



**Innocence at Stake:
The Need for Continued Vigilance
to Prevent Wrongful Convictions
in Canada**

2018

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

2018

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

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Stephen Bindman
Eric Tolppanen Q.C.
Committee Co-Chairs

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CHAPTER 1 – INTRODUCTION

“Wrongful convictions are a blight on our justice system and we must take reasonable steps to prevent them.”

Justice Michael Moldaver in *R. v. Hart*¹

We have known for decades that factually innocent people in Canada have been convicted of crimes they did not commit. High-profile cases have led to public inquiries stretching back decades. We have learned valuable lessons from these inquiries about the causes of wrongful convictions. Yet we still do not know the magnitude of the phenomenon in Canada, or how frequently wrongful convictions are going undetected in this country.

While no recent case of a proven wrongful conviction is dominating the headlines as this report goes to print, we should not allow that to lessen our resolve to remain ever vigilant. Despite the broad and varied efforts since the early 2000s to reduce the likelihood of wrongful convictions, we simply do not know when the next case will be discovered, but we can reasonably expect that miscarriages of justice will continue to occur.

In the fall of 2002, the Federal/Provincial/Territorial Heads of Prosecutions Committee (HOP) established a Working Group on the Prevention of Miscarriages of Justice in response to a number of wrongful convictions that had been identified and studied across the country. The Working Group was given the mandate to assist police and prosecutors to better understand the causes of wrongful convictions and how to prevent them by recommending proactive policies, protocols and educational processes, and by developing a list of best practices.

Two years later, the Working Group, composed of senior prosecutors as well as several police officers from across the country, completed and presented the [*Report on the Prevention of Miscarriages of Justice*](#).² It was released to the public by Federal, Provincial and Territorial Ministers Responsible for Justice at their annual meeting on January 25, 2005.

The 165-page *Report* comprehensively explored common causes of wrongful conviction, including tunnel vision, faulty eyewitness identification and testimony, the phenomenon of false confessions, the use of in-custody informers, challenges

1 *R. v. Hart*, 2014 SCC 52, [2014] 2 SCR 544 at para 8.

2 Hereafter referred to as the *2005 Report*.

in the use of forensic evidence, and the frailties of “expert” testimony. The findings and recommendations from commissions of inquiries into wrongful convictions throughout Canada and internationally were collected and examined. Most importantly, the *Report* provided clear, comprehensive and practical recommendations for improvements to the criminal justice system that were designed to reduce the likelihood of wrongful convictions.

That landmark *Report* has been well received, both in Canada and internationally. It has been cited at all levels of court in Canada, including by the Supreme Court of Canada. It has been studied at conferences in various countries, is cited by scholars in the academic literature, is consulted by professionals in the development of training materials for police and Crowns, and is part of the curriculum of several law school courses in Canada dedicated to the study of wrongful convictions. In short, the *Report* has had a significant influence and has been an important catalyst for shedding light on the causes and circumstances leading to wrongful convictions in Canada.

Even before the *Report* was released by Ministers, the HOP established this permanent Subcommittee on the Prevention of Wrongful Convictions. A key element of its mandate is to assist police and prosecutors in Canada to take measures to prevent the occurrence of wrongful convictions. In particular, it is to:

- Make recommendations to the HOP on how to implement the recommendations of the Working Group on the Prevention of Miscarriages of Justice and how to keep them up to date, in light of legal and technological developments;
- Review any developments in Canada and abroad related to wrongful convictions, including emerging case law, technology, legislation and commissions of inquiry, and report to Heads on any changes in policies, practices and directions that should be implemented, either by individual prosecution services or Heads as a whole;
- Work with individual prosecution services and police forces to develop best practices and educational training to prevent wrongful convictions;
- Report periodically to Heads on its activities and any developments in the area of wrongful convictions; and
- Undertake any work related to wrongful convictions as directed by Heads.

Although its membership has evolved as members assumed different jobs (including several appointments to the bench), the Subcommittee continues to be composed of senior police and Crown representatives with many years of experience in all aspects of the criminal justice system. It has consistently had police representatives, including from the Canadian Association of Chiefs of Police Law Amendments Committee and the RCMP. Currently, its

membership includes prosecution representatives from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Newfoundland and Labrador, the Public Prosecution Service of Canada and policy advisors from the Department of Justice Canada. There are currently police representatives from the RCMP and several municipal police departments and one representing both the CACP and the Metro Vancouver Transit Police (formerly Deputy Chief of the Vancouver Police Department.)

The Subcommittee generally meets in person once a year and communicates regularly by teleconference to share information and best practices. It also exchanges a great deal of information via email throughout the year about the latest developments, educational activities, cases and emerging issues. It reports to the HOP Committee at each of its twice-yearly meetings.

In 2011, the Working Group released a comprehensive update to the *2005 Report* entitled *The Path to Justice: Preventing Wrongful Convictions*. It provided a summary of developments in the law and reported on efforts to implement the 2005 recommendations. Those recommendations were re-examined in light of events over the previous six years and, where appropriate, modifications were suggested.

Although that *2011 Report* did not recommend a third report after a full five-year review, the members of the Subcommittee later decided that an update would be useful to assess efforts by police and prosecutors in Canada to make changes aimed at reducing the risks of wrongful convictions. The Subcommittee also wished to bring to the attention of police and prosecutors as well as other criminal justice system participants relevant developments in the law and research since 2011. This decision was supported by the HOP.

One of the difficulties in this area of research is that while most agree that wrongful convictions are a fundamental failure of justice, there is no universally agreed upon definition of a wrongful conviction. This makes it difficult to compare cases and to reach definitive conclusions about the situation in different jurisdictions. For the purposes of this *Report*, the Subcommittee adopts the following definition: the conviction of a person who is factually innocent of the crime for which he or she was convicted (i.e., a person who is convicted of a crime they did not commit or there was no crime) and whose conviction is not remedied through the ordinary court processes within a reasonable time.

The format of this 2018 update largely mirrors the 2011 version and updates and enhances those recommendations where necessary. However, three chapters from the *2011 Report* have been eliminated: Chapter 2 – International Review (there have simply been so many developments in this area around the globe

it is impossible to summarize them in one chapter); Chapter 3 – Canadian Commissions of Inquiry (there have been no such inquiries since 2011); Chapter 8 – DNA Evidence (the very few developments in this area are discussed in Chapter 6 Forensic Evidence).

As well, the Subcommittee has added three new chapters to highlight emerging issues that it believes are deserving of greater attention. Chapter 9 discusses the perils of Crown advocacy and common errors that may lead to wrongful convictions. Chapter 8 examines the issue of false guilty pleas in Canada. Chapter 10 discusses the vulnerability of particular groups in society – women, Indigenous Canadians, young persons – to wrongful convictions. The goal of that chapter is not to provide an exhaustive examination of all of these groups but rather to highlight growing research that suggests that certain populations may be particularly vulnerable to wrongful convictions. It is acknowledged that poverty, mental illness and race are also factors that can contribute to a person being unjustly accused and convicted. By focusing on certain at-risk populations in this chapter, the Subcommittee is attempting to acknowledge that certain segments of the population experience wrongful conviction for reasons unique to that specific group and that more research is required in this area.

It is important to emphasize that, given the mandate of this Subcommittee, the main purpose of these reports is to highlight what police and prosecutors can do to prevent wrongful convictions. However, some of the issues identified in the research as playing a role in wrongful convictions are systemic, broad and interconnected, and implicate other criminal justice system participants, including federal and provincial governments. For example, in some cases, the research points to action that could be taken by governments (such as legislative change) or by other criminal justice system participants to reduce the risks of wrongful convictions. The Subcommittee considers it in the public interest not to ignore these observations from experts in the field despite the focus of its mandate.

In 2018, 13 years after the first report was released publicly, there is a high level of awareness within the police and Crown communities in Canada about the causes of wrongful convictions and what can be done to prevent them. There is a great deal of ongoing activity to reform past and current practices, particularly in the areas of false confessions and forensic science. But it can be difficult to maintain that momentum, especially when there are no galvanizing events that draw everyone together in the common cause.

Since the *2011 Report*, there have been fewer high-profile cases of wrongful conviction in Canada and no attention-grabbing commissions of inquiry. This can be interpreted in different ways – some would suggest that perhaps the lessons of past wrongful convictions are beginning to be heeded, unlike in the United States where wrongful conviction cases are routinely being discovered and reported by agencies monitoring this phenomenon. Others would posit that there are issues with the way Canada detects and remedies such miscarriages of justice.

The Subcommittee believes strongly that the lack of a recent commission of inquiry in Canada or even a high-profile wrongful conviction should not instil complacency or be interpreted as a sign that wrongful convictions are no longer occurring in Canada, or are merely relics of distant historical convictions.

In these difficult times for the criminal justice system in Canada, in the competition for scarce public resources, the Subcommittee fears that concern for wrongful convictions may receive less priority and attention as other issues – notably trial delay following the Supreme Court of Canada’s landmark ruling in *Jordan* – come to the fore.

Subcommittee members believe strongly that we have a duty to ensure that concern about wrongful convictions remains part of the public discourse concerning the criminal justice system.

Therefore, we end where we began 13 years ago, by highlighting a central theme from the *2005 Report*: the importance of all criminal justice system participants remaining vigilant in seeking to prevent wrongful convictions:

Everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice and must be provided with appropriate resources and training to reduce the risk of wrongful convictions. Indeed, the Working Group believes that individual police officers and prosecutors, individual police forces and prosecution services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.³

As the title of this current *Report* emphasizes, innocence is at stake.

3 *2005 Report*, 154.

CHAPTER 2 – UNDERSTANDING TUNNEL VISION

I. INTRODUCTION

Tunnel vision in the criminal justice context can be described as a tendency of participants in the system, such as police or prosecutors, to focus on a particular theory of a case and to dismiss or undervalue evidence which contradicts that theory. This mental process leads to “...unconscious filtering in of evidence that will ‘build a case’ against a particular suspect, while ignoring or suppressing evidence respecting the same suspect that tends to point away from guilt.”⁴ It is a collection of mental processes that occur in all human beings and, as such, cannot be prevented merely through education on the topic and/or an effort among justice system participants to attempt to consciously avoid tunnel vision through ordinary practices.

Legal scholars typically include “confirmation bias” as an element of tunnel vision. Confirmation bias is a powerful psychological process that causes an individual to unconsciously prefer information that supports a conclusion that they have already settled on and to disregard or be overly sceptical about information that contradicts that conclusion. While tunnel vision narrows the focus of an investigation to a single target, confirmation bias leads investigators and prosecutors to filter in evidence supporting their theory and to ignore or undervalue evidence that suggests their theory might be incorrect. Confirmation bias causes people to seek, recall, and even interpret data in ways that support their prior beliefs.⁵

“Hindsight bias,” or the “knew-it-all-along effect,” is another psychological phenomenon that affects tunnel vision in criminal investigations and prosecutions. Hindsight bias occurs when a person mixes new information with old information in their brain. This can result in a person believing an event was predictable and they knew it would happen, even if there was no objective evidence for predicting it would occur at the time. The danger of this process in the course of an investigation or prosecution is that when a theory of a case is developed, hindsight bias can lead to a “rejudgment process that the given outcome seems inevitable or, at least, more plausible than alternative outcomes.”⁶ Studies have shown that

4 Bruce A. MacFarlane, “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” Ontario Ministry of the Attorney General: 2008, available at: https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf.

5 Keith A. Findley, “Tunnel Vision,” in *Conviction of the Innocent: Lessons From Psychological Research*, ed. Bryan Cutler (APA Press, 2010).

6 Erin M. Harley, Keri A. Carlsen and Geoffrey R. Loftus, “The ‘saw-it-all-along’ effect: Demonstrations of visual hindsight bias,” *Journal of Experimental Psychology: Learning Memory & Cognition*, 960-968.

hindsight bias can also affect judgements about accused persons' past conduct, making the current allegations against them seem all the more probable.⁷

In addition to unconscious biases, human psychology also tells us that individuals typically rely on a host of cognitive heuristics or mental shortcuts to make decisions, even complex ones.⁸ Decision makers – even the best, the brightest and the highly principled – do not have unlimited mental capacity to process each piece of information that is presented to them in a problem, assign the level of importance each piece has on the decision as a whole, consider all the available alternatives, and then engage in a complex mental algorithm to arrive at their decision. Indeed, research suggests that as the demands on limited cognitive resources increase, the more likely it is that decision-makers will employ cognitive heuristics or other strategies intended to reduce the amount of mental effort required to arrive at a decision.⁹ In such cases, the decision-maker is often (unconsciously) seeking a satisfactory solution, rather than an optimal one. An exploratory piece of research conducted by Islam, Weir and Del Fiol (2014),¹⁰ examined decision making in expert clinicians and found they use mental shortcuts in complex cases, particularly when they are faced with significant time constraints, multiple interruptions and simultaneous demands. Police and prosecutors across Canada also routinely make decisions under similar conditions. When these conditions are coupled with high or unmanageable caseloads, it is easy to see how an over-reliance on cognitive heuristics and biases could open the door to the effects of tunnel vision.

The general process of a criminal investigation in Canada may also increase the likelihood of tunnel vision occurring. Typically, prosecutors receive a developed case full of evidence implicating the accused. They are not usually provided with evidence that might implicate other suspects or is otherwise inconsistent with the investigator's theory of the case. Prosecutors must be extremely vigilant and willing to challenge the investigation in order to guard against the effects of tunnel vision. As discussed in the previous *Reports*, several Canadian commissions of inquiry have indicated tunnel vision is a leading cause of wrongful convictions.

7 Neal Roese and Kathleen Vohns, "I Knew It All Along...Didn't I? – Understanding Hindsight Bias," *Association for Psychological Science*, September 2012.

8 See Gerd Gigerenzer and Reinhard Selten, *Bounded Rationality: The Adaptive Toolbox* (MIT Press, 2001).

9 Anuj K. Shah and Daniel M. Oppenheimer, "Heuristics Made Easy: An Effort Reduction Framework," *Psychological Bulletin* 134, no. 2 (2008):207-222.

10 Roosan Islam, Charlene Weir and Guilherme Del Fiol, "Heuristics in Managing Complex Clinical Decision Tasks in Experts' Decision Making," *IEEE International Conference Healthcare Informatics*. September, 2014: 186–193

II. 2011 RECOMMENDATIONS

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

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

III. INSTITUTIONAL PRESSURES THAT REINFORCE TUNNEL VISION

As discussed above, tunnel vision stems from a group of naturally occurring cognitive biases and shortcuts to which all humans are susceptible. Furthermore, these cognitive biases tend to arise more readily in the justice system when the circumstances of the offence or the accused offender are susceptible to extraneous environmental factors, such as widespread public outrage, being perceived as an “outsider,” or from a disadvantaged, unpopular or minority group. These cognitive

biases can also be reinforced by internal pressures which are endemic to the justice system. This section examines several of these pressures which may serve to reinforce tunnel vision in unsuspecting justice system participants.

a) Pressure on Prosecutors and Police

Prosecutors are instructed that obtaining a conviction is never their primary goal and that their quasi-judicial function “excludes any notion of winning or losing.”¹¹ However, there remain institutional pressures including pressure from victims and their families, the public, colleagues, and supervisors to obtain a conviction.¹² The long-term impact of these pressures can contribute to a “conviction psychology” where a prosecutor’s mentality shifts from doing justice towards obtaining convictions. This may be influenced by the fact that Crowns must believe there is a reasonable or substantial likelihood of conviction in order for a case to proceed to trial. However, studies reveal that prosecutors do tend to develop a conviction psychology over time.¹³ Interestingly, each of the Crown counsel in the well-known wrongful convictions of Donald Marshall, Guy-Paul Morin, David Milgaard, Thomas Sophonow, and James Driskell were lawyers with lengthy trial experience.¹⁴

Policing agencies are also exposed to intense public pressure and media scrutiny in the course of their investigations, particularly when the alleged crime is violent or disturbing in nature, and there is reason to believe the offender remaining at large poses a risk to the safety of others. In these instances, police are working to identify a suspect quickly and, as a result, may succumb to tunnel vision by prematurely focussing their investigation on one person and ignoring other potential leads or lines of inquiry.

Policing culture that fosters competition between team members also hinders open communication and collaboration in a case. Further, it is important for police agencies to guard against a “win at all costs” culture in terms of solving crime: not all crimes can be solved and the temptation to cut investigative corners or to engage in conduct that violates Charter rights must be zealously discouraged. Investigators must accept that it is better to let a suspect evade prosecution than to engage in unacceptable conduct such as “noble cause corruption.” To do otherwise can also promote tunnel vision amongst investigators who do not want to admit if they made a mistake. Justice Fred Kaufman in the *Commission on Proceedings Involving Guy Paul Morin* (1998)¹⁵ recommended that investigators should not receive elevated standing in an investigation via acquiring or pursuing the “best”

11 *Boucher v. The Queen*, SCC [1955] SCR 16, p.24.

12 Bruce A. MacFarlane, “Wrongful Convictions.”

13 Keith A. Findley and Michael S. Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases,” *Wisconsin Law Review*, no. 2 (2006).

14 Bruce A. MacFarlane, “Wrongful Convictions.”

15 Honourable Fred Kaufman, “Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin,” Ontario Ministry of the Attorney General: 1998.

suspect or lead, as this is detrimental to the sharing of critical information between teams. Management in policing agencies must also take responsibility for creating a work environment that values open, honest and fair investigation, that protects the rights of suspects and accused persons, and that supports constant as well as continuous fact verification.¹⁶

b) Changing Prosecution Trends

The true enemy of tunnel vision is thorough, objective thought. Although crime has been on a downward trend in Canada since the 1990s, the demands that have been placed upon Crown prosecutors across the country have dramatically increased, limiting time for important case analysis in some instances. For example, the number of court appearances required to resolve a matter has been on the rise nationwide, consuming precious prosecution resources.¹⁷ Technology and forensic science have evolved in leaps and bounds, resulting in much larger volumes of evidence to process, and posing serious challenges to providing full disclosure in a timely manner. Some have suggested that the introduction of new mandatory minimum sentences provides incentive for more matters to go to trial, and the trials that proceed have become longer and more complex.¹⁸ Additionally, the *R. v. Jordan* decision on trial delays by the Supreme Court of Canada adds further strain to an already overburdened system, holding the Crown accountable for moving cases forward as quickly as possible.

c) Noble Cause Corruption, Trauma and Tunnel Vision

In the literature on tunnel vision, much has been written about “noble cause corruption” and how it may lead to wrongful convictions. Noble cause corruption occurs when investigators and/or prosecutors focus on an end result (such as apprehending or convicting a suspect), and engage in unethical or perhaps even unlawful activities to achieve that result (such as using excessive force, or suppressing adverse forensic reports).¹⁹ In such instances, justice system participants may be responding to public pressure, or they may be emotionally invested in a case and driven by the need to protect the victim or society from the suspected perpetrator, and so they will do “whatever it takes” to secure a conviction. It is important to note that these individuals believe they are working in the public interest and are generally not dishonest or unethical people. Some aspect of the

16 Doug A. LePard and Elizabeth Campbell, “How Police Departments Can Reduce the Risk of Wrongful Convictions,” in *Criminal Investigative Failures*, ed. D. Kim Rossmo (Boca Raton, FL: CRC Press, Taylor & Francis Group, 2009): pp.269-293.

17 See : Benjamin Perrin, Richard Audas and Sarah Péloquin-Ladany, “Canada’s Justice Deficit: The Case for a Justice System Report Card,” *The Macdonald-Laurier Institute*, 2016, available at: https://www.macdonaldlaurier.ca/files/pdf/MLI_JusticeReportCard_F_web.pdf.

18 Jacqueline Speyer, “The Crown’s Obligation to Streamline the Case,” Ontario Ministry of the Attorney General, for the National Criminal Law Program, July, 2016.

19 Bruce A. MacFarlane, “Wrongful Convictions.”

case, however, is causing them to make emotional decisions rather than engaging in impartial and principled thought. A Canadian research study, for example, suggests that investigators who regularly deal with child and elder abuse are more tolerant of noble cause corruption, and may themselves engage in this behaviour.²⁰ In these instances, the police and/or the Crown have an accused in their sights, and want to “put him away.” This mindset is an extension of tunnel vision by distorting any new information these individuals may receive. It may also be the result of vicarious trauma.

“Vicarious trauma,” or secondary trauma, occurs when an investigator or Crown prosecutor begins internalizing a victim’s traumatic experience. Prolonged exposure to graphic images of crime scenes, for instance, or disturbing accounts of violence and cruelty, may intrude on a professional’s daily life and cause considerable distress.²¹ Vicarious trauma is a cumulative process that occurs over time, and often affects individuals who feel responsible, committed and care deeply about their work.²² Some of the more common symptoms of vicarious trauma include feelings of numbness or hyper-arousal, difficulty managing emotions, difficulty making good decisions, and problems managing boundaries between yourself and others. Therefore, when a professional who is experiencing vicarious trauma is left to deal with a particularly horrific case, they may not understand that their decision-making ability has been compromised. They may also employ tunnel vision (unconsciously) as a means of coping with the situation by focusing on getting the accused off the street and behind bars, rather than objectively reviewing all the available information in the matter.

Traditionally, research on vicarious trauma has focused on social workers, psychologists and first responders. In fact, many police services across the country recognize how this issue affects their officers and have programs in place to help. Additionally, provinces such as Saskatchewan, Alberta, Manitoba, Ontario, British Columbia and the Yukon have implemented various forms of juror support programs for jury members who are exposed to traumatic material in court.²³ At the federal level, the House of Commons Standing Committee on Justice and Human Rights undertook a study of counselling and other mental health supports for jurors and found that those who witness a traumatizing event or hear details about it can later be diagnosed with PTSD and vicarious trauma. The report recommended that the federal Minister of Justice encourage the provinces and territories to offer a psychological support and counselling program to all jurors after their jury service has ended.²⁴

20 Ibid.

21 Maxine Sushelsky, “Secondary Trauma and Burnout in Lawyers and What to Do About It,” *Massachusetts Lawyers Journal*, December 2011.

22 Laurie A. Pearlman and Lisa McKay, “Understanding and Addressing Vicarious Trauma,” *Headington Institute*, Online Training Module Four, 2008, available at: http://headington-institute.org/files/vtmoduletemplate2_ready_v2_85791.pdf.

23 Barb Pacholik, “Mental Health Support Available for Jurors in Saskatchewan,” *Regina Leader-Post*, Updated: November 30, 2017, available at: <https://leaderpost.com/news/crime/mental-health-support-available-for-jurors-in-saskatchewan>.

24 Anthony Housefather, “Improving Support for Jurors in Canada: Report of the Standing Committee on Justice and Human Rights,” House of Commons Canada, 42nd Parliament, 1st Session, May 2018, available at: <http://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/report-20>.

Mental health assistance for prosecutors and family law lawyers has not been as forthcoming, despite ongoing and chronic exposure to the same distressing material, but this is beginning to change as we understand how vulnerable these professionals can be to this form of trauma. Research has found that rates of vicarious trauma among U.S. attorneys were almost five times higher than that of other professions.²⁵ Furthermore, a study published in the *Pace Law Review* found that lawyers working with victims of domestic violence and criminal defendants experienced significantly higher levels of vicarious trauma than social workers and mental health professionals. This difference appeared to be the result of the lawyers' higher caseloads and lack of education around vicarious trauma and its effects.²⁶

Justice professionals do not have to experience vicarious trauma to engage in noble cause corruption or tunnel vision. However, it is clear that undiagnosed, traumatized individuals are more susceptible to its effects. If Crowns do not truly understand what vicarious trauma is or how it can affect their work, they may not be able to recognize when it is having a detrimental effect on their case analysis or decision making. Providing further training in this area and taking greater care in managing Crown caseloads could assist with warding off the two-headed spectre of noble cause corruption and tunnel vision in criminal matters.

IV. COURT COMMENTARY ON TUNNEL VISION SINCE 2011 REPORT

A review of “tunnel vision” commentary by Canadian courts (since 2011) suggests this topic is most often raised by defence counsel regarding the quality of the police investigation that was conducted in a criminal matter. The following cases include examples of such commentary:

a) ***R. v. Iskander*, 2017 ABPC 191²⁷**

This matter involved allegations of sexual assault and is subject to a publication ban. It resulted in a judicial stay, and the court offered some commentary about the lead detective in the matter, who, the court found, was suffering from tunnel vision in his investigation.

25 Janice Mucalov, “Compassion Fatigue in the Legal Profession?” *The Canadian Bar Association*, October 22, 2010, available at: <https://www.cba.org/Publications-Resources/CBA-Practice-Link/Work-Life-Balance/2010/test>.

26 Andrew Levin and Scott Greisberg, “Vicarious Trauma in Attorneys,” *Pace Law Review* 24, no.1 (2003): p. 245, available at: <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1189&context=plr>.

27 *R. v. Iskander*, 2017 ABPC 191 (CanLII), <<http://canlii.ca/t/h5mwq>>, retrieved on 2018-03-26.

Did [the investigator] suffer from “tunnel vision” (“a single-minded and overly narrow focus on a particular investigative theory”) in this investigation?

[80] I find that he did. The issue in the Morin case was the identity of the perpetrator. Here, the issue was whether the acts the Accused allegedly committed, in fact, occurred. [The investigator] clearly believed they did and his investigation had a single-minded and overly narrow focus on his belief.

[92] [The investigator] later offered this: “Hearing from witnesses to date, there is a large divide in the church community and [the Accused] is allegedly still providing false information to the community targeting the victims and their families.”

[93] When questioned during this hearing about what he meant by the Accused “providing false information to the community”, [the investigator] conceded that he had heard from witnesses that the Accused was telling people he was innocent of the charges.

[94] Perhaps no other piece of evidence amongst the testimony and 27 documentary exhibits produced at this hearing demonstrates as clearly as these comments that [the investigator], even though he “understands the presumption of innocence”, suffered from tunnel vision.

b) *R. v. Fries*, 2017 MBCA 58²⁸

This appeal concerned a second degree murder conviction. The accused argued that the verdict was unreasonable because the absence of evidence provided the alternative inference of someone else committing the murder. The appeal was dismissed by the Manitoba Court of Appeal:

[11] While the accused did not testify, he advanced the defence through counsel that someone else stabbed the victim to death after his fight with him and that the police had tunnel vision by focussing their investigation on the accused alone as they did not have DNA analysis done on all of the exhibits seized.

[16] Also, the challenge to the adequacy and objectivity of the police investigation is nothing but supposition, given the record. We have no doubt, as a general proposition, that competent defence counsel will vigorously pursue forensic analysis of any evidence if they have a true concern of the

28 *R. v. Fries*, 2017 MBCA 58 (CanLII), <<http://canlii.ca/t/h4fbd>>, retrieved on 2018-03-26.

police having tunnel vision in their investigation and results of forensic testing of evidence may exonerate an accused. For defence counsel to fail to do otherwise would risk a wrongful conviction of their client.

[17] It is difficult to see how the police had tunnel vision here when the exhibit officer testified that, if the defence had asked that a particular exhibit seized be forensically examined by the RCMP lab, she saw no reason why the Winnipeg Police Service would not have made that request to the RCMP lab. Moreover, section 605 of the *Code* allowed the accused to obtain custody of any exhibit seized by the police for independent scientific testing if the police had been unable or unwilling to assist, or the defence did not want the police involved in any way in the testing process. It is noteworthy, for the purposes of disposing of this appeal, that there is no suggestion by appellate counsel that the defence counsel at trial was incompetent by not pursuing forensic analysis of exhibits gathered in the police investigation that were not selected and sent to the RCMP lab for forensic analysis by the investigators.

c) ***R. v. Richards*, 2015 ABQB 617²⁹**

This case involves two accused who were charged with manslaughter and kidnapping. Counsel for the accused allege that the police investigation was tainted by tunnel vision.

[373] Having reviewed the evidence carefully as a whole, and having paid particular attention to the investigatory process outlined by [the investigator] in his evidence, both in chief and during cross-examination, the Court rejects the accused's submission that the investigation was tainted by tunnel vision.

[374] The Court has outlined the testimony of [the detective] above. While there were a number of leads that CPS devoted less than full resources to, this does not cause the Court to conclude that the investigation was tainted by tunnel vision.

[402] In *R v Zoraik*, 2010 BCPC 472 (CanLII); conviction upheld on appeal: 2012 BCCA 283 (CanLII), the Court discussed the interplay between tunnel vision and the Crown's burden, stating, at para 81:

It is important to not lose sight of what is in issue when tunnel vision is part of the defence attack on the police investigation. The police investigation is not on trial. Nor should the strategic decisions the police make be subject to minute after-the-fact analysis. What is in issue is

29 *R. v. Richards*, 2015 ABQB 617 (CanLII), <<http://canlii.ca/t/glwq2>>, retrieved on 2018-03-26.

whether a reasonable doubt is created because the police investigation has failed to bring before the court a complete and persuasive picture of what occurred. It may be of interest that tunnel vision led to an incomplete investigation. But the issue nevertheless remains whether the evidence presented is complete so as to satisfy the burden of proof. The focus should be no more and no less.

[403] Defence Counsel alleged numerous deficiencies in the police investigation. The Court has found the allegations as to tunnel vision during the investigative process to be groundless. The manner and method of investigation described by [the investigator] and other officers does not suggest that relevant information was ignored or suppressed.

d) *R. v. Caron*, 2014 BCCA 111³⁰

This appeal involved an accused who was convicted of sexual assault, unlawful confinement and uttering threats of death or bodily harm, and is subject to a publication ban. A key issue at trial involved the identification of the individual who attacked the complainant. Potential investigative tunnel vision was also examined and dismissed by the court. The conviction was upheld.

[35] Lastly, Mr. Caron submits the trial judge did not address the adequacy of the police investigation, or investigative tunnel vision. He points to the failure of the police to follow up on the identity of the male at the medical clinic; the failure to follow up on two other possible suspects, one who may have fit the complainant's description of her attacker; the unfair photo line-up containing only headshots of dark haired men wearing no glasses; the police looked only for a local blue Ford Ranger truck, although it was Canada Day weekend with a large influx of tourists into the area; and there was no investigation into the uniqueness of the type of tread pattern on the windshield or a bare foot impression on the windshield.

[50] The final argument Mr. Caron raises concerns the nature of the police investigation. He submits that the evidence regarding the shoeprints was tainted by investigative "tunnel vision", which when taken in conjunction with the arguments addressed above establishes that the verdict was unreasonable.

[51] When determining whether an investigation has been tainted by "tunnel vision", the concern is whether the accused person was limited in his ability to make full answer and defence. This could include whether the Crown failed in its disclosure obligations or whether the police negligently or deliberately ignored evidence that the offence might have been carried out by any person other than the accused: *R. v. Wilkinson*, 2010 BCCA 316 (CanLII) at para. 40.

30 *R. v. Caron*, 2014 BCCA 111 (CanLII), <<http://canlii.ca/t/g68fb>>, retrieved on 2018-03-26.

e) *R. v. Chapman*, 2013 BCPC 232³¹

The matter involved an allegation of physical assault against a young child (L.M.) who was three years old. The accused was acquitted of the charge. In the Reasons for Judgment, the court offers some commentary about tunnel vision and victim advocacy.

[27] In the present case, I have noted the high level of concern and involvement of L.M.'s immediate and extended family, most of whom have attended during the several days of trial. It is clear to me that emotions are high. My previously referenced observations about family member's testimony makes clear to me the family have made up their mind Mr. Chapman is guilty and that they want to procure a conviction. That emotions are high is very understandable when a loving family believes one of their young and vulnerable has been victimized by an adult. It is this type of emotional backdrop that can lead people to have what is referred to as 'tunnel vision'.

[28] Tunnel vision is when people convince themselves a theory is true, and then focus only on consistent evidence, and disregard evidence that is inconsistent with the theory. Tunnel vision can happen not only to concerned and emotionally involved family members, but there have been several regrettable high profile cases in Canada where it has been later established the accused were wrongfully convicted as a result of the tunnel vision of the justice system professionals. I hasten to add that there is no evidence of tunnel vision on the part of the police or Crown in this case, and that this was a case properly brought to trial. My above discourse is for the benefit of the family, and to emphasize that it is the responsibility of a trial judge to take into consideration all of the admissible evidence in determining whether the evidence establishes guilt beyond a reasonable doubt.

f) *Auclair c. R.*, 2011 QCCS 2661³²

This matter was a mega-case which involved a group of 155 individuals who were alleged to be members of the Hells Angels. These individuals (the petitioners) were seeking either a stay of the proceedings for abusive prosecution, or the quashing of the direct indictment. The respondent in the matter was the Director of Criminal and Penal Prosecutions. The commentary the court offers on the subject of tunnel vision is both comprehensive and enlightening.

31 *R. v. Chapman*, 2013 BCPC 232 (CanLII), <<http://canlii.ca/t/g0kr9>>, retrieved on 2018-03-26.

32 *Auclair c. R.*, 2011 QCCS 2661 (CanLII), <<http://canlii.ca/t/fnbb8>>, retrieved on 2018-03-26.

Loss of objectivity – adoption of tunnel vision

[64] The petitioners argued that the respondent, even before analyzing the evidence, adopted the police theory. The adoption of that preconceived idea resulted in the prosecution's loss of objectivity. The danger of tunnel vision was described in Chapter 4 of the *Report on the Prevention of Miscarriages of Justice*, prepared by the F.P.T. Heads of Prosecutions Committee:

Tunnel vision has been defined as “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.” Tunnel vision, and its perverse by-product “noble cause corruption,” are the antithesis of the proper roles of the police and Crown Attorney. Yet tunnel vision has been identified as a leading cause of wrongful convictions in Canada and elsewhere.

[65] According to the petitioners, the adoption of tunnel vision in this case is proven by the close collaboration between police and prosecutors during the investigation; by the use of a legal theory referring to criminal responsibility that is not supported by the literature or jurisprudence; by the abandonment of the prosecutors' traditional role as prosecutor and their assumption of the role of investigator, as shown by the hours of meetings with certain special witnesses; by the absence of a critical sense; and by the premature arrests.

[66] After studying the evidence, the Court concludes that the petitioners did not prove, on a balance of probabilities, that the respondent either had tunnel vision or failed in its duty to be objective. Let us look at the arguments advanced by the petitioners.

[67] They complained of close collaboration between police and prosecutors, who went so far as to share the same premises for months before the arrests. The evidence certainly shows that that was true, but the Court concludes that that was understandable, given the scope of the case. The various studies produced by the petitioners are unanimous in recognizing that, in mega-investigations and mega-trials, it is essential that there be greater complicity between the investigators and the prosecutors.

[68] The petitioners failed in their attempt to show that the prosecutors went beyond merely providing legal opinions to the police and actually conducted investigations. The Court stresses at this point that the petitioners' attorneys repeated many times during the hearing of the motion that they did not doubt the good faith of the Director's prosecutors. There is no evidence to support the inference that the respondent's prosecutors abandoned their traditional role and took on that of investigator.

[69] The police witnesses were unanimous: the prosecutors never directed the investigation because that was not their role; only the prosecutors decided on the charges to be brought and against whom; those decisions were made after days of meetings between prosecutors.

[70] Given the scope of the case and the important role attributed to the special witnesses, it is not surprising that the prosecutors met with some of them for hours before the laying of charges. The petitioners conceded that it was legitimate for the prosecutors to determine whether the special witnesses, and especially Boulanger, were credible and reliable in their eyes. Furthermore, in the Court's opinion, considering the period of time covered by the charges and the potential number of accused, it is understandable and acceptable for the prosecutors to want to review those facts with the potential witness. That the review resulted in requests for further investigations is neither surprising nor unreasonable.

V. MITIGATING TUNNEL VISION

Although many institutional pressures in the justice system may exacerbate tunnel vision, there are also a number of mitigating strategies and protective factors that can assist in preventing this insidious effect. This section will examine some of these elements.

a) Major Case Management Methodology and Training for Police

The Major Case Management (MCM) Model was developed in 1994 by the Canadian Police College, refined over time, and has since become an accepted "best practice" for managing serious investigations.³³ MCM methodology is used by agencies such as the RCMP and the Vancouver Police Department and has also received strong endorsement from the judiciary. Justice Archie Campbell's Bernardo Investigation Review,³⁴ as an example, explicitly encourages police to take MCM training, as it provides a solid framework investigators can use to overcome the innumerable challenges that come with major incident investigations. Correctly applying the nine principles of MCM can prevent tunnel vision at the outset of an investigation by ensuring it is conducted professionally, strategically and ethically. Currently, British Columbia has a Major Case Management Team Commander accreditation process and those personnel selected to lead major investigations are typically accredited Team Commanders.

33 Doug LePard and Elizabeth Campbell, "How Police Departments Can Reduce the Risk of Wrongful Convictions."

34 Honourable Archie Campbell, "Bernardo Investigation Review: Report of Mr. Justice Archie Campbell," Ontario Ministry of the Attorney General: June 1996.

Quality police training in general plays an important role in preventing tunnel vision in the justice system. While many agencies, including the RCMP, do not offer courses which are specific to wrongful convictions, many investigative courses do cover related topics such as tunnel vision. Further, the MCM training summarized above considers failed investigations – including those that resulted in a wrongful conviction – and its systematic approach and emphasis on use of best practices and ethical decision-making lends itself well to preventing wrongful convictions. Chapter 7 of this *Report* outlines the results of a recent survey which examined police and prosecutor training across Canada on the issue of wrongful conviction course content, and tunnel vision specifically. While 100 percent of responding police agencies indicated their training included tunnel vision subject matter, only 50 percent of responding police training institutes indicated that their courses had some material on tunnel vision, indicating that considerable training occurs within police agencies, rather than relying on provincial police training institutions. With respect to Crown training, 75 percent of the responding prosecution services indicated they provide training with tunnel vision course content.

b) Wrongful Conviction Risk Assessment Checklist

The International Association of Chiefs of Police³⁵ has crafted a checklist to assist investigators in identifying “red flags” in their cases:

- Does the case revolve around a single eyewitness identification?
- How confident does the team feel about the confession statement?
- Was the forensic evidence properly collected and is the forensic analysis reliable?
- Is there corroboration from other evidence?

Prince Edward Island³⁶ has developed a guide for prosecutors to critically assess the strength of their case that includes the following questions:

- a) Are there grounds for believing that some evidence may be excluded?
- b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?

35 International Association of Chiefs of Police & Office of Justice Programs U.S. Department of Justice, “National Summit On Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions,” 2013.

36 Crown Attorney’s Office, “Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island,” November, 2009.

- c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused or may be otherwise unreliable?
- d) Has a witness a motive for telling less than the whole truth?
- e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- f) Based on objective indicators, what sort of impression is the witness likely to make?
- g) How is the witness likely to stand up to cross-examination?
- h) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- i) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- j) Are all the necessary witnesses competent to give evidence?
- k) Where child witnesses are involved, are they likely to be able to give sworn evidence or to give evidence based upon a promise to tell the truth?
- l) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- m) Where two or more accused are charged together, is there a reasonable prospect of the proceedings being severed? If so, is there sufficient evidence against each accused, should separate trials be ordered?

A wrongful conviction assessment guide or checklist is a practical tool that helps prevent tunnel vision by encouraging the open-minded review of cases.

c) Independence and the Prosecution Service

While public pressure has been described as a factor that can lead to tunnel vision in a criminal matter, the principle of prosecutorial independence is a fundamental tenet of our legal system and can serve to insulate prosecutors from making decisions that may be popular, but incorrect. In preventing wrongful convictions, prosecutors must be objective, impartial and non-partisan in their decision-making. Crowns cannot be swayed by public opinion or compelled by government officials to make hasty decisions, or, as history tells us, tunnel vision and wrongful convictions can be the result.

Prosecution services across Canada are expected to operate independently of partisan concerns and this goal has been achieved in two ways – either through legislation or through convention. Nova Scotia, British Columbia, Quebec and the Public Prosecution Service of Canada all have legislatively independent prosecution services, transferring responsibility for criminal prosecutions away from the (elected) Attorney General, and toward an appointed head of the prosecution service. This, it may be argued, reduces political pressure on the Attorney General and Minister of Justice, and safeguards prosecutorial discretion. Nova Scotia is the oldest of the statutory-based independent prosecution services, and sought its independence following an inquiry into the wrongful conviction and incarceration of Donald Marshall Jr., whose case involved elements of tunnel vision. Since that time, Nova Scotia’s prosecution service has been subject to at least three reviews, all of which have supported legislative independence. In the third review, known as the Westray Prosecution Review, the independence of the service was truly tested after the Crown decided not to proceed with the prosecution of the operators of the Westray mine, which exploded in 1992, killing 26 miners and provoking considerable public outrage. The review concluded: “the decision to stop the prosecution was based upon a consideration of appropriate factors.”³⁷

The remaining prosecution services across Canada remain independent by convention, meaning that the Ministers of Justice and Attorneys General generally do not become involved in the prosecution of cases before the courts, although they have the power to do so. The Attorney General, however, like Crowns, also has a constitutional obligation to act independently of partisan concerns and other improper motives. This fact was recently re-emphasized in the 2016 Supreme Court of Canada *R. v. Cawthorne*³⁸ decision:

The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister’s membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. [32]

Therefore, whether independent by legislation, or independent by convention, prosecutors across Canada are expected to make their decisions in an objective, professional manner, uninfluenced by public pressure or any other factor that is irrelevant to the case. The principle of the independent, objective prosecutor is one of the surest safeguards against tunnel vision in the system. It must be supported

37 “Westray Prosecution Review Released,” *Public Prosecution Service*, 2000; Nova Scotia News Releases.

38 *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 SCR 983.

and upheld at all times, particularly by “those responsible for the daily operation and public repute of the criminal justice system.”³⁹

d) Pre-charge Consultation and Collaboration

Close collaboration and open communication between Crown and police in the early stages of a case is another way of mitigating tunnel vision in both parties. Although it is important for police and Crown to maintain separate and distinct roles in the criminal justice system, it is just as important for them to work collaboratively by sharing information with one another, while the evidence in a matter is still “fresh,” and alternative theories and suspects may still be vigorously pursued. Although tunnel vision experts such as MacFarlane warn against the blurring of lines between police and Crown, early discussions and consultations about a case does not necessitate the loss of objectivity if both participants keep an open mind. Furthermore, cases such as *R v. Ahluwalia* demonstrate that while prosecutors may rely on the police to investigate matters, the courts expect the Crown to “poke and prod” investigators to ensure tunnel vision has not set in for either party.⁴⁰

The level of expected pre-charge consultation and collaboration differs significantly between law enforcement agencies and the various prosecution services across Canada. It is worth noting that British Columbia, New Brunswick, and Quebec adhere to a pre-charge system, which requires that a Crown prosecutor reviews and approves charges before the police lay an information in a matter. In these provinces, the Crown who recommends and approves charges is sometimes different from the Crown who is assigned to prosecute the case. (In Quebec, this process is only possible in large centres.) This separation adds additional perspective to the matter and offers further protection against tunnel vision.

The remaining provinces and territories adhere to a post-charge system, which does not mandate any level of consultation before charges are laid. However, in many post-charge provinces, the prosecution services have forged close connections with their policing counterparts, and communication and collaboration during the investigative stage is not unusual between these two groups. Alberta, as an example, has Pre-charge Consultation Protocols in place with all the policing services across the province that ensures consultation takes place in serious and violent matters, and/or in cases with complex evidentiary requirements or complex search warrants. This is another way of promoting an organized and collaborative approach to reviewing evidence in a case, without fundamentally changing the dynamics between police and Crown.

39 John Pearson, Director of Crown Operations, Central West Region, Ministry of the Attorney General of Ontario, “Preserving the Independent and Objective Public Prosecutor”, undated.

40 See: Robert J. Frater’s “The Seven Deadly Prosecutorial Sins,” *Canadian Criminal Law Review*, April, 2002.

e) Devil's Advocate Position

Crown prosecutors are taught to be contrarian thinkers, which is a protective factor against tunnel vision. However, when work stress and pressures begin to add up, even the most independent prosecutor can fall victim to this effect. This necessitates making contrarian thinking a more formalized process in Crown Offices by developing a “contrarian” or “devil’s advocate” position. The role of the devil’s advocate would be to review major cases separately from those in charge of the prosecution. An individual in this position would intentionally approach their review of the case from the perspective that the accused is innocent and would view evidence to the contrary as disconfirming evidence of their theory. The value of this position is two-fold: 1) it prevents the devil’s advocate from having the prosecutor and investigator’s theory of the case reinforced via direct communication and 2) it combats the institutional pressures that Crown prosecutors feel by being placed in a unique role that is free of the expectations of victims, the public, and their colleagues.

This position is not a new idea and has been discussed before in high-profile inquiries in Canada such as the Morin Inquiry.⁴¹ Further, the role of the “contrarian” is a component of the Major Case Management model taught at the Canadian Police College and has been successfully used by policing agencies to prevent tunnel vision and “premature investigative conclusions.”⁴²

41 Bruce A. MacFarlane, “Wrongful Convictions,” p. 62.

42 Doug LePard and Elizabeth Campbell, “How Police Departments Can Reduce the Risk of Wrongful Convictions.”

VI. TUNNEL VISION IN PROSECUTION POLICY

Some prosecution services across Canada explicitly address tunnel vision in their guidelines to Crown. These guidelines, and their instruction to prosecutors, are:

Prosecution Service

Public Prosecution Service of Canada (Includes Nunavut, the Yukon and the Northwest Territories)

Guideline

[Prevention of Wrongful Convictions](#)⁴³

Reference to Tunnel Vision

Includes an entire section dedicated to the discussion of tunnel vision. Encourages Crowns to act as gatekeepers and critically review all available evidence, to seek out second opinions, and to foster a work environment that embraces questions, consultations and frank debate. Mentoring is mentioned as an important tool in understanding the role and the independence of the Crown.

Prosecution Service

Alberta

Guideline

[Decision to Prosecute](#)⁴⁴

Reference to Tunnel Vision

Emphasizes the importance of seeking a second opinion from prosecutors who are uninvolved with a case to prevent tunnel vision from occurring.

Prosecution Service

Newfoundland and Labrador

Guideline

[Duties and Responsibilities of Crown Attorneys](#)⁴⁵

Reference to Tunnel Vision

Policy notes the Crown has a duty to be fair and to appear as fair, and as such, they must carefully guard themselves against tunnel vision and of practicing “overzealous” or “overreaching” advocacy. They must also remain open to alternate defence theories and remain free of partisan influences.

Prosecution Service

Prince Edward Island

Guideline

[Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions In Prince Edward Island](#)⁴⁶

Reference to Tunnel Vision

Instructs Crowns to guard against being inflicted by “tunnel vision” through close contact with the investigative agency, colleagues or victims.

43 See: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch04.html>

44 See: https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx

45 See: <http://www.justice.gov.nl.ca/just/prosect/guidebook/006.pdf>

46 See: https://www.princeedwardisland.ca/sites/default/files/publications/guide_book_of_policies_and_procedures_for_the_conduct_of_criminal_prosecutions.pdf

Other Prosecution services, including [British Columbia](#)⁴⁷, [Saskatchewan](#)⁴⁸, [Manitoba](#)⁴⁹, [Ontario](#)⁵⁰ and [Nova Scotia](#)⁵¹ provide guidelines that define the role of the prosecutor in the justice system, and the importance of being independent, objective, dispassionate, free from outside influences and measured in their approach. [Quebec](#)⁵² provides a directive to prosecutors which requires them to keep an open mind and constantly re-evaluate new evidence when they proceed with a prosecution. [New Brunswick's](#)⁵³ Legal Advice to Police policy warns Crowns not to become too involved in an investigation lest they lose their objectivity. Being mindful of their duties, and comfortable with their role in the justice system is essential for any prosecutor in the fight against tunnel vision.

VII. UPDATED RECOMMENDATIONS

The *2005* and *2011 Reports* made eight recommendations that may assist in reducing tunnel vision in law enforcement and Crown prosecution agencies. These recommendations were as follows:

1. Crown policies on the role of the Crown should emphasize the quasi-judicial nature of the position and the inherent danger of adopting the viewpoints or enthusiasm of others without thorough analysis. Policies should encourage prosecutors to remain open to alternate theories proffered by defence counsel or other credible parties.
2. Where geography and resources permit, jurisdictions should consider implementing a best practice whereby a prosecutor who had significant pre-charge involvement is replaced by another prosecutor to maintain carriage of the file post-charge.
3. In jurisdictions without pre-charge screening, charges should be reviewed by prosecutors as soon as practicable and an ongoing critical assessment must be made.
4. Second opinions and case reviews should be available in all areas.
5. Internal organizational accountability should be clearly defined and understood. Prosecutors must understand their role in each prosecution and the respective role of their supervisors.

47 See: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf>

48 See: <http://publications.gov.sk.ca/documents/9/93159-Proceeding%20with%20Charges.pdf>

49 See: <https://www.gov.mb.ca/justice/crown/prosecutions/pubs/role.pdf>

50 See: <https://www.ontario.ca/document/crown-prosecution-manual/>

51 See: https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/Preface.pdf

52 See: <http://www.dpcp.gouv.qc.ca/documentation/directives-directeurs.aspx>

53 See: <http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/LegalAdvicetoPolice.pdf>

6. A Crown culture which encourages discussion and contrarian thinking should be cultivated in Crown Law offices.
7. Law enforcement agencies and prosecutors play complementary roles in the criminal process. While they both enjoy institutional independence at their respective stage of the process, it does not preclude cooperation and mutual assistance to strive for justice.
8. Training for prosecutors and police on the prevalence and prevention of tunnel vision should be implemented. Prosecutors and police should have a clear understanding each other's role in the criminal justice system.

Additionally, the Subcommittee suggests the following new measures:

9. Information on vicarious trauma should be provided to Crown prosecutors. Crowns should understand the symptoms of vicarious trauma, and how it affects the decision making-process. Those affected should receive appropriate support.
10. Where resources permit, prosecution services should consider formalizing the "devil's advocate" position in Crown offices and on Crown Prosecutions Teams.
11. Case assessment tools or guidelines aimed at preventing wrongful convictions should be developed by the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, for consideration by prosecution services across the country.
12. Tunnel vision guidelines and policies should be developed by police and prosecution services which don't currently have them.
13. Police services should be encouraged to continue to support delivering MCM training to those involved with major case investigations, as such training specifically addresses causes of failed investigations and gives strategies to mitigate them.
14. Other jurisdictions should be encouraged to consider British Columbia's Major Case Management Team Commander accreditation process as a method to ensure only highly qualified personnel are assigned to lead major investigations.

CHAPTER 3 – EYEWITNESS IDENTIFICATION AND TESTIMONY

I. INTRODUCTION

Eyewitness identification and testimony is a critical component of the criminal justice system. It is used to guide police investigations and prosecutions and can be compelling evidence in a courtroom. However, even the most well-meaning and confident eyewitness can be mistaken. The U.S. Innocence Project estimates that eyewitness error was a contributing cause in 70 percent of the 356 wrongfully convicted accused who have been exonerated by DNA evidence in that country.⁵⁴ The American Psychological Association estimates that one in three eyewitnesses make an erroneous identification.⁵⁵ As Mr. Justice David Doherty of the Ontario Court of Appeal famously put it:

[T]he spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law.⁵⁶

As described in the *2011 Report*, there is considerable research that has documented that eyewitness misidentification has long been regarded as the leading cause of wrongful convictions. Eyewitnesses can make mistakes and their memories can be impacted by a variety of factors, including being inadvertently influenced or biased by police officers and police procedures. Eyewitness misidentification, especially in the early stages of an investigation, can set in motion a chain of errors causing an innocent person to be charged and leading the trier of fact toward a guilty verdict. It is the criminal justice system's responsibility to help eyewitnesses make the most accurate identification possible. As stated in the *2011 Report*, eyewitnesses, law enforcement and the public at large will benefit from identification procedures that are designed according to scientific research and conducted consistently nationwide. This has not changed.

