-hand experience in investigating potential cases of wrongful convictions:

- Osgoode Hall Law School’s Innocence Project;
- Innocence McGill;
- University of British Columbia Law School’s Innocence Project. It is a full-year course which incorporates in its weekly meetings speakers from the legal and forensic science communities. It recently announced a partnership with the Graduate School of Journalism to involve journalism students in investigating cases;
- The University of Ottawa Faculty of Common Law;
- University of New Brunswick’s Law School offers assistance to AIDWYC in that province;
- University of Western Ontario.

The Subcommittee recommends the continuation and expansion of these courses so that all law students across Canada are exposed to this issue and receive education about addressing and preventing wrongful convictions.

VI. OTHER OPTIONS FOR EDUCATION OPPORTUNITIES

a) National Forum on the Prevention of Wrongful Convictions – Winnipeg 2005

The *2005 Report* recommended a National Forum on the Prevention of Wrongful Convictions to raise the profile of this issue by sending a message to all justice participants, as well as to the public at large, that wrongful convictions will not be tolerated. The *Report* suggested the creation of a National Forum which would include leadership from the Ministries of the Attorney General, Deputy Ministers, the Heads of Prosecutions Committee, and Chiefs of Police to demonstrate a strong national commitment to the issue and to foster confidence in the administration of justice. The *Report* listed a number of desired outcomes following the creation of a National Forum on this issue.

In October 2005, the Province of Manitoba, in conjunction with the University of Manitoba Law School, organized a highly successful international conference on avoiding wrongful convictions, which achieved many of those goals. “*Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction*” was held in Winnipeg, on October 20-22, 2005. The conference brought together judges, prosecutors, defence lawyers, law enforcement personnel, scientists, legislators, journalists, victims and academics from around the world to explore all aspects of the causes, prevention, detection and remedies of miscarriages of justice. The registrants traveled to Winnipeg from across Canada, and from the United States, England, Nigeria, Scotland, Bermuda, Norway, Hong Kong, and Australia.

Pertinent details about the presenters and presentations are included below to demonstrate how this type of national conference, involving participants from different fields and jurisdictions, can embrace a wealth of information and perspectives on such a fundamentally important issue in an inclusive and collegial atmosphere. The keynote speakers and their areas of presentation included:³⁶⁴

- The Honourable Peter Cory, Commissioner of the *Sophonow Inquiry*, identified a number of contributing factors toward the wrongful conviction of innocent people and expressed the view that “we must be sure that the deprivation of that fundamental liberty [the bedrock of democracy] is appropriate and is demonstrated beyond a reasonable doubt on evidence that is fair and a process that is fair;”

364 These brief summaries of the keynote speakers’ presentations come from the Final Report on the proceedings of the Conference in Winnipeg, Manitoba, Canada on October 20-22, 2005, www.canadiancriminallaw.com.

- Jennifer Thompson, a North Carolina victim of a brutal attack who incorrectly identified her attacker during a police line-up which ultimately led to his conviction until DNA evidence proved his innocence eleven years later;
- James Lockyer, a leading advocate in Canada on behalf of the wrongfully convicted and one of the founders of the Association in Defence of the Wrongfully Convicted (AIDWYC), spoke about how exposure of wrongful convictions is critical to the administration of justice because it acknowledges the innocence of the wrongfully convicted person and reopens the case in search of the real offender;
- Janet Reno, former Attorney General of the United States, spoke about methods of avoiding wrongful convictions and the crucial role that everyone in the legal community plays in the prevention and detection of wrongful convictions;
- Peter Neufeld, co-founder of the New York-based Innocence Project, spoke about the improvement of forensic science to help exonerate the wrongfully convicted; he also stressed that DNA testing and other forensic science evidence should not be required for the exoneration of those wrongfully convicted, given there are countless cases where scientific testing is not possible due to the lack of available scientific evidence;
- The Honourable Irwin Cotler, then Minister of Justice and the Attorney General of Canada, insisted that justice officials be guided by the pursuit of justice, and delivered a passionate plea for all justice system participants to develop a “culture of prevention to pre-empt these factors;”
- Bryan Stevenson, Executive Director of the Equal Justice Initiative of Alabama, pointed out that the principle of justice is based on fairness, not the marginalization of race or poverty; however, in the United States the justice system often treats guilty rich people better than innocent poor people;
- Dr. Adrian Grounds, forensic psychiatrist at the Institute of Criminology and Department of Psychiatry at the University of Cambridge, has conducted research on the psychiatric effects of wrongful conviction and imprisonment, and the treatment and support needs people face when released from long-term imprisonment;
- Dr. Don Read, Department of Psychology at Simon Fraser University, spoke about the issues associated with eyewitness misidentification;
- Alan D. Gold, defence lawyer, reviewed forensic science and the extent to which it provides reliable evidence in court, and argued that fundamental justice encompasses only reliable evidence and the prospect of imprisonment or other loss of liberty based upon unreliable evidence violates our standards of what is proper and just;

- Gisli Gudjonsson, Professor of Psychology at the Institute of Psychiatry in London, spoke about his examination of the phenomenon of false confessions, and highlighted psychological vulnerability and police impropriety as the two main causes for false confessions.

In addition to these keynote speakers, several panels offered various perspectives on the following issues:

- *Lost Lives: The Human Side of Wrongful Convictions* – Michael Austin (who spent 27 years in a Maryland prison for a murder he didn't commit); Joyce Milgaard (who spent 23 years fighting to free her son); Ronald Dalton (who spent almost nine years in a Newfoundland prison for strangling his wife and was acquitted on a retrial); Justice Jeffrey Oliphant (Manitoba Court of Queen's Bench);
- *The Need for Experts on Eyewitness ID: Not Seeing Eye to Eye* – a debate between defence counsel Mona Duckett of Royal, McCrum, Duckett & Glancy in Edmonton, and law professor Lee Stuesser of the University of Manitoba Faculty of Law;
- *Splitting Hairs: A Case Study in Reviewing Faulty Science* – Bruce MacFarlane, QC, then Deputy Attorney General of Manitoba, and General Counsel Rick Saull, reviewed the work of Manitoba's Forensic Evidence Review Committee (FERC), which examined serious cases in which now discredited hair comparison evidence was relied upon to secure a conviction;
- *Jailhouse Informants: The Problems and Solutions* – Richard Wolson, defence lawyer and Commission Counsel during the *Sophonow Inquiry*, and Rob Finlayson, then Assistant Deputy Attorney General with Manitoba Justice, focused on the detrimental impact of jailhouse informant testimony on the reputation of the criminal justice system, as it is often a contributing factor to miscarriages of justice;
- *In-Custody Interrogations: Protecting the Accused/ Preserving the Record* – Peter Neufeld, co-founder of the Innocence Project in New York, Neil Barker, Director of the Polygraph School at the Canadian Police College, and Renee Pomerance, then Crown Counsel for the Ontario Ministry of the Attorney General, discussed the issues of tunnel vision, false confessions, and how non-adherence to proper in-custody interrogation procedure may contribute to wrongful convictions;
- *Truth or a Train? Light at the End of the Tunnel Vision* – Chief Jack Ewatski of the Winnipeg Police Service, and Jacqueline St. Hill, Director of Winnipeg Prosecutions for Manitoba Justice, discussed the role all participants in the criminal justice system can play in combating tunnel vision;

- *The Role of the Media in Unlocking the Innocent* – examined the critical role journalists often play in uncovering wrongful convictions, and debated the ethical and legal issues facing reporters in the process; perspectives were offered from the media (Kirk Makin, *Globe and Mail*; Dan Lett, *Winnipeg Free Press*), the defence (David Asper), the government (Bruce MacFarlane, QC);
- *Wrongful Detection Models: Two Examples, External Observations and Rebuttal* – two different systems for investigating allegations of wrongful conviction were discussed. Kerry Scullion, Department of Justice Canada, explained the work of the Criminal Conviction Review Group. Graham Zellick described how England’s Criminal Cases Review Commission, an investigative body independent of the criminal justice system, works. The Honourable Peter Cory closed the panel by presenting his observations on the benefits and drawbacks of each system;
- *Righting the Wrong: Remedies and Compensation* – The Honourable Peter Cory, Dr. Adrian Grounds, and Madam Justice Sheilah Martin, Court of Queen’s Bench of Alberta, examined whether, once a wrongful conviction has been confirmed, a public inquiry should be held, and how should the level of compensation be determined.

