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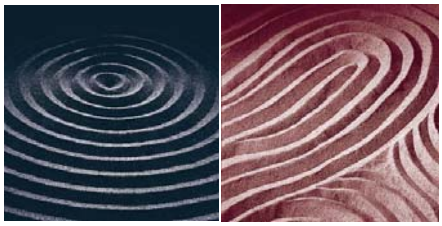

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Wrongful Convictions in Canada

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International Conference of the International Society for the Reform of Criminal Law

June 2007

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WRONGFUL CONVICTIONS IN CANADA

CHAPTER ONE

INTRODUCTION AND BACKGROUND

BY ROBIN BAJER AND MONIQUE TRÉPANIER[1]

Introduction

Canada, like too many other countries around the world, has had its woeful share of wrongful convictions, despite what it lauds as a strong criminal justice system of checks and balances which includes a Charter of Rights and Freedoms, as well as independent prosecutors and police. The notorious cases of David Milgaard, Thomas Sophonow, Guy Paul Morin, Donald Marshall Jr., James Driskell and Gregory Parsons are a reminder of the fallibility of our criminal justice process.[2] Unfortunately, these individuals are but some of the relatively recent persons who have been incarcerated at length for serious crimes that they did not commit. They are not the only victims. It has been said that every time someone is convicted of an offence for which they are innocent, the justice system fails in three ways: first, by inflicting unjustifiable harm on the wrongfully convicted person, secondly, by allowing the actual perpetrators of the crime to remain free to victimize others, and thirdly, by re-victimizing the victim or his or her family by undoing the emotional closure that has already taken place.[3]

The haunting truth is that wrongful convictions will almost certainly continue to occur in Canada and elsewhere. Despite the systematic checks and balances that have developed over centuries of criminal proceedings, guilt or innocence is ultimately decided, as it must be, by fallible human

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[1] Monique Trepanier and Robin Bajer are both associates at Miller Thomson LLP in Vancouver.

[2] Since the 1976 abolition of capital punishment in Canada, a number of convicted prisoners have been exonerated, including some who would likely have faced execution had the death penalty still existed. Wrongful executions are of grave concern in the United States. In January 2003, Illinois' then Governor, George Ryan, decided to commute the sentences of all 167 inmates on the state's death row to life in prison (see G. Ryan, "When justice threatens to murder the innocent, you've got to choose life" *The New York Times* (13 January 2003) online: <http://www.smh.com.au/articles/2003/01/12/1041990178073.html>. Ryan's decision was based in part on a study that examined 300 death penalty cases in Illinois that were reversed for a new trial or re-sentencing.

[3] Bruce Macfarlane, "Convicting the Innocent: A Triple Failure of the Justice System", (2006) 31 Man. L.J. 403 at 487.

beings. Realistically then, the challenge to all those involved in the criminal justice system is to try and *minimize* the number of miscarriages of justice that do occur.[4]

In Canada, the federal and provincial governments have responded to wrongful convictions in three ways – by appointing full public commissions of inquiry, making public apologies and financial redress, and instituting preventative mechanisms to guard against future miscarriages of justice. The remainder of this chapter will attempt to give a brief overview of the findings and recommendations of the commissions of inquiry that have concluded their work to date.

Commissions of Inquiry

Since 1986, six full public commissions of inquiry have been held in Canada following cases where wrongful convictions for murder were confirmed. Although each of the commissions reported to and were funded by the government, they were independent of government, often headed by highly-respected retired judges mandated to independently review all aspects of the justice system, including the prosecutorial and police functions, forcing all players to re-examine their practices, policies and cultures.[5]

The following broad themes emerge out of the commissions of inquiry in Canada:

- Miscarriages of justice are inevitably the result of a multitude of inappropriate actions by a number of people, and solutions are usually rooted in the attitudes, practices and culture of the various participants who exercise authority in the criminal justice system.[6]

- Some problems, themes and mistakes arise time and time again, both in Canada and elsewhere. They are not confined to proceedings in the courtroom, but relate also to the conduct of police, Crown prosecutors, defence lawyers, judges and forensic scientists.[7]

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4 Macfarlane, *supra*, at 405.

5 Macfarlane, *supra*, at 430.

6 Macfarlane, *supra*, at 421.

7 *Report on the Prevention of Miscarriages of Justice*, 2004, FPT Heads of Prosecutions Committee Working Group, at 2, online: <http://www.justice.gc.ca/en/dept/pub/hop/>.

- Key factors that contribute to wrongful convictions are *tunnel vision*, mistaken eyewitness identification and testimony, false confessions, in-custody informers, DNA evidence, forensic evidence and expert testimony, and lack of education.[8]

- Beyond the immediate causes of wrongful convictions, there are environmental or *predisposing* circumstances that can allow immediate causes to arise, such as public pressures to convict, intense media assaults, and the culture of a *game* approach to the adversarial system.[9]

- Some of the solutions are not novel, but are simply a plea to all involved to conscientiously and diligently follow existing principles and guidelines.[10]

Canada's wrongful conviction inquiries, whose reports date from 1989 to 2007, have been said to be "among the most comprehensive analyses of wrongful convictions and are oft-cited around the world."[11] As one journalist notes, Canada's public inquiry process has been cited repeatedly by American legislators, scholars and jurists as being worthy of adoption in the United States.[12] A wrongful conviction conference that took place at Harvard University in April 2002 included, "at almost every panel, someone [rising] to point to the Canadian experience as a model for US reform".[13] At the same time, scholars such as Professor Keith Findley caution that states such as the US could avoid "mustering the fortitude to engage in the type of painful (and expensive) individual-case self-scrutiny the Canadians have undertaken in [their public] inquiries" by forming study commissions to scrutinize the failings of a justice system as a whole rather than awaiting high profile exonerations in an individual case.[14]

The following summaries provide an overview of the recommendations stemming from the wrongful conviction inquiries held to date in Canada. These recommendations are discussed in

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8 *Report on the Prevention of Miscarriages of Justice, supra*, at 3.

9 Macfarlane, *supra*, at 485.

10 *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, (2007) at 186, quoting the Honourable John Enns, online: <http://www.driskellinquiry.ca>.

11 *Report on the Prevention of Miscarriages of Justice*, FPT Heads of Prosecutions Committee Working Group (2004) at 28, online: <http://www.justice.gc.ca/en/dept/pub/hop/>.

12 M. Green, "Testing our Convictions" *The Globe and Mail* (May 20 2002).

13 *Ibid.*

14 K. Findley, "Learning from our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions" 38 (2002) *Cal. W.L. Rev*. 333 at 351.

further detail in subsequent chapters, beginning with those which are related to the police, followed by those relating to Crown prosecutors and ending with those relating to defence counsel.

Donald Marshall, Jr.

On May 28, 1971, a 17-year old Aboriginal[15] man named Donald Marshall met by chance a 17-year old black man named Sandy Seale while both of them were walking through Wentworth Park in Sydney, Nova Scotia. There they met two other men, Roy Ebsary, 59, and Jimmy MacNeil, 25. After a brief exchange of words, Ebsary fatally stabbed Seale in the stomach. Marshall was investigated by the police, convicted of murder, and sentenced to life in prison. After serving 11 years in jail, the Court of Appeal ultimately quashed Marshall's conviction. Ebsary, who had admitted his role 10 days after Marshall's conviction, was eventually convicted and sentenced for the murder.

In October, 1986, a Royal Commission was appointed to review the case and make recommendations. After hearing 113 witnesses in 93 days of public hearings, it released its report in December 1989,[16] which concluded that:

> [t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could – and should – have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, J. is a Native.[17]

The Report went on to lay out 82 recommendations, including:

- That the Department of the Attorney General and Solicitor General adopt a Policy on Race Relations that has as its basis a commitment to employment equity and elimination of inequalities based on race.

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[15] In Canada, the terms of ethnicity "Aboriginal", "Native" "Indigenous" and "First-Nations" are often used interchangeably.

[16] *The Royal Commission on the Donald Marshall, Jr. Prosecution.*

[17] *supra,* Digest of Findings and Recommendations, at 1.

- That training for all police officers include content on police/minority concerns and sensitivity to visible minority issues.

- That a community-controlled Native Criminal Court be established in Nova Scotia.

- That all courts in Nova Scotia have the services of an on-call Mi'kmaq[18] interpreter.

- That a Native court worker program be established as an immediate first step in making the criminal justice system more accessible to Native people.

- That the RCMP and municipal police forces, where applicable, take immediate steps to recruit and hire Native constables.

- That funding of legal aid in Nova Scotia be re-examined to ensure that there are sufficient counsel to properly serve minority clients and to engage in proactive programs in minority communities.

Guy Paul Morin

On July 30, 1992, 25-year-old Guy Paul Morin was convicted of the murder of his next-door neighbour, nine-year old Christine Jessop. On January 23, 1995, almost 10 years after he was first arrested and two trials later, he was exonerated as a result of DNA testing not previously available. The real killer was never found.

The *Commission on Proceedings Involving Guy Paul Morin,* which lasted 146 days and heard testimony from 120 witnesses, released its report on April 9, 1998.[19] The report made 119 recommendations for change. Some of the systemic and individual factors identified in the report that may have contributed to Morin's wrongful conviction were:

- undue reliance by experts and the prosecution on hair comparison evidence (absent DNA analysis);

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[18] The First Nations People of Nova Scotia are called Mi'kmaq, as is their language.

[19] *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, 1998 online: <http://www.attorneygeneral.jus.gov.on.ca/English/about/pubs/morin/>.

- undue reliance by the prosecution on jailhouse informants, who the inquiry subsequently found to have been "totally unreliable"; and

- flawed and inadequate police investigation.

Thomas Sophonow

Thomas Sophonow was tried three times for the 1981 murder of 16-year-old Barbara Stoppel. In 1985, after having spent 45 months in jail, Sophonow was ultimately acquitted by the Court of Appeal. Following his acquittal, he continued to seek exoneration. In 1998, the Winnipeg Police Service undertook a reinvestigation of the murder and on June 8, 2000, it announced that Sophonow was not responsible for the murder. *The Inquiry Regarding Thomas Sophonow* released its report in September, 2001.[20] Among its primary recommendations were:

- mandatory video or audio taping of police interviews with all suspects;

- improved line up and photo-pack identification;

- mandatory education of police officers, counsel and judges on the phenomenon of 'tunnel vision';

- longer storage of police note books and trial exhibits;

- a prohibition on jailhouse informants from testifying; and

- the establishment of a completely independent entity which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged.[21]

Gregory Parsons

In 1994, Gregory Parsons was convicted of the murder of his mother which occurred when he was 19. Parsens was sentenced to life imprisonment. DNA testing exonerated him in 1998. *The Lamer Commission of Inquiry into the Wrongful Conviction of Ronald Dalton, Gregory Parsons,*

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[20] The *Inquiry Regarding Thomas Sophonow*, 2001, online: <http://www.gov.mb.ca/justice/sophonow/toc.html>.

[21] along the lines of the UK model.

Randy Druken issued its report in 2006,[22] which largely echoed the recommendations from previous reports.

James Driskell

James Driskell was convicted of first-degree murder of Perry Dean Harder on June 14, 1991, and sentenced to life imprisonment. His appeal was unsuccessful. After spending 13 years, one month, and seven days in jail, he was released on bail pending a review of his conviction by the Minister of Justice.[23] The review resulted in his conviction being set aside, and a new trial ordered. The Manitoba Attorney General then directed a stay of proceedings.

The *Report of the Commission of Inquiry into Certain aspects of the Trial and Conviction of James Driskell* was released in January, 2007.[24] The inquiry identified a number of systematic issues that may have contributed to Driskell's wrongful conviction, including:

- the failure of certain police officers to make notes or produce reports of various events, in accordance with police policy as it existed at the time;
- the Crown's decision not to proceed with a preliminary inquiry, which, while in accordance with policy at the time, deprived the accused of a significant opportunity to test the prosecution's case;
- a lack of communication between the various participants in the criminal justice system;
- inadequate post-conviction disclosure policy of the Crown; and
- inadequate disclosure policies of the police and the Crown regarding benefits requested, discussed or provided to central witnesses, including jailhouse informants, accomplices, and other potentially unreliable witnesses.

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[22] *Lamer Commission of Inquiry into the Wrongful Conviction of Ronald Dalton, Gregory Parsons, Randy Druken*, 2006, online:<http://www.justice.gov.nl.ca/just/lamer/>.

[23] pursuant to section 696.2 of Canada's *Criminal Code.*

[24] The *Report of the Commission of Inquiry into Certain aspects of the Trial and Conviction of James Driskell*, online: <http:// www.driskellinquiry.ca>.

David Milgaard

David Milgaard's case is perhaps the most well-known wrongful conviction case in Canada, and one of the worst miscarriages of justice in modern Canadian history. Milgaard was convicted at the age of 16 for the murder of 22 year old Gail Miller. Milgaard was eventually released from prison at the age of 40, largely as a result of his mother uncovering substantial evidence that was not before the trial judge. He was finally exonerated in 1997 as a result of DNA testing, which also confirmed that the murder was caused by Larry Fisher, who was subsequently convicted of the crime. The *Commission of Inquiry into the Wrongful Conviction of David Milgaard* was announced on February 20, 2004. Its report is still forthcoming as of the date of this paper.

Preventative Mechanisms

Although it is clearly important to understand and acknowledge past wrongs, the goal of everyone involved in the criminal justice process must be to prevent miscarriages of justice from occurring in the first place. In 2004, the FPT Heads of Prosecutions Committee Working Group released a *Report on the Prevention of Miscarriages of Justice.* [25] The report is intended to describe 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.[26] The report draws upon the international literature of wrongful convictions, starting with the *American Prison Congress Review of 1912*, canvassing the 1980's Royal Commissions in Australia and New Zealand, the legacy of the IRA bombings and subsequent false-imprisonments[27] in Britain, and the various Canadian inquiries, commentary, and case law. The report makes over 100 recommendations, including:

- better practices to assist in deterring 'tunnel vision';

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[25] *Report on the Prevention of Miscarriages of Justice*, 2004, online: <http://www.justice.gc.ca/en/dept/pub/hop/>.

[26] *Report on the Prevention of Miscarriages of Justice*, 2004 at 2.

[27] including the Guildford Four, the Birmingham Six, the McGuire Seven, and Judith Ward. For a media chronology of the Guildford Four wrongful conviction story, see online: <http://news.bbc.co.uk/onthisday/hi/dates/stories/october/19/newsid_2490000/2490039.stm>. For a media chronology of the Birmingham Six wrongful conviction story, see online: <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/14/newsid_2543000/2543613.stm>.

- better standards and practices for police and prosecutors relating to eyewitness identification and testimony, confessions, in-custody informers, DNA evidence, forensic evidence and expert testimony;
- improved education for all players on the causes of wrongful convictions;
- using DNA data bank provisions[28] to their fullest potential;
- ongoing training of prosecutors on the use of experts;
- ongoing education for all players on all of the areas that may contribute to wrongful convictions; and
- the establishment of a resource centre on the prevention of wrongful convictions.

Since 1976, 1070 people have been executed in the United States, 13 in 2007 so far.[29] 123 individuals condemned to death in the United States since 1973 have been exonerated, some within days of their scheduled executions.[30] Although wrongful conviction cases in Canada do not paint as dramatic a picture as the American examples involving capital punishment, legal errors with dire consequences for innocent people obviously occur here as well. It is through the adoption of measures such as those proposed by our public inquiry Commissioners that we are better able to approach our goal of ensuring that our criminal justice process maintains its

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[28] The DNA Data Bank consists of two collections or indices of DNA profiles: a crime scene index, containing DNA profiles derived from bodily substances found at a crime scene; and a convicted offenders index, containing DNA profiles derived from bodily substances taken from offenders against whom post-conviction DNA data bank orders have been made. The DNA profiles are continually compared and, if a match is obtained, the fact of this match may be used to allow police investigating an unsolved designated offence, to apply for a DNA warrant to seek a new investigative sample of bodily substances from the individual. The DNA profile derived from the new sample would serve to exclude the individual as a suspect or become evidence in a prosecution for the crime. As of May 9, 2005, there were over 77,000 DNA profiles in the convicted offender index and more than 21,400 DNA profiles in the crime scene index. In addition, there have been 3,270 matches between crime scene DNA profiles and convicted offender DNA profiles and 408 "forensic matches" (crime scene to crime scene)." (source: Public Safety Canada, online: <http://www.publicsafety.gc.ca/prg/cor/tls/dna-en.asp> (date accessed: June 7, 2007)).

[29] See online: The Death Penalty Information Center <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (date accessed: April 15, 2007).

[30] *Ibid*. In the United States, one estimate is that one in two hundred of all felony convictions are wrongful convictions: Huff, C. R., Rattner, A., & Sagarin, E. (1996). *Convicted but innocent: Wrongful conviction and public policy*. Thousand Oaks, CA: Sage.

integrity and remains consistent with the dictum that it is better that ten guilty people go free than that one innocent person be convicted.

CHAPTER TWO

HOW POLICE DEPARTMENTS CAN REDUCE THE RISK OF WRONGFUL CONVICTIONS

BY ELIZABETH CAMPBELL[31] AND DOUG LEPARD[32]

Introduction

This section will provide an overview of the police-relevant recommendations from Canadian commissions or inquiries into wrongful convictions. These recommendations are directed at improving investigations by addressing the problems associated with mishandled investigations generally, and specific problems such as mistaken identifications, false confessions, in-custody informers, those aspects of police culture – such as "tunnel vision" – that contribute to wrongful convictions, and ideas for ongoing education to ensure police stay current on issues with respect to wrongful convictions.

For each major issue identified in the literature, a description of the issue will be provided, followed by the relevant recommendation(s). Then, the response of a major urban police force, the Vancouver Police Department (hereinafter referred to as the "VPD"),[33] will be examined in terms of how it has responded to the issues in order to reduce the risk of a wrongful conviction. For simplification, the VPD response will refer to the recommendations of the 2004 *Report on the Prevention of Miscarriages of Justice* (hereinafter referred to as "the Heads of Prosecution Report").[34], as they are representative of those from other commissions and inquiries into wrongful convictions.

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[31] Elizabeth Campbell is a prosecutor with the Ministry of Attorney General for British Columbia although the views expressed here are her own and not necessarily those of the Ministry.

[32] Doug LePard is the Deputy Chief Constable commanding the Investigation Division of the Vancouver Police Department and has championed the analysis and response to the Heads of Prosecutions Report to ensure compliance with all police-relevant recommendations.

[33] The Vancouver Police Department online: <http://www.vpd.ca> has an authorized sworn strength of 1231 officers and serves an official population of almost 600,000 in a metropolitan region of over 2 million residents.

[34] The report was a product of a Federal/Provincial/Territorial group of "Heads of Prosecution" and was authored by D.A. Bellemare, Q.C. of the Federal Prosecution Service and Rob Finlayson of the Manitoba Justice Prosecutions Service, and can be located online: <http://www.justice.gc.ca/en/dept/pub/hop/>.

a) Eyewitness Identification

The misidentification of suspects by eyewitnesses to the crime has been identified as one of the leading causes of wrongful convictions. This cause was looked at in detail in the Sophonow inquiry and was examined again in the Heads of Prosecution Report. Three types of "line-ups" were considered: a photo line-up, a live line-up, and a "show-up".

A photo line-up is the most common of the three and had traditionally been conducted with six to ten photos set out together on a piece of paper. The line-up was shown to a witness by the investigating officer, and the number of the photo the witness selected, if any, was recorded on a form. The officer usually read a series of instructions from the form before the photos were shown. The process was not usually recorded by audio or videotape.