Eyewitness error has been studied by social scientists for more than 100 years and there is a vast body of research on the subject.⁵⁷ Environmental factors such as distance and poor lighting, as well as physical aspects such as witness vision, hearing, attention and intoxication, all have evident effects on eyewitness

54 "Eyewitness Misidentification," *Innocence Project*, available at: <https://www.innocenceproject.org/causes/eyewitness-misidentification/>

55 Richard A. Wise, Giuseppe Sartori, Svein Magnussen and Martin A. Safer, "An Examination of the Causes and Solutions to Eyewitness Error," *Frontiers in Psychiatry* 5, August 2014, available at: <https://doi.org/10.3389/fpsy.2014.00102>

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

57 Steven E. Clark, Aaron S. Benjamin, John T. Wixted, Laura Mickes and Scott D. Gronlund, "Eyewitness Identification and the Accuracy of the Criminal Justice System," *Policy Insights from the Behavioral and Brain Sciences* 2, no.1 (2015): 175–186.

accuracy. The memory recall process itself has also been identified as another important factor to consider in this discussion.

Although it is common to think of memory as a series of photos or recordings in someone's mind, psychology tells us it is actually a reconstructive, malleable process, which occurs in three stages. First, when an individual is exposed to a piece of information or an event, the memory is encoded; it is at this stage when environmental factors and physical aspects of the witness can affect the accuracy of the memory. The memory then goes through the second stage, the retention stage, where it is stored before reaching the third phase, memory retrieval. Although a witness can cycle back and forth between the retention and retrieval phase, a memory is only encoded once, and it decays the longer it is retained. During this time, the witness may also be exposed to post-event information which may not be accurate, but may distort the memory nonetheless. When this occurs, the witness is unaware that the memory has been altered, and it is difficult if not impossible to restore it to its "original" version.⁵⁸

Despite such challenges, there are a number of best practices and legal safeguards in place across the criminal justice system to minimize the effects of eyewitness error when it occurs.

II. 2011 RECOMMENDATIONS

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

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:
 - a) If possible, an officer who is independent of the investigation should be in charge of the lineup or photo-pack presentation. This officer should not know who the suspect is, avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.
 - b) The witness should be advised that the actual perpetrator may not be in the lineup or photo-pack, and therefore the witness should not feel that they must make an identification.
 - c) The suspect should not stand out in the lineup or photo-pack as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

⁵⁸ See: Elizabeth F. Loftus and Jacqueline E. Pickrell, "The Formation of False Memories," *Psychiatric Annals* 25, no. 12 (1995): 720-725.

- d) All of the witness's comments and statements made during the lineup or photo-pack viewing should be recorded verbatim, either in writing or if feasible and practicable, by audio or videotaping.
 - e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.
 - f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.
 - g) A photo-pack should be provided sequentially, and not as a package, thus preventing 'relative judgments'.
2. For prosecutors, the following practical suggestions should be considered:
- a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
 - b) Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.
 - c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.
 - d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.
 - e) Never tell a witness that they are right or wrong in their identification.
 - f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances,

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

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

III. STATUS OF RECOMMENDATIONS

Chapter 7 of this *Report* highlights a recent survey which sought to determine if police and prosecutor training across Canada contained wrongful conviction course content, and eyewitness identification content specifically. Eighty-five percent of responding police agencies and 50 percent of responding police training institutes indicated that their courses contained information about eyewitness identification. Sixty-three percent of responding prosecution services indicated their training contained this information. This suggests that while the majority of the responding agencies are providing information about the role of eyewitness error in wrongful convictions, further strides can be taken in disseminating this important information. Reviewing the standards and practices listed above is useful information for police and prosecutors, and is even more effective when incorporated into early training initiatives.

IV. COURT COMMENTARY ON EYEWITNESS IDENTIFICATION AND TESTIMONY SINCE 2011 REPORT

A review of eyewitness evidence and commentary by Canadian courts since 2011 suggests that judges are certainly aware of the dangers associated with this kind of testimony, and the need for the court to seek strong confirmatory evidence in such cases to prevent a wrongful conviction. While the cases and commentary cited below deal with different aspects of eyewitness identification evidence, one similarity is evident: witnesses are using social media and their smartphones to help identify the alleged perpetrator – sometimes prior to viewing a police lineup or photo array. Furthermore, this behavior appears to be “tainting” or “contaminating” eyewitness descriptions over time, resulting in the eyewitness providing a description of the alleged perpetrator at trial that is far more detailed than the description that was originally given to police, immediately following the incident.

The justice system will increasingly have to wrestle with the issues posed by witnesses who conduct post-offence research via social media in order to identify suspects. Witnesses searching for and identifying suspects through the internet are doing so without the safeguards employed by police agencies, and their searches are not being video-recorded, making the trier of fact unable to review the process. When this evidence is presented to police agencies, it is incumbent upon them to take a statement from the witness documenting how the identification was made, and not simply accept it at face value. Though this identification evidence is obtained in circumstances that lack the markers of reliability identified in the Sophonow Inquiry, it can still be pertinent and weighed by judges.

a) *R. v. Leeds*, 2013 NSSC 364⁵⁹

The accused in this case was charged with manslaughter following an assault in an alleyway after a New Year’s Eve party. The identity of the perpetrator was the sole issue at trial, and the only identification evidence was that of one eyewitness, the girlfriend of the deceased. This decision is particularly illuminating as it deals with eyewitness identification evidence at length, outlining variables such as the environmental factors of the crime scene (e.g., poor lighting) and physical aspects of the eyewitness (e.g., level of intoxication) as well as how the photo arrays were assembled and presented. The commentary offered below is related to the possible contamination of the eyewitness by exposure to members of the deceased’s family (both in person and electronically), immediately following the assault. The accused was found not guilty.

59 *R. v. Leeds*, 2013 NSSC 364 (CanLII), <<http://canlii.ca/t/g220h>>, retrieved on 2018-03-26.

[14] Eye witness identification evidence must be based on the independent recollection of the witness and not recollection arising as the result of discussions with and amongst various people. Such evidence may be compromised where an eye witness has discussed with others his or her recollection of the person's appearance before making an identification: *R. v. Holden* (2001), 2001 CanLII 14562 (ON CA), 56 O.R. (3d) 119 (C.A.) at p.136-137. In some cases, the failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of the identification.

[39] I do not accept that [the witness's] identification of the accused was truly her independent recollection of the person she saw. The different descriptions she gave to the first responding police officers; the fact that she was in a room at the hospital with family and friends of the deceased for several hours and discussed the identity of the assailant with them; the fact that the accused was unknown to her at the time of the incident but that she was nonetheless able to give the police a nickname and that she and another person who had been at the hospital attended the police station together and were kept together before viewing the photo lineup. These factors all speak to the reliability and independence of [the witness's] recollection.

[40] My conclusion regarding the reliability and independence of [the witness's] identification evidence is further buttressed by the fact that while viewing the photographs at the police station [the witness] had her cell phone in hand and appeared to be looking at it while being shown the photographs. This was noted by [the detective] who was showing her the photographs and at one point he asked her to put the phone away.

[60] The fact that [the witness's] description became more detailed over time is of concern. It speaks of the tainting which occurred as a result of her discussions with others about the identity of the perpetrator.

b) *R. v. Mohamed*, 2014 ABCA 398⁶⁰

The Alberta Court of Appeal discussed the identification evidence of the key witness, specifically the viewing of Facebook photographs shown to him by an acquaintance, where he was led to believe by the acquaintance that the suspect would be present in the photographs. The Court of Appeal distinguished this process from the process of a police-conducted photo-lineup, commenting:

[30] It is better compared to a situation where an eyewitness who does not know a shooter at the time of the offence later identifies him on the street after a third party has drawn attention to him. Such evidence is not entirely

60 *R. v. Mohamed*, 2014 ABCA 398 (CanLII), <<http://canlii.ca/t/gffh3>>, retrieved on 2018-03-26.

without weight simply because it was not obtained in the context of the safeguards provided in a police lineup. Rather, “it is what it is”, and the trial judge has the obligation to assess it in the context of all the evidence to determine its degree of reliability.

c) *R. v. Jobe*, 2016 NSSC 282⁶¹

This trial involved three co-accused who were charged in an armed robbery at a hotel. The Court found that eyewitness identification was the foundation of the Crown’s case and thereby exercised “special caution” in considering it. The three accused were found not guilty.

[20] At this point in her direct testimony, [the witness] began to describe the three men...I found that throughout her direct examination [the witness’s] description of the men varied. The difficulty with these varying descriptions became compounded when [the witness] allowed that some of her recollections were based upon social media and other exchanges in the roughly one year since the robbery. In this regard, I accept Defence counsels’ submissions that this aspect of [the witness’s] testimony, which they term crowd-sourced, is full of hearsay and must be disregarded.

[24] The fact that [the witness’s] description of these individuals became more detailed over time is of concern. It speaks of the tainting which occurred as a result of her social media and other exchanges about the possible identities of the robbers...

d) *R. v. R. P.*, 2017 ONCJ 743⁶²

This case concerned an underage complainant/witness who was sexually propositioned by a man who was unknown to her, but lived in her community. The Court found that the complainant’s identification evidence, which largely resulted from a Facebook search several weeks later, had insufficient reliability to resolve the reasonable doubt within the trial judge’s mind. The accused was acquitted.

[8] The complainant told the police that she found the picture on Facebook three or four weeks earlier but did not report it because “I didn’t know if it was super important”. Eventually, she told her father and he took her to the police station. Before this happened, the complainant saw the man again. She explained she was in her father’s car and they passed him on the street. She pointed him out to her father and he said, “That’s who I thought it was”.

61 *R. v. Jobe*, 2016 NSSC 282 (CanLII), <<http://canlii.ca/t/gv6j8>>, retrieved on 2018-03-26.

62 *R. v. P.*, 2017 ONCJ 743 (CanLII), <<http://canlii.ca/t/hn8w9>>, retrieved on 2018-07-24

[9] The complainant acknowledged her encounter with the man lasted “one minute or so” and that she had never seen him before. She searched Facebook for him after she overheard her father tell her step-mother that the culprit was [R.P]. The discovery of his picture happened 11 to 18 days after the encounter. The complainant testified she was certain the culprit is the man in the photograph.

[11] The Crown concedes the dangers inherent in “stranger identification” cases and that the interaction between the parties was brief. Counsel points out, however, that there was sufficient opportunity for the complainant to observe and later relate a detailed description of the man and his clothing as well as a residential address. On overhearing the name of the suspect, she immediately recognized him on Facebook. Counsel submits that other than this suggestion by her father, there is no other “tainting” of her identification.

[12] The Defence submits that it is problematic that the identification in this case is based upon a single picture found on social media by the complainant after searching a name she overheard her father say was the culprit. Counsel argues that the latter point is especially significant given the close relationship between father and daughter. That the complainant trusts her father is evident in the video record of the police statement. Counsel also points out that the interaction between the complainant and the culprit was brief and the evidence of the defendant’s address is not sufficiently compelling.

e) ***R. v. Assefa*, 2018 ABCA 6⁶³**

This was the appeal of a man convicted of assault at a house party. The morning after the house party, the victim used Instagram to identify the accused, who had attended the party with someone the victim knew. The victim then sent the Instagram photos to police, which were entered as exhibits at trial. The Court of Appeal upheld the conviction, as the trial judge ruled the identification by the victim was recognition evidence, rather than the proverbial “fleeting glance.”

[22] As the Crown points out, there is a significant difference between the identification of a stranger and identification of someone the witness is able to recognize. The New Brunswick Court of Appeal has recently commented that “where an eyewitness has no previous knowledge of the identity of a suspect, the circumstances surrounding the encounter take on much more meaning”: *R. v. Arsenault*, [2016 NBCA 47 \(CanLII\)](#) at para 30, 342 CCC (3d) 322.

63 *R. v. Assefa*, 2018 ABCA 6 (CanLII), <<http://canlii.ca/t/hpp9c>>, retrieved on 2018-03-26.

[23] The trial judge here took all of the circumstances surrounding the encounter and Gardner's identification of the assailant into account. When Gardner reviewed Edgar's Instagram photos, he was looking for the face of a person he had seen and recognized throughout the evening in the company of Edgar, a man he knew and had spoken to on previous occasions. The trial judge found that his was not a fleeting glance case, but one of recognition. She noted that Gardner's identification is not precisely the same as that of a witness who has known a suspect over a lengthy period of time, but found that Gardner's eyewitness account nevertheless did not suffer from all the frailties of the identification of a fleeting glance of a stranger. It was the task of the trial judge to take the circumstances of the identification into account and assess the weight to be accorded to it. We see no reviewable error in the trial judge's assessment of Gardner's identification evidence and in her reliance on that evidence to convict the appellant.

Similarly, in *R. v. Delorme*, 2017 SKCA 3, the Saskatchewan Court of Appeal upheld a conviction where the key identification witness was shown a photograph of the suspect on Facebook and told the suspect was "wanted," while he waited at the police station to give his statement. The Court of Appeal found the trial judge had looked for markers of reliability in the witness's testimony, and had compared it to the corroboratory evidence, and that his identification evidence was not tainted by his exposure to Facebook.⁶⁴

When post-offence identification evidence is offered by a witness, it is incumbent upon police and prosecutors to establish the circumstances of the identification, so that the trier of fact has an accurate understanding of the reliability of the identification evidence. The Ontario Court of Appeal's comments in *R. v. Smerciak*, (1946) 87 CCC 175 remain relevant:

The conditions under which an observation is made, the care with which it is made, and the ability of the observer, affect the weight of the evidence. In addition to such matters, and of the utmost importance, is the method used to recall or refresh the recollections of a witness who is to be relied upon to identify a person suspected of wrongdoing or who is under arrest. If a witness has no previous knowledge of the accused person so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias created directly or indirectly. Conversely, if the means employed to obtain evidence of identification involve any acts which might reasonably prejudice the accused, the value of the evidence may be partially or wholly destroyed. Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and

64 *R. v. Delorme*, 2017 SKCA 3 (CanLII), <<http://canlii.ca/t/gwwxb>>, retrieved on 2018-03-26.

wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person.

In 2017, over 70 percent of regular internet users in Canada were reported to be social media users,⁶⁵ which suggests that social media platforms will continue to be used by eyewitnesses and victims as a means of identifying accused persons. Police and prosecutors must be aware of the inherent issues of post-offence identification, how it affects witnesses' reliability, and the inherent dangers to identification and recognition evidence generated in an unrecorded and uncontrolled setting. As a result, it is more important than ever for police to meticulously record all comments or statements made by a witness during a lineup or photo-pack viewing via video, audio, or in writing. Although it is recognized that not every police agency has the necessary technology to video record eyewitness identification procedures, the American National Academy of Sciences has recommended that this become a standard practice for law enforcement to follow.⁶⁶

V. SOCIAL MEDIA USE AND MEMORY RESEARCH

As discussed above, post-event information supplied by police, prosecutors, other eyewitnesses and social media sources has been clearly shown to alter people's memories of a person or an event. Researchers have found that altered photos, subtle suggestions and leading questions can result in witnesses experiencing vivid and yet completely false memories of an event.⁶⁷ For instance, arbitrarily being labeled a "good" or "bad" witness can significantly affect eyewitness observation scores.⁶⁸ Even the hand gestures of interviewing police officers have been shown to alter witness accounts of a crime.⁶⁹ The potential for post-event information to contaminate, "taint" or otherwise alter eyewitness recall, and the importance of preventing this from occurring, is what informed many of the reasonable standards and practices for police and prosecutors in the recommendations in this chapter. However, when eyewitnesses post their firsthand accounts of a crime on social

65 Val Maloney, "A Look Ahead at Canada's Social Media Penetration: eMarketer," *Media in Canada*, (2017) available at: <http://mediaincanada.com/2017/07/13/canadians-over-index-on-twitter-use-emarketer/>

66 Steven Clark et al, "Eyewitness Identification."

67 See: Elizabeth Loftus, "Our Changeable Memories: Legal and Practical Implications," *Nature Reviews Neuroscience* 4, (2003): 231–234.

68 Rachel Roper and David Shewan, "Compliance and Eyewitness Testimony: Do Eyewitnesses Comply with Misleading 'Expert Pressure' During Investigative Interviewing?" *The British Psychological Society*, 2002.

69 Daniel J. Gurney, Karen Pine and Richard Wiseman, "The Gestural Misinformation Effect: Skewing Eyewitness Testimony Through Gesture," *The American Journal of Psychology* 126, no. 3 (2013): 301-14.

media, is it possible that the act of simply “posting” this information could contaminate their memory of the event in question?

New research on memory and social media has found that people remember experiences better when they post them on sites like Facebook.⁷⁰ However, the nature of social media sites encourages, as one 2010 court decision put it, “a certain amount of puffery” in one’s postings.⁷¹ A 2012 study on social media psychology found that users selectively screen photos and information they post on social media platforms to develop online personae that may not necessarily reflect their daily life or true emotional state.⁷² A paper published in the *Connecticut Law Review* argues that the informal nature of social media encourages exaggerations and falsifications among its users.⁷³ Additionally, the memory and social media study cited above acknowledges that when we post online, we are “creating a sense of self”, and that by shaping the way we remember our experiences, it is also shaping who we are.⁷⁴ This information suggests that posting firsthand eyewitness accounts of a crime on social media may influence the person’s memory and recall of that event. More research is required in this area.

VI. MITIGATING STRATEGIES

To mitigate potential memory contamination from social media use, as well as from other sources, research suggests that when police conduct a non-leading interview soon after an event (and preferably before a Facebook posting), they can help consolidate witness memories, leading to stronger memory performance over time.⁷⁵ Investigative interviews that maximize narrative detail and minimize specific prompting have been shown to elicit more accurate and detailed responses from witnesses.⁷⁶ Furthermore, allowing witnesses to provide details at their own pace promotes more elaborate memory retrieval and results in a more coherent account of what occurred.⁷⁷ Child witnesses, for example, who were allowed to talk about something innocuous (e.g., what they did for summer vacation) at their

70 Qi Wang, Dasom Lee and Yubo Hou, “Externalising the Autobiographical Self: Sharing Personal Memories Online Facilitated Memory Retention,” *Memory* 25, no. 6 (2017).

71 *DeWaard v. Capture the Flag Indoor Limited*, 2010 ABQB 571 (CanLII), <<http://canlii.ca/t/2f3p6>>, retrieved on 2018-03-26

72 Kathryn R. Brown, “The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs,” *Vanderbilt Journal of Entertainment & Technology Law* 14, no. 2 (2012):357.

73 Allison L. Pannozzo, “Uploading Guilt: Adding a Virtual Records Exception to the Federal Rules of Evidence,” *Connecticut Law Review* 44, no.5 (2012).

74 Qi Wang et al, “Externalising the Autobiographical Self.”

75 Martine Powell, Maryanne Garry and Neil Brewer, “Eyewitness Testimony,” *Thomson Reuters*, Update: 72, (2013), available at: <https://www.agd.sa.gov.au/sites/g/files/net2876/f/powellgarrybrewer13eyewitnesstestimony.pdf?v=1490676272>

76 *Ibid.*

77 *Ibid.*

own direction and pace, prior to remembering a target event, remembered two and a half times as many details about the target event as children who answered questions from an interviewer-directed script.⁷⁸ Powell and Snow propose that the effectiveness of interview questions should be judged by their adherence to the acronym SAFE for:

- Simple language;
- Absence of specific details (not previously raised) or coercive techniques;
- Flexibility in allowing the interviewee to choose what information will be reported; and
- Encourages an elaborate response (such as tell me *everything* that happened at Joe's house).⁷⁹

Promoting deep memory processing among eyewitnesses through non-leading interview techniques reduces the chance of eyewitness identification error and promotes accurate eyewitness testimony in court. To this end, organizations in Australia are pooling their resources to develop a national interview framework, which encompasses best practices and guidelines for training.⁸⁰

In Canada, many police agencies, including the RCMP, use Cognitive Interviewing, which has been shown to successfully enhance the memory retrieval process.⁸¹ In this phased approach, the officer begins the interview by establishing trust and strong communication with the witness by making them feel valued and an equal partner in the process.⁸² Developing a strong rapport with the witness has been shown to improve both the quality and quantity of the information that is recalled in the interview and is intended to reduce witness anxiety, which can affect memory retrieval. It is also intended to make the witness more resilient and less likely to comply with leading questions, which are often precursors to eyewitness error.

78 Ibid.

79 Martine Powell and Pamela Snow, "Guide to Questioning Children During the Free-Narrative Phase of an Investigative Interview," *Australian Psychologist* 42, no.1 (2007).

80 Martine Powell et al, "Eyewitness Testimony."

81 See: Ronald P. Fisher and Edward R. Geiselman, *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (Springfield, IL: Charles C. Thomas, Publisher, 1992).

82 See: Rebecca Milne, "The Enhanced Cognitive Interview: A Step-by-step Guide," *Surrey Police*.

Cognitive Interview practices include:⁸³

- Beginning an interview with open-ended questions. This primes the witness to give elaborate and detailed responses and helps to consolidate memories. Even important demographic information (such as a contact phone number) should be collected from the witness at the end of the interview, as providing short, closed answers has been shown to negatively affect the ensuing recall process.
- Memory retrieval at the most detailed level requires intense focus and concentration. It is important for the witness to feel there is adequate time to search through their memory and to report everything that is recalled, even details that might not seem important to the witness. The witness should be encouraged to conduct as many retrieval attempts as possible during this time.
- Approach the interviewer role with a facilitator mindset. To ensure the witness remembers and consolidates as much information about the event as possible, they should do most of the mental work and talking throughout the interview. The officer should use active listening techniques and keep interruptions to a minimum.
- Context has a powerful effect on memory. Mentally reconstructing an event in a witness's mind can enhance overall recall.
- At the end of the interview, the officer should summarize the account, using the witness's own words. This process helps to ensure the officer understands all the information that has been shared, and also functions as a final memory retrieval process for the witness, who should be encouraged to add any new information that may be recalled during this time. If closed-ended questions are required for further clarification, they should be asked during the final phase of the interview.

The recommendations in the *2005* and *2011 Reports* related to police photo-pack presentations remain valid and sound. Indeed, the state of Louisiana, for example, recently introduced a bill (which is before the legislature at the time of this writing) to adopt statewide procedures for how eyewitness identifications are handled by law enforcement agencies which closely mirror these recommendations.⁸⁴

Incorporating Cognitive Interviewing into standard practice enhances these practices and will not only result in the witness's retrieval of more information for police to use in their investigation, but will also act as an additional safeguard against memory "tainting," eyewitness error, and ultimately wrongful convictions. Cognitive Interviewing techniques can also be used by prosecutors when they meet with a witness before a case.

83 Ibid.

84 Legislature of Louisiana (2018). Senate Bill 38: *Eyewitness Identification Procedures*, available at: <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1065561>

VII. IDENTIFICATION AND EYEWITNESS CONFIDENCE

Since the release of the *2011 Report*, further research has been conducted on the relationship between eyewitness confidence and accuracy. Much of the research has described the critical role of law enforcement in ensuring proper protocols are followed to avoid or mitigate bias or witness contamination in light of the frailties of human memory.

In October 2014, the *National Research Council of the National Academy of Sciences (USA)* released its report *Identifying the Culprit; Assessing Eyewitness Identification*.⁸⁵ This report outlines research on vision, memory and the variables that may impact a witness's ability to accurately identify an alleged offender. Amongst its many recommendations, the report recommends investigators document a witness's self-assessment of confidence in the identification at the time the witness first identifies a suspect. Evidence indicates that while self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy (the witness having been influenced by external factors such as recall bias and opinions voiced by others), greater self-confidence at the moment of initial identification is generally reflective of greater accuracy of identification. That said, the strength of the confidence-accuracy relationship is dependent upon factors such as environmental conditions, persons involved and individual emotional states.⁸⁶

In 2017, John Wixted and Gary Wells authored *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*. Wixted and Wells's research confirms that the greatest threat regarding the ability to rely on confidence in eyewitness identification occurs when witnesses receive post-identification feedback that suggest they made an accurate identification. It appears in the U.S. there is a growing trend within the legal system to disregard eyewitness confidence, with no distinction drawn as to whether the eyewitness-identification procedures were appropriate or not and with no distinction drawn between witness confidence at the time of the initial identification versus witness confidence at a later time. It is suggested that the legal system should

85 National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (Washington, DC: The National Academies Press, 2014), available at: <https://doi.org/10.17226/18891>.

86 See: John T. Wixted, Don J. Read and Stephen D. Lindsay, "The Effect of Retention Interval on the Eyewitness Identification Confidence–Accuracy Relationship," *Journal of Applied Research in Memory and Cognition* 5, no.2 (2016):192-203, available at: <https://www.sciencedirect.com/science/article/pii/S221136811630047X?via%3Dihub>. The authors suggest that a high confidence identification made by an eyewitness remains accurate even after a longer period of time has passed and that low-confidence identifications by eyewitnesses were much less reliable and have resulted in DNA exonerations of those suspects found guilty.

draw a distinction between initial confidence that was obtained using pristine testing procedures and confidence obtained later or under conditions known to compromise the confidence-accuracy relationship.⁸⁷

Wixted and Wells also describe various factors known to affect eyewitness memory and the importance of these factors being taken into consideration. Many of these factors are what they call *estimator variables* – variables that affect memory but are outside of the control of the legal system. Some common estimator variables they mention include:

1. Race (cross-race identifications are less accurate than same race identifications)
2. Exposure duration (brief exposure to the subject results in worse memory by the witness than longer exposure)
3. Lighting (poor lighting during the crime results in worse memory for the witness than good lighting)
4. Retention interval (a longer duration between the witnessed crime and the first lineup test may result in worse memory for the witness than a shorter duration).
5. Stress (high stress can lead to worse memory by the witness than low stress)
6. Weapon focus (witness memory is worse when a weapon is present than when no weapon is present).

The research conducted indicates that low-confidence initial identifications will almost always signal low accuracy, regardless of whether the identification procedures were pristine or not. High-confidence identification on an initial test generally signals high accuracy when pristine testing conditions were used by law enforcement. They recommend collecting a confidence statement at the time of the initial identification; when an eyewitness makes an identification, a statement should be obtained from that eyewitness indicating how confident they are that the person identified is the offender.

In summary, the biggest obstacle in relying heavily on confidence in eyewitness identification occurs when witnesses receive post-identification feedback that suggests they made an accurate identification. As per previous recommendations, this type of threat is mitigated by having an officer who is independent of the

87 John T. Wixted and Gary L. Wells, “The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis,” *Psychological Science in the Public Interest* 8, no.1 (2017),10– 65.

investigation conduct the photo-pack presentation without knowing who the suspect is, thus avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.

It is also important to always be mindful of cases such as *R. v. Hanemaayer*⁸⁸, where a witness can be confident but also inaccurate, even at the early stages of the process. Evidence suggests that confidence statements can be a helpful tool to law enforcement, but they must be used carefully.

VIII. UPDATED RECOMMENDATIONS

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:
 - a) If possible, an officer who is independent of the investigation should be in charge of photo-pack presentation. This officer should not know who the suspect is, avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.
 - b) The witness should be advised that the actual perpetrator may not be in the photo-pack, and therefore the witness should not feel that they must make an identification.
 - c) The suspect should not stand out in the photo-pack as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.
 - d) All of the witness's comments and statements made during photo-pack viewing should be recorded verbatim, by video and audio recording, or if that is not feasible, in writing. When an eyewitness makes an identification, a statement should be obtained from that eyewitness indicating how confident they are that the person identified is the perpetrator.
 - e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness as soon as possible upon completion of the photo-pack presentation to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.

88 *R. v. Hanemaayer*, 2008 ONCA 580 (CanLII), <<http://canlii.ca/t/2065m>>, retrieved on 2018-03-26

- f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.
 - g) A photo-pack should be provided sequentially, and not as a package, thus preventing 'relative judgments'.
2. For prosecutors, the following practical suggestions should be considered:
- a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
 - b) Allow the witness a reasonable opportunity to review all previously provided statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.
 - c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.
 - d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.
 - e) Never tell a witness that they are right or wrong in their identification.
 - f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.

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

CHAPTER 4 – FALSE CONFESSIONS

I. INTRODUCTION

Though it may be difficult to understand, it remains true that innocent individuals sometimes confess to crimes they have not committed. As noted by Justice Binnie of the Supreme Court of Canada, in dissent, in *R. v. Sinclair*⁸⁹:

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

As this chapter highlights, considerable progress has been made in implementing the *2011 Report's* recommendations, which called for a review of investigation standards on the interviewing of suspects and witnesses, and training about false confessions.

II. 2011 RECOMMENDATIONS

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. Video recording should not be confined to a final statement made by the suspect, but should include the entire interview.
2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

89 *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para 90.

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

III. LEGAL DEVELOPMENTS AND COMMENTARY

a) The Right to Counsel

Section 10(b) Update

In a trilogy of cases released by the Supreme Court of Canada in October 2010 – *R. v. Sinclair*⁹⁰, *R. v. McCrimmon*⁹¹, and *R. v. Willier*,⁹² – the Court declined to expand the scope of the right to counsel to include the right to have a lawyer present during an in-custody police interview and the continuing right to consult with a lawyer throughout the interview process. The Court held that police are not required to monitor the quality of legal advice once contact with counsel is made. Such advice is protected as privileged. Instead, in the absence of the detainee indicating that the advice received was inadequate, the police are entitled to assume that the detainee is satisfied with his or her exercise of the right to silence under Section 10(b) of the *Charter* and carry on with their investigation.

b) Mr. Big Operations

“A confession provides powerful evidence of guilt, but only if it is true”.⁹³

A significant area of development since the *2011 Report* has been judicial pronouncements on so-called “Mr. Big” cases, which some have suggested can lead to wrongful convictions.

Confessions derive their probative force from the fact that they are against the accused’s self-interest. The notion that people do not falsely confess has undergone a significant re-evaluation and, in known cases, has been discredited. Specifically, the circumstances in which Mr. Big confessions are obtained can particularly undermine this notion. While these operations have proved to be an effective investigative tool indispensable in the search for the truth, their very nature can raise the spectre of unreliable confessions, a known contributor to wrongful convictions.

90 Ibid.

91 *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402.

92 *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429.

93 *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para 99.

As an undercover investigative technique used in serious, often “cold” cases, Mr. Big operations have a considerable history.⁹⁴ The potential they have to produce unreliable, i.e., false, confessions, either through overwhelming inducements or through police conduct that crosses the line from skilful to that which the community perceives as intolerable, has been a concern of the criminal law throughout the technique’s history. Mr. Big operations, by design, seek to elicit confessions from the target. These operations follow a general pattern. Undercover officers lure their suspect, or target, into a fictitious criminal organization. The target is befriended by the undercover officers over the course of several weeks or months and is shown that working with the organization is a pathway to financial and other rewards. There is often the particular lure of “the big score” in which the target stands to be enriched far beyond what he has received for his efforts on behalf of the organization to that point. However, in order to participate in the work leading to the “the big score”, the target’s participation must be approved by the organization’s head, Mr. Big. The operation culminates in an interview with Mr. Big. The undercover officers working most closely with the target stress the importance of being honest with Mr. Big. During the interview, Mr. Big raises the topic of the actual crime under investigation and questions the target about his involvement in it. Denials are rebuffed and Mr. Big presses for what the police believe to be a truthful account. It is readily apparent to the target that continued participation in the profitable activities of the organization, including “the big score”, depends upon the target confessing to the subject crime.⁹⁵

With its decision in *R. v. Hart*, the Supreme Court of Canada took an in-depth look at Mr. Big confessions and the principles that govern their admissibility. As noted by Justice Moldaver, to the date of the *Hart* decision, there were no established wrongful convictions stemming from the use of the Mr. Big undercover technique.⁹⁶ He further observed that Mr. Big confessions “have typically been

94 Ibid., at para 56: “The Mr. Big technique is a Canadian invention. Although a version of the technique appears to have been used by the police as far back as 1901, its modern use began in the 1990s and has continued since then (see *R. v. Todd* (1901), 4 C.C.C. 514 (Man. K.B.), at p. 532. According to the B.C. RCMP, the technique has been used across Canada on more than 350 occasions as of 2008.

95 In *R. v. Niemi*, 2017 ONCA 720, Paciocco JA provides a much more succinct description of the technique: “A Mr. Big operation, in its classic form, involves recruiting a suspect into a fictitious criminal organization and then holding out the benefits linked to membership if the suspect admits to the crime being investigated.”

96 See *Hart*, supra at para 62: “To date, there are no established wrongful convictions stemming from its use. However, in 1992, Kyle Unger was convicted of murder based in part on a confession elicited through a Mr. Big operation, as well as on forensic evidence found at the scene of the crime. In 2004, the forensic evidence was called into question by a review committee. The Minister of Justice ordered a review of the conviction, and the Crown ultimately withdrew the charges after determining it did not have sufficient evidence to proceed with a new trial (see also *R. v. Bates*, 2009 ABQB 379, 468 A.R. 158, where an accused, though properly convicted of manslaughter, overstated his involvement by falsely confessing to Mr. Big that he was the person who shot a rival drug dealer).”

received at trial”.⁹⁷ Targets of Mr. Big operations do not have the right to silence because they are not detained. Neither do they benefit from the Confessions Rule because they do not know they are speaking to police officers. As Justice Moldaver noted, trial judges have “only rarely” excluded Mr. Big confessions, none through an application of the abuse of process doctrine and only one because its prejudicial effect exceeded its probative value.⁹⁸

The Court established a new, two-pronged approach to address these issues in a consistent manner across Canada, something that had been lacking. In setting out a new analytical framework to assess the admissibility of statements produced in Mr. Big operations, the Court strove “to achieve a just balance – one which guards against the risk of wrongful convictions that stem from false confessions but which ensures the police are not deprived of the opportunity to use their skill and ingenuity in solving serious crimes”.⁹⁹

The SCC’s new approach seeks to address the risks recognized to be inherent in these statements, namely their potential unreliability and their prejudicial effect. The third risk, posed by the nature of the undercover operation itself, is potential police misconduct.

The Court found these risks to be substantially ameliorated by the new, two-pronged approach combining the presumptive inadmissibility of a confession to Mr. Big subject to a demonstration by the Crown that the confession is more probative (i.e., reliable) than prejudicial, together with a new, more robust conception of the doctrine of abuse of process. This two-pronged approach “strikes the best balance between guarding against the dangers posed by Mr. Big operations, while ensuring the police have the tools they need to investigate serious crime”¹⁰⁰ by in turn “ensuring that only those confessions that are more probative than prejudicial”, and which do not result from police conduct that crosses the line from skilful to abusive, are admitted into evidence”.¹⁰¹

As noted, the burden of rebutting the presumed inadmissibility rests with the Crown. The onus of establishing an abuse of process rests with the defence, with case-specific determinations being made about whether the police conduct, such as exposing the target to scenes of threatened and “actual” violence or preying on the target’s vulnerabilities, coerced the target into confessing. Both onuses are on a balance of probabilities. The presence or absence of testimony from the accused on the *Hart voir dire* about his or her perception of, and reaction to, the undercover operation, is influential in the discharge of the defence burden.

97 Ibid., at para 63

98 Ibid., at para 65, and the reference therein to *R. v. Creek*, 1998 CanLII 3209 (B.C.S.C.).

99 *Hart*, supra, at para 3.

100 Ibid., at para 84.

101 Ibid., at para 87.

Absent waiver or admissions by the defence, one can expect the Crown to lead the Mr. Big operation evidence culminating in the confession on a *voir dire*. As “gate-keeper”, the trial judge assesses the probative value and the prejudicial effect of the evidence and determines the threshold question of “whether the evidence is worth being heard by the jury” while reserving for the jury “the ultimate question of whether the evidence should be accepted and acted upon.”¹⁰²

It is inherent in Mr. Big operations that the accused is shown as engaging in what he or she believes to be criminal activities for financial and other forms of gain, such as friendship or camaraderie and lifestyle enhancement. The strength of these inducements can be significant, giving rise to reliability concerns. Willingness to engage in the activities of an ostensible criminal organization, feigned though they may be to the knowledge of all participants except the accused, reflects poorly upon the accused’s character and is thereby prejudicial. The presence of threats, particularly the use of physical violence, “actual” or threatened, may be coercive, giving rise to both reliability and abusive police conduct concerns.

The assessment of the reliability of a Mr. Big confession is analogous to the assessment of threshold reliability under the principled exception to hearsay.¹⁰³ Courts should look to the circumstances in which the statement was made and determine whether there is any confirmatory evidence.¹⁰⁴

Justice Moldaver provides a non-exhaustive list of factors relevant to this assessment of reliability.¹⁰⁵ These include:

- The length of the operation;
- The number of interactions between the undercover officers and the accused;
- The nature of the relationship between the undercover officers and the accused;
- The nature and extent of the inducements offered;
- The presence of any threats;
- The conduct of the interrogation itself; and
- The personality of the accused (his or her age, sophistication, mental health, financial circumstances).

The assessment of a confession’s probative value, or reliability, is augmented by the presence or absence of “markers of reliability”, again listed non-exhaustively:¹⁰⁶

102 Ibid., at para 98.

103 Ibid., at para 100.

104 Ibid., at para 101.

105 Ibid., at para 102.

106 Ibid., at para 105.

- The level of detail contained in the confession;
- Whether it leads to the discovery of additional evidence; and
- Whether it identifies any holdback evidence, elements of the crime that had not been made public or whether it accurately describes mundane details of the crime the accused would not likely have known had he or she not committed the crime.

The presence of confirmatory evidence is “not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability”.¹⁰⁷

The weighing of the confession’s prejudicial effect is a more familiar exercise, concerned with both moral and reasoning prejudice.¹⁰⁸ The risk of prejudice can be attenuated by the Crown not calling, or the trial judge excluding, certain pieces of particularly prejudicial evidence that are “unessential to the narrative” and by careful limiting instructions to the jury.¹⁰⁹ There is abundant appellate authority recognizing the lessened risk of moral or reasoning prejudice when the trial is before a judge sitting without a jury.¹¹⁰

The abuse of process doctrine is intended to guard against state conduct that society finds unacceptable and which threatens the integrity of the justice system. Justice Moldaver acknowledged that in the context of Mr. Big operations, “thus far, the doctrine has provided little protection”.¹¹¹ The solution to this concern is the “reinvigoration” of the doctrine in this context. He set forth a number of guidelines¹¹² to assist in the determination of whether a particular operation was abusive:

- The mere presence of inducements is “not problematic”;
- Police conduct, including inducements and threats, become problematic when it approximates coercion. In conducting these operations, police cannot be permitted to overcome the will of the accused and coerce a confession;

107 Ibid.

108 Ibid., at para 106.

109 Ibid., at para 107.

110 See, for example, *R. v. Allgood*, 2015 SKCA 88, leave to appeal dismissed, [2015] S.C.C.C.A. No. 423; *R. v. West*, 2015 BCCA 379; *R. v. Johnston*, 2016 BCCA 3; and *R. v. Magoon and Jordan*, 2015 ABCA 351, appeal by Crown allowed, cross-appeals for both accused dismissed and convictions for first degree murder substituted, 2016 ABCA 412, appeal pending, [2017] S.C.C.A. No. 48 and [2017] S.C.C.A. No. 87 (hearing scheduled for November 27, 2017).

111 *Hart*, supra, at para 114.

112 Ibid., at paras 115 – 117.

- Examples of coercive police tactics are physical violence and threats of violence against the accused. (Subsequent decisions (considered below) have addressed the impact of such tactics when they are directed not at the accused but at other members of the criminal organization or non-members interacting with the organization in the pursuit of its activities); and
- Operations that prey on an accused's vulnerabilities such as mental health problems, addictions, or youthfulness are also "highly problematic."

In general, misconduct on the part of the police that offends the community's sense of fair play amounts to an abuse of process and warrants the exclusion of the confession.

Subsequent developments

There have been a number of cases where the *Hart* analytical framework has been applied to non-Mr. Big undercover operations.¹¹³ Often in these cases, there were confessions made to undercover officers who were not posing as members of a criminal organization. In others, the confession was made to a police agent. In these cases, there was no presumption of inadmissibility but the trial judges considered it useful to apply the new framework to assess reliability versus prejudice, and abuse of process, concerns.

Very recently, in *R. v. Kelly*¹¹⁴, the Ontario Court of Appeal said this in response to the Crown's submission that the presumption of inadmissibility did not apply to a confession obtained through an undercover operation involving the target being told he was the beneficiary of a life insurance policy on the deceased's life:

[35] Clearly the police sting scheme that was used on the appellant is missing the most offensive tactics of the traditional Mr. Big operation: no criminal organization, no Mr. Big, no violent culture, no friendship and camaraderie. What this scheme used was the inducement of a large financial payout based on a fraud on the insurance company. For me, the relevant question is: is there in this police sting scheme sufficient potential for the three dangers: unreliable confessions, prejudicial effect of the evidence of the appellant's participation in the scheme, and potential for police misconduct, to warrant the application of the new approach from *Hart*?

[36] In my view, the answer is yes. I say this for two reasons. The first is that the scheme is clearly a variation of a Mr. Big, with the same police intent to induce a stranger into dishonest conduct by holding out a potentially powerful

113 See, for example, *R. v. Tang*, 2015 BCSC 1640; *R. v. S.M.*, 2015 ONCJ 537; *R. v. Habib*, 2017 QCCQ 1591; and *R. v. Zvolensky*, 2017 ONCA 272.

114 *R. v. Kelly*, 2017 ONCA 621.

inducement to confess, whether truthfully or untruthfully. Therefore, reliability in engaged, as is prejudice. Second, in my view, it serves little purpose to conduct an analytical exercise of differentiating and distinguishing variations of police schemes, when the same concerns are raised, even though those concerns may be attenuated.

Expert Evidence and Jury Instructions

One area where *Hart* has not resulted in any change to date is the admissibility of the evidence of expert witnesses tendered by the defence to testify about the prospect of false confessions produced by the Mr. Big undercover technique, or about the particular susceptibility of the accused due to his or her personality, or both. By and large, as discussed in the *2011 Report*, such evidence was inadmissible before *Hart* and it remains so. In *R. v. Ledesma*,¹¹⁵ although the appeal was allowed for other reasons, the Alberta Court of Appeal affirmed the trial judge's decision not to permit this testimony from a witness tendered as an expert in the area of police undercover investigations and the reliability, from a psychological perspective, of Mr. Big confessions. The Court found it was unnecessary under the *R. v. Mohan*¹¹⁶ test.

In *R. v. Mack*, the companion case to *Hart*, the Supreme Court addressed in the main the proper ingredients of a jury instruction in a Mr. Big case. Rejecting the notion that a jury must be instructed that Mr. Big statements are “inherently unreliable”, Justice Moldaver held that:

[T]rial judges are required to provide juries with the tools they need to address the concerns about reliability and prejudice that arise from these confessions. The nature and extent of the instructions required will vary from case to case.¹¹⁷

Justice Moldaver nevertheless went on to offer “some guidance – short of a prescriptive formula.”¹¹⁸ He suggested¹¹⁹ that trial judges should:

- Tell the jury that the reliability of the accused's confession is a question for them;
- Review the factors relevant to the confession and the evidence surrounding it;
- Advise the jury to consider “the length of the operation, the number

115 *R. v. Ledesma*, 2017 ABCA 131.

116 *R. v. Mohan*, [1994] 2 S.C.R. 9.

117 *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para 50.

118 *Ibid.*, at para 51.

119 *Ibid.*, at paras 52, 53 & 55.

of interactions between the police and the accused, the nature of the relationship between the undercover operators and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused”;

- “Discuss the fact that the confession itself may contain markers of reliability (or unreliability). Jurors should be told to consider the level of detail in the confession, whether it led to the discovery of additional evidence, whether it identified any elements of the crime that had not been made public, or whether it accurately described mundane details of the crime the accused would not likely have known had he not committed it”;
- Instruct the jury that any associated bad character evidence “has been admitted for the limited purpose of providing context for the confession” and that it “cannot rely on that evidence in determining whether the accused is guilty”; and
- Tell the jury “that simulated criminal activity – even that which the accused may have eagerly participated in – was fabricated and encouraged by agents of the state”.

Compendiously, trial judges should alert the jury to the concern about the reliability of the confession, and highlight the factors relevant to assessing it¹²⁰ and leave the jury equipped to deal with the concerns of reliability and prejudice.¹²¹

Going Forward from *Hart*

It is beyond the scope of this report to track all the post-*Hart* decisions but some significant trends from the reported decisions can be addressed and are important to note in preventing possible wrongful convictions. Without question, one of the big issues flowing from the post-*Hart* cases is the exposure of the target to violence or threats of violence in the course of various undercover scenarios.

By and large, the cases have held that the inclusion of scenarios exposing the target to violence or the threats of violence does not, *per se*, render the confession inadmissible as coerced and thus unreliable or constitute an abuse of process on the basis of unacceptable police conduct. These cases have recognized that violent scenarios can be necessary in order to convey the impression to the target that the criminal organization engages in violent conduct to create a context or milieu where the target will feel more comfortable describing his or her own violent actions in connection with the offence under investigation. It can be legitimate, for example, when the target is suspected of having murdered a woman, for the undercover scenario to threaten, or to simulate the infliction of physical violence against, a woman. Some background or contextual evidence from the police

120 Ibid., at para 54.

121 Ibid., at paras 59 & 61.

explaining why violence was resorted to can be important. At the same time, a target's participation in a violent scenario can increase the risk of moral prejudice.

In the result, as highlighted by the recent case law, there are any number of questions to be posed in these circumstances. These include:

- Was there a legitimate basis in the specific case for the use of violence?
- Were these scenarios designed for a specific purpose such as to create an atmosphere considered appropriate for the investigation?
- What effect did exposure to and/or participation in these violent scenarios have upon the target?
- Was he or she coerced or intimidated?
- Was the target comfortable in participating?
- Was he or she a willing participant or was he or she disturbed by the scenario?
- Was the operation's cover team monitoring the target's responses and adjusting future scenarios accordingly?
- Against whom was the threats or actual violence directed?
- Could the target reasonably interpret anything the undercover operators did or said as a personal threat to him or her, or a loved one?
- What messages were the undercover operators conveying to the target about the consequences to him or her of disappointing the criminal organization?

Depending on the circumstances of a given case, all these questions could be important. Potentially the most important is against whom the threats of violent conduct are directed. It serves to recall that in *Hart*, when citing physical violence or threats of violence as examples of coercive police tactics, Justice Moldaver noted that “[a] confession derived from physical violence or threats of violence against an accused will not be admissible – no matter how reliable – because this, quite simply, is something the community will not tolerate.”¹²²

An example of this principle is found in the Nova Scotia case of *R. v. Derbyshire*.¹²³ This case did not involve a Mr. Big operation in a strict sense inasmuch as undercover officers posing as members of an outlaw motorcycle gang, intending to obtain information against another suspect, had only one interaction with Ms. Derbyshire, the accused. The operation did not result in evidence against the other suspect, but Ms. Derbyshire implicated herself in the one scenario and was

122 *Hart*, supra, at para 116.

123 *R. v. Derbyshire*, 2016 NSCA 67, application for leave to appeal to SCC denied, March 30/17 (#37337).

charged with being an accessory after the fact to murder. While ruling that this was not a Mr. Big operation *per se* and that the presumption of inadmissibility was not applicable, the trial judge nevertheless applied the *Hart* factors and concluded that the undercover operation was coercive and constituted an abuse of process. He excluded the evidence obtained and acquitted the accused. The Crown appealed.

The Nova Scotia Court of Appeal upheld the exclusion of the evidence and the acquittal, agreeing that courts cannot condone the conduct of the police of the kind about which the trial judge made “very clear, strong findings of fact.”¹²⁴ It was clear the undercover officers were aggressive and intimidating in their dealings with the accused. She was essentially confined inside a vehicle with them for many hours. Implicit threats of physical harm were levelled against her. The trial judge largely accepted the accused’s *voir dire* testimony about feeling fearful, intimidated and coerced. In upholding the decision, the Court concluded:

It is not the aura of violence and intimidation in general that crosses the line. It is when the intimidation and threats express or implied, coerce the accused to provide inculpatory evidence.¹²⁵

What about when violence is used or threatened against someone other than the targeted accused? In *R. v. Laflamme*,¹²⁶ the Quebec Court of Appeal found the scenarios of simulated violence against a female debtor, portrayed by an undercover officer, described both as a “collaborator” and a “member” of the organization, to be coercive. In addition, the Court pointed to the evidence that the target was told that if he didn’t succeed in being admitted to the organization, the primary undercover operator “would pay the price”. The third aspect of the operation that led to the finding that the confession to Mr. Big was inadmissible as an abuse of process was the general message that the organization would not hesitate to use violence against its own members.

The B.C. Court of Appeal, in a series of decisions,¹²⁷ has distinguished *Laflamme* and found that the inclusion of violent scenarios did not constitute an abuse. In these cases, the target or anyone close to him, including the primary operator, was never directly or by implication threatened with violence. Any violence, such as a simulated beating, feigned kidnapping and mock execution, was directed at non-members, or outsiders, only. The undercover officers consistently told the target that he had nothing to fear at the hands of the criminal organization. Violence was not exacted upon members not performing up to standards. The consequence

124 *Ibid.*, at para 126.

125 *Ibid.*, at para 123.

126 *R. v. Laflamme*, 2015 QCCA 1517, application for leave to appeal to the SCC denied, April 21/16 (#36731).

127 *West*, *supra*; *Johnston*, *supra*; and *R. v. Randle*, 2016 BCCA 125, application for leave to appeal dismissed, [2016] S.C.C.A. No. 176.

to them was mere expulsion from the organization. The courts of appeal in Saskatchewan¹²⁸ and Alberta¹²⁹ have also distinguished *Laflamme* on similar bases.

Judicial tolerance of simulated violence in appropriate circumstances notwithstanding, it is now likely that courts will be less tolerant of violent scenarios in which the target, or someone close to him or her, is directly or indirectly threatened with violence. Courts will want to see that the designers of these undercover operations are taking the admonitory language in *Hart* to heart. Police are now alerted to the risks associated with the use of gratuitous violence in their undercover operations.

Contextual, Explanatory Evidence from the Cover Team/Operation's Designer

It can sometimes be useful for the prosecution to adduce behind the scenes, or contextual, evidence from the officers in charge of the operation. This evidence can address the technique and its objectives generally or the specifics of the operational decisions made in the given case. An example is for the police to testify and explain what they hoped to achieve in certain violent scenarios. In *West*¹³⁰, Justice Frankel wrote:

[98] In the present case, the officer who directed the undercover operation gave the following explanation for why simulated violence was used in the second pornography scenario:

It was directly to show Mr. West that violence against women was accepted in our organization. The investigation was a homicide on a female and we wanted to show him that women — to conduct violence on women is not a big deal.

[99] Neither the pornography scenarios nor the use of simulated violence are of such a nature as to render the Mr. Big operation an abuse of process. Those scenarios were used to indirectly communicate to Mr. West that the undercover officers had little respect for women and were unconcerned about the use of violence against women. Given the nature of the murder being investigated, it is understandable that the police would want to create an atmosphere in which Mr. West would not be reluctant to discuss his own involvement in violence against women. ...

128 *Allgood*, supra.

129 *R. v. Yakimchuk*, 2017 ABCA 101.

130 *West*, supra, at paras 98 & 99.

This type of evidence can stray beyond permissible bounds. In *R. v. Worme*,¹³¹ a case concerned with the ultimate reliability of the Mr. Big confession, police evidence was found to be self-serving by giving the impression that the technique always produces true confessions and, concomitantly, that the accused's testimony at trial recanting the confession is not true. Characterizing this evidence as a form of oath helping, together with improper limitations on cross-examination challenging this impression, the Court allowed the conviction appeal and ordered a new trial on a charge of first degree murder.

c) Police Interviews of Suspects

As noted in the *2011 Report*, a confession from an accused person is a particularly powerful form of evidence. The interviewing of accused persons remains a key strategy in police investigations, and the resulting evidence may be critical to solving the crime, recovering physical evidence and property, and potentially preserving life.