Following the close of the conference, Justice Marc Rosenberg of the Ontario Court of Appeal and Professor Kent Roach of the University of Toronto’s Faculty of Law delivered an educational panel for the judiciary entitled, “Frailties in the Criminal Justice Process: The Judicial Role.”

b) Joint Educational Opportunities

A number of the provinces have hosted joint education sessions in recent years involving any combination of Crowns, police, defence lawyers, judiciary, and other experts that participate in the criminal law system. These joint educational opportunities offer participants a theme or topic, such as the prevention of miscarriages of justice, which is discussed from different perspectives, thus providing valuable insight for all participants.

One prime example of a joint educational opportunity is the “Pediatric Head Injury and the Law” conference hosted by the Ministry of the Attorney General in Ontario in March, 2010. Crown attorneys, defence counsel, members of the judiciary and pathologists attended to focus on issues related to pediatric forensic pathology and wrongful convictions.

In October 2010 in British Columbia, the Continuing Legal Education Society hosted a Crown-Defence Conference, attended by many police officers, entitled “Preventing Wrongful Convictions,” which addressed a host of issues relating to the causes and prevention of wrongful convictions.

The recent creation of the Centre for Forensic Science and Medicine at the University of Toronto³⁶⁵ is an interdisciplinary initiative dedicated to advancing teaching and research in the forensic disciplines.³⁶⁶ Of particular importance to the Centre is recognition of the interface between the law and the social sciences. As well as offering inter-professional education for students of medicine and law, the Centre offers continuing professional development initiatives for the medical and legal communities, and intends to facilitate research into areas of controversy and debate in forensic medicine and science, among other educational endeavours.³⁶⁷ The Centre is currently developing symposia and workshops for continuing professional development for lawyers and the judiciary.

c) Police Education Opportunities

The educational initiatives undertaken by a number of police agencies across the country are to be commended. The Subcommittee continues to endorse its earlier recommendations regarding continuing education in relation to the prevention of miscarriages of justice. As stressed in the *2005 Report*, increased police education with respect to the prevention of wrongful convictions and reinforcing proper investigative techniques and training will accomplish two very important goals: (1) preventing wrongful convictions; and (2) ensuring the guilty are convicted.

Since the *2005 Report*, considerable training focused entirely or partially on the problem of wrongful convictions as been developed and delivered at the national, provincial and municipal levels. The training is most frequently (but not exclusively) delivered in the context of “Major Case Management” training, which includes content specifically designed to address the problem of wrongful convictions. It is also included in various investigative training courses.

The following is a non-exhaustive list of training relevant to preventing wrongful convictions provided at the national, provincial and municipal level in Canada.

365 See <http://www.forensics.utoronto.ca>.

366 The creation of this Centre was discussed at the *Inquiry into Pediatric Forensic Pathology* in Ontario, and received support from Commissioner Goudge. *Goudge Inquiry Report*, p. 299.

367 *Ibid.*, pp. 298-299.

National

At the national level, the Canadian Police College in Ottawa delivers a number of courses related to major case management and serious crime investigation that have some element directed at the issue of wrongful convictions, most notably the two-week Major Case Management Course, which is significantly informed by the findings of commissions of inquiry into wrongful convictions and other failed investigations. The course is supported by a very comprehensive manual developed and regularly updated by the Canadian Police College.

Police agencies from across Canada take advantage of opportunities to send qualified members to the Canadian Police College in Ottawa for Major Case Management training. This CPC program is also delivered at the RCMP's Pacific Region Training Centre (PRTC) in Chilliwack, B.C. and is attended by RCMP and municipal officers from throughout B.C.

Provincial

In British Columbia, the RCMP created a "Foundations of File Coordination" course. Since 2009, 12 courses have been delivered to approximately 225 police officers. All candidates are required to have read several summaries of wrongful convictions cases including Morin, Sophonow, and Dix, as well as other cases where there were significant investigative failures, including Bernardo and Murrin. Police officers from the RCMP and municipal police departments across Canada have received this training. It is expected this course will be delivered in other provinces as well.

In addition, the RCMP's Pacific Region Training Center delivers a course titled "Introduction to Major Case Management," now available on-line through the Canadian Police Knowledge Network (CPKN).

In 2008-2009, the RCMP delivered three-day "Critical Thinking" workshops to RCMP and municipal police officers in B.C., targeted at Team Commanders, Primary Investigators and File Coordinators – the three key positions in the Major Case Management Command Triangle. This training was made available to Crown counsel as well. The main goal of these workshops was to provide police officers critical thinking skills to use to target tunnel vision in investigations. Training aimed at avoiding tunnel vision was also delivered to RCMP in northern communities in 2009-2010.

The Justice Institute of BC (JIBC) in New Westminster provides both basic and advanced training for all municipal police officers in B.C. The JIBC contracts with the Ontario Police College to provide a nine-day Major Case Management

(MCM) course. A module specifically to address the issue of wrongful convictions has been included since the *Morin Inquiry*. Further, an important feature of MCM training is emphasis on conducting ethical investigations which follow best practices and respect the current state of the law and public expectations. In addition, other courses provided by the JIBC, such as the Major Crime Investigators' course, also include modules on preventing wrongful convictions.

Municipal

In addition to training provided at the national and provincial level, other training occurs internally in municipal police departments as well.

For example, the Vancouver Police Department, the largest municipal police department in B.C., has an extensive in-service training program and its "Level II Investigators' Program" includes a half-day module specifically targeted at preventing wrongful convictions.

The Calgary Police Service in Alberta and the Toronto Police Service in Ontario – each the largest municipal forces in their provinces – both deliver training specific to preventing wrongful convictions. Calgary Police Service has a mandatory e-learning module on Miscarriages of Justice that police recruits complete, which is complemented by one hour of classroom time to complete the session.

Several other municipal police agencies, including those in Winnipeg, Edmonton and Halifax, deliver major case management and other investigative training which includes elements directed at how to avoid wrongful convictions.

d) Judicial Opportunities -- National Judicial Institute (NJI)

The National Judicial Institute's (NJI) three-day seminar, "Preventing Wrongful Convictions," concentrates on the judge's role in identifying and managing factors that can increase the likelihood of wrongful convictions. This course was first presented to Canadian judges in 2001 and has been offered on a number of occasions since then. In addition, modules from the course have been offered at various court requested programs across the country.

The NJI's latest offering of this intensive skills-based course was in October 2010. The seminar continues to evolve in the aftermath of several Canadian commissions of inquiry into wrongful convictions. Most recently, the course has given particular attention to the problems of expert evidence in light of the *Goudge Inquiry* in Ontario. Other topics include eyewitness identification evidence, false confessions, suspect witnesses, ineffective assistance of counsel,

circumstantial evidence and prosecutorial misconduct.

e) Bar Admission Course

The Subcommittee continues to support its earlier recommendation that law societies across the country include an educational module in their curriculum that deals with the causes and prevention of wrongful convictions, as well as the ethical responsibilities of the prosecution and defence. The course could offer case-specific examples to illustrate the fact that this is a problem that occurs in Canada more often than previously believed, and that must be combated by all justice participants.

f) Education Opportunities for the Defence Bar

The Subcommittee endorses its earlier position that the issue of wrongful convictions should continue to be part of defence counsels' educational activities on a regular basis. The Ontario Criminal Lawyers' Association, the Advocates' Society, Osgoode Professional Development and other continuing legal education programs host regular conferences and continue to provide extensive legal resources to its members. These educational activities should be encouraged.

Defence counsel should be invited to participate in panel discussions at Crown educational conferences and seminars, and invite Crown representatives to their educational events. Providing guest lectures at law schools on this issue, together with Crown representatives, should be encouraged to foster awareness and a deeper understanding of this complex issue for law students. Joint education opportunities should be encouraged.

VII. POSSIBLE TECHNIQUES TO PROMOTE EDUCATIONAL INITIATIVES

The *2005 Report* included a number of methods to present information with respect to miscarriages of justice. The Subcommittee strongly encourages the implementation of each of these methods for a rich and varied approach to providing education in relation to miscarriages of justice across Canada:

- presentation of case studies of wrongful convictions and lessons learned, to emphasize that the problem of wrongful convictions is not just a matter of legal theory, but involves real people wrongly incarcerated, while the real perpetrator runs free;
- small group discussions, which allow participants to identify problematic areas and tools to reduce the risk of wrongful convictions;

- practical exercises such as role-playing, demonstrations of witness interviews, conducting photo-lineups, etc., to allow participants to put theory into practice;
- distribution of educational materials and policies by CD-ROM, DVDs, and/or providing on-line links for inexpensive access, which will promote information sharing across the country;
- video-linked conferences to allow larger provinces to share resources and educational opportunities with smaller provinces and to provide ongoing educational training;
- multi-disciplinary conferences involving experts from outside the justice system to help adjust attitudes and the culture within the justice system;
- guest speakers;
- regular newsletters to keep Canadians involved and up-to-date on miscarriage of justice issues and conferences.