In the Sophonow report, based on research into the causes of a mistaken identification, a new procedure was recommended, as follows:

- the "photo pack" should contain at least 10 subjects;
- the photos should resemble as closely as possible the eyewitnesses' description or, if that is not possible, then they should be as close as possible in appearance to the suspect's photo;
- everything should be recorded on video or audio from the time the officer meets the witness through showing the photos and to the end of the interview;
- the officer showing the photo pack should not know who the suspect is and should not be involved in the investigation;
- the officer should tell the witness that he does not know who the suspect is or whether his/her photo is contained in the line-up and the officer should advise the witness that it is just as important to clear the innocent as it is to identify the suspect;
- the photo pack should be presented to each witness separately;
- the photo pack must be presented sequentially and not as a package;

- there should be a form for signatures setting out in writing the comments of the officer and the witness – all comments of the witness must be recorded verbatim and signed by the witness; and

- officers should not speak to witnesses after the line-up regarding their identification or their inability to identify anyone.

The Heads of Prosecution Report adopted the findings of the Sophonow report, and made six recommendations regarding the methodology employed for photo line-ups, summarizing the process described above.

Photo line-ups are by far the most common tool used in the VPD (and other Canadian police agencies) for identification of unknown suspects by witnesses. The key change recommended by the Heads of Prosecution Report was switching from a line-up where photos are presented side-by-side, to a "photo pack", or sequential presentation of photos. The VPD responded by creating a "task team" to ensure the necessary policies, procedures, and training were developed to ensure effective and efficient implementation of the photo-pack process. This work was completed by July, 2005. (The full policy/procedure and associated forms are attached as Appendix I.)[35]

Live line-ups were also dealt with in the Sophonow report and recommendations for an appropriate procedure were similar to those with respect to photo line-ups. Specifically, the recommendations were:

- the line-up should contain a minimum of 10 persons;

- the fillers in the line-up should match as closely as possible the description given by the witness or, if that is not possible, they should resemble the suspect;

- an officer who does not know the case or the suspect should be in the room with the witness;

- everything should be recorded, preferably on videotape;

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- the witness should be advised that the officer does not know who the suspect is and that the suspect may not be in the line-up;
- all statements made by the witness should be recorded verbatim and signed by the witness;
- the officer should escort the witness from premises after the line-up; and
- if there has been an identification, the witness should be asked as to the degree of certainty of identification – that question and answer should be recorded verbatim and signed by the witness.

Although the VPD historically conducted live line-ups in a specially-designed facility, it abandoned this investigative strategy as a result of a Supreme Court of Canada decision in 1989, making this recommendation moot.[36]

In the Heads of Prosecutions report, "show-ups" were also considered. "Show-ups" involve the physical presentation of a single suspect to a witness during an investigation. This may happen by the police arranging for an "accidental" encounter on the street or through attending a court appearance of the suspect. The recommendation in that report was that "show-ups" should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

The VPD historically used a variation of the "show-up" known as an "impromptu line-up." Generally, this would involve placing a suspect with a group of people (typically in a bar or similar), securing any exits, then walking the witness through the premises to see if the suspect could be identified. However, for a variety of reasons – not the least of which being the right of a suspect to refuse to participate – impromptu line-ups are very rarely employed; therefore, the VPD is in compliance with the related recommendation.

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[36] In *R. v. Ross*, [1989] 1 S.C.R. 3, the Supreme Court of Canada held that a suspect could not be compelled to cooperate with a live line-up.

b) Criminal Informants

The concerns related to jailhouse informants were discussed in detail in both the Morin and the Sophonow reports, but the Driskell report demonstrates that there are risks with any criminal informants, whether the alleged confession is said to have taken place in jail or when the suspect was not in custody.

In the Sophonow report, it was suggested that jailhouse informants should be prohibited from testifying as a general rule and that it should only be in rare cases that their testimony be permitted.

It was recommended in the Morin and the Heads of Prosecutions reports that special protocols be established for dealing with in-custody informants and investigating their reliability. Those reports also suggested that provinces establish an in-custody informer registry and that the police contribute relevant information to that registry such as any instances of an individual disclosing an alleged confession by another inmate.

The Morin, Sophonow and Driskell reports all set out similar procedures that should be followed when dealing with any criminal informant. An informant's report of an alleged confession should be videotaped and taken under oath using non-leading questions. At the outset, the informant should be advised of the consequences of untruthful statements and false testimony. All contacts with the informant should be videotaped from beginning to end or, if videotape is not possible, they should be audiotaped. Any discussions of benefits offered or provided by the police or Crown, or any benefits sought by the informant, should be recorded and disclosed. The police operational manual should also reflect the continuing obligation to disclose potentially exculpatory material to the Crown post-conviction, whether or not an appeal is pending.

The statement made by the informant must be thoroughly investigated. A review of the statement should be conducted to determine whether the information could have been obtained from media reports or evidence at a preliminary inquiry or trial if the trial is underway or there was a previous trial. The statement should also be assessed for material that could only be known by the one who committed the crime, for disclosed evidence that is detailed and significant as to the manner in which the crime was committed, and for evidence that has been confirmed by police investigators as correct and accurate. The police should also investigate

whether the informant has any prior experiences testifying as an informer or as a witness generally.

The use of informants generally is important to solving crime, but requires great caution, particularly with respect to in-custody informers. The VPD considers their use a rare but "necessary evil" in police work. It is an area fraught with risk, because of the skill demonstrated by jailhouse informants in gathering compelling information that seems could only be known to the offender, but which has resulted in whole or in part in wrongful convictions. For example, in the Sophonow case, multiple in-custody informants came forward with purported confessions, and the Crown adduced testimony at trial from three of them. In-custody informants were described in the Sophonow Inquiry as:

> …the most deceitful and deceptive group of witnesses known to frequent the courts...They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.

The Heads of Prosecution Report makes several recommendations designed to minimize the risks posed by in-custody informants, as summarized earlier. A key recommendation concerns training. The VPD sends investigators to several courses at the Canadian Police College in Ottawa and the Justice Institute of BC ("JIBC") during which the problems associated with in-custody informants are covered. In addition, one of the authors of this chapter[37] developed and regularly delivers to new investigators a two-hour training session on avoiding wrongful convictions during which the problems of in-custody informants are reviewed.

A significant challenge with in-custody informants is the need for corroboration of their claims, because of their inherent lack of credibility. So it is somewhat surprising that there have not been recommendations around the desirability of capturing such alleged confessions by "wiring" the suspect's cell and attempting to have the jailhouse informant re-engage the suspect in the conversation that allegedly already took place. If repeated, this would provide reliable and generally incontrovertible evidence. In addition, when dealing with an in-custody informant, a

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[37] Deputy Chief Constable LePard began delivering this training in 2005. It will be increased to three hours in mid-2007.

polygraph test should be utilized. But it is far preferable that a police cell-mate be utilized in a covertly video- and audiotaped cell, so that all aspects of the operation can be controlled.[38] In fact, the use of an in-custody informant by the VPD is exceedingly rare,[39] and police undercover cell plants are relied on for obtaining "cell mate" statements from suspects.

The Heads of Prosecution Report also recommends that appropriate policy guidelines be developed regarding the use of in-custody informants. The VPD has a specialized "Source Handling Unit" overseen by a sergeant with considerable expertise in this area who has oversight responsibility for all informant handling issues. In addition, the VPD has recently extensively amended several areas of its Regulations and Procedures Manual to reflect both the recommendations of the Heads of Prosecution Report and best practices in the field of informant handling. The new procedures pay particular attention to the risks of using information from in-custody informants, recognizing specifically their role in previous wrongful convictions. Approval from both a police supervisor (sergeant) and manager (inspector) are required before information from an in-custody informant may be utilized. Further, the procedure sets out a series of factors that investigators must consider in attempting to determine the informant's credibility.[40]

c) Mishandling of Investigations

The investigations analysed in the various wrongful conviction reports were found to have been mishandled in a variety of ways. One of the concerns with respect to the manner of investigation, tunnel vision, will be discussed below with respect to police culture. This part will look at recommendations relating to specific investigative problems that were identified, such as conducting searches, note taking and conducting interviews.

Notwithstanding those specific issues, the overall management of serious cases is key to ensuring that the "mishandling" found in various wrongful conviction cases is avoided. Investigations

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[38] A notable recent example was the evidence given in the 2007 Robert Pickton murder trial regarding the use of an audio- and videotaped cell plant operation that occurred shortly after Pickton's arrest in February 2002.

[39] In fact, Deputy Chief LePard has been in various squads in the VPD Investigation Division on and off since 1988 and has commanded the Division since 2003, but is personally aware of only one case in which a in-custody informant has been used in that time, although the use of police cell plants are a common investigative strategy.

[40] The nature of the policy/procedure is such that it must remain confidential, on advice of the VPD's Freedom of Information and Privacy Unit Coordinator.

into serious offences are often stressful, complex, and require strong leadership, teamwork, and a variety of skill sets. While it is important to address specific problems, as outlined above, the importance of implementing a systematic approach to investigations cannot be overemphasized; it is noteworthy that a systematic approach to investigations was typically absent in cases resulting in wrongful convictions. (This is not surprising, considering that most known wrongful convictions in Canada resulted from investigations that took place prior to the development of a systematic approach to handling serious cases.)

In Canada, the Canadian Police College's major case management model ("MCM"), developed in 1994 and refined since then, is the accepted "best practice" for managing serious investigations and is followed by the VPD. MCM is a methodology for managing major cases that provides for accountability, clear goals and objectives, planning, efficient utilization of resources, and control over the speed, flow and direction of the investigation. One of its nine key principles is the importance of ethical investigations. Justice Archie Campbell cited the MCM model in his review of the Paul Bernardo[41] investigation as "a well-thought out approach to the problems of major serial predator investigations, solidly grounded in Canadian investigative experience and the lessons learned from failures and successes."[42] He went on to say:

> The Canadian Police College Course deals in a highly organized and systematic manner with issues such as the accountability of the senior officer in charge, the organization of the major investigative functions such as liaison with victims and their families, team building, financial administration, file organization, scene examination, profiling of victims and suspects, computerized investigative techniques, preparing for Crown disclosure, processing tips, planning the arrest and the interview, handling inter-jurisdictional issues, public appeals and planning for the deluge of information that results from them, dealing with the inevitable stress inflicted on the investigators and the victims and their families, establishment and management of the command post, and dozens of other issues faced daily by the officer in charge of a major serial predator investigation.[43]

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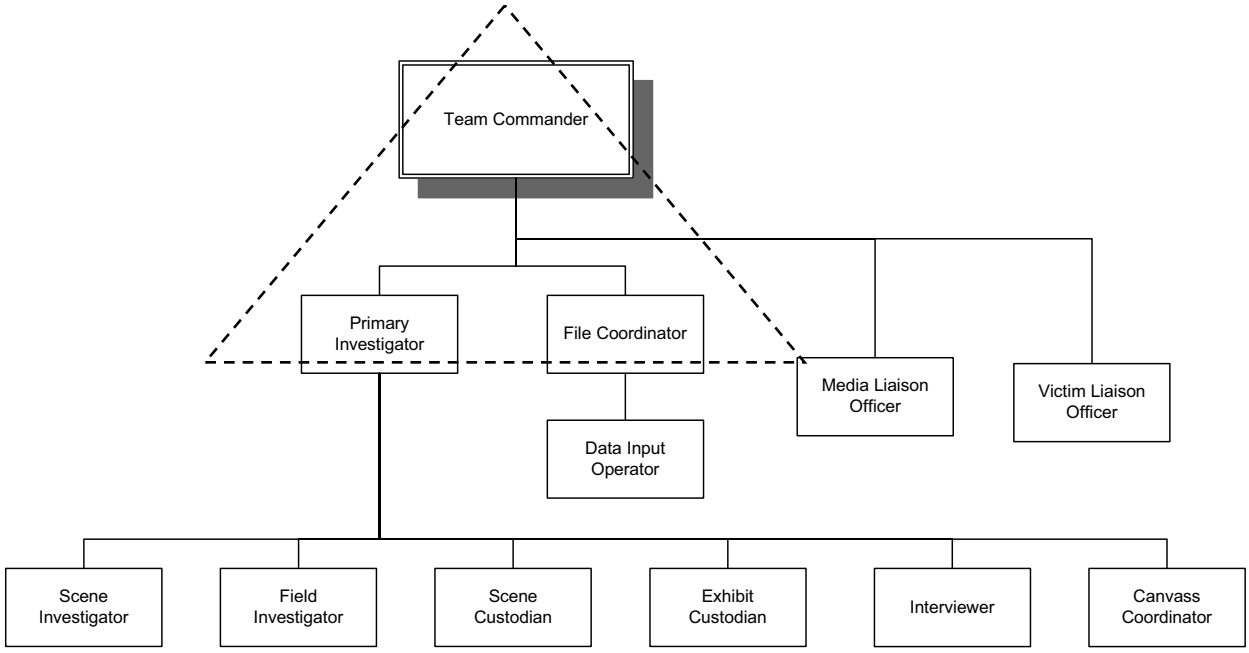
[41] Between 1987 and 1992, Bernardo committed a series of sexual assaults and rapes against young women in Ontario. He also abducted, raped and murdered schoolgirls Leslie Mahaffey and Kristen French. The case was shocking for a number of reasons, including the fact that Bernardo's wife, Karla Homolka, was an accomplice in the murders, and also assisted in raping and killing Homolka's own sister, Tammy Homolka. Bernardo was sentenced to life imprisonment and also declared a Dangerous Offender. Homolka has since been released from prison after serving her full 10-year sentence for manslaughter resulting from a controversial plea agreement made prior to the recovery of graphic videotaped evidence of her participation in the murders.

[42] Justice Archie Campbell (1996). *Bernardo Investigation Review*, Government of Ontario, at 271.

[43] *Ibid*., at 324.

The major case management model training prepares police candidates to assume and retain effective command of co-ordinated investigation teams by providing the wherewithal to recognize, understand and deal with a variety of critical management issues inherent to such investigations. The major case management model repackages the cumulative skills, knowledge and experience derived from the successes and failures of Canadian law enforcement and organizes them in a manageable format, which makes them more effective and easily applied.

Fundamental to the major case management model is the "command triangle," as shown in the sample diagram below. The Team Commander is at the top of the triangle, and the File Coordinator and Lead Investigator report to him or her. Data entry staff report to the File Coordinator, and all field investigators report to the Primary Investigator. It is the responsibility of the Team Commander to decide the speed, direction and flow of the investigation, and to ensure it proceeds in a lawful and ethical manner, following established best practices that, amongst other benefits, minimize the chances of a wrongful conviction.[44]



[44] See the Canadian Police College's Major Case Management Manual for a much fuller description of the selection criteria and duties of the various positions in the Major Case Management model.

As described earlier, the VPD sends its investigators and investigative supervisors on MCM training, and also participates in a provincial MCM "accreditation program" for managers of serious and complex investigations. But aspects of MCM training regarding wrongful convictions are also delivered at the earliest opportunity for new investigators. For example, in the VPD training described earlier regarding the avoidance of wrongful convictions, the importance of offering suspects an opportunity to provide a response to allegations is stressed with the explanation (with examples) of the reality of false and mistaken allegations. It is also stressed that it is the responsibility of every investigator in every investigation, not just serious and complex investigations, to guard against those factors that lead to wrongful convictions.

Implementation of the MCM model and training around effective case management will help ensure that investigations are not mishandled generally and the problems arising from the specific issues set out below are minimized.

(i) Missing Person Investigations and Searches

One of the investigative problems identified in the Morin report resulted from a situation where the police were initially dealing with a missing person investigation which turned into a murder investigation after a number of witnesses had already been interviewed without statements being properly recorded. In addition, the initial searches had been conducted in a manner that did not meet the standards for a murder investigation. As a result, it was recommended that officers conducting missing persons investigations be mindful that the investigation could escalate into a major crime investigation. Therefore, they must keep an accurate and complete record of statements taken from relevant persons, and must preserve potential evidence from removal or contamination. In addition, it was recommended that searches in missing persons investigations be supervised by a trained search coordinator and conducted in accordance with standardized search procedures.

The Morin report also addressed proper search procedures upon the discovery of a body and recommended that a search of a body site include: a grid search; preservation of the scene against inclement weather; adequate lighting; coordinated search parties with documented search areas; a search plan and search coordinator; full documentation of items found and retained, together with precise location and continuity; adequate videotaping and photographing of the scene; adequate indexing of exhibits and photographs; adequate facilities and methods for

transportation of the remains; decontamination suits in some instances; and resources to avoid cross-contamination of different sites.

The VPD has had a specialized Missing Persons Unit for many years; however, its performance was inconsistent, and a major review of Vancouver's Missing Women investigation[45] identified systemic problems in the Unit. As a result, in 2004, the VPD contracted a consultant with relevant policing experience to conduct a comprehensive audit of the Missing Persons Unit, resulting in extensive changes. Since then, the VPD's Missing Persons Unit has made great strides and is now considered the leader in Canadian policing with respect to missing persons investigations and is looked to by police agencies across Canada for best practices because of its extraordinary success.[46]

Part of the Unit's success can be attributed to its incorporation within the Major Crime Section, along with the Homicide and Robbery/Assault Squads, which are all managed by the same Inspector. This structure helps to ensure that investigations are handled in a coordinated fashion with recognition of the potential for a missing persons investigation to evolve into a homicide file. The Missing Persons Unit is responsible for the coordination and oversight of any search for a missing person, and the police officers involved are guided by detailed procedures that address the recommendations discussed earlier.

In addition, the VPD created its "Search and Canvas Team" in 2005. This team of over 60 officers deploys squads of at least eight officers specially trained by police experts from the United Kingdom and the VPD to conduct searches for missing persons and evidence in criminal cases, as well as canvassing for witnesses and taking statements.

The four-day course required to join the team is adapted from a joint British Army and Police Anti-terrorist Squad search course in the United Kingdom. Also included is a second element of

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[45] Beginning in the mid-1990s, numerous addicted sex trade workers began to go missing from Vancouver's Downtown Eastside and police were criticized for an inadequate response. In 2002, Robert "Willie" Pickton was arrested and stands charged with the murders of 26 of the Missing Women. His trial began in January 2007 on the first six counts and is progress at the date of writing.

[46] See, for example, Patrick Brethour, "Streetwise: B.C.'s finest finders – Missing persons unit of Vancouver police had a perfect record in 2006: 4,004 found," in the *Globe and Mail*, January 13, 2007, at S1.

detailed canvasses and re-enactment canvassing from combined UK and VPD experiences, utilising existing UK standards and practices, including a structured paperwork system.

The course includes: theory; practical application of personnel; fingertip, line, vehicle and route searches at crime scenes; venue searches (defensive and/or existing threats); use of specialized equipment; canvasses and re-enactment canvasses; and the incorporation of canine and boat team searches.

Since the creation of the team, it has been extraordinarily successful, recovering evidence in robberies, homicides, and locating missing persons. For example, in April 2006, the team was called out thirteen times during the intensive investigation into the brazen gunpoint kidnapping of Graham McMynn.[47] The team was used for canvassing, video canvassing, searching, arrest teams, media strategy and public reassurance. The searches included line searches of the rural and urban areas, fingertip searches of the crime scenes, and coordination of the river and shoreline searches. The team also searched one of the crime houses and approximately 30 bags of home refuse, separating DNA materials for forensic identification unit investigators. The team recovered important evidence and also located several witnesses. In May 2006, when a child went missing in Vancouver's notorious Downtown Eastside, the Search Team Coordinator organized an extensive search involving over 100 officers that resulted in the locating of the child. In 2006, the team was deployed forty-four times.