Most people may tend to assume that an innocent person would not falsely confess to a crime they didn't commit unless they were tortured or psychologically disturbed.¹³² However, both research and real-life examples have shown that innocent persons may falsely confess for a variety of reasons.¹³³

The causes of false confessions have been determined to potentially include both characteristics of the individual that may make them increasingly vulnerable to providing a false confession, and also the nature of the tactics used by the police in questioning the subject. Problematic police tactics identified in the literature as potential contributors to false confessions include lengthy interviews, accusatorial and guilt-presumptive questioning styles, the use of false evidence, and the use of minimization tactics that imply leniency.¹³⁴

Canada's rules regarding the admissibility of statements of accused persons are more stringent compared to the criteria in the United States.¹³⁵ The assessment of the *voluntariness* of the statement (the common-law Confessions Rule) and compliance with the Charter remain the criteria for the admissibility.¹³⁶ The Confessions Rule was

131 *R. v. Worme*, 2016 ABCA 174, application for leave to appeal to SCC denied, Jan. 19/17 (#37173).

132 Stephen Porter, Katherine Rose and Tianna Dilley, "Enhanced Interrogations: The Expanding Roles of Psychology in Police Investigations in Canada," *Canadian Psychology* 57, no. 1 (2016): 35-43.

133 Saul Kassin, "The Social Psychology of False Confessions," *Social Issues and Policy Review* 9 (2015): 25-51.

134 Aldert Vrij, Christian A., Meissner & Saul Kassin, "Problems in expert deception detection and the risk of false confessions: no proof to the contrary in Levine et al. (2014)," *Psychology, Crime & Law* 21, 2015:901-909.

135 Craig M. Bradley, "Interrogation and Silence: A Comparative Study," *Wisconsin International Law Journal* 27, no.2 (2009): 271-297.

136 Refer to the "Interrogation Trilogy": *R. v. Oickle* (2000) SCC 38; *R. v. Singh* (2007) SCC 48; and *R. v. Sinclair* (2010) SCC 35. Also, *R. v. Grant* (2009) SCC 32.

re-stated in *R. v. Oickle*¹³⁷, and focusses on four areas: a) the presence of inducements, b) oppression, c) the operating mind of the interview subject, and d) the use of police trickery, which is a separate and distinct inquiry (the ‘community shock’ test).

In *Oickle*, the Supreme Court noted:

The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.¹³⁸

The *2011 Report* cautioned that when assessing a purported confession for use in a prosecution, police and prosecutors should look for internal consistency (a coherent, logical narrative of events) and external consistency (corroboration with known facts) to ensure that the confession is *reliable*.

Since the *2011 Report*, there has been continued judicial and academic scrutiny of police interview methods, particularly the Reid Technique – an interview style that has been widely used by both American and Canadian police agencies for decades. Alternative interviewing methods have been explored by numerous police agencies, including the PEACE model adapted from the UK.¹³⁹ More recently, the RCMP transitioned to the Phased Interview Model – a hybridized model containing elements of numerous scientifically-validated techniques including cognitive interviewing, conversation management and elements of the PEACE model. At around the same time that the RCMP transitioned to the Phased Interview Model, the Toronto Police Service transitioned to the Progressive Interview Model – also a hybrid interview model utilizing an evidence-based approach.

The Reid Technique

The Reid Technique is an interview process created in 1947 by John E. Reid, and taught by Reid and Associates to police across North America for decades. The process consists of three parts: a Factual Analysis (file review), a Behaviour Analysis Interview in which the interviewer assesses the subject’s responses and body language to determine whether the suspect is truthful or deceptive, and a guilt-presumptive Interrogation if the Interviewer determines that the subject was deceptive during the preceding Behaviour Analysis Interview. During the Interrogation, the Interviewer controls the dialogue through a Nine-Step process designed to elicit a

137 *Oickle*, supra.

138 *Ibid.*, at para 47.

139 Brent Snook et al., “Reforming Investigative Interviewing in Canada,” *Canadian Journal of Criminology and Criminal Justice* 52, no.2 (2010): 203-218.

confession from the suspect. After the suspect confesses to the crime, the Interviewer develops the admission into a detailed confession containing details of the offence and potentially reduces the confession into a written form.¹⁴⁰

One of the most frequent criticisms of the Reid Technique focuses on the Behaviour Assessment Interview. According to a large body of research, law enforcement professionals have demonstrated the ability to correctly discriminate between truthful and deceptive behaviours by interview subjects at a rate slightly better than chance (50 percent), and that the Behaviour Assessment Interview taught as part of the Reid Technique may actually cause interviewers to perform *worse*.¹⁴¹ This in turn may create confirmation bias,¹⁴² generating a confession-driven attitude in the interviewer rather than a fact-gathering attitude. The cumulative effect creates a risk that police will mistakenly categorize innocent people as being ‘guilty’ during the Behaviour Assessment Interview, singling them out for Interrogation and creating an increased risk of generating a false confession by subjecting them to a potentially coercive, guilt-presumptive interview.¹⁴³

There is a growing body of academic research suggesting that the Reid Technique, although effective at generating confessions from guilty suspects, may also represent an increased risk for obtaining false confessions from innocent subjects due to the potentially coercive nature of the interview. Criticisms of the Reid Technique include that the Interrogation portion of the interview may be lengthy, accusatorial and confrontational in style. These factors may be exacerbated by potentially problematic police actions such as shutting down denials, presenting false evidence implicating the suspect in the crime, and the use of minimization techniques that imply leniency.¹⁴⁴

A very pointed criticism came in *R. v. Chapple*¹⁴⁵, 2012 ABPC 229, where the Court found during a preliminary hearing that the confession of the suspect was inadmissible following a lengthy, accusatorial interview closely adhering to the Reid Technique. The Court determined that, among other factors, the police had misrepresented the existing evidence by disregarding alternative facts that may have supported the accused’s version of events, that the interviewer was also found to have denigrated the legal advice received by the accused, and that the interviewer ignored the accused’s attempted assertions of her right to silence to a degree that overrode the ability of the accused to remain silent.

140 Fred E. Inbau et al., *Criminal Interrogation and Confessions* (5th ed.), (Jones & Bartlett Learning, 2011).

141 Richard A. Leo and Steven A. Drizin, “The Three Errors: Pathways to False Confession and Wrongful Conviction,” in *Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations*, ed. G. Daniel Lassiter and Christian Meissner (American Psychological Association, 2010); University of San Francisco Law Research Paper No. 2012-04.

142 See discussion of this concept in Chapter 2.

143 Brian L. Cutler, Keith A. Findley and Timothy Moore, “Interrogations and False Confessions: A Psychological Perspective,” *Canadian Criminal Law Review* 18, (2014): 153-170.

144 Leo and Drizin, “The Three Errors.”

145 *R. v. Chapple*. (2012) ABPC 229.

In finding the statement inadmissible, the Court provided the strongly worded comment that “Although there is no law prohibiting the use of The Reid Technique, I find that it has the ability to extinguish the individual’s sacred legal rights to be presumed innocent until proven guilty and to remain silent in the face of police questioning.”¹⁴⁶ Notwithstanding the criticism of the Reid Technique by the Court, the decision to find the statement inadmissible was consistent with existing case law on voluntariness.

Prevention of False Confessions

It should be noted that the factors cited in criticism of the Reid Technique are explicitly considered in the voluntariness assessment under the common law Confessions Rule, and police interviewers in Canada cannot blindly use the Reid Technique without awareness of the potential impacts of the interview technique and sensitivity to the voluntariness requirements in law.

Taking this further, among the recommendations in the literature to prevent police investigators from committing the errors that may lead to a false confession, education is the most common. Specifically, it has been recommended that investigators should be educated that research does not support the belief that interviewers possess the ability to differentiate between innocent and guilty subjects based on their actions in a Behaviour Analysis Interview. Further to this, investigators should be trained that no one should ever be subject to an Interrogation unless there is reasonable evidentiary basis for believing in his or her guilt. Finally, investigators should be educated about the empirical scientific research about the psychology of police interrogation and the potential causes of false confessions. If investigators are more aware of how and why their techniques work, and why those techniques may contribute to incidents of false confessions, they may be more able to prevent obtaining false confessions from innocent subjects.¹⁴⁷ These recommendations are consistent with the recommendation in the *2011 Report* for ongoing education for police, prosecutors and other justice system participants about the causes and risks of false confessions.

Alternative Interview Methods

There are numerous alternative interview models and techniques to Reid. Some models are more accurately described as techniques, which offer components that may be implemented into a broader systematic approach to interviewing suspects, such as Conversation Management, Cognitive Interviewing or the Strategic Use of Evidence (SUE) Technique. These techniques, in and of themselves, do not provide a comprehensive approach to conducting a systematic interview of a suspect. These techniques also do not in and of themselves take into account

146 Ibid., at para 121.

147 Leo and Drizin, “The Three Errors,” pp 26 – 27.

the potential impact of Canada's laws concerning admissibility and the legal / procedural protections entitled to suspects.

The PEACE Model

In response to several high-profile wrongful conviction cases in the United Kingdom that were attributed, in part, to manipulative and coercive interviewing practices, the United Kingdom implemented reforms to police interviewing practices in the early 1990s. The resulting interview model is known as PEACE, an acronym that stands for the steps of the interview process – Preparation and Planning, Engage and Explain, Account, Closure, and Evaluation. PEACE is a non-accusatory, rapport-based interview style that teaches investigators to focus on gathering facts rather than seeking confessions and may be used for witness, victim and suspect interviews. Benefits ascribed to the PEACE model include that it does not make use of coercive interview strategies associated with the potential for false confessions.¹⁴⁸

The PEACE model is a product of the British legal system, and is not directly applicable to the Canadian legal context without adaptation. Unlike in Canada, the British courts may draw an adverse inference from the suspect's silence during a police interview if the suspect fails to mention evidence that he or she later relies upon at trial.¹⁴⁹ This represents a marked contrast from the Canadian legal system, in which no adverse inference can be drawn from a suspect's silence. As a result, in the British context there are potential situations where there is systemic pressure for a suspect to make a statement; these situations are not present in Canadian experience. In another contrast, the Canadian courts have permitted the use of persuasion in the course of police interviews so long as the statement is not obtained in an oppressive or coercive manner, a practice that is not authorized in the United Kingdom and which is a dimension lacking in the PEACE Model.

Hybridized Interview Models

'Hybridized' interview models have emerged in North America as a result of the increased awareness of the potential for obtaining false confessions from innocent persons. Generally, these interview models seek to maximize the potential for gathering information from suspects of crimes while minimizing the risk of creating a coercive environment that may contribute to the risk of obtaining a false confession. Many of these models are influenced by the PEACE model, adapted for use in legal environments other than the United Kingdom and utilizing empirically validated techniques from a variety of methods. The use of persuasion, accepted by Canadian courts, is a feature of hybridized interview models that is not present in the PEACE model.

148 Snook et al., "Reforming Investigative Interviewing," *Canadian Journal of Criminology and Criminal Justice*.

149 Bradley, "Interrogation and Silence," *Wisconsin International Law Journal*.

The RCMP Phased Interview Model

The RCMP Phased Interview Model for Suspects, adopted in 2014, is an example of a hybridized approach. The Phased Interview Model contrasts two specific components: non-accusatory interviewing (the vast majority of interviewing) and accusatory interviewing (a conscious decision when the investigator possesses tangible evidence implicating the suspect and attempts to gather information through non-accusatory interviewing have been exhausted). The model consists of 6 'Phases': 1) Review, Preparation and Planning, 2) Introduction and Legal Obligations, 3) Dialogue, 4) Version Challenge, 5) Accusation and Persuasion, and 6) Post Interview Review. The model is designed to be responsive to the interview subject's behaviour, and interviewers are trained to establish and maintain dialogue with the subject through rapport in a non-accusatorial manner through Conversation Management and Cognitive Interviewing techniques. The Phased Interview Model recommends video recording of all suspect interviews where practicable, and audio recording in situations where video recording is not practicable.

When it becomes clear that a suspect has provided information contradicting facts known to the police, or omitted information known to the police, the suspect may be challenged in a non-accusatorial manner through the Strategic Use of Evidence technique in an effort to generate new information. If objective evidence of the suspect's guilt exists, and attempts at dialogue and challenges have been unproductive in obtaining a version from the subject, interviewers may choose to move to an accusatorial interview focused on the use of persuasive interview techniques with the objective of encouraging the suspect to engage in dialogue. The focus of the model is gathering information, and not seeking confessions. Unlike in the Reid method, when faced with denials the interviewer will attempt to develop additional information through a return to dialogue and the development of a version. This in turn may lead to a challenge based on the Strategic Use of Evidence technique and then back into dialogue and the development of a new version. At the conclusion of the interview process, the information gathered is evaluated by the interviewer against known facts and an assessment is made about the reliability of the information received and the potential for gathering additional information from the suspect through additional interviews.

Consistent with the recommendations in the literature, interviewers are taught that relying on behavioural analysis techniques to detect deception is inherently unreliable. Interviewers are taught instead to utilize Objective Veracity Assessment, which is the corroboration or disproof of information provided by the suspect against known facts. The emphasis of the approach is on generating information through dialogue.

The Supreme Court of Canada noted in *Singh*¹⁵⁰ that the right to silence does not include the right not to be spoken to by police, although care must in turn be taken by police to not overbear the suspect's meaningful right to choose whether or not to speak. Consistent with the principles of the Confessions Rule in *Oickle*¹⁵¹, investigators are taught to use persuasive interview techniques in a manner that remains cognizant of the potential impact of those techniques, and the limits prescribed to the use of persuasive techniques by the courts. In the Phased Interview Model, interviewers are also taught about the potential causes of false confessions, and the association of factors such as the use of false evidence, lengthy, oppressive interviews, and inappropriate minimization techniques such as implicit and explicit offers of leniency

The Phased Interview Model places an emphasis on non-accusatorial, rapport-based interviewing using empirically validated methods and provides investigators options consistent with Canadian law that are not present in the PEACE Model to engage with suspects who refuse to participate in dialogue. It was adopted as the training standard for all interviews of suspects by the Royal Canadian Mounted Police in 2014. The Model has since been adopted by other agencies in Canada including the Canadian Police College, the Royal Newfoundland Constabulary, and Edmonton Police Service.

The High Value Detainee Interrogation Group [HIG] Model (United States)

The HIG, a joint task force of interview specialists drawn from the FBI, CIA, Department of Defense and other partner United States law enforcement agencies, was formed in 2009 to improve the ability of the US Government to conduct terrorism-related interviews. The HIG is supported by a research program to review the existing research on interview techniques and commission new scientific studies about interview methods.¹⁵²

The HIG Model is more accurately described as a collection of techniques adapted from original and existing research. The model consists of a variety of techniques and frameworks delivered in non-accusatorial, rapport-based interview style. The model is team-based and places an emphasis in preparation and planning, dialogue and rapport. The model emphasizes the use of open-ended questions, active listening, and strategic use of evidence to guide interview objectives and assess the veracity of information obtained from the interview subject. Interviewers adapt new strategies drawn from existing concepts and tailored to their interview subject to avoid reliance on formulaic approaches and techniques.¹⁵³

150 Ibid.

151 Ibid.

152 Federal Bureau of Investigation, USA, *Interrogation Best Practices*, High Value Detainee Interrogation Group, August 26, 2016, available at: <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view>.

153 Ibid.

The HIG Model is influenced by the PEACE Model and draws from similar source material as the RCMP Phased Interview Model. The ‘lack of model’ approach, while suitable for the HIG context, would likely be difficult to implement in a police context where interviewers may be drawn from widely varying levels of experience and knowledge, presenting a barrier for implementation in Canada. The HIG Model was created in the American system and does not take into account Canadian law regarding the admissibility of statements.

d) Canadian Law Enforcement Policy/Practice Regarding the Recording of Police Interviews/Interrogations

There is no law in Canada requiring statements to be recorded, however there is much caselaw, including the leading case on voluntariness, *R v Oickle*, that suggests that where possible, a complete record of the interview will be of utility in making a determination of voluntariness. It can be expected that there will be challenges in cases where the statement was not recorded, although in and of itself the absence of recording as a factor may not cause a statement to be excluded. Some agencies have addressed the issue by providing specific direction on what interviews/interrogations will be recorded, however most only provide general guidelines. The following is a random sampling of such policies.

RCMP

“Unless extenuating circumstances exist, audio and/or video recording must be used when taking statements from suspects, accused persons, eye witnesses, and victims in relation to significant criminal investigations.”¹⁵⁴

Just what is a significant criminal investigation varies depending on the context. For example the same crime in a small community (e.g., theft) may meet that threshold where that may not be the case in a large urban area.

For further clarification, interviews must be video and/or audio recorded when:

- Children are under 12;
- A person is of reduced mental capacity;
- A person is seriously ill;
- It is a significant criminal investigation;
- Violent relationship offences are involved;
- There is a previous recantation or the likelihood to recant;

154 RCMP Policy OM-ch.24.1, “Interviews/Statements: Suspect/Accused/Witness,” Section 2. Statements, Part 2.3.

- Taking a sworn witness statement;
- There is a language difficulty; or
- A witness is susceptible to intimidation.

Victoria Police Department

“Members conducting an interview of an individual who is a:

- Critical witness, and/or victim
- The investigation is in relation to a complex crime i.e. major assaults, domestic assaults, sexual assaults, homicides, attempted homicides, or
- Where there is an officer safety issue;

Should have a second member present to monitor the interview/interrogation.”¹⁵⁵

There is no specific direction to record the interview.

Toronto Police Service

Toronto’s policy provides a general statement that the electronic recording of a statement is very valuable and the courts have come to expect them, therefore where practicable, they should be recorded. The more serious the offence, the greater the expectation that statements will be electronically recorded.

The policy states the following:

“The video recording system (VRS) should be used for all statement processes, but where this would be impractical or where the recording equipment is unavailable, investigators should be prepared to justify in court why the video recording system was not used.”¹⁵⁶

155 Ibid., Parts 2.4. to 2.5., Section 3. Suspect Recordings, Parts 3.1. to 3.6.

156 Toronto Police Service Policy & Procedure 04-32, “Electronically Recorded Statements,” Section: Procedure, p.2.

Edmonton Police Service

Policy directs when statements should be recorded as follows:

“Custodial interviews of a suspect or accused person at a police facility in investigations involving offences of significant personal violence (e.g., murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) or other significant criminal offences (such as drug trafficking) as identified by the police investigators based on the circumstances and seriousness of the offence should be video recorded. The video recording should not be confined to a final statement made by the suspect, but should include the entire interview.

Where the police set about to interview a suspect or an accused person and video recording equipment is readily available, failure to video record the interview will likely cause the courts to question the voluntariness of any such statement, potentially resulting in the suspect or accused statement being ruled inadmissible. If an interview of a suspect or accused person is not video recorded, members should make a note in their notebook, or in the police report, as to why the interview was not video recorded. This will assist in court if the statement is challenged by defence.”¹⁵⁷

Winnipeg Police Service

Mandatory Use of Recorder:

“Any suspect/accused taken into custody on the strength of a Criminal Investigation Bureau (CIB) investigation will be subject to continuous recording, regardless of the nature of the investigation.

Any suspect/accused taken into custody by members who are not assigned to CIB and:

- The offence is normally dealt with by CIB members; and
- Arresting members will pursue an interview/interrogation;

Must subject the suspect/accused to continuous recording, regardless of the nature of the investigation.

157 Edmonton Police Service Policy & Procedure IN3-1PR, “Investigative Aids and Resources Procedure,” Section C. **Interviews and Interrogation, Part 2** Audio/Video Equipment for Interrogation and Interview, Item f.

Non Mandatory Use of Recorder:

Any suspect/accused taken into custody by members who are not assigned to CIB and the offence is not normally dealt with by CIB members, may be recorded.”¹⁵⁸

The above is subject to exceptions such as the recording equipment is not available or has failed.

Clearly, police agencies across Canada are aware of the case law and academic commentary related to the use of audio and/or video recorded statements and have reflected this in their policies and procedures.

IV. STATUS OF RECOMMENDATIONS

The *2011 Report* noted that although it was not a mandatory requirement to record interviews, it was recommended as a best practice to reduce the likelihood of wrongful convictions. Most police agencies have amended their policies and practices to clarify, at a minimum, that all custodial interviews involving offences of significant personal violence should be recorded. Due to practical considerations, agencies have stopped short of mandatory requirements however they have clearly articulated that the failure to use electronic equipment when available will receive judicial scrutiny.

The other recommendations, calling for a review of investigation standards respecting the interviewing of suspects and witnesses and training about false confessions, has resulted in significant changes in police policies and training across Canada. For example, in Alberta the Investigative Skills Education Program was introduced which ensures police officers are trained properly in various interview techniques and also receive instructions on the dangers of false confessions. The Edmonton Police Service also created an Interview Support Team with the goal of having a team of interview experts available to assist and ensure all interviews are conducted in accordance with the law, including the need to minimize the possibility of false confessions. The Phased Interview Model was introduced by the RCMP in British Columbia and is being used in many parts of the country. Many agencies in Canada have modified their investigative standards and training to ensure adherence with current academic research and literature.

158 Winnipeg Police Service Policy, “Recording of Statements,” Section 4 Suspect/Accused, Part A. Mandatory Use of Recorder, and Section 5 Witnesses, Part A, Witness Statement.

V. DISCUSSION OF 2011 RECOMMENDATIONS

The *2011 Report's* first recommendation suggested the video recording of custodial interviews of suspects in “investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.)”. The Subcommittee again considered broadening the types of investigations which should be recorded but concluded that the rationale underlying the phrase “offences of significant personal violence” still applied and therefore should remain as is. However, this should include interviews of suspects as well as interviews of key witnesses related to those same investigations.

Improvements in technology and the corresponding reduction in related costs has resulted in police agencies equipping officers responsible for these types of investigations with handheld digital devices capable of recording in the field. Therefore, it is reasonable to expand the recommendation to include non-custodial interviews of suspects in investigations involving offences of significant personal violence and key witnesses. Many significant personal offence investigations are transferred to the “cold case” category and reopened years later due to advances in technology related to DNA, etc. Recorded witness interviews are very beneficial in assisting with memories that have faded over time.

Interview “techniques” have received considerable attention by the courts and academics since the first *Report* was released. There has been a slow movement away from sole reliance on the Reid “accusatory” style of interview towards greater use of non-accusatorial/persuasive and hybridized techniques. There are robust protections within the Canadian legal system to assess the voluntariness of statements of accused persons prior to their use as evidence. Education of police and Crown prosecutors on the factors associated with the risk of false confessions is integral to minimize the risk of obtaining false confessions through inappropriate interview techniques. It is incumbent on all police agencies to continuously assess their interview training, policy and practices to ensure they are consistent with current case law and research.

Since the *2011 Report* there has been considerable judicial consideration of covert interview techniques. Although there are no known cases of a wrongful conviction due to a Mr. Big type operation, the potential that this may occur certainly exists. Since the suspect is not detained, he/she is not afforded the protection of Section 10(b) nor does the Confessions Rule apply. As such, the new two-pronged approach set out by the Supreme Court of Canada to avoid false confessions should be part of police and Crown training in order to ensure all practices and strategies will minimize the very real risk of false confessions occurring during these Covert scenarios.

VI. UPDATED RECOMMENDATIONS

1. All interviews of suspects and key witnesses in investigations involving offences of significant personal violence (e.g., murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be audio and video recorded. Audio and video recording should not be confined to a final statement made by the suspect, but should include all contacts with the suspect through the course of the investigation.
2. Investigation standards should be continuously reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview. This should include an understanding of the case law and academic literature related to the appropriate balance between “persuasion” and “accusatory” interview strategies.
3. Police investigators and Crown prosecutors should receive ongoing training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.
4. Investigation standards should be reviewed to ensure there is a consideration of the inherent risk of false confessions in Covert Operations. These risks are not limited to a “Mr. Big” operation but also may be a factor in any type of undercover scenario where the suspect is unaware that he/she is speaking with the police or a police agent.

Recommendations Specific to Mr. Big Undercover Operations:

5. Police should ensure there is no release of holdback evidence, such as the specific details of the offence, for example, the murder weapon used and the nature of the deceased’s injuries, either to the public before the operation is mounted or to the target during its course. This care should be taken in recognition of the fact that the most significant marker of reliability of a confession to Mr. Big is the target’s knowledge of the details held back by investigators. In addition, the undercover operator(s) working closely with the target should also not be provided with any information concerning the holdback evidence.
6. Police should take great care to ensure that a target’s vulnerabilities, such as his or her young age, mental health, social isolation or dire financial straits, are not exploited or taken advantage of during the operation.
7. Police should take care in the use of scenarios portraying violent or threatening conduct seemingly perpetrated by undercover officers. Their convincing portrayals that they are members of a criminal organization not

ill-disposed to violence should not be created without first giving thought as to whom the violence or threats of violence are being directed, that individual's connection to the criminal organization, and the closeness of his or her relationship to the target.

8. Prosecution services should consider offering in house training on the lessons to be learned from *Hart* and its new analytical framework, given the serious nature of the charges for which the technique is most often employed.
9. Crown counsel conducting a trial involving a Mr. Big undercover operation should have a clear understanding of the Supreme Court's ruling in *Hart* and the limitations imposed on such operations. Counsel should obtain from investigators a written breakdown of all the scenarios employed in the course of the operation, from pre-operation background checks to initial contact through to the culminating confession to Mr. Big and any post-confession re-enactments or attendances at the crime scene with the target. Crown should determine how many of these scenarios were recorded and obtain transcripts, if available. Crown should either listen to the recordings or review the transcripts, or both. Special attention should be paid to scenarios involving violence or threats of violence. If these are viewed as potentially problematic to the prosecution, either due to their prejudicial effect or due to abuse of process concerns, discussions with the officer(s) who designed the operation should occur so that timely decisions can be made about adducing contextual evidence to address the specific operational decisions made to include them. In making decisions about leading this type of contextual evidence, Crown should bear in mind the permissible bounds of such evidence.
10. Crown counsel should consult with prosecutors in the various prosecution services across Canada who have conducted trials in which Mr. Big undercover evidence was led or appeals in which admissibility and abuse of process rulings are in issue, to share experiences and to benefit from lessons learned.

CHAPTER 5 – JAILHOUSE INFORMERS

I. INTRODUCTION

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

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

Widespread recognition of their unreliability has grown in the aftermath of public inquiries into wrongful convictions where jailhouse informers figured prominently (e.g., Morin, Sophonow, Dalton/Parsons, Druken, Driskell).

The recommendations by these inquiries have led to important changes in the use and treatment of this type of evidence by the courts. Courts now recognize, and generally accept, that jailhouse informers, who are often waiting to be dealt with by the same criminal justice system that they offer to assist, have major credibility issues and may be concerned only with advancing their own interests.¹⁵⁹

In addition, as a result of the inquiries, with the exception of Quebec, federal and provincial prosecution services have implemented policies and guidelines on the use of jailhouse informers with stringent conditions regarding their use. In Quebec, these recommendations were considered in the development of its Guidelines which govern the use of all collaborating witnesses, including jailhouse informers.

II. 2005 RECOMMENDATIONS

1. Cross-sectoral educational programming should be provided to ensure that all justice professionals are aware of:
 - a) the dangers associated with in-custody informer information and evidence;

159 The Honourable Fred Kaufman, “Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin,” Ontario Ministry of the Attorney General: 1998, p. 599.

- b) the factors affecting in-custody informer reliability;
 - c) policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.
2. Policy guidelines should be developed to assist, support and limit the use of in-custody informer information and evidence by police and prosecutors.
 3. Provincial in-custody informer registries should be established so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. The creation of a national in-custody informer registry should be considered as a long-term objective.
 4. A committee of senior prosecutors unconnected with the case should review every proposed use of an in-custody informer. The in-custody informer should not be relied upon except where there is a compelling public interest in doing so. The In-Custody Informer Committee's assessment should take into account, among other things, factors affecting the reliability of the information or evidence proffered by the informer. That reliability assessment should begin from the premise that informers are, by definition, unreliable. Any relevant material change in circumstances should be brought to the In-Custody Informer Committee's attention to determine whether the initial decision regarding the compelling public interest in relying on the in-custody informer should be revisited.
 5. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.
 6. In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.

III. 2011 RECOMMENDATIONS

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

1. Police must ensure that when an in-custody informer provides a statement, the most stringent protocols are in place to reduce the likelihood of introducing fabricated evidence to a judicial proceeding.

2. Every police agency should have a policy that sets out the importance of treating the statements of in-custody informers with a high degree of suspicion because of their demonstrated skills in manipulation and the ulterior motives that may exist. The policy should also set out the steps that must be taken to attempt to assess the credibility of the informant and statement.
3. Before submitting a statement from an in-custody informer, the police agency should consider having the statement and all related investigative analysis critically reviewed by a person not connected to the investigation.
4. If any statement of an in-custody informer is provided to a Crown prosecutor, an analysis providing the following information should be submitted as well so the prosecutor is able to make a fully informed decision as to whether the in-custody informer should be allowed to give evidence:
 - what consideration, if any, the incarcerated informant is requesting;
 - an exhaustive background investigation of the incarcerated informant;
 - the extent to which the intelligence is corroborated;
 - the amount of detail provided by the incarcerated informant, with particular attention given to unusual details, or lack thereof, and the discovery of information known only to the perpetrator;
 - the degree of access that the incarcerated informant may have had to external sources of information, such as media or police reports, Crown Counsel briefs and/or other sources;
 - the incarcerated informant's general character, as evidenced by his/her past conduct known to the police;
 - any request the incarcerated informant has made, whether agreed to or not, for consideration in connection with providing the information;
 - whether the incarcerated informant has provided reliable information in the past and whether that information was utilized in previous investigations; and
 - whether the incarcerated informant has given reliable evidence in court in the past, as well as any judicial findings in relation to the accuracy and reliability of that evidence.
5. Strong links among the provinces should be developed to ensure that police and Crown Attorneys have access to any history of the informant in another jurisdiction, to help in the assessment of whether or not to call the informant as a witness.

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

IV. IN-CUSTODY INFORMER POLICIES CURRENTLY IN PLACE

With the exception of Quebec, all provincial prosecution services have issued policies and guidelines on the use of in-custody informer evidence in response to the *Morin* and *Sophonow Inquiries*. Some, but not all of these, have been updated since the *2011 Report*.

Public Prosecution Service of Canada

The PPSC's policy in relation to [in-custody informers](#) is found in the PPSC's Deskbook, Part III, 3.3, 7 with updates as of March 1, 2014. The chapter recognizes that the use of in-custody informers has been identified as a significant contributing factor in cases of wrongful convictions.¹⁶⁰

The policy specifies that after careful scrutiny and being satisfied that the informer evidence is credible, it should be recommended to the Chief Federal Prosecutor (CFP) that the informer be called as a witness. If the CFP believes it is an appropriate case for use of the informer, the CFP should seek the advice of the Major Case Advisory Committee before making a final decision. Should the Committee and the CFP disagree, the matter should be directed to the appropriate Deputy DPP for a final decision.

British Columbia

British Columbia's Ministry of the Attorney General issued a policy regarding in-custody informer witnesses on November 18, 2005, which was updated on Oct. 2, 2009 and further updated on April 13, 2015.¹⁶¹

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

160 See: http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch03.html#section_7

161 Available at: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>

On March 1, 2018, the British Columbia Prosecution Service released its new policy manual. The chapter on [In-Custody Informer Witnesses](#) is essentially the same as the chapter contained in its 2015 policy manual.¹⁶²

Alberta

The Alberta Department of Justice and Attorney General released an updated [In-Custody Informant Evidence](#) guideline on May 20, 2008 regarding the procedure and criteria governing the use of in-custody informers.¹⁶³ Similar to its 1999 predecessor, the guideline confirms that “[t]his kind of evidence should only be adduced where there is a compelling public interest in doing so and after the matter has been thoroughly reviewed.”

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

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

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

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

162 See: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/inc-1.pdf>

163 See: https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/immunity_from_prosecution.aspx

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

Saskatchewan

Saskatchewan issued a practice memorandum regarding [in-custody informers](#), dated November 6, 2009.¹⁶⁴ Its guiding principle is that in-custody informants "will only be tendered as prosecution witnesses where this evidence is justified by a compelling public interest, based on an objective assessment of reliability."

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

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

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

164 See: <http://publications.gov.sk.ca/documents/9/93151-In%20Custody%20Informants.pdf>

for consideration; previous reliability as an informant; any other known indicia that might diminish the credibility of the informant; and safety issues.

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

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

The rationale for the memorandum is identified as:

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

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

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

Manitoba

The Manitoba Department of Justice issued an [In-Custody Informer Policy Directive](#) on November 5th, 2001 which states: "Except in the unusual circumstances as permitted by this policy directive, in-custody informers *should not* be called to testify on behalf of the Crown."¹⁶⁵ The Manitoba Department of Justice drafted a new policy on disclosure in March 2008 in accordance with the

165 See: https://www.gov.mb.ca/justice/crown/prosecutions/pubs/in_custody_informer.pdf. This policy was reviewed in detail in the *2005 Report*.

Driskell Inquiry Report recommendations that “recognizes the suspect nature of the evidence of unsavoury witnesses generally.”¹⁶⁶ Among other obligations, the policy refers to the obligation to disclose “all benefits requested, discussed, or provided or intended to be provided for any central witness, at any time, in relation to that central witness” as recommended by the *Driskell Inquiry Report* and clarifies that “benefits” should be interpreted broadly “to include any promises or undertakings, between the witness and the Crown, police or correctional authorities.”

The policy includes the following:

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

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

Ontario

The dangers presented by in-custody informers were targeted by the Ontario Ministry of the Attorney General as a major area of reform in 1998, resulting in a number of initiatives, including the creation in 1999 of the Ontario In-Custody Informer Committee to review all in-custody informers proposed by the Crown as witnesses in criminal proceedings. Ontario’s current policy on in-custody informers came into force on November 14, 2017 and forms part of Ontario’s [new Crown Prosecution Manual](#).¹⁶⁷ The Ministry continues to refer cases to the In-Custody Informer Committee where the testimony of a jailhouse informer is sought by the prosecution. A senior Crown counsel appointed by the Assistant Deputy Attorney General serves as Chair of the Committee. The policy provides for a minimum of three Crown counsel to review each case, although in the majority of cases the Committee consists of five members to ensure a wide variety of independent opinions. The Committee includes representation from outside the region in which the trial is to take place. The Committee applies a rigorous set of criteria and insists on a thorough and complete investigation of the credibility and reliability of the in-custody informer’s evidence. There must be a compelling public interest to tender evidence from an in-custody informer.

166 See: https://www.gov.mb.ca/justice/crown/prosecutions/pubs/disclosurepolicy_march2008.pdf

167 See: <https://www.ontario.ca/document/crown-prosecution-manual>

Ontario also maintains an In-Custody Informer Registry. Information from the registry is available to the Committee so that repeat would-be informers can be identified. The cumulative effect of the procedures in place since 1998 has resulted in a greater degree of screening and vetting by trial Crown counsel before applications are made to the Committee, as well as greater sophistication with respect to the applications made to the Committee. The existence of the Committee and approval process has resulted in greater awareness of the dangers of relying on the testimony of these witnesses.

The focus of the In-Custody Informer Committee is the approval of informers as witnesses. However, one of the beneficial by-products of the process is that the committee is often able to offer advice or observations in relation to other trial issues, such as trial tactics.

New Brunswick

The Department of Justice in New Brunswick issued a guideline entitled “[Public Interest Agreements](#)” in March 2003, stating: “Given the high propensity for harm in relying on an in-custody informant careful consideration must be given in making an assessment as to whether the in-custody informant should be called as a witness for the Crown.”¹⁶⁸

Effective September 1, 2015, the Department issued its policy on [in-custody informant evidence](#) contained in its Operational Manual (Chapter V – Witnesses and Victims).¹⁶⁹

The procedure for deciding whether to call an in-custody informer includes a comprehensive assessment of the factors going to the informer’s reliability and their potential testimony.

Where, upon thorough review, the Crown Prosecutor believes that the in-custody informant’s evidence is reliable and use of it is in the public interest, the Crown prosecutor shall prepare and submit a report to the Regional Director or the Director of Specialized Prosecutions, as the case may be, for review.

168 See: <http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/CrownImmunityandPublicInterestAgreements.pdf>

169 See: <http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/In-custodyInformantEvidence.pdf>

Where the Regional Director or the Director of Specialized Prosecutions, as the case may be, agrees that the in-custody informant's evidence is reliable and use of it is in the public interest, the Regional Director or the Director of Specialized Prosecutions, as the case may be, shall obtain approval from the Director of Public Prosecutions.

If there is any significant change of circumstances throughout the course of the prosecution, the Crown Prosecutor shall consult the Regional Director or the Director of Specialized Prosecutions, as the case may be, to discuss whether the matter should be reassessed.

Newfoundland and Labrador

In October 2007, the Office of the Director of Public Prosecutions released its *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*.¹⁷⁰ The section dealing with jailhouse informants refers to Commissioner Lamer's conclusion that Commissioner Cory's recommendations with respect to the use of jailhouse informants in the *Sophonow Inquiry Report* should be incorporated into the policy and practices of Crown Attorneys in Newfoundland and Labrador.

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

Also included are a number of "mandatory considerations" to guide Crown attorneys with respect to the use of a jailhouse informant in a given case, starting with a general rule that jailhouse informants should be prohibited from testifying. The considerations include examples of the types of rare cases in which a jailhouse informant may be permitted to testify. They outline the procedure police should follow when considering the use of this type of witness, and what to look for when reviewing the information provided by the prospective witness. If the intention remains to consider the jailhouse informant as a prospective witness, the testimony will only be admitted if it meets the requirements suggested by Commissioner Kaufman. In particular, the trial judge will have to determine on a *voir dire* whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Commissioner Kaufman.

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

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

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

Prince Edward Island

In November 2009, the Attorney General adopted a comprehensive [Guidebook on the Conduct of Criminal Prosecutions](#).¹⁷¹ Included is a policy on In-Custody Informants which mirrors that of Newfoundland and Labrador.

Nova Scotia

In May 2004, Nova Scotia’s Public Prosecution Service distributed a policy document entitled “[In-Custody Informers](#).”¹⁷² It was patterned on the Ontario policy and incorporated many of the *Morin Inquiry* recommendations.

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

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

171 Available at: https://www.princeedwardisland.ca/sites/default/files/publications/guide_book_of_policies_and_procedures_for_the_conduct_of_criminal_prosecutions.pdf

172 See: https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/In-custodyInformersMay04.pdf

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

V. LEGAL DEVELOPMENTS AND COMMENTARY

In the United States, there has been renewed controversy in recent years on the use of jailhouse informers.

The National Registry of Exonerations¹⁷³ reports that eight percent of all exonerees in the Registry were convicted in part by testimony from jailhouse informers, 119 out of 1,567. They are concentrated among the worst crimes: 102 out of 119 are murder cases, 15%, of all murder exonerations, compared to 2% of all other exonerations (17/900). Among murders, the more extreme the punishment, the more likely we are to see a jailhouse informer, ranging from 23% of exonerations with death sentences to 10% of murder cases in which the defendant received a sentence less than life in prison.

Loyola Law professor Alexandra Natapoff, one of the U.S.’s leading experts on criminal informers, said lawmakers “from Texas to Montana to New York, are considering and passing bills to better regulate the use of compensated criminal witnesses.” She wrote:

It has become an article of common sense that if the government is going to pay its criminal witnesses for evidence and testimony, it should have to keep track of them, their histories and those rewards—and disclose that information to the defense.

Texas has been a leader in this regard, passing comprehensive new requirements in July. Such reforms are driven first and foremost by the fear of wrongful conviction: Compensated witnesses hoping to gain their own freedom obviously have strong incentives to lie.

Better tracking and disclosure also strengthen the integrity of the adversarial system. These new state laws are an important effort to level the adversarial playing field and improve its accuracy as well as its integrity.

173 The National Registry of Exonerations: <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>

Lots of states are going further, however. They are rethinking not just what the government should disclose about its informants but under what circumstances it should be permitted to use them at all.¹⁷⁴

Natapoff went on to describe the spectrum of proposed and adopted laws focused on reforming practices around “incentivized informants,” including:

- Legislation that sets limits on the extent of benefits that informers can receive in exchange for information;
- Senate Bill 249 in Montana which introduced “comprehensive legislation that would require, among other things, electronic recording of informers’ statements, greater prosecutorial disclosure, pretrial reliability hearings, and cautionary jury instructions;” and
- An Illinois bill that requires pretrial hearings for all jailhouse informers.

“This wave of new reform has been a long time coming,” wrote Natapoff. “The innocence movement warned us for years that criminal informants are a leading cause of wrongful conviction... Almost every week brings a new media story about an informant case gone awry. Criminal informants have historically been secretive and under-regulated; today, this problematic law enforcement practice is getting its much-deserved day in the sun.”¹⁷⁵

In 2014, a highly publicized controversy unfolded in Orange County, California regarding the use of jailhouse informers. The prosecutor and sheriff’s offices were accused of running a secret jailhouse informers program for over 30 years, failing to disclose key information to defense attorneys and lying about it in court. Some informers were allegedly paid hundreds of thousands of taxpayer dollars to elicit confessions from inmates. In response, District Attorney Tony Rackauckas assembled a group of lawyers independent of his office and a retired judge to examine the office’s policies and practices on the use of jailhouse informers. The committee, the Informant Policies & Practices Evaluation Committee (IPPEC), made 10 recommendations and concluded:

What also became clear during the evaluation was that, in many ways, the OCDA’s Office functions as a ship without a rudder... In short, the office suffers from what is best described as a failure of leadership. This failure appears to have contributed to the jailhouse informant controversy. The management in the office was unaware of the caseloads, use of jailhouse informants, and discovery challenges of Deputy District Attorneys in the

174 Innocence Project, “States Show Promising Signs of Reforming Informant Practices,” Sept. 28, 2017, available at: <https://www.innocenceproject.org/states-show-promising-signs-of-reforming-informant-practices/>.

175 Ibid.

Target, Gang, and Homicide Units. The lack of oversight of these serious cases led to repeated legal errors that should have been identified and rectified by management long before the problems reached the current scale.¹⁷⁶

In 2009, Texas became one of the first states to regulate testimony from jailhouse informers by prohibiting the conviction of defendants based solely on jailhouse informers' testimony without corroborating evidence.¹⁷⁷

But in September 2017, new legislation took effect, which was hailed by the *New York Times* as "the most comprehensive effort yet to rein in the danger of transactional snitching." The bill came from a list of recommendations presented to the Texas Legislature by the Timothy Cole Exoneration Review Commission, formed in 2015 to review cases in which convicted defendants were exonerated. It requires prosecutors to track and disclose to defence key information and establishes strict record keeping guidelines for their use – who they are, what they told and what they got for telling.

Under the new law, prosecutors are required to disclose a jailhouse informer's complete criminal history, including any dismissal or reduced charges as part of a plea bargain. As well, any leniency or special treatment given in exchange for the testimony also must be disclosed, along with information about other cases in which the informer had testified or offered to testify against another jailed defendant.¹⁷⁸

In Canada, it is not surprising that a review of case law since the *2011 Report* has shown that jailhouse informers as a category of witnesses continue to be seen as inherently unreliable. Moreover, in the few cases where jailhouse informers are being used, in addition to the courts' general recognition of their unreliability, judges are taking extra effort in scrutinizing their testimony (*Vetrovec, Khela*).

In the recent Manitoba case of *R. v. Richard*,¹⁷⁹ the accused was charged and convicted of second degree murder. The Crown tendered the evidence of a jailhouse informer who was detained at the same jail as the accused shortly

176 Patrick Dixon, Robert Gerard, Blithe Leece, Laurie Levenson and the Honourable James Smith, "Orange County District Attorney Informant Policies and Practices Evaluation Committee Report," Informant Policies & Practices Evaluation Committee, December 30, 2015, p. 7-8, available at: <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23414>.

177 *San Antonio Express-News*, "Jailhouse Snitches Face Greater Scrutiny," August 5, 2017, available at: <https://www.mysanantonio.com/opinion/editorials/article/Jailhouse-snitches-face-greater-scrutiny-11735206.php>

178 *Ibid.*

179 *R. v. Richard*, 2017 CarswellMan 60, 2017 MBQB 11, [2017] M.J. No. 46, 136 W.C.B. (2d) 651, 375 C.R.R. (2d) 61

after his arrest and detention. The informer testified that the accused admitted to him committing the offence and provided specific details of the killing that, seemingly, would have been information only the perpetrator of the offence would have possessed. The accused testified and, interestingly, stated that he did have the conversation with the informer as described by him. Essentially, the only difference between their testimony was that, according to the accused, the details he provided to the informer was information provided by the police during his interrogation when he was arrested. He also denied admitting to the informer that he had committed the murder.

In her assessment of the informer's testimony, the trial judge stated she found the informer "forthcoming and sincere" and "...that most of his evidence about his meeting with Mr. Richard was confirmed by Mr. Richard's testimony. As well, there was no evidence that (the informer) was offered money or other incentives for his evidence, with the written agreement he entered into with the Crown three days before this trial simply providing for his commitment to tell the truth and noting that he had not received any benefit for doing so."¹⁸⁰

At the outset of her assessment of the informer's evidence, the judge also emphasized the importance of applying special scrutiny and cited the seminal decisions of *Vetrovec* and *Khela*. She stated that "...jailhouse informers such as Arnold are almost invariably motivated by self-interest and have little respect for the truth." She also stated, "Furthermore, as Arnold is a jailhouse informer, I must, in assessing his evidence, consider the factors that the courts have held are of assistance in determining his reliability or lack thereof (*Brooks*, para 82)."¹⁸¹

After applying the above principles, and despite the confirmatory evidence supporting the informer's evidence, the judge did not accept his evidence of the admission from the accused. She cited specific concerns related to the informer's contact with another witness and concluded, "Given the extent of Arnold's contact with Neil and their apparent attempt to minimize it, Arnold's criminal background and the general caution I must exercise when considering the testimony of a jailhouse informer, I reiterate that I do not accept his testimony about Mr. Richard's admission."¹⁸²

In *R. v. J.J.G.*,¹⁸³ the youth accused was charged with the second degree murder of an infant. The Crown tendered evidence of a jailhouse informer to whom the accused had allegedly made incriminating statements while in custody at a youth detention facility shortly after the accused was arrested. The Crown conceded that the evidence of the informer was necessary for the Court to be satisfied beyond a reasonable doubt of the accused's guilt.

180 Ibid., at para 74.

181 Ibid., at para 73.

182 Ibid., at para 81.

183 *R. v. J.J.G.*, 2015 BCSC 77 (CanLII)

In assessing the informer's evidence, the trial judge stated:

It is common ground that C.L. is a Vetrovec witness and consequently I must assess his reliability with extreme care, and in so doing must search in the evidence for confirmatory evidence which is material and independent of C.L. to assist in determining whether C.L.'s evidence is reliable. During the same search, I must be alive to the presence of contradictory evidence, if any. I do so caution myself and will proceed accordingly.¹⁸⁴

The Court described the informer as having a "plethora" of problems going to his credibility and reliability and outlined several.¹⁸⁵

The Court also stated:

The Court must always be concerned in jailhouse informant cases, and I am also concerned about it here, that a person in C.L.'s situation may have some personal motive, something to be gained from testifying in such a case. It is clear that there is no evidence of a deal having been made, of a quid pro quo or an agreement with law enforcement authorities that he will benefit in some way. C.L. also denied that he was expecting anything. However, he also testified that he had taken it upon himself to question the accused, having heard the rumour of what he was charged with. He said, "I just took it upon myself to tell the right people and deal with this as well as I could've."¹⁸⁶

The judge went on to state, "Let me be clear, for the reasons I have already stated, I will accept nothing that C.L. says as truthful, unless I am satisfied that it has been confirmed by independent and material evidence."¹⁸⁷

With the above principles in mind, the Court thoroughly reviewed the evidence and, coupled with the mental health and age of the accused, found the informer's reliability to be of "dubious" value and acquitted the accused.¹⁸⁸

These cases serve as examples of the courts' recognition of jailhouse informers' inherent unreliability and also demonstrate the diligent and careful scrutiny being applied by judges in assessing their evidence.

184 Ibid., at para 30.

185 Ibid., at para 31.

186 Ibid., at para. 36.

187 Ibid., at para 46.

188 Ibid., at para 67.

Although this Subcommittee has not done an in-depth search of cases comparing the use of jailhouse informers before and after the publication of our last report in 2011, it appears jailhouse informers are still being used, but more sparingly.

VI. UPDATED RECOMMENDATIONS

In light of the above, the Subcommittee considered recommending an outright ban on the use of jailhouse informers. However, the danger associated with the use of jailhouse informers was balanced against the reality that there are certain measures available to address reliability concerns and such witnesses can sometimes offer highly probative evidence. Despite obvious inherent reliability concerns, jailhouse informers may still be called to give evidence but there should be a compelling public interest to warrant such testimony.

A case in point is *R. v. Bailey*.¹⁸⁹ While this case is an example where the lower court did not apply careful scrutiny of a jailhouse informer witness, ironically, the lower court's lack of scrutiny likely impacted positively on the accused.

In *Bailey*, the accused was convicted of first degree murder. The three accused entered the victim's residence intending to rob the victim. The victim was taken into the basement by two of the robbers and was shot in the head. The verdict turned on whether the Crown could prove that the appellant was the shooter. The Crown had called a witness/jailhouse informer who testified about incriminating comments made by the appellant while sharing a cell with him.

The accused appealed the conviction. The grounds of appeal included an alleged misdirection to the jury arising from the trial judge's instruction on eyewitness identification and the inadequacy of the *Vetrovec* instruction.

The appellant's appeal was granted on the first ground, however, writing for the Ontario Court of Appeal, Justice Doherty commented on the *Vetrovec* instruction.

The trial judge's instruction on this issue was:

“Common sense tells you that in light of those circumstances there is good reason to look at Mr. Whissel's evidence with the greatest care and caution. You are entitled to rely on Mr. Whissel's evidence even if it is not confirmed by another witness or other evidence, but I would suggest it is dangerous for you to do so.”¹⁹⁰

189 *R v. Bailey*, 2016 ONCA 516, [2016] O.J. No. 3508, 131 W.C.B. (2d) 450, 339 C.C.C. (3d) 463, 351 O.A.C. 141

190 *Ibid.*, at para 58.

Justice Doherty noted it would have been better for the trial judge to specifically explain why it was dangerous. However, he went on to state:

As I would reverse on the eyewitness identification instruction, I need not decide whether the failure to explain to the jury why it was dangerous to rely on Whissel's evidence constituted reversible error. I note that the Vetrovec instruction was vetted with counsel and there was no objection taken. I also observe that had the trial judge given a more detailed explanation for the reasons behind treating Whissel's evidence with caution, he could also have given a more detailed review of the evidence in this case capable of supporting the contention that Whissel was not a typical "jailhouse informant". He had only a minor criminal record, did not appear to be part of any criminal subculture, had no history of testifying for the Crown, and little, if anything, to gain when he gave his statement to the police, or, when he testified. A more thorough review of the pros and cons relevant to the assessment of Whissel's credibility may not have helped the defence.¹⁹¹

This case serves as an example of the widespread recognition by the courts of the dangers associated with jailhouse informers, yet also illustrates the benefits these witnesses can occasionally offer to a case and the fact that even within this category of witness, reliability concerns can vary.

Applying a balanced approach, the Subcommittee therefore decided not to recommend an outright ban on the use of jailhouse informers.

As well, further consideration was given to strengthening the stringent conditions used in the federal/provincial prosecution guidelines by applying "a presumption of inadmissibility" consistent with the language and principle used by Justice Moldaver in *Hart* and the admissibility of Mr. Big confessions.

However, while jailhouse informers and Mr. Big confessions have similar reliability concerns, the use of the presumption in the Mr. Big context is well justified given the central role of the state in eliciting the confessions and the absence of other safeguards that would normally apply when a confession is given to a person in authority (e.g. the confessions rule and the *Charter*). It is the view of this Subcommittee that a presumption of inadmissibility is not required in the federal and provincial prosecution guidelines.

191 Ibid., at para 60.

The Subcommittee believes that the current prosecution service policies, coupled with Canada's more stringent disclosure rules and the strict scrutiny by Canadian courts of the use of jailhouse informers, are sufficient to address the concerns raised by various commissions of inquiry.