VIII. STATUS OF RECOMMENDATIONS REGARDING EDUCATIONAL AGENDA AND TOPICS

The *2005 Report* pointed out that a clear understanding and delineation of the roles of the Crown, the police, and the forensic scientist is crucial to the prevention of wrongful convictions. An itemized list was provided and many of the suggestions were incorporated into some of the recent educational programs offered to prosecutors and police across the country.³⁶⁸ All items recounted in the *2005 Report* should continue to be a part of continuing education and should be incorporated into law school curricula so that law students will be cognizant of these issues at the outset of their careers.

IX. EDUCATION IN THE FUTURE

Tunnel vision, frailties in eyewitness identification, the use of jailhouse informants, and faulty forensic science are some of the common problems that ultimately lead to cases of wrongful convictions. However, more troubling is the intangible, inherent “culture” with its entrenched attitudes and practices that provides the milieu in which wrongful convictions can result. As recognized in the *2005 Report*, it will take time, and the right kind of education, to foster the necessary cultural and attitudinal changes.

368 Please see *2005 Report, Chapter 10 – Education*, pp.148-151, for a discussion of these topics.

Justice system participants are to be commended for their increased awareness and efforts to improve the cultural milieu that has been identified as a leading cause of wrongful convictions in Canada in the hopes of preventing future miscarriages of justice. It is most important that this work be continued if it is to have any lasting effect.

Due to current economic restraints, new, innovative ways of delivering education must be explored. The creation of joint educational conferences that can be webcast on-line for all justice participants to access may be one way to contain costs while continuing to provide education in this area. Funds can be pooled together from various groups and Ministries. Offices can be encouraged to facilitate group discussions about the topics raised at the conference. In difficult economic times, the solution is not to forego continuing education, but to find creative ways to make it happen.

Given the staggering impact on people who are wrongly convicted, the damaging effect of wrongful convictions on public confidence in the administration of justice, and the financial costs involved in commissions of inquiry and compensation, the Subcommittee maintains its position that the expenditure of public funds on education programs in the hopes of preventing future miscarriages of justice is well worthwhile.

The Subcommittee continues to endorse all of the education recommendations in the *2005 Report*. Furthermore, in light of the success of the Winnipeg conference, it would be useful for a follow-up conference should be considered to canvass the developments over the past five years, together with the latest issues in relation to wrongful convictions.

CHAPTER 11 – OTHER ISSUES

I. INTRODUCTION

The *2005 Report* identified several other matters relating to wrongful convictions that the Working Group considered worthy of further consideration:

1. issues relating to police note taking and the inadequate retention of police notebooks, Crown files, trial exhibits and evidence;
2. inadequate disclosure; and
3. the ineffective assistance of counsel.

Regarding police notes, the *Report* cited findings in both the Morin and Sophonow inquiries indicating that there were no consistent rules on how police took and kept their notes, how long police officers' notebooks should be kept, and who should keep them and where. The *Report* observed a similar lack of consistent rules for the maintenance of Crown files, trial exhibits and evidence gathered but not used. Such retention issues had made it difficult to later investigate allegations of wrongful convictions, the *Report* noted. Efforts to locate police notes years later had been further hampered because police recorded their notes chronologically, rather than by project; thus all notes in relation to one case would not necessarily be found in one notebook. This practice, coupled with the fact that police officers, upon retiring, generally took their notebooks home with them, made it difficult, if not impossible, to locate all relevant notes long after the fact. The *Report* suggested that clear policies be developed for police, Crowns and court services regarding how long to keep police notebooks, Crown files and trial exhibits.

Concerning disclosure, the *Report* observed that several cases of wrongful conviction, especially historic ones, had involved the failure of Crown counsel to disclose information to the defence.³⁶⁹ However, another Heads of Prosecutions Committee Working Group produced a report on this subject and thus the Working Group chose not to examine this matter further.

In relation to the ineffective assistance of counsel, the *Report* noted that there was information to suggest that ineffective defence lawyers had contributed to some

369 See for example, the *Marshall Inquiry Report*, Volume I: Findings and Recommendations, pp. 238-244, and Recommendations on Crown Disclosure, pp. 290-291, Recs: 39-42. Significant disclosure issues were also identified in the *Sophonow Inquiry Report*, in particular the section on Disclosure.

cases of wrongful conviction in the United States, but it was unclear whether this was a factor in wrongful conviction cases in Canada. None of the Canadian commissions of inquiry that had reported when the *2005 Report* was released had highlighted this as an issue. Nevertheless, the Working Group recognized this as a potential issue in wrongful conviction cases in Canada and suggested in the *Report* that guidelines be developed to assist prosecutors in circumstances where it is suspected that an accused person may not be getting effective counsel.

II. 2005 RECOMMENDATIONS

Although no recommendations were made in the *2005 Report* regarding these issues, the following observations were made:

Police Notebooks/Crown Files/Trial Exhibits

Clear policies should be developed for police, Crowns and court services on how long to keep police notebooks, Crown files and trial exhibits. Clearly the cost implications and rapid technological changes will have to be considered in developing such policies.

Ineffective Assistance of Counsel

An issue that deserves some attention is the responsibilities of Crown counsel when they suspect an accused person may not be getting effective counsel. Perhaps some guidelines should be developed to assist prosecutors in these difficult ethical situations.

III. CANADIAN COMMISSIONS OF INQUIRY SINCE 2005

1. Police note taking and related issues

A. Quality of Police Note Taking

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

Commissioner Lamer identified inadequate police note taking by members of the Royal Newfoundland Constabulary (RNC) as a shortcoming in the police investigation that resulted in the wrongful murder conviction of Gregory Parsons. Commissioner Lamer noted that police documentation was inadequate overall.

Some officers did not take notes, some notes were made on scraps of paper³⁷⁰ and, even when people had important information, the information was not always adequately and accurately recorded.³⁷¹ Even experienced police officers sometimes took no notes when interviewing key witnesses, Commissioner Lamer observed. ³⁷² “...the absence of rigorous investigative techniques, in this case note-taking, can lead to the mishandling of important evidence.” ³⁷³

Commissioner Lamer recommended that the Royal Newfoundland Constabulary carefully review the recommendations in the *Morin Inquiry Report* concerning interviewing, note taking and statement taking, with a view to incorporating them into policy.³⁷⁴

In the *Morin Inquiry Report*, as part of Recommendation 100, the following recommendations were made in relation to the quality of police note taking;

Recommendation 100:

Creation of policies for police note taking and note keeping

Police note taking and note keeping practices are often outdated for modern day policing. Officers may record notes in various notebooks, on loose leaf paper, on occurrence reports or supplementary occurrence reports or on a variety of other forms. The Ministry of the Solicitor General should take immediate steps to implement a province wide policy for police note taking and note keeping. Financial and other resources must be provided to ensure that officers are trained to comply with such policies.

Minimum components of such a policy are articulated below:

[...]

g) Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities.

h) Supervision of police note taking is often poor; enforcement of police regulations as to note taking is equally poor. Ontario police

370 *Lamer Inquiry Report*, p. 104.

371 *Ibid.*, p. 108.

372 *Ibid.*, p. 119.

373 *Ibid.*, p. 121, but see the discussion generally at pp. 119-123.

374 *Ibid.*, p. 109. See also Recommendation 5 (a) at p. 327.

services must change their policies to ensure real supervision of note taking practices, including spot auditing of notebooks.³⁷⁵

b) Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007)

Commissioner LeSage criticized the failure of various police officers to make notes or produce reports of various events. He observed that, although it is fundamental to a police officer's role in the justice system that there be an accurate record of the information given to the police, and that this information be forwarded to the Crown if it relates to a prosecution, this was not always done in the Driskell investigation.