The Search and Canvass Team initiative has significantly improved the VPD's ability to respond to serious incidents and has identified and implemented a number of best practices, including:

- a systematic reporting process that details the activities of search and canvass members;

- creation of relationships with outside agencies that can supply specialized support such as the RCMP Dive Team and Air Support, the Canadian Military, and civilian search and rescue teams;

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[47] For an extensive media story on the McMynn kidnapping, see: Ian Mulgrew, Kim Bolan, Chad Skelton & Maurice Bridge, "Daring raid by combined forces frees McMynn," in the *Vancouver Sun*, April 13, 2006, at A1.

- improved evidence gathering standards in regard to real evidence as well as interviews and written statements;

- an improved method for a lead investigator to communicate their expectations for a search and/or canvass via a search contract or agreement document; and

- identification of the requirement for further training and education in relation to crime scene management, including DNA issues, exhibit control, and scene contamination, thus improving the skills and abilities of officers in both patrol and detective positions to appropriately manage a crime scene.

The search training developed in the VPD, including the anti-terrorist aspect, is now being studied for use at the Olympics and beyond, and is expected to be adopted as a national standard.

(ii) Note Taking

Documenting statements and other evidence through written notes was also discussed in the Morin report as an investigative problem. It was recommended that police have policies for note taking and note keeping practices. Such policies would better regulate the contents of police notebooks and reports in order to reinforce the need for a complete and accurate record of interviews, police observations and police activities.

As was noted in the Driskell report, the police do not take notes solely to assist their own recollection in the future. They are recording information that may have great significance to the accused and to the Crown, although that significance may not be known for some time. In the Driskell report, it was recommended that complete, detailed notes be taken by police of all information and that all notes be passed on to the Crown.

The importance of good notes is stressed at the recruit training level at the Justice Institute of BC and in every investigators' course delivered internally in the VPD. In addition, the VPD has policies and procedures regarding note taking that range from the issue of content to retention of notebooks. In 2005, the VPD, in an effort to improve primary investigations, initiated additional training on various issues from note taking to evidence giving. For example, in 2005, a "Training Bulletin" was distributed setting out the VPD's expectations for note taking, and the

issue is covered in a variety of training courses. It is also standard practice in the VPD that in every case, every officer involved submits a copy of all notes with the Report to Crown Counsel.

(iii) Interviewing

The proper recording of police interviews has also been addressed in the reports. Both the Sophonow and the Morin reports state that all interviews of suspects must be videotaped or at least audiotaped in their entirety. In the Lamer report, it was recommended that, in all major crime investigations, all police station interviews be videotaped and field interviews be audiotaped. If an oral statement is not recorded on tape, it should be re-read to the suspect at the police station on videotape and his/her comments recorded or, alternatively, the statement should be put in writing and the suspect permitted to read it and sign it if it is regarded as accurate by the suspect[48]. In the Morin report it was also recommended that all significant witnesses in serious cases be interviewed in a similar fashion.

Coincidentally, and for a variety of reasons, since the 1990s, there has been a move in Canadian policing to videotape interviews of suspects whenever practicable. Canadian courts have "raised the bar" in a number of respects regarding suspect interviews, recognizing that only a taped statement is a truly reliable reflection of what the suspect and interviewer said in the interview room. A videotaped interview eliminates, or at least greatly reduces, the problems caused by "misunderstandings" or inaccurate note taking. This provides a benefit to police investigations, in that it is much more difficult for a defence lawyer to allege interview improprieties that, if accepted by the Court, might result in a statement being ruled inadmissible.

In addition, a videotaped statement provides the Court an opportunity to judge the tenor of the conversation and the condition of the suspect to allow a more informed decision as to the voluntariness of the statement. Further, while confessions that are not videotaped are not necessarily inadmissible, where facilities are available and the police fail to use them, the confession will be inherently suspect and may be ruled inadmissible.[49] Finally, with recent

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[48] Morin report.

[49] *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.). See also *R. v. Menezes* (2001), 48 C.R. (5th) 163 (Ont. S.C.J.).

research into the phenomenon of false confessions[50] and wrongful convictions resulting in part from inappropriate suspect interviews, videotaping suspect interviews protects the rights of those wrongly accused.

In consideration of various issues of prosecutorial effectiveness, the "Heads of Prosecution Committee" (the senior Crown Counsel from each province and territory in Canada) has produced draft guidelines recommending that all statements made by an accused be either video or audio taped if at all practical or feasible.[51]

Ideally, then, to ensure both that inculpatory statements have the best chance of being found to be admissible, and that there is no chance of mistaking what was said, the best practice is to use a tape recorder at the scene of arrest for the early conversations, and to tape all interactions with the accused during transport, including when moving the accused from cells to the interview room. However, it is recognized that, except for a planned arrest, it is impracticable for frontline officers to audiotape suspect interviews because of the cost of transcriptions and of equipping every officer, and associated challenges.

While the VPD is committed to taking all reasonable steps to implement best practices regarding the interviewing of suspects, at the field interview stage in an urban centre such as Vancouver, it would be virtually impossible – and counterproductive – to require that all statements be audiotaped.

Notwithstanding the challenges of interviews at the point of arrest, in the interview room all suspect conversations can and should be videotaped, or at the very least, audio taped. Like many police services in Canada, the VPD has multiple interview rooms fully equipped with digital audio/video recording devices. In addition to other benefits, use of this equipment reduces the likelihood of factors that could lead to a wrongful conviction, and it is the practice for all planned interviews of suspects to be audio- and videotaped.

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[50] For example, see: Kassin, S.M. and Gudjonsson, G. H. (2004). *The Psychology of Confessions. A Review of the Literature and Issues*. Psychological Science in the Public Interest, 5, at 33-67.

[51] Federal/Provincial/Territorial Heads of Prosecution *Draft Disclosure Best Practices Protocol,* February 2004, at 3-5.

Video recording protects police investigators from false allegations of interviewing improprieties, and protects suspects from the potentially very serious consequences of inaccurate note taking,[52] fabricated evidence, or interview strategies that render a confession untrustworthy.[53] Videotaping of suspect interviews wherever possible is best practice, best serves the interests of justice, and is reflected in the policies and practices of the VPD.

(iv) Alibi witnesses

The Morin and Sophonow reports made recommendations on interviews of alibi witnesses. It was recommended that any alibi be investigated by officers other than those directly involved in investigating the crime or the accused. Interviews with alibi witnesses should be videotaped or at least audiotaped in their entirety. When interviewing alibi witnesses, they should not be cross-examined, it should not be suggested to them that they are mistaken, and they should not be influenced to change their position although it is appropriate for police to instruct them that it is essential they tell the truth and the consequences of failing to do so (Sophonow).

One important aspect of the MCM model employed by the VPD is to assign a "contrarian" role in serious investigations. In short, that investigators role is to be sceptical when a suspect is identified, and to attempt to "disprove" evidence pointing in the suspect's direction. Carefully gathering and recording alibi evidence is part of this role. This accomplishes two purposes. First, if the suspect is innocent, then he can be eliminated as early as possible, freeing up investigative resources and removing the aura of suspicion surrounding him. Second, if the suspect is factually guilty, then the role of contrarian will assist in eliminating potential defences such as false alibis.

d) Retention of Evidence

One of the problems that arises when looking at older cases either to assess whether there was a wrongful conviction or to assess the possibility of a prosecution, is that evidence is often missing.

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[52] For example, in the wrongful conviction of Thomas Sophonow, investigators' notes of an interview with Sophonow suggested that he provided information only the killer could have known. This couldn't have occurred since Sophonow was not the killer!

[53] In the United Kingdom and other industrialized Western nations, there have been several infamous cases where it was determined that police officers fabricated or coerced false confessions. One of those is the "Guildford Four", who signed a false confession after being coerced by police.

In the Sophonow report, it was recommended that the police forces be responsible for keeping police notebooks and that they should be kept for at least 20 years, but preferably 25 years, from the date that the officer leaves the force or retires. To address possible storage issues, it was noted that the notebooks may be preserved on microfiche.

The storage of original evidence was addressed in both the Morin and the Sophonow reports. It was recommended in the Sophonow report that exhibits, whether filed in court or gathered in the course of the investigation, should be stored for at least 20 years from the date of the last appeal or the expiry of the time to undertake that appeal.

The VPD has had a policy since 2001 requiring that police members who leave the VPD must turn their notebooks into VPD Archives. The retention policy requires that they be kept permanently.

The VPD also has a detailed evidence retention policy that sets out the number of years evidence and reports are retained, depending on the nature of the incident involved. For example, the reports on murders and sex offences are kept permanently, and for robberies, they are kept for ten years. In the case of physical evidence, for homicides and sex offences the evidence is kept permanently, and evidence in less serious cases is disposed of after varying lengths of time, after consultation with the investigator.

e) False Confessions

Various reports, including the Heads of Prosecution Report, identified the problem of false confessions, the psychology that underlies them, and recommendations to minimize their possibility. The recommendations include:

- requiring the entire suspect interview to be videotaped (not just the final statement);
- reviewing investigation standards regarding interviewing to ensure they are designed to enhance the reliability of the product of the interview process, and to accurately preserve the contents of the interview; and
- training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not

committed,[54] and the use of proper techniques for the interview of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

As described earlier, an important practice to reduce the possibility of a wrongful conviction based on statements attributed to the accused is to videotape the entire interview; the VPD is committed to this practice, not only with respect to preventing wrongful convictions, but also to ensure inculpatory statements have the best chance of being ruled admissible.

The problem of police-induced false confessions is also covered in a variety of training programs, beginning with a cursory examination in recruit training at the JIBC, and more extensively in advanced investigators' courses at the JIBC and Canadian Police College. In addition, the issue is specifically covered in the aforementioned VPD training on avoiding wrongful convictions. Investigators are taught not only to videotape interrogations in their entirety, but also to understand the psychology of police-induced false confessions and how psychological strategies can cause both guilty and innocent people to confess. They are also taught the importance of testing statements against known facts.

Finally, as introduced earlier, the MCM model imposes the investigative standards recommended in the Heads of Prosecution Report. This investigative methodology has been incorporated for all significant criminal cases. As a national and best practice standard, application of the MCM model ensures that major investigations proceed in an orderly, coordinated and defensible manner. It is noteworthy that a key role of the "Team Commander" in the MCM model is to ensure that the highest technical and ethical standards are maintained so that investigations are not compromised by "short cuts", poor practice, and inappropriate investigative practices.

f) False Allegations

The issue of false allegations is not specifically covered in the literature around wrongful convictions. However, it is a problem in practice and one that police investigators must be aware of, so it is covered in somewhat more depth than other issues in this section. False allegations arise in two broad sets of circumstances. The first is when a crime *has* occurred, but allegations

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[54] False confessions usually occur because of a combination of factors, including psychological vulnerability, to protect someone else, to escape custody, and a lack of ability to cope with interrogative pressure.

are made against an innocent party. The second is when allegations are made against an innocent party about crimes that have *not* occurred. Motivations for false allegations include maliciousness; revenge; to gain an advantage (such as in the case of in-custody informants); emotional and/or mental instability; as a weapon in custody disputes;[55] as a result of improper and/or coercive police questioning, particularly where children are concerned; and finally as a tool to extricate oneself from a difficult situation, such as "a sexual encounter with someone other than their boyfriend or husband, or a young person acting against the wishes of their parent."[56] Often, a combination of these factors is involved, as described in the examples below.

Some false allegations are a product of emotional instability and may be driven by a need for attention. In a VPD case that generated considerable publicity, the complainant made repeated allegations of stalking, and produced compelling "evidence" in the form of phone traces, a recording purported to be the suspect making an obscene call, a witness who reported seeing the suspect at the victim's home, and an allegation that the suspect had tried to kill the victim in his car, amongst others. Although charges were originally recommended against the "suspect," additional investigation requested by Crown to further corroborate the allegations revealed that, in fact, all the evidence had been engineered or fabricated. The complainant, who had a long history of attention-seeking behaviour, was convicted of public mischief. Key to avoiding a miscarriage of justice was a careful examination of the complainant's background and careful analysis of the evidence.

With respect to mental illness, in three cases involving Lower Mainland teachers all investigated by the same police officer, mentally ill women made bizarre allegations of sexual assault that were initially deemed credible. Overzealous and incompetent investigations had a devastating impact on the teachers, and one case of a "recovered repressed memory" resulted in charges and multiple trials before the teacher was exonerated.[57] A second teacher successfully sued for

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[55] One recent study found that where a custody or access dispute has occurred, twelve percent of child maltreatment allegations were false, three times the rate where no custody or access dispute was involved. See: Nico Trocme, University of Toronto, Faculty of Social Work & Nick Bala, Queen's University Law School, 2004, *False Allegations of Abuse and Neglect When Parents Separate*, available online: <http://www.leadershipcouncil.org/docs/trocme.pdf>.

[56] Linda Light & Gisela Ruebsaat, *Police Classification of Sexual Assault Cases as Unfounded: An Exploratory Study*, Centre for Leadership and Community Learning, Justice Institute of British Columbia, March 2006, at 77.

[57] *R. v. Kliman*, [1994] B.C.W.L.D. No. 587.

damages after having been alleged to have raped the complainant in the classroom. "It was obvious, the judge said, that the girl was experiencing the onset of schizophrenia."[58] In the third case, the victim alleged her father, mother and fifty others had "abused her as part of Satanic cult activities,"[59] yet she was still considered a credible witness by the investigator. An internal police review of the case concluded that there "is an onus on the investigator to judge the credibility of the victim in conducting an unbiased investigation…[the investigator] clearly made a biased assessment…without any consideration of the bizarre and unbelievable comments…".[60]

Flawed and leading interviews of children can result in false allegations and miscarriages of justice. For example, by the 1990s, allegations of Satanic and ritual abuse of children had become common, resulting, in part, from improper investigative and interviewing techniques that created "group hysteria."[61] The most notorious Canadian case was in Martensville, Saskatchewan where tunnel vision and improper police interviews of suggestible children in daycare by an inexperienced officer led to numerous bizarre allegations.[62] Eventually, nine people were charged, including five police officers.[63] Even after an independent review by a joint RCMP/Saskatoon Police task force raised serious doubts about the allegations, the Crown continued the prosecutions. But only the teenage son of the caregivers was found guilty of fondling two of the children; there never was a Satanic conspiracy of pedophiles.

One of the officers who was eventually exonerated, John Popowich, never returned to police work and lost an eye when attacked in a restaurant after his charges were stayed. He was subsequently awarded 1.3 million dollars by the Saskatchewan government for malicious prosecution and received a written apology from Saskatchewan's Minister of Justice affirming that Popowich was "fully innocent." Separate reviews conducted by the Crown[64] and the

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58 Rick Ouston, "3 discredited sex cases linked," in the *Vancouver Sun,* February 27, 1998, at A1-2 & B5.

59 *Ibid*, at B5.

60 *Ibid.*

61 See online: <http://members.shaw.ca/imaginarycrimes/timeline.htm> for one timeline of ritual abuse cases.

62 The case was explored in the CBC series "The Fifth Estate" in an episode entitled *Hell to Pay*, broadcast on February 12, 2003, and detailed information can be found online: <http://www.cbc.ca/fifth/martin/scandal.html>.

63 For a timeline of the case, see online: <http://www.cbc.ca/fifth/martin/timeline.html>.

64 Online: <http://www.cbc.ca/fifth/martin/docs/mar_or1.pdf>.

RCMP[65] found the investigation seriously flawed, particularly around the interviews of the children.

False allegations of sexual offences by complainants seeking to extricate themselves from a difficult situation are a troubling reality that faces police investigators. Statistics Canada reports that in 2002, 16% of sexual offences were "unfounded," more than twice the rate of other violent offences.[66] In an extraordinary case, the first exoneration by DNA in the state of Illinois was of Gary Dotson, who was wrongfully convicted of the 1977 rape of a 16-year-old girl and sentenced to 25 to 50 years in prison.[67] The key evidence against him was the girl's identification, and flawed forensic science, particularly around tests done on semen found in the girl's underpants. In 1985, the victim recanted her allegations, stating that the semen in her underpants was from sex with her boyfriend the day prior to her allegation, and that she had wanted a cover story in case she was pregnant. A court hearing was ordered, but the judge decided the complainant's original evidence was more credible than her recantation, saying her recantation was "implausible."[68] It was not until 1989 that advanced DNA analysis had positively excluded Dotson as the donor of semen found in the complainant's underpants, and proved that it was in fact from the complainant's boyfriend.[69]

Coercive police questioning of witnesses, particularly those who are psychologically vulnerable, can lead to false allegations, either because the witnesses come to believe the allegation, or to avoid further police questioning. For example, in the Milgaard case, repeated and coercive questioning by police of the three youths who were with Milgaard at the time of the murder occurred led them to make false and highly damaging allegations against him and were the basis of his conviction.[70] Likewise, in the much more recent case of the murder of Breann Voth by Derek Post,[71] improper police interviewing techniques with a drug addicted "witness" led her to

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65 Online: <http://www.cbc.ca/fifth/martin/docs/mar_rcmp1.pdf>.

66 R. Kong, H. Johnson, S. Beattie, & A. Cardillo. 2003. *Sexual offences in Canada*. Juristat, Canadian Centre for Justice Statistics 23:6, at 9.

67 Online: <http://www.law.northwestern.edu/news/fall02/dotson.html>.

68 National Desk, "Rape case judge calls recantation 'implausible'," in the *New York Times*, August 22, 1985, at A13.

69 Online: <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Dotson.htm>.

70 Neil Boyd & D. Kim Rossmo, 1992, *Milgaard v. The Queen: Finding Justice – Problems and Process,* School of Criminology Research Centre, Simon Fraser University, at 18.

71 *R. v. Post*, 2005 BCSC 1522.

allege that she had seen two men – the original suspects – commit the crime. The trial judge had this to say about the interview:

> I am disturbed that [the witness] is asked to close her eyes and imagine she's watching a movie. The interrogation encourages her to engage in speculation and imagine herself in various places. I find the nature of the questions and the circumstances under which they were made, shocking…[the investigator] encourages her to imagine a story. It is an atmosphere ideal for implanting false memories.[72]

Each of the examples above provides lessons for police investigators, and are used in VPD training regarding wrongful convictions, the content of which is summarized below. First and foremost, investigators are taught that while they must demonstrate professionalism and compassion toward complainants, their role is to determine the facts, not to act as an advocate. An investigator's responsibility to an accused person is the same as it is to a complainant: conduct a fair and ethical investigation following best practices motivated only by a search for the truth. As described elsewhere in this section, tunnel vision is frequently implicated in wrongful convictions. Therefore, it is extremely important to keep an open mind, not jump to conclusions, and to follow the other best police practices set out in this section regarding avoiding wrongful convictions.

Key to determining if an allegation is false is careful interviewing and follow-up. Allegations must be compared against known facts, and efforts should always be made to find corroboration, and to question why it cannot be found if that is the case. Investigative tools such as "statement analysis" can be invaluable for determining if a statement is deceptive.[73] It is entirely appropriate and necessary to check a complainant's background to see if there is a history of suspicious complaints. Where children are involved, it is crucial that only an investigator properly trained in conducting non-leading and age-appropriate interviews be utilized, and the background to the disclosure and previous interviews must be carefully examined for the possibility the allegation has already been tainted by leading questions.

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[72] Gerry Bellett, "Judge rules out other men in Voth killing: Justice Harvey Groberman also slams police interrogation for "manipulating" addict into implicating 2 men," in the *Vancouver Sun,* October 6, 2005, at B5.

[73] Statement analysis training has been common for police investigators since the 1990s, and the most well-known training in Canada originated with a former Israeli police investigator, Avinoam Sapir, whose company's website can be found online: <http://www.lsiscan.com/>.