In the *2005 Report*, this Subcommittee recommended the establishment of provincial and national in-custody informer registries. The *2011 Report* further emphasized the development of strong links among the provinces to ensure police and Crown attorneys have access to the history of the informer in other jurisdictions to help in the assessment of whether to call the informer as a witness.

To date, British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario have such registries. The Subcommittee reiterates this recommendation and urges those jurisdictions without such registries to establish them.

Despite the significant advances in our understanding and education on the problems and concerns with in-custody informers, it is important we continue our vigilance in limiting their use in only the clearest of circumstances. By implementing provincial and national registries, we can better attain our goal by providing a fuller history of the informer and preventing miscarriages of justice.

CHAPTER 6 – FORENSIC EVIDENCE AND EXPERT TESTIMONY

I. INTRODUCTION

Science continues to play an important role in advancing the truth-seeking function of our criminal courts. As we know only too well, however, forensic science brings with it many potential dangers: science itself is sometimes unreliable, or less reliable than it is believed or stated to be, and can be misapplied in a forensic context. These dangers are heightened by the fact that science is admitted in our courtrooms through the mouths of expert witnesses who give opinion evidence on matters that, by definition, are outside of the knowledge of ordinary people.

Our appreciation of the potential dangers of forensic and expert evidence has come at the expense of individuals who have been wrongfully convicted and through the work of the public inquiries that have been established to examine “what went wrong”. The reports and recommendations of inquiries such as the *Driskell* and *Goudge Inquiries* have provided us with a critical lens through which we can evaluate the integrity of forensic science and expert testimony.

There is no doubt that, as a result of these inquiries, all players within the justice system have a heightened awareness of the need to ensure that expert opinion evidence is received from properly qualified experts whose opinions are based on reliable science. But it is equally clear that for all of the progress that has been made, we must continue to be vigilant in ensuring that the trust we place in science and expert witnesses is well placed. For example, in 2016 an expert panel in the United States identified three forensic disciplines (bite mark, firearms and hair analysis) which in its view lacked basic foundational validity.¹⁹² In Canada, one need look no further than the findings of the *Lang Report* and the *Motherisk Inquiry Report* on the flawed hair testing conducted by the Motherisk Drug Testing Laboratory at the Hospital for Sick Children between 2005 and 2015 – the same hospital where disgraced pathologist Charles Smith worked – to appreciate that there is no room for complacency.¹⁹³

192 President’s Council of Advisors on Science and Technology (PCAST Report), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, (USA: September 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

193 Honourable Susan E. Lang, “Report of the Motherisk Hair Analysis Independent Review,” Ontario Ministry of the Attorney General: 2015, pp.21, 206-8, <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lang/>. Also referred to as the “Lang Report”.

II. 2005 RECOMMENDATIONS

1. Prosecutors should receive training on the proper use, examination and cross-examination of expert witnesses during ongoing and regular education sessions.
2. The Heads of Prosecutions Committee should consider the feasibility of establishing a national central repository to catalog and track, among others:
 - case law;
 - newsletters and articles;
 - reliability of current techniques;
 - the latest developments and advancements in specific fields of expertise;
 - sources of literature and study guides;
 - directories of professional organizations from across the country (including criteria for the qualifications of specific experts);
 - prosecution policies;
 - teaching aids. This applies to all Web-based models permitting online access to the data and regular updating of information to maintain currency.
3. Prosecutors should not shy away from the use of and reliance on novel scientific technique or theory in the appropriate situation, providing there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value does not exceed the potential prejudicial effects.
4. Prosecutors should be reminded of the existence of Section 657.3 of the *Criminal Code* which sets out the requirements and reciprocal obligations of disclosure imposed on all parties to a proceeding intending to tender expert evidence at trial.

III. 2011 RECOMMENDATIONS

The Subcommittee made the following additional recommendations:

1. Continuing multi-disciplinary legal education among the bar, the judiciary, and the scientific disciplines and police is of utmost importance and will assist all participants in becoming literate with respect to basic scientific concepts, developing scientific areas, methods, and techniques.

2. There should be continuing education for prosecutors on the proper use of, and how to examine and cross-examine, expert witnesses.
3. The federal government should continue its role in updating the provinces and territories with current, relevant information in this area, including press releases, reports, etc. This recommendation effectively and efficiently implements Recommendation 2 in the 2005 Report.
4. Each province or territory should encourage an appropriate network, both within the province/ territory and with other provinces/ territories, when searching for expert witnesses for their cases.
5. Case conferences between Crown experts and defence experts should be encouraged to try to narrow and/or potentially resolve the scientific issues in a given case. Crown and defence counsel should encourage these case conferences and request that issues relevant to the case be addressed.
6. Some international jurisdictions have rules relating to reciprocal disclosure of expert evidence. The Criminal Code addresses this issue in a limited way. Consideration should be given to strengthening the Criminal Code provisions to provide for reciprocal disclosure well in advance of trial. This greatly enhances a full consideration of scientific issues affecting the soundness of prosecutions and convictions.

IV. CANADIAN COMMISSIONS OF INQUIRY SINCE 2011

The *2011 Report* identified and discussed three public inquiries conducted in Canada between 2005 and 2011 that addressed issues related to forensic evidence and expert testimony: the *Lamer Inquiry* (2006), the *Driskell Inquiry* (2007) and the *Goudge Inquiry* (2008). The lessons revealed, and recommendations made, by these and other earlier inquiries, and especially the *Goudge Inquiry*, continue to have a significant impact on forensic sciences and the criminal justice system in Canada, with stakeholders approaching the forensic sciences and the reception of expert evidence with heightened rigour and caution.

Since the *2011 Report* there have been two related Ontario inquiries dealing with flawed forensic science and expert evidence from the Motherisk Drug Testing Laboratory (MDTL) at the Hospital for Sick Children in Toronto: the *Motherisk Hair Analysis Independent Review*¹⁹⁴ and the *Motherisk Commission*. The reports of both emphasize the dangers of ignoring the lessons of the past and the need for constant and continued vigilance.

194 As its title suggests the Motherisk Hair Analysis Independent Review was not, strictly speaking, a public inquiry but an independent review. See: The *Lang Report*, *supra*, Appendix 2, Order in Counsel, April 22, 2015.

a) The Motherisk Hair Analysis Independent Review

Commissioner Goudge's recommendations arising from his review of forensic pathology apply with equal force to the science of forensic toxicology as it relates to hair tests. Of particular relevance are his many recommendations aimed at reducing the risks of an expert opinion being misunderstood: for example, his emphasis on the importance of forensic training, the careful use of terminology and plain language in opinion evidence, transparency, and clear communication of those areas where there are limitations on or controversy concerning the opinion.

Justice Susan Lang, *Report of the Motherisk Hair Analysis Independent Review, 2015*¹⁹⁵

The Motherisk Drug Test Laboratory (MDTL) began as a research laboratory at Toronto's Hospital for Sick Children and, gradually, evolved into a clinical and forensic laboratory. During the 10-year period between 2005 and 2015, it tested thousands of hair samples for drug and alcohol consumption and exposure. While the results of this testing were used primarily in child protection proceedings, they were also used in criminal proceedings in a handful of cases.

Serious concerns regarding the MDTL were recognized following the Ontario Court of Appeal decision in *R. v. Broomfield*,¹⁹⁶ which involved two convictions related to administering cocaine to a child. In that case, the Court admitted expert fresh evidence from the Deputy Chief Toxicologist of the Office of the Chief Medical Examiner in Alberta which called into serious question the integrity of the MDTL's hair-testing methodology and its interpretation of the test results. The Court of Appeal held that the trial judge was unaware of the existence of a genuine controversy about the use of the testing methods relied upon. It indicated that while ordinarily a new trial would be appropriate, it was acceding to the Crown's request to stay the proceedings on the basis that a new trial would not be in the interests of justice.

The *Broomfield* decision was released on October 14, 2014. On November 26, 2014, the Ontario government appointed former Ontario Court of Appeal Justice Susan Lang to conduct an independent review of the Motherisk hair analysis program.

Justice Lang released her *Report of the Motherisk Hair Analysis Independent Review* (the *Lang Report*) on December 15, 2015. The report cited a myriad of deficiencies at the MDTL and concluded that the "hair-strand drug and alcohol

195 Lang Report, supra, p.240

196 *R. v. Broomfield*, 2014 ONCA 725.

testing used by the MDTL between 2005 and 2015 was inadequate and unreliable for use in child protection and criminal proceedings.¹⁹⁷ Of particular concern were the following findings:

- Until August of 2010, the MDTL routinely relied on *unconfirmed* results of ELISA tests – tests expressly intended for use only as preliminary screening tests – to identify positive hair samples.
- The ELISA tests were used to calculate the concentration of drugs in the samples, something which was simply unheard of in forensic toxicology laboratories.
- Although operating as a forensic laboratory, the MDTL had no written Standard Operating Procedures. As a result, its practices were unacceptable and fell well below expected standards for a forensic laboratory.
- The MDTL’s communications to its “customers” were deficient in numerous respects, including the misinterpretation and over-interpretation of test results. Indeed, no one at the MDTL had the expertise to provide forensic toxicological interpretations of the hair test results.¹⁹⁸

Justice Lang concluded that “the use of the Laboratory’s hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.”¹⁹⁹ She contemplated a review of cases where “an unreliable MDTL test result may have made a material contribution to the outcome of the case.”²⁰⁰

Although the *Lang Report* focused primarily on the use of flawed MDTL testing in the context of child protection proceedings, the testing was used as evidence in a handful of criminal proceedings as well. In the context of the criminal cases, the *Lang Report* referred to convicted persons’ rights of appeal and recommended that in cases where an individual seeks to set aside convictions based on MDTL evidence, the Crown should assist in facilitating and expediting access to the Court of Appeal.²⁰¹

b) The Motherisk Commission

The *Lang Report’s* recommendations led to the establishment in January 2016 of the Motherisk Commission, headed by Justice Judith Beaman. The Commission’s focus was on the use of MDTL evidence in child protection proceedings. It was tasked with reviewing cases as well as providing counselling and legal funding

197 Lang Report, *supra*, p.5

198 Lang Report, *supra*, pp.4-12

199 *Ibid.*, p.229.

200 *Ibid.*, p.234.

201 *Ibid.*, pp.237-8.

in some cases. It reviewed child protection cases in Ontario between 1990 and 2015. The final *Report of the Motherisk Commission* was released on February 26, 2018. It determined that of 1,271 cases that were comprehensively reviewed, MDTL testing had a “substantial impact” in 56 of them: “Behind every one of the 56 ‘cases,’ families were broken apart and relationships among children, siblings, parents and extended families and communities we damaged or lost.”²⁰² One of its findings was that this testing was disproportionately used in child welfare proceedings involving Indigenous people.

The *Report of the Motherisk Commission* made numerous findings and recommendations related to the child welfare system in Ontario. Of particular relevance to the subject of this report were its findings and recommendations related to the use of expert evidence:

Child protection law has special rules of evidence that recognize the need to protect children and to make decisions about their care as quickly as possible. However, the relaxed approach to admitting the test results in the cases we reviewed pushed these less rigorous standards of evidence beyond what could reasonably be considered necessary or fair.²⁰³

The report also emphasized the importance of the role of judges as gatekeepers in respect of the receipt of expert evidence and recommended increased judicial education to enable judges to better fulfill this role. Other recommendations included suggested changes to the Family Law Rules to require parties who wish to introduce medical or scientific test results to accompany any such results with a report from an expert explaining the meaning of the test results and the underlying science behind the testing. Such a report should include any known possible impacts of gender, socio-economic status, culture, race or other factors in the testing or assessment of the tests and what, if any, steps the expert took to address them. It also recommended amendments to the Family Law Rules to require courts to address the necessity and reliability of expert evidence through a *voir dire* prior to admission, and to similarly tighten the rules governing the receipt of expert evidence at temporary and summary judgment hearings.²⁰⁴

202 Honourable Judith C. Beaman, “Harmful Impacts: The Reliance on Hair Testing in Child Protection, Report of the Motherisk Commission,” Ontario Ministry of the Attorney General: February 26, 2018, p.vii, <http://motheriskcommission.ca/wp-content/uploads/Report-of-the-Motherisk-Commission.pdf>.

203 Ibid., p. x.

204 Ibid., pp. x, xiii-xv.

c) Responses to Problems with the Motherisk Drug Testing Laboratory

Upon release of the *Lang Report*, the Attorney General of Ontario announced that any affected criminal cases would be referred to the Ontario Criminal Convictions Review Committee (OCCRC). The OCCRC reviewed seven criminal cases, six of which resulted in convictions. Other than the *Broomfield* case, the OCCRC was of the view that the MDTL evidence had a significant impact on one conviction. Although the OCCRC sought to give notice of its findings to the convicted individual, it was learned that this person had died. Since the OCCRC's initial work a further criminal case has come to light and is to be reviewed.

When the Motherisk Commission's Report was released, Ontario's Minister of Children and Youth Services and the Attorney General of Ontario made a joint statement accepting the recommendations.²⁰⁵ As the *Motherisk Report* was just released at the time of writing, the Subcommittee cannot yet comment on the full impact of the Report or the specific implementation of its recommendations.

Although the MDTL was located in Toronto, it conducted testing on samples submitted by several other provinces. As in Ontario, the testing was relied on primarily in child welfare cases. Several other provinces, including British Columbia,²⁰⁶ New Brunswick and Nova Scotia have begun internal reviews of the use of MDTL hair testing in child welfare proceedings. These reviews are of varying degrees of scope and completion, and questions have been raised about whether independent inquiries are needed. In some provinces, such as British Columbia, the government has stated that it was awaiting the findings of the Motherisk Commission before determining how to move forward. Again, as the *Report of the Motherisk Commission* was just released at the time of the writing of this report, it is too soon to make any definitive comments here.

205 Ontario Ministry of Children, Community and Social Services, "Statement from the Minister of Children and Youth Services and the Attorney General on the Motherisk Commission Final Report," February 26, 2018, <https://news.ontario.ca/mcys/en/2018/02/statement-from-the-minister-of-children-and-youth-services-and-the-attorney-general-on-the-motherisk.html>.

206 British Columbia Ministry of Children and Family Development, *A Review of Motherisk Drug Testing Laboratory Hair Strand Testing in Child Protection in British Columbia: Phase I*, Office of the Provincial Director of Child Welfare, December 2017, https://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-supports-for-parents-with-young-children/reporting-monitoring/00-public-ministry-reports/review_of_motherisk_drug_testing_laboratory_-_hair_strand_testing_in_child_protection_in_bc.pdf.

d) Update on Prosecution Services Response to the Driskell Inquiry

In 2007, the *Driskell Inquiry Report* detailed the role that problems relating to the use of hair microscopy²⁰⁷ evidence played in the wrongful conviction of James Driskell. It recommended that “microscopic hair comparison evidence should be received with great caution and, when received, jurors should be warned of the inherent frailties of such evidence.” It also recommended that the Attorneys General of the provinces and territories review other criminal cases in which hair microscopy testing was used.

The *2011 Report* outlined the response by prosecution services in Canada to the *Driskell Inquiry Report*, and noted that all Canadian jurisdictions had conducted some form of review.²⁰⁸ While at the time of the *2011 Report* other jurisdictions had completed their reviews, Ontario had completed only the initial phases of its review, including the identification of cases for detailed review. The final phase – a detailed review by the Ontario Criminal Convictions Review Committee (OCCRC) of those cases to determine whether there was a reasonable basis to conclude that a miscarriage of justice may have occurred – had yet to be completed. The OCCRC’s final review has since been completed. One convicted person was alerted to the OCCRC’s views and offered an opportunity to have DNA testing conducted on the hair sample in issue. That offer was declined.

V. INTERNATIONAL DEVELOPMENTS

The scrutiny being brought to bear on the forensic science disciplines and expert evidence as a result of their role in wrongful convictions is by no means limited to Canada. Internationally, and particularly in the United States, the state of forensic science has been the subject of self-examination and critique by scientists and experts themselves. As in Canada, lawyers and judges in other countries are focused on the integrity of expert evidence and the need to guard against the admission of unreliable and misleading evidence. The concern for both science and the justice system is to ensure that expert opinion evidence received by the courts is both reliable and accurately presented.

An exhaustive review of international developments is beyond the scope of this report. However, two developments are illustrative of the important work that has and continues to be done in these areas. One is the U.S. President’s Council of Advisors on Science and Technology (PCAST) 2016 report *Forensic Science in*

207 Note that the hair analysis considered in the *Driskell Inquiry* is different than the MDTL hair testing.

208 For a discussion of the various provincial prosecution services’ responses to the *Driskell Inquiry*, and the role of prosecution services in uncovering wrongful convictions more generally, see: Bruce MacFarlane, *Wrongful Convictions: Is It Proper For the Crown to Root Around, Looking For Miscarriages of Justice?* (2012) 36:1 Man LJ 1-36.

Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods. It is far and away the most comprehensive statement on the state of forensic sciences since the release of the *2011 Report*, and its influence has transcended the borders of the United States. The other is the Law Commission in England and Wales 2011 report *Expert Evidence in Criminal Proceedings in England and Wales*,²⁰⁹ and the responses of the government and the courts in England and Wales to that report.

a) United States of America: President’s Council of Advisors on Science and Technology (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, September 2016

... neither experience nor judgment, nor good professional practices (such as certification programs and accreditation programs, standardized protocols, proficiency testing, and codes of ethics) can substitute for actual evidence of foundational validity and reliability. The frequency with which a particular pattern or set of features will be observed in different samples, which is an essential element in drawing conclusions, is not a matter of “judgment.” It is an empirical matter for which only empirical evidence is relevant. Similarly, an expert’s expression of *confidence* based on personal professional experience or expressions of *consensus* among practitioners about the accuracy of their field is no substitute for error rates estimated from relevant studies. For forensic feature-comparison methods, establishing foundational validity based on empirical evidence is thus a *sine qua non*. Nothing can substitute for it.²¹⁰

In 2009, the National Research Council issued its report, *Strengthening Forensic Science in the United States: A Path Forward* (the “NRC Report”).²¹¹ It identified critical and systemic weaknesses in several forensic disciplines and concluded that “much forensic evidence – including, for example, bitemark and firearm and toolmark identifications – is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.”²¹²

The *NRC Report* generated extensive discussion within the forensic disciplines, government, and the criminal justice system and led to the establishment in

209 Although this report was released in 2011, it was not available at the time of the writing of the *2011 Report*.

210 PCAST Report, *supra*, p.6

211 Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward*, National Research Council, USA, August 2009.

212 President’s Council of Advisors on Science and Technology, *REPORT TO THE PRESIDENT, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, Executive Office of the President, USA, September 2016, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

2013 of the National Commission on Forensic Science (NCFS) within the U.S. Department of Justice and the Organization for Scientific Area Committees for Forensic Science at the National Institution of Standards and Technology.²¹³ The NCFS was a federal advisory body with a mandate to enhance the practice and reliability of forensic science. It was comprised of federal, state and local forensic science service providers; research scientists and academics; law enforcement officials; prosecutors, defense attorneys and judges; and other stakeholders from across the country.

During its four years in existence, the NCFS made recommendations on a variety of issues related to forensic sciences, including accreditation, certification and proficiency testing. The U.S. Department of Justice formally accepted several of the NCFS recommendations, including its recommendation that forensic experts not use phrases like “reasonable scientific certainty” or “reasonable [forensic discipline] certainty” in their reports or testimony.²¹⁴ The NCFS’s charter expired on April 23, 2017 and was not renewed by the new Attorney General Jeff Sessions.

In 2015, President Obama asked his President’s Council of Advisors on Science and Technology (PCAST) whether there were additional steps that could be taken to help ensure the validity of forensic evidence.²¹⁵ PCAST identified and sought to address two gaps: (1) the need for clarity about the scientific standards for the validity and reliability of forensic methods; and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable. The Council conducted an in-depth examination of these two issues in the context of “feature-comparison”²¹⁶ disciplines which had been identified in the 2009 *NRC Report* as particularly vulnerable to shortcomings, such as: inadequate training and education; inadequate resources and facilities; a lack of standardization; the absence of systems to determine error rates; and in some cases no meaningful scientific validation.

The *PCAST Report* was published in January 2016. It issued a strong statement that forensic methodology must be both foundationally valid and valid as it is applied. Foundational validity requires that the scientific method “be shown, based on empirical studies, to be repeatable, reproducible, and accurate, at levels that

213 PCAST Report, *supra*, pp.1, 4.

214 See U.S. Department of Justice Website, “Recommendations of the National Commission on Forensic Science; Announcement for NCFS Meeting Eleven,” September 6, 2016, <https://www.justice.gov/opa/file/891366/download>.

215 PCAST is an advisory group of the leading scientists and engineers in the United States, appointed by the President of the United States, to “augment the science and technology advice” available to the President and to make policy recommendations concerning a wide range of issues.

216 Feature comparison methods are “methods that attempt to determine whether an evidentiary sample (e.g., from a crime scene) is or is not associated with a potential “source” sample (e.g., from a suspect), based on the presence of similar patterns, impressions or other features in the sample and the source.”

have been measured” and for which valid estimates of the method’s accuracy can be given. It “means that a method can, in principle, be reliable”. The nature of the empirical studies required depend on whether the feature-comparison method is objective or subjective. Subjective feature-comparisons, such as hair analysis, “require particularly careful scrutiny because their heavy reliance on human judgment means they are especially vulnerable to human error, inconsistency across examiners, and cognitive bias”. Subjective feature-comparison methods are generally validated through “black box” studies in which many examiners render decisions about many independent tests to determine error rates. The PCAST report asserted that “without appropriate estimates of accuracy, an examiner’s statement that two samples are similar – or even indistinguishable – is scientifically meaningless” and cautioned that “statements claiming or implying greater certainty than demonstrated by empirical evidence are scientifically invalid.”²¹⁷

Validity as applied “means that the method has been reliably applied in practice”. It has two prongs. First, the “forensic examiner must have been shown to be capable of reliably applying the method and must actually have done so”. Second, the “practitioner’s assertions about the probative value of proposed identifications must be scientifically valid. The expert should report the overall false-positive rate and sensitivity for the method established in the studies of foundational validity.”²¹⁸

PCAST examined six forensic disciplines: single source and simple mixture DNA²¹⁹; complex mixture DNA; bitemarks; latent fingerprints; firearms identification; and footwear analysis. It also considered hair analysis, although it considered recently reviewed data rather than conducting an in-depth evaluation of its scientific validity. In its report, PCAST issued a reminder that its findings reflected PCAST’s views at a particular point in time and that studies published subsequent to the PCAST report may “change the landscape” as PCAST found it:

... the evaluation of scientific validity is necessarily based on the available scientific evidence at a point in time. Some methods that have not been shown to be foundationally valid may ultimately be found to be reliable, although significant modifications to the methods may be required to achieve this goal. Other methods may not be salvageable, as was the case with compositional bullet lead analysis and is likely the case with bitemarks. Still others may be subsumed by different but more reliable methods, much as DNA analysis has replaced other methods in some instances.

217 PCAST Report, pp.4-6

218 Ibid., p.6

219 A “single source” DNA sample is a sample from a single source, which can then be compared with the DNA of a known person such as a victim or suspect. “Simple mixtures” are DNA mixtures involving two persons, where the DNA of one of the people is known. Ibid., p.70.

A summary of PCAST's findings is set out below.

Single-Source and Simple-Mixture DNA analysis:

DNA analysis is an objective method in which the laboratory protocols are precisely defined and the interpretation involves little or no human judgment. Each of the steps has been found to be “repeatable, reproducible, and accurate”. Although human error can occur through sample mix-ups, contamination, incorrect interpretation and errors in reporting, these errors can be minimized through proficiency testing.²²⁰

Complex-Mixture DNA analysis:

DNA analysis of complex mixtures is inherently difficult. Interpreting a mixed profile is different from, and more challenging than, interpreting a simple profile. PCAST found that initial approaches to the interpretation of complex mixtures that relied on subjective judgment by examiners and simplified calculations have not been found to be foundationally valid and are not reliable. It noted, however, the development of computer programs that applied various algorithms to interpret complex mixtures in an objective way. PCAST found that these programs clearly represent a major improvement over purely subjective interpretation, and while studies have validated their use with three-person mixtures, further study was required to support validity across broader settings.²²¹

Bitemark analysis:

“Bitemark analysis is a subjective method. Current protocols do not provide well-defined standards concerning the identification of features or the degree of similarity that must be identified to support a reliable conclusion that the mark could have or could not have been created by the dentition in question. Conclusions about all these matters are left to the examiner’s judgment”.

PCAST concluded as follows:

...Few studies – and no appropriate black box studies – have been undertaken to study the ability of examiners to accurately identify the source of a bitemark. In these studies, the observed false-positive rates were very high – typically above ten percent and sometimes far above. Moreover, several of these studies employed inappropriate closed-set designs that are likely to underestimate the true false positive rate. Indeed, available scientific evidence strongly suggests that examiners not only cannot identify the source of bitemark with reasonable accuracy, they cannot even consistently agree on whether an injury is a human bitemark. For these reasons, PCAST finds the bitemark analysis is far from meeting the scientific standards for foundational validity.²²²

220 Ibid., p.7.

221 Ibid., pp.7-8.

222 Ibid., p.9.

Latent Fingerprint Analysis:

Latent fingerprint analysis is the comparison of a “latent print” – a complete or partial friction ridge impression from an unknown subject on a surface with one or more prints from a known source or sources. PCAST found that latent fingerprint analysis is a foundationally valid subjective methodology – albeit one with a substantial false positive rate which highlighted the importance of stating false-positive rates based on properly designed validation studies. PCAST commented on the importance of seeking to avoid confirmation and contextual bias, and for proficiency testing. It also commented on the desirability of converting latent-print analysis from a subjective to an objective method through the use of automated image analysis.²²³

Firearms Analysis:

PCAST noted that there was only one as yet unpublished and appropriately designed black box study of firearms analysis – many earlier studies having been inappropriately designed. Foundational validity required that there be more than one such study – ideally published in a peer-reviewed journal. PCAST concluded that “[w]hether firearms analysis should be deemed admissible based on current evidence is a decision that belong to the courts. If firearms analysis is allowed in court, the scientific criteria for validity as applied should be understood to require clearly reporting the error rates seen in the one appropriately designed black-box study.”²²⁴ As with latent-prints, PCAST saw potential for firearms analysis to transform itself from a subjective to an objective method.

Footwear Analysis:

PCAST focussed on the reliability of conclusions that an impression was likely to have come from a specific piece of footwear as opposed to more readily discernable class characteristics such as size and make. It concluded that there were “no appropriate black-box studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks. Such associations are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.”²²⁵

Hair Analysis:

PCAST did not undertake a detailed review of hair analysis, but referred to recent U.S. Department of Justice guidelines which stated that “hair comparison has been demonstrated to be a valid and reliable scientific methodology” although

223 Ibid., pp.9-11.

224 Ibid., p.12.

225 Ibid., p.13.

“microscopic hair comparisons alone cannot lead to person identification and it is crucial that this limitation be conveyed both in the written report and in testimony.”²²⁶ PCAST’s review of available studies found that they did not establish the foundational validity and reliability of hair analysis.

On January 6, 2017, an *Addendum to the PCAST Report on Forensic Science in Criminal Courts* was issued following stakeholders’ responses to the original report. PCAST affirmed its position that empirical studies of subjective forensic feature-comparison methods is the only way to establish the validity and reliability of such methods, and that absent such studies such methods should not be accepted as such.²²⁷ It went on to clarify that while the PCAST report supported “black box” studies²²⁸ to establish empirical validity, it did not intend to discount other objective methods.

The PCAST Report’s findings have real significance in Canada, where our courts rely on similar science as in the U.S. In particular, the PCAST’s findings that bitemark, footwear and hair analysis all lack foundational validity raise a concern as to whether these kinds of evidence should be admissible in our courts at all. In this regard it is worth noting that awareness of the problems with hair analysis emerged in Canada even before the NCR and PCAST Reports, and were the subject of the Driskell Inquiry.

The PCAST Report’s findings on other forensic disciplines which are heavily dependent on subjective interpretation, such as fingerprint and firearms analysis, suggest that, at a minimum, this evidence should be admitted only with caution and where the trier of fact is made fully aware of the limitations of the evidence.

226 Ibid.

227 Addendum to the PCAST Report on Forensic Science in Criminal Courts is available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf.

228 A black box study is one that focuses solely on outputs generated in response to selected input. They are useful in evaluating subjective feature-comparison methods of analysis because the individual steps that any given analyst has gone through are not objectively knowable. The analyst’s method must be evaluated as if it were a “black box” in their head. In this context a black box study evaluates validity and reliability by comparing the decisions of many different analysts, usually in relation to known samples, to determine error rates.

United Kingdom: The Law Commission: Expert Evidence in Criminal Proceedings in England and Wales

In 2011, the Law Commission of England and Wales released a report to Parliament proposing draft legislation to consolidate and reform the law relating to expert evidence in criminal proceedings.²²⁹ Building on a 2009 report,²³⁰ which had identified a variety of issues and problems arising from wrongful conviction cases and had made provisional recommendations to develop a new reliability-based test for the admissibility of expert opinion evidence, the Law Commission sought to address a “concern that expert opinion evidence was being admitted in criminal proceedings too readily, with insufficient scrutiny”.

The Commission’s 2011 report recommended that there be a single legislative framework governing the admissibility of all expert evidence in criminal proceedings. This framework would include a codification of existing common law concerning expert opinion evidence, including the “Turner test” (the requirement that the court requires the assistance of an expert witness), that the evidence be given by a qualified expert in the relevant field, and that the expert be able to provide objective, impartial evidence.²³¹ It offered a proposed bill that included a stringent reliability test stipulating that “expert opinion evidence is admissible in criminal proceedings only if it is sufficiently reliable to be admitted”. Reliability would be established if an opinion is soundly based and the strength of the opinion is warranted having regard to the grounds on which it was based. The bill provided a list of factors to be considered in determining reliability, as well as factors that might lead to a finding of unreliability. The bill also allowed the courts to “disapply” the test, so long as this was not done routinely and would not reduce the reliability test to a nominal barrier to the introduction of unreliable expert opinion evidence.

Although the British government did not enact the Law Commission’s draft bill, it did make amendments to Criminal Procedure Rule, Part 33. These amendments took effect on October 14, 2014, and included provision that an expert’s duty to the Court includes obligations to expressly define area(s) of expertise when preparing reports and testifying, and to be proactive in identifying areas that fall outside of their expertise. The amendments also required expert reports to “include such information as the court may need to decide whether the expert’s opinion is sufficiently reliable to be admissible as evidence”.²³²

229 Law Commission, “Expert Evidence in Criminal Proceedings in England and Wales,” Law Commission No. 325, March 21, 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229043/0829.pdf.

230 Law Commission, “The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales,” Consultation Paper No. 190, 2009, http://www.lawcom.gov.uk/app/uploads/2015/03/cp190_Expert_Evidence_Consultation.pdf.

231 Law Commission No.325, supra, pp.48-49.

232 Ministry of Justice, “Criminal Procedure Rules Part 33: Expert Evidence,” United Kingdom, October 6, 2014, <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-33.pdf>.

In addition, a new Practice Direction was issued by the Courts.²³³ It notes that the government did not pass the Law Commission's draft bill, and stated that "Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors."²³⁴ The Practice Direction sets out the "factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion". These include:

- a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
- b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
- d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;
- e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;
- f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
- g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and
- h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.²³⁵

233 England and Wales Court of Appeal, "Criminal Practice Directions, Amendment No.2," EWCA Crim 1569, 2014.

234 *Ibid.*, 33A.3 & 33A.4.

235 *Ibid.*, 33A.5.

It further stated that, “in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

- a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
- b) being based on an unjustifiable assumption;
- c) being based on flawed data;
- d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or
- e) relying on an inference or conclusion which has not been properly reached.²³⁶

A subsequent Practice Direction issued November 16, 2016,²³⁷ directed the substance of the “statement and declaration” required by the Criminal Appeal Rules. It requires experts to declare, amongst other things, that their overriding duty is to give objective unbiased evidence within their expertise, that they have no conflict of interest or pecuniary or other interest in the outcome of the case, that they have clearly stated any qualifications to their opinion and have endeavoured to include matters which might adversely affect it, the validity of their opinion, and that they have complied with their duty of disclosure.

VI. LEGAL DEVELOPMENTS AND COMMENTARY

Cases Involving Dr. Charles Smith (1991-2001)

Ontario’s Chief Coroner conducted a review of cases between 1991 and 2001 to identify those that resulted in criminal convictions where there was problematic evidence from Dr. Charles Smith. The Chief Coroner’s Review identified 13 cases in which there had been a conviction (or NCR finding in one case) *and* where there were significant concerns about Dr. Smith’s reports and/or testimony.²³⁸ The

236 Ibid., 33A.6.

237 England and Wales Court of Appeal, “Criminal Practice Directions 2015, Amendment No.2,” EWCA Crim 1714, 2016.

238 Honourable Stephen T. Goudge, “Inquiry into Pediatric Forensic Pathology in Ontario: Report,” Ontario Ministry of the Attorney General: 2008, Volume 1, p.7. Hereafter referred to as the *Goudge Inquiry Report*.

results of the Coroner’s Review led directly to the establishment of the *Goudge Inquiry*. Recommendation 141 of the *Goudge Report* indicated that in “cases in which it is sought to set aside convictions based on errors in Dr. Charles Smith’s work identified by the Chief Coroner’s Review, the Crown Law Office – Criminal should assist in expediting the convicted person’s access to the Court of Appeal and in facilitating a determination of the real substantive issues in the cases, unencumbered by unnecessary procedural impediments.”²³⁹

No legal action was taken in three of the 13 cases identified by the Chief Coroner’s Review. All of the remaining 10 cases have now been dealt with at the Ontario Court of Appeal. A brief summary of the outcomes of the cases is set out in the chart below.

Dr. Smith Cases – Post 1991²⁴⁰

Case	Charge at Trial & Disposition	Related Proceedings	Hearing Date at Court of Appeal	Outcome
<i>R. v. Blackett</i> 2018 ONCA 119	August 30, 2001 Charged with 2 nd degree murder. Guilty plea to manslaughter		January 29, 2018	Crown consented to guilty plea being set aside and a new trial being ordered. Charges withdrawn by Crown.
<i>R. v. Brant</i> 2011 ONCA 362	April 21, 1995 Charged with manslaughter. Guilty plea to aggravated assault		May 4, 2011	Crown consented to guilty plea being set aside and an acquittal being entered.

239 Ibid., pp.85-86.

240 The Chart references only those cases that were identified by the Chief Coroner’s Review and were subsequently dealt with by the Court of Appeal for Ontario. It should be noted that the Courts have dealt with other cases in which Dr. Smith gave evidence.

<i>R. v. C.F.</i> 2010 ONCA 691	July 6, 1998 Charged with infanticide. Guilty plea to infanticide.		October 20, 2010	Crown consented to guilty plea being set aside and a new trial. Charges stayed by trial Crown.
<i>R. v. C.M.</i> 2010 ONCA 690	July 27, 1994 Charged with infanticide. Guilty plea to infanticide.		October 20, 2010	Crown consented to guilty plea being set aside and a new trial. Charge withdrawn by trial Crown.
<i>R. v. Kumar</i> 2011 ONCA 120	December 5, 1992 Charged with 2 nd degree murder. Guilty plea to criminal negligence causing death		January 20, 2011	Crown consented to guilty plea being set aside and an acquittal being entered.
<i>R. v. Marquardt</i> 2011 ONCA 281	October 24, 1995 Found guilty of 2 nd degree murder.	January 22, 1998 Court of Appeal dismissed appeal. February 10, 2009 SCC granted extension of time and remanded to Court of Appeal	February 10, 2011	Crown consented to conviction being quashed and a new trial ordered. Charges withdrawn by the trial Crown.

Case Law

In Chapter 18 of the *Goudge Inquiry Report*, Justice Goudge discussed the role of the courts in ensuring the integrity of expert evidence. He made numerous recommendations emphasizing that expert evidence should be received by experts who are properly qualified, who testify within a clearly identified area of expertise, and who base their opinions on science which meets standards of threshold reliability.²⁴¹ A review of recent jurisprudence dealing with expert evidence suggests that our courts continue to strive to give effect to Justice Goudge's recommendations.

Of particular note is the Supreme Court of Canada's decision in *White Burgess*, in which the Court provided a restatement of the *Mohan* test for the admissibility of expert opinion evidence and considered where the expert's duty to the Court fits within that test. Although a civil case, the decision in *White Burgess* applies equally to criminal cases. Since its release, there has been a renewed focus on the impartiality of expert witnesses and *White Burgess* has been considered and applied by trial and appellate courts in the criminal context in numerous cases, some of which are noted below.

Expert Qualifications: The Duty to Give Fair, Objective and Non-Partisan Evidence

a) *White Burgess Langille v. Abbott and Haliburton* 2015 SCC 23

... we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice As observed by Beveridge J.A. in this case [referring to the reasons in the court below], The Commission of Proceedings Involving Guy Paul Morin: Report (1998) authored by the Honourable Fred Kaufman and the Inquiry into Pediatric Forensic Pathology in Ontario: Report (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice: para.105." Other reports outline the critical need for impartial and independent expert evidence in civil litigation.

Justice Cromwell, *White Burgess*, *supra* at para 12

White Burgess involved a civil action between shareholders and the auditors of their company. The shareholders retained a forensic accountant and sought to tender her as an expert in the legal proceedings. The auditors objected to the admissibility of the evidence on the basis that the expert was not an impartial

241 *Goudge Inquiry Report*, Volume 3, pp.470-513.

expert witness. The Supreme Court held that there was no evidence that the proposed expert was biased or acting as an advocate for the party who called her, and found that she was aware of her ultimate duty to the court.

Writing for the Court, Justice Cromwell adopted Justice Doherty's reformulation of the *Mohan* test with "minor adjustments". The first stage of the test focuses on the threshold requirements of admissibility – the four traditional *Mohan* factors (logical relevance, necessity, absence of an exclusionary rule and a properly qualified expert) plus the additional requirement of reliability in cases involving novel or contested science. Evidence that does not meet these requirements should be excluded. The second stage is the residual or gatekeeper stage, where the trial judge balances the potential risks and benefits to ensure that the potential helpfulness of the evidence is not outweighed by the risk that the dangers associated with expert evidence will materialize.

The decision also clarified a debate in the jurisprudence on whether concerns about whether the expert can discharge their duty to the court – will their evidence be impartial, independent, and free of bias – goes to should the evidence be admitted rather than how much weight to attach to it. The Court's answer was that it goes to both. The expert's duty is a central aspect of the threshold requirement. While an expert's independence and impartiality should not be presumed, once an expert testifies that they will fulfill their duty, the burden falls to a party challenging their evidence to show that there is *a realistic concern* that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If they do, the party seeking to call the evidence must rebut the concern on a balance of probabilities. If this burden isn't met, then the evidence "or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded". Even where the expert evidence meets the threshold requirement, the trial judge still has a residual discretion to exclude the evidence under the second or gatekeeper stage of the inquiry.²⁴²

In respect of the application of the test, the SCC made the following additional comments:

- The threshold requirement is not onerous and should not result in trials becoming longer. It will likely be quite rare that an expert's evidence would be excluded for failing to meet it.²⁴³
- A mere employment relationship with the party calling the evidence will be insufficient to meet the threshold. A direct financial interest in the outcome of the litigation, a close familial relationship, or situations where the expert would face professional liability if his evidence is not accepted by the court, will cause more concern.²⁴⁴

242 *White Burgess Langille v. Abbott and Haliburton* 2015 SCC 23 at para 48.

243 *Ibid.*, at paras 47-48.

244 *Ibid.*, at para 49.

- Exclusion will occur only in very clear cases where the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear inability to meet the duty to the court can still be taken into account in the overall prejudicial vs. probative value analysis.²⁴⁵
- The question of a reasonable apprehension of bias does not enter into the admissibility analysis.
- The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill their primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.²⁴⁶

b) *R. v. Tang* 2015 ONCA 470

In *Tang*, the Ontario Court of Appeal applied *White Burgess* in the context of a criminal case that had originally begun as an Ontario Securities Commission (OSC) investigation. At issue on appeal was whether opinion evidence from a forensic accountant who was in the employ of the OSC and involved in the investigation was wrongly admitted at trial as lacking in independence and impartiality. In its endorsement, the Court affirmed that *White Burgess* did not establish a *per se* rule that would automatically disqualify an expert with a prior connection with an investigation and stated that this issue could only be determined with reference to the context and facts specific to the case:

The nature of the prior investigation, the role played by the individual expert in that investigation, and the nature of the proposed expert evidence would all be important considerations in the determination of whether the expert's prior involvement made the case was (sic) one of those relatively rare cases in which an expert's lack of independence or impartiality provided a basis for holding that the expert was not competent to testify. As *Burgess* indicates, in most cases, suggestions that an expert witness lacks independence or impartiality will go to the weight of the expert's evidence rather than its admissibility.²⁴⁷

The Court in *Tang* did not give effect to the objection to the admissibility of the forensic accountant's evidence and noted that, in any event, the bulk of the accountant's evidence related to the tracing of funds and that the few answers that could be considered opinion evidence were not central to the case.

245 *Ibid.*, at paras 49, 54.

246 *Ibid.*, at para 50.

247 *R. v. Tang* 2015 ONCA 470 at para 6.

c) *R. v. McManus* 2017 ONCA 188

In *McManus* two accused were convicted of drug offences at trial. On appeal, they argued that the trial judge erred in admitting the opinion evidence of a police officer about the meaning of language used in text messages. The officer in question had had prior dealings with one of the accused, believed him to be a drug dealer, and had testified at the accused's bail hearing that he believed him to be a member of a criminal organization. The officer was also extensively involved in the investigation in that he had participated in both surveillance of the accused and the execution of a search warrant during which he had discovered cocaine and acted as the exhibits officer. It was also significant that the officer had taken it upon himself to prepare the report analyzing the text messages following the conclusion of the preliminary inquiry at which the judge had observed that the Crown's case was not a strong one.

Writing for the Court, Justice Van Rensburg applied *White Burgess* and found that there was a "realistic concern" that the officer was unable to comply with the duty of an expert to provide independent, impartial and unbiased evidence. In so finding, Justice Van Rensburg commented that "there is a heightened concern with police expert witnesses to ensure their ability to offer impartial expert evidence".²⁴⁸ As the evidence did not meet the fourth *Mohan* criteria, the evidence should not be admitted. This, combined with two other errors, denied the appellants a fair trial. The appeal was allowed and a new trial was ordered.

d) *R. v. Soni* 2016 ABCA 773

In *Soni*, the Alberta Court of Appeal applied *White Burgess* in the context of a charge of dangerous operation of a motor vehicle causing death. The Crown tendered evidence from an accident reconstructionist – a police officer who had been actively involved in other aspects of the investigation, including interviewing the appellant and a co-accused. In so doing he had made it clear that his investigation to that point suggested that the appellant was guilty, and he told one witness that he thought she was withholding evidence. The defence conceded that the officer could give evidence on collision reconstruction and stated that any concerns went to the weight of the evidence. This concession was made with knowledge that *White Burgess* was under reserve and was maintained even when the trial judge expressly asked whether there was any opposition to the officer testifying as an expert on the basis that "playing multiple roles perhaps in a police department eliminates

248 *R. v. McManus* 2017 ONCA 188 at para 67.

your availability as an expert”. The appellant sought to retract that position at the conclusion of the trial. The trial judge agreed with the defence and found that the officer’s evidence lacked the objectivity and impartiality expected of an expert witness. As there was other evidence supportive of his opinion, she was, however, placing diminished weight on it rather than according it no weight at all.

The Alberta Court of Appeal held *White Burgess* does not “compel a trial judge to perform any independent analysis about the admissibility of expert evidence when the parties concede it is admissible”, and that the appellant ought not be permitted to retract his original position on the admissibility of the expert evidence in this case.²⁴⁹ It further held that an employment relationship was not a disqualifying factor: there is “no rule that expert witnesses cannot be investigators, and investigators cannot be experts”.²⁵⁰ Nor, the Court of Appeal held, does “[a]n expert lose objectivity merely because he forms an opinion about the case”.²⁵¹ While the expert ought not to have disclosed his preliminary views of the case to the appellant, the interview was conducted seven months after the accident and there was no suggestion that the officer had prematurely jumped to any conclusions or that he had closed his mind to alternative theories as the investigation progressed. Finally, the Court of Appeal held that, if anything, the trial judge overemphasized the perceived problems with the expert’s evidence. In the Court’s view there was nothing on the record before it “to suggest that the expert’s objectivity was so lacking that his evidence should have been ruled completely inadmissible”.²⁵²

e) *R. v. Natsis* 2018 ONCA 425²⁵³

The appellant was convicted of impaired driving causing death and dangerous driving causing death and sentenced to five years imprisonment. She appealed on grounds that included that the police accident reconstruction officer who gave expert evidence at the trial was unable or unwilling to provide fair, objective, and non-partisan evidence. While the trial judge accepted that there was a realistic concern that the officer might be biased, he accepted that the officer at least believed he was acting independently and was not driven by malice. The trial judge limited the officer’s evidence to “analyses and opinions based directly upon his personal observations, calculations and measurements as documented by his field notes and in the photographs” and speed calculations that were largely confirmed by vehicle data recording systems. The trial judge found that, if circumscribed in this manner, the officer was able to give his evidence impartially. The Court of Appeal found no basis to interfere with the trial judge’s ruling. Justice Pardu, writing for the Court, noted that although the trial judge did not

249 *R. v. Soni* 2016 ABCA 773 at paras 16 & 23.

250 *Ibid*, at para 18.

251 *Ibid*, at para 22.

252 *Ibid*, para 23.

253 *R. v. Natsis* 2018 ONCA 425 (CanLII).

have the benefit of the Supreme Court of Canada's decision in *White Burgess*, he effectively applied the same test, and considered bias at several stages: at the threshold bias inquiry; the bias inquiry; the Mohan admissibility inquiry; and when considering the weight to be given to the officer's evidence. Justice Pardu also agreed that the degree of subjectivity associated with an expert's opinion is a relevant factor in assessing whether conduct suggesting bias leads to the conclusion that the expert will not be able to give evidence independently and impartially. Significantly, in *Natsis*, there was abundant objective evidence supporting the officer's conclusions.

Anecdotal Evidence & the Proper Scope of Expert Testimony

f) *R. v. Sekhon* 2014 SCC 15

The appellant appealed convictions related to the importation and possession of cocaine on the basis that the trial judge improperly relied on evidence from a police expert who went beyond the proper scope of his expertise when he testified that, throughout his career, he had never encountered a courier who did not know what they were carrying. The majority of the British Columbia Court of Appeal disagreed, Justice Newbury dissenting.

At the Supreme Court of Canada, both the majority and the dissent held that the police expert had strayed outside of the area of appropriate expert testimony. The evidence was neither relevant nor necessary, and had significant prejudicial potential. The majority held:

The inherent danger of admitting such evidence is obvious — as Newbury J.A. pointed out:

Anecdotal evidence of this kind is just that – anecdotal. It does not speak to the particular facts before the court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an “expert”.²⁵⁴

The majority stressed the need to be vigilant in ensuring that experts remain within their appropriate areas of expertise, and stated:

Given the concerns about the impact expert evidence can have on a trial – including the possibility that experts may usurp the role of the trier of fact – trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges – including those in judge-alone trials – have an ongoing duty to ensure that the expert evidence remains within its proper scope. It

254 *R. v. Sekhon* 2014 SCC 15 at para 50.

is not enough to simply consider the Mohan criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence.²⁵⁵

The majority found that the trial judge's reliance on the evidence was minimal in the context of what was an otherwise overwhelming case and held that, accordingly, no miscarriage of justice had been occasioned by the evidence. The dissent did not agree and would have ordered a new trial.

g) *R. v. Dominic* 2016 ABCA 114

In *Dominic*, the Alberta Court of Appeal considered *Sekhon*, again in the context of expert evidence given by a police officer in relation to drug trafficking. The appellant was arrested with 11 grams of cocaine in individually wrapped packages, and was also in possession of \$600 cash, money, cell phones with no information on them, and a rental car. The appellant's defence was that he was not a dealer but simply a heavy user of cocaine. The police expert was qualified to give expert opinion evidence on a variety of issues related to cocaine use and trafficking, including the practices and habits of cocaine traffickers, but not on the issue of consumption patterns. The police expert testified that cocaine is a "binge drug" where regular users would commonly buy no more than two or three grams at a time, and that the circumstances of the appellant's cocaine possession was consistent with drug trafficking rather than heavy personal use. The defence challenged the officer's qualifications on the basis that his experience in relation to regular cocaine users was dated, was based on anecdotal evidence, and was limited to regular rather than heavy users of cocaine.

The Alberta Court of Appeal dismissed the appeal, holding that the expert officer's experience was lengthy, broad, and intensive and included training courses and extensive experience with 50 drug informers over a 10-year period. The Court distinguished *Sekhon*, saying that it had not rejected anecdotal evidence *per se*. It stated that to exclude all anecdotal evidence was:

... tantamount to challenging expertise gained through experience. "Anecdotal evidence" is not a legal concept or a term of art but simply a way to describe second-hand evidence. It does not define, must less preclude, admissibility of that evidence. Being a qualified expert means having "acquired special or peculiar knowledge through study or experience": *Mohan, supra* at 25. The mere fact that police experience about drug use is gained through information received from others does not, by itself, diminish the validity of the special

255 *Ibid.*, at para 46.

knowledge acquired in this manner. The reality is that experience is often based on the accumulated wisdom of what some might describe as anecdotal information learned on the job.²⁵⁶

Even handed approach to defence and Crown experts: DNA Evidence

h) *R. v. Awer* 2017 SCC 2²⁵⁷

The accused was convicted of sexual assault. A critical piece of evidence was the presence of the complainant's DNA on a penile swab taken from the accused. Both the Crown and the defence called experts who gave opinion evidence on what inferences could be drawn on how the complainant's DNA was transferred to the accused's penis. The Crown expert testified that wet materials would transfer more DNA than dry ones. Relying on studies and his experience, he opined that contact with a dry substance could not result in the large amount of the complainant's DNA found on the accused's penis. The defence expert testified that the mode of DNA transfer could not be conclusively determined and that there was no reliable scientific basis to support the Crown expert's opinion. The trial judge accepted the evidence of the Crown's expert and relied on it and other evidence to find that the only reasonable inference to be drawn was that the accused had non-consensual sexual contact with the complainant. An appeal to the Alberta Court of Appeal was dismissed, with dissenting reasons.

The Supreme Court of Canada allowed the appeal and ordered a new trial on the basis that the trial judge had subjected the evidence of the defence expert to a materially higher level of scrutiny than that of the Crown expert. The Court did not decide whether the evidence from the Crown's expert was admissible or not. Although the defence expert had challenged the evidence of the Crown's expert as speculative and without scientific foundation, defence counsel at trial had not cross-examined the Crown's expert on this. Accordingly there was "no way of telling whether it was speculative, scientific, or somewhere in between". This issue would have to be determined on a *voir dire* in the event the Crown sought to tender this evidence on a re-trial.

Scope and Necessity of Expert Evidence: Psychiatric Evidence Going to Disposition

i) *R. v. Suarez-Noa* 2017 ONCA 627

Mr. Suarez-Noa was charged with the second-degree murder of his common law partner. While he admitted to stabbing and killing her, he claimed that he did not have the intent for murder or, alternatively, that he acted under provocation such

256 *R. v. Dominic* 2016 ABCA 114 at paras 22, 31-32.

257 *R. v. Awer* 2017 SCC 2, [2017] 1 SCR. 83.

that he was guilty only of manslaughter. The jury found him not guilty of second-degree murder but guilty of manslaughter. The Crown appealed on the basis that provocation ought not to have been left to the jury and that the trial judge erred in admitting the evidence of a defence psychiatrist.