Commissioner LeSage recommended:

Police policies (it was the Winnipeg Police Service in this case) specifically state that complete, detailed notes are to be taken, and that all of this information is to be forwarded to the Crown if it relates to a prosecution, including all information relating to the credibility of a prosecution witness.³⁷⁶

c) Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008)

Commissioner MacCallum observed that investigation reports were not always complete, and that the investigation report would sometimes fail to relate the circumstances under which a statement was taken.³⁷⁷

B. Retention of police notebooks/Crown files, trial exhibits

Several of the Canadian inquiries that have released reports since 2005 have also identified inadequate retention periods regarding police notebooks, Crown files, trial exhibits and unused evidence as a problem in wrongful conviction cases simply because, years after the fact, the police notes and other relevant materials become impossible to locate when a potential wrongful conviction case is being examined.³⁷⁸

³⁷⁵ *Morin Inquiry Report*, pp. 34-35.

³⁷⁶ *Driskell Inquiry Report*, pp. 113-114.

³⁷⁷ See, for example, the *Milgaard Inquiry Report*, pp. 303, 318, 423.

³⁷⁸ The inability to locate police notebooks many years after the fact was identified in the case of the wrongful conviction of Milgaard. See comments in the *Milgaard Inquiry Report*, pp. 320, 330 and 423.

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

Commissioner Lamer recommended that police review the recommendations in the *Morin Inquiry Report* regarding notetaking with a view to incorporating them into policy. Recommendation 100 from the *Morin Inquiry Report* includes advice in relation to the retention of police notebooks:

- a) There should be a comprehensive and consistent retention policy for notes and reports. One feature of such a policy should be that, where original notes are transcribed into a notebook or other document, the original notes must be retained to enable their examination by the parties at trial and their availability for ongoing proceedings.
- b) A policy should establish practices to enable counsel and the police themselves to easily determine what notes and reports do exist. These practices might involve, for example, direction that one primary notebook must bear a reference to any notes or reports recorded elsewhere - for instance, October 4, 1998: supplementary report prepared respecting interview conducted with A. Smith on that date.
- c) The pages of all notebooks, whether standard issue or not, should be numbered.
- d) Policies should be clarified, and enforced, respecting the location of notebooks.
- e) The use of the standard issue “3” by “5” notebook should be revisited by all police forces. It may be ill suited to present day policing.
- f) The computerization of police notes must be the ultimate goal towards which police forces should strive.

b) Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008)

Commissioner MacCallum noted that many of the police officers’ notebooks were destroyed by the time of the first conviction review of the police files in 1989, 20 years after the initial investigation. Only a few officers had their original notebooks; in fact not many notebooks were available for the Commission to review. He observed in particular that the notebooks of officers involved in the murder investigation were not retained on the investigation file because officers’ notes included notes on many different cases and investigations. The original RCMP investigation file from 1969 was destroyed in the 1970s as part of the force’s regular file destruction policy.³⁷⁹

Concerning the retention of trial exhibits and other evidence, the unusual retention of the trial exhibits in Mr. Milgaard’s case for 27 years permitted DNA testing

379 *Milgaard Inquiry Report*, Vol. 2, Chapter 8, pp. 418, 423.

of semen samples found on the clothing of Gail Miller in 1997, which pointed to another perpetrator and factually absolved Mr. Milgaard. The retention of the trial exhibits had the unforeseen result that DNA typing was possible in 1997.³⁸⁰ Had the provincial practice been followed regarding the retention of exhibits, these items would not have been available for testing because the items would have been disposed of as soon as the case had exhausted the court process (including the outcomes of any appeals).³⁸¹

Commissioner MacCallum made three key recommendations concerning the preservation of these kinds of materials:

- all police and prosecution files, including police notebooks, relating to indictable offences, should be retained in their original form for a year, then scanned and entered into a data base, where a permanent secure electronic record can be kept;
- in all homicide cases, all trial exhibits capable of yielding forensic samples should be preserved for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions, and
- in all indictable offence cases, documentary exhibits should be scanned and stored electronically, unless a court orders otherwise.³⁸²

2. Disclosure

Lack of disclosure was identified as a central issue in one of the Commission reports released since 2005 and found to be a weakness in two others.

a) Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007)

Lack of disclosure to James Driskell of information relating to the credibility of two Crown witnesses was identified as the central issue.³⁸³ Commissioner LeSage found, in particular, that several members of the Winnipeg Police Service had failed to disclose material information to the Crown before, during and after Mr. Driskell's trial, and that these failures contributed to the miscarriage of justice against Mr. Driskell.³⁸⁴

380 *Ibid.*, for example, at Vol. 1, p. 319 at (f) (iii) and also p. 330.

381 *Ibid.*, Vol. 1, p. 330.

382 *Ibid.*, Vol. 1, Chapter 7, pp. 413-414.

383 *Driskell Inquiry Report*, p. 113.

384 *Ibid.*, p. 111.

b) Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008)

Prior to the Milgaard trial, the Saskatoon Police did not provide the Crown with police files relating to unsolved 1968 sexual assaults nor did they inform the Crown that the police considered a possible connection between these sexual assaults and the murder of Gail Miller, for which Mr. Milgaard was convicted.³⁸⁵ Later, when the Saskatoon Police received a report in 1980 from Linda Fisher that she believed her ex-husband, Larry Fisher, was responsible for the murder for which Mr. Milgaard had been convicted, the report was received, filed, referred to and possibly evaluated by the Saskatoon police but it went no further, Commissioner MacCallum found.³⁸⁶ Following up on the report might have led to the identification of Larry Fisher as a viable suspect in 1980, Commissioner MacCallum suggested. The Crown involved said that, had he been made aware of the report, he would have disclosed it to Mr. Milgaard or someone on his behalf. Commissioner MacCallum ultimately recommended that every complaint to police calling into question the safety of a conviction should be passed to the head of the prosecution agency, in this case the Director of Public Prosecutions.³⁸⁷ Nevertheless, the Commissioner generally found that the Crown's disclosure to the defence met the disclosure standards of the day,³⁸⁸ which were significantly less onerous than those mandated by the Supreme Court of Canada in the 1991 *Stinchcombe* decision.³⁸⁹

c) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

Disclosure issues were identified in two of the three cases examined. In the case of Randy Druken, Commissioner Lamer observed what he described as a significant breach of the disclosure obligation by the police and a serious breach by the Crown in failing to provide full and timely disclosure.³⁹⁰ In the Parsons case, disclosure was provided, but under highly unusual and stringent conditions.³⁹¹ However, disclosure was not considered a major enough issue in either case to result in recommendations by Commissioner Lamer.

385 *Milgaard Inquiry Report*, Vol. 1, p. 404.

386 *Ibid.*, Vol. 1, p. 407.

387 *Ibid.*, p. 329.

388 *Ibid.*, p. 404.

389 [1991] 3 S.C.R. 326. Re disclosure obligations, see also *R. v. McNeil* [2009] 1 S.C.R. 66.

390 See *Lamer Inquiry Report*, pp. 267-268.

391 *Ibid.*, p. 82.

3. Ineffective Assistance of Counsel

a) The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken (2006)

Commissioner Lamer raised questions concerning the conduct of defence counsel in all three of the cases he examined.

In determining why it took eight years for the appeal of the murder conviction of Ronald Dalton to be heard by the Newfoundland Court of Appeal while he languished in prison, Commissioner Lamer concluded that the conduct of two defence counsel played an instrumental role in that delay. He cited one lawyer's lack of diligence as the direct cause of one 15-month delay³⁹² and a second lawyer's conduct as the direct cause of a further delay of about four years, between July 1993 and April 1997.³⁹³ In both cases, Commissioner Lamer cited "procrastination" by these two defence counsel. "Neither lawyer saw Mr. Dalton's situation in sufficient light to admit, at the outset, that they simply were not up to the task but that the situation was urgent."³⁹⁴ However, in fairness, Commissioner Lamer concluded that criminal justice players generally must share responsibility for the results ultimately reached by the system. The criminal justice system 'did not see' Mr. Dalton for eight years and for that we are all responsible, he concluded.³⁹⁵ After Mr. Dalton's appeal was heard, a new trial was ordered. He was subsequently acquitted of the murder charge.