While bizarre allegations can be true – keeping an open mind requires their consideration – generally speaking, the more bizarre the allegation, the less likely it is to be true, no matter how credible and articulate the complainant seems. And while a mental illness does not necessarily mean a complaint is not credible, if the illness is one involving psychosis and delusional thinking, then this is a major red flag for the investigator. In addition, great care must be taken in interviewing those who are emotionally or mentally frail, including those with substance abuse problems, as they may be more susceptible to leading or suggestive questioning. Complainants may make false allegations for the same reasons discussed earlier regarding false confessions, including coercion, and investigators must guard against unduly influencing a witness or complainant's statement.

Finally, with respect to suspects, it is crucially important that they be given an opportunity to provide a response to allegations against them, and that any denials or alibi evidence proffered be fully investigated with an open mind as to the possibility they are true.

g) Police culture

There is a recognized need for police to foster a culture within their ranks that will guard against the risks to a proper investigation that have been identified as "tunnel vision" and "noble cause corruption".

Tunnel vision was defined by Commissioner Kaufman in the Morin report as "the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information". One of the suggestions in the Morin report was that investigators should not attain an elevated standing in an investigation through acquiring or pursuing the "best" suspect or lead, as this promotes competition between investigative teams for the best lead, it results in tunnel vision and it isolates teams of officers from each other.

Bruce MacFarlane[74] noted that tunnel vision can set in where there is substantial public pressure, which is usually conveyed through media pressure, on the police to solve a crime. This increases the pressure on police to identify a viable suspect quickly and can cause the police to

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[74] Bruce MacFarlane, "Convicting the Innocent – A Triple Failure of the Justice System", (2006) 31 Man.L.J. 403 at 435-36.

prematurely focus on a suspect against whom there is some evidence and not explore other potential leads or lines of investigation. During an investigation, even where a viable suspect has been identified, police should continue to pursue all reasonable lines of enquiry, whether they point toward or away from the suspect.

MacFarlane described "noble cause corruption" as a phenomenon where police believe that it is justifiable to fabricate or artificially improve evidence, or in some other fashion bend the rules to secure the conviction of someone they are satisfied is guilty. This could manifest itself in false testimony, excessive force, illegal searches or surveillance, or other questionable police strategies. It is conduct that masks itself as legitimate on the basis that the guilty must be brought to justice despite evidentiary, substantive or constitutional considerations that could "get in the way."

Predisposing or environmental circumstances often set the stage for investigative failures. Factors include public pressure for an arrest in high profile cases, an unpopular suspect, an investigative environment where the pursuit of the truth is surrendered to a desire to "win" at virtually any cost, and the belief that the end justifies the means because of a belief the suspect committed the crime.

To address these concerns, it was recommended in the Morin report that police forces must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management in the force must recognize that it is their responsibility to foster this culture. The police need to develop and maintain a culture that guards against early investigative bias, and that emphasizes the importance of fact verification throughout the full investigation.

As discussed earlier, a key role of the Team Commander in the MCM model employed by the VPD (and other police agencies) is to ensure investigations proceed in a lawful and ethical fashion. The role of "contrarian" is an important part of MCM training to guard against tunnel vision, i.e., coming to conclusions too early in an investigation about who the right suspect is. Implementation of the MCM model with police officers properly trained in their roles is the best defence against tunnel vision, bad police practice, over-zealousness or bias, "noble cause" corruption and incompetent investigations. To this end, the VPD requires that all Sergeants and Inspectors in charge of investigative units and sections are required to receive MCM training. In

addition, the VPD is committed to the RCMP's provincial MCM Accreditation process, and has an accredited Team Commander who sits on the evaluation committee. Finally, part of the philosophy of MCM is to encourage independent reviews of investigations. The VPD supports this philosophy, and has also entrenched a system of conducting facilitated debriefings of major cases as a learning exercise. A detailed report is prepared setting out the challenges of the investigation, what went well, what didn't, and lessons and recommendations for the future. These reports are available to all VPD members on the VPD's "Knowledge Base" (See "Education" following for further information.).

Integrity in investigations is incorporated into all VPD investigators training, particularly the session on avoiding wrongful convictions, where the role of the contrarian, the importance of ethical conduct, and the importance of challenging inappropriate actions are all stressed.

It should also be noted that the hiring process for VPD recruits is highly comprehensive – including a polygraph exam – and a key "showstopper" issue is integrity. Integrity is one of the VPD's four "IPAR" values (along with, Professionalism, Accountability, and Respect) and members are expected to live these values in every aspect of their work. For example, police officers are repeatedly advised that if they have to choose between letting an alleged criminal go free or compromising their values, then they are expected to let the criminal go free. The VPD has gone further, and in 2006 created an "Ethics Officer" position specifically to ensure that ethical issues are constantly reviewed and reinforced. The VPD values are imbued in a variety of ways, including being incorporated into every promotion process.

h) Education

It was recommended in the Morin report, and repeated in other reports, that police officers should receive regular training on the known or suspected causes of wrongful convictions and how police officers may contribute to their prevention. Recommendations have also been made in the reports to specific areas of training that should be addressed, including the following:

- the identification and avoidance of tunnel vision (Morin) - annual tunnel vision training with examples and discussion (Sophonow, Heads of Prosecutions);

- ethical training (Morin);

- a wide range of investigative skills, on a continuing basis (Morin);
- the appropriate use of, and limitations upon, criminal profiling e.g., to generate ideas for investigation but keeping in mind that the creation of a profile once a suspect is identified can be misleading and dangerous (Morin);
- the limitations of forensic fibre comparisons (Morin);
- police protocols respecting in-custody informants and appropriate methods of dealing with, and investigating the reliability of, such informers (Morin);
- the perils of eyewitness misidentifications (Heads of Prosecutions);
- the appropriate use and limitations of polygraph results (Morin); and
- how to address and evaluate "late breaking evidence" meaning evidence that could reasonably be expected to have been brought forward earlier, if true, including exploring the information available to the witness, the reason or motivation for the untimely disclosure, the need to attempt to independently confirm such evidence and to view such evidence with caution (Morin).

In the Morin report, a number of specific topics were identified for police training with respect to conducting witness interviews:

- interviewing techniques which enhance the reliability of witness statements and the techniques which detract from their reliability;
- the dangers of unnecessarily communicating information to a witness that might colour the witness' account of events;
- the dangers of communicating their assessment of the strength of the case or their opinion of the accused's character; and
- how to interview youthful witnesses, including that the interview should be conducted in the presence of an adult disinterested in the evidence.

With respect to suspect interviews, the Heads of Prosecutions report recommended police training on 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 interviewing suspects (and witnesses) that are designed to enhance the reliability of the product of the interview.

The VPD fully supports all the recommendations described above. They are incorporated in training at the JIBC, in MCM training delivered by the Canadian Police College, in internal investigator training courses, and specifically in the training session on wrongful convictions delivered in the "Level II" investigators program to all VPD members within their first five years of service, whether or not they are assigned to an investigative squad. So at the minimum, every officer will be introduced to these issues during their basic training at the JIBC, then receive more in-depth exposure within their first five years. Any officer who moves into an investigative squad will then receive considerably more training, such as in the Level I and II (formerly known as the Major Crime Course) Investigator Programs, the Sexual Offence Investigator program, various interviewing and interrogation courses, and particularly in major case management training. Finally, the VPD Investigation Division has created a "Knowledge Base", which is a searchable Intranet-based electronic library of literature promoting investigative excellence. It includes a section on wrongful convictions containing the reports of relevant commissions and inquiries, as well as other relevant literature, and its creator, the Division's Deputy Chief, promotes use of and contributions to this resource.[75]

Conclusion

There can be no greater failure of the Criminal Justice System than to convict an innocent person. Yet we know it happens, and with greater frequency than once believed. If one extrapolates from the 197 convicted persons exonerated by DNA of serious crimes in the U.S., and the small but growing number in Canada, it is only reasonable to assume that the actual

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[75] One example from the Knowledge Base is a superb and detailed article on the most common reasons for failed investigations, which can be found in two parts at: Rossmo, D. K. (2006). Criminal investigative failures: Avoiding the pitfalls. *FBI Law Enforcement Bulletin*, *75*(9), 1-8; and Rossmo, D. K. (2006). Criminal investigative failures: Avoiding the pitfalls (Part two). *FBI Law Enforcement Bulletin*, *75*(10), 12-19. A fuller version will be published in book form in January 2008.

number is far greater, because of the high number of cases where DNA was not available to assist in determining the truth. This is unacceptable.

Fortunately, it is possible to greatly reduce the potential for wrongful convictions. In every Canadian case discussed earlier, serious, avoidable errors were made in the police investigations (as well as by other players in the Criminal Justice System). There is now considerable research on why investigative failures leading to wrongful convictions occur, which provides the roadmap to preventing them. Proper recruiting and training, implementation of the major case management model, fostering a culture of excellence in ethical investigations, and ongoing education into the causes of wrongful convictions and proper investigative techniques are necessary to create an environment in which only the guilty are convicted, not the innocent. A wrongful conviction not only hurts the individual convicted, it hurts society, both in terms of the true guilty party being allowed to remain free, but also in terms of the public's confidence in the Criminal Justice System. The police play a pivotal role in this system, and must play a similarly significant role in working to prevent wrongful convictions.

CHAPTER THREE

REVIEW: WRONGFUL CONVICTIONS AND THE ROLE OF CROWN COUNSEL

BY NICOLA MAHAFFY AND JULIE ROBINSON[76]

Introduction

> "A criminal trial is not a personal contest of skill or professional pre-eminence: prosecuting counsel must resist any notion that the object of the prosecution is to secure a conviction or, put simply, to 'win'".[77]

Prosecutors vary in capability, judgement and experience. Like all people, even the best of them make mistakes. Mistakes or improper behaviour by prosecutors are a common element of most wrongful convictions.[78] The purpose of a criminal prosecution is to present to the Court what the prosecutor considers to be credible relevant evidence. Each aspect of a prosecutor's function is a matter of public duty which must be performed with the impartiality of judicial proceedings themselves.[79] The prosecutor must show absolute integrity and be seen as free of all suspicion of favouritism or bias.[80]

This review article summarises the findings and recommendations of various reports and inquiries into wrongful convictions and the role of the Crown prosecutor in those wrongful convictions.

General

The Heads of Prosecutions Committee Report identified a number of potential causes of wrongful convictions including: tunnel vision; mistaken eyewitness identification and testimony;

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76 The authors are prosecutors with the Ministry of Attorney General for British Columbia, Canada.

77 MacFarlane, B.A., "Convicting the Innocent – A triple failure of the justice system", Dec, 15, 2005 ("Convicting the Innocent"), at 46.

78 Due to the Prosecutor's role in approving charges, she is also primarily responsible when charges are laid without foundation. Wrongful charges on heinous crimes even with no conviction, due to the attendant publicity, may be very harmful to the unfortunate innocent person involved.

79 *Randall v. The Queen*, [2002] 2 Cr. App. R. 17 (P.C.).

80 The Inquiry Regarding Thomas Sophonow, 2001: online: <http://www.gov.mb.ca/justice/sophonow/toc.html> ("Sophonow Inquiry").

false confessions; in-custody informers; misuse of DNA evidence; forensic evidence and wrong expert testimony; and inadequate prosecutorial education[81].

The following predisposing circumstances for wrongful convictions have also been identified[82]:

- public pressure to convict in serious, high profile cases;
- an unpopular defendant, often an outsider or member of a minority group;
- a local legal environment that has converted the adversarial process into a "game", with the result that the pursuit of the truth has given way to strategies, manoeuvring and a desire to win at virtually any cost; and
- "Noble cause corruption": the belief that the end justifies the means. The suspect is known to have committed the crime so improper practices are seen as justifiable in order to ensure a conviction.

The reports from the Driskell, Morin, and Sophonow inquiries and Commissioner Lamer's inquiry into the wrongful convictions of Ronald Dalton, Gregory Parsons and Randy Druken mirror, to a large extent, the comments from the Heads of Prosecution Report. The reports, however, also make further recommendations for Crown Counsel on the issues of:

- disclosure;
- Crown Counsel's use of the "stay of proceeding" power; and
- Crown Counsel's use of notoriously unreliable evidence such as demeanour evidence and evidence of consciousness of guilt.

Tunnel Vision

Tunnel vision on the part of police as well as the Crown has been identified as a frequent factor in wrongful convictions. Tunnel vision has been defined as:

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81 Report on the Prevention of Miscarriages of Justice, 2004, FPT Heads of Prosecutions Committee, Working Group: www.justice.gc.ca/en/dept/pub/hop/ ("HPC").

82 Convicting the Innocent, *supra* at 435 & 436.

> the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received, and one's conduct in response to the information.[83]

Tunnel vision is insidious because it is all too often intangible, as it can result from an honest, perhaps well-intentioned belief in an individual's guilt. This, in turn, can lead to a disregard of information or evidence that is inconsistent with the Crown's theory. Overzealousness or over-enthusiasm may also play a role. Justice Lamer stated:

> Tunnel vision is rarely the result of malice on the part of individuals. Rather, it is generated by a police and prosecutorial culture that allows the subconscious mind to rationalize a biased approach to the evidence. Moreover, it is mutually reinforcing amongst police officers, amongst prosecutors and in the interaction between these groups of professionals. It may even affect judges.[84]

The Heads of Prosecutions Committee Report identified a number of specific factors that contribute to tunnel vision:

- close identification with police and/or victims;
- pressure by media and/or special interest groups; and
- isolation from other perspectives.[85]

The unique role of Crown Counsel must be examined when considering the nature, cause and effects of tunnel vision. The role of Crown Counsel is not to seek a conviction, but rather to see that justice is done. Fairness is integral to the role of Crown Counsel. In discussing the role of the Crown in *Boucher v. The Queen,* Rand J. stated:

> It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is represented: it should be done firmly and pressed to its legitimate strength but it also must be done fairly. The role of the prosecutor excludes any notion of winning or loosing; his function is a matter of public duty than [sic] which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an

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[83] Kaufman Inquiry (Morin), 11, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>.

[84] *The Lamer Commission of Inquiry pertaining to the cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, 2006: online: <http://www.justice.gov.nl.ca/just/lamer/, at 330 ("Lamer Inquiry").

[85] HPC.

> engrained sense of dignity, the seriousness and the justness of judicial proceedings.[86]

It is therefore of the utmost importance that Crown Counsel remain mindful of their unique role within the justice system. This role is quasi-judicial, which "includes a duty to both the accused and to the court".[87] In that regard, Crown Counsel must be wary of being caught up in the enthusiasm of the investigators. They must also be wary of being influenced by media coverage or the wishes of the victims, which may consciously or subconsciously impact upon the exercise of Crown discretion. In remaining vigilant of this important role, and by strict adherence to the principles of fairness, Crown Counsel will safeguard against the perils of tunnel vision.

The Driskell, Sophonow and Morin inquiries all discussed the dangers of tunnel vision, and all made recommendations for Crown Counsel to safeguard against tunnel vision. The Marshall Inquiry emphasised the need for separation between police and Crown functions to create a system of institutional checks and balances. The Sophonow inquiry recommended regular, mandatory training for police officers on tunnel vision, and the Morin Inquiry extended this recommendation to include Crown Counsel.[88]

The Heads of Prosecutions Committee Report made the following recommendations to assist in deterring tunnel vision:

- Crown Counsel policies should emphasize the quasi-judicial role of the Crown and the dangers of adopting the views of others. The policies should also stress the importance of the Crown being open to the views of defence counsel and others.

- For most cases, Crown offices should adopt a practice of having different Crown prosecute the case than the Crown who advised the police and laid the Charge. "Mega cases" may require a different practice.

- Where the Crown does not do pre-charge screening of the case, the charge should be scrutinized by the Crown as soon as possible.

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[86] (1955) S.C.R. 16 at 24.

[87] HPC 40.

[88] HPC 36.

- Second opinions and reviews should be available in all cases.

- There should be internal checks and balances through supervision by senior Crown in all areas and roles and accountabilities should be clearly defined. The lead Crown on every case should also be easily identified.

- Crown offices should have a culture that does not discourage questions, consultations and consideration of a defence perspective by the Crown.

- The Crown should respect the independence of the police, while fostering cooperation and early consultation to ensure their common goal of achieving justice.

- Regular training for Crown on the dangers and prevention of tunnel vision should be implemented. This training should include a component on the role of the police.

Eyewitness Identification

A positive identification of an accused is an essential element of proving an offence. Eyewitness testimony which directly links the accused to the commission of the alleged offence is often the most important and compelling part of the Crown's case. Dr. Elizabeth Loftus, an acknowledged expert in eyewitness testimony, has stated "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says, "that's the one!''[89]

However, eyewitness identification evidence is fraught with inherent frailties. Unfortunately even the most honest, well intentioned witness can be mistaken. Therein lies the danger of witness misidentification, as "it is deceptively credible, because it is honest and sincere."[90]

In Canada there is a significant body of case law which acknowledges and discusses the inherent frailties of eyewitness identification. In *R. v. Hibbert* the Supreme Court of Canada stated:

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[89] Dr. Elizabeth Loftus has a PhD in psychology from Stanford University and is the author of numerous books, articles and chapters on psychological issues, particularly as they relate to memory and the psychology of eyewitness testimony. Dr. Loftus testified as the lead psychological expert at the Sophonow Inquiry on wrongful convictions before Commissioner Cory. Convicting the Innocent, *supra* at 53.

[90] HPC 43.

> The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value placed on it. I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded "little weight", goes far enough to displace the danger that the jury could still give it weight that it does not deserve….in this particular case, I think it would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a witness and the accuracy of that witness…[91]

In "Convicting the Innocent - A Triple Failure of the Justice System", Bruce MacFarlane states that eyewitness misidentification is *"the single most important factor leading to wrongful convictions."*[92] The Innocence Project in New York City[93] reported that of 130 post-conviction exonerations based on new DNA evidence, 101 (78%) involved mistaken identification. The Innocence Project concluded that mistaken eyewitness identification was by far the leading factor in the cases of wrongful convictions that they examined.[94]

The Driskell, Sophonow, Morin and Lamer commissions of inquiry have also concluded that eyewitness misidentification has been the foundation of tragic miscarriages of justice in Canada. They discuss the necessity of proper interview techniques, procedures by police and by Crown as being essential to ensure the reliability of identification evidence. It is commonly agreed that the honesty of the witness is not determinative of the quality of the identification; thus one must look to the circumstances surrounding identification itself to determine what weight it ought to be given. The Heads of Prosecutions Committee Report lists the following "indicia of reliability" that one must consider when assessing the strength and quality of eyewitness identification evidence:

- Was the suspect a complete stranger or known to the witness?
- Was the opportunity to see the suspect a fleeting glimpse or something more substantial?
- What were the lighting and other physical conditions at the time of observation?

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91 *R. v. Hibbert*, [2002] S.C.R. 445, paras 50 and 52.

92 Convicting the Innocent , at 445.

93 The Innocence Project at the Benjamin N. Cardozo School of Law of Yeshiva University in New York is a non-profit legal clinic which handles only cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. HPC 26, 43.

94 *Ibid* at HPC 26, 43.

- Was the description reduced to writing or reported in detail in a timely fashion?
- Is the description general and vague or descriptive in detail including distinctive features of the suspect and their clothing?
- Was there a potential tainting or contamination of the identification?
- Has the witness described a distinguishing feature of the suspect or failed to mention a distinguishing feature?
- Has the eyewitness identification been confirmed in some particular way?[95]

An awareness of these factors that impact upon the reliability of a witnesses' identification may assist the Crown to ascertain the "honest but mistaken" witness. The Crown must acknowledge the inherent frailties associated with eyewitness identification, and be mindful of the frailties in any prosecution where eyewitness identification forms part (or all) of the Crown's case.