The Ontario Court of Appeal allowed the second ground of appeal, set aside the acquittal and ordered a re-trial on the charge of second-degree murder. Citing *R. v. Robertson* [1975] O.J. No. 1658, the Court noted that psychiatric opinion evidence going to an accused's disposition is admissible only in limited circumstances – where the disposition in question constitutes a characteristic feature of an abnormal group such that the jury can receive appreciable assistance from the expert on a matter outside of the knowledge of lay people. In this case, the psychiatrist's opinion was not based on any diagnosis of a recognized psychiatric disorder, but “reflected his personal opinion on what may have been in Mr. Suarez-Noa's mind”.²⁵⁸ The Court held that the psychiatrist's opinion went beyond the proper ambit of expert psychiatric opinion of disposition and that it was also unnecessary in that the jury had the same, indeed more, information about Mr. Suarez-Noa's state of mind and the factors that may have been relevant to his conduct than the expert did.

The Reliability of Expert Evidence: Meaning of Tattoos

j) *R. v. Abbey* 2017 ONCA 640²⁵⁹

This case is a “sequel” to *R. v. Abbey* 2009 ONCA 624, which was discussed in the *2011 Report*. In its 2009 decision, the Ontario Court of Appeal ordered a retrial following an acquittal on the basis that the trial judge had erred in excluding an expert's opinion on the meaning of a teardrop tattoo engraved on the accused's face within months of the murder. The Crown tendered the expert evidence on the retrial and Abbey was convicted. He appealed his conviction, relying on fresh evidence which called into question the credibility and reliability of the statistical evidence and studies on which the expert purported to base his opinion. The Court of Appeal found that the fresh evidence showed the expert evidence on the meaning of a teardrop tattoo was too unreliable and that had the trial judge been aware of the fresh evidence, he would not have admitted it. The Court found that the evidence had played a prominent role in the Crown's case. The fresh evidence was admitted and a new trial was ordered.

258 *R. v. Suarez-Noa* 2017 ONCA 627 at para 83.

259 *R. v. Abbey* 2017 ONCA 640.

Admissibility of Drug Recognition Examiner: Knowledge of Underlying Science

k) *R. v. Bingley* 2017 SCC 12

In *Bingley*, the Supreme Court of Canada considered the qualifications of a certified drug recognition examiner (DRE). Mr. Bingley was observed driving erratically, pulling into a parking lot and striking a car. He exhibited symptoms of impairment but passed a roadside screening device for alcohol. He failed a field sobriety test and was taken to the police station where a drug recognition evaluation was conducted by a DRE. The evidence of the DRE was admitted at his first trial without the necessity of a *voir dire*, but he was acquitted. The Crown successfully appealed. At his second trial, the trial judge held that s. 254(3.1) of the *Criminal Code* did not allow for the automatic admissibility of the DRE's evidence and that the evidence was not admissible under common law principles because the DRE expert was not trained in the science underlying the drug recognition procedure. The Court of Appeal held that s. 254(3.1) implicitly allows the automatic admissibility of this kind of evidence.

The majority of the Supreme Court of Canada held that while s. 254(3.1) gives the police “the investigative tools” to investigate such crimes, it does not dictate that the evidence is automatically admissible – the common law rules apply. In this case, the question was whether the DRE expert had special expertise to meet the fourth *Mohan* factor. The Court stated that this factor requires only that the witness have expertise outside the experience and knowledge of the trier of fact. Certified DRE's are specially trained in how to administer and interpret the 12-step drug recognition evaluation and, as such, possess knowledge outside of the experience of the trier of fact and that knowledge of the science underlying the evaluation is not a precondition to the admissibility of a DRE's opinion. Expert witnesses are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only where the science is novel. The scope of a DRE's expertise is in the application of the prescribed 12-step evaluation, not its scientific foundation.²⁶⁰

In respect of the underlying reliability of the 12-step evaluation, the majority held that by establishing a uniform evaluative framework Parliament had established that the 12-step evaluation is sufficiently reliable for the purposes of determining impairment. No further evaluation of the reliability of the steps mandated by the Regulations was required and any challenge to the underlying effectiveness of the evaluation would require a challenge to the legislative framework itself.²⁶¹

²⁶⁰ *R. v. Bingley* 2017 SCC 12 at para 22.

²⁶¹ *Ibid.*, at para 25.

Judicial Notice of Forensic Literature – Fingerprint Analysis

l) *R. v. Bornyk*, 2015 BCCA 28

The accused was charged with breaking and entering. The Crown relied primarily on the evidence of a police officer qualified to give expert evidence on the identification and comparison of fingerprints. The trial judge reserved his decision following the conclusion of the evidence. Before rendering a decision, the judge sent counsel four articles critical of fingerprint identification evidence. In acquitting the accused, the judge referred to these articles and found areas of concern with the expert's evidence on matters that were not put to the expert witness and which appeared to have been derived from the articles located by the judge.

The British Columbia Court of Appeal ordered a new trial. It held that a judge may only rely on evidence presented at trial, except where judicial notice may properly be taken. Articles commenting on forensic science are not matters of which the judge could take judicial notice. The trial judge stepped beyond his proper neutral role and compromised the appearance of judicial independence essential to a fair trial. While he sought submissions on the material he had located, by the very act of his self-directed research he assumed the multi-faceted role of “advocate, witness and judge”. The trial judge also erred by conducting his own analysis of the fingerprints, absent the assistance of the expert witness. The very point of having an expert witness in a technical area is that the specialized field requires elucidation in order for the court to form a correct judgment.²⁶²

As a postscript to this case, the accused was again convicted following a re-trial (see *R. v. Bornyk* [2015] B.C.J. No 94). Significantly, however, the trial judge presiding over the retrial heard the evidence of two police identification experts, as well as two other experts on the integrity of fingerprint identification evidence more generally.

Fresh Hair Analysis Evidence Admitted at Supreme Court of Canada

m) *R. v. Hay* 2013 SCC 61²⁶³

Hay and a co-accused were found guilty of first degree murder in the shooting of two men. The Crown's case against Hay included hair clippings found in the garbage of the bathroom nearest his bedroom and hair clippings in an electric razor found in his nightstand. Hay had very short hair when he was arrested and the Crown's theory was that he had shaved his head after the shootings in order to disguise his involvement. This evidence was also said to explain why an

262 *R. v. Bornyk*, 2015 BCCA 28 at paras 8-11.

263 *R. v. Hay*, 2013 SCC 61.

eyewitness described the second shooter as having longer and different hair than Hay's, and why another witness was unable to identify him from an arrest photo.

Hay's appeal to the Court of Appeal for Ontario was dismissed. While his application for leave to appeal to the Supreme Court of Canada was pending, Hay filed a motion to compel the Crown to release hair clipping evidence for forensic testing to determine from what part of the body the clippings came. The Court allowed the motion and Hay ultimately sought to tender the results of that testing as fresh evidence on the appeal.

The fresh evidence from two defence experts was that the hair clippings were predominantly facial as opposed to head or trunk hair. On the basis of a paper review, the Crown's experts concluded that there was no evidence to support the proposition that the hair clippings represented a head shave. Given the Crown's reliance on the hair clippings at trial the fresh evidence could reasonably have affected the result. The motion to adduce fresh evidence was granted and a new trial was ordered. The Crown subsequently withdrew the charge, stating "it is no longer in the public interest to continue with the prosecution of Mr. Hay."

VII. OTHER DEVELOPMENTS RELATED TO FORENSIC SCIENCES & EVIDENCE IN CANADA

a) **Centre for Forensic Science and Medicine (CFSM) at the University of Toronto, *Forensic Science in Canada: A Report of Multidisciplinary Discussion***

Forensic science in Canada is at a critical juncture. Both public and judicial confidence in our practices have been eroded by several high profile inquiries into the damage wrought by faulty forensic evidence. We have learned that reliable forensic science is a cornerstone of any effective justice system. However, in the past few years there have been considerable improvements, much to the benefit of the public. In this report, forensic experts from across Canada describe the current state-of-the-art in forensic science and make recommendation to improve services. The unanimous conclusion is that the forensic sciences must grow and develop in Canada to enhance public health, public safety, and justice. Continuous and sustainable improvement in all the disciplines of forensic sciences will require the coordinated efforts of academic institutions, government, stakeholders in the justice sector, and forensic scientists.²⁶⁴

CFSM, *Forensic Science in Canada: A Report of Multidisciplinary Discussion*, 2013

264 Centre for Forensic Science & Medicine, "Forensic Science in Canada: A Report of Multidisciplinary Discussion," 2013, p.3.

In 2013, the Centre for Forensic Science and Medicine (CFSM) at the University of Toronto published *Forensic Science in Canada: A Report of Multidisciplinary Discussion* (the CFSM Report).²⁶⁵ The CFSM Report was the product of discussions held at the CFSM on the state of forensic sciences in May 2012. These discussions were held in direct response to well-known public inquiries and cases, including cases of wrongful convictions, in which forensic science played a key role. They were also responsive to publications of the National Academy of Sciences (NAS) in the United States, and in particular its 2009 publication *Strengthening Forensic Science in the United States: A Path Forward*, which “painted a bleak picture of the state of forensic sciences in the United States and cast doubt on the reliability of evidence coming from experts working in long-established forensic sciences”.²⁶⁶ Fundamental to the discussions was the recognition of the paradigm shift to an evidence-based form of forensic scientific inquiry, and the need to bridge the gap between expectations and deliverables in expert opinion evidence in the forensic sciences.²⁶⁷

The CFSM Report surveyed the state of nine key disciplines within forensic sciences: pathology; anthropology; odontology; nursing; entomology; physical evidence; toxicology; biology; and psychiatry. It looked at a variety of aspects within each discipline, including the history or development of the discipline, the provision of services (including legal/legislative frameworks, facilities, and the existence of professional standards); education (including qualifications/certification and continuing education); research; and the existence and role of professional bodies and organizations. It did not advocate for specific systemic reforms as the NAS report did, nor did it make recommendations on how principle stakeholders and clients of forensic sciences should make use of the report. Rather, it identified themes, conclusions and made general recommendations designed to assist the academic and public sectors in defining and funding strategic priorities to strengthen forensic science in Canada. Its aim was to engage stakeholders and act as a catalyst for further activities and the development of a national strategic plan for forensic science in Canada.

The CFSM Report drew six general conclusions, paraphrased as follows:

1. That forensic science wants for lack of a national granting agency. Because forensic science generates novel questions and issues distinct from mainstream scientific problems, it does not fit well into the mandate of existing funding agencies.

265 Ibid.

266 Ibid., Forward by Marc Rosenberg, p.1.

267 Ibid., p.9.

2. There is no culture of research in Canada's forensic science community, possibly due to workload and lack of funding. The lack of research culture directly and negatively impacts on our capacity to train forensic scientists and practitioners.
3. The low number and geographically scattered nature of Canada's population makes it difficult to create a critical mass of scientists and practitioners in any one place, and creates a dissonance between the academic and forensic science communities.
4. Forensic science has suffered from the patchwork of provincial and federal agencies, responsibility and paymasters, which impede the development of unified strategies.
5. There is a lack of coordination of training and recruitment amongst universities, institutions and agencies. There is no agreement on the content and standards of training for most disciplines on a national level, with a few exceptions such as forensic pathology and forensic psychiatry.
6. Credentialing of forensic scientists is absent in some disciplines, fragmentary in others, not universally accepted as necessary or desirable by some, and not lawfully mandated for most.²⁶⁸

The CFSM Report's recommendations focused on four main areas: research; education and training; best practices; and administration and regulation.

Research: The CFSM Report made a variety of recommendations to foster a research culture in Canada, including a recommendation that research granting agencies and universities recognize and fund research and programs in the forensic sciences. It also recommended the development of a statistical, probabilistic approach to problems in forensic science, the use of objective and evidence based methodologies, and the encouragement of research addressing cultural dimensions of the practice of forensic science.²⁶⁹

Education & Training: It recommended multidisciplinary cross-training between scientists, police, lawyers and judges, and specifically recommended continuing education in key forensic sciences for judges. It recommended that scientists receive training on best practices in report writing and giving expert witness testimony, the development of internet-based training modules for forensic-identification officers and scientists, and increased graduate and postgraduate degrees and training programs in key forensic disciplines.²⁷⁰

268 Ibid., p. 101.

269 Ibid., p.103.

270 Ibid., pp.102-3.

Best Practices: It recommended the development and circulation of standards and best practices, including international standards where appropriate, and the development of and participation in professional certification programs. It emphasized the need for all practitioners to “embrace professionalism and adopt strong codes of ethical practice” and to adopt a “culture of scientific neutrality . . . irrespective of their paymaster.” It also recommended a systemic response to error: “We note with regret that, at present, the public inquiry is the primary mechanism for remediation after a miscarriage of justice occurs, if the error is detected at all.”²⁷¹

Administration and Regulation: It recommended the development of workload standards, MOUs between fee-for-service forensic scientists and service end-users, and funding models that emphasize full-time personnel over fee-for-service providers, especially in the areas of forensic nursing and pathology. It also recommended the development of peer review and other quality management systems, and that the “policies and procedures of medicolegal death investigation systems should be brought into alignment with current thinking on the best practices in forensic pathology”.²⁷²

The CFSM Report was a critical step by members of key forensic disciplines in Canada to engage in self-examination on a national scale and to identify areas for and barriers to improvement. At the same time, it acknowledged the limitations of what it could do. As stated in the concluding remarks to the report:

The science that serves as the underpinning of so many court cases in Canada requires scrutiny. The volunteerism, good intentions, and *ad hoc* organizational efforts of Canada’s forensic scientists are no substitute for a thoughtfully designed system of service delivery. Other jurisdictions, including the United States, have begun the process of critically evaluating these systems, and Canada cannot afford to lag behind her peers in this respect.²⁷³

Regrettably, to date, the CFSM Report has not received the attention it deserves, and Canada still lacks a national strategy or multidisciplinary forum in which to continue to address issues related to forensic sciences. As the late Mr. Justice Marc Rosenberg stated in his Forward to the CFSM Report:

As the *Driskell*, *Morin* and *Goudge* inquiries show, we ignore the state of forensic sciences at our peril.²⁷⁴

271 Ibid., p.103.

272 Ibid., pp.103-4.

273 Ibid., pp.104.

274 Ibid., Forward by Marc Rosenberg, p.2.

b) DNA: Probabilistic Genotyping

A recent change in forensic DNA analysis involves the use of probabilistic genotyping. Probabilistic genotyping involves the use of computers to aid scientists with the interpretation of forensic DNA profiles. The underlying technology remains unchanged: where sufficient DNA is gleaned from a crime scene or a person, selected regions of DNA known as short tandem repeats (STR's) are amplified using polymerase chain reaction (PCR) and a profile is derived from the results. The change is in how these results are interpreted. Formerly, the results were interpreted solely by qualified experts through the application of empirical guidelines and professional judgment. Now, an expert's interpretation is aided by both the same empirical guidelines as well as computer algorithms based on biological modelling, statistical theory, and probability distributions. This new method has produced impressive increases in a forensic laboratory's ability to interpret forensic DNA profiles, particularly those involving complex mixtures.²⁷⁵

The shift to probabilistic genotyping requires a change in how forensic DNA results are reported. An exclusion remains an exclusion and will be reported as such. In a case of non-exclusion, random match probability statistics will no longer be used as they are incompatible with probabilistic genotyping. Instead, a likelihood ratio will be reported such as the "evidence is 1 million times more likely if the DNA profile originates from Jane Doe than if it originates from an unknown, unrelated individual." Essentially, a likelihood ratio provides a mathematical estimate of how well one particular hypothesis or proposition explains the DNA results relative to another.²⁷⁶ This form of expression seems awkward at first but makes sense upon reflection. A likelihood ratio, in the example above, is the probability of the evidence under the proposition that it originates from Jane Doe divided by the probability of the evidence under the competing proposition, i.e. that it originates from an unknown, unrelated individual. A result in favour of the Jane Doe proposition will be a number greater than one, potentially a very large number. A result in favour of an unknown, unrelated individual will be a number smaller than one. The statistic, then, focuses on the probabilities of DNA results under given propositions (which are the proper province of the expert) as opposed to the more global question of the probabilities of the propositions themselves (which is the province of the trier-of-fact). The statistic focuses on the DNA results. It does not define the probability of guilt.

275 See: Neil Fernandopulle, "DNA Warrant Comparison Samples," Ontario Ministry of Community Safety and Correctional Services: October 7, 2016, <https://www.mcscs.jus.gov.on.ca/english/CentreForensicSciences/TechnicalInformationSheets/Biology/DNAWarrantComparisonSamples.html>. This section represents the Subcommittee's attempt to synthesize information received from various scientists at the Centre of Forensic Sciences among others. Any errors are those of the Subcommittee.

276 See: Centre of Forensic Sciences, *Improving the Interpretation of Complex DNA Mixtures with Probabilistic Genotyping -- A Guide to STRmix for Clients*, Ontario Ministry of Community Safety and Correctional Services, <https://www.mcscs.jus.gov.on.ca/english/CentreForensicSciences/TechnicalInformationSheets/Biology/CFSTechnicalInformationSheetsBiologyGuideSTRmix.html>.

The particular form of probabilistic genotyping software chosen by public Canadian forensic laboratories to date, STRmix™, has received a high level of acceptance in courts in the United States, the United Kingdom, Australia, and New Zealand. The Centre of Forensic Sciences in Ontario began employing STRmix™ in selected cases in August 2016. It is now available in most cases submitted for DNA analysis, other than those submitted through the Centre's High Volume Service. Québec's forensic laboratory, le Laboratoire de sciences judiciaires et de médecine légale du Québec, is currently validating STRmix.™

c) Legislative Developments

Ontario: *Forensic Laboratories Act*

As a practical matter, most large forensic laboratories are already accredited on a voluntary basis. However, some laboratories engage in forensic testing without accreditation or, as was the case with the Motherisk Drug Testing Laboratory, without even an appreciation that they are operating as a forensic laboratory. As Motherisk illustrated, the risk inherent in the operation of an unaccredited forensic lab can be extremely high.

On March 8, 2018 Ontario passed the *Forensic Laboratories Act*. The *Act* seeks to ensure that forensic laboratories in Ontario have common operational standards. Accreditation is to be done by accreditation bodies using the International Organization for Standardization (ISO) 17025 standard. The accreditation process includes proficiency testing, annual audits, performance reports, surveillance visits, management reviews and a code of conduct. It also requires that reports on testing conducted in the laboratory provide specific information on a form to be prescribed by the Regulations. The *Act* provides for regular inspections and enforcement mechanisms. In cases of non-compliance it contemplates warnings, suspensions, revocations and fines of up to \$30,000 for a first offence and \$50,000 for second and subsequent offences. The *Act* also provides for an advisory committee to advise the Minister.

VIII. UPDATED RECOMMENDATIONS

The recommendations of the *2005* and *2011 Reports* continue to be relevant and are endorsed by the Subcommittee. Education, in particular, is a continuing and continual priority. In addition, the following additional recommendations are made.

1. The federal, provincial and territorial governments should support the creation of a permanent national multidisciplinary group to study and make recommendations concerning aspects of forensic sciences in Canada.
2. The federal, provincial and territorial governments should consider amendments to the *Criminal Code* and other provincial legislation, including rules of criminal procedure, to codify, clarify and enhance the common law rules concerning the admissibility of expert opinion evidence.
3. All levels of court should consider amendments to Practice Directions concerning the requirements for the admissibility of expert opinion evidence.

CHAPTER 7 – EDUCATION

I. INTRODUCTION

As various Canadian public inquiries have taught us, education and training to justice system participants can reduce the risk of wrongful convictions. Further, it is important that the education and training be targeted to the role of individual justice system players, and that it be made a regular component of training and education regimes to ensure it is sustained. Ensuring ongoing training and education is an important method to build both general awareness of the causes of wrongful convictions, and also to provide specific strategies that will reduce the risk.

Education about the causes of wrongful convictions and strategies to prevent them makes an important contribution to achieving the overarching goal of the *2011 Report*: promoting continuing vigilance against the key risk factors that contribute to wrongful convictions. As the *2005 Report* stated:

By educating Crowns, defence, police, members of the judiciary, forensic scientists and last but not least the public at large, we may be able to prevent wrongful convictions, thus promoting a strong, fair justice system and public confidence in the administration of justice. Indeed, the Morin and Sophonow Inquiries both identified the education of justice participants as a key aspect of any response to wrongful convictions and as a means to prevent them in the future.²⁷⁷

II. 2011 RECOMMENDATIONS

1. A National Forum on the Prevention of Wrongful Convictions, co-sponsored by the Heads of Prosecutions Committee and the Canadian Association of Chiefs of Police, should be held to provide national leadership and direction.
2. The following options for educational venues should be considered:
 - a) joint educational sessions involving Crowns, police, defence and forensic scientists;
 - b) specialized conferences, courses and educational materials for police;
 - c) specialized conferences for Crowns, as well as segments in continuing education programs;

277 See: The Honourable Peter Cory, Commissioner, “The Inquiry Regarding Thomas Sophonow,” Manitoba Justice: 2001, available at: <https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1>.

- d) judicial information sessions;
 - e) law school courses;
 - f) bar admission course; and
 - g) education opportunities for the defence bar.
3. The following educational techniques should be considered:
- a) presentation of case studies of wrongful convictions and lessons learned;
 - b) small group discussions and role-playing, demonstrations of witness interviews, and conducting photo-lineups;
 - c) on-line training for Crowns and police;
 - d) distribution of educational materials/policies on CD-ROM;
 - e) video-linked conferences;
 - f) participation of psychologists, law professors and criminologists in educational conferences;
 - g) guest speakers, including the wrongfully convicted; and
 - h) regular newsletters on miscarriage of justice issues.
4. The following educational topics should be considered:
- a) role of the Crown and Attorney General;
 - b) role of the police;
 - c) tunnel vision;
 - d) post-offence conduct and demeanour evidence;
 - e) frailties of eyewitness identification;
 - f) false confessions;
 - g) witness interviews;
 - h) alibi evidence;
 - i) jailhouse informants;

- j) ineffective assistance of defence counsel;
 - k) forensic scientific evidence and the proper use of expert evidence;
 - l) benefits of DNA evidence;
 - m) disclosure;
 - n) charge screening;
 - o) conceding appeals / fresh evidence.
5. Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.
 6. Any educational plan for the prevention of miscarriages of justice should include a public communication strategy to advise the public that participants in the criminal justice system are willing to take action to prevent future wrongful convictions.

III. THE CURRENT STATE OF TRAINING FOR POLICE AND PROSECUTORS IN CANADA

In the *2011 Report*, considerable information was gathered about initiatives underway across Canada for prosecution services and police. For this report, the Subcommittee decided that there would be a benefit to conducting a quantifiable analysis to understand the current state of training for police and prosecution agencies regarding the issue of wrongful convictions. To gather the data necessary, surveys were developed and administered to police agencies, police training institutes and prosecution services in Canada.

A total of 42 police agencies, ten police training institutes, and ten prosecution services (one representative per agency) responded to the survey.

Methodology

The surveys were designed electronically using the Survey Monkey software program. This software allows for anonymity of responses and pre-programmed “logic flow” to direct respondents to relevant questions. This program allows respondents to respond to both quantitative and open-ended questions.

The surveys were sent to key individuals within each organization so that a representative could complete the survey on behalf of the organization (i.e., someone who is familiar with training courses). An email invitation was sent indicating the purpose of the survey and the length of time the survey would be available to complete.

Key Findings

- The majority of respondents from all three sample groups reported that their agency does not offer a specific course on wrongful convictions.
- The majority of respondents from all sample groups indicated that their agency does offer other training/courses that contain some material on wrongful convictions; the police survey and police training institutes reported that this material is approximately 10 percent of the training and two respondents from Crown reported that the material is 10 percent and 20 percent.
- The police agencies indicated that it is often the Major Case Management, Major Crime, or General Investigative Techniques courses that offer some wrongful conviction material.
- The majority of representatives from all three samples support the development of a new national course on preventing wrongful convictions.
- The preferred delivery method, should a new course be developed, is either online or a combination of on-line and in-class delivery.

a) Police Agencies: Key Findings

Sample Summary

A total of 42 police agencies (one representative per agency) responded to a survey designed to assess current practices in training police officers on wrongful convictions and interest in future training. (There are approximately 150 police services across Canada.) Fifteen agencies indicated that they had more than 500 officers (with an average of 1,367 sworn members). The remaining agencies had between eight and 413 sworn members.²⁷⁸

²⁷⁸ The list of participating police agencies is provided in Appendix D.

Courses Identified with a Wrongful Conviction Component

Of the 42 responding police agencies, half indicated they had investigative courses that included material on wrongful convictions as a component of the course.

These courses included:

- Team Commander
- Major Case Management
- Negligent Investigations
- General Investigation and Major Crime Investigation
- Forensic Interviewing
- Undercover Investigations
- Recruit Training

Respondents were asked to describe the subject areas covered in the various training courses that included a component of wrongful convictions:

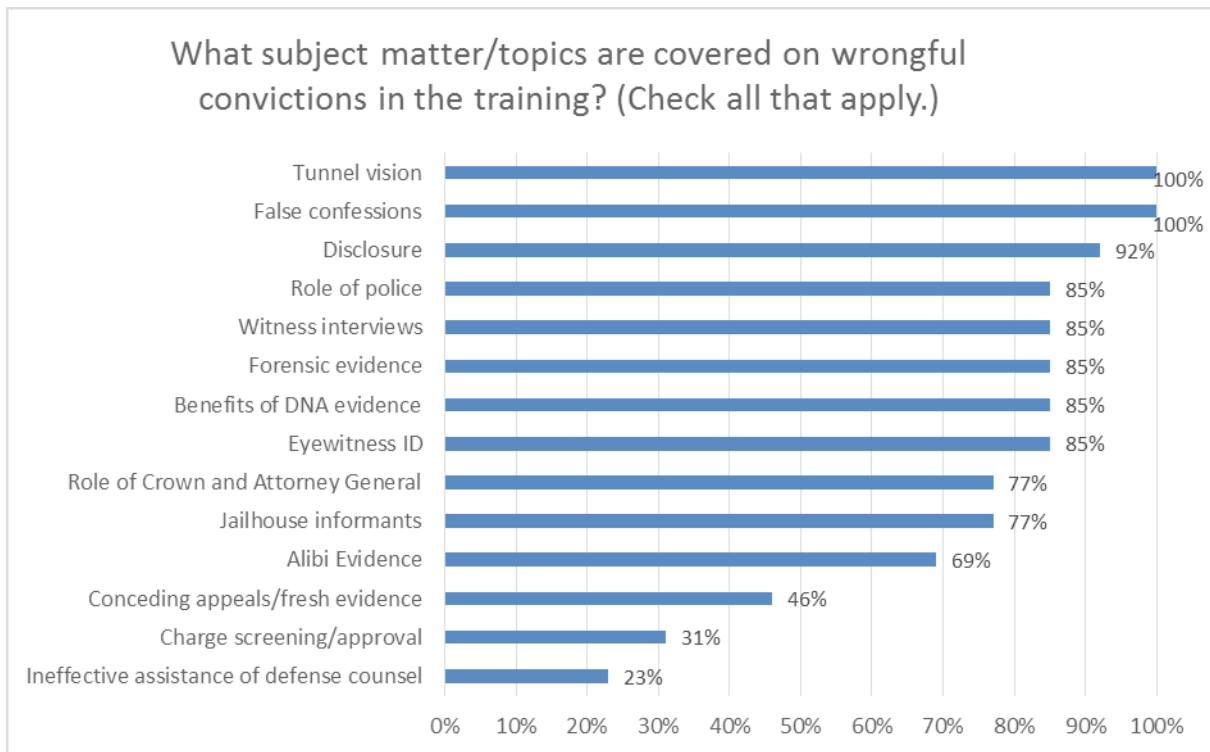
- Role of Crown and Attorney General
- Role of the Police
- Tunnel Vision
- Eyewitness Identification
- False Confessions
- Jailhouse Informants
- Alibi Evidence
- Witness Interviews
- Ineffective Assistance of Defense Counsel
- Forensic Evidence
- Benefits of DNA Evidence
- Disclosure
- Charge Screening/Approval
- Conceding Appeals/Fresh Evidence

Wrongful Convictions Training Summary

Forty police agencies (98 percent of the agencies that responded) reported that they do not have a specific course on the prevention of wrongful convictions for police officers. One agency indicated that they did have a specific course, but the respondent did not answer any subsequent questions about their wrongful convictions course.

- While 21 police agencies (53 percent) offer investigative training courses that contain some material on the prevention of wrongful convictions, 19 agencies (48 percent) did not have a course that has any material on wrongful convictions.
- Of the 21 agencies that had investigative courses with wrongful conviction material, 12 agencies provided the name(s) of their investigative course that contains material on wrongful convictions. Major Case Management, Major Crime, and General Investigative Techniques were the three most commonly mentioned courses that are currently available and contain components of curriculum on wrongful convictions. The intended audience for these courses was predominantly Detectives/Detective Constables (92 percent), Constables (62 percent), Sergeants/Staff Sergeants (38 percent), and Upper Management (15 percent) (as depicted in the histogram below).
- Of the 12 responses, 10 agencies indicated that the material on wrongful convictions comprises 10 percent of the material in the course (two respondents indicated that the material on wrongful convictions is 90 percent or more of the course).
- The majority of these courses are delivered in-class (for 92 percent or 11 agencies) with one agency using a combined in class and on-line delivery method.
- Respondents were asked to choose from a list of topics to indicate which particular wrongful conviction subject matter/topics is covered in the training. The survey findings reveal that tunnel vision and false confessions were covered in all the courses (from all agencies that indicated their investigative courses have material on wrongful convictions).

The histogram below presents the topics that are covered along with the frequency:



Learning Objectives

When asked whether the course has learning objectives, seven respondents indicated that the training does have learning objectives. When asked to describe the objectives, the responses were as follows:

- Historical cases of wrongful convictions, interviewing methods to test for and protect against false confessions;
- Mainly proper collection of evidence;
- Part of general investigative techniques course;
- No, not specific to wrongful conviction;
- Principles of major case management;
- Most of it is built in as part of the training to be an effective investigator.

Evaluation Component

- Eighty-three percent (10 agencies) indicated that there is an evaluation/exam upon completion of the training.
- Seventeen percent (2 agencies) indicated that there is no evaluation/exam upon completion of the training.

The Development of a National Course on Preventing Wrongful Convictions

- Ninety-six percent of the respondents (27 agencies) support the development of a new national course on preventing wrongful convictions (1 agency did not).
- Forty-six percent (13 agencies) would prefer an online course.
- Forty-six percent (13 agencies) would prefer a combination of on-line and in-class course.
- Seven percent (2 agencies) would prefer an in-class course.

Areas for Improvement

Eighteen individuals responded with areas for potential improvement and key themes revolved around the general need for more training. Below are select quotes:

- I would like to see this topic integrated in some of our internal investigative and interviewing courses.
- In addition to learning about the wrongful convictions that have unfortunately occurred in the past, would be good to describe some success stories of wrongful convictions avoided etc.
- More case reviews of what went wrong in other investigations.
- Although we briefly cover it in various courses, it would be nice to have a formalized course.
- Developing an online course for all members.
- Always room for improvement in the evolution of training courses.

Further Comments/Recommendations on Training for Police

Fourteen responses were received when asked to provide additional comments or recommendations on training police in the prevention of wrongful convictions. Three responses indicated they did not have any further suggestions. The remaining comments are provided below:

- Make sure to keep hold backs in your investigation for yourself and search for corroboration with your suspect confessions.
- Consistent message of “follow the evidence” rather than trying to make things fit the way you expect them to. You will often be surprised sometimes how things really happened. Always nice to have a victim/family of victim component for ‘buy-in’.
- Recommend standardizing provincial training, use actual cases from Subject Matter Experts.
- I was working the VPD (Vancouver Police Department) on building a Preventing Wrongful Convictions course within the VPD. This is on our radar for development for 2017 as we have no training on this in-house.
- The utilization of CKPN (Canadian Police Knowledge Network) for a specific course on wrongful convictions would be effective and efficient.
- You have to ensure that your supervisors have the (key skills and abilities) to review and monitor investigations to avoid wrongful prosecutions and convictions.
- Training needs to bring together elements discussed in Investigative Interviewing, GIT, APT, Warrant Course etc., and expand on each in relation to preventing wrongful convictions. (i.e., bad confessions, poor interviewing, following the evidence, knowing your authorities etc.)
- Would definitely support the development of a national curriculum on this topic.
- Emphasis on quality investigations and following all investigative avenues. Use of a peer review process to ensure a dispassionate investigative outcome was reached and that all reasonable leads followed.
- Having been involved in Ontario MCM exec steering committee and the Kaufman Hearings, I see great jeopardy in the evolving work being done on cold cases. It has potential to affect many police services if we do not agree on standards to establishing retroactive review and the rehabilitation of evidence.

Current programs being offered on homicide and major case management (in Ontario) are for the development of investigators to provide for more professional and thorough investigations. Best practices and case reviews form an integral part of the learning. Ongoing development through conferences such as the OHIA (Ontario Homicide Investigators

Association) annual Homicide Conference review investigations and provide current insight into best practices.

b) Police Training Institutes: Key Findings

Sample Summary

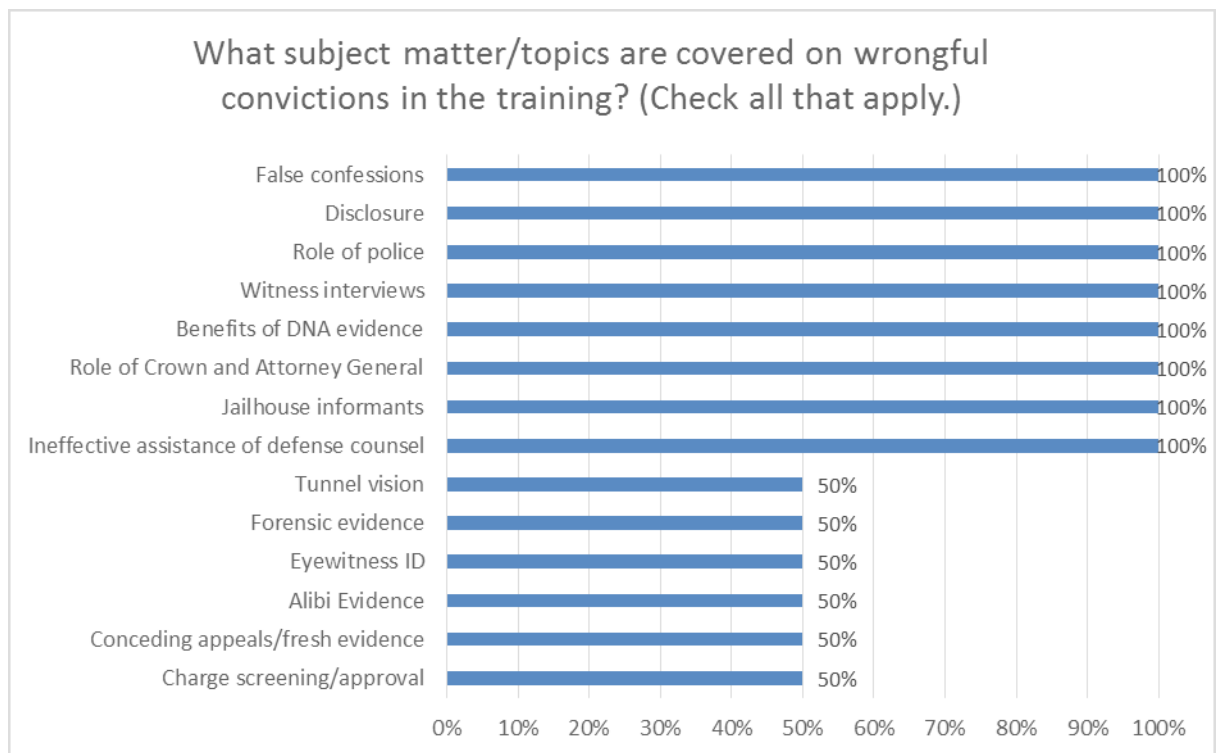
Police training institutes often offer both recruit training for new police officers and in-service advanced training for experienced officers, such as at the Justice Institute of B.C. However, some institutes only offer specialized training to current police officers, such as the Canadian Police College and the RCMP's Pacific Region Training Centre. Ten police training institutes responded to the survey (one representative per institution). Of the ten institutions, eight were RCMP (e.g. Depot, Divisions) and the others were the Canadian Police College and Justice Institute of B.C.

Wrongful Convictions Training Summary

- Nine of the ten training institutes do not have a specific course on preventing wrongful convictions.
- One training institute has a dedicated course on the prevention of wrongful convictions. The course is titled “Major Crimes Investigative Techniques” and it has a half-day session on wrongful convictions presented by Innocence Canada. This course is an in-service training course for sworn members (i.e. not recruits) and has “ongoing” availability (e.g. offered anytime—presumably online).
- Six of the ten agencies indicated that their institution offers courses that contain some material on preventing wrongful convictions. Four agencies indicated that there was no other training offered that has material on wrongful convictions.
- Of the six agencies that offer training with material on wrongful convictions:
 - All six agencies indicated that the training was in-service training (i.e. not for recruits).
 - All six agencies reported that wrongful convictions material is approximately 10 percent of the material in the course.
 - All six agencies reported that the format of the training was a combination of online and in-class with the course having ongoing availability (offered anytime).
 - Respondents were asked to choose from a list of topics to indicate which particular wrongful conviction subject matter/topics is covered

in the training. The survey findings reveal that the role of Crown and Attorney General, the role of police, false confessions, jailhouse informants, witness interviews, ineffective assistance of defense counsel, DNA evidence and disclosure are topics that are covered in all of the courses (from all agencies that indicated their investigative courses have material on wrongful convictions).

The following histogram presents the topics that are covered in the training:



Learning Objectives

Of the six training institutes that indicated that the courses have specific learning objectives, three agencies responded as follows:

- Investigator Development Program (IDP) Major Case Management (MCM)
- Investigator Development Program
- Yes. Most of the training focuses on past cases or case law. Candidates gain an awareness of best practices to prevent future mistakes.

Evaluation Component

- Four training institutes indicated that there is an evaluation/exam upon completion of the training.
- Two training institutes indicated that there is no evaluation/exam upon completion of the training.

The Development of a National Course on Preventing Wrongful Convictions

- Four agencies indicated that their institution would not support the development of a new national course.
- Six agencies indicated supporting the development of a new national course.
- The preferred delivery format if such a course was developed was:
 - 11 percent would prefer an in-class course
 - 44 percent would prefer an online course
 - 44 percent would prefer a combination of in-class and online.

Further Comments/Recommendations on Training for Police

Four respondents provided additional comments/recommendations:

- At Depot we stress the importance to the cadets on how to conduct thorough investigations; gather pertinent and accurate information; comply with the Charter of Rights/meeting legal obligations and proper handling of exhibits; etc. The investigative techniques taught encompassed with the Core Values of the RCMP should contribute to the prevention of wrongful convictions.
- No such training is currently available, so any inclusion on an existing investigative course would be an improvement.
- Up to date material on wrongful convictions in Canada. Correspondence from other countries is unnecessary as they follow different investigative rules (disclosure, statements, etc.) The RCMP is committed to preventing wrongful convictions and ensures that various aspects of training focus on this topic.
- What would also be helpful is the availability of segmented ‘preventing wrongful convictions’ training resources or lesson plans that could be added into already existing courses for investigators. This would ensure the information is woven in each investigative course to reach the greatest number of investigators. The concept would mirror ‘open education’ where the material is open to all users with no licensing or copyright issues.

Canadian Police College

Notably, in addition to the information revealed in the survey, the Canadian Police College, which provides in-service training to police officers from across Canada, has been including material on failed investigations – including those resulting in wrongful convictions – since at least 1995 when the then three-week Major Case Management program started. Currently, the prevention of wrongful convictions is the subject of a three-hour lecture on the Major Crime Investigative Techniques course (MCITC). This is a recent addition to the curriculum and continues to be refined. Innocence Canada and well-known wrongful convictions expert Bruce MacFarlane have both lectured on the program.

RCMP

The RCMP is the largest police agency in Canada and so its training has a significant impact on the quality of policing in Canada. Further, the RCMP makes seats on many of its courses to other police agencies.

The RCMP does not offer a specific course related to Preventing Wrongful Convictions. However, the objective of preventing wrongful convictions, miscarriages of justice, and failed investigations is a learning objective in a variety of investigative courses post-recruit training. The following are some examples, but not an inventory of all courses, where significant training related to the prevention of wrongful convictions for RCMP (and other police agencies) does occur.

In understanding the level of training specific to preventing wrongful convictions, it is necessary to understand the fundamentals of Major Case Management (MCM) including the nine principles of MCM, which are: Command Triangle, Management Considerations, Crime Solving Considerations, Leadership and Team Building, Legal Considerations, Ethical Considerations, Accountability Mechanisms, Communication Considerations, and Partnerships. Of critical importance to MCM is the Command Triangle which includes the Team Commander (TC), Primary Investigator (PI) and the File Coordinator (FC). MCM training was formalized at the Canadian Police College in 1994 and continues in its development in the aftermath of miscarriages of justice, recommendations from various public inquiries, civil liability, and legislation. For example, in Justice Archie Campbell's Bernardo Investigation Review, MCM training is strongly endorsed.²⁷⁹

The nine principles of MCM, when applied correctly, serve to ensure a professional investigation is completed to the ever-increasing investigative standards expected in Canada. As MCM was, in part, created in response to

279 The Honourable Archie Campbell, "Bernardo Investigation Review: Report of Mr. Justice Archie Campbell," Ontario Ministry of the Attorney General: 1996, available at: https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Wendy_Leaver/pdf/10_Campbell_Summary.pdf.

miscarriages of justice, these principles enhance best practices that serve to prevent wrongful convictions.

In addition to MCM training, the following RCMP Investigative Courses have specific training related to wrongful convictions:

Introduction to MCM (online): This course is a prerequisite for many RCMP members working in investigative roles. It is also required to be eligible for advanced investigative training opportunities as well as certification as an Accredited Team Commander. This course presents case studies on the miscarriages of justice in Canada and significant unsuccessful investigations as part of its curriculum to aid in the prevention of wrongful convictions. This online course was released to the Canadian Police Knowledge Network (CPKN) so any subscribing Canadian police agency can access it.

Investigators Development Program (IDP) (online and classroom): Candidates are provided a lesson in Effective Decision Making that provides instruction on duty of care to suspects, liability for investigative negligence, critical thinking, and the avoidance of tunnel vision. Candidates are also provided case presentations on miscarriages of justice in Canada.

Phased Interview for Witnesses (online and classroom): Candidates are introduced to the Phased Interview model that focuses on gathering information from interviewees. Related to preventing wrongful convictions, this model embraces pure version statement techniques to objectively seek the truth.

Phased Interview for Suspects (classroom): Candidates are introduced to the Phased Interview for Suspects model that is non-accusatory and focusses information gathering in a non-adversarial conversation. This models serves to prevent false confessions and as such, prevents wrongful convictions.

Foundations of File Coordination (FCC) (classroom): This is an E Division [BC RCMP] Course that is considered an advanced level for the employees that take it. A component of the course is a module that presents case studies on miscarriages of justice in Canada, significant unsuccessful investigations, and the impact a File Coordinator is required to have in future investigations in this regard.

Major Crime Investigative Techniques Course (MCIT) Canadian Police College (CPC) (classroom): The MCIT is an advanced course, focusing on the role of the primary investigator, guiding participants through different decision-making models which affect the speed, flow and direction of an investigation.²⁸⁰ Related to preventing wrongful convictions, candidates are instructed on strategies to evaluate

280 Adapted from the Canadian Police College Web site: <https://www.cpc-ccp.gc.ca/en/mcitic>.

a number of group decision making models to mitigate risks and select the best possible course of action. Training in this course is often a pre-requisite for other advanced investigative training as well as for Team Commander Accreditation.

Major Case Management – Team Commander (MCMTC) CPC Course (classroom): The MCMTC Course is a pre-requisite for Accredited Team Commanders. It is currently considered the highest level course for MCM training for RCMP employees and many other police agencies that access the training. Regarding the prevention of wrongful convictions, this course has a module dedicated to managing decision making. During this module, candidates are provided with case studies on the miscarriages of justice in Canada and significant unsuccessful investigations to identify threats to good decision making and to develop effective decision making techniques for application in future investigations. Examples of tunnel vision and examples of correct critical thinking concepts are demonstrated.

These various courses represent a significant investment by the RCMP in training its members (and the many other police agencies that access the training) to improve the quality of serious crime investigations and reduce the chances of a wrongful conviction. Strong adherence to, and application of, the nine principles of MCM is the platform that underpins these efforts.

c) Crown Counsel: Key Findings

Sample Summary

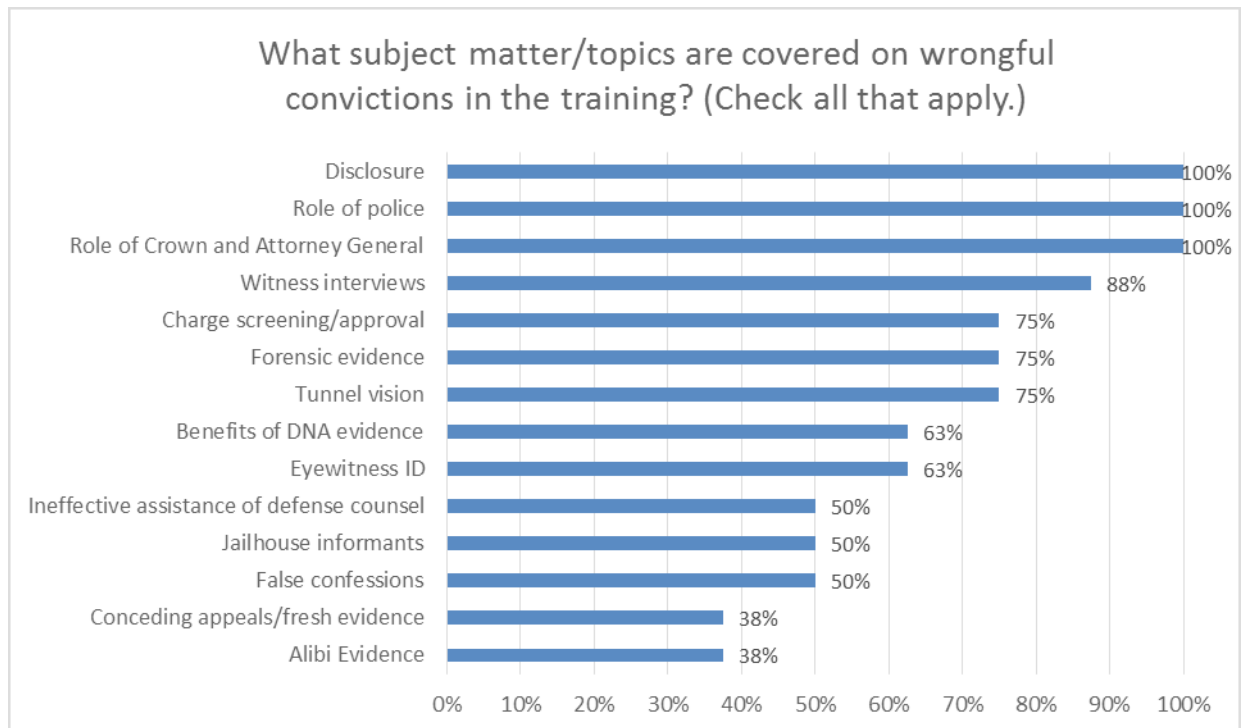
Representatives from ten Prosecution Services completed this survey (one representative per prosecution region).

Wrongful Convictions Training Summary

- Nine of the ten prosecution services do not have a specific course on preventing wrongful convictions.
- One prosecution service has a dedicated course on the prevention of wrongful convictions. It is called “The Prevention of Wrongful Convictions: Lessons from the Canadian Experience”. This on-line course is mandatory for all Crown counsel (e.g. junior, mid-level and senior) and is available at all times.
- Seven of the ten prosecution services indicated that they offer courses/training that contain some material on preventing wrongful convictions. Three services indicated that there was no other training offered that has material on wrongful convictions.
- Of the prosecution services that offer training with material on wrongful convictions, three specified the names of the courses/training:

- Newly hired Crown Attorney Professional Development Program (intended for Junior Crown counsel)
- Workshops on the Role of the Crown and Advocacy
- Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island (intended for all Crown counsel)
- One prosecution service reported that material on wrongful convictions is approximately ten percent of the material in the course, one reported it was approximately 20 percent and the third reported it was approximately 40 percent.
- When asked to describe the format of the training, two respondents answered that it was an in-class course.
- Respondents were asked to choose from a list of topics to indicate which particular wrongful conviction subject matter/topics is covered in the training. The survey findings reveal that the role of Crown and Attorney General, and the issues of disclosure, are topics that are covered in all of the courses (from the prosecution services that indicated their courses have material on wrongful convictions). One prosecution service whose course was 40 percent on wrongful convictions reported it included multiple key issues, e.g., tunnel vision, jailhouse informers, and others.

The following histogram presents the topics that are covered in the training:



Learning Objectives

Of the prosecution services that indicated that the courses have specific learning objectives, two responses were received when asked to describe the learning objectives:

- Exercise of discretion; role of the Crown
- Yes. Attuning Crowns to the basic factors and issues common in the known cases of wrongful convictions.

Evaluation Component

One prosecution service responded that there is an evaluation/exam upon completion of the training.

The Development of a National Course on Preventing Wrongful Convictions

- Of the ten prosecution services that responded to the question, six indicated that they would support the development of a new national course on preventing wrongful convictions.
- The preferred delivery format if such a course was developed was as follows (respondents could choose more than one option):
 - One prosecution service would prefer an in-class course
 - Five prosecution services would prefer an online course
 - Four prosecution services would prefer a combination of in-class and online.

Areas of Training for Potential Improvement

Several responses were received when asked to describe any areas of training for potential improvement around preventing wrongful convictions:

- Development of a specific workshop on preventing wrongful convictions
- (a) tunnel vision (b) expert evidence

Further comments/Recommendations on Training on Preventing Wrongful Convictions

Five responses were received for additional comments:

- Focus on the role of the Crown: i.e. not win or lose.
- Suggest there may be general resource materials or subject area experts that specifically address wrongful convictions that could be identified and used in a focused training session. For example, examining specific cases within Canada or other jurisdictions such as the United States.
- Our support for a national course would not include financial support.
- We have devoted our annual conference to preventing wrongful convictions twice in the last decade. Also, we have repeatedly featured conference sessions on preventing wrongful convictions and problematic investigative techniques. We have had webinars for both Crown and staff looking at the work of the HOP sub-committee and on the reports from the group.

Public Prosecution Service of Canada Online Training Package

As discussed in the surveys, it is notable that the Public Prosecution Service of Canada (PPSC) has provided training for a number of years concerning the prevention of wrongful convictions, in collaboration with the federal Department of Justice. Further, on December 12, 2016, to coincide with the 10th anniversary of the creation of the PPSC, the federal prosecution service launched an online training package, mandatory for all PPSC Crown counsel, concerning the Prevention of Wrongful Convictions. The training package is called *The Prevention of Wrongful Convictions: Lessons from the Canadian Experience*. It consists of two modules, and is available to PPSC Crowns in both official languages. It is the first online training program developed by any prosecution service in Canada dedicated exclusively to the Prevention of Wrongful Convictions.

In the first module, a Chief Federal Prosecutor from the PPSC provides an overview of the subject, and identifies what has been learned from the research, as well as the seven Canadian commissions of inquiry in Canada, regarding the factors and related issues that have consistently played a role in known wrongful convictions in Canada. In the second module, three experienced senior counsel discuss various fictitious cases that highlight the risks of wrongful convictions. The scenarios enable the panellists to discuss how the Crown should best respond to these situations to reduce the risks of wrongful convictions. The training package also alerts Crowns to the “PPSC Deskbook Directive 2.4 on the Prevention of Wrongful Convictions”, which is readily available to the public online. The training package also includes a bibliography for further reading and is available to federal Crowns at any time through an internal web site. The training is accredited by Canadian law societies.