In that same inquiry, Commissioner Lamer also criticized the conduct of defence counsel regarding the wrongful conviction of Gregory Parsons. While the Commissioner was considerably more critical of the Crown's conduct in the case, he criticized the defence counsel for various reasons, such as for failing to object to several aspects of the Crown's closing address,³⁹⁶ and for failing to alert the police when he became aware during the trial of another viable suspect. Commissioner Lamer found that he should have done so.³⁹⁷ He also suggested that the defence counsel was not adequately skeptical of aspects of the police theory that would prove critical to the conviction. The defence had failed to adequately discuss aspects of the case with his client, Lamer suggested. However, he concluded that while defence counsel could have done certain things differently, overall he did everything he could and Mr. Parsons was fortunate to have had him as counsel.³⁹⁸

392 *Ibid.*, pp. 32-33,

393 *Ibid.*, p. 38.

394 *Ibid.*, pp. 66-67.

395 *Ibid.*, p. 68.

396 *Ibid.*, p. 157.

397 *Ibid.*, pp. 157, 158.

398 *Ibid.*, p. 162.

Finally, in the case of Randy Druken, who spent more than six years in prison for the 1993 murder of Brenda Young before proceedings were stayed against him after a jailhouse informant recanted his testimony, Commissioner Lamer again questioned the conduct of defence counsel. While he made no adverse findings against defence counsel, Commissioner Lamer raised several issues relating to his conduct, which he concluded may well have influenced the outcome of the trial.³⁹⁹

IV. LEGAL DEVELOPMENTS AND COMMENTARY

1. *Police Note taking and related issues*

A. Quality of Police Note Taking

Shortcomings in police note taking have been identified by other Canadian bodies and inquiries since 2005, although not in relation to allegations of wrongful conviction. While it is difficult to assess the prevalence of poor police note taking in Canada, the existence of police investigations hampered by poor note taking shows that the problem is of sufficient concern to merit continued attention.

Poor note taking by members of the RCMP was identified in two separate reports by the Commission for Public Complaints against the RCMP (CPC). In fact, in the Kingsclear Investigation Report (the Final Report by the CPC) into the RCMP investigation of alleged sexual and physical assaults of residents at the New Brunswick Training School at Kingsclear, the Commission noted that the adequacy of note taking, report writing and documenting has long been identified as a problem by both the Commission and the RCMP. In the Kingsclear case, the Commission observed that notes kept by the two officers who interviewed the police officer who was the subject of a serious criminal investigation were so cursory and devoid of substance that they were of no value to the investigation.⁴⁰⁰ “Neither previous policies dealing with note taking, report writing and documenting nor the focused cadet training mentioned in the Commissioner’s Notice have been successful in eliminating chronic problems in this area.”⁴⁰¹

399 *Ibid.*, p. 296-298.

400 See the Commission for Public Complaints against the RCMP, Chair’s Final Report After Commissioner’s Notice, Kingsclear Public Interest Investigation Report, File No.: PC-5710-200401, p. 2 of Executive Summary.

401 *Ibid.*

Two of the CPC's Final Report recommendations (Recommendations 5 and 7) concern police note taking practices:

- The CPC recommends that the RCMP examine, amend and enforce the "Investigator's Notebook" policy and all policies related to note taking, report writing and documenting to ensure that the policies are operationally effective and that officers adhere to and are continuously trained according to the guidelines;
- The CPC recommends that the various issues associated with note taking, report writing and documenting be addressed through various approaches, including training, policy revisions, internal oversight and monitoring.⁴⁰²

In the CPC Public Interest Investigation Report on Canada Day 2008-Victoria, British Columbia, which involved complaints that the RCMP and municipal police conducted unauthorized searches in Victoria, the RCMP were again criticized for failing to keep detailed notes, in this case of their participation in the Canada Day celebrations. The RCMP were urged to take contemporaneous notes and to document their actions accordingly, consistent with RCMP policy.⁴⁰³

Bearing in mind that the CPC has the mandate to comment only on the conduct of RCMP members, and to make findings and recommendations in relation to only their conduct (as opposed to that of officers from other agencies), the CPC noted that the lack of note taking by members of the West Shore RCMP Detachment was inconsistent with RCMP policy. The CPC recommended that the RCMP properly document matters in the future.⁴⁰⁴

Finally, in the *Report of the Cornwall Public Inquiry*, released in December 2009 concerning the institutional response to allegations of historical sexual abuse of young people in the Cornwall, Ontario area, Commissioner G. Normand Glaude also identified poor police note taking practices as an issue.⁴⁰⁵ Among the inquiry's recommendations, Commissioner Glaude stressed that it is important that the police (in this case the Cornwall Community Police Service and the OPP) be trained in proper police note taking (in this case for sexual assault investigations).⁴⁰⁶

402 See the *Kingsclear Final Report*, Executive Summary, p. 4.

403 Chair's Public Interest Investigation Report Canada Day 2008-Victoria, British Columbia, Overview, p. 1.

404 *Ibid.*, p. 9.

405 See, for example, comments by Commissioner Glaude concerning poor police note taking by the Cornwall Community Police Service, discussed in the *Report of the Cornwall Inquiry*, Vol. 1, Chapter 6, pp. 276-277, 392, 398-399, and in particular, his recommendations in that regard, pp. 472-474. <http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/index.htm>.

406 *Ibid.*, Vol. 1, Chapter 6, pp. 472-474, and Chapter 7, pp. 836-841.

Since the release of the *2005 Report*, some judges have also criticized police officers from forces across Canada for the poor quality of their note taking, or indeed for the failure to take notes at all, in relation to a range of charges. The quality of police notes or the lack of them has sometimes undermined the prosecution.

In the unreported case of *R. v. Campbell*,⁴⁰⁷ Stewart J. of the British Columbia Supreme Court excluded evidence of drugs and firearms in relation to a warrantless apartment search in 2007, in good part because the rookie police officers had failed to take proper notes “to create and preserve a detailed, coherent, consistent record of why they did what they did in connection with the warrantless search of the home.”⁴⁰⁸ In essence, the police could not provide the evidence through their notes of their grounds for searching the apartment and thus prove that the entry was authorized by law.

Likewise, in the 2007 Ontario Court of Justice case of *R. v. Sookram*,⁴⁰⁹ Chisvin J. sharply criticized the officers for their failure to take notes concerning their reasons for stopping a motorist, which reflected negatively on their credibility. The judge concluded that there was no legal basis for the detention of the motorist. Since it was an unlawful detention, the ensuing search was also unlawful, thus Mr. Sookram’s ss. 8 and 9 rights had been breached. The evidence of guns and drugs was excluded.

In the case of *R. v. Jarosinski*,⁴¹⁰ Stone J. of the BC Provincial Court excluded the evidence of breath samples after finding violations of the accused’s s. 10 rights. A central problem was that the police officer did not make specific notes regarding what he said in relation to the right to counsel.

Inadequate police note taking practices can play a significant role both in wrongful convictions and in the investigation of allegations many years later when memories have faded and witnesses are no longer available. The lack of a proper police record in such cases clearly impairs the re-investigation. In order to ensure that complete police records exist to permit the proper re-investigation of cases where allegations of wrongful conviction are alleged in relation to the most serious charges, the quality of police note taking must be improved across police agencies. While it may be that note-taking is adequate in most cases, the issue is so important that policies and practices across Canada should be harmonized to ensure best practices are followed. In that respect, it is encouraging that several police agencies in Canada have made significant improvements – or changes are under way – in their note taking policies and practices.

407 20080307, Docket: 24477, Vancouver Registry (BCSC).

408 *Ibid.*, p. 12.

409 [2007] O.J. No. 3123 (CJ)

410 [2006] B.C.J. No. 1178 (PC)

For example, the RCMP is developing a national policy dealing with both the quality of police note taking and related retention issues. In March 2011, a nationwide notice was issued to all RCMP officers from Deputy Commissioner Knecht, which acknowledged the important role of note taking in police investigations. It stated in part:

The responsibility to take proper notes does not stop with the individual investigator, but is also a critical function of effective supervision and management. Our long outdated notebook policy is being rewritten to reflect increased supervisory oversight and monitoring of members' notes to verify their quality and to address any note taking deficiencies. More specifically, the updated policy will more accurately reflect the significance of note taking and ensure that appropriate and accountable measures are established.

Supervisors and unit heads were instructed to ensure that members under their command adhere to good note taking practices and check notes monthly while the policy is formalized.

Notably, the Winnipeg Police Service, which was criticized for poor note taking and related issues in the *Sophonow Inquiry*, has since developed a comprehensive policy that addresses the major recommendations of the *Sophonow Inquiry* and other inquiries and could be considered a model policy for other agencies. For example, it instructs officers to write legibly, using a black ink pen and "if an error is made, cross it out with a single stroke so it can be read and initial it." It also suggests using a separate notebook for major investigations when "the extent of the member's involvement and the anticipated volume of information recorded indicates the material would be best organized in a separate notebook."