However, the likelihood of wrongful convictions can be reduced if vigilance and diligence are employed in gathering, cataloguing and presenting eyewitness identification. The following summarizes practice suggestions for the Crown:

- The Crown should assume that the identity of the accused is always at issue unless the defence specifically admits it on the record. The Crown should engage in timely preparation and review of all of the available eyewitness identification evidence, including the manner in which it was obtained.
- The witness should be given a reasonable opportunity by the Crown to review all of their previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. The Crown should carefully canvass all of the indicia of identification including any distinguishing evidence.
- The Crown should never interview witnesses collectively. The Crown should never prompt or coach a witness by offering clues or hints about the identity of the accused in court. The Crown should not condone nor have the witness

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[95] HPC 52.

participate in a "show up" line up. The Crown should never show the witness an isolated photograph or image of the accused during the interview.

- In serious cases, it is wise for the Crown to have a third party present for the interview to ensure there is no later disagreement about what took place at the meeting.

- The Crown should never tell a witness they are right or wrong about their identification.

- The Crown must remember that disclosure is a continuing obligation and that all inculpatory and exculpatory evidence should be given to the defence in a timely fashion. Where a witness materially changes their evidence by offering more or recanting previously given information during an interview, the defence must be told. In this case, it would be wise for the Crown to have a police officer take a further statement from the witness.

- The Crown should 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 (i.e.: the composition of the photopack).

- The Crown should always be wary of prosecutions based on weak single-witness identification. The Crown should ascertain whether there are any corroborations of the eye-witness identification.

- The Crown should ensure there is a proper charge and caution to the jury on the inherent dangers of identification evidence.

- Workshops on proper interviewing techniques should be incorporated into regular and ongoing training sessions for the Crown.

- Presentations on the perils or eyewitness misidentification should be incorporated in regular and ongoing training sessions for the Crown.

False Confessions

It seems counterintuitive that an individual would confess to a crime that they did not commit. However, it can, and does occur; innocent individuals do confess to crimes they have not committed. The Supreme Court of Canada has acknowledged the phenomenon of false confessions, and the Court has further noted that experts have identified five basic kinds of false confessions: voluntary, stress compliant, coerced-compliant, non-coerced persuaded and coerced-persuaded.[96]

Stress compliant confessions occur when the pressures of interrogation become so intolerable that suspects confess simply to end the interrogation.[97] The suspect literally "gives in". *Coerced-compliant* confessions are the product of "classic coercive influence techniques such as threats and promises".[98] The *non-coerced-persuaded* confession occurs when police tactics cause the innocent person to "become confused, doubt his memory, be temporarily persuaded of his guilt and confess to a crime he did not commit".[99] The *coerced-persuaded* confession is similar to the non-coerced persuaded. However, it also involves the classically coercive aspects of the coerced-compliant confession.[100]

False confessions inevitably lead to tragic miscarriages of justice because confessions are regarded as the most powerful and persuasive evidence of the guilt of the accused. Thus judges and juries are not inclined to believe claims of innocence by someone who has confessed.[101]

Protections against false confessions presently exist in Canada both at common law and under the *Canadian Charter of Rights and Freedoms* (the "Charter"). The Supreme Court of Canada recently re-examined the confessions rule in *R. v. Oickle*[102], recognizing that they have "a growing understanding of the problem of false confessions".[103] The court in *Oickle* emphasises that there are interrogation techniques which "commonly produce false confessions", and

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96 *R. v. Oickle,* [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321.
97 *Ibid* at par 37 et seq.
98 *Ibid.*
99 *Ibid.*
100 *Ibid*, Convicting the Innocent, at 473.
101 *Ibid*, at 474.
102 [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321.
103 *Ibid* at para 32.

outlines relevant factors that must be reviewed to determine if the confession was voluntarily made. These factors include:

- whether *threats or promises* were made (paras. 48-57);
- whether there were *oppressive conditions* which led to a confession (paras 58-62);
- whether the accused had an *operating mind*; i.e. did the accused know what he was saying (paras 63-64); and
- whether other *police trickery* used (paras 65-67).[104]

The Supreme Court also discussed the importance of videotaping interviews of suspects to help ensure procedural fairness, and to assist the trier of fact in assessing the admissibility of the confession:

> First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgements about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard will have the additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.[105]

The *Charter* also offers protections against false confessions. Section 7 of the *Charter* guarantees the right to remain silent: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", and s.10(b) guarantees the right to counsel: "Everyone has the right on arrest or detention…to retain and instruct counsel without delay and to be informed of that right".

The Canadian commissions of inquiry have examined the issue of false confessions, and recognized that both police and Crown Counsel must take steps to avoid this phenomenon. They have made recommendations concerning the taking of statements from suspects and witnesses, including the following:

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[104] *Ibid* at para s 48-67.

[105] *Ibid* at para 46.

> Crown Counsel 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 interview of suspects and witnesses that are designed to enhance the reliability of their statement.[106]

In-custody Informers

> "The most dangerous witness of all is the jailhouse informant".[107]

US studies demonstrate that jailhouse informants were used in approximately 20% of all wrongful conviction cases.[108] Among their findings are the facts that:

- Jailhouse informants are polished and convincing liars.
- All confessions of an accused (even those made to a cell mate) are given great weight by jurors.
- Jurors give the same weight to "confessions" made to jailhouse informants as they will to a confession made to a police officer.
- "Confessions" made to jailhouse informants have a cumulative effect and, thus, the evidence of three jailhouse informants have a greater impact on a jury than the evidence of one.
- Jailhouse informants often rush to testify, particularly in high profile cases.
- Evidence from jailhouse informants appears to have come from the person who committed the offence.
- The tendency of jailhouse informants to lie and make it seem as if they are telling the truth makes them a threat to the principle of a fair trial and, thus, to the administration of justice.[109]

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[106] HPC 133.

[107] Convicting the Innocent" at 466, 469.

[108] Sophonow Inquiry.

[109] Sophonow Inquiry.

Most in-custody informers wish to benefit from their contemplated participation as witnesses for the prosecution. There is significant danger of an unscrupulous witness manufacturing evidence for personal benefit.[110]

In Canada, the use of jailhouse informants has led to several wrongful convictions. Mr. Morin, Mr. Driskell and Mr. Sophonow were all wrongfully convicted in cases where the Crown relied on jailhouse informants. Morin was wrongfully sentenced in 1992 to life imprisonment for the murder of nine-year-old Christine Jessop. Ultimately he was acquitted. Driskell was found guilty in 1991 of the murder of Perry Harder in Winnipeg. The reliability of key witnesses was a central concern. Sophonow was convicted of the murder of Barbara Stoppel and spent four years in prison before the Manitoba Court of Appeal acquitted him in 1985. Douglas Martin, a jailhouse informant claimed he heard Sophonow confess to the murder. The reports from the inquiries into their wrongful convictions make a number of recommendations with respect to protocols the Crown should follow in deciding when to use jailhouse informants. The Heads of Prosecution Committee has also made a number of recommendations in this area:

1. Justice professionals need cross-sectoral education to learn about:

    (a). The dangers associated with in-custody informers;

    (b). The factors affecting in-custody informer reliability; and,

    (c). Policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.

2. The Crown should develop policy guidelines to assist, support and limit the use of in-custody informer information and evidence.

3. Each province should establish an in-custody informer registry which the police, Crown and defence can access for information about prior testimonial involvement of in-custody informers.

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

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[110] Morin Inquiry.

upon except where there is a compelling public interest in doing so. In assessing whether or not to use an in-custody informer, the reliability of the information or evidence proffered by the informer should be taken into account. The assessment should start from the premise that informers are, by definition, unreliable. Any material change in circumstances should be re-evaluated by the in-custody informers' committee to determine whether the information is reliable.

5. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be put in writing and signed by the prosecutor, the informer and his or her counsel. A fully recorded oral agreement may substitute for a written one.

6. The Crown should vigorously and diligently prosecute any in-custody informers who give false evidence in order to, among other things, deter like-minded members of the prison population.[111]

The Morin, Driskell, and Sophonow inquiries to some extent mirror the recommendations of the Heads of Prosecution Committee. In most cases, however, they go further.

The Sophonow report recommends that, as a general rule, jailhouse informants should be prohibited from testifying. If a jailhouse informant does testify in a case, the report recommends that only one jailhouse informant should be used. This is because of the cumulative impact of alleged confessions.

In his report into the wrongful conviction of Mr. Morin, Commissioner Kaufman makes a number of recommendations with respect to Crown Counsel policies and protocols for the use of jailhouse informants. He recommends:

1. Crown polices on the use of in-custody informers should reflect:

   (a). That the seriousness of the offence, while relevant to the decision to use an in-custody informer, will not, standing alone, demonstrate a compelling public interest in the presentation of their evidence.

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[111] HPC.

(b). It will never be in the public interest to initiate or continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

2. The Crown should have credible confirmatory evidence or information, independent of the in-custody informer, which significantly supports the position that the incriminating aspects of the proposed evidence were not fabricated.

3. The following should be listed in the Crown policy as being factors to consider in deciding whether or not to call in-custody informers:

(a). The extent to which the statement is confirmed by credible independent evidence;

(b). The specificity of the alleged statement. For example, a claim that the accused said "I killed X" is easy to make but extremely difficult for any accused to disprove;

(c). The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;

(d). The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused;

(e). The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;

(f). Any request the informer has made for benefits or special treatment (whether or not agreed to), and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;

(g). Whether the informer has, in the past, given reliable information to the authorities;

(h). Whether the informer has previously claimed to have received statements while in custody;

(i). Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution of the defence or on his own behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;

(j). Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;

(k). The circumstances under which the informer's report of the alleged statement was taken;

(l). The manner in which the report of the statement was taken by the police (e.g. non-leading questions, KGB statement[112]…); and,

(m). Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer.

If a decision is made by a prosecutor to call a jailhouse informant as a witness, the Morin report makes the following recommendations:

- Prosecutors involved in negotiations with the in-custody informer for benefits in exchange for testimony should generally not be counsel ultimately expected to tender the evidence of the informer in court.

- Any agreement with an in-custody informer should provide that the informer should expect no benefits to be conferred that have not been previously agreed to and, specifically, that the informer should expect no additional benefits in relation to undiscovered criminality.

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[112] In Canada, significant changes to the use of hearsay evidence was made by the Supreme Court of Canada in the case of *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257. That case established a procedure under which the police could take statements from witnesses which, if the witness later recanted or was otherwise unavailable at trial, could be used in evidence for the truth of its contents. Generally, the statement must be made under oath, solemn affirmation or solemn declaration and following the administration of an explicit warning to the witness of his amenability to prosecution if it is discovered that he lied.

- Where additional benefits are sought by the in-custody informer subsequent to his or her compelled testimony, they should not be conferred by Crown Counsel.

- Any agreement respecting benefits should not be conditional upon a conviction.

- The Attorney General should establish limits on the kinds of benefits available to in-custody informants.[113]

When the Crown decides to call the evidence of a jailhouse informant, the Crown is under a heavy onus to make complete disclosure in relation to the use of in-custody informer evidence. This includes:[114]

- The criminal record of the in-custody informer and, where possible, the synopsis of the facts relating to the convictions.

- Any information in the prosecutor's possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given.

- Any offers or promises made by the police, corrections authorities, Crown Counsel, or a witness protections program to the informer or person associated with the informer in consideration for information in the present case.

- Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities.

- Any arrangements for benefits should, absent exceptional circumstances, be put in writing and signed and/or recorded on video-tape. They should be approved by the Director of the Crown office and should be disclosed to the defence prior to the informer giving evidence.

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[113] Morin Inquiry.
[114] Morin Inquiry.

- Notes of police officers, corrections officers, and Crown Counsel who were present during promises of and negotiations for benefits sought by an in-custody informer.

- The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.

- If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.

As recommended in the Sophonow report, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.[115]

The consequences of calling what later transpires to be false evidence, can be far reaching. As a result, if an in-custody informer has lied to the authorities or to the Court, that informer, where there is a reasonable prospect of conviction, should be prosecuted to the appropriate extent of the law, even if his or her false claims were not tendered in a criminal proceeding. Other prisoners must be deterred from similar conduct.

DNA Evidence

DNA evidence carries substantial potential to incriminate or to exculpate and has led to the exoneration of many wrongfully convicted persons. "The Innocence Project", a US based organization dedicated to exonerating wrongfully convicted persons through DNA testing, as noted earlier, reports that as of May 9, 2007, 200 innocent people spent 2,500 years in prison for crimes they did not commit. They were exonerated through DNA testing[116]. In Canada, DNA testing has led to the exoneration of Guy Paul Morin, David Milgaard, and Thomas Sophonow.

Given the power and importance of DNA evidence, the Crown needs strong policies and procedures in place to ensure that DNA evidence and the DNA data bank provisions are being meticulously and fully used.[117]

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[115] Sophonow Inquiry.

[116] The innocence project website as of May 9, 2007: online: <http://innocenceproject.org/>.

[117] HPC.

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 the Crown. A research package for prosecutors on DNA data bank applications and the use of DNA evidence should be developed and kept current because the science continues to evolve.[118]

All forensic material should be retained for repeat testing whenever practicable. If only one test is possible, the defence should be invited to observe the test.[119] Standards are needed for the collection and preservation of DNA evidence. It is important to ensure that DNA testing methods meet rigorous scientific criteria for reliability and accuracy; forensic scientists must be fully informed and taught to communicate evidence in a credible manner. Criminal justice practitioners need to understand the rapidly advancing technology.

DNA evidence, when properly carried out and interpreted, is based on solid science but not all expert testimony is made on such a solid basis.

Expert Testimony

Expert evidence can be powerful and important evidence in a prosecution. Its admission into evidence must, however, be closely examined, especially where the evidence involves new or novel scientific theories or techniques. This is because:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight that it deserves.[120]

In the case of Mr. Morin, the misuse of scientific evidence - hair comparison evidence - was found to be one of the three main causes of his wrongful conviction. Commissioner Kaufman recommended in his report on the case that, where evidence is tendered of "hair comparison evidence" that shows only that the accused cannot be excluded as the donor of the unknown hair, the Court should take a more critical analysis of the evidence before admitting it.

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[118] HPC.

[119] Morin Inquiry, at 10.

[120] *R v. Mohan*, [1994] S.C.J. No. 36 at paragraph 19.

A review of the Heads of Prosecution Report, the Morin inquiry, and the paper "Convicting the Innocent", leads to the following recommendations for Crown Counsel:

- Where an expert is testifying in an area involving ongoing research and changing view, the jury must be instructed to consider those opinions with care, especially where there are contrary views.[121]

- The prosecution should not rely on microscopic hair comparison evidence in court, moving instead to DNA testing in all cases.

- Expert evidence which advances a novel scientific theory or technique should be subject to special scrutiny by prosecutors.

- The prosecution should provide the defence with the underlying raw data on which the results are based: test results, notes, worksheets, photos…and anything else that will facilitate a second assessment.

- The prosecution should provide the defence with the written correspondence and notes of telephone conversations between the police and the forensic lab.

- The prosecution should provide the defence with a description of any potentially exculpatory conclusions that arise from the testing.[122]

The limitations upon the inferences to be reliably drawn from forensic fibre comparisons needs to be better appreciated by the Crown. This requires education.

Where a forensic scientist has left the witness stand concerned that his or her evidence has been misapprehended, the expert should immediately notify the Crown who should immediately disclose this fact to the defence.

When the Crown has a concern about the forensic evidence and how it was handled, the Crown should take that concern to the forensic department so that it can be fully investigated.[123]

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[121] Convicting the Innocent, at 457-461.
[122] Convicting the Innocent, at 465.
[123] Morin Inquiry.

Education

In examining and assessing the factors which have led to wrongful convictions, the same themes continually arise: the use of jailhouse informants, flawed forensic procedures, tunnel vision, the frailties of eyewitness identification, and false confessions. As these factors have been repeatedly identified, steps can (and must) be taken to avoid these common errors and missteps. Thus the education of participants in the criminal justice system is essential as a means to prevent wrongful convictions in the future. Both the Morin and Sophonow inquiries identify education as "a key aspect of any response to wrongful convictions."[124]

However it must be noted that the problems and pitfalls which may result in a wrongful conviction are not confined to court proceedings; deeply rooted attitudes or culture may contribute to a miscarriage of justice. McFarlane notes that "the reshaping of attitudes, practices and cultures within the criminal justice system is critical to the fair functioning of the system".[125] Therefore education strategies must also address these factors.

As the reports of inquiry indicate, a miscarriage of justice is rarely due to only one factor. Indeed they are multi-factorial, usually the result of multiple mistakes by various participants in the criminal justice system. Educational initiatives must take this into account, and be aimed at all persons involved in the administration of justice.

The Canadian Commissions of Inquiry have made detailed recommendations with respect to the education of justice participants. However many of the recommendations are specific to Crown Counsel, including the following from The Commission on Proceedings Involving Guy Paul Morin:[126]

- Recommendation 18 – Joint education on Forensic Issues
- Recommendation 48 – Post-conviction disclosure by Crown Counsel
- Recommendation 60 – Crown education respecting informers

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[124] HPC 133.
[125] Convicting the Innocent.
[126] Morin Inquiry.

- Recommendation 74 –Crown education respecting tunnel vision
- Recommendation 75 – Crown Counsel discretion respecting potentially unreliable Evidence
- Recommendation 76A – Overuse and misuse of consciousness of guilt and demeanour evidence
- Recommendation 106 – Crown education respecting interviewing practices
- Recommendation 115 – Crown education on the limits of advocacy[127]

The Inquiry Regarding Thomas Sophonow commented unfavourably on the "atmosphere of suspicion between Crown and Defence bar" and suggested that regular meetings be held between defence and Crown to ameliorate their relationship. It was noted that "[t]he entire administration of justice has too much at stake to permit any feelings of mistrust to fester and spread, thereby jeopardizing the ability of the courts to arrive at a fair and just result".[128]

Educational Initiatives in Canada

In Canada the importance of education on the causes of wrongful convictions has been recognized by prosecution offices and educators alike.

"Unlocking Innocence", an international conference on avoiding wrongful convictions, was held in Winnipeg, Manitoba from October 20-22, 2005. The conference examined a number of topics that contribute to wrongful convictions including witness misidentification, tunnel vision, forensic science and the role played by the media.

Universities also are recognizing the need for education in this area. For example, the University of British Columbia School of Law offers a course devoted exclusively to wrongful convictions.

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[127] Morin Inquiry.

[128] Sophonow Inquiry.

Finally, Crown Counsel offices have also recognized the importance of studying this important area. For example, at the BC Crown Counsel Professional Development Conference in 2005, an entire plenary session was devoted to a discussion on wrongful convictions.

The Heads of Prosecutions Committee Report summarizes their recommendations respecting education for Crown Counsel as follows:

1. The following options for educational venues should be considered for Crown Counsel:

    (a). joint sessions involving the Crown, the police, defence and forensic scientists; and

    (b). specialized conferences for Crown as well as segments in continuing education programs.

2. The following education techniques should be considered:

    (a). presentation of case studies of wrongful convictions and lessons learned;

    (b). small group discussions and role-playing, demonstrations of witness interviews; and conducting photo line-ups;

    (c). on line training for Crowns and police;

    (d). distribution of educational materials/policies on CD-ROM;

    (e). video-linked conferences;

    (f). participations 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.

3. The following educational topics should be considered:

    (a). role of the Crown and Attorney General;

    (b). role of 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; and

(o). conceding appeals/fresh evidence.

4. Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.

5. 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.

Inadequate Disclosure

Full disclosure to the accused of the evidence in the case is a vital part of any criminal prosecution. Indeed, non-disclosure has been a source of injustice. As Sopinka J. held in the leading Canadian case on the issue:

> [T]the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.[129]

Where a factually innocent accused is charged with an offence, the Crown and police have an overwhelming advantage in terms of information about the crime. In these cases, the importance of adequate disclosure is heightened because it is the factually innocent that stand to suffer the most when exculpatory information, usually known to the perpetrator (not an innocent accused), is withheld.[130]

In the Sophonow inquiry it was found that a great deal of very significant material was not disclosed to the defence. Had this evidence been disclosed, it may have had a significant impact on the trial process and ultimate verdict. The inquiry found that when the Crown does not properly disclose the evidence to the defence, the risk of a wrongful conviction increases significantly.[131] The defence is, for instance, precluded from pursuing a line of questioning, calling a witness, or impeaching the credibility of a key witness for the Crown.