In Quebec, since the publication of the *2005 Report*, steps have been taken to raise awareness among prosecutors about the risks that can lead to wrongful convictions. Education on these important notions has been incorporated into the basic training given to prosecutors since 2006. In addition, since its creation in 2007, the Director of Criminal and Penal Prosecutions (DCPP) has instructed its prosecutors to remain objective and open-minded at all times to avoid handling a file in a manner that may result in a wrongful conviction. In 2012, a presentation on the *2011 Report* was given to all prosecutors. The report has since been added to the DCPP's online legal library so that it be easily accessible to all prosecutors. Finally, the PPSC training program is available online for all DCPP prosecutors.

IV. CURRENT EDUCATIONAL INITIATIVES FOR JUDGES IN CANADA

The prevention of wrongful convictions is a topic which is included in educational programs and resources available to Canadian judges through the National Judicial Institute (NJI). Based in Ottawa, the NJI is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally. The NJI's offerings include:

- A national seminar on Preventing Wrongful Convictions, most recently delivered in March 2017, which addresses the role of race, Indigenous status and gender in wrongful convictions; confessions and false witness statements; perception, memory and reliability, including eyewitness evidence; the frailties of scientific evidence; and the role of the judge in preventing wrongful convictions. The co-chair of the Subcommittee was among the presenters. The course was presented again in fall 2018;
- A national week-long program on Evidence, which includes in-depth sessions on character evidence, confessions, credibility and deception detection, and scientific evidence;
- A comprehensive bench book (an overview of legal procedure for judges) on Evidence, which discusses the findings of various inquiries into wrongful convictions to put into context the jurisprudence on issues such as eyewitness identification, hearsay, expert evidence, confessions and *Vetrovec* warnings;
- A national program on Science in the Courtroom, which focuses on:
 - The scientific method, scientific literacy, and ethical standards for experts; and
 - A Science Manual, which was created in response to the recommendations of the *Inquiry into Pediatric Forensic Pathology in Ontario*, and which provides judges with comprehensive information on the role of the judge hearing scientific evidence, the scientific method, and the management of scientific evidence in the courtroom. The Honourable Stephen T. Goudge, head of that Inquiry, was on the editorial committee of this publication.

- The 2016 Symposium in Honour of the Honourable Justice Marc Rosenberg, which was a joint effort of the NJI and Osgoode Hall Law School. Preventing wrongful convictions was one of the themes of the program. More than 200 judges, lawyers, government officials, law students and academics from across the country attended the event. The papers from the program were published in 2017.

In addition to these national programs and resources, judges participate in sessions on these same topics during their individual courts' regular educational seminars.

V. DEVELOPMENTS IN EDUCATIONAL INITIATIVES IN CANADIAN LAW SCHOOLS

Courses dealing with wrongful convictions are now a staple at many Canadian universities and law schools. The courses, usually seminars, involve a mixture of traditional lectures, guest speakers (including the wrongfully convicted themselves), audio-visual materials such as podcasts and documentaries, case studies and doctrinal readings from law and other disciplines. Indeed, the *2011 Report* is the required text for several of the courses.

Among the courses are those at: University of Ottawa (Faculty of Common Law and Department of Criminology), University of Toronto Faculty of Law, University of Toronto Centre for Criminology, Carleton University, Western University, University of Alberta, University of Manitoba, Peter A. Allard School of Law at the University of British Columbia, and Algoma University.

Here is the description of one such course:

Offered at UBC Law since 2004, this seminar is designed to explore the phenomenon of wrongful convictions. The broad focus is on the legal rules and principles designed to prevent wrongful convictions, including the evolution of those rules and principles. The course considers particular types of evidence that have been identified as sources of wrongful convictions. These include:

- eyewitness identification;
- testimony of unsavoury witnesses;
- false confessions;
- problematic scientific evidence; and
- questionable circumstantial evidence.

The seminar also studies how criminal justice system participants (the police, Crown counsel, defence counsel, experts and the judiciary) may contribute to wrongful convictions, and what can be done to reduce the risk of wrongful convictions. The course has a variety of guest speakers attend as well as regular lectures.

“In each class we focused on race, gender, socioeconomic status and other factors that make Indigenous people, racialized people, the poor and others particularly vulnerable to wrongful convictions,” explains Amanda Carling, manager of the Indigenous Initiatives Office at the Faculty of Law at the University of Toronto. “We spend a lot of time speaking about the fact that most of the high-profile wrongful convictions we study in Canada, largely by virtue of the public inquiries that have followed, are the cases of white men. We contrasted this to the situation in the United States where we know that Black people are overrepresented among the exonerated, at rates that cannot simply be explained by their overrepresentation in prisons.”²⁸¹

Several faculties also have Innocence Projects, where students investigate allegations of wrongful conviction and help prepare applications to the federal Minister of Justice under s. 696.1 of the *Criminal Code*. Some combine both an academic and clinical component. Among the projects are those at the University of Ottawa, Peter A. Allard School of Law at the University of British Columbia, University of Manitoba, McGill University and University of Montreal. Algoma University also houses the Innocence Compensation Project, an organization dedicated to assisting those who have been wrongfully convicted and imprisoned re-enter their communities and obtain compensation for the loss of their liberty and the collateral damage caused by that loss.²⁸²

VI. CONCLUSION

The surveys of police agencies, police training institutions, and prosecution services provided helpful data, which demonstrates that while much good work is being done, some agencies are much more advanced than others in providing education and training to reduce the chances of wrongful convictions.

281 Email with Amanda Carling, March 2018.

282 The Innocence Compensation Project, Web site: <http://uottawainnocenceproject.org/index.php/number-of-wrongful-convictions-ca/>

It was discouraging that the majority of respondents from all three sample groups reported that their agency does not offer a specific course on wrongful convictions. However, on a more positive note, the majority of respondents from all sample groups indicated that their agency does offer other training/courses that contain some material on wrongful convictions, such as in Major Case Management and Police Investigator courses. The police survey and police training institutes reported that this material is approximately ten percent of the training, while two respondents from Crown reported that the material is ten percent and twenty percent of various courses provided to prosecutors. The police agencies indicated that it is often the Major Case Management, Major Crime, or General Investigative Techniques courses that offer some wrongful conviction material.

The majority of representatives from all three samples support the development of a new national course on preventing wrongful convictions. The preferred delivery method, should a new course be developed, is either online or a combination of on-line and in-class delivery. The data from the surveys provides a strong basis for recommendations going forward to improve the consistency of training across Canada.

VII. UPDATED RECOMMENDATIONS

1. A national course with modules for police and Crown that can be delivered on-line should be developed and updated periodically;
2. An on-line course should be complemented by the development of a curriculum intended to be delivered in person once the on-line course had been completed;
3. Once the on-line and in-person curriculum is developed, a national “train the trainers” course should be developed so that all police and prosecution services can ensure that appropriate staff are trained in delivering the curriculum; and
4. All police agencies and police training institutions should be encouraged to review current investigative training programs (e.g., major case management and team commander training, forensic interviewing courses, general investigator courses) to ensure that the causes and solutions for wrongful convictions are integrated in this training given that such training is entirely consistent with promoting investigative excellence.

Appendix A

Heads of Prosecution Subcommittee on Preventing Wrongful Convictions – Training Survey (Police)

1. Please provide the name of your police agency.

2. Please provide the number of sworn officers in your organization.
(If number is unknown, please provide an approximation)

3. Do you have a specific course on prevention of wrongful convictions available to police officers?

Yes

No

If Yes to Q3...

4. What is the name of the course?

5. Who is the intended audience for the course? (Check all that apply.)

Constables

Detectives/Detective Constables

Sergeants/Staff Sergeants

Upper Management

6. How often is the course offered?

Ongoing (i.e. available anytime) Monthly

Annually

Other (please specify)

If No to Q3 or after Q6....

7. * Do any of your investigative training courses contain materials on preventing wrongful convictions?

Yes

No

If Yes to Q7...

8. Please name these courses.
-

9. Who is the intended audience for these courses? (Check all that apply.)

Constables

Detectives/Detective Constables

Sergeants/Staff Sergeants

Upper Management

10. What subject matter/topics are covered on wrongful convictions in the training? (Check all that apply.)

Role of Crown and Attorney General

Role of police

Tunnel vision

Eyewitness ID

False confessions

Jailhouse informants

Alibi Evidence

Witness interviews

Ineffective assistance of defense counsel

Forensic evidence

Benefits of DNA evidence

- Disclosure
- Charge screening/approval
- Conceding appeals/fresh evidence

Other (please specify)

11. How much of the course is dedicated to preventing wrongful convictions?

12. What is the format in which the training containing lessons on preventing wrongful convictions is delivered?

- Conference
- Online Course
- In Class Course
- Combined Online and In Class Course

Other (please specify)

13. Are there specified learning objectives for this training? If so, what are they?

14. Does this training have an evaluation/exam upon completion for those that took the training?

- Yes
- No

If No to Q7 or after Q14...

15. Would your police agency support the development of a new national course on preventing wrongful convictions?

Yes
 No

16. If a new course curriculum was developed on preventing wrongful convictions, which format would you prefer? (Check all that apply.)

Conference
 Online Course
 In Class Course
 Combined Online and In Class Course

Other (please specify)

17. Please describe any areas of training for potential improvement within your agency around preventing wrongful convictions.

18. Do you have any further comments or recommendations on providing training for police on preventing wrongful convictions?

Appendix B

Heads of Prosecution Subcommittee on Preventing Wrongful Convictions – Training Survey (Training Institutes)

1. Please provide the name of your training institution.

2. Please provide the number of agencies served by your training institution.
(If unsure, please provide an approximation.)
-

3. Does your institution provide training/courses specifically on prevention of wrongful convictions?

Yes

No

If Yes to Q3...

4. What is the name of the course?
-

5. Who is the intended audience for the course? (Check all that apply.)

Police Recruits

Sworn Members (i.e. In-Service Training)

6. How often is the course offered?

Ongoing (i.e. available anytime)

Annually

Monthly

Other (please specify)

Only answer Q7 if the course is intended for police recruits.

7. In what segment of recruit training is prevention of wrongful convictions covered?
-

Only answer Q8 if the course is intended for sworn members (i.e. In-service training).

8. How often is the In-Service course offered?

Ongoing (i.e. available anytime)

Annually

Monthly

Other (please specify)

If No to Q3 or after Q8....

9. Does your institution offer any other training/courses contain materials on preventing wrongful convictions?

Yes

No

If Yes to Q9...

10. Who is the intended audience for this training? (Check all that apply)

Police Recruits

Sworn Members (i.e. In-Service Training)

Only answer Q11-12 if the course is intended for police recruits.

11. In what segment of recruit training is prevention of wrongful convictions covered?

12. What subject matter/topics are covered on wrongful convictions in the training? (Check all that apply.)

- Role of Crown and Attorney General
- Role of police
- Tunnel vision
- Eyewitness ID
- False confessions
- Jailhouse informants
- Alibi Evidence
- Witness interviews
- Ineffective assistance of defense counsel
- Forensic evidence
- Benefits of DNA evidence
- Disclosure
- Charge screening/approval
- Conceding appeals/fresh evidence

Other (please specify)

Only answer Q13-19 if the course is intended for sworn members (i.e. In-service training).

13. Please name these In-Service courses.

14. What subject matter/topics are covered on wrongful convictions in the training? (Check all that apply.)

- Role of Crown and Attorney General
- Role of police
- Tunnel vision
- Eyewitness ID
- False confessions
- Jailhouse informants
- Alibi Evidence
- Witness interviews
- Ineffective assistance of defense counsel
- Forensic evidence
- Benefits of DNA evidence
- Disclosure
- Charge screening/approval
- Conceding appeals/fresh evidence

Other (please specify)

15. How much of the course is dedicated to preventing wrongful convictions?

16. What is the format in which the training containing lessons on preventing wrongful convictions is delivered?

Conference

Online Course

In Class Course

Combined Online and In Class Course

Other (please specify)

17. How often is the course offered?

Ongoing (i.e. available anytime)

Annually

Monthly

Other (please specify)

18. Are there specified learning objectives for this training? If so, what are they?

19. Does this training have an evaluation/exam upon completion for those that took the training?

Yes

No

If No to Q9 or after Q19...

20. Would your institution support the development of a new national course on preventing wrongful convictions?

Yes

No

21. If a new course curriculum was developed on preventing wrongful convictions, which format would you prefer? (Check all that apply.)

Conference

Online Course

In Class Course

Combined Online and In Class Course

Other (please specify)

22. Do you have any further comments or recommendations on providing training for police on preventing wrongful convictions?

Appendix C

Heads of Prosecution Subcommittee on Preventing Wrongful Convictions – Training Survey (Crown)

1. Please provide the name of your prosecution service (e.g. Criminal Justice Branch, BC Ministry of Justice)

2. Please provide the number of Crown counsel in your prosecution service (If number is unknown, please provide an approximation)

3. Do you have a specific course on prevention of wrongful convictions available to Crown counsel?

Yes

No

If Yes to Q3...

4. What is the name of the course?

5. Who is the intended audience for the course? (Check all that apply.)

Junior Crown Counsel (less than 5 years called to the bar)

Mid-Level Crown Counsel (5 to 10 years called to the bar)

Senior Crown Counsel (more than 10 years called to the bar)

All Crown Counsel

6. How often is the course offered?

Ongoing (i.e. available anytime)

Annually

Monthly

Other (please specify)

If No to Q3 or after Q6....

7. Does any other training that is offered to Crown counsel contain materials on preventing wrongful convictions?

Yes

No

If Yes to Q7...

8. Please name the training (e.g. course, conference, module) that contains material on preventing wrongful convictions.

9. Who is the intended audience for the course? (Check all that apply.)

Junior Crown Counsel (less than 5 years called to the bar)

Mid-Level Crown Counsel (5 to 10 years called to the bar)

Senior Crown Counsel (more than 10 years called to the bar)

All Crown Counsel

10. What subject matter/topics are covered on wrongful convictions in the training? (Check all that apply.)

Role of Crown and Attorney General

Role of police

- Tunnel vision
- Eyewitness ID
- False confessions
- Jailhouse informants
- Alibi Evidence
- Witness interviews
- Ineffective assistance of defense counsel
- Forensic evidence
- Benefits of DNA evidence
- Disclosure
- Charge screening/approval
- Conceding appeals/fresh evidence

Other (please specify)

11. How much of the training is dedicated to preventing wrongful convictions?

12. What is the format in which the training containing lessons on preventing wrongful convictions is delivered?

- Conference
- Online Course
- In Class Course
- Combined Online and In Class Course

Other (please specify)

13. Are there specified learning objectives for this training?
If so, what are they?

14. Does this training have an evaluation/exam upon completion for those that took the training?

Yes

No

If No to Q7 or after Q14...

15. Would your Crown office support the development of a new national course on preventing wrongful convictions?
16. If a new course curriculum was developed on preventing wrongful convictions, which format would you prefer? (Check all that apply.)

In Class Course

Online Course

Combined In Class and Online Course

Other (please specify)

17. Please describe any areas of training for potential improvement within your office around preventing wrongful convictions.

Do you have any further comments or recommendations on providing training for Crown counsel on preventing wrongful convictions?

Appendix D

Responding Police Agencies

London Police Service
Sûreté du Québec (SECP-(homicides))
Laval Police Département
Regina Police Service
Ottawa Police Service
Hamilton Police Service
Vancouver Police Department
Kingston Police
Peel Regional Police
Calgary Police Service
Amherstburg Police Service
Abbotsford Police
Royal Newfoundland Constabulary
Cornwall Community Police Service
Barrie Police Service
Cornwall Community Police Service
Waterloo Regional Police Service
Regina Police Service
Waterloo Regional Police Service
Saanich Police Department
Hamilton Police Service
Charlottetown Police Services
Saint-Eustache
Bathurst City Police
Royal Newfoundland Constabulary
Woodstock Police Force
Brantford Police Service
West Vancouver Police Department
Gatineau Police Service
Oak Bay PD
North Bay Police Service
Camrose Police Service
Guelph Police Service
York Regional Police
Lakeshore Regional Police Service
Amherst Police Department
Halifax Regional Police
Edmundston Police force
Altona Police Service
Royal Canadian Mounted Police

Appendix E

Responding Prosecution Services

1. Manitoba Prosecution Service
2. Public Prosecutions Saskatchewan
3. Directeur des poursuites criminelles et pénales (Montréal, Québec)
4. Criminal Justice Branch, BC Ministry of Justice & Attorney General
5. Canadian Military Prosecution Service
6. Nova Scotia Public Prosecution Service
7. Prince Edward Island Crown Attorney's Office
8. Alberta Crown Prosecution Service
9. Public Prosecution Service of Canada (HQ) (Ottawa)
10. Crown Attorneys' Offices, Ontario Ministry of Attorney General

CHAPTER 8 – FALSE GUILTY PLEAS

I. INTRODUCTION

The freedom of an accused person to choose whether to plead guilty or not guilty to a crime is well established in the Canadian common law.²⁸³ It is a constitutional right. The courts recognize as a principle of fundamental justice the right of accused persons to control the conduct of their defence,²⁸⁴ which must be seen to include fundamental decisions about that defence, such as how to plead. However, we now know that factually innocent persons in Canada have sometimes, for a variety of reasons, pleaded guilty to crimes they did not commit. The phenomenon of false guilty pleas has become an issue of growing concern among experts in Canada and elsewhere. For this reason, the Subcommittee has chosen to explore this important subject in a new chapter in this report, to raise awareness and to address two key questions:

- How significant is the phenomenon of false guilty pleas in Canada?
- What steps, if any, should be taken to reduce the risks of false guilty pleas?

II. BACKGROUND AND CONTEXT

The now defunct Law Reform Commission of Canada warned well over a quarter of a century ago that plea bargaining (as resolution discussions were then widely known) could, in extreme cases, persuade accused persons to plead guilty to offences they did not commit,²⁸⁵ and it is now undisputed that it has happened in

283 David Layton and Michel Proulx, “Chapter 9: Plea Discussions,” in *Ethics and Criminal Law* (2nd ed.), (Toronto: Irwin Law Inc., 2015) 427 at 429-430. See also *R. v. GDB*, 2000 SCC 22, at para 34.

284 *Ibid.*, p.430. See also *R. v. Swain*, [1991] 1 S.C.R. 933. (1991), 63 CCC (3d) 481 at paras 33-36.

285 Law Reform Commission of Canada, Department of Justice, *Criminal Procedure: Control of the Process*, Working Paper 15, 1975 at page 46. See more recently Christopher Sherrin, “Guilty Pleas from the Innocent,” *Windsor Review of Legal and Social Issues* 30, no.1 (March 2011), pp. 5-7.

For purposes of this chapter, a false guilty plea is defined as a guilty plea entered by a factually innocent person: accused persons pleading guilty to crimes they did not commit or pleading guilty to a crime when in fact no crime occurred. See for example cases such as *R. v. Hanemaayer*, 2008 ONCA 580, where police later identified the real perpetrator. See also *Marshall c. R.*, 2005 QCCA 852 (where guilty pleas to sexual assaults were later found not to be credible or reliable). DNA evidence exonerated Marshall, who was intellectually handicapped. The convictions were overturned and an acquittal entered. See also *R. v. Kumar*, 2011 ONCA 120 and *R. v. CM*, 2010 ONCA 690, where both accused were charged with murder but pleaded guilty to lesser offences. In *Kumar*, the Ontario Court of Appeal set aside Dinesh Kumar’s guilty plea after finding the conviction was unreasonable in light of the lack of conclusive evidence that his son died as a result of Shaken Baby Syndrome. Likewise in *CM*, the guilty plea for manslaughter was set aside after several experts were unable to conclusively find that

Canada. In short, Canada's criminal justice system is not preventing false guilty pleas in all cases. It is clear they occur; we simply do not know the scope of the phenomenon.

While pleading guilty to a crime one did not commit can be a rational choice for certain accused in certain situations under Canada's current justice system, this Subcommittee adopts the premise that, from the perspective of the state, a false guilty plea is never an acceptable outcome in Canada's criminal justice system,²⁸⁶

CM's newborn baby died of asphyxia. In *R. v. Shepherd*, 2016 ONCA 188, Maria Shepherd pleaded guilty to manslaughter in the death of her three-year-old stepdaughter. Based on a joint submission, she was sentenced to two years less a day followed by three years' probation. The leading pediatric pathologist in Ontario at the time, Dr. Charles Smith, had done the post-mortem and concluded that the child died as a result of a backhand blow to the back of the deceased's head by the perpetrator, who was wearing a wristwatch. Smith found that Ms. Shepherd's watch matched the injury the child had sustained; Smith determined that the child was the victim of homicide. Had the matter proceeded to trial, the Crown had indicated that it would seek a substantial penitentiary term. On appeal, the Court found that the fresh evidence had thoroughly discredited the cause of death. There was no demonstrated nexus between Ms. Shepherd's conduct and her stepdaughter's death, the Court held. The experts' evidence, accepted as fresh evidence on appeal, differed as to the cause of death. The guilty plea could no longer be said to be informed, the Court said. The justice system had held out a powerful inducement to Ms. Shepherd to change her plea to guilty, the Court of Appeal held. The guilty plea and conviction were set aside and an acquittal entered. In *R. v. Brant*, 2011 ONCA 362, Richard Brant, who was originally charged with manslaughter in his infant son's death, pleaded guilty to aggravated assault. He had always maintained his innocence but pleaded guilty in light of the unequivocal opinion of Smith that his son had died from a non-accidental head injury. On appeal, the medical evidence was found to be inconclusive and there was no circumstantial evidence supporting a finding that Brant had intentionally harmed his son. The guilty plea was set aside and an acquittal entered. In *R. v. CF*, 2010 ONCA 691, CF pleaded guilty after Dr. Smith concluded that her infant's death was due to infanticide. None of the five experts who later reviewed the case concluded that the cause of death was infanticide. CF's plea was set aside on appeal. In *R. v. Sherret-Robinson*, 2009 ONCA 886, *Sherret-Robinson* was charged with the first-degree murder of her four-month-old son. She had always maintained that she had not harmed her child. The murder charge was later withdrawn and a charge of infanticide was laid. Although *Sherret-Robinson* pleaded not guilty to the infanticide charge she agreed not to contest a set of facts that included an allegation that she smothered her child. She was sentenced to a year in prison, which she completed many years ago. Years later, following a review of cases in which Dr. Smith had provided an opinion, experts could find no positive evidence to support a finding of suffocation or smothering. The Ontario Court of Appeal held in 2009 that her child likely died as a result of an accident, at paras. 8-9; the conviction was quashed and an acquittal entered. She had been wrongly convicted based on flawed pathological evidence, the Court held.

Meanwhile, the case of Phillip Tallio is ongoing. In November 1983, Tallio plead guilty to the second degree murder of a 22-month-old girl. He was 17 years old at the time of the incident. He was sentenced to life and has been in prison for about 35 years. He has maintained his innocence throughout his jail term. However, on June 30, 2017, the British Columbia Court of Appeal granted an extension of time for Tallio to enable him to bring his appeal against conviction. In a subsequent March 12, 2018 decision, the BCCA granted Tallio's application for the release of tissue samples of the victim for testing for male DNA. See *R. v. Tallio*, 2018 BCCA 83.

286 See Martin, G. Arthur, "Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions," Ontario Ministry of the Attorney General, 1993 at 293, (hereafter referred to as the "Martin Report") where the Committee declared that: "...it is not in the interests of justice in Ontario to permit a guilty plea to stand where an accused maintains his or her innocence."

that it is never in the public interest to convict the innocent. The Subcommittee is also strongly of the view that while accused persons ultimately have the freedom to control the conduct of their defence, all criminal justice participants, including defence counsel, have an ethical obligation to take all reasonable steps within their purview to prevent false guilty pleas.

“The precept that the innocent must not be convicted is basic to our concept of justice...no just society can tolerate the conviction and punishment of the innocent,” Canada’s top court has said.²⁸⁷ It behooves governments and other criminal justice system participants to investigate the scope of the problem, why it is happening, and whether all reasonable steps that could be taken to reduce false guilty pleas in criminal cases in Canada *are* being taken, or whether more can and should be done.

III. THE PREVALENCE OF FALSE GUILTY PLEAS BY THE FACTUALLY INNOCENT

False guilty pleas are similar to false confessions in that individuals are admitting to crimes they did not commit.²⁸⁸ But unlike false confessions, which usually occur during police interrogations, false guilty pleas (like valid guilty pleas), generally follow discussions between an accused and defence counsel, or follow resolution discussions between the Crown and defence counsel. Some experts suggest that the known documented cases of false guilty pleas are increasing, and that the sheer number of guilty pleas entered annually in Canada suggests false guilty pleas are likely more prevalent than we realize, but remain undetected,²⁸⁹ and are more difficult to identify and much less studied than false confessions.²⁹⁰ Among known exonerees in the United States, some research indicates that those who falsely confess are also more than three times more likely to plead guilty to

287 *R. v. Seaboyer; R. v. Gayme*, [1991], 2 SCR 577, at paras. 29 and 31 respectively.

288 Experts point out that innocent individuals sometimes plead guilty for some of the same reasons that may lead them to falsely confess. See Brandon Garrett, “Chapter 6: Innocence on Trial,” in *Convicting the Innocent*, (Cambridge MA: Harvard University Press, 2011), p. 152.

See also Allison D. Redlich, “The Susceptibility of Juveniles to False Confessions and False Guilty Pleas,” *Rutgers Law Review* 62, no.4 (2010): 943 at 952 and Jerome Kennedy, “Plea Bargains and Wrongful Convictions,” *The Criminal Law Quarterly* 63, no.4 (2016): p. 556. Regarding the relationship between false confessions and false guilty pleas, see the National Registry of Exonerations at: <http://www.law.umich.edu/special/exoneration/Pages/Guilty-Pleas.aspx>.

289 Kent Roach, “Wrongful Convictions in Canada,” *University of Cincinnati Law Review* 80, no.4 (2012): 1465 at 1466-1467 and 1475-76; Kent Roach “The Wrongful Conviction of Indigenous People in Australia and Canada,” *Flinders Law Journal* 17, (2015): 203 at 205, and Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, at pp. 1-4 of QL printout.

290 Redlich, “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, 943 at 943-944 and 951, 957. Experts such as Redlich make the point that the research on false guilty pleas is sparse despite the fact that most convictions follow guilty pleas and that this area requires greater attention.

crimes they did not commit in contrast to exonerees who did not falsely confess.²⁹¹ Growing academic literature also indicates that certain sub-populations, such as young persons, Indigenous persons, and those with cognitive deficits or mental health issues, or who are otherwise marginalized due to factors such as race, poverty or some combination of these factors, may be particularly vulnerable to false confessions and false guilty pleas.²⁹²

That said, no Canadian studies to date have quantified, through empirical research, the scope of the phenomenon of accused persons in Canada choosing to plead guilty to crimes they did not commit. While Innocence Canada, formerly the Association in Defence of the Wrongly Convicted, has identified five of the 21 exonerations in which it has been directly involved as relating to false guilty pleas,²⁹³ there is no official comprehensive national “list” of such cases in Canada. Canadian academics who have studied the phenomenon contend “there is good reason to believe they are fairly common,”²⁹⁴ and that there are probably many more undocumented cases.²⁹⁵

291 See National Registry of Exonerations referenced above.

292 The particular vulnerability of certain groups within the population to plead guilty to crimes they did not commit, or to falsely confess to crimes they did not commit, is explored in articles such as Redlich’s “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, 943 at 943-945 and 951, 957. Redlich and other experts suggest that young persons, known as juveniles in the United States, may be at greater risk than adults of entering false guilty pleas for various reasons and suggest that more research is required. See also on this subject: Joshua Tepfer, Laura Nirider and Lynda Tricarico, “Arresting Development: Convictions of Innocent Youth,” *Rutgers Law Review* 62 (2010): 887 at 894; Drizin, Steven & Luloff, Greg, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions?,” *Northern Kentucky Law Review* 34 (2007): 257, 257-62; Amanda Carling, “A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions,” *The Criminal Law Quarterly* 64, no.3 (2017): 415; Roach, “The Wrongful Conviction of Indigenous People,” *Flinders Law Journal*, 203; Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, p. 7 of the QL printout; and the case of the Central Park Five, where five black and Latino teenagers from Harlem falsely admitted some involvement in the brutal beating and rape of a Central Park jogger, as documented in Sharon L. Davies, “The Reality of False Confessions- Lessons of the Central Park Jogger Case,” *New York University Review of Law and Social Change* 30 (2005): 209; and in Sarah Burns, *The Central Park Five: A Chronicle of a City Wilding* (New York, Alfred A. Knopf, 2011). The vulnerability of certain groups to wrongful convictions generally is considered in Chapter 10 of this report on At-Risk Populations.

293 Innocence Canada lists these as: Anthony Hanemaayer, Dinesh Kumar, Maria Shepherd, Sherry Sherret-Robinson and Richard Brant. Technically, Sherret-Robinson did not plead guilty to infanticide but rather chose not to contest the Crown’s allegation that she had smothered her child. See Innocence Canada web site, which documents each of the 21 cases in which Innocence Canada has been directly involved for discussion of the cases:

[http://innocencecanada.com/exonerations/.](http://innocencecanada.com/exonerations/)

294 Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, p.18 of QL printout. American academics argue similarly that innocent defendants plead guilty more often than most people think and more often than most people wish to acknowledge. See for example, John H. Blume and Rebecca Helm, “The Unexonerated: Factually Innocent Defendants Who Plead Guilty,” *Cornell Law Review* 100, no 1., (2014): 157 at 157 and 161.

295 Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, at pp. 1-4 of QL printout.

Canadian experts have nevertheless attempted to estimate the prevalence of false guilty pleas in Canada based on what we do know, estimates that flow in part from the application of logic and common sense. More than 450,000 accused persons are dealt with in Canada's criminal justice system annually, and the vast majority plead guilty, which could mean that hundreds or even thousands of people every year plead guilty to offences they did not commit (even if only one percent of guilty pleas are false), some Canadian academics contend.²⁹⁶ In the June 2017 Senate report concerning delays in Canada's criminal justice system, the Senators referred to testimony indicating that 90 percent of criminal cases do not go to trial and are resolved mainly through plea bargains.²⁹⁷ "...[G]iven the recent evidence of innocent people making both irrational and rational decisions to plead guilty, it cannot be assumed that all those in Canada who plead guilty actually are guilty," leading Canadian experts warn.²⁹⁸

In addition, research suggests innocent persons are entering guilty pleas not just for serious crimes, but for less serious matters as well. Historically, the best-known wrongful conviction cases in Canada have generally related to homicide or sexual assault. Less serious offences have not received the same measure of attention or study, thus we have no idea how many false guilty pleas for less serious crimes may have occurred in this country.²⁹⁹ Advocates, and indeed the accused themselves, may be less motivated to seek redress for wrongful convictions regarding relatively minor offences that resulted in minor penalties. The rate of false guilty pleas for relatively minor offences could be higher than the rate for more serious crimes, some argue.³⁰⁰ An early guilty plea to resolve the matter quickly in a minor case (where the penalty is expected to be relatively light) can be a rational choice for an innocent person to avoid the financial, emotional and related costs incurred in the time-consuming process of contesting the matter,³⁰¹ which can include being denied bail.

296 Ibid., 4.

297 Honourable Bob Runciman and Honourable George Baker, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada," Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, June 2017, p. 44.

298 Roach, "Wrongful Convictions in Canada," *University of Cincinnati Law Review*, 1465 at 1475.

299 Ibid., pp.1474-1475.

300 See Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent," *Criminal Law Quarterly* 56, nos. 1&2 (2010): 116 (Section 2) at page 3 of QL printout. See also Josh Bowers, "Punishing the Innocent," *University of Pennsylvania Law Review* 156, no.5 (2008): 1117; and Blume and Helm, "The Unexonerated," *Cornell Law Review*, 157 at 173-174. Blume and Helm argue that many innocent people charged with relatively minor offences plead guilty to avoid spending more time in jail. Others such as Sherrin's, "Guilty Pleas," in Windsor Review of Legal and Social Issues, 30 WRLSI I (March 2011), at 5-7, argue that the costs of getting to trial (which can include languishing in jail) can simply be perceived as too high when weighed against the perceived penalty for a guilty plea and that this may be particularly true in relatively minor matters.

301 See Sherrin, "Guilty Pleas," in *Windsor Review of Legal and Social Issues*, 5-7. See also Bowers, "Punishing the Innocent," *University of Pennsylvania Law Review*, pp.1132-1139.

In a recent Canadian case, the Manitoba Court of Appeal permitted an Indigenous accused to withdraw his guilty plea, quashed his conviction, and acquitted him after it heard evidence that he could not possibly have committed the crime to which he had pleaded guilty because he was in jail at the time. Richard Joseph Catcheway was arrested in September 2017 for several offences, including being unlawfully in a dwelling house on March 10, 2017. In November 2017, he pleaded guilty to that offence and was sentenced in January 2018 to six months pre-sentence custody, one day court appearance, and 18 months' probation. The fact that he was in custody at the Brandon Correctional Centre on the date the offence occurred in Winnipeg came to light a few weeks following his sentencing. Although the reasons Mr. Catcheway decided to plead guilty are not entirely clear, his comments to the writer of his pre-sentence report, which are quoted in the joint factum that was filed with the Court of Appeal, reveal that he pleaded guilty at least in part to avoid going to trial:

...he initially stated that he did not remember the night he was charged for Unlawfully in a Dwelling House. He then indicated he is pleading out because he does not wish to go to trial and also because there was a video statement saying he was there at the time of the offence. During the interview, the subject alternated between saying he did not remember and he was not there.³⁰²

Predictably, there is more American research regarding false guilty pleas, which is true of the phenomenon of wrongful convictions generally. In the United States, research indicates that of the first 250 individuals exonerated through DNA testing, 19 had pleaded guilty to a crime for which they were later exonerated (that is 7.6 percent).³⁰³ Professor Brandon Garrett suggests these figures may be misleading regarding the overall percentage of false guilty pleas because the 250 cases involved serious offences such as murder where the accused persons would be understandably reluctant to plead guilty due to the penalty. The rate of false guilty pleas in the U.S. may be higher overall when all offences are considered, American experts suggest. "It is one thing to agree to falsely admit to having committed a crime if the crime is relatively trivial and the sentence is a year in prison, but it is another thing entirely if the result is life in prison..."³⁰⁴

The National Registry of Exonerations is a joint project of the University of California Irvine Newkirk Centre for Science and Society, the University of Michigan Law School and the Michigan State University College of Law. It provides information on all known exonerations in the U.S. since 1989. (Unlike the exonerations recognized by the New-York based Innocence Project, the National Registry does not restrict itself to recognizing exonerations only where DNA evidence eliminates the accused as the offender).

302 Joint Factum of the Parties, Her Majesty the Queen and Richard Joseph Catcheway, Manitoba Court of Appeal, File No.: AR18-30-09003, at para. 25.

303 Garrett, "Chapter 6: Innocence on Trial," *Convicting the Innocent*, 150.

304 *Ibid.*, 151.

With that caveat, in its 2018 report, the National Registry reported that it had recorded 2161 exonerations in the United States from 1989 through the end of 2017.³⁰⁵ For the year 2017, the Registry reported 139 exonerations, of which 36 were for convictions based on guilty pleas and another 29 involved false confessions. Thus, 25.9 percent of the exonerations identified by the National Registry in 2017 related to guilty plea cases.

The New York based Innocence Project launched a special campaign in 2017 to draw attention to the issue of false guilty pleas. Nearly 11 percent of the 349 exonerations as of that time period involved false guilty pleas.³⁰⁶

IV. WHY DO FACTUALLY INNOCENT PEOPLE PLEAD GUILTY TO CRIMES THEY DID NOT COMMIT?

As counterintuitive as it may appear, innocent persons sometimes plead guilty to crimes they did not commit, and for a variety of reasons. Chief among these reasons, experts suggest, is that an early guilty plea allows an accused to avoid the uncertainty of a trial outcome, and receive the more lenient sentence that generally accompanies an early guilty plea,³⁰⁷ whether factually guilty or not. (An early guilty plea has long been recognized in the common law as a mitigating factor at sentencing).³⁰⁸

305 The National Registry of Exonerations, *Exonerations in 2017*, March 14, 2018, at page 3.

306 Innocence Project, site accessed January 19, 2018. <https://www.innocenceproject.org/guilty-plea-campaign-announcement>.

307 See Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, Part II, at pp. 4-5 and 9 of QL printout. See also Layton and Proulx, *Ethics and Criminal Law*, 427 at 456. Despite the paucity of research in this area, as many as 50 percent of innocents in laboratory experiments have been induced to plead guilty according to some American experts. The incentives associated with guilty pleas are most often cited as reasons for false guilty pleas in the American research to date, i.e. see Redlich, “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, at 951-952. In the Canadian context, Anthony Hanemaayer and Dinesh Kumar are cited as two examples of this. See *R. v. Hanemaayer*, 2008 ONCA 580 at paras 19-20 and *R. v. Kumar*, 2011 ONCA 120 at para 34. See also *R. v. Anthony-Cook*, 2016 SCC 43, at paras. 35-45, where Moldaver J. for the Court discusses the benefits that flow from plea resolution discussions leading to guilty pleas and joint submissions on sentence.

308 See early cases such as *R. v. Johnston and Tremayne* 1970 2 OR 780 (CA) at para. 7, *R. v. de Haan* 1967 3 ALL ER 618 and *R. v. Rosenberg* 1993 OJ No. 3260 (Gen. Div.) at paras. 17-19 for early references to this well-settled principle. But see more recent cases such as *R. v. Sandercock* (1985) 22 CCC (3d) 79 (Alta. CA) and *R. v. Lacasse*, 2015 SCC 64, at para. 81. See also discussion of an early guilty plea as a mitigating factor in the Martin Report, beginning at p. 309, and in sentencing texts such as Allan S. Manson et al., *Sentencing and Penal Policy in Canada (2nd ed.)*, (Toronto: Emond Montgomery Publications Ltd., 2008), at Chapter 3, *Aggravating and Mitigating Factors*, pp. 117-132 in particular. While the concept of mitigating circumstances generally as a consideration at sentencing in criminal cases has been recognized in the common law for centuries, and is referred to in section 718.2 of the *Criminal Code*, Canada has never codified specific mitigating factors in the *Criminal Code*. See *R. v. Arcand* 2010 ABCA 363 on this point at paras. 34 and 60.

However, factually innocent persons may plead guilty to crimes they did not commit for other reasons as well, both rational and irrational, including the following factors or combination of factors:

- their youth;³⁰⁹
- mental illness;³¹⁰
- intellectual deficits;³¹¹
- the belief that an admission of guilt will allow them to go home;³¹²
- the need to relieve psychological stress;³¹³
- the desire to get out of custody³¹⁴ sometimes because being granted bail is perceived to be unlikely, often due to the accused's criminal record;³¹⁵
- because they are charged with a minor offence³¹⁶ and believe that the penalty flowing from an early guilty plea will be less than the sanction that would result from a conviction following trial;
- wanting or needing to avoid the emotional, financial and other costs of fighting a criminal case and proceeding to trial;³¹⁷

309 Redlich, "The Susceptibility of Juveniles to False Confessions," *Rutgers Law Review*, 943.

310 See Sherrin, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, p. 7 of QL printout. See also Roach, "Wrongful Convictions in Canada," *University of Cincinnati Law Review*, 1465 at 1506 regarding mental disabilities as a factor in false confessions, a characteristic that has also been cited as a factor in false guilty pleas.

311 See Sherrin, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, p. 7 of QL Printout. See also *Marshall c. R.*, 2005 QCCA 852 (where guilty pleas to sexual assaults were later found not to be credible or reliable). DNA evidence exonerated Marshall, who was intellectually handicapped. The convictions were overturned and an acquittal entered.

312 Garrett, "Chapter 2: Contaminated Confessions," *Convicting the Innocent*, p. 18.

313 Sherrin, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, p. 7 of QL Printout.

314 See for example on this point David M. Tanovich, "Taillefer: Disclosure, Guilty Pleas and Ethics," *Criminal Reports* 17, no. 6 (2004):149. The phenomenon of pleading guilty in return for a sentence that will allow detained accused, albeit factually innocent, to be released from pre-trial custody is discussed in greater detail in the body of the chapter below.

315 See Layton and Proulx, *Ethics and Criminal Law* "Plea Discussions", 427 at 456-457. See also Carling, "A Way to Reduce Indigenous Overrepresentation" *The Criminal Law Quarterly*, 415, in particular Section 3: What's New and Why, regarding why Indigenous persons may be more inclined to plead guilty at the bail stage.

316 Blume and Helm, "The Unexonerated," *Cornell Law Review*, 157 at 173.

317 Layton and Proulx, *Ethics and Criminal Law*, 427 at 456. See Sherrin, Christopher, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, on these financial costs as well as emotional costs, stress, anxiety, etc... of fighting the state, at pages 5-6. See also the discussion of this in Brockman, "An Offer You Can't Refuse," *Criminal Law Quarterly* at Section 3.

- the belief that admitting to the crime or to at least some role in it may result in less severe punishment;³¹⁸
- perceiving the situation as hopeless since the police and other state actors appear to be convinced of their guilt, and/or conviction appears likely because the Crown case appears strong despite their factual innocence;³¹⁹
- protecting the real perpetrator;³²⁰
- lack of an alibi;³²¹
- desire to resolve the matter quickly;³²²
- perceived pressure from defence counsel or Crown;³²³
- offender is facing multiple offences and is guilty of some of them thus does not care about being convicted of all of them if it does not affect the overall sentence;³²⁴
- to receive a more lenient sentence and thus avoid the negative collateral consequences that could result from a longer sentence imposed following trial, such as being deported;³²⁵ and

318 See Davies, “The Reality of False Confessions,” *New York University Review of Law and Social Change*, p. 6, regarding admissions that minimized their roles. For a detailed examination of this case, see Burns, *The Central Park Five*. Note that this case concerned false admissions that led to false confessions. The five youths in the Central Park Jogger case were convicted and imprisoned but later exonerated for the 1989 beating and rape of a woman after another man confessed to the crime and his DNA was linked to the crime.

319 Anthony Hanemaayer is an example of accused changing his plea not only to avoid stiffer sentence but also because of perceived strength of the Crown’s case, in this case the perceived strength of eyewitness testimony. See also Garrett, “Chapter 2: Contaminated Confessions,” *Convicting the Innocent*, pp. 22-23 and Burns, *The Central Park Five*.

320 See Layton and Proulx, *Ethics and Criminal Law*, 427 at 456. See Sherrin, “Guilty Pleas,” in *Windsor Review of Legal and Social Issues*, Part C, p. 7.

321 See this point at issue in the case of Anthony Hanemaayer, as discussed in Brockman “An Offer You Can’t Refuse,” *Criminal Law Quarterly*, at Section 2.

322 Layton and Proulx, *Ethics and Criminal Law*, at 456.

323 Garrett, *Convicting the Innocent*, pp. 150-153.

324 See Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, Part C, p. 7 of QL printout.

325 For example, under the *Immigration and Refugee Protection Act*, a sentence of at least six months would result in the loss of the right to appeal a deportation order for a permanent resident. *R. v. Pinas* (2015) OJ No. 941 (CA) and ss. 64 (2) of IRPA.

- in some cases, because the accused, during the interrogation process, comes to believe he or she committed the crime.³²⁶

These factors, which can overlap in some cases, are all deserving of greater examination regarding their relationship to false guilty pleas. The state, as represented by the police and the Crown, clearly has no control over many of these factors, beyond being attuned to them during police interrogations and during the Crown review of the file when assessing the prospect of conviction. In fact, a number of these factors arguably relate more to the role of defence counsel in advising their clients. Since the focus of this chapter is on what state actors such as the police and the Crown can do to reduce the risks of false guilty pleas, however, the Subcommittee has chosen to focus on areas in which these players are involved. For example, the Subcommittee has chosen to consider further the relationship between being denied bail and entering a false guilty plea, in part because the Crown has some control over this factor in light of its capacity to provide direction to Crowns through bail policies, which may ultimately be reflected in bail positions in individual cases.

That said, it is important to state clearly at the outset that the Subcommittee is not suggesting that the Crown take a more lenient position on bail than otherwise deemed necessary or appropriate in a given case to reduce the risks of an accused entering a false guilty plea to get out of pre-trial detention. The Subcommittee is strongly of the view that when determining its position on bail, the Crown priority is, and must rightly be, public safety. Crowns of course are also bound to follow the bail policies of their prosecution services as well as the dictates of the common law in this regard. Rather, the goal of this discussion is to identify what the academic literature suggests to date regarding the link between accused who are denied bail and false guilty pleas and to point the way forward regarding further research.

326 The American case of Michael Crowe is a graphic illustration of this final point. See a brief discussion of this case in Steven Drizin, Laura Nirider and Joshua Tepfer, “Juvenile Justice Investigation: Narrative Contamination, Cultural Stereotypes, and the Scripting of Juvenile False Confessions” in *Examining Wrongful Convictions*, eds., Allison D. Redlich et al., (Durham, North Carolina: Carolina Academic Press, 2014), at 182-183. See also *Crowe v. County of San Diego*, 2010, as well as the case of Jeffrey Deskovic, which is reported upon in Garrett’s, “Chapter 2: Contaminated Confessions,” *Convicting the Innocent*, at pp. 14-18; Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, pp. 6-7; and Rachel Aviv, “Remembering the Murder You Didn’t Commit: A Reporter at Large,” *The New Yorker*, June 19, 2017. For a more comprehensive discussion of the many reasons that may lead an innocent person to plead guilty, see Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, Part C, pp.6-7 of QL printout; see also Kennedy, “Plea Bargains,” *The Criminal Law Quarterly*, 556 at 4 (c) for a list of factors he identifies as contributing to false guilty pleas and Allison D. Redlich et al., “The Psychology of Defendant Plea Decision Making” *American Psychologist* 72, no.4 (2017): 339-352.

The research is increasingly clear that accused persons who have been denied bail feel greater pressure (versus non-detained accused) to plead guilty to simply get out of custody.³²⁷ In a July 2014 report on bail, the Canadian Civil Liberties Association (CCLA) observed that accused are being pressured to plead guilty to escape overcrowded dead time.³²⁸ What is less clear in the Canadian research is the extent to which factually innocent persons are pleading guilty because they have been denied bail and simply want to get released. Canadian academics contend that it is happening but, again, similar to wrongful convictions generally, the scope of the phenomenon is unclear. Some academics argue that it is reasonable to assume that many factually innocent persons plead guilty to avoid the risk of prison (including a potentially longer period) or to avoid conditions in some pre-trial detention centres, and that the increase of accused in detention centres in Canada can only be expected to increase the number of innocent accused who plead guilty to get released, especially if the sentence for the crime is likely to attract a very short jail sentence, if one at all.³²⁹ (The CCLA reported in its report that the remand rate in Canada has tripled over the last 30 years).³³⁰

Some Canadian academics argue that it is “commonly accepted” that innocent persons who are denied bail sometimes plead guilty rather than await trial, to get out of custody sooner.³³¹ The fact is, as experts point out, an accused can sometimes get released earlier from custody by pleading guilty than by going to trial. In a 1971 *Life Magazine* article about a New York City lawyer, the defendant was quoted as saying: “You mean if I’m guilty I get out today...But if I’m innocent, I got to stay in?”³³² As one American academic put it: “A guilty plea thus means immediate freedom, whereas fighting to vindicate one’s innocence necessarily means a longer

327 Elsa Euvrard and Chloe Leclerc, “Pre-trial detention and guilty pleas: Inducement or coercion?,” *Punishment & Society* 19, no.5 (2017). See also: Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, July 2014, pp. 3-4, and Carling “A Way to Reduce Indigenous Overrepresentation,” *The Criminal Law Quarterly*, pp. 425-427 in particular; see also: Will Dobbie, Jacob Goldin and Crystal S. Yang, “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review* 108, no.2 (2018): 201–240. In this study of 420,000 criminal defendants, the researchers indicate that they found that pre-trial detention significantly increases the probability of conviction, primarily through an increase in guilty pleas. These findings are consistent with pre-trial detention weakening the accused’s bargaining position, the authors argue.

328 See Canadian Civil Liberties Association and Education Trust, *Set Up to Fail*, pp. 3 and 10. Time spent in pre-trial custody is sometimes referred to as dead time for several reasons: This time generally is not taken into account when determining parole eligibility, statutory release and remission provisions, detention centres generally do not provide educational retraining or rehabilitation programs for those in custody awaiting trial, and due to overcrowding and other circumstances, conditions at remand centres can be poor.

329 See Tanovich, “Taillefer,” *Criminal Reports*, 149.

330 See Canadian Civil Liberties Association and Education Trust, *Set Up to Fail*, p. 1.

331 Christopher Sherrin, “Excessive Pre-Trial Incarceration,” *Saskatchewan Law Review* 75 (2012): 55-96, at para. 21.

332 *Ibid.*, para. 1.

wait for a trial and potential freedom. Even an innocent defendant may find such a deal, and the prospect of immediate release, irresistible.”³³³

In fact, some Canadian experts point out that the incentive for a factually innocent person to enter an early guilty plea may be stronger in minor matters where an accused with a lengthy record believes there is zero chance of getting bail and recognizes that the delay before trial will exceed the sentence that would be imposed for an early plea.³³⁴

In the United States, the common requirement for accused persons to come up with cash bail has been cited as an incentive for the poor to plead guilty even when innocent since their chances of raising the required cash are low.³³⁵ In New York City alone, about 45,000 people are jailed each year because they cannot pay the bail.³³⁶ Journalist Nick Pinto described it as a trap door for those who cannot afford to pay: “The open secret is that in most jurisdictions, bail is the grease that keeps the gears of the overburdened system turning. Faced with the prospect of going to jail for want of bail, many defendants accept plea deals instead....”³³⁷ Denial of bail in the U.S. has been described as a ‘tool of compulsion,’ “forcing people who would not otherwise plead guilty to do so.”³³⁸ Poor accused are particularly vulnerable, Pinto contends: “Bail makes poor people who would otherwise win their cases plead guilty.”³³⁹

In Canada, conversely, a 2017 unanimous decision of the Supreme Court of Canada, *R. v. Antic*, has stated clearly that cash bail should be relied upon only in exceptional circumstances. Even then, when exceptional circumstances are found to exist and cash bail is ordered, the amount must not be so high that it is beyond the readily available means of accused persons and their sureties.³⁴⁰

333 See Stephanos Bibas, “Plea Bargaining’s Role in Wrongful Convictions,” in *Examining Wrongful Convictions*, eds., Allison D. Redlich et al., (Durham, North Carolina: Carolina Academic Press, 2014), p. 161. Jeffrey D. Stein, a public defender in Washington, D.C., explained poignantly the pressures detained accused may feel that lead them to plead guilty while factually innocent in “How to Make an Innocent Client Plead Guilty,” *The Washington Post*, Opinions, January 12, 2018.

334 See Layton and Proulx, *Ethics and Criminal Law*, 427 at 456-457. See also Carling, “A Way to Reduce Indigenous Overrepresentation,” *The Criminal Law Quarterly*, 415, in particular Section 3: What’s New and Why, regarding why Indigenous persons may be more inclined to plead guilty at the bail stage.

335 Nick Pinto, “The Bail Trap,” *The New York Times Magazine*, August 13 2015, available at: <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

336 *Ibid.*, 3-4 of article printout.

337 *Ibid.*, 4.

338 *Ibid.*, 7.

339 *Ibid.*, 13.

340 *R. v. Antic*, 2017 SCC 27, at para. 67, (h) and (i).