Likewise, the Peel Regional Police Service has a comprehensive notebook policy that complies with a standard developed by the Ontario Police College. Further, the Edmonton Police Service developed a note taking course in 2009 and has made it available through its "Online Learning System."

B. Retention of police notebooks/Crown files, trial exhibits

Other inquiries since 2005 have identified poor retention practices for police notes as a problem in investigations, but again, these inquiries were not examining cases of alleged wrongful conviction.

In its 2007 *Final Report* concerning the Kingsclear Public Interest Investigation, the CPC recommended that the RCMP examine the policies on notebook retention used by other police agencies to identify best practices applied across the country,

especially for officers who are retired, transferred or who voluntarily resign.⁴¹¹

In addition, Commissioner Glaude identified retention problems as a factor in his *Report of the Cornwall Public Inquiry*. Commissioner Glaude urged the Cornwall Community Police Service and the OPP to take appropriate measures to ensure that their retention policies regarding police officers' notes are clearly defined, well understood and strictly enforced. The policies should ensure they stipulate that officers' notes are police property, Glaude recommended. Should a police officer retire or go on extended leave, his or her notes need to be turned over to the police force.⁴¹²

Regarding the common law, the case of Romeo Phillion is a significant post-2005 example where the failure to locate important police notes and other evidence was a significant issue in the investigation into an alleged miscarriage of justice. In that case, a 1968 police report written by an Ottawa detective came to the attention of Mr. Phillion in 1998. It stated that Mr. Phillion had an alibi and could not have committed the Ottawa murder of which he had been convicted in 1972. However the police officer consistently maintained since 1998 that he later discredited that alibi. But no police notes, documentation or evidence were ever located to substantiate that claim. In fact, as the Ontario Court of Appeal noted, attempts to locate the detective's notes of his investigation and any physical evidence related to the case were unsuccessful.⁴¹³ As a result of an application to the federal Minister of Justice under s. 696.1 of the *Criminal Code*, Mr. Phillion's conviction was eventually quashed and a new trial was ordered. The Crown withdrew the charge; Mr. Phillion had spent 31 years in prison.

In 2010, Amina Chaudhary, who is serving a life sentence for first degree murder, filed an application in the Ontario Superior Court of Justice for a declaration that:

It is a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* that upon conviction for an offence prosecuted as an indictable offence all evidence and exhibits pertaining to the case be preserved for the lifetime of the offender, unless (1) the offender waives this requirement, or (2) a Court Order is obtained, upon notice to the accused, allowing for the destruction of any or all of the evidence.⁴¹⁴

411 *Kingsclear Investigation Report, supra*, Executive Summary, *Final Report*, p. 4.

412 *Report of the Cornwall Inquiry, supra*, Volume I, Recommendation 21, p. 475 and similar comments on p. 839.

413 *R. v. Phillion* [2009] O.J. No. 849 (CA) at para. 41.

414 See *Chaudhary v. Canada (Attorney General)* 2010 O.J. No. 4751. (Sup. Ct.) at para. 1.

Although Mr. Justice Edward Belobaba struck the application as being so “imprecise and ill-defined as to be completely unworkable,”⁴¹⁵ he said it was not frivolous and made the following comments:

Every police force, coroner’s office and forensic investigation agency has its own procedure about the preservation and retention of evidence. Some are set out in written protocols; others are more informal. Some are dictated by municipal bylaw; others simply reflect internal policy. In general, the more serious the crime, the longer the retention period.

It is fair to say that there is little to no uniformity in the post-conviction evidence retention policies that exist across the country. There is, for example, no legislated federal or provincial standard. It is also fair to say that the loss or destruction of evidence post-conviction is a recurring problem for the wrongfully convicted, a problem that has been highlighted by several recent commissions of inquiry including those reviewing the convictions of Stephen (sic) Truscott, Guy Paul Morin and David Milgaard.⁴¹⁶

In response to the various inquiry recommendations, federal/provincial/territorial deputy ministers of justice recently approved the establishment of a broad-based working group to study the issue of national standards for the retention of exhibits and evidence in criminal cases.

The Subcommittee agrees that there remain ongoing unresolved issues relating to the retention and storage of police notes and files, not to mention physical evidence such as trial exhibits, which can pose significant barriers to the investigation of alleged wrongful conviction cases years after the fact.

It is encouraging, however, that in an informal survey of a sample of police agencies from across Canada, every agency consulted had policy addressing the need to retain police officers’ notebooks when they retire or otherwise leave the agency.

Conclusion

A number of police agencies in Canada have made efforts to improve police note taking practices and/or made changes to retention policies since 2005. Nevertheless, problems appear with sufficient frequency to justify continued

415 *Ibid.*, at para. 15.

416 *Ibid.*, at paras 11, 6 and 8 respectively.

focus on this issue. More efforts must be made to ensure that all police agencies in Canada implement adequate policies and practices to reduce the incidence of inadequate note taking or notebook retention contributing to miscarriages of justice.

2. Disclosure

The November 2008 *Report of the Review of Large and Complex Criminal Case Procedures* by Justice Patrick LeSage and Professor Michael Code⁴¹⁷ is the most significant Canadian inquiry in recent years to examine disclosure procedures and practices. Citing the disclosure issues in relation to the wrongful murder conviction of Donald Marshall Jr. in Nova Scotia in the 1970s, LeSage and Code recognized that “the failure to comply with this right (to disclosure) is closely related to the risk of miscarriages of justice. ...[It] is one of the most important obligations in the criminal justice system.”⁴¹⁸

3. Ineffective Assistance of Counsel

The Innocence Project in the United States has identified “bad lawyering” as one of the seven most common causes of wrongful convictions.⁴¹⁹ The U.S. government responded to concerns in this area by introducing the Justice for All Act of 2004, which became law in October 2004. Although this Act became law prior to the publication of the *2005 Report*, it was not discussed in the Report. The Act includes the Innocence Protection Act, which, among other things, includes provisions to assist states that have the death penalty to create effective systems for the appointment and performance of qualified counsel as well as better training and supervision for both defence lawyers and prosecutors.

V. DISCUSSION OF RECOMMENDATIONS

While no recommendations were made in the *2005 Report* on these issues, the Subcommittee notes that these matters have been highlighted in various Commissions of Inquiry and in the jurisprudence in the ensuing years. The Subcommittee therefore wishes to emphasize that these issues remain ongoing matters of concern that require attention.

417 This document can be accessed online through the Attorney General of Ontario web site at <http://www.attorneygeneral.jus.gov.on.ca>.

418 *Ibid.*, p.21.

419 <http://www.innocenceproject.org>.

1. Police note taking and Related Issues

As described earlier, notwithstanding the improvements implemented or in progress in several police agencies in Canada, the quality of police note taking and related issues remain matters of concern for the Subcommittee. Since the survey conducted for this report was necessarily limited in scope, it remains unclear if the improvements noted are reflected in the majority of police agencies in Canada. The Subcommittee therefore recommends that a formal survey of police note taking practices, policies and related issues in Canada be undertaken.

2. Disclosure

Experts who have examined the literature and the cases on wrongful convictions have identified lack of disclosure as a critical factor in wrongful conviction cases.⁴²⁰ Indeed, it has been an important issue in a number of the high profile wrongful conviction cases in Canada, including in the recent case of James Driskell. The Subcommittee emphasizes this fact to illustrate the importance of both police and Crown remaining ever mindful of their disclosure obligations. The Subcommittee proposes no further action in this regard.

3. Ineffective Assistance of Counsel

The Subcommittee merely highlights the fact that questions concerning the conduct of defence counsel have been raised in relation to a number of the post-2005 Canadian cases of wrongful convictions.

4. Emerging Issues

Concerns Relating to Guilty Pleas

One issue that has received attention lately relates to the concept of “plea bargaining” or “plea compression,” where the prosecution offers a reduced penalty, and may agree to reduce the charge, in exchange for a guilty plea. An early guilty plea is recognized in the Canadian jurisprudence as a mitigating factor in sentencing, largely because it is seen to demonstrate remorse⁴²¹ and an acceptance of responsibility by the offender, and avoids the need to have the victim testify. Plea bargaining is a well-established discretionary process conducted between the parties out of the public eye that is generally accepted and valued by all criminal justice system participants. However, following a handful

420 See for example, Bruce A. MacFarlane, “Convicting the Innocent: A Triple Failure of the Justice System,” (2006) 31 *Manitoba Law Journal* 403.