Full disclosure by the Crown at all stages of the trial process is critical to ensuring that the accused receives a fair trial. The Driskell, Sophonow and Morin inquiries conclude that this obligation continues post-conviction. They find Crown Counsel have a positive and continuing obligation to disclose potentially exculpatory material to the defence post-conviction, whether or not an appeal is pending.[132] To ensure that information that comes to the Crown post trial is still disclosed to the defence, it is recommended that the Crown have a policy that covers post-trial disclosure.[133]

Crown Stay Power

When Crown Counsel makes the decision not to proceed with a prosecution, Crown Counsel will often enter a "stay of proceedings" in the case. This practice was criticized by both Justice Lamer in his report, and by the Driskell inquiry. As Justice Lamer wrote:

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[129] *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at paragraph 12.

[130] Convicting the Innocent, at 452.

[131] Convicting the Innocent, at 453.

[132] Morin Inquiry.

[133] The *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, online: <http://www.driskellinquiry.ca/faq.html>, at 119 ("Driskell Report").

> A stay of proceedings may leave an impression with the public that the charge is merely being "postponed" or "the authorities", in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.[134]

Justice Lamer concluded that in cases where applications have been heard under s.696 of the *Canadian Criminal Code* for Ministerial Review for miscarriages of justice, a stay of proceedings should only be used where there is some reasonable likelihood that the proceedings will be recommenced. Once a determination has been made not to proceed further, the charge should be withdrawn.

In his report, Justice Lamer makes the following recommendations regarding the termination of proceedings by Crown Counsel:

> A withdrawal of the charge is appropriate where the Crown Attorney decides that:
>
> i. reasonable and probable grounds did not exist to lay the charge;
>
> ii. there is no probability of a conviction; or,
>
> iii. it is not in the public interest to proceed with the charge.

A stay of proceedings is appropriate where there is a reasonable likelihood of recommencement of the proceedings but it has become necessary, for example, for the police to conduct further previously unforeseen investigations. A stay of proceedings is not justified merely because a judge has made a ruling unfavourable to the Crown.

Unreliable Evidence

Crown policies should reflect that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely to be untrue and to advise the trier of fact that evidence ought not to be relied upon in whole or in part, due to its inherent unreliability.[135]

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[134] Driskell Report, at 129, quoting with approval from the Lamer Inquiry.

[135] Morin Inquiry.

Consciousness of guilt and demeanour evidence is notoriously unreliable.[136] Crown Counsel should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way. The use of the term "consciousness of guilt" should be avoided.[137]

It is an appropriate exercise of Crown discretion not to call evidence which is inherently unreliable and to invite the trier of fact not to rely upon such evidence.[138]

Conclusion

People have spent decades in jail in Canada for crimes they did not commit. To find out what went wrong, lengthy commissions of inquiry have examined the cases in detail and produced various reports making recommendations. In addition, the Canadian Heads of Prosecutions looked at the issue. Many of the same problems and mistakes are identified in each of the reports and have been summarised in this review article.

Crown Counsel play an important role in ensuring accused persons receive a fair trial, and mistakes or improper conduct by Crown Counsel are a common element of most wrongful convictions.

> "The duty of prosecuting counsel is … to act as a minister of justice." [139]

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[136] Morin Inquiry.

[137] Lamer Inquiry, at 330.

[138] Lamer Inquiry, at 328.

[139] *Boucher v. The Queen* (1954), 110 C.C.C. 263 (SCC); *R v. Regan* (2002), 161 C.C.C. (3d) 97 (SCC) at 125.

CHAPTER FOUR

THE ROLE OF DEFENCE COUNSEL IN WRONGFUL CONVICTIONS

BY DWIGHT STEWART[140]

The Canadian criminal process is premised on two related principles; the accused is presumed to be innocent,[141] and the state bears the burden of proving guilt beyond a reasonable doubt.[142] Despite this presumption in favour of the accused, and the high burden on the state, we know that factually innocent people are proven to be guilty beyond a reasonable doubt. This is what the law refers to as the "legally but wrongfully convicted."

This chapter questions whether the related principles of the presumption of innocence and the state onus to prove guilt, lead to a narrow and limited role for defence counsel, which is not to prove innocence, but to merely raise a reasonable doubt. In writing this chapter, I am mindful of my own experience. Most of my work at the criminal bar has been in the role of defence counsel. If at any point my comments seem critical – they should be taken as self-criticism. As much as defence counsel may rely on the lower threshold of raising a reasonable doubt, it is the prospect that a client you believe to be innocent might be convicted on your watch that keeps you up at night.

The primary focus of most inquiries or investigations into wrongful convictions is how it occurred that the police and prosecution managed to prove beyond a reasonable doubt that a factually innocent person was guilty. It seems that fewer questions are asked of the accused, and more specifically, his or her counsel, about the part they played in a wrongful conviction.

It is understandable that a commission of inquiry would find these questions difficult to ask, particularly of the accused. It is akin to asking a victim of a violent offence whether they somehow contributed to their attacker's behaviour. But questioning defence counsel about their role in a wrongful conviction might be compared to asking the parents of a victim if they think that they could have done more to protect their child from the attack.

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[140] Dwight Stewart is a lawyer practicing at Miller Thomson LLP in Vancouver, British Columbia.

[141] Section 11(d) *Part I of the Constitution Act, "Canadian Charter of Rights and Freedoms" (the "Charter").*

[142] *R. v. Oakes,* [1986] 1 S.C.R. 103; *R. v. Whyte,* [1988] 2 S.C.R. 3; *R. v. Keegstra,* [1990] 3 S.C.R. 697.

This concept played out dramatically in the Commission of Inquiry into the Wrongful Conviction of David Milgaard.[143] During the Inquiry, David Milgaard – who spent 23 years in prison after he was wrongfully convicted for the rape and murder of Gail Miller – refused to testify before the Commissioner. Mr. Milgaard, through his counsel, sought relief from the burden of testifying, and introduced evidence from his psychiatrist that he suffered from Post Traumatic Stress Disorder, and worried that if he was forced to relive the events of his wrongful conviction and imprisonment, he would suffer a relapse.

Although Mr. Milgaard was eventually accommodated, (he was permitted to testify through a video deposition in the city in which he resided, and was only questioned by commission counsel), his application to be excused from testifying was denied. In his Reasons, the Commissioner rejected the diagnosis that Mr. Milgaard suffered from PTSD and made the following comments:

> Dr. Baillie describes the four core features of PTSD. The first of these is:
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> > "... exposure to a traumatic event that involved death or serious injury or threat to physical integrity, and the person's response to the event involved intense fear, helplessness or horror ..."
>
> Asked where such an experience was had by David Milgaard (who has said that he was not at the scene of the Miller murder, and could not therefore have been exposed to it), Dr. Baillie explained (as I understand him) that the definition was wide enough to comprise Mr. Milgaard's conviction and what happened to him as a result.[144]
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> [Emphasis Added].

While conceding that the literature contained no example of a conviction, per se, as the "traumatic event", Mr. Milgaard's psychiatrist said that the event was not discrete, but rather a series of bad experiences which flowed from it. The Commissioner refused to accept that Mr. Milgaard's wrongful imprisonment at the age of seventeen, (which in its 23 year duration included treatment for psychiatric disorders diagnosed on the basis of Mr. Milgaard's refusal to admit guilt for a violent crime, a suicide attempt, and being shot by the police while unlawfully at large), constituted a basis for the diagnosis of post traumatic stress disorder.

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[143] Online: <http://www.milgaardinquiry.ca>.

[144] Online: <http://www.milgaardinquiry.ca>, Reasons on the Application of David Milgaard for Accomodation, Vol 120 - Wednesday, February 8th, 2006, at 24154, 24155.

The Commissioner commented on the fact that Mr. Milgaard had already given evidence under oath on examination for discovery in the civil action he commenced against the Province of Saskatchewan's Department of Justice[145] and that he testified before the Supreme Court of Canada in 1992 in support of his Application for Ministerial Review:[146]

> I would be reluctant to accept the label of Post Traumatic Stress Disorder as a condition currently applying to Mr. Milgaard. Dr. Baillie, I think, has been persuaded that nothing of value remains to be learned from Mr. Milgaard who has already answered "thousands of questions". Possibly he is correct, but that is not for him to say.
>
> The second half of the test is more in his line – the probable harm to Mr. Milgaard. Here, his opinion is forcefully expressed in saying that if questioning goes beyond general inquiries of knowledge of an event and seeks to find out why a certain thing happened or if it happened, Mr. Milgaard might conclude that he is being asked to share the blame, at least in part, for his conviction and will be devastated.
>
> But one must acknowledge the obvious. The point of the questions will not be whether Mr. Milgaard killed Gail Miller, but whether his words or actions led the authorities to believe he did, or at least to suspect him; and secondly whether it should have led to an earlier reopening of the case.[147]
>
> [Emphasis added].

The Commissioner did eventually accommodate the request for procedural safeguards to minimize the possible devastation that Mr. Milgaard would suffer as a result of being compelled to testify at the Inquiry. The Commissioner was eventually prepared to liken Mr. Milgaard's situation to that of other victims who testify before the courts. The Commissioner commented on the fact that "often deeply traumatized children or women, are asked hard questions about intensely personal matters", and accepted that discretion should be exercised "to alleviate the pain and embarrassment of testifying in public."[148]

Of course the questions of Mr. Milgaard contemplated by the Commissioner were very much at issue before the inquiry. Although the eventual video deposition of Mr. Milgaard did not deal

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[145] doc. ID 198515.

[146] doc. ID 182051.

[147] *Reasons on the Application of David Milgaard for Accomodation Vol 120 - Wednesday, February 8th, 2006 at 24155, 24156.*

[148] *Reasons on the Application of David Milgaard for Accomodation Vol 120 - Wednesday, February 8th, 2006 at 24157.*

with these matters in any detail, certainly this was the focus of inquiry of Calvin Tallis – the lawyer who defended Mr. Milgaard during his 1970 trial.

The case of David Milgaard is well known in Canada. It is the subject of a well known song by one of Canada's favorite bands,[149] and his story was made into a Gemini award winning movie, "Milgaard".[150] What is remarkable about the case (other than the fact that a factually innocent 16 year old was proven beyond a reasonable doubt to have committed a crime for which he served 23 years of his life) is the fact that when reviewing his 1969 trial, it is not entirely surprising that he was convicted. Further, he was convicted despite having a court-appointed, legal aid lawyer. By all accounts Milgaard's counsel, Calvin Tallis, was considered at the time to be one of the very best criminal lawyers in the province, and was renowned to be a workaholic who toiled tirelessly on every case, regardless of the nature of his retainer.

When one of the first lawyers to look at overturning Mr. Milgaard's conviction, testified at the Inquiry, and was asked about his initial thoughts of Mr. Milgaard's trial lawyer, Tony Merchant recalled telling Mr. Milgaard's mother that; "I don't think I'm going to turn a page and find in the written words that Cal Tallis made some mistake and eureka, we can jump out of the bathtub and run to Ottawa!"[151]

Indeed, when the Supreme Court of Canada granted Milgaard's request for a review of his conviction in 1992, the Court commented as follows:

> It is appropriate to begin by stating that in our view David Milgaard had the benefit of a fair trial in January 1970. We have not been presented with any probative evidence that the police acted improperly in the investigation of the robbery, sexual assault and murder of Gail Miller or in their interviews with any of the witnesses. Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time. Milgaard was represented by able and experienced counsel. No error in law or procedure has been established. At the conclusion of the trial, there was ample evidence upon

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[149] The Tragically Hip, *"Wheat Kings",* from the album "Fully and Completely" 1992. The song includes the lyrics; "Twenty years for nothing, well that's nothing new, besides, No one's interested in something you didn't do."

[150] Barna-Alper Productions and Marble Island Pictures, in association with Bar-Harbour films, originally aired on CTV on April 11, 1999 – in all provinces except Saskatchewan – where it was the subject of a publication ban until the conclusion of the trial of Larry Fisher – who was convicted of the same murder on November 22, 1999.

[151] Evidence of Tony Merchant, November 30th, 2005, at 20478 of the transcripts of evidence at the Milgaard Inquiry.

> which the jury, which had been properly instructed, could return a verdict of guilty.

In writing this paper, I have not had an opportunity to review all of the evidence that was before the Supreme Court of Canada on the issues of police conduct and disclosure. The Court's comments in 1992 are at issue with certain evidence led in the Milgaard Inquiry in 2006. In particular, on the issue of police disclosure, there appears to have been both pre-trial and post-conviction failures of disclosure.[152]

The Decision Whether to Testify

Central to the review of the conduct of the Defence in Milgaard has been the fact that Mr. Milgaard did not testify during his 1969 jury trial. Both before the Supreme Court of Canada in 1992, and in the 2006 Milgaard inquiry, Mr. Milgaard waived solicitor client privilege. This afforded a rare glimpse into this difficult decision made by a 16 year old client and his parents in consultation with his lawyer.[153]

While there has been no report in the Milgaard Inquiry, what is clear is that Mr. Tallis cannot be criticized for his role in the decision that Mr. Milgaard would not testify. There were numerous areas in Milgaard's own description of the events that would appear to incriminate him, and it was clear that he would have had a very difficult time answering questions under cross-examination. The questioning of Mr. Tallis, by Hersh Wolsh, Q.C. - Mr. Milgaard's counsel

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[152] The primary focus in the inquiry on disclosure failures was the fact that there was no disclosure made to the defence at the time of trial concerning an ongoing investigation into three unsolved sexual and indecent assaults that occurred in the three months proceeding the rape and murder of Gail Miller in the same general area of Saskatoon. Victim #1 was assaulted on October 12, 1968, Victim #2 on November 13, 1968, Victim #3 on November 29, 1968. Gail Miller was raped and murdered on January 31, 1969 sometime between 6:45 a.m. and 8:30 a.m. Margaret Yanicki was indecently assaulted on the same morning at 7:07 a.m. Victim #4 was assaulted on February 21, 1970, three weeks after Milgaard was sentenced to life, having been convicted of the murder of Gail Miller. Larry Fisher – who was eventually convicted of the murder of Gail Miller in 2001 -- confessed to the assaults against Victim #3 and Victim #4 to the Saskatoon City Police (SCP). He was charged with the assault of Victims #1, #2, #3, and #4 in December 1970, and entered a guilty plea to these charges in December 1971.

[153] It is of some interest to the writer that Calvin Tallis – who was at the time of the Milgaard Inquiry a retired Saskatchewan Court of Appeal Justice – is variously described in the Inquiry as one of the leading defence lawyers in Saskatchewan at the time. He appears to have been only 39 years of age at the time of the trial in 1970 – and would still be considered as a "Young Lawyer" within this Society.

before the Supreme Court of Canada Reference and at the Milgaard Inquiry - reveals the remarkable circumstance that resulted:[154]

> **Q** … You have a person who is factually innocent, he tells you he is innocent, and you have made or advised him, correctly I agree, not to testify -- correctly; isn't there something wrong with the system, or some problem that a truly innocent person is better off not testifying?
>
> *A* Well I can, I guess, put it to you as – respond in this way: Unfortunately, that's the way the system presently works, and counsel cannot abdicate his or her responsibility in terms of giving advice to a person that is required to make a decision whether or not to testify.
>
> **Q** No, but --
>
> *A* And whether there should be a change is, of course, a question that you raise, and a genuine question.
>
> But what I am saying to you is that counsel, I think, are faced with this responsibility and under a duty to discharge their responsibility to the best of their ability, and yet of course one knows that cross-examination of an innocent person can result in statements that are viewed in relation to other matters that turn out to be very damaging.
>
> **Q** But you have a 16-year-old boy, or 17 at the time, who really can't be a match for a highly-skilled cross-examiner even if he's innocent?
>
> *A* Well, I agree with you, and the same thing applies to many unsophisticated adults. And many of us that have worked our way through the courts, and I'm sure you are one of them, have observed things that create real difficulties.
>
> **Q** Well --
>
> *A* And, you know, that was -- that's why, I guess, there were two schools of thought that developed whether the decision to testify or not to testify was solely the client's without the benefit of advice or direction from his counsel.
>
> The other school of thought, if you want to divide it into two schools of thought -- and it's clear that I belong to that school -- was that I had an obligation to not only explain the options that were open to the accused person, whether a boy of David's age, an unsophisticated adult, or a highly-educated adult, and in the light of the evidence and the interviews and knowing the areas that are going to be probed, what, in my best judgment, was the advice that should be given. So those are the two schools of thought that I had in my mind at the time and still, essentially, do.

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[154] Online: <http://www.milgaardinquiry/MilgaardTranscripts/V124022106R.PDF> (Testimony of Calvin Tallis by Mr. Wolch, February 26, 2006 at 25060 – 25065.

…

Q I hear what you are saying very clearly. I guess what I am troubled with is that the best advice, and I agree, the best advice in this case, to an innocent person, is not to testify; that's sort of a troubling concept?

A Yes.

Q And I'm not disagreeing with you, I think you are right, --

A I --

Q --- but I just say that's a troubling concept?

A Well, as I say, I can't do any better than that in articulating my views.

Q No, you are --

A -- and agreeing with you, essentially, that that's the way the system works.

It is a fascinating commentary on the limits of the presumption of innocence, and limits of an accused's right against self-incrimination, that whether or not an accused testified is a permissible consideration on appeal, and that it is a central focus of an application for review to the Minister of Justice, and the resulting reference to the Supreme Court of Canada. While these inquiries are understandable, if we accept that at every stage of judicial review of a conviction this question is to be asked, what faith do we have that either a jury, or judge sitting alone, does not take into account the failure of an accused to testify? Every lawyer in the position of Mr. Tallis – advising a client whether or not to testify - has in mind the reality that most jurors (and while we don't want to admit it, some judges) will ask themselves: "If he didn't do it, why didn't he just get in the stand and say that?"[155]

This is the "Catch 22" that Milgaard and his counsel found themselves in at trial. It remained this way on appeal.[156] Again, Mr. Wolsh questioning Mr. Tallis, now a retired Appellate Justice, dealt with this issue at the Milgaard Inquiry. The fact that an accused doesn't testify can be held against him on appeal, and the other option is that "your client testified and he wasn't believed?"

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[155] Of course we don't know the answer to this question because it is illegal to ask jurors about their deliberations. This in itself may now come under review. The Commission on Proceedings Involving Guy Paul Morin, at Recommendation 80 (the "Morin Report"), calls for the amendment of the *Criminal Code* to permit research into the jury's deliberative process, with a view to improving the administration of justice. *Cf.* at 28, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf>.

[156] Joseph Heller, *Catch 22,* 1961. Resulting from its specific use in the book, the phrase "Catch-22" is common idiomatic usage meaning "a no-win situation" or "a double bind".