Nevertheless, Canadian scholars have advocated reform of the bail system in Canada so that bail is granted more frequently and with fewer conditions to reduce the number of innocent people who plead guilty to get out of custody. They argue that certain groups, such as Indigenous accused, are overrepresented among those who falsely plead guilty.³⁴¹ The only way to reduce the incentive for factually innocent persons to plead guilty to get out of detention is to grant accused persons bail once they have served the same amount of time in custody as they would serve upon an early guilty plea, some experts suggest.³⁴²

It is important to note that on March 29, 2018, the federal government introduced Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*,³⁴³ which includes major reforms to the criminal justice system, including significant reforms to the interim release and bail system. The proposed changes include a requirement that peace officers, justices and judges give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances.³⁴⁴ The proposed amendments also require peace officers, justices and judges, when considering whether to release an accused at the pre-trial stage, to give particular attention to the circumstances of Indigenous accused and accused who belong to vulnerable populations that are overrepresented in the criminal justice system and that are disadvantaged in obtaining pre-trial release.³⁴⁵

The relationship between being denied bail and guilty pleas by the factually innocent deserves greater attention, given the remand rate in Canada. Even the Supreme Court of Canada has observed that an accused must not feel forced to plead guilty to be released from custody. In *R. v. Antic*, Justice Wagner, writing for the Court, stated: “An accused is presumed innocent and must not find it necessary to plead guilty solely to secure his or her release....”³⁴⁶

341 Carling, “A Way to Reduce Indigenous Overrepresentation,” *The Criminal Law Quarterly*, 417-421.

342 Sherrin, “Excessive Pre-Trial Incarceration,” *Saskatchewan Law Review*, at paras. 6, 25 and 32 for example.

343 <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading>.

344 Ibid., Clause 212, the new section 493.1 of the *Criminal Code*.

345 Ibid., the new section 493.2.

346 *R. v. Antic*, supra, at para. 66.

V. AVENUES FOR FURTHER EXPLORATION REGARDING THE REDUCTION OF FALSE GUILTY PLEAS

Reforms aimed at reducing the risk of false guilty pleas in Canada can be complicated and fraught with challenges, because at least some possible changes may require the re-consideration of longstanding legal principles and entrenched practices. That said, governments and key criminal justice actors, such as police, prosecutors, defence lawyers and judges, as well as professional associations, law societies and other relevant organizations in Canada, share an obligation to consider any and all possible reforms that could reduce the risk of false guilty pleas in Canada. The following discussion focuses on areas of potential reform identified by experts in the field that merit further examination.

1. Resolution Discussions and an Early Guilty Plea as a Mitigating Factor at Sentencing

a) Resolution Discussions

As previously mentioned, the vast majority of criminal cases in Canada do not go to trial but rather are resolved by guilty pleas, often as a result of resolution discussions between defence counsel and the Crown.³⁴⁷ While the scope of resolution discussions can be wide,³⁴⁸ such negotiations often involve accused persons pleading guilty to the charges laid or to lesser offences in return for the Crown agreeing to seek a more lenient sentence than the one the accused could expect to receive should they be convicted following a trial. Under the Canadian common law, an early guilty plea has long been recognized as a mitigating factor at sentence and thus the Crown agreeing to seek a lesser sentence in exchange for an early guilty plea is invariably an aspect of resolution discussions.

The focus of this section thus concerns resolution discussions aimed at resolving matters through guilty pleas, and what, if anything, the state and its key actors can do to reduce the risks of false guilty pleas being entered following such discussions.³⁴⁹ The point should be made at the outset, however, that both plea resolution discussions and the practice of the Crown agreeing to seek a reduced sentence for an early guilty plea are entirely proper, ethical and lawful practices within the Canadian criminal justice system. That said, they are being examined here in the interests of conducting a thorough consideration of any and all practices involving key criminal justice system participants, such as defence lawyers and Crown counsel, which have sometimes resulted in false guilty pleas.

347 Layton and Proulx, *Ethics and Criminal Law*, 427-428. See also *R. v. Nixon*, 2011 SCC 34, at para 47.

348 Layton and Proulx, *Ibid.*

349 *Ibid.*

The longstanding practice in Canada of “plea bargaining,”³⁵⁰ often referred to today as plea negotiations or plea resolution discussions, was once the subject of considerable controversy³⁵¹ but is now considered an integral aspect of Canada’s criminal justice system.³⁵² The Supreme Court of Canada, in a 2016 ruling, agreed with the 1993 Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, that the practice is a “proper and necessary part of the administration of criminal justice.”³⁵³ Resolution discussions between the Crown and the defence are “not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently,”³⁵⁴ Canada’s top court said in *R. v. Anthony-Cook*.

The prospect of a joint submission that carries with it a high degree of certainty encourages accused persons to enter a plea of guilty. And guilty pleas save the justice system precious time, resources, and expenses, which can be channeled into other matters. This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.³⁵⁵

In fact the Supreme Court of Canada has long recognized plea discussions as a core element of prosecutorial discretion.³⁵⁶

350 The Law Reform Commission of Canada stated in its Working Paper 15, *Criminal Procedure: Control of the Process*, (Ottawa: The Commission, 1975) at page 44 that plea bargaining was an established practice in many parts of Canada. According to Joseph Di Luca, “Expedient McJustice or Principled Alternative Bargaining Dispute Resolution? A Review of Plea Bargaining in Canada,” *The Criminal Law Quarterly* 50, no.1 (2005): 14, Sections 6 and 7, academics in the 70s referred to plea bargaining (his term) as the “unspoken of phenomenon” but the practice became increasingly widespread and accepted in Canada through the 70s and into the late 80s.

351 The Law Reform Commission of Canada condemned plea bargaining in the 1975 *Criminal Procedure: Control of the Process* (Working Paper 15) at 45, but changed its position and approved of such negotiations in 1989 in *Plea Discussions and Agreements* (Working Paper 60) (Ottawa: The Commission, 1989) at 40, recommendations 1 and 2. See also: Layton and Proulx, *Ethics and Criminal Law*, 427 at 435 and the Martin Report, “Chapter IV: Resolution Discussions.”

352 *R. v. Anthony-Cook*, 2016 SCC 43 at para. 1; *R. v. Nixon*, 2011 SCC 34 at paras 46-47. See also the Martin Report, “Chapter IV: Resolution Discussions,” and Layton and Proulx, *Ethics and Criminal Law*, 427 at 435.

353 *R. v. Anthony-Cook*, 2016 SCC 43, at para. 35, where Moldaver J. quotes the Martin Report at page 290. See also *R. v. Anderson* 2014 SCC 41.

354 *Ibid.*, para. 1. See also *R. v. Nixon*, 2011 SCC 34 at paras 46-47.

355 *R v Anthony-Cook*, *Ibid*, para. 40.

356 *R v Anderson*, 2014 SCC 41, at para. 44. See also *R. v. Nixon* 2011 SCJ No. 34, at para 21 and *R. v. Power* (1994) 89 CCC (3d) 1.

The history is similar in the United States. Plea bargaining became common there in the mid-1800s. Although controversial, the practice received judicial approval from the United States Supreme Court in 1971, when it was characterized as an “essential component of the administration of justice.”³⁵⁷ It is a well-established and acknowledged practice today. The U.S. Supreme Court acknowledged in 2012 that plea bargaining plays a central role in securing convictions and determining sentences, and that the criminal justice system is “for the most part a system of pleas, not a system of trials.”³⁵⁸

Despite the central and lawful place of resolution discussions within Canada’s criminal justice system, a key weakness of these routine discussions, from the vantage point of advocates concerned about the factually innocent, is that they occur in private between the Crown and the defence, are generally privileged,³⁵⁹ and are not subject to public scrutiny or oversight to the same degree as proceedings in open court. In other words, resolution discussions lack the protections built into the adversarial system, including the concept of the open court as a hallowed principle, i.e., agreements reached during resolution discussions are not wholly visible or transparent.³⁶⁰ The accused can arguably be subject to unrecognized pressures and coercion to plead guilty flowing from these discussions, some argue. When defence counsel, Crowns and judges perform their duties in public, their compliance with ethical and legal obligations can be scrutinized. Such outside scrutiny and oversight is absent when discussions occur in private.³⁶¹

The Martin Report noted that the practice, while still controversial, had gained widespread support by the time that Committee reported in the 1990s,³⁶² and recognized such discussions as an essential part of the criminal justice system in Ontario.³⁶³ The Martin Report nevertheless acknowledged the longstanding and persistent disapproval of the practice by some for its private nature, and its lack of procedural protections (as contrasted with trials presided over by an impartial judge), and thus the greater risks that coerced pleas and unethical conduct could go undetected.³⁶⁴ The Martin Report also noted that some have contended that the nature of plea negotiations can result in the merits of the case taking a back seat to the skills of the negotiating parties.³⁶⁵ It further observed that resolution discussions create a much more limited record for later scrutiny than a case that proceeds to trial.³⁶⁶

357 Simon Verdun-Jones and Douglas F. Cousineau, “Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada,” *Osgoode Hall Law Journal* 17, no. 2 (1979.)

358 *Lafler v. Cooper*, 566 US _ 2012, at p. 11.

359 Although resolution discussions between defence and Crown are subject to privilege, this privilege can be pierced for various reasons, including to enable the Crown to rebut allegations of improper conduct during the discussions. See Layton and Proulx, *Ethics and Criminal Law*, 427 at 432-433.

360 Di Luca, “Expedient McJustice,” *The Criminal Law Quarterly*, Section 5.

361 *Ibid.*

362 Martin Report, “Chapter IV: Resolution Discussions,” 278-280.

363 *Ibid.*, at 281.

364 *Ibid.*, at 276-278.

365 *Ibid.*, at 277.

366 *Ibid.*, at 302.

That said, as discussed in subsequent sections of this chapter, Crown counsel across Canada are today guided by policies that establish the proper and ethical parameters of any such resolution discussions, and both Crown and defence counsel must also adhere to the professional rules of conduct established by law societies.

Nevertheless, some contemporary Canadian and American experts continue to argue that the practice deserves more careful scrutiny.³⁶⁷ In fact, the late Justice Marc Rosenberg of the Ontario Court of Appeal stated publicly in 2011 that plea bargaining had become coercive, that it tempted an intolerable number of innocent persons to plead guilty, and that it required a thorough review. There is no evidence the system would collapse if plea bargaining were abolished, he stated. The U.S. city of New Orleans had abolished plea bargaining several years earlier, and the system had not ground to a halt, he was quoted as saying. Accused persons continued to plead guilty and there was no sharp increase in trials, he observed.³⁶⁸

Some suggest the judiciary should play a more active role: the pre-hearing judge should question the Crown and defence about the facts of the case, if a plea bargain is offered. The sentencing judge could specifically ask accused persons whether they admit committing the crime, whether any promises have been made and, if so, whether such promises have affected the decision to plead guilty. The answers to these questions could inspire the judge to question counsel in greater detail regarding the facts supporting the guilty plea and the judge could ultimately refuse to accept the plea due to concerns about its validity.³⁶⁹ (Under the common law, a trial judge is expected to reject a joint submission on sentence only if it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system.”)³⁷⁰ At the time of writing in April 2018, the federal government had introduced amendments to s. 606 of the *Criminal Code*, aimed at requiring more of judges who accept guilty pleas. This amendment is discussed below in the section concerning s. 606.

367 See Di Luca, “Expedient McJustice,” *The Criminal Law Quarterly*, Section 5. See also Garrett, *Convicting the Innocent*, 153.

368 Justice Rosenberg made these comments in the Kirk Makin article “Top jurist urges review of ‘coercive’ plea bargaining system,” *The Globe and Mail*, March 7, 2011. Online at: <https://www.theglobeandmail.com/news/national/top-jurist-urges-review-of-coercive-plea-bargaining-system/article569776/>. Various U.S. jurisdictions have banned or curtailed plea bargaining over the years.

369 Kennedy, “Plea Bargains,” *The Criminal Law Quarterly*, 556.

370 *R. v. Anthony-Cook*, 2016 SCC 43, at paras. 32-34.

b) An Early Guilty Plea as a Mitigating Factor at Sentencing

According to some experts, pleading guilty to secure a more lenient sentence is the chief reason innocent persons sometimes choose to plead guilty. As previously stated, a guilty plea, particularly one entered early in the court process, has been recognized in Canada for decades under the common law as a mitigating factor at sentencing.³⁷¹ The earlier in the process the plea is entered, the more mitigating it is perceived to be.³⁷² Among other things, pleading guilty early in the criminal process can imply remorse,³⁷³ and also spares victims and witnesses the stress and anxiety of waiting to testify, and the added stress that often comes with having to testify twice (at a preliminary hearing and a second time at trial.)³⁷⁴ It is also sometimes interpreted as the offender taking responsibility early in the process, which has been recognized as the first step in rehabilitation, and it can be perceived as saving valuable resources as well as sparing expense and inconvenience for witnesses and the community at large.³⁷⁵ In fact, the Martin Report recommended that the Ontario Attorney General emphasize to prosecutors that when the guilty plea is offered at the first reasonable opportunity it is “particularly mitigating.”³⁷⁶

However, the risk of this longstanding sentencing practice, although entirely justified in law, is that it can be (and has been) an incentive to an accused person to plead guilty, even if they have not committed the crimes. If it appears that a conviction following trial is likely, and that an accused will receive a significantly stiffer sentence following trial if convicted, pleading guilty early in the process can be a rational choice for a factually innocent accused. The case of Anthony Hanemaayer³⁷⁷ is a classic example in Canada.

Hanemaayer had always maintained that he had not committed the break and enter and assault with which he was charged, but he had no alibi witness to support his story that he was home at the time. After hearing the eyewitness evidence during the trial, whom Hanemaayer perceived as a convincing witness, and after consulting with his lawyer, he changed his plea to guilty. He indicated that he had understood from his lawyer that it was almost certain he would be convicted and could expect a penitentiary term of six years or more. He understood that if he pleaded guilty, he would receive a sentence of less than two years. Hanemaayer

371 See footnote 308 regarding the earlier case references and discussion of this principle.

372 See Allan Manson, “Mitigating Factors” in *The Law of Sentencing* (Toronto: Irwin, 2000), 131-148; *R. v. Lacasse* 2015 SCC 64 at para. 81.

373 Manson, *Ibid.* See also *R. v. Sandercock*, 1985 22 CCC (3d) 79 (Alberta CA).

374 *R. v. Sandercock*, *supra*; *R. v. Rosenberg* 1993 OJ No 3260 (Gen. Div.). An early guilty plea as a mitigating factor at sentencing is discussed in great deal in Martin Report, at p. 285 but also at pp. 309-312.

375 *R. v. Rosenberg* 1993 OJ No 3260 (Gen. Div.) at paras 17-19.

376 Martin Report, recommendation 52, p.309.

377 *R. v. Hanemaayer*, 2008 ONCA 580.

spent 16 months in jail for a crime he did not commit;³⁷⁸ his conviction was eventually overturned by the Ontario Court of Appeal. Justice Rosenberg, in the unanimous court ruling, described the case as “an important cautionary tale for the administration of criminal justice.” Justice Rosenberg wrote:

...[t]he court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.³⁷⁹

Upon further investigation, the police concluded that Paul Bernardo had committed the crime.

Abolishing, or at least limiting, the sentence discount for an early guilty plea would arguably eliminate or reduce the key incentive of the factually innocent to plead guilty to crimes they did not commit. There are strong arguments for and against moving in this direction, which can be summarized as follows: On the one hand, some scholars³⁸⁰ (and presumably some defence lawyers) believe that innocent persons should be free to plead guilty in exchange for lesser sentences if conviction after trial appears likely despite their factual innocence,³⁸¹ given the law as it is. Why should factually innocent persons languish in jail for months awaiting trial, even years, when they could be out much sooner if they plead guilty and receive a shorter sentence, some scholars ask. Innocent accused should not be denied benefits available to accused persons who are factually guilty, they contend.³⁸² In addition, defence counsel are duty bound to act in their clients’ best interests, which includes advising accused persons of the strength of the

378 See Innocence Canada’s Website: <http://www.innocencecanada.com/exonerations/anthony-hanemaayer/>.

379 Ibid., at paras 2 and 18 respectively. Similar comments were made more recently in *R. v. Shepherd* 2016 ONCA 188 at paras 14 and 20 regarding the “powerful inducement” to plead guilty where the Crown’s case is strong although the key forensic evidence regarding cause of death was later discredited. See also comments in *R. v. Kumar* 2011 ONCA 120 at paras. 34 and 37.

380 Layton and Proulx, *Ethics and Criminal Law*, 427 at 467. See also Bowers, “Punishing the Innocent,” *University of Pennsylvania Law Review*, pp. 1170-79.

381 See Brockman, “An Offer You Can’t Refuse,” *Criminal Law Quarterly*, at Section 4 and Bowers, Ibid., 1174. But see Kennedy, “Plea Bargains,” *The Criminal Law Quarterly*, who argues at Section 6 (a) that in cases of factual innocence, a lawyer can never be part of a guilty plea, yet there are certain situations where it would be hard for a lawyer to advise his client to refuse an offer involving a significantly lesser sentence for a plea. Still he states: “If defence counsel knows that an innocent client is only admitting guilt because of a plea bargain then he or she cannot participate in that gravest of injustices, the conviction of an innocent person. However, there will be very few cases that are so obvious.”

382 Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, Part III, referring to Bowers, Ibid., 1133-1134.

Crown's case,³⁸³ as well as offers from the Crown before trial and the likelihood of conviction and sentence following trial.³⁸⁴ This can result, and has resulted, in accused persons who are factually innocent making rational decisions to plead guilty. In addition, some maintain, as the Supreme Court did recently in *R v Anthony-Cook*, that Canada's criminal justice system could not function if plea negotiations (which have at their core the offering of a reduced sentence for an early guilty plea) did not occur.³⁸⁵

Conversely, others argue that while false guilty pleas may be a rational choice in certain situations from the perspective of the accused, a false guilty plea is never an acceptable resolution in Canada's criminal justice system. It undermines the integrity of our criminal justice system, and steps must be taken to reduce or eliminate false guilty pleas.³⁸⁶ Indeed, the Ontario Court of Appeal has referred to "the well-established principle that it can never be in a defendant's interest to be wrongly convicted."³⁸⁷ Nor can criminal justice system participants, including the police and the Crown, knowingly permit, or turn a blind eye to, factually innocent people pleading guilty to crimes they did not commit. Acknowledging it as self-evident, the Martin Report recommended that the Crown should not accept a plea of guilty knowing that the accused is innocent.³⁸⁸ While it is questionable just how often, if ever, the Crown will have actual *knowledge* that the accused is factually innocent, the Martin Report stated that accepting a guilty plea from an innocent person "contravenes counsel's professional status as officer of the Court, and violates the duty of uncompromising integrity: it resembles an attempt to perpetrate a fraud upon the Court."³⁸⁹

While it has been a longstanding practice in this country to treat an early guilty plea as a mitigating factor at sentencing, this principle has never been codified in the *Criminal Code*. However, in a June 2017 Senate committee report on delays in the criminal justice system, the Senators recommended that the Minister of Justice introduce legislation to amend the *Criminal Code* to add a principle to s. 718.2 to that effect. Nevertheless, the committee clarified that: "[E]arly guilty pleas are only appropriate when they reflect the true sentiment of the accused person; encouraging them should never force an accused person to compromise

383 For example, in the commentary section of the Federation of Law Societies of Canada's Model Code of Professional Conduct, as amended on March 14, 2017, under rule 3.2-2, in particular 3.2-2[2], a defence lawyer has a duty to be honest and candid with the client, which includes clearly disclosing what the lawyer honestly thinks about the merits and probable results of the case.

384 Layton and Proulx, *Ethics and Criminal Law*, 427 at 450-451, the authors identify the factors that defence counsel must discuss with the accused prior to the accused entering a plea.

385 See for example *R. v. Anthony-Cook*, at paras. 1, 2 and 40.

386 See Sherrin, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, pp. 8-9 and in conclusion at page 18. See also Layton and Proulx, *Ethics and Criminal Law*, 427 at 468-469.

387 *R. v. Pietrangelo*, 2008 ONCA 449, at para. 6.

388 Martin Report, 291.

389 Ibid.

their belief that they are innocent.”³⁹⁰ Currently, s. 718.2 refers to mitigating circumstances but does not list any examples. Adding an early guilty plea as a mitigating factor could result in an over-emphasis of this factor in sentencing, if no other factors are listed. This Subcommittee takes no position on whether the federal government should include this mitigating factor in the *Criminal Code* or seek to develop a more complete list of mitigating factors for inclusion in the *Criminal Code*; we suggest only that the matter deserves careful and thorough examination prior to any movement in that legislative direction. Regardless of whether the federal government ultimately chooses to codify the principle that an early guilty plea is a mitigating factor at sentencing, alone or as part of a list of mitigating factors, it may be worth considering whether to include in the *Criminal Code* a basic principle that criminal justice system participants must be attuned to the risk of false guilty pleas and aware that certain segments of the population may be particularly vulnerable to entering false guilty pleas.

The documented fact that an agreement by the Crown to seek a more lenient sentence in return for an early guilty plea can prompt factually innocent persons to plead guilty to crimes they have not committed raises fundamental questions that strike at the heart of this issue: Should the state consider abolishing,³⁹¹ or at least limiting to some degree the size of the sentence discount that the Crown can offer an accused in exchange for an early guilty plea as the United Kingdom has done?³⁹² Should governments at least consider researching what we know empirically about the relationship between the longstanding practice of offering more lenient sentences in exchange for early guilty pleas and false guilty pleas? Should the federal government or another appropriate research body in Canada examine the approach and experience of countries such as Britain, which has chosen to limit the size of the sentence discount that can be offered in exchange for an early guilty plea, or that of various American states who have either abolished or limited the size of the sentence discount that can be offered?

It must be emphasized that it remains entirely proper, lawful and ethical in Canada for the Crown to enter into plea resolution discussions, provided Crown counsel adhere to resolution discussion policies, and provided that both defence and Crown counsel respect and honor the rules of professional conduct by which they are bound. This section has nevertheless raised important questions that are worthy of deeper examination, given that the agreement by the Crown to

390 *Delaying Justice is Denying Justice*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, p. 45.

391 Oonagh E. Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Toronto: Carswell Legal Publications, 1990) p. 239.

392 See Section 144 of the *Criminal Justice Act* 2003, as well as new sentencing guidelines in this regard that took effect on June 1, 2017. Sentencing guidelines in the U.K. require that the usual reduction will be one third where the guilty plea was indicated at the first stage of proceedings. For certain offences that carry mandatory minimum sentences, the maximum available discount is 20 percent.

seek a reduced sentence in exchange for an early guilty plea is so often at the core of resolution discussions. These issues require much more discussion and consideration than is possible in this chapter. The Subcommittee merely raises this question in the spirit of a comprehensive examination of this important topic.³⁹³

In closing, it is sufficient to state that so long as an early guilty plea remains a mitigating factor that can result in a more lenient sentence (and in some cases, in a significantly more lenient sentence) than the sentence that would be imposed had the accused been convicted after trial, some accused persons who are factually innocent could continue to plead guilty to crimes they did not commit, unless other safeguards can prevent such false guilty pleas.

2. Crown Policies Across Canada

The Crown, as a state actor, is obliged to do everything in its mandate to ensure that state sanctions, including loss of liberty, are imposed only on persons who have committed the crimes for which they are charged. The development and evolution of Crown policies in Canada over the decades regarding resolution discussions is one means of attempting to ensure this. The Canadian Sentencing Commission recommended in 1987 that the appropriate federal and provincial prosecutorial authorities develop and seek to enforce guidelines regarding the ethics of plea bargaining.³⁹⁴ Two years later, the Law Reform Commission of Canada made a host of recommendations aimed at promoting ethical plea discussions.³⁹⁵ And the Martin Report's final recommendation in 1993 was that the Ontario Attorney General issue public guidelines to implement the Committee's many recommendations regarding resolution discussions.³⁹⁶ The Martin Committee was clearly alive to the issue of wrongful convictions and the need to guard against them. "Under no circumstances" is it in the public interest to seek a conviction where it is known that the accused is innocent, the Martin Report stated.³⁹⁷ "[T]here is no greater disservice to the public interest in the administration of justice than the wilful conviction of an innocent accused."³⁹⁸

393 See Sherrin, "Guilty Pleas," *Windsor Review of Legal and Social Issues*, pp. 9-10. See also significant discussion of the concept of plea discounts in Di Luca, "Expedient McJustice," *The Criminal Law Quarterly*, at Section 9 (1).

394 "Prosecutorial Discretion and Plea Negotiation," Chapter 13 in the Canadian Sentencing Commission and Archambault, J. R. Omer *Sentencing Reform: A Canadian Approach*, Report of the Canadian Sentencing Commission. Minister of Supply and Services Canada, Ottawa, 1987. See recommendations at pp. 427-429, in particular recommendations 13.8, 13.9, 13.12.

395 See the Commission's 23 recommendations, as set out on pp. 67-71 of its report: Law Reform Commission of Canada, Working Paper 60, *Plea Discussions and Agreements*, 1989.

396 Martin Report, Recommendation 79, at pp. 384-385.

397 *Ibid.*, 291-292.

398 *Ibid.*, 292.

Today, a quarter of a century later, all Canadian prosecution services have guidelines for prosecutors regarding resolution discussions, which govern the conduct of federal and provincial prosecutors across Canada and are generally available to the public online. Guidelines on resolution discussions have been in existence for many decades in some cases.³⁹⁹

The Crown obligation to not accept a guilty plea where the prosecutor has knowledge or concerns that the accused is factually innocent is addressed directly in the policies of most prosecution services in Canada. However, the language used differs; some guidelines are more clear and directive than others. For example, Saskatchewan's policy states that Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent. In its chapter on Resolution Discussions, the Public Prosecution Service of Canada Deskbook, which applies to all federal prosecutions, and thus includes all *Criminal Code* and *Controlled Drugs and Substances Act* (CDSA) prosecutions in the three territories, as well as CDSA and certain *Criminal Code* matters in the provinces, states that: "It is important to emphasize that Crown counsel cannot proceed with a resolution agreement where the Crown has knowledge or concerns based on the evidence that suggest the accused may be factually innocent."⁴⁰⁰ Prosecution guidelines for Nova Scotia, Alberta and Prince Edward Island regarding resolution discussions use slightly different language but all prohibit Crown counsel from accepting pleas where the accused continues to assert innocence. The British Columbia and New Brunswick policies require that the accused be prepared to accept legal and factual guilt before the Crown can accept a guilty plea. Newfoundland and Labrador requires that the accused is willing to acknowledge guilt unequivocally and that the accused's guilty plea is voluntary and informed. The Manitoba policy refers to the Crown's duty to be guided by the public interest, the Crown's overarching duty of fairness, its duty not to mislead the court, and the fact that facts provided to the Court on a guilty plea must be facts either accepted by defence counsel or that the Crown can prove beyond a reasonable doubt if disputed. The Quebec policy refers to the fact that the Crown cannot accept a guilty plea to a charge that is not supported by the evidence.⁴⁰¹ Ontario's new Crown Prosecution Manual, which took effect in November 2017, focuses on the fact that the Crown should continue with the prosecution of a charge only where there is a reasonable prospect of conviction, a standard that Crowns are directed to apply in all cases and at all stages.

Crown policies also require the Crown to ensure that the decision to prosecute test has been met regarding the offence, although again, the wording of these policies

399 For example, as the Martin Report points out on page 276, Ontario has had guidelines on plea discussions going back to the 1970s.

400 The Resolution Discussions chapter 3.7 is contained in the PPSC Deskbook and is available online at: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>.

401 This sentence is a translation of the last sentence in paragraph 5 of the Quebec policy on negotiated pleas, which is PLA-1.

varies among prosecution services. For example, the federal Crown can proceed with a charge only if there is a reasonable prospect of conviction based on evidence that is likely to be available at trial regarding the offence. If that standard is met, the prosecution must also best serve the public interest.⁴⁰²

The Crown policies on resolution discussions and the prosecution tests for each jurisdiction cannot be examined in detail in this chapter. However the Subcommittee is of the view that all Crown policies that provide guidance and direction to Crowns in areas that could bear on the prevention of false guilty pleas should be carefully reviewed to ensure that all necessary direction is being provided to Crowns in prosecution policies and related directives to reduce the risks of Crown counsel accepting false guilty pleas following resolution discussions.

3. Rules of Professional Conduct

The known cases of factually innocent persons in Canada pleading guilty to secure more lenient sentences has prompted some to question the ethics and propriety of defence lawyers entering guilty pleas on behalf of clients who maintain their innocence.⁴⁰³ Various legal entities, such as the Law Reform Commission of Canada in its 1989 report,⁴⁰⁴ the Martin Committee⁴⁰⁵ and perhaps more indirectly, law societies and similar bodies⁴⁰⁶ across the country, have been suggesting for decades that Crown prosecutors and defence counsel should avoid assisting in plea agreements that involve an accused pleading guilty to an offence while maintaining innocence or where defence or Crown have knowledge or evidence that the accused is factually innocent. However, even if clients maintains factual innocence in private conversations with defence counsel, if accused persons want to plead guilty, ultimately, they can find a way to do so, in accordance with the current law and wording of the professional rules of Canada's law societies. In order to respect the rules of professional conduct, which require, among other things, that counsel cannot mislead the court,⁴⁰⁷ in practice, defence counsel deal with this in various ways. Sometimes defense counsel withdraw from the case and

402 PPSC Deskbook, Decision to Prosecute, Chapter 2.3.

403 Roach, "Wrongful Convictions," *University of Cincinnati Law Review*, 1465 at 1512. See also Layton and Proulx, *Ethics and Criminal Law*, 427 at 458. See *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70, at paras 109-110. See also comments from Anthony Hanemaayer referred to in *R. v. Hanemaayer*; supra, para. 11.

404 Law Reform Commission of Canada, Working Paper 60, *Plea Discussions and Agreements*, pp. 48-49 and 68.

405 See Martin Report recommendations 47-49, at p. 476.

406 But the law society rules on this point are often general, vague and ambiguous. The Federation of Law Societies of Canada's *Model Code of Professional Conduct* under section 5.1-8 regarding Agreement on Guilty Plea says only that the defence can enter into an agreement with the Crown regarding a guilty plea if the client is voluntarily prepared to admit the necessary factual and mental elements of the offence charged. Being prepared to admit the elements of the offence is not the same thing as admitting commission of the offence.

407 See for example the Federation of Law Societies *Model Code* at Rule 5.1, in particular Rules 5.1-1 and 5.1-2 (b) and (e).

the client who wishes to plead guilty goes to another lawyer. Sometimes defence counsel advise the court that counsel will not assist with the plea but will still make sentencing submissions.⁴⁰⁸

Leading Canadian authorities on legal ethics acknowledge that the rules of professional conduct in Canada are simply unclear regarding whether counsel can represent a client on a guilty plea if that client continues to maintain innocence.⁴⁰⁹ In fact, some academics suggest it is time for Canada's legal profession and the courts to address this issue head on and develop a specific ethical and legal rule of conduct in this regard.⁴¹⁰

The Federation of Law Societies of Canada, the national coordinating body of Canada's 14 provincial and territorial law societies that regulate lawyers and related legal professionals, has approved a Model Code of Professional Conduct.⁴¹¹ While each of Canada's law societies has its own code of conduct for lawyers, the Federation's Model Code has been implemented in whole or in part by almost all law societies.⁴¹² The Model Code is a useful guide because it establishes uniform national guidelines for lawyers. However its guidelines may not yet be adequately robust and detailed to address concerns about preventing false guilty pleas. For example, the Federation's current model rule regarding Agreement on Guilty Plea may not provide sufficient safeguards against false guilty pleas. Rules 5.1-8 (c) and (d) state that a lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea, if, following investigation, (c) "the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged;" and (d) "the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea."⁴¹³ This statement requires only that the accused is prepared to admit the essential elements of the crime. Similar wording is found in other rules of professional conduct of other law societies across the country.⁴¹⁴ Experts in legal ethics argue that this wording can be interpreted in various ways: On the one hand, it could mean that defence counsel cannot represent an accused on a guilty plea if the accused continues to assert innocence in private. However, this wording applies

408 See July 2011 paper presented at the National Criminal Law Program (Quebec City): "Ethical Considerations for Defence Counsel in Negotiating a Guilty Plea and the Conduct of Plea Proceedings" by Elizabeth Buckle, now Nova Scotia Provincial Court Judge Elizabeth Buckle, at p. 14 in particular.

409 This is the position of authors David Layton and the late Michel Proulx in their chapter "Plea Discussions," in *Ethics and Criminal Law*, 427 at 458.

410 Tanovich, "Taillefer," *Criminal Reports*, 149 at final unnumbered paragraph.

411 The *Model Code* was accessed in January 2018. The *Model Code* is readily available online through the Federation's web site: <https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>.

412 This commentary is based on the Federation of Law Societies web site, which was accessed on January 16, 2018.

413 Federation of Law Societies of Canada, *Model Code of Professional Conduct*, as amended March 14, 2017, Rule 5.1-8, p. 86.

414 See also Layton and Proulx, *Ethics and Criminal Law*, 427 at 448.

only to plea agreements, which suggests defence counsel can proceed with guilty pleas of clients who maintain innocence provided this is not done as part of agreements, some argue. In addition, experts say, the phrase “prepared to admit” can be interpreted to mean that the accused must be willing to make a public admission of guilt during the plea and sentencing proceedings but not necessarily during private discussions with defence counsel.⁴¹⁵

The rules in Chapter 5 of the Model Code go only so far as to say that defence counsel must represent the client resolutely and honorably and treat the court with candour and fairness.⁴¹⁶ However the commentary in Footnote 10 under rule 5.1-1 makes the point that admissions by the accused to a lawyer may impose strict limitations on the conduct of the defence and the accused should be apprised of this. Nor can defence counsel pursuant to rule 5.1-2 (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable or (e) knowingly attempt to deceive the tribunal or influence the course of justice by offering false evidence. Likewise, under rule 5.1-3, the prosecutor must act for the public and the administration of justice “resolutely and honorably” while treating the tribunal with candour and fairness.

But these are general rules that are vague and open to interpretation. The model rules do not expressly and specifically state that guilty pleas can be accepted from accused persons only if the evidence demonstrates that they committed the offences and if they admit committing the offence. Nor do the rules clearly and directly address the professional duties of defence counsel in situations where clients want to plead guilty while continuing to profess their factual innocence to the lawyer, nor make the point that a prosecutor cannot accept a guilty plea from an accused known to be innocent, or that, as a fundamental principle, it is never in the public interest to accept a guilty plea or agree to a sanction for an individual who has not committed the criminal offence. The law societies should consider whether the rules of professional conduct in Canada should address this matter more clearly and directly.

415 *Ibid.*, 458.

416 *Model Rules*, rule 5.1-1.

What *is* clear in the Model Code, and in the rules of law societies across the country, as well as in the rulings from the Supreme Court of Canada, is that a lawyer cannot knowingly attempt to deceive or mislead the court.⁴¹⁷ While the meaning of the phrase “mislead the court” may also be the subject of debate, its practical and logical meaning would arguably preclude a lawyer from representing in court that the client is guilty when counsel knows that the client is innocent.⁴¹⁸ But how often, if ever, will counsel know with 100 percent certainty that the client is factually innocent? As Layton and Proulx posit in *Ethics and Criminal Law*, is a lawyer misleading the court if the lawyer does not believe the client’s private insistence on his innocence or is simply uncertain of the veracity of the claim of innocence?⁴¹⁹

In the final analysis, what can defence and Crown counsel do when an accused insists he is guilty and wishes to plead so, despite their doubts, if the facts support the essential elements of the offence and the prosecution standard has been met? To what extent can, or should, the defence and Crown play the role of gatekeeper in these circumstances? Should the judge’s role at the time of plea be expanded? How far can, or should, key criminal justice system participants go in seeking to confirm the veracity of the guilty plea? What are the boundaries of professional responsibility in this regard? What further steps, if any, should professional bodies practically take to regulate professional conduct in this regard? These are valid, important and practical questions worthy of further consideration.

4. Judicial Training

As discussed in Chapter 7, the National Judicial Institute offers courses for federally-appointed judges across Canada, including a specific course on wrongful convictions. When it was offered in 2017, a part of the course included the topic of false guilty pleas.

417 In *R. v. Anthony-Cook*, 2016 SCC 43, at para 44, Moldaver J for the Court reminds both Crown and defence counsel that they are bound professionally and ethically not to mislead the court. See also Layton and Proulx, *Ethics and Criminal Law*, 427 at 463-464. In England and Wales, barristers can represent clients on guilty pleas despite the clients continuing to protest their innocence in private, on certain conditions. This is discussed in “Chapter 9: Plea Discussions.” In the United States, accused persons can enter either what is known as an Alford Plea (pleading guilty while maintaining innocence, as discussed in *North Carolina v Alford* 400 US 25 (1970)) or a *nolo contendere* plea. The latter plea, which is available in federal courts and in most state courts in most circumstances, involves the accused not contesting the Crown’s case. This is thus an implied admission of guilt so that the court can enter the conviction and sentence the accused in the proceeding. These two forms of plea are discussed later in this chapter in the section on section 606 of the *Criminal Code*.

418 Layton and Proulx, *Ethics and Criminal Law*, 427 at 459 and 469.

419 *Ibid.*, 459.

5. The Judiciary and Section 606 of the *Criminal Code*

Pleas

SECTION 606

Pleas permitted

606. (1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

Conditions for accepting guilty plea

(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

- a) is making the plea voluntarily; and
- b) understands
 - (i) that the plea is an admission of the essential elements of the offence,
 - (ii) the nature and consequences of the plea, and
 - (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

Validity of plea

(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

Refusal to plead

(2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

Subsections 606 (1.1) and (1.2) are relatively new sections in the *Criminal Code*. They were introduced in 2002, and reflect the proposed wording and recommendations of the 1993 Martin Report. The Report had noted that since it was acceptable in the U.S. to plead guilty while maintaining one's innocence, a plea comprehension inquiry was desirable in Ontario since a guilty plea cannot proceed if the accused denies guilt.⁴²⁰ The Martin Report recommended that the Attorney General of Ontario seek an amendment to the *Criminal Code* requiring a sentencing judge to question the accused in every case where a guilty plea is to be entered, regarding the voluntariness of the plea, as well as the accused's understanding of the nature and consequences of a guilty plea. Given the potential implications for an accused, the Martin Report explained that it was recommending that the trial judge conduct the inquiry in open court.⁴²¹

Under the Canadian common law, courts have interpreted ss. 606 (1.1) to mean that, in order for a guilty plea to be valid, it must be voluntary, unequivocal and informed.⁴²²

Yet some scholars suggest that the current wording of s. 606 of the *Criminal Code* is not adequately demanding or robust, that it does not demand enough of the accused or the judge to ensure that the accused is factually guilty. No special rules adequately limit the ability of judges to accept pleas in these circumstances or require them to conduct more in-depth inquiries of the factual bases underlying the pleas, scholars say. "Ineffective assistance of counsel combined with judicial passivity in accepting guilty pleas dramatically increases the risk of wrongful convictions," some scholars contend.⁴²³

In practice, presumably judges can continue to assume that accused persons are receiving effective assistance of counsel in the sense that the accused is being properly advised of the availability of any and all available defences, including the inability of the Crown to prove the required mental element when this is the opinion of defence counsel. That said, the current wording of s. 606 requires only that the judge inquire, among other things, whether the accused is prepared to admit the essential elements of the offence. It does not require the judge to inquire whether the accused actually committed the offence.⁴²⁴ Nor does a judge's

420 Martin Report, p. 320. See Recommendations 55 and 56 and accompanying discussion at pp. 317-323.

421 Ibid., p. 318.

422 *R. v. TL*, 2016 SKCA 160. Among the cases for this proposition is *Adgey v the Queen* 1973 13 CCC (2d) 177 (SCC).

423 Roach, "Wrongful Convictions," *University of Cincinnati Law Review*, at 1513.

424 Scholars such as Joan Brockman ("An Offer You Can't Refuse," *Criminal Law Quarterly*), have suggested the current wording of s. 606 enables judges to "dodge" the question of whether the accused committed the offence. But these observations predate the amendment to s. 606 proposed in Bill C-75. Note also that the Canadian jurisprudence going back many decades says that, where an accused is represented by counsel and pleads guilty, the trial judge as a matter of law is not bound to interrogate the accused before accepting the plea. *R. v. Brosseau* 1969 SCR 181.

failure to fully inquire as to whether the conditions in ss. 606(1.1) have been met invalidate the guilty plea, which some academics argue undermines the obligation of a judge to conduct a full inquiry.⁴²⁵ In short, the statute requires only that an accused voluntarily choose to plead guilty, and that the accused understands that the guilty plea is an admission of the essential elements of the offence and appreciates the nature and consequences of the plea. As some academics have noted, s. 606 does not directly address the issue of the factual accuracy of the plea.⁴²⁶ “Innocent accused can freely choose to plead guilty, fully understanding that they are admitting to the elements of the offence, even if they are lying or do not understand what those elements are.”⁴²⁷ In other words, the section does not require that the accused expressly and voluntarily admit committing the act and also admit having had the required mens rea, nor does it require the judge to ask accused persons directly if they committed the crime. In essence, as one academic puts it, s. 606 currently permits the trial judge to “dodge” the question of whether the accused actually committed the offence.⁴²⁸

To address these concerns regarding the essential elements of the offence, the Crown, in reading in the agreed statement of facts on which the guilty plea is based, should take care to refer to the facts and evidence in support of each essential element of the offence, including the evidence supporting the requisite mental element of the offence, regardless of how serious or minor the crime.

A key problem with s. 606, academics argue, is that it enables both the accused and the judge to remain “extraordinarily passive” and creates few barriers for accused persons who wish to plead guilty to crimes they not commit.⁴²⁹ For example, some Canadian experts contend the accused should have to personally enter the guilty plea in all cases and confirm the accuracy of the facts supporting the charge. Currently, an accused does not have to personally enter the guilty plea or personally acknowledge as true the facts alleged by the Crown in support of the charge; defence counsel can make these admissions on behalf of the accused. If the accused had to take these steps personally and publicly in open court, some academics contend that innocent persons might find this more difficult to do as it requires an overt act of lying.⁴³⁰ It should also be legally mandatory for the judge to hear the facts in support of the charge⁴³¹ and to question the accused to ensure the accuracy of the facts,⁴³² which could also make it more challenging for the

425 Brockman, “An Offer You Can’t Refuse,” *Criminal Law Quarterly*.

426 See a discussion of how the plea process under s 606 could be improved to better ensure the accuracy of the guilty plea in Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, pp. 13-15.

427 *Ibid.*, 15.

428 Brockman, “An Offer You Can’t Refuse,” *Criminal Law Quarterly*, at Section 4 (subsection 3) on the Plea Comprehension Inquiry.

429 Sherrin, “Guilty Pleas,” *Windsor Review of Legal and Social Issues*, p. 13.

430 *Ibid.*, 13-14.

431 *Ibid.*, 14.

432 *Ibid.*

innocent accused to enter a false guilty plea. Some advocate that the judge should be required to conduct a brief factual inquiry of the accused to hear the accused explain directly what they did and why. The judge should not accept the plea unless satisfied that the accused is honestly and accurately admitting to all of the elements of the offence.⁴³³ While these practices may already occur in many cases, requiring them by law would arguably assist in reducing false guilty pleas.

In summary, Professor Christopher Sherrin suggested some years ago that the law should be amended in three ways to address the infirmities in s. 606 of the *Criminal Code*:

- Require the accused to enter the plea personally and to acknowledge the facts supporting the charge;
- Require the judge taking the plea to hear the facts in support of the charge; and
- Require the judge taking the plea to question the accused to verify factual accuracy.⁴³⁴

Bill C-75, which was introduced on March 29, 2018 and referred to earlier,⁴³⁵ contains a key change to s. 606 that is designed to address to at least some degree concerns that have been identified. The amendment proposes changes to ss. 606 (1.1) of the *Criminal Code* so that it would require that a court can accept a guilty plea only if it is satisfied that the facts support the charge. Obviously this amendment, should it become law, would require the judge to specifically consider in each case the elements of the charge and the facts supporting each element.

In its Charter statement accompanying the introduction of Bill C-75, the government explained its rationale for this amendment:

Clause 270 would amend the plea provisions of the *Criminal Code* to require the court to be satisfied that the facts support the charge, as a condition for accepting a guilty plea. This requirement is already contained in section 36 the *Youth Criminal Justice Act* (YCJA) as a recognition of the vulnerability of youth. The amendment is in recognition that many adults in the criminal justice system are also vulnerable and it would provide an additional safeguard against an innocent accused pleading guilty due to being denied bail and/or trying to avoid a lengthy wait for trial, while promoting respect for the rights to liberty and to a fair trial as protected by sections 7 and 11(d) of the Charter.

433 Ibid.

434 Ibid., 13.

435 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, at Clause 270.

Under ss. 36 (2) of the YCJA, if a young person pleads guilty but the court is not satisfied that the facts support the charge, it must proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or dismiss the charge, as the case may be.⁴³⁶ As noted by the Saskatchewan Court of Appeal in *R v TL*, s. 36 is intended to ensure that young persons are found guilty only of offences flowing from their actual conduct.⁴³⁷ Likewise, ss. 32 (4) of the YCJA requires that if the court is not satisfied that the young person understands the charge, the judge must enter a plea of not guilty and proceed with the trial in accordance with s. 36. (Additional and related protections under s. 32 of the YCJA apply to unrepresented young persons.)

Finally, in adult court, plea comprehension forms are now being used in at least some jurisdictions, to some degree, where accused persons (presumably with the assistance of defence counsel) must review and answer direct questions relating to whether they committed the offence, and sign the form, to provide greater assurance that the accused persons committed the offence and fully understand the implications of pleading guilty. These forms probe the fundamental issue of factual guilt to varying degrees and may vary in value and effectiveness in identifying factually innocent persons. Examples of these forms are attached as Appendices A and B.

6. Other Forms of Plea

Another question that is arising in the public discourse in Canada, as well as in the jurisprudence, is whether other plea options should be permitted in Canada to reduce false guilty pleas.⁴³⁸ While this idea was raised in the June 2017 Senate report as one avenue for reducing delays in the criminal justice system,⁴³⁹ it could provide a solution for at least some accused persons who wish to resolve their matters without pleading guilty to crimes they did not commit, and may be worthy of further study and consideration, at least regarding minor offences. Currently in Canada, accused persons have two basic legal options: they can plead guilty or not guilty⁴⁴⁰ whereas in at least some American jurisdictions an accused person can also enter what is known as an *Alford* plea, or plead no contest (*nolo contendere*).⁴⁴¹

436 *Youth Criminal Justice Act*, s. 36. *R v TL*, 2016 SKCA 160 supports the argument that s. 36 of the YCJA is more robust than s. 606 as currently worded in providing legislative protection against false guilty pleas. See also *R. v. K(S)* 24 OR (3d) 199 (CA). In both cases, the guilty pleas were vacated and new trials ordered.

437 *R. v. TL*, supra, at para 20. See also *R. v. HJPN* 2010 NBCA 31, relied upon in *R v TL*.

438 *Delaying Justice is Denying Justice*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, p. 44.

439 Ibid.

440 Unless one of the special pleas in s. 607 of the *Criminal Code* applies.

441 Bibas, "Plea Bargaining's Role," p. 161.

An *Alford* plea means an accused pleads guilty while still declaring innocence whereas in *nolo contendere* cases, which have existed since the Middle Ages, the accused simply refuses to admit guilt.⁴⁴² A no-contest plea means the accused is neither admitting nor denying guilt but accepts that the judge will impose a sentence for the offence. An *Alford* plea, on the other hand, means the accused maintains innocence but agrees to plead guilty and be sentenced as if guilty. The U.S. Supreme Court in *North Carolina v Alford*⁴⁴³ held that a guilty plea is valid if it is voluntary and an intelligent choice among the available alternatives.⁴⁴⁴ In that case, the accused testified that he had not committed the murder but was pleading guilty to avoid the death penalty. Under North Carolina law at the time, the penalty upon conviction for first-degree murder was death unless the jury recommended a life sentence, but a guilty plea would reduce the penalty to life imprisonment.⁴⁴⁵

In the 2017 Senate report, one witness suggested that a third plea option other than guilty or not guilty could be useful in Canada so that the accused would not necessarily tie up the system by fighting the matter. Using an alternative form of third plea could be useful for minor offences and specific categories of offenders, such as vulnerable and repeat offenders and those who are often before the courts for reasons related to addiction and mental health, the witness suggested.⁴⁴⁶ Some academics have argued similarly: that innocent-but-guilty pleas should be permitted, at least in what have been described as low-stakes cases, where accused persons believe they cannot endure the financial, emotional and other costs of fighting the charge, and the penalty for admitting guilt is not considered unacceptable. Those same academics suggest that accused in high-stakes cases are better off without plea-bargaining or with at least reduced plea-bargaining pressures.⁴⁴⁷

Some American academics argue that these two additional forms of plea make it easier for innocent people in the U.S. to avoid stiffer sentences.⁴⁴⁸ Despite these American plea options, the Martin Report concluded that “it was not in the interests of justice in Ontario to permit a guilty plea to stand where an accused maintains his or her innocence.”⁴⁴⁹

442 Blume and Helm “The Unexonerated,” *Cornell Law Review*, 157 at 171.

443 400 US 25 (1970).

444 Brockman, “An Offer You Can’t Refuse,” *Criminal Law Quarterly*, Section 1.

445 For a good explanation of the Alford Plea, see Blume and Helm, “The Unexonerated,” *Cornell Law Review*, 157 at 171-172.

446 *Delaying Justice is Denying Justice*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs. See comments of Judge Raymond Wyant, Senior Judge of the Manitoba Court and Former Chief Judge of the Provincial Court of Manitoba, at p. 44.

447 Bowers, “Punishing the Innocent,” *University of Pennsylvania Law Review*, p. 1165. In the case of *R. v. Sherret-Robinson*, 2009 ONCA 886, the Crown withdrew the murder charge prior to trial and a charge of infanticide was laid instead. The accused plead not guilty to infanticide but agreed not to contest facts that included an allegation that she smothered her child and a summary of the evidence of then Dr. Charles Smith. Sherret-Robinson was sentenced to and served one year in custody; she always maintained she had not harmed her child and was eventually acquitted after the Ontario Court of Appeal held that the evidence could not support a finding that she killed her child.

448 Bibas, “Plea Bargaining’s Role,” p. 161.

449 Martin Report, p. 293.

The Subcommittee takes no position on these other forms of plea that exist in the United States. They are mentioned only in the interests of providing information about how other countries are addressing similar legal challenges in their criminal justice systems and in the spirit of identifying for further consideration any and all possible options that could play a role in reducing the risks of false guilty pleas in Canada.

7. A Comment on Resources

Finally, the Subcommittee makes the general observation that properly resourced police and prosecution services, as well as legal aid plans that enable indigent accused to secure defence counsel, can be expected to assist in reducing the risk of false guilty pleas. Sufficient resources help to ensure adequate staffing and proper training of police and Crown prosecutors, which in turn helps to ensure proper and thorough police investigations, Crown screening, and prosecutions where the test for prosecution has been met. Likewise, adequate funding of legal aid plans can assist in ensuring that impoverished accused persons receive adequate assistance from defence counsel.

VI. RECOMMENDATIONS

1. The federal government and other appropriate federal and provincial entities in Canada should undertake research regarding:
 1. the circumstances that lead to false guilty pleas in Canada;
 2. the extent of the phenomenon;
 3. the extent to which certain groups may be particularly vulnerable to false guilty pleas, and, if so, why; and
 4. what changes, if any, should be made to reduce the risk of false guilty pleas in Canada.

In particular, this research should examine:

- the factors that have been identified as playing a role in false guilty pleas, to determine the significance of each factor, such as the impact of being denied bail or being offered more lenient sentences in exchange for guilty pleas;
- the impact of the proposed amendment to s. 606 of the *Criminal Code* in Bill C-75, if it becomes law, to assess whether it addresses concerns about this section that have been raised in the academic literature;
- the longstanding principle that an early guilty plea is a mitigating factor at sentencing and its relationship to false guilty pleas;
- the experience of other countries, such as Britain and various United States jurisdictions, which have either limited the size of the sentence discount that is offered to an accused in exchange for an early guilty plea, or banned

- or curtailed plea bargaining, to assess the impact of such approaches on reducing the risk of false guilty pleas;
- whether other *Criminal Code* amendments are required to better guard against false guilty pleas;
 - whether an accused person in Canada should have additional plea options; and
 - whether the mandatory use of a model uniform plea comprehension form in Canada would assist in reducing the risk of false guilty pleas.
2. Prosecution services in Canada should review Crown policies regarding resolution discussions and other relevant policies, such as the Decision to Prosecute and bail policies, to ensure they contain adequate safeguards, guidelines and clear direction to prosecutors, to assist in guarding against false guilty pleas.