421 *R. v. Fegan* (1993) 80 CCC (3d) 356 (Ont. C.A.). See also *R. v. Pitkeathly* (1994) 29 CR (4th) 182 (CA).

of recent cases before the Court of Appeal for Ontario, concerns are emerging as to whether the practice has, in some instances, enticed innocent persons to plead guilty to avoid the risk of receiving harsher sentences if convicted after trial.

Recently, the Ontario Court of Appeal has dealt with a small number of cases where the defendant pleaded guilty to a serious criminal offence that he or she did not commit, and later sought to appeal the conviction. In each case, the guilty plea was valid in the legal sense; however, fresh evidence admitted on appeal established that the guilty plea should be set aside as a miscarriage of justice.⁴²² The Court exercised its discretion to look behind the guilty pleas to try to understand *why* the accused persons pleaded guilty to crimes they did not commit: “[E]ven though an appellant’s plea of guilty appears to meet all the traditional tests for a valid guilty plea, the court retains a discretion, to be exercised in the interests of justice, to receive fresh evidence to explain the circumstances that led to the guilty plea and that demonstrate a miscarriage of justice occurred.”⁴²³

The factors that emerged pointed to the pressures faced by the defendant, such as the reality that those found guilty after trial often received harsher penalties. The Court was troubled by the fact that the inducements to plead guilty to avoid the risk of trial and the potential imposition of harsher sentences were extreme enough to entice innocent persons to plead guilty, especially when huge discounts in penalty were offered in exchange for the guilty plea. In *Hanemaayer*, the Court identified the quandary as a “terrible dilemma” faced by the accused: “[T]he justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.”⁴²⁴ In the cases of *Mullins-Johnson*, *Sherret-Robinson*, *C.M.*, *C.F.*, *Brant* and *Kumar*, each involving the death of an infant or child, the expert opinion of Dr. Charles Smith was relied on by the police, the Crowns, and the defence. Given Dr. Smith’s stature at that time, each accused and his or her counsel did not believe they could contest his opinion successfully. In *Kumar*, for example, the accused was charged with the second degree murder of his five-week-old-son. In addition to accepting the impossibility of successfully challenging the powerful evidence of Dr. Smith at that time, the Court found that Mr. Kumar, like Mr. Hanemaayer, faced a “terrible dilemma” when the justice system held out a “powerful inducement” – “a reduced charge, a much-reduced sentence (90 days intermittent instead of a minimum of ten years), all but the elimination of the possibility of deportation, and access to his surviving child.”⁴²⁵

422 See, for example, *R. v. Kumar*, *R. v. Sherret-Robinson*, *R. v. Mullins-Johnson*, *R. v. Hanemaayer* *supra*. See also Joan Brockman, “An Offer You Can’t Refuse: Pleading Guilty When Innocent”, *C.L.Q.* Vol. 56, 2010, 116.

423 *Kumar*, *supra*, at para. 34.

424 *Hanemaayer*, *supra*, at para. 17.

425 *Kumar*, *supra*, at para. 34.

These cases involving Dr. Smith were identified previously at the *Goudge Inquiry*, where the issue of “plea compression” was apparent in a number of child homicide cases that resulted in guilty pleas to lesser charges, often for reduced sentences, often to avoid the severe consequences that would follow convictions on the original charges.⁴²⁶ Commissioner Goudge made the following recommendation to address the concern that individuals may plead guilty to crimes they did not commit:

Recommendation #114:

The Child Homicide Team should, as an important component of its role, review cases in which plea offers have been made to the defence. This role will arise either as part of the mandated consultation by the prosecuting Crown with the team at every stage of the prosecution, or at the initiative of the defence.

The effect of this recommendation would be to ensure that Ontario’s Child Homicide Team, already involved at each stage of the prosecution, would be accessible to the defence to review any plea resolutions. This process would ensure that the correct charge(s) has been laid and an appropriate penalty for the offence has been offered, should a guilty plea proceed.

It is important to note that prosecution agencies and law societies across Canada, as well as the *Criminal Code*, provide some relevant guidance to lawyers working in the criminal justice system. For example, in the Deskbook of the Public Prosecution Service of Canada, the chapter concerning plea and sentence discussions and issue resolution indicates that Crown counsel’s approach to resolution discussions must be based on important principles, including fairness, openness and accuracy, and that Crown counsel may participate in resolution discussions where the accused is willing to acknowledge guilt unequivocally and the consent of the accused to plead guilty is both voluntary and informed.⁴²⁷ Similarly, the Guidebook of Policy and Procedure for the Conduct of Criminal Prosecutions in Newfoundland and Labrador encourages resolution discussions, but clarifies that pleas must be informed and voluntary and that agreements will be terminated if the accused maintains a position of innocence.⁴²⁸ Likewise, the Crown Counsel Policy Manual for provincial prosecutors in B.C. encourages

426 *Goudge Inquiry Report*, Volume 3, p. 451. Some of these cases have since appeared before the Court of Appeal for Ontario. The cases that involved Dr. Charles Smith, referred to above, were examined initially at the *Goudge Inquiry*. The fact that a number of these accused persons chose to plead guilty rather than fight for their innocence has led Mr. Justice Marc Rosenberg of the Ontario Court of Appeal to conclude that plea bargaining has become coercive to the extent that it requires a thorough review.

427 See Chapter 20 of the PPSC Deskbook, which was under revision at the time of writing.

428 See Conduct of Criminal Litigation in directives 9-24(8) and Plea Discussions and Agreements (12)

Crowns to initiate resolution discussions but advises Crowns to ensure that the accused accepts legal and factual guilt in relation to the proposed guilty plea.⁴²⁹

Additional guidance can be found in the rules of professional conduct established by law societies across the country, which guide the conduct of prosecutors and defence lawyers in each province and territory in Canada. For example, the rules of the Law Society of Upper Canada state that a defence lawyer cannot knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable. A related rule states that a defence lawyer shall not knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, or misstating facts or law.⁴³⁰ Law Society rules of professional conduct, as well as those of the Canadian Bar Association, also identify the general duties of prosecutors, which include the duty to act fairly⁴³¹ and honourably.⁴³²

Finally, s. 606 of the *Criminal Code* states that a court may accept a guilty plea only if it is satisfied that the accused is making the plea voluntarily and that he or she also understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea, and that the court is not bound by any agreement made between the accused and the prosecutor.

The extent to which defence lawyers and prosecutors require more direct and specific guidance in this important area is beyond the mandate of the Subcommittee; however, the discussion above serves as an important cautionary tale for the administration of justice.⁴³³

The Subcommittee wishes to reiterate that all participants in the criminal justice system must be vigilant to guard against creating an environment in which innocent people are induced to plead guilty.

429 Resolution Discussions and Stays of Proceedings, File No. 55000-00, 56220-00, Oct. 2, 2009.

430 See Rule 4.01 (2) (b) and (e).

431 See for example the BC Law Society Professional Conduct Handbook, Chapter 8, Rule 18, Duties of Prosecutor.

432 Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01 (3).

433 *R. v. Hanemaayer*, *supra*, at para. 2.

CONCLUSION

“Circumstances may accumulate so strongly even against an innocent man, that directed, sharpened, and pointed, they may slay him.” Charles Dickens, The Mystery of Edwin Drood.

The major theme of the *2005 Report* was vigilance:

Everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice and must be provided with appropriate resources and training to reduce the risk of wrongful convictions. Indeed, the Working Group believes that individual police officers and prosecutors, individual police forces and prosecution services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.

As this update has illustrated, there is a greater level of awareness among Canadian police and prosecutors about the causes and prevention of wrongful convictions. Education about the phenomenon of miscarriages of justice is now a staple of training for rookie and senior officers and prosecutors alike. However, in an era of fiscal restraint and new pressures on the justice system, there is a danger that this promising new level of activity will inevitably diminish. Thus the central message of this report must be the need for continued vigilance.

Specifically, the *2005 Report* made three concluding recommendations:

1. Subject to available resources, the Heads of Prosecutions Committee, perhaps in association with the Canadian Association of Chiefs of Police, should establish a resource center on the prevention of wrongful convictions. This could be a Web page or a page on the revamped FPT Heads' Intranet site.
2. The Heads of Prosecutions Committee should establish a permanent committee on the prevention of wrongful convictions, with continued involvement of the police community through the CACP.
3. The recommendations in this report should be continually reviewed by the committee to take into account developments in the law and technology and subsequent commissions of inquiry. At a minimum, a full review should take place in five years building on the ongoing work of this committee.