For the wrongfully convicted accused who has gone to the Court of Appeal, "you are damned if you do testify, you are damned if you didn't".[157]

Beyond the decision whether to testify there were two other critical moments in the trial of Mr. Milgaard where the conduct of Mr. Tallis is of interest. The first occurred when the Trial Judge unilaterally declared a witness to be hostile in front of the jury, without ever having heard argument from the defense and without receiving any submissions in the absence of the jury. The second occurred when the Trial Judge re-examined the crown's forensic expert, confusing or `muddying' the clear evidence Mr. Tallis had obtained during cross-examination – that the forensic evidence actually excluded Mr. Milgaard. In both circumstances, Mr. Tallis did his best to repair the damage done, but, as good counsel should, remained focused on the ultimate result of the trial. Speaking of the role of defence counsel in this situation, Mr. Tallis testified as follows:

> **Q** And it would be difficult to anticipate a judge making the comments that he did, like, you are in front of a jury, there's -- as defence counsel could you anticipate that happening and once it happened it's happened; right?
>
> *A* Yes, and you then have to deal, you know, try to conduct the trial as skillfully as you can in the light of that, and of course, and I've alluded to this earlier, ever mindful of the importance of the final instructions and you hope to get final instructions to the jury that are as favorable as possible.
>
> **Q** So you are walking a bit of a tightrope trying to stay on relatively good terms with the judge and yet the transcript reveals at times you stood up to the judge, but -- and stood up to the judge and --
>
> *A* Yes, and in fairness to the presiding judge, I never detected any resentment on his part when I, you know, submitted, in rather strong terms when I read them, that I thought he was wrong.
>
> **Q** Yeah.
>
> *A* But this is the stuff that courtrooms are made of, so to speak, and if -- I think there was a feeling of mutual respect even though there were irreconcilable differences of opinion on certain matters that were addressed there and ultimately again raised in the Court of Appeal.[158]

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[157] Online: <http://www.milgaardinquiry/MilgaardTranscripts/V124022106R.PDF> (Testimony of Calvin Tallis by Mr. Wolch, February 26, 2006 at 25070 – 25071.

[158] Online: <http://www.milgaardinquiry/MilgaardTranscripts/V124022106R.PDF> (Testimony of Calvin Tallis by Mr. Pringle, at 25089 – 25090).

In fact, the 1971 Saskatchewan Court of Appeal decision in Milgaard remains the leading decision on the procedure followed in cases tried by a jury on applications under section 9(2) of the *Canada Evidence Act,* to permit a party to cross-examine its own witness on a prior statement that is inconsistent with the witness' testimony.[159]

Despite these adverse moments during the trial, and the eventual conviction of Mr. Milgaard, on reflection, Mr. Tallis agreed that his efforts to maintain a respectful relationship with the trial judge benefited Mr. Milgaard by getting a favorable instruction, and even more favorable re-instruction to the jury.[160] Focusing on these dramatic moments in the trial of Mr. Milgaard is in no way meant as a criticism of the conduct of Mr. Tallis. It merely highlights the difficult position that all counsel find themselves in from time to time in trial. However, the description offered by Mr. Tallis, that "this is the stuff that courtrooms are made of" must always be balanced against the sobering fact that this trial resulted in the conviction of an innocent man.[161]

Of course, the seriousness of what occurs in our courtrooms is the subject of numerous inquiries which have been canvassed in detail throughout this paper. As stated above, for the most part these inquiries largely focus on the roles of the police and the prosecution. It is expected that any report that results from the Milgaard Inquiry will speak to the role of defence counsel, particularly with respect to the decision to testify, and the admission of exculpatory statements made upon arrest.[162] At the time of writing this chapter no report in the Milgaard Inquiry has been released, but it is awaited with considerable anticipation.

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[159] *R. v. Milgaard* (1971), 2 C.C.C.(2d) 206 (Sask. C.A.), leave to appeal refused (1971), 4 C.C.C. (2d) 566 (S.C.C.).

[160] Online: <http://www.milgaardinquiry/MilgaardTranscripts/V124022106R.PDF> (Testimony of Calvin Tallis by Mr. Pringle, at 25089).

[161] This recognition of the difference between the tactical considerations which are sometimes necessary in an effort to secure the best result at trial, and subsequent consideration of whether an injustice may have occurred, was recognized in the Morin Report. Recommendation 86 called for relaxation of "the 'due diligence' requirement to provide that fresh evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons." The Morin Report advised that this requirement should be relieved against to prevent a miscarriage of justice. *Cf.* online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf>, at 29.

[162] This issue has also been commented upon in the Report from the Commission on Proceedings Involving Guy Paul Morin, at Recommendation 77, which calls for consideration of "a legislative amendment permitting the introduction of an exculpatory statement made by an accused upon arrest, at the instance of the defence, where the accused testifies at trial." While this issue is of extreme importance to the prevention of miscarriages of justice it does not specifically relate to the role of defence counsel, and is otherwise beyond the scope of this

Previous Commissions of Inquiry have dealt with issues specific to the role of defence counsel. In particular**,** the Commission of Inquiry regarding Thomas Sophonow in the province of Manitoba, resulting in *The Thomas Sophonow Inquiry Report*, (the "Sophonow Report"),[163] dealt with the issue of disclosure of alibi evidence. The Commission on Proceedings Involving Guy Paul Morin in the province of Ontario, resulting in the Report of the Kaufman Commission, (the "Morin Report")[164], made a series of recommendations, many of which touch directly upon the role of the defence.

The Decision Whether to Disclose Defence Evidence

Thomas Sophonow is another Canadian who was wrongfully convicted of a crime that he did not commit. A particularly tragic aspect of the case was that the alibi put forward by Mr. Sophonow was not and could not have been the product of a recent concoction. He outlined it in considerable detail for his counsel within days after his arrest. However, by the time it was disclosed, it was thought by the police and Crown Counsel to be a tardy and incomplete disclosure.

Disclosure of an alibi defence is a partial exception to the general rule that the defence is under no obligation, common law, statutory or constitutional, to disclose the nature of a defence, the evidence upon which the defence relies, or the witnesses if any that the defence proposes to call.[165] To be clear, it is not that the defence is mandated to disclose evidence in support of an alibi. Instead, the trier of fact may draw an adverse inference or give less weight to such evidence, due to the failure of the defence to disclose the alibi defence in adequate detail, and within sufficient time that allows the prosecution to investigate the evidence and ascertain its

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paper. *Cf.* online: *<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf>,* at 26.

[163] Online: <http://www.gov.mb.ca/justice/publications/sophonow/intro/index.html>.

[164] Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>.

[165] Another exception is the requirements pursuant to sections 657.3(3)-(7) of the *Criminal Code* governing notice and disclosure of *expert evidence.* This was also the subject of comment by Commissioner Kaufmann, with Recommendation 17 relating to Reciprocal Disclosure and requiring that "the defence should be obliged to disclose to the Crown in a timely manner the names of any expert witness it intends to call as witnesses, along with an outline of the witnesses' evidence." online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf>, at 6.

validity.[166] For most defence counsel, there is always a concern that early disclosure of defence evidence will merely permit the police an opportunity to undermine the strength of otherwise exculpatory evidence.

The Commissioner, the Honourable Peter de C. Cory, found that part of the reason for the mistreatment of the alibi evidence in the Sophonow investigation was the lack of trust that existed between Defence Counsel and the police and Defence Counsel and Crown Counsel. The Commissioner found that:

> No doubt, Defence Counsel were concerned that the police might by their words and actions encourage the alibi witnesses to change their account of events. On the other side, the police were undoubtedly suspicious of any alibi and concerned that it was fabricated and recently concocted in order to meet the Crown's case.[167]

In order to address this atmosphere of mistrust that exists between Defence counsel and both the police and Crown, the Commissioner recommended that regular meetings be held once or twice a year for the Crown and Defence bar, to discuss issues which may lead to miscarriages of justice, and seek a greater attitude of cooperation and trust between the two sides of the bar. The Commissioner also suggested that at some meetings, high-ranking police officers should attend, as well as members of the judiciary and, perhaps, the media, so that all would be aware of the problems and could contribute to their solution. The Commissioner commented on the importance of this proposal, stating that "[t]he entire administration of justice has too much at stake to permit any feelings of mistrust to fester and spread, thereby jeopardizing the ability of the courts to arrive at a fair and just result."[168]

The Commissioner's comments in the Sophonow report were mirrored in the Morin Report. Commissioner Kauffman made detailed recommendations in terms of education including the Crown, the police, the Centre for Forensic Sciences, law schools, and the Law Society of Upper Canada Bar Admission Course. Particular to the role of defence counsel, Commissioner Kaufman recommended that:

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[166] *R. v. Cleghorn,* [1995] 3 S.C.R. 175, 41 c.r. (4th) 282, 100 C.C.C. (3D) 393; *R. v. Leterourneau* (1994), 87 C.C.C. (3d) 481 (B.C.C.A.) leave to appeal refused (1995), 102 C.C.C. (3d) vi (S.C.C.); *R. v. Clarke* (1979), 48 C.C.C. (3d) 230 (N.S.C.A.).

[167] Online: <http://www.gov.mb.ca/justice/publications/sophonow/alibi/recommend.html>.

[168] Online: <http://www.gov.mb.ca/justice/publications/sophonow/alibi/recommend.html>.

> The Criminal Lawyers' Association should develop an educational program for criminal defence counsel which specifically addresses the known or suspected causes of wrongful convictions and how defence counsel may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry.[169]

Because alibi defences are relatively rare, special treatment of their investigation would not unduly tax the resources of the police department. The Commissioner made recommendations in connection with alibi witnesses and their investigation by police as follows:

> 1. The alibi defence should be disclosed within a reasonable time after the Crown disclosure has been completed and the Defence has reviewed it and is in a position to know the case that must be met. When that disclosure should be made by the Defence will vary from case to case. It will obviously depend upon the extent of the Crown disclosure, how long it will take the Defence to review that disclosure and how quickly Defence Counsel can prepare the alibi evidence disclosure. To the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses. Alibi evidence may well establish innocence and the Defence should spend all the time and energy required to put forward a complete and detailed position on the alibi evidence.
>
> 2. How should the police investigate the alibi evidence? Obviously, it is incumbent upon them to ensure that the alibi defence is credible. However, because of the importance of the evidence, the same care should be taken in interviewing the alibi witnesses as is taken with the interviews of suspect. That is to say, wherever possible, the interview should be videotaped and, if that is not feasible it must, at the very least, be audiotaped. The entire interview must be on tape. Anything which is alleged to have been said that is not transcribed should be considered inadmissible.
>
> 3. The interviewing of alibi witnesses should be undertaken by officers other than those who are the investigators of the offence itself. [170]
>
> 4. It has been suggested that it should be done by members of other police forces. However, this is cumbersome and may be unnecessarily expensive. If the interview is conducted by an officer other than one involved in the investigation of the crime itself and if the interview is videotaped or audiotaped, this will provide sufficient safeguards.

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[169] Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf>, Recommendation 71 at 25, 26.

[170] This point was also made by Commissioner Kaufmann in the Morin Report, at Recommendation 94 as follows:

"Where defence discloses the existence of an alibi in a serious case, police should be encouraged to have the alibi investigated by officers other than those most directly involved in investigating the accused. Often the investigation of an alibi need not draw extensively upon the knowledge of the investigating officers themselves. This recommendation permits a more objective, less predisposed approach to the potential alibi."

5. The alibi witnesses should not be subjected to cross-examination or suggestions by the police that they are mistaken. The alibi witnesses should be treated with respect and courtesy. They should not be threatened or intimidated or influenced to change their position. However, I agree that it is appropriate for the police to instruct the witnesses that it is essential that they tell the truth and that a statement can be used as proof of its contents. The witnesses should be advised that they should be careful to tell the truth and of the consequences of a failure to do so.

6. If, as a result of the disclosure of the alibi and the interviewing of the alibi witnesses, the Crown deems it appropriate to conduct further interviews of Crown witnesses expected to be called at the trial, a procedure similar to the interrogation of the alibi witnesses should be followed. That is to say, if there is to be a further interview of a Crown witness, it should be conducted by someone other than the investigating officers. The police conducting the interview should make every effort to avoid leading questions or questions which suggest the position of the police on the case.

7. It is essential that any further interviews of Crown witnesses following the disclosure of the alibi evidence should as well be videotaped or, if that is impossible, audiotaped. Every portion of the interview should be transcribed. Any statement alleged to have been made by the witness and which does not appear on the tape recording should be deemed to be inadmissible.

Equality of Arms

Any discussion of defence disclosure contemplates the consequential result of subsequent investigation of defence evidence by the police. It is less common that the defence has any opportunity to separately investigate the evidence relied on by the prosecution. While certain wealthy persons facing a criminal charge may be in a position to spare no expense, and retain defence investigators to work on their case, more often, people of limited means are barely able to afford their counsel, let alone a private investigator, and those who qualify for legal aid will rarely be approved for the cost of retaining a private investigator.

The dilemma of inadequately funded defence teams is addressed in Europe by the principle of "Equality of Arms." The European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution. The European Commission of Human Rights expanded on this concept in *Jespers v. Belgium*, No. 8493, Report of the Eur. Comm'n H.R., 27 D.R. [1981] 61 at 87, where it noted that:

> In any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the 'rights of the defence'...have been instituted.

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side. [171] The European Commission of Human rights has found the equality of arms an inherent element of a fair trial.[172]

This proposition that the equality of arms principle was intended to elevate the Defence to the level of the Prosecution, as much as possible, in its ability to prepare and present its case, is evident in the case law arising out of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR") and the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), both of which incorporate the principle of equality of arms in the concept of a fair trial.[173]

In practice, where violations of this principle have been found, it is because the Defence was somehow unfairly disabled from preparing or presenting its case. For example, in *Bönisch v. Austria*, 92 Eur. Ct. H.R. (ser. A) [1985] at 15, the European Court of Human Rights found that there was a violation when it determined that an expert involved in a proceeding was in effect a witness for the Prosecution rather than an expert and that because the accused had not been given the same opportunity to call such an "expert", the principle of equality of arms had been violated.

It is interesting to a common-law jurisdiction defence lawyer to see how the initially attractive idea of "equality of arms" might create unintended consequences. At the International Criminal

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[171] Decision of Judge Vorah, November 27, 1996 in the matter of *the Prosecutor v. Dusko Tadic* – Case No. IT-94-1 Tbis – R117.

[172] *Pataki v. Austria* No. 596/59*; Dunshirn v. Austria* No. 789/60, Reports of the Eur. Comm'n H.R., vol. 6, 1963 Y.B. Eur. Conv. on H.R. 714 at 731-732.

[173] *See* Van Dijk and Van Hoof, *supra* at 319-320; *Delacourt v. Belgium*, 11 Eur. Ct. H.R. (ser. A) [1970] 1 at 15; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993) at 244.

Tribunal for the former Yugoslavia, the prosecutors in the case of *the Prosecutor v. Dusko Tadic* sought production of witness statements obtained by defence investigators. The Prosecutor submitted that where there was an equality of arms by virtue of a well-funded defence team, it was entitled to production of defence evidence. While the prosecutor's argument was rejected, the fact that the argument was ever made is a caution to Canadian defence counsel to be "careful what you wish for." [174]

Despite the European concept of Equality of Arms, this concept has been rejected in Canada. Although there is constant encouragement from our courts for increased government funding for legal aid, the Supreme Court of Canada has rejected notions like an equality of arms.[175] However, proposals to make some move towards the principle of Equality of Arms have been recommended in Canada. The Morin Report suggests providing defence counsel with confidential access to forensic investigative services. The Report proposes to achieve this through two separate initiatives:[176]

> The Centre of Forensic Sciences, in consultation with other stakeholders in the administration of criminal justice, should establish a protocol to facilitate the ability of the defence to obtain forensic work in confidence.
>
> The Centre should facilitate the preparation of a registry of duly qualified, recognized, independent forensic experts. This registry should be accessible to all members of the legal profession.

Further, the Morin Report recommends ensuring adequate funding and resources for both defence counsel and Crown to prevent miscarriages of justice. Chronic under-funding of programs for legal-aid cannot help but contribute to the real risk of wrongful convictions.[177] Just as importantly, the under-staffing of Crown offices also serves to frustrate the role of defence counsel.

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[174] ICTY Decision in the matter of *the Prosecutor v. Dusko Tadic* – Case No. IT-94-1 Tbis – R117.

[175] Although not specifically addressing funding in criminal cases, in a recent decision dealing with the issue of legal funding, Justices Bastarache and Lebel commented that; "Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants…" *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* 2006 SCC 2, at 30.

[176] Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin>, Recommendation 27, at 9.

[177] Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>, Recommendation 116 at 39.

When dealing with less serious matters, a common complaint from defence counsel about Crown Counsel, is that it is sometimes difficult to find a prosecutor who knows something about your case, or who has any available time to sit down and read it. This is not the fault of Crown Counsel. Often their scheduling system seems to afford them little time to review matters involving less serious offences. However, if the first chance you have to speak with a prosecutor who has an in-depth knowledge of your client's case is in the days before trial, defence counsel has been forced to expend scarce legal resources preparing for a trial that might be capable of an alternative resolution.

While Canada has benefited considerably from Commissions of Inquiry into the wrongfully convicted, most of these cases involve convictions for serious offences resulting in lengthy jail terms. Very little has been done to investigate the real possibility that the greater incidence of miscarriages of justice, including wrongful convictions, occurs everyday in our summary conviction courts that deal with minor offences, and lesser punishments.

It is perhaps in this area that the position of defence counsel is most precarious. The competing burdens of minimizing expense to your client, and securing the best possible result, sometimes lead to impossible dilemmas for both counsel and client. It is not unusual that a client will face a choice between the unaffordable cost and uncertain result of a trial for an offence they did not commit, versus the reduced cost, and greater guarantee in the result of joint submissions on a guilty plea and sentencing hearing.

By way of example, an accused may admit to pushing a complainant from a standing position to a seated position on a chair, but insist that this was done in self-defence. The crown may insist that the assault occurred as a closed-fisted punch without provocation. If the client cannot afford the cost for preparation and attendance at a one-day trial, and the crown recommends a sentence of one year probation on a guilty plea to the original allegation of facts, the accused will often decide to plead guilty. The immediate result and the restriction on liberty to the client are not significant. Even the conviction itself has little day-to-day effect on many people. But the situation creates an interesting dilemma for counsel.

In British Columbia, section 1(b) of the Law Society's *Canons of Legal Ethics* states that "A lawyer must not knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonorable." Section 20(a) of the *Canons* states that "A lawyer may

represent an accused on a guilty plea provided that the accused: (a) admits to all the factual elements of the offence." Both of these passages from the *Canons* are described as prohibited conduct. Yet is the lawyer in the circumstances described above, who accepts his client's instructions to enter a plea, and speak to sentence on his behalf, unethical? Is it a preferable alternative to withdraw ones services and abandon the client to stand alone before a trial or a sentencing hearing without any assistance from counsel?

These are difficult questions to ask. What is perhaps more difficult is the likely answer, which is that "the system is not perfect." It is perhaps because we permit this type of thinking in our summary conviction courts, where the offences are not so serious, and the consequences are not so dire, that this leads to the type of ethical and legal boundary encroachments that are documented in every investigation into wrongful convictions.

This chapter does not purport to provide a solution to these problems. Would our system benefit from better funding for defence counsel? Absolutely. Is it a complete answer? Absolutely not. The justice system would also benefit from better funding for over-worked and under-paid Crown Counsel. But the money would need to come from somewhere in a society already burdened by limitless need and limited resources.

Perhaps the best (and most affordable) solution is that each participant in the criminal justice system knows each others roles a little better. I am mindful of the June 2006 report of the former Chief Justice of Canada, the Rt. Hon. Antonio Lamer, into three cases of miscarriage of justice in the Canadian province of Newfoundland and Labrador, where Chief Justice Lamer made comments about the participants in the "criminal justice system" that have application to this point.[178]

> Many of the individuals and the institutions they represented often saw only the narrowest of issues for which they were specifically responsible. They did not recognize that their contributions were only meaningful in the context of the criminal justice "system". Each **of us** has responsibility not only for our own specific **tasks but also for the results ultimately** reached by **the "system".**

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[178] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* is available online: <http://www.justice.gov.nl.ca/just/lamer/LamerReport.pdf>, at 66 -68.

> This is not a new problem for the criminal justice system. The following passage is taken from an essay written by G.K. Chesterton almost 100 years ago, after he had served on a jury. He was impressed by the fresh perspective that a jury could bring to the work of professionals who could become insensitive because of familiarity:
>
> > Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things... And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.
>
> [Emphasis in original]

The old admonition that one should not judge another man until he has walked a mile in his shoes applies to each of our respective roles in the criminal justice system. Perhaps in this manner we are less likely to "get used to" our usual place, and forever be reminded that our workshop is the "awful court of judgment" described above.

BIOGRAPHIES

Robin Bajer practices litigation at Miller Thomson LLP in Vancouver. Prior to articling there in 2002, he served as law clerk with the Federal Court of Canada, Ottawa. Robin received his BA in philosophy from Simon Fraser University in 1996, his LLB from the University of Manitoba in 2001, and in January 2003 was called to the British Columbia Bar.

Monique Trépanier Monique is an associate at Miller Thomson LLP, practising estate planning and corporate commercial law. Monique was called to the British Columbia Bar in August 2004. She received her Bachelor of Laws in 2003 from the University of British Columbia and her Bachelor of Arts (Honours) in History with International Relations from the same university in 1995. Prior to joining Miller Thomson LLP, Monique articled with the law office of Anthony Tobin and was a seconded articled student at both Miller Thomson LLP and the Provincial Crown Prosecutor's Office. In addition, Monique worked throughout and prior to law school, as a Program Coordinator and Researcher for the International Centre for Criminal Law Reform and Criminal Justice Policy.

Elizabeth Campbell is currently a prosecutor with the Crown Counsel Office in Vancouver. Prior to July 1999, she practiced law at Harper Grey Easton from 1997. From September 1996 to June 1997 she served as Law Clerk, Supreme Court of B.C. From May to August 1993 and again from January to June 1996 she interned with a public interest law firm in Durban, South Africa. Ms. Campbell was granted a B.A. (Honours), Queens University, 1991; a Master of International Relations, Queens University, 1992; and her LL.B., University of Victoria, 1996. She was called to the British Columbia Bar in 1998.

Doug LePard has been a member of the Vancouver Police Department since 1981 and is currently the Deputy Chief Constable commanding the Investigation Division. He has worked at several ranks in a variety of investigative roles as well as in operational and administrative assignments. He holds a Bachelor's degree in Criminology from Simon Fraser University as well as certificates from the Canadian Police College, the Banff School of Management and Queen's University. He has been honored with numerous commendations, including a Lieutenant Governor's award for bravery and an Attorney General's award for service to victims of crime. He has written or co-written several articles and book chapters on various investigative issues, and has instructed extensively, most recently on the issue of wrongful convictions.

Nicola Mahaffy is currently a prosecutor with the Crown Counsel Office in Vancouver. From December 2005 to May 2005 she worked in the Director of Public Prosecution's office in Dublin, Ireland, on an exchange from the Crown Counsel's office in Vancouver. This exchange came about as a result of the ISRCL. From July 2001 to May 2002 she worked as a lawyer for the United Nations Mission in Kosovo, most recently in the International Prosecutor's Office, and returned to Vancouver in June 2002. She had earlier qualified as a Solicitor in England and worked for a short time with the law firm Kingsley & Napley. Ms. Mahaffy has co-authored a paper on the protection of witnesses in the International Criminal Court (1999). She was granted a B.A., University of British Columbia, 1990 and her LL.B., University of Calgary, 1995. She was called to the British Columbia Bar in 1996 and admitted as a Solicitor of the Supreme Court of England and Wales in 1998.

Julie Robinson is currently a prosecutor with the Crown Counsel Office in Vancouver.

Dwight Stewart practices criminal, regulatory, and constitutional law at Miller Thomson LLP in Vancouver. He has also been counsel to members of the Canadian Armed Forces in proceedings by Court Martial. Mr. Stewart was called to the Bar in British Columbia in 1995, and in the Yukon Territory in 2004. He was granted his B.A. (Honours), from the Royal Military College in 1991, and his LL.B. from Queen's University in 1994. Mr. Stewart is also an adjunct professor at the University of British Columbia Law School where he teaches Trial Advocacy.

Elizabeth, Nicola, Monique and Dwight wrote the following papers for prior ISRCL conferences:

At the 2003 ISRCL Conference in the Hague, NL on "the Treatment of Victims and Witnesses in the International Criminal Court as Compared to the Canadian Criminal System."

At the 2004 ISRCL Conference in Montreal, PQ, Canada, on "Canada's Approach to Combatting Police Corruption."

At the 2005 ISRCL Conference in Edinburgh, Scotland on "The Prosecution of Child Sex Tourism Offences in Canada."

APPENDIX I

Investigation Aids

14.05 Photo Line-Ups

Next Section

(Effective: 2006.06.29)

Policy

The Vancouver Police Department (VPD) recognizes that photo line-ups and photo packs are useful tools in many types of investigations. It is imperative that the presentation of a photo pack is conducted in strict accordance with court defined procedures. This will ensure a fair photo pack presentation and will enhance subsequent admissibility of the identification evidence in court.

Overview of Photo Line-up Procedure

1. Police officers shall use a photo pack presentation, rather than a traditional 8 photograph line-up, to gather identification evidence.
2. A photo pack should be presented to a witness as soon as possible after the event, while witness memories are still fresh. Where the presentation of the photo pack may hinder the progress of an investigation, the presentation may be delayed until a more appropriate time.
3. A photo pack used for a photo presentation shall contain 10 photos, to be shown sequentially.
4. A photo pack presentation shall be conducted by an officer who does not know the identity of the suspect.

Constructing a Photo Pack

5. Computer generated or standard photographs may be used for a photo pack presentation. In the first instance, officers are to use the VPD Computerized Arrest and Booking System (CABS) to generate suitable photographs for a photo pack presentation.
6. If there is not a recent VPD CABS photographs available, officers shall query the suspect on CPIC and contact the police agency with the most recent photograph of the suspect to obtain a copy of that photograph. Filler photographs from the same police agency shall also be requested to ensure that the background and format of the photographs are consistent. Officers should request a copy of the booking sheet information related to their suspect and the filler photographs, and also record the name and PIN information of the police officer from the agency that is assisting them.
7. Where there is no photograph available from a police agency, officers may use a Criminal Code Section 487 search warrant to obtain a photograph from another agency such as the Motor Vehicle Branch. As a last resort, officers may seek to obtain a 487.01 General Warrant to obtain a photograph of the suspect through some other investigative technique.
8. A photo pack shall be made up of all colour, or all black and white photographs. Colour photographs shall be used whenever possible.
9. All photographs used in a photo pack shall resemble each other in a fair manner, and bear a reasonable likeness to the suspect.
10. No more than one suspect shall be included in a photo pack.
11. All photographs in a photo pack shall be of the same size and shall be printed on similar paper.
12. There shall be no identifying marks or numbers on the front of the photographs in any photo pack presentation.
13. The type of photographs used in a photo pack shall not preclude or imply that the suspect may have a previous criminal record - e.g. a mug shot with a police detachment name or occurrence number.
14. Sufficient copies of each picture in a photo pack shall be prepared to allow a separate photo pack to be used for each witness who will be viewing the line-up.
15. Each witness shall be presented a separate photo pack for each suspect.

Recording and Documenting the Photo Pack Presentation

16. All officers shall utilize the following forms when presenting a photo pack:
    a. Constructing Member Checklist;
    b. Presenting Member Checklist; and
    c. Photo Line-up Instruction Sheet and Ballot .
17. When conducting a photo pack presentation, the officer shall make notes in their notebook and document the circumstances surrounding the presentation in the GO Report.
18. At the completion of a photo pack presentation, the officer shall photocopy the front and back of each photo for court purposes. These photocopies shall be included with any other attachments into the GO report.

Presenting the Photo Pack to Witnesses

19. A photo pack presentation shall be conducted by an independent officer. An independent officer is an officer who:
    has not been and presently is not involved in the investigation of the case; and
    has not been advised by the investigating officer(s) as to the identity of the suspect.
20. An officer presenting a photo pack shall use the Vancouver Police Photo Pack Presentation Instructions and Ballot form.
21. A photo pack shall be presented to each witness separately from other witnesses.
22. Each of the ten photographs in a photo pack shall be presented to the witness sequentially and in random order.
23. Only one (1) photograph shall be visible to the witness at any time.
24. If the witness asks to view a photograph(s) again, the presenting officer will separate that photograph from the photo pack for viewing by the witness. It is important that the officer make note of each such request and ensure that only one photograph is viewed by the witness at a time.
25. Once the witness has signed the photograph they have selected, the presenting officer shall sign the rear of the same photograph, and include their PIN, and the date.
26. If no identification is made, the presenting officer shall seal all of the photographs presented and add a text page in the GO advising the disposition of the photo pack presentation.
27. Officers shall not discuss with witnesses their ability or inability to make an identification before, during, or after the presentation.

Reporting

28. The construction and presentation of a photo pack shall be fully documented through the use of the checklists and officer's notes. Officers shall also ensure that the instruction and ballot form is completed and that any other necessary information is recorded in their GO report.
29. After a presentation, the photo pack shall be sealed and maintained as an exhibit for court, regardless if any identification was, or was not, made (See RPM section section 26.01 Property - General Procedures).

Vancouver Police Department
Constructing Member – Photo Pack Constructing Checklist

Incident/Event #_____

Members should refer to the Regulations and Procedures Manual Section 14.05 Photo Line-Ups when constructing and presenting a Photo Pack Presentation.

When you have completed the following items, place your initials and PIN in the box next to the step that has been completed.

PIN and Initials	Preparing The Photo Pack
	I prepared a 10 person photo pack line-up in which all of the photographs were of the same size and were all either black and white or colour.
	There were no identifying marks on the face or on the reverse of the photographs.
	The suspect appeared in no more than one photograph within the photo pack.
	I kept a copy of the "proof" sheet containing the information about the photographs selected.
	I prepared sufficient copies of the photographs contained in the photo pack for each witness to view an identical but separate photo pack.
	Providing Photo Pack to Presenter
	I provided ____ (#) copies of the photo pack to _____ at _____ hrs on _____ (date) to show to the following witness(es) who had been identified: 1. _____ 2. _____ 3. _____ 4. _____ 5. _____
	I have retained the original photograph proof sheet and have provided copies of the photographs to the officer who will conduct the presentation. **I did not discuss** with the presenting member the identity of the suspect
	Receipt of Photo Pack from Presenter
	I received ____ (#) photo pack(s) from _____ at _____ hrs on _____(date). The photo packs which had been presented to witnesses were each accompanied by a completed ballot sheet.
_____	_____
PIN	**AND SIGNATURE OF MEMBER CONSTRUCTING PHOTO PACK**

Vancouver Police Department
Presenting Member - Photo Pack Presentation Checklist

INCIDENT/EVENT #:_____

Members should refer to the Regulations and Procedures Manual Section 14.05 Photo Line-Ups when constructing and presenting a Photo Pack Presentation.

When you have completed the following items, place your initials and PIN in the box next to the step that has been completed. The photograph selected by a witness viewing the photo pack **MUST** be signed on the reverse of the picture. This will indicate that the witness selected that photo, as well as enable Crown Counsel to show the photo pack to the witness prior to court, and then recreate the photo pack presentation in Court.

There should be no markings on the front of the photographs either before, during or after the presentation. There may only be markings on the reverse of the photographs in accordance with the following:

POLICE OFFICER INSTRUCTIONS RE: SIGNING AND DATING PHOTOS

IF A PHOTOGRAPH IS SELECTED BY THE WITNESS

- The presenter shall instruct the witness to turn over the photograph that he/she has selected and place their signature on the back of the photograph at the time they select it;
- The presenter shall place his/her signature, PIN, time and date **on the BACK** of the selected photograph **IMMEDIATELY AFTER THE WITNESS HAS SIGNED THE PHOTOGRAPH** ; AND
- The presenter shall place their initials on the back of all the photographs **VIEWED BUT NOT SELECTED** by the witness. Any Photos that are not viewed by the witness should not be initialled by the presenter of the witness.

IF NO PHOTOGRAPH IS SELECTED BY THE WITNESS

- The presenter shall place his/her initials, PIN, time and date on the back of ALL of the photographs **VIEWED BUT NOT SELECTED BY THE WITNESS**.

PIN and Initials	Receipt of Photo Pack
	At _____ hrs on _____ (date) I received a photo pack from _____ to show to the following witness: 1. _____ (use a separate check sheet for each witness).
	I am not involved in the investigation of the incident related to the photo pack.
	I do not know the identity of the suspect involved in the incident.
PIN and Initials	**Presentation of Photo Pack**
	I met with _____ (name of witness) at _____ (location) at _____hrs (time) on _____ (date) to present the photo pack.
	There were no other witnesses involved in the incident present during the photo pack presentation.
	I provided the witness with a Vancouver Police Department "Photograph Pack Presentation Instructions and Ballot" form.
	I read the Instructions contained on the Vancouver Police Department "Photograph Pack Presentation Instructions and Ballot" form to the witness and confirmed that he/she understood.

Vancouver Police Department
Presenting Member - Photo Pack Presentation Checklist

INCIDENT/EVENT #:_____

	I placed the photographs contained in the photo pack **face down**, and shuffled them to ensure that the photographs would be in a random order when presented to the witness.
	I then stacked the photographs face down, and numbered each photo from "one to ten" (1-10) to ensure that the order in which the photographs were presented could be recreated in court.
	I presented the photographs face up to the witness, starting with number one (1).
	Only one (1) photograph was visible to the witness at any one time.
	I presented each photograph sequentially to the witness and instructed the witness to advise me when he/she had finished looking at the photograph and was ready to view the next photograph.
	When the witness indicated he/she had viewed a photograph and was ready to view the next photograph, I removed the photograph currently in view, and placed it **face down**.
	I placed my initials, the time and date on the back of the photograph that had just been viewed by the witness.
	I then revealed the next photograph to the witness and followed the above procedure for each subsequent photo.
PIN and Initials	**Request by Witness to View Photos again (Complete this section ONLY if the witness requests to see the photos again and HAS NOT selected a photograph)**
	The witness did not select/identify any photograph and requested to view the photographs again.
	I presented the photographs in the **same order** as initially presented and followed the same procedure as during the initial presentation.
	I placed my initials, PIN and the time and date on each photograph that was viewed but not selected during the second showing. (Photos that were shown more than once to the witness each contain an additional set of my initials, PIN, date and time for each viewing)
PIN and Initials	**Selection of A Photo by the Witness**
	The witness indicated that he/she has identified a person depicted in a photograph. I instructed the witness to place his/her **signature** on the **back** of the photograph which he/she has identified.
	I placed my signature, PIN and the time and the date on the back of the photograph selected by the witness immediately after the witness placed their signature on the photo.
	No initials appear on any photographs that were **NOT** viewed by the witness.

INCIDENT/EVENT #:_____

PIN and Initials	No Selection of a Photo by the Witness
	The witness viewed all of the photographs but did not select a photograph. I verified that I had placed my initials, PIN, the time and the date on the reverse of **ALL** of the photographs **viewed** by the witness.

IMPORTANT NOTES:

- Do not encourage comments or have a discussion with the witness, before, during or after the photo pack presentation;
- Remember that all conversation between yourself and the witness may be recorded and will need to be transcribed, keep all conversation related to the photo pack presentation and limit any unnecessary conversation as much as possible; and
- Describe, in the space below, the situation/circumstances surrounding the photo pack presentation. (For example: People present, particulars about the location, any interruptions or distractions etc)

PRESENTING POLICE OFFICER COMMENTS AND NOTES

PIN	AND	SIGNATURE OF MEMBER	DATE	TIME

VPD 95 (04)

Vancouver Police Department
Photograph Pack Presentation Instructions and Ballot

I _____ (name and PIN) a Peace Officer with the Vancouver Police Department, am currently meeting with _____ (name of witness) on _____ (date) at _____ hrs (time) at _____ (location) to show a photograph pack presentation in relation to a crime.

General Instructions

It is important that you understand this presentation. I will read the instructions to you out loud and if any of the instructions are not clear, you should ask any questions that you might have. I will now read the instructions.

1. This photograph line-up may be audio or video recorded to accurately capture your responses and to ensure that the presentation is fair.
2. A photograph line-up is an investigative aid, and is **not** the sole basis on which a charge is laid.
3. A picture of the person who is suspected of having committed the crime may or may not be contained in these of photographs. You do **not** have to select anyone.
4. The presenter of the photographs does not know the identity of the suspect and is not involved in the investigation.
5. Do not discuss the photographs you have viewed with anyone else **except** the investigating officer or the officer presenting the photo line-up.
6. You will have access to these instructions during the presentation of the photographs and you may refer to them at any time during the presentation.

Specific Instructions

7. View each photograph carefully. The photographs may or may not be recent, and such things as hairstyles, facial hair, clothing and eyeglasses may differ.
8. You may view each photograph for as long as you wish, but you may view only one photograph at a time. Once you have viewed a photograph and you wish to view the next photograph, please tell the presenter.
9. If you select a photograph, the presentation will be finished without the rest of the photographs being shown.
10. If you do not select a photograph you may request to view the photographs again.
11. The presenter **cannot** comment on the photographs or discuss any identification that you may or may not have made.
12. If you identify a person who has committed this crime, turn that photograph over and sign your name to the back of that photograph.
13. Having selected a photograph, please sign your name beside the following statement below.

Witness Signature

I HAVE SELECTED a photograph from the photographs presented to me; and

I HAVE PLACED my signature on the back of the photograph that I selected.

We have read, understood and complied with the above instructions.

Signature of Witness Viewing Photographs	Signature and PIN of Presenter of Photographs

APPENDIX 2

GLOSSARY OF ACRONYMS

BC	–	British Columbia
CBC	–	Canadian Broadcasting Corporation
CTV	–	A privately owned Canadian television network.
ECHR	–	*European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950
FPT	–	Federal/Provincial/Territorial
HPC	–	Heads of Prosecutions Committee, Working Group
ICCPR	–	*International Covenant on Civil and Political Rights* 1966
ICTY	–	International Criminal Tribunal for the former Yugoslavia
JIBC	–	Justice Institute of British Columbia
MCM	–	Canadian Police College's Major Case Management model
PTSD	–	Post-Traumatic Stress Disorder
Q.C.	–	Queen's Counsel
RCMP	–	Royal Canadian Mounted Police
VPD	–	Vancouver Police Department

APPENDIX 3

Wrongful Convictions Resources

Report on the Prevention of Miscarriages of Justice, FPT Heads of Prosecutions Committee, Working Group, 2004: www.justice.gc.ca/en/dept/pub/hop/

The Commission on Proceedings involving Guy Paul Morin (The Honourable Fred Kaufman, Commissioner), 1998: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/

The Inquiry regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (The Honourable Peter Cory, Commissioner), 2001: www.gov.mb.ca/justice/sophonow/toc.html

The Lamer Commission of Inquiry pertaining to the cases of: Ronald Dalton, Gregory Parsons, Randy Druken (The Honourable Antonio Lamer, Commissioner), 2006: http://www.justice.gov.nl.ca/just/lamer/

Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (The Honourable Patrick J. LeSage, Commissioner), 2007: http://www.driskellinquiry.ca/index.html

The (on-going) ***Commission of Inquiry into the Wrongful Conviction of David Milgaard***: http://www.milgaardinquiry.ca

Bruce MacFarlane, "***Convicting the Innocent: A Triple Failure of the Justice System***", (2006) 31 Man. L.J. 403

Association in Defence of the Wrongly Convicted: http://www.aidwyc.org

The Innocence Project – Cardoza Law School, New York, N.Y.: http://www.innocenceproject.org/