Even before the Report was released by Ministers, the Federal/Provincial/Territorial Heads of Prosecutions Committee (HOP) did indeed establish a permanent committee on the prevention of wrongful convictions. Its mandate is:

- The F/P/T Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions shall assist prosecutors and police in Canada to take measures to prevent the occurrence of wrongful convictions. In particular, it shall:
- Make recommendations to Heads on how to implement the recommendations of the Working Group on the Prevention of Miscarriages of Justice and how to keep them up to date, in light of legal and technological developments;
- Review any developments in Canada and abroad related to wrongful convictions, including emerging case law, technology, legislation and commissions of inquiry, and report to Heads on any changes in policies, practices and directions that should be implemented, either by individual prosecution services or Heads as a whole;
- Work with individual prosecution services and police forces to develop best practices and educational training to prevent wrongful convictions;
- Report periodically to Heads on its activities and any developments in the area of wrongful convictions; and
- Undertake any work related to wrongful convictions as directed by Heads

Although its membership has evolved as members went on to different jobs (including several to the bench), the Subcommittee has consistently had police representatives, including from the Canadian Association of Chiefs of Police Law Amendments Committee and the RCMP. Currently, its membership includes prosecution representatives from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick and Newfoundland and Labrador, the Public Prosecution Service of Canada and Department of Justice Canada. There are currently police representatives from the RCMP and one representing both the CACP and Vancouver Police Department.

The Subcommittee generally meets twice a year to share information and best practices. It also shares a great deal of information via email throughout the year about the latest developments, educational activities, cases and emerging issues. It reports to the HOP Committee at each of its twice-yearly meetings.

One of the Subcommittee's major projects has been the completion of this updated Report.

The Subcommittee does not believe it is necessary to conduct another five-year review. However, the Subcommittee will continue to monitor police and prosecution activities and continue to act as an advocate for change and concerted action in this area. It believes it would be more useful to issue reports on specific issues as they arise rather than to conduct another complete review. And it is recommending a national conference, following on the success of the 2005 Winnipeg conference, to canvass the developments over the past five years, together with the latest issues in relation to wrongful convictions.

There are now a wealth of resources available to police and prosecutors on wrongful convictions. For example, a select list of Web sites is attached at Appendix A. Through this Subcommittee and its expert members, it is now clear that Canadian police, prosecutors and even the judiciary know where to turn for information and expertise on wrongful convictions.

But while the Subcommittee does not recommend another five-year review, the commitment to focusing attention on the issue of wrongful convictions at a senior level must continue and be sustained and supported by the Heads of Prosecutions Committee, Federal, Provincial and Territorial governments, and by the Canadian Association of Chiefs of Police. Much progress has been made in understanding and addressing the causes of wrongful conviction. But “victory” cannot be claimed until the risk of a factually innocent person being convicted of a crime in Canada is eliminated – continued vigilance and much work remains to be done to reach that important goal.

Innocent lives depend on it.

APPENDIX A

SELECT WEBSITES

GENERAL

Wrongful Conviction and Innocence Resources on the Internet:

<http://www.llrx.com/features/wrongfulconviction.htm>

Actual Innocence Awareness Database:

http://tarlton.law.utexas.edu/current_awareness/actual_innocence

Gary Wells – Eyewitness ID:

<http://www.psychology.iastate.edu/FACULTY/gwells/homepage.htm>

Bluhm Blog on False Confessions:

http://blog.law.northwestern.edu/bluhm/false_confessions/index.html

EyeID.org:

<http://eyeid.org/>

The Truth About False Confessions:

<http://www.truthaboutfalseconfessions.com/>

Convicting the Innocent – A triple failure of justice:

<http://canadiancriminallaw.com/articles/articles%20pdf/Convicting%20the%20Innocent%20Revised%202006.pdf>

Criminal Law Resources: DNA Post-Conviction Resources:

<http://www.llrx.com/features/dnapostconviction.htm>

The Innocence Record:

https://www.innocencerecord.org/Pages/Home.aspx?ReturnUrl=%2f_layouts%2fAuthenticate.aspx%3fSource%3d%252f&Source=%2f

Strange Justice Blog:

<http://stju.blogspot.com/>

Truth in Justice:

<http://www.truthinjustice.org/index.htm>

Just Science Coalition:

<http://www.just-science.org/>

Mr. Big Documentary:

<http://www.mrbigthemovie.com/>

REPORTS**The Royal Commission on the Donald Marshall Jr. Prosecution:**

http://www.gov.ns.ca/just/marshall_inquiry/default.asp

The Inquiry Regarding Thomas Sophonow:

<http://www.gov.mb.ca/justice/publications/sophonow/intro/index.html>

The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken:

<http://www.justice.gov.nl.ca/just/publications/index.html#g6>

Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell:

<http://www.driskellinquiry.ca/terms.html>

The Commission on Proceedings Involving Guy Paul Morin:

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>

Commission of Inquiry into the Wrongful Conviction of David Milgaard:

<http://www.justice.gov.sk.ca/milgaard/>

The Inquiry into Pediatric Forensic Pathology in Ontario:

<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html>

Report of the Working Group on the Prevention of Miscarriages of Justice:

<http://canada.justice.gc.ca/eng/dept-min/pub/pmj-pej/toc-tdm.html>

New Jersey Death Penalty Commission:

http://www.njleg.state.nj.us/committees/njdeath_penalty.asp

ADVOCACY GROUPS

AIDWYC (Association in Defence of the Wrongfully Convicted):

<http://www.aidwyc.org/>

The Innocence Project:

<http://www.innocenceproject.org/>

Center on Wrongful Convictions:

<http://www.law.northwestern.edu/wrongfulconvictions/>

The Osgoode Hall Law School Innocence Project:

<http://www.innocenceproject.ca/>

The Juvenile Initiative: Kids and Wrongful Conviction:

<http://www.ip-no.org/mission/juvenile-initiative-kids-and-wrongful-conviction>

Medill Innocence Project:

<http://www.medillinnocenceproject.org/>

Center on Wrongful Convictions of Youth:

<http://cwcy.org/>

Life After Innocence:

<http://blogs.luc.edu/afterinnocence/>

Life After Exoneration Program:

<http://www.exonerated.org/content/>

Life Intervention for Exonorees:

<http://www.nikolantoniono.com/life/exonerated.html>

William Dillon Foundation:

<http://www.wdffoundation.org/index.html>

Centurion Ministries:

<http://www.centurionministries.org/>

Innocence Project New Zealand:

<http://www.victoria.ac.nz/ipnz/>

Injustice Quebec:

<http://injusticequebec.ca/index.html>

Justice Denied: The Magazine for the Wrongfully Convicted:

<http://www.justicedenied.org>

Death Penalty Information Center:

<http://www.deathpenaltyinfo.org/newsanddev.php?scid=6>

Truth in Justice:

<http://www.truthinjustice.org/index.htm>

INNOCENT!:

<http://www.aboutinnocent.org/purpose.htm>

Miscarriages of Justice Organization (MOJO):

<http://www.mojoscotland.com/>

<http://www.mojuk.org.uk/>

The Innocence Network:

<http://www.innocencenetwork.org/>

Innocence Institute of Point Park University:

<http://www.innocencenetwork.org/>

Witness to Innocence:

<http://www.witnesstoinnocence.org/>

The Faces of Wrongful Conviction:

<http://www.facesofwrongfulconviction.org/>

Snitching Blog:

<http://www.snitching.org/>

Mid-Atlantic Innocence Project:

<http://exonerate.org/facts/>

Innocence Project of Florida:

<http://www.floridainnocence.org/>

Prison Blog:

<http://www.genpop.org/>

REVIEW BODIES

Criminal Conviction Review Group (Canada):

<http://canada.justice.gc.ca/en/ps/ccr/index.html>

Criminal Cases Review Commission (UK):

<http://www.ccrcc.gov.uk/>

Connecticut Advisory Committee on Wrongful Convictions:

<http://www.jud.ct.gov/Committees/wrongfulconviction/#Members>

California Commission on the Fair Administration of Justice:

<http://www.ccfaj.org/>

North Carolina Innocence Inquiry Commission:

<http://www.innocencecommission-nc.gov/>