In particular:

- (i) All prosecution services have policies that indicate that a criminal charge cannot proceed unless there is a reasonable prospect of conviction, or words to that effect. All Decision to Prosecute policies of Crown prosecution services should be reviewed to ensure they clearly state that the Crown can proceed with a prosecution only if the decision to prosecute test has been met, and that plea resolution discussions cannot proceed where this standard is not met;⁴⁵⁰
 - (ii) During resolution discussions, Crown prosecutors should be alive to the risks that:
 - a) an early guilty plea offer may create an incentive for a factually innocent person to plead guilty, and
 - b) a factually innocent person who has been detained, particularly for a minor offence, may be motivated to plead guilty.
3. The Federation of Law Societies of Canada, as well as provincial and territorial law societies, should examine their rules of professional conduct to ensure they provide adequate and clear direction to defence counsel and Crown counsel, to the extent appropriate, to better guard against factually innocent persons pleading guilty.
4. The National Judicial Institute and other organizations that provide educational programs and resources for judges in Canada, should be encouraged to continue to provide content that includes the state of the research concerning the phenomenon of false guilty pleas in Canada, and the role of judges in the prevention of false guilty pleas.

450 It is important to note that the wording of this standard varies among prosecution services in Canada.

Appendix A

Agreement to Enter Guilty Plea

I, _____, am charged with the offence(s) of:

_____.

I understand that the prosecutor is seeking a plea of guilty to the following charge(s):

_____.

I read, write, speak and understand English, OR I understand the court-ordered interpreter who will be helping me in court.

Yes No _____ Initial

I have not taken any medicine, pills, drugs, alcohol or substances that may affect my ability to make a decision about what I should do about the charge(s) or my understanding about what may happen when I plead guilty in court.

Yes No _____ Initial

I have talked with duty counsel (or my own lawyer), and any questions about my understanding of the charge(s) against me and this guilty plea have been discussed and answered.

Yes No _____ Initial

Before making this plea, I agree that I have been **advised of**, and **understand**:

1. I have the right to plead **not guilty** and have a trial. At that trial the prosecution would have to prove the case against me beyond a reasonable doubt. **I agree to plead guilty and give up my right to a trial.**

Yes No _____ Initial

2. I am pleading guilty voluntarily, without pressure from anyone.

Yes No _____ Initial

3. I have read the facts contained in the written document (“synopsis”) I have received from the prosecution, and I am prepared to admit that those facts are true. I understand that the Judge may discuss those facts with me before accepting my plea of guilty.

Yes No _____ Initial

4. I understand that as a result of my plea I will have a criminal record (or if I already have a criminal record, I will add to it).

Yes No _____ Initial

5. I have been told that the prosecutor will be asking for the following sentence:

_____.

I understand that I can agree with the sentence the prosecutor seeks (a joint submission) or that I can suggest another type of sentence (an open submission).

Yes No _____ Initial

6. I understand that the Judge does not have to accept the sentence suggested by the prosecutor or by myself. I understand that the Judge may discuss this with me before deciding what sentence the Judge thinks is right. I understand that the Judge may give a higher or lower sentence than the prosecutor suggests.

Yes No _____ Initial

7. I am aware that there may be other indirect penalties that may come as a result of my guilty plea. Some of these may include losing my right to remain in Canada or not being able to travel to other countries, my ability to have a driver's licence, my car insurance rates, any family law proceedings, as well as my current job and future job opportunities. I am aware that I have a right to talk to a lawyer who could advise me about these penalties before I enter my plea.

Yes

No

_____ Initial

Signature of Accused: _____

Signature of Witness: _____

Date: _____

Appendix B

Modified: September 14, 2016

PLEA COMPREHENSION INQUIRY

I _____ . Date of Birth: _____

State that I have instructed Counsel that I wish to Plead Guilty to the following charge(s):

_____.

I have instructed Counsel from the Counsel office to represent me for this Guilty Plea.

I am aware of the Crown’s Position on sentence as follows: (include charges accused is pleading guilty to and Crown’s position)

_____.

I am aware that Counsel, on my behalf, will recommend to the judge that the appropriate sentence is:

_____.

I understand that:

- The judge will not accept my guilty plea if I tell the judge that I did not commit the crime(s) I am charged with committing.
- Counsel does not recommend that I plead guilty if I am pleading guilty just to get it over with (for example, pleading guilty to avoid missing school or work).
- I cannot withdraw my plea because I do not like the sentence the judge imposes.
- Counsel has advised me that I should not plead guilty at this time and I am choosing to do so against this advice. [Counsel should strike out if not applicable.]
- I have a right to plead not guilty and to have a trial where the Crown must prove that I am guilty of the charge(s) beyond a reasonable doubt. If, after the trial, the judge finds that the charge(s) was not proven beyond a reasonable doubt, the judge will find me not guilty. I am giving up this right.
- I am pleading guilty voluntarily, of my own free will, and no one has pressured me to do so or promised me anything in return for pleading guilty.
- By pleading guilty I admit that I committed the essential elements – or the required parts – of the above criminal offence(s) as explained by counsel.
- At this time, I have only been able to consult with a lawyer based on a summary of the Crown’s evidence against me.
- I have a right to know in advance of the trial what evidence the Crown has against me and to wait for complete disclosure (the full file of all the evidence against me) to speak with a lawyer about the complete case. This could allow me to learn whether there are any weaknesses (i.e. legal or factual) in the Crown’s case against me or whether there are any defence(s) to this charge. I am giving up this right.
- The Judge will listen to what the lawyers say about what sentence I should receive and anything I wish to say, BUT it is the Judge’s decision to sentence me as s/he sees fit which could include jail, or a longer period of jail than what is being proposed. The Judge is not required to follow any agreement made between my Counsel and the Crown Attorney, even if my Counsel and the Crown Attorney agree to suggest to the Judge a particular sentence.
- I require the assistance of a _____ interpreter and that assistance has been provided to me for the purposes of translating and completing this form. The interpreter who assisted with the translation of this form is _____

Furthermore, Counsel has explained the consequences of pleading guilty to me. I understand that:

- An Absolute Discharge or Conditional Discharge is a “finding of guilt” that, will result in a **temporary criminal record** and a **permanent police and computer record** of the discharge.
- Any finding of guilt, including an Absolute or Conditional Discharge may affect my current or future employment including losing my current job or stop me getting another or different job.
- A finding of guilt may affect travel to other countries, including the United States, in particular. It is completely up to the other country to admit me or not.
- If I am not a Canadian citizen a finding of guilt can affect my immigration status (possibly leading to my deportation from Canada). I have been advised to seek advice from an immigration lawyer before pleading guilty.

[If applicable, Counsel should indicate which phrase applies]:

I have refused to do this _____

I have spoken directly to an immigration lawyer _____

Counsel has sought advice from an immigration lawyer on my behalf _____

- A finding of guilt may affect any child custody hearings in which I may be involved, especially with respect to any form of assault against another person.
- A finding of guilt may affect my ability to be a volunteer, for example, at a school or day care.
- There may be other consequences of pleading guilty that could last for years or even the rest of my life, including a DNA order, weapons prohibition, restrictions on my mobility and consequences under the *Highway Traffic Act*.
- (If applicable) I will also be added to *Sex Offender Information Registration Act* (SOIRA).
- (If applicable) I will be ordered by the Judge to pay a Victim Fine Surcharge (VFS).

I understand that the information on this form is to clarify the consequences of a guilty plea. My signature is not a commitment to enter a guilty plea, and I can change my mind about my plea at any time until my plea is actually entered before the court.”

(*Advise client of any other/collateral consequences, where known, and make a note.) **Other instructions or customization of guilty plea**

Signature of Accused _____

Date _____ Counsel _____

This inquiry MUST be completed for EVERY plea represented by Counsel (staff and per diem) for both in and out of custody clients and attached to the intake.

Instructions to Counsel:

1. **Counsel must not assist on any part of a plea – including sentencing – where the accused has not admitted the essential elements of the offence.**
2. **Counsel must ask the Judge to conduct the s. 606 inquiry on the record, notwithstanding the use of this form.**
3. **Counsel should not admit the facts on the record for the accused person. The accused person should be asked to admit the facts personally on the record.**
4. **Where there is the possibility of immigration consequences due to the plea, Counsel should obtain permission from the accused to indicate on the record that Counsel has advised the accused to seek immigration advice before entering the plea and the client has chosen to proceed today without this advice. If the client does not want this indicated on the record, Counsel should advise that the court may, of its own accord, ask the client about his/her immigration status and that Counsel will refer the question to the accused directly for response.**

CHAPTER 9 – CROWN ADVOCACY

I. OVERVIEW

Crown conduct can play a role in wrongful convictions in many ways. Failure to provide timely and complete disclosure, calling unreliable expert evidence, relying on jailhouse informers and demonstrating tunnel vision are all forms of conduct that have been proven to contribute to wrongful convictions.

Crown advocacy requires the exercise of careful judgment. Criminal trials are often very hard fought; in the words of Mr. Justice Moldaver they are “not a tea party.”⁴⁵¹

But knowing the difference between forceful advocacy and improper advocacy is an essential attribute of Crown counsel.

Improper Crown advocacy during trial may render the process unfair, and can also lead to wrongful convictions. While the relationship between improper Crown advocacy and wrongful convictions may be less direct than, for example, withholding exculpatory evidence, it is important that prosecutors be conscious of improper advocacy as a contributing factor. This chapter highlights the nature of the concerns and makes recommendations for addressing the problem.

II. RECOMMENDATIONS BY COMMISSIONS OF INQUIRY

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

This Report contains the most important statements on the role of Crown advocacy in cases of wrongful conviction. Former Chief Justice Lamer offered general guidance on the role of Crown counsel:

The role of a Crown Attorney requires not only professional skills and judgment but also courage. Often the working conditions include difficult time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.⁴⁵²

451 *R. v. Clark* (2004), 182 CCC (3d) 1 (Ont. C.A.).

452 Honourable Antonio Lamer, “The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,” Newfoundland and Labrador: 2006. (Hereafter referred to as the Lamer Report.)

The Report suggested that “[t]he [Newfoundland and Labrador] Crown Policy Manual should provide clear guidelines as to the appropriate limits of Crown advocacy.”⁴⁵³ Justice Lamer’s recommendation arose from his consideration of the Crown’s closing address to the jury in the trial of Gregory Parsons. Justice Lamer found that the Crown’s address was inflammatory, tending to demonize the accused.

Justice Lamer agreed with earlier recommendations made by Mr. Justice Fred Kaufman in the *The Commission on Proceedings Involving Guy Paul Morin* (hereafter referred to as the Morin Inquiry), who suggested that Crown counsel should receive training on the limits of Crown advocacy.⁴⁵⁴

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

In this Report⁴⁵⁵, Justice Patrick LeSage was highly critical of the conduct of several Crown counsel but did not make any new recommendations of his own. Rather, he endorsed the views of Justice Lamer on the role of Crown counsel reproduced above.

III. LEGAL DEVELOPMENTS AND COMMENTARY

The role of prosecutorial misconduct in wrongful convictions is well-established, but the specific contribution of advocacy has been much less studied. In this chapter, we are concerned with a specific type of misconduct: attempting to persuade a court of a person’s guilt through improper means.

453 Ibid., p. 328.

454 Honourable Fred Kaufman, “Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin,” Ontario Ministry of the Attorney General: 1998, Recommendation 115.

455 Honourable Patrick LeSage, “Report of the Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell,” Manitoba Justice: 2007, available at: http://www.driskellinquiry.ca/pdf/final_report_jan2007.pdf

The contribution of improper advocacy to wrongful convictions is difficult to study. Unethical forms of advocacy, such as improper cross-examination or inflammatory jury addresses, are recognized as misconduct and denounced by appellate courts, whether or not they lead to the setting aside of a conviction.

In the United States, the Northern California Innocence Project has attempted to review the role of prosecutorial misconduct in wrongful convictions, the most comprehensive attempt to study the problem.⁴⁵⁶ That study in turn refers to a 2010 study of 255 cases where DNA evidence exonerated a convicted person. Sixty-five of those cases were found to be cases where prosecutorial misconduct was alleged, 31 were cases in which it was found to have occurred, and 12 were cases in which it was found to have been harmful.⁴⁵⁷ Although the DNA exoneration study did not break down the types of misconduct involved, the Northern California Innocence Project's work suggested that improper arguments and examinations of witnesses were the most common type of prosecutorial misconduct.⁴⁵⁸

Use of improper advocacy techniques such as inflammatory jury addresses may also be evidence of what is termed "noble cause corruption".⁴⁵⁹ "Noble cause corruption" is "the end-justifies-the-means" thinking that is also symptomatic of tunnel vision. Resolute belief in the guilt of the accused, particularly in notorious crimes, may inspire use of tactics designed only to help ensure conviction.

Some prosecution agencies have addressed the wrongful conviction reports' concerns with Crown advocacy through policies. Newfoundland and Labrador responded to Justice Lamer's report with a policy on training and development, a policy aimed at fostering the type of culture Justice Lamer recommended.⁴⁶⁰ The Public Prosecution Service of Canada's policy on the Prevention of Wrongful Conviction encourages mentoring of junior counsel on the appropriate limits of Crown advocacy.⁴⁶¹

456 Kathleen Ridolfi and Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California, 1997-2009," 2010, Northern California Innocence Project at Santa Clara University School of Law, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

457 Ibid., p. 65.

458 Ibid., p. 25.

459 Bruce A. MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System," *Manitoba Law Journal* 31, No.3 (2005), <http://netk.net.au/Canada/MacFarlane.pdf>.

460 Office of the Director of Public Prosecutions, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, Newfoundland and Labrador, 2007, p. 24.

461 Public Prosecution Service of Canada, *Prevention of Wrongful Convictions*, Deskbook, 2014, <http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch04.html>.

Finally, it is important to recognize, as the Supreme Court of Canada has, that doing something about “the blight on our justice system”⁴⁶² that wrongful convictions constitute, requires addressing some Crown conduct that may increase this risk.⁴⁶³

IV. FORMS OF IMPROPER CROWN ADVOCACY

As noted above, prosecutorial misconduct may take many forms. While any exercise of prosecutorial discretion may be considered as a form of Crown advocacy, this chapter is concerned with advocacy that attempts to persuade the court through improper means. The three most common areas of impropriety are jury addresses, examination of witnesses, and misleading (or otherwise dealing unfairly) with the court. In addition to potentially leading to wrongful convictions, these improprieties can lead to the ordering of new trials by appeal courts.

a) Jury Addresses

There are many types of improper jury addresses,⁴⁶⁴ but the most troublesome are those that suggest that the prosecutor has lost professional detachment. Once the prosecutor demonstrates that conviction is what matters most, there is reason to suspect that the prosecutor may have lost the ability to critically assess the Crown’s case. Oral advocacy should not be used to make up for the shortcomings of an investigation, as noted by former Chief Justice Lamer:

He was a highly skilled lawyer, very industrious and highly motivated. He applied these skills to compensating for inadequacies in the police case rather than confronting them. This is a common systemic danger in a Crown culture that does not recognize the importance of critically analyzing the results of a police investigation, particularly one that was fuelled by tunnel vision.⁴⁶⁵

Prosecutors must not use rhetorical devices capable of distorting the fact-finding process.⁴⁶⁶ Thus, the types of address that are most likely to distort include excessive appeals to emotion such as compassion for the victim, outrage over the crime or anger at the accused;⁴⁶⁷ misstating the evidence;⁴⁶⁸ giving opinions on

462 *R. v. Hart*, [2014] 2 S.C.R. 544 at para. 8.

463 *R. v. Hart*, at paras. 3, 8 (adducing potentially false confessions); *R. v. Nur*, [2015] 1 S.C.R. 773 at para. 96 (plea bargaining).

464 For a comprehensive review of the subject of improper jury addresses, see Robert J. Frater, Q.C., *Prosecutorial Misconduct*, 2d ed. Toronto: Thomson Reuters, 2017.

465 Lamer Report, p. 279.

466 *R. v. Trochym* (2017), 216 C.C.C. (3d) 225 (S.C.C.), at para. 79.

467 *R. v. Vallieres*, [1970] 4 C.C.C.69 (Que. C.A.); *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont.C.A.).

468 *R. v. Paré* 2010 QCCA 1415; *Clarke v. R.* (1981), 63 C.C.C. (2d) 224 (Alta. C.A.); *R. v. Duran*, 2013 ONCA 343.

subjects such as the accused's guilt,⁴⁶⁹ undermining the accused's Charter rights, such as the presumption of innocence⁴⁷⁰ or the right to silence.⁴⁷¹

b) Treatment of Witnesses

Another common form of misconduct capable of having serious consequences for the fairness of trials is Crown counsel's treatment of witnesses. The most common type of impropriety occurs in cross-examination of the accused, though impropriety may also arise in examination of the Crown's own witnesses.

Improper forms of cross-examination, as with jury addresses, may involve subversion of the accused's Charter rights. Crown counsel may infringe the right to silence by suggesting the accused's version of events is a recent fabrication that ought to have been told at the time of arrest. The Supreme Court has suggested this line of cross-examination would render the right to silence a "snare and a delusion".⁴⁷² Crown counsel may also undercut other rights, such as the right to disclosure of the Crown's case, by suggesting the accused's story is tailored to fit the disclosure.⁴⁷³

Crown counsel must also refrain from other forms of improper cross-examination. Many wrongful conviction cases involved accused who had committed other criminal offences or disreputable acts; however, cross-examination on the accused's bad character is carefully circumscribed.⁴⁷⁴ There is no justification for abusive cross-examination,⁴⁷⁵ or use of language designed to arouse the jury's emotions against the accused.⁴⁷⁶

c) Dealings with the Court

Every counsel owes an overriding duty to be fair in their dealings with the court.⁴⁷⁷ The best expression of the nature of this duty is found in the American Bar Association's Criminal Justice Standards for the Prosecution Function. Standard 3.1-4 is entitled "The Prosecution's Heightened Duty of Candor".⁴⁷⁸

469 *R. v. Boucher*, [1955] S.C.R. 16; *R. v. Charest* (1990), 57 C.C.C. (3d) 312 (Que. C.A.).

470 *R. v. Parsons* (1996), 146 Nfld. & P.E.I. R. 210 (Nfld. C.A.).

471 *R. v. Gilling* (1997), 117 C.C.C. (3d) 444 (Ont. C.A.).

472 *R. v. Chambers*, [1990] 2 S.C.R. 1293.

473 *R. v. White* (1999), 132 C.C.C. (3d) 373 (Ont. C.A.).

474 *R. v. Rohatyn* 2004 ABCA 264; *R. v. Tash* 2013 ONCA 380.

475 *R. v. F. (A.)* (1996), 30 O.R. (3d) 470 (Ont. C.A.).

476 *R. v. J. (M.A.)* 2015 ONCA 725.

477 *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.), at pp. 227-228.

478 American Bar Association, *Fourth Edition of the Criminal Justice Standards for the Prosecution Function*, Criminal Justice Section, Standard 3-1.1, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html

- a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.
- b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.
- c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution's position and not disclosed by others.

These obligations are important in relation to avoiding wrongful convictions. For example, the statements in part b) concerning the correction of information provided to the court but subsequently discovered to be false implies a duty to take steps to rectify the situation. This may occur not only pre-trial, but post-trial as well.

V. UPDATED RECOMMENDATIONS

Prosecution services should take steps to ensure that improper Crown advocacy does not contribute to wrongful convictions. Adopting some or all of the following measures would assist not only in preventing wrongful convictions, but also in reducing the number of re-trials ordered because of prosecutorial misconduct.

1. Training

Ensuring that prosecutors participate in training designed to reinforce ethical advocacy is an important obligation of a modern prosecutorial agency. Such training should not be limited to junior counsel; in fact, many of the most notable examples of prosecutorial misconduct were committed by senior counsel. Both the Lamer and Kaufman reports recommended that training on Crown advocacy be implemented to help protect against wrongful convictions. It is also common for law societies to require a certain number of hours of professional development every year, and some require a professionalism component.

2 Mentoring

Mentoring may be seen as a particular type of training, and is a venerable tradition in the legal profession. Ensuring that young lawyers, in particular, partner with a senior practitioner may be particularly important where a prosecutor without any significant background in criminal law starts employment.

3 Policy Manuals

All prosecution agencies in Canada should review their policies on a wide variety of matters dealing with the proper exercise of prosecutorial discretion. As members of law societies, prosecutors are bound to follow the ethical code of their law society,⁴⁷⁹ but policy manuals are capable of reinforcing the ethical messages of these codes. Policies that give guidance on jury addresses, for example, can help avoid some of the most blatant forms of prosecutorial misconduct.

479 The standard guidance in Canada is found in the Federation of Law Societies of Canada, Model Code of Professional Conduct: <https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>.

CHAPTER 10 – AT-RISK POPULATIONS

I. INTRODUCTION

Miscarriages of justice occur regardless of the gender, race, age, or socio-economic status of the accused. However, the root causes of such injustices can differ, and can relate to the population from which the wrongfully accused person originates, or to other personal characteristics or circumstances. Research suggests some groups may be more vulnerable than the population at large, more vulnerable than other groups, or vulnerable for unique gender-related reasons. At-risk populations can experience wrongful convictions for reasons similar to those experienced by the population at large. Unfortunately tunnel vision, flawed police investigations, faulty eyewitness testimony, evidence from unreliable in-custody informants, and erroneous science are common in wrongful conviction cases generally. Yet there are some causes of miscarriages of justice that may be unique to particular groups.

The purpose of this chapter is to highlight some segments of the population that may experience wrongful convictions for reasons unique to that group. The Subcommittee has not conducted a comprehensive examination of all groups that may be particularly vulnerable to wrongful convictions but rather is focusing in this chapter on certain subsets of the population: women, Indigenous people (First Nations, Inuit, and Metis) and young persons. The Subcommittee recognizes that other groups may also be particularly vulnerable, and that poverty, mental illness and race can also create factors and circumstances that contribute to a person being unjustly accused and convicted.

II. WOMEN

In the United States, there is a considerable amount of data about wrongful convictions generally, and wrongful convictions of women specifically. Between January 1989 and October 2016, the National Registry of Exonerations reports there were 1,900 exonerations in the U.S., and 171 (9 percent) were women. The Registry also keeps a running total of exonerations, which, as of March 6, 2018, reflected 2,180 exonerations, with women remaining approximately nine percent of the total.⁴⁸⁰ Also of note from the Registry, 37 percent of women were exonerated because of false or misleading forensic evidence; DNA evidence plays a role in only 7 percent of women's exonerations, compared to more than 25 percent of men's exonerations; 40 percent of female exonerees were convicted of harming children or loved ones in their care; and two thirds of female

480 Samuel R. Gross, "What We Think, What We Know and What We Think We Know About False Convictions," *Ohio State Journal of Criminal Law* 14, no.2 (2017): p. 756.

exonerees were convicted in cases in which no crime occurred. However, there is a lack of similar Canadian research, and the number of known wrongful convictions of women in Canada is small; to date there have been seven known cases of Canadian women identified as wrongfully convicted. According to researcher Kelsey Flanagan, six of the seven were convicted on the basis of flawed expert evidence provided by disgraced pathologist Dr. Charles Smith. She further described that in five of these six cases, no crime occurred. Finally, regarding the seventh wrongful conviction, an actual crime occurred but the wrong person was convicted due to flawed eyewitness testimony, police misconduct, and flawed expert testimony.⁴⁸¹ As will be discussed later, there are gender-based differences that affect outcomes for women: research over a 10-year period from 1994 to 2004 suggests that when considering both wrongful accusations and convictions, women are disproportionately affected compared to men in Canada.⁴⁸²

As discussed earlier, the commonly accepted definition of “wrongful conviction” incorporates situations where the accused is factually innocent as well as situations where an individual is convicted but no crime in fact occurred. The discussion in this chapter will deal with cases using that definition. However, it should be noted that miscarriages of justice occur for women (and men) outside of these bounds.

For example, some argue that women who plead guilty to manslaughter rather than proceeding with the risk of trial on a second-degree murder charge in cases where self-defence can be raised in a domestic violence situation have experienced a miscarriage of justice. Further, it can be argued that women who plead guilty to manslaughter (with a maximum sentence of life imprisonment) rather than to infanticide (with a maximum sentence of five years’ imprisonment) have experienced a wrongful conviction.

The acceptance of a plea arrangement and the decision to plead guilty to a charge that may not be the most appropriate is not unique to any specific population. However the factors that motivate the decision to do so can be very much gender-based, as well as being impacted by race. For example, in a study of 91 Canadian women tried for killing intimate partners where there was a history of abuse by the males, it was determined that 41 percent of the women were Aboriginal, and that they faced “a credibility contest framed by discrimination.”⁴⁸³ Although situations such as these are not the focus of this report, the implementation of the recommendations in this chapter could contribute to a reduction of these

481 Kelsey Flanagan, “The Unique Challenges Faced by Wrongfully Convicted Women: A Canadian Perspective,” Unpublished paper for CML 3147, *University of Ottawa Faculty of Law* (Dec. 6, 2016): pp. 8-9.

482 Emma Cunliffe, “Women and Child Homicide: Exploring the Role of Stereotypes about Gender, Race and Poverty in Contemporary Canadian Cases,” in *Within the Confines: Women and the Law in Canada*, ed. Jennifer Kilty, (Women’s Press, 2014), pp. 223-244.

483 *Ibid.*, 228.

situations.⁴⁸⁴ Gender-based reasons for guilty pleas are discussed further in the section below.

Because there is so little Canadian research on the prevalence and causes of wrongful convictions specifically against women, it is necessary to turn to the work done in other countries (such as the Women's Project at the Center for Wrongful Convictions, Northwestern University, Chicago)⁴⁸⁵ to examine the underlying causes of these injustices. Its research indicates that women's cases are often quite different than those of men. For example, while DNA evidence has played a key role in a significant percentage of exonerations of men, for women, it has been central to less than three percent of cases. This makes sense when one considers that 40 percent of female exonerees were convicted of harming children or other loved ones in their care, in which the presence of their DNA would be expected and therefore of no evidentiary value, and, two-thirds of female exonerees were convicted in cases in which they were determined to be factually innocent because *no crime had occurred*.⁴⁸⁶ In contrast, only 22 percent of male exonerees had been convicted of offences against children, and they were convicted of crimes that did not occur at one-third the rate of women.⁴⁸⁷

The leading American researchers on wrongful convictions against women, Mitch Ruesink and Marvin Free, have found that the most common factor associated with female wrongful conviction is unethical conduct by police and prosecutors, versus the most common cause overall, which is eyewitness identification, as was identified in the *2011 Report*.⁴⁸⁸ (Strengthening the work of police and prosecutors has been addressed in previous *Reports* and is dealt with elsewhere in this *Report*.)

The experience of wrongfully convicted women in other jurisdictions is strikingly similar to that of the U.S. and Canada, in that the cases often involve allegations of mothers murdering their children. In the U.S., according to the National Registry of Exonerations, women are wrongfully convicted of killing children at twice the rate of men. Internationally, in Australia, the case of Lindy Chamberlain gained great notoriety when she was convicted of murdering her daughter after claiming she was taken from a campsite by a dingo. Chamberlain was acquitted in

484 A thorough review arguing for the expansion of the definition of 'wrongful conviction' can be found in the review described in: Debra Parks and Emma Cunliffe, "Women and Wrongful Convictions: Concepts and Challenges," *International Journal of Law in Context* 11, no.3 (2015): 219-244.

485 Northwestern Pritzker School of Law, Bluhm Legal Clinic, Center on Wrongful Convictions: Women's Project, accessed October 2, 2017 at <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/womensproject/>

486 Ibid.

487 Ibid.

488 Mitch Ruesink and Marvin Free, "Wrongful Convictions Among Women: An Exploratory Study of a Neglected Topic," *Women & Criminal Justice* 16, no.4 (2005): 13.

1988 when it was determined her conviction had been a miscarriage of justice.⁴⁸⁹ In the U.K., three women were convicted of killing multiple infants in their families, partially on the basis of the evidence of renowned pediatrician Sir Roy Meadow who testified beyond his expertise that multiple infant deaths from natural causes were “unlikely, if not impossible.”⁴⁹⁰ He elaborated, despite his lack of qualifications, to testify that the odds of two “cot deaths” occurring in one family were one in 73 million (they were actually just one in 77), and that “two deaths is suspicious, three is murder.” Yet in one of the disputed cases it was learned that the accused’s “maternal grandmother lost five children in early infancy, suggesting a genetic disorder could account for the deaths.”⁴⁹¹ Meadow’s evidence was subsequently discredited and he was struck from the medical registry by a disciplinary tribunal.⁴⁹²

Research has suggested that other causes of wrongful convictions against women are gender stereotyping, evidentiary challenges and plea bargaining.

a) Gender Stereotyping

Certain segments of society still appear to expect women to behave in certain ways in certain situations, based on stereotypes.⁴⁹³ Visible grief is expected when a child dies, for example, perhaps more so from a mother than a father. Observable emotional turmoil is expected upon the death of a partner, again perhaps more so from women than men. When the expected behavior does not occur, this can falsely be interpreted as an indication of guilty conduct. Expressive grief, or a lack thereof, can be used to infer guilt or innocence.⁴⁹⁴ In one study that examined the impact of gender and race of women wrongfully convicted in the U.S., it was determined that it was “motherhood itself on trial.”⁴⁹⁵ In other words, women from troubled backgrounds who did not meet society’s expectations for maternal behaviour suffered from systemic bias that could contribute to them being disbelieved, which could potentially contribute to a wrongful conviction.

489 *Reference under S. 433A of the Criminal Code by the Attorney-General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain No. CA2 of 1988* [1988] NTSC 64 (15 September 1988). Accessed on October 4, 2017 at: http://www.supremecourt.nt.gov.au/archive/doc/sentencing_remarks/0/88/0/NS000620.htm.

490 *R. v. Clark* [2000] EWCA 54; [2003] EWCA Crim. 1020; *R. v. Cannings* [2004] EWCA Crim. I; *R. v. Anthony* [2005] EWCA Crim. 952.

491 *The Guardian*, “Timeline: Sir Roy Meadow,” July 15, 2005, accessed on October 4, 2017 at: <https://www.theguardian.com/society/2005/jul/15/NHS.uknews1>.

492 *Ibid.*

493 For example, see the description of stereotypes about women at <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity/what-are-gender-roles-and-stereotypes>.

494 Molly Redden, “Why Is It So Hard for Wrongfully Convicted Women to Get Justice,” *Mother Jones*, July/August 2015, online: <http://www.motherjones.com/politics/2015/05/wrongfully-convicted-women-exonerations-innocence-project>.

495 Elizabeth Webster and Jody Miller, “Gendering and Racing Wrongful Conviction: Intersectionality, ‘Normal Crimes,’ and Women’s Experiences of Miscarriage of Justice,” *Albany Law Review* 78, no.3 (2015):973-1033.

Demeanor evidence, or the appearance or attitude of a witness on the stand, has historically been relied upon by Canadian courts as a method of assessing credibility.⁴⁹⁶ The earliest example of the Supreme Court instructing lower courts to rely on this form of evidence can be found in *R. v. White* (1947), when the Court stated:

[Credibility assessment] is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.⁴⁹⁷

This statement is intuitively appealing; however, social science research does not support the Court's supposition. In fact, a significant body of research demonstrates unequivocally that people are poor at detecting the lies of others – even those who have been specifically trained in lie detection, such as secret service agents.⁴⁹⁸ While there is evidence that judicial education and cautions regarding demeanor evidence are on the rise, including in the Supreme Court, there continues to be a gap between legal research and psychological research when it comes to the treatment of this form of evidence by the justice system.⁴⁹⁹ For examples, in the recent case of *R. v. NS*, a sexual assault complainant was ordered to remove her niqab while she testified, as the accused argued her facial cues were a form of communication that could be used as an assessment of her credibility.⁵⁰⁰ As witness demeanor has been shown to be an unreliable method of assessing truthfulness and credibility, the admissibility of such evidence in court must be considered carefully. Standard jury instructions should be developed to caution juries about placing undue weight on the demeanor of a witness, as an overreliance on demeanor evidence can have a disproportionately negative effect on women and other at-risk populations, whose behavior does not conform to implicit gender and cultural stereotypes.

496 For a review of the use of demeanor evidence in Canada, see: Amna Qureshi, "Relying on Demeanor Evidence to Assess Credibility during Trial – A Critical Examination," (January 1, 2014), available at SSRN: <https://ssrn.com/abstract=2384966>.

497 *R. v. White*, [1947] SCR 268 at para 8.

498 Maria Hartwig and Charles F. Bond, "Why Do Lie-Catchers fail? A Lens Model Meta-Analysis of Human Lie Judgments," *Psychological Bulletin* 137, no.4 (2011): 643-659.

499 Qureshi, "Relying on Demeanor Evidence."

500 *R. v. NS*, 2012 SCC 72.

b) Evidentiary Challenges

Many convicted men are exonerated on the basis of DNA evidence. However, such evidence may not be useful to exonerate wrongfully convicted women because their DNA may be located for innocent reasons at the location of the alleged crime. It would be expected that a mother's DNA would be present in close proximity to her child, or that her DNA would be located on or close to her partner. Hence no physical evidence may exist to challenge the conviction,⁵⁰¹ such as DNA from an unknown person. While it is also true that men are charged with murdering children in their care, as described earlier where DNA would not be useful to exonerate, this occurs at a much lower rate. Women are almost twice as likely as men to be exonerated of crimes against child victims, according to the National Registry of Exonerations. Further, "women are the likely victims of false convictions for violent crimes that are believed to have been committed by caretakers in roles that are overwhelmingly filled by women – as parents and other family care givers, and as day care workers and teachers of young children."⁵⁰² Notably, in the seven known cases of wrongful convictions of women in Canada, none of them was exonerated by DNA.⁵⁰³ As discussed above, in five of the seven Canadian cases, no crime occurred, thus one would not have expected to find DNA evidence from another party in any event. In the U.S., while 27 percent of exonerated men recorded in the wrongful conviction registry relied on DNA evidence, this was true of only 7 percent of wrongfully convicted women.⁵⁰⁴ And because DNA evidence is either unlikely to exist or to be meaningless, the likelihood of a wrongfully convicted woman's case being selected for review by an Innocence project is low, since many only take cases where the existence of DNA capable of exonerating is available.

Further, when women are convicted in "no crime" scenarios, defence counsel must dismantle the prosecutor's case rather than seek to identify the real culprit. Women are more likely than men to be wrongly convicted of crimes in which

501 *Reference under S. 433A of the Criminal Code by the Attorney-General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain.*

502 "Kaitlin Jackson & Samuel Gross, *Female Exonerees: Trends and Patterns*, National Registry of Exonerations, 2014, available at: <http://www.law.umich.edu/special/exoneration/Pages/Features.Female.Exonerees.aspx>. Also see the National Registry of Exonerations at: www.law.umich.edu/special/exoneration/Pages/Features.Female.Exonerees.aspx and The Innocence Project, *Bearing the Burden of Love – The Unique Experience of Wrongfully Convicted Women*, February 27, 2018, <https://www.innocenceproject.org/bearing-burden-love/>.

503 Flanagan, "The Unique Challenges Faced by Wrongfully Convicted Women," *University of Ottawa Faculty of Law*, p. 25.

504 Judy Royal, "Why Women's Wrongful Convictions Are Different," *Women's Health Research Institute*, 2013, Accessed on October 2, 2017 at: https://www.womenshealth.northwestern.edu/sites/womenshealth/files/ckfinder/userfiles/files/WHR_Forum_Notes_February2013.pdf.

scientific evidence is sparse, uncertain or the expert opinion evidence is wrong.⁵⁰⁵ This was certainly the situation with the cases involving disgraced pathologist Charles Smith, which account for six of the seven known wrongful convictions of women in Canada, five of which involved crimes that in fact did not occur.⁵⁰⁶ At least in cases where a crime has actually occurred, there is the potential for the correct suspect to be identified, but as one exoneree poignantly noted,

How do you prove that you didn't commit a crime when there were no witnesses against you, just an unexplained dead baby? How do you live with the knowledge that the courts have labeled you a "child murderer," because someone must have killed the child?⁵⁰⁷

Based on the research available, then, it is important to understand that there is a clear distinction between the crimes with which women and men are charged: men are far more likely to be charged with crimes of violence involving non-family members than women are and thus DNA evidence is a more helpful exoneration tool; the fact that women are commonly charged with offences where DNA evidence is not useful to exonerate has an impact on the potential for a wrongful conviction.

c) Plea Bargaining

As discussed earlier, both men and women plead guilty to crimes they have not committed for a variety of reasons. They may be offered a lower sentence in exchange for the plea, and this is seen as the best option. They may be unable to afford to mount a defence and are ineligible for Legal Aid. The personal and financial cost of a trial may outweigh the consequences of a guilty plea.

There are, however, reasons specific to women as to why they may enter a plea of guilty for a crime they have not committed. The impact of incarceration on childrearing may motivate the decision, given that women generally remain the primary caregivers of children.⁵⁰⁸ For example, research by the Woman Abuse Council of Toronto determined that women charged with domestic violence offences were motivated to plead guilty by wanting to be with their children,⁵⁰⁹

505 Ibid.

506 Flanagan, "The Unique Challenges Faced by Wrongfully Convicted Women," *University of Ottawa School of Law*, p. 27.

507 Laura Caldwell and Leslie S. Klinger, eds., *Anatomy of Innocence: Testimonies of the Wrongfully Convicted*, (Liveright Publishing Corporation, New York 2017), p. 103.

508 See, for example, Anne Milan, Leslie-Anne Keown and Covadonga Robles Urquijo, "Families, Living Arrangements and Unpaid Work," *Statistics Canada*, December 2011, available at: <https://www.statcan.gc.ca/pub/89-503-x/2010001/article/11546-eng.htm#a13>.

509 Shoshana Pollack, Vivien Green, and Anke Allspach, "Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies," *Woman Abuse Council of Toronto*, (March 2005): p. 13, at: <https://ifls.osgoode.yorku.ca/wp-content/>

and because the majority of women charged with crimes are mothers, face “exceptional pressure to plead guilty as compared to fathers who are charged.”⁵¹⁰ Finally, they may be taking responsibility for the crime in order to protect someone else,⁵¹¹ and are more likely than men to plead guilty for this purpose.⁵¹²

It is clear that women face unique pressures to plead guilty, which increases the risk that innocent women will plead guilty to crimes for which they are factually innocent, or at least for which they may have a viable defence.

Conclusion

The literature suggests women are more likely than men to be wrongfully convicted of a crime that never occurred, rather than of a crime that occurred but was committed by another person. In fact, according to the National Registry of Exonerations, females are exonerated of crimes that never occurred at three times the rate of men. As a result, DNA evidence is less helpful in such cases due to the nature of the crime, yet crimes where scientific evidence is “sparse and uncertain” are the circumstances in which women may be most likely to be wrongfully convicted.⁵¹³ Further, research also suggests women are more likely to plead guilty, including to crimes of which they are factually innocent, because of gender-related systemic factors. Wrongful convictions against women are not easily remedied or avoided. Measures can be taken, however, to decrease the likelihood of such injustices occurring.

Recommendations

Just as prosecutors are cautioned to be attuned to the risk of tunnel vision in themselves and in the police investigators involved in a case, they should also be strongly warned to be on guard for signs of gender stereotyping and other forms of discrimination in the thought processes and analyses, in relation to all charges, investigations and prosecutions. Prosecution services should also develop and include in their policies specific strategies and approaches to assist prosecutors in identifying discriminatory thinking and conduct that can impact decision-making on a file.

[uploads/2015/02/Pollack-Green-Allspach-Women-Charged-with-Domestic-Violence.pdf](https://www.researchgate.net/publication/312500000/uploads/2015/02/Pollack-Green-Allspach-Women-Charged-with-Domestic-Violence.pdf)

- 510 Redden, “Why Is It So Hard for Wrongfully Convicted Women,” *Mother Jones*, p. 13.
 511 Ruesink and Free, “Wrongful Convictions Among Women,” *Women & Criminal Justice*, p. 13.
 512 Jon F. Sigurdsson and Gisli H. Gudjonsson, “The Psychological Characteristics of ‘False Confessors’: A Study Among Icelandic Prison Inmates and Juvenile Offenders,” *Personality and Individual Differences* 20, no.3, (1996): 321, as cited in Stephen Jones, “Partners in Crime: A Study of the Relationship between Female Offenders and Their Co Defendants,” *Criminology & Criminal Justice* 8, no. 2 (2008): 147.
 513 Parks and Cunliffe, “Women and Wrongful Convictions,” *International Journal of Law in Context*, p. 238.

For example, the policies could identify examples of stereotypes that may impact a prosecutor's assessment of a file generally, their review of specific types of evidence, and the reasonable prospect of a conviction. The policies could also involve discussion of stereotypes about gender-based expectations of post-offence behaviour, as well as other forms of stereotypes and discrimination that could impact a prosecution and result in a wrongful conviction, with references to Canadian case law and academic literature. For example, the policies could highlight the risks of biases held by police and Crowns that relate to non-mainstream lifestyles, parenting behaviour, or entrenched stereotypical views of how a woman and a mother is expected to behave in certain situations, the potential for women to admit to, or plead guilty to, conduct that did not occur, or for which there is a legitimate defence, for gender-based reasons or because of gender bias in society and in the criminal justice system. Such policies could include a recommendation to consult with experts in women's issues as appropriate throughout the case.

1. A review should be undertaken of the admissibility and proper use of demeanor evidence, specifically in cases where the accused are women and/or members of other vulnerable, at-risk groups.
2. All prosecution services should review their relevant policies to ensure they alert prosecutors to the risk of falling victim to gender stereotypes, as well as other forms of discrimination, during the course of their prosecutions, from the initial file assessment to the resolution of the case.
3. A standard jury instruction should be developed to caution juries about placing undue weight on the demeanor presentation of a witness, particularly in cases which involve female and other at-risk accused, whose emotional reaction may have been noted by the court as "unusual" or "unexpected", and not in compliance with typical gender and cultural stereotypes.
4. All prosecution services should review their policies regarding resolution discussions to ensure that the policies require that:
 - the offender is admitting all elements of the offence to which a plea is being entered;
 - that the facts and evidence against the accused support the offence for which a plea is being entered;
 - the Crown is satisfied there is a reasonable prospect of conviction;
 - the prosecution service policy states clearly that the Crown cannot accept a guilty plea from an accused where the Crown has knowledge or concerns that the accused is factually innocent, and that
 - the Crown is particularly sensitive to guilty pleas being entered by accused persons from identified groups who are recognized as being at particular risk of wrongful convictions.

III. FIRST NATIONS, INUIT, OR MÉTIS PERSONS

a) First Nations, Métis and Inuit People in Canada

According to the 2016 census, approximately 1.7 million people in Canada (or about 4.9 percent of the total population) identified themselves as an Indigenous person (i.e., First Nations, Métis or Inuit). While only a small percentage of the Canadian population is comprised of Indigenous persons, it is growing rapidly with a 42.5 percent increase between 1996 and 2016 and a 20.1 percent increase between 2006 and 2011, compared to 5.2 percent for the non-Indigenous population between 2006 and 2011. Finally, the Indigenous population is much younger than the non-Indigenous population, with 28 percent being age 14 or younger, compared to 16.5 percent of the non-Indigenous population,⁵¹⁴ and with an average age of 32.1 years, almost ten years younger than the non-Indigenous population in Canada.

Compared to non-Indigenous persons, Indigenous persons are more likely to live in poverty and substandard housing;⁵¹⁵ have lower levels of educational achievement;⁵¹⁶ ⁵¹⁷ have poorer health, including much higher rates of diabetes, HIV/ AIDS and tuberculosis;⁵¹⁸ have higher rates of mental health problems;⁵¹⁹ have higher rates of alcohol and drug dependency;⁵²⁰ suffer higher rates of victimization by crime, particularly relationship violence;⁵²¹ have higher youth suicide rates;⁵²² and are more likely to have negative contact with the criminal

514 Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, National Household Survey, 2011, retrieved on March 9, 2017 from: <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

515 Ibid.

516 Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, “Victimization and Offending Among the Aboriginal population in Canada,” *Juristat: Canadian Centre for Justice Statistics* 26, no.3, (2006), p.3, retrieved March 9, 2017 from www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf.

517 Health Canada, *A Statistical Profile on the Health of First Nations in Canada: Determinants of Health, 2006 to 2010*, available at: http://publications.gc.ca/collections/collection_2014/sc-hc/H34-193-1-2014-eng.pdf.

518 Health Canada, *A Statistical Profile on the Health of First Nations in Canada: Self-rated Health and Selected Conditions, 2002 to 2005*, available at: https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/fnih-spnia/alt_formats/pdf/pubs/aborig-autoch/2009-stats-profil-vol3/2009-stats-profil-vol3-eng.pdf

519 Norah Kielland and Tonina Simeone, “Current Issues in Mental Health in Canada: The Mental Health of First Nations and Inuit Communities,” *Legal and Social Affairs Division, Parliamentary Information and Research Service*, 2014, Retrieved on March 10, 2017: <http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2014-02-e.pdf>.

520 *The Guardian*, “Timeline: Sir Roy Meadow.”

521 Ibid.

522 See: Health Canada, *Acting on What We Know: Preventing Youth Suicide in First Nations*, Report of the Advisory Group on Suicide Prevention, available at: http://www.hc-sc.gc.ca/fnih-spnia/alt_formats/fnihb-dgpsni/pdf/pubs/suicide/prev_youth-jeunes-eng.pdf.

justice system, including significant over-representation in federal and provincial prisons.⁵²³ Notably, the homicide rate for Indigenous persons is almost seven times higher than the rate for non-Indigenous persons, and they are accused of homicide at a rate 10 times that of non-Indigenous persons.⁵²⁴

The reasons for Indigenous persons' overrepresentation in these negative contexts are many and complex, but certainly include a history of institutionalized racism and discrimination. Though there are many examples of this throughout history, the most visible manifestation of such discrimination was the federal government's emphasis on assimilation and the residential school system it implemented in the 1870s to "kill the Indian in the child."⁵²⁵ It took until the 1990s for this system to be completely dismantled⁵²⁶ and the impacts of it will be felt for many generations to come.

b) First Nations, Inuit and Métis People in the Criminal Justice System

Indigenous persons are significantly over-represented in the Canadian criminal justice system as both victims and offenders. They are more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned.^{527 528 529} As concluded in the 1995 Report of the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people, on-reserve and off-, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.⁵³⁰

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- 523 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," Ontario Ministry of the Attorney General (N.D.), Retrieved on March 9, 2017 from: https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf.
- 524 Zoran Miladinovic and Leah Mulligan, "Homicide in Canada, 2014," *Juristat: Canadian Centre for Justice Statistics*, Retrieved March 9, 2017 from: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14244-eng.pdf>.
- 525 Truth and Reconciliation Commission of Canada: <http://www.trc.ca/websites/trcinstitution/index.php?p=39>.
- 526 See: *CBC News*, "A History of Residential Schools in Canada," May 16, 2008, <http://www.cbc.ca/news/canada/a-history-of-residential-schools-in-canada-1.702280>, retrieved on March 9, 2017.
- 527 Brzozowski, Taylor-Butts and Johnson, "Victimization and Offending," *Juristat*.
- 528 Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, July 2014, p.19, retrieved on March 13, 2017 from: https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf.
- 529 Howard Sapers, *Annual Report of the Office of the Correctional Investigator 2015-2015*, Office of the Correctional Investigator, retrieved on March 12, 2017 from: <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx#s8>.
- 530 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995), p. 309.

The Royal Commission also concluded that, “[r]epeated assaults on the culture and collective identity of aboriginal people have weakened the foundations of aboriginal society and contributed to the alienation that drives some to self-destruction and antisocial behaviour.”⁵³¹

Over-representation in the criminal justice system is one of the natural consequences of the system’s failures regarding Indigenous persons. The reasons for their over-representation in the criminal justice system generally are complex, but are not unknown. Many reports and court decisions have explored these reasons and have made recommendations to ameliorate the challenges to Indigenous persons being treated justly. These include the Royal Commission report referenced above, as well as other Inquiry reports,⁵³² academic analyses,⁵³³ and appellate court decisions.⁵³⁴

In *R. v. Gladue* and *R. v. Ipeelee*, the Supreme Court of Canada recognized the gross overrepresentation of Aboriginal people in Canada’s prisons and criminal justice system constituted a “crisis.” The Court found that systemic bias and discrimination throughout the criminal justice system had combined with “[y]ears of dislocation and economic development and have translated, for many Aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation” to propel over-incarceration.⁵³⁵

c) Wrongful Convictions of First Nations, Inuit and Métis People

Research suggests Indigenous persons also suffer a disproportionate number of wrongful convictions.⁵³⁶ It is important to recognize that Indigenous persons’ significant over-representation in the criminal justice system contributes to their risk of wrongful convictions (for reasons that will be discussed in more detail later). It is unknown how many wrongful convictions of Indigenous persons have

531 Ibid.

532 See for example, Honourable David H. Wright, “Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild,” Regina, 2004; “Report of the Osnaburgh/Windigo Tribal Justice Review Committee,” prepared for the Ontario Attorney General and the Minister Responsible for Native Affairs and the Solicitor General 1990; Amnesty International Canada, “Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada,” Ottawa: Amnesty International Canada, 2004; Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, “Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, Vol.1,” Edmonton: The Task Force, 1991, available at <http://open.alberta.ca/publications/1369434>.

533 Statistics Canada, *Aboriginal Peoples in Canada*, National Household Survey, 2011.

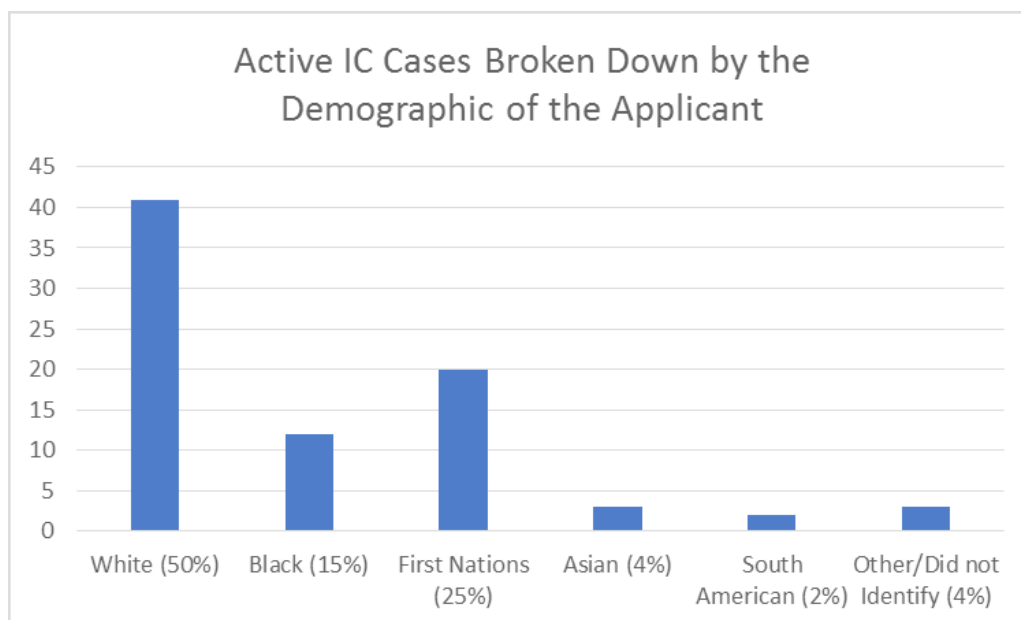
534 See for example, *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee* [2012] SCC 13, 1 SCR 433.

535 Parks and Cunliffe, “Women and Wrongful Convictions,” *International Journal of Law in Context*, p. 19.

536 Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada,” *Flanders Law Journal* 17, 2015, p. 224.

occurred in Canada, and as discussed earlier, there is no comprehensive Canadian list of wrongful convictions. According to Professor Kent Roach of the University of Toronto, Innocence Canada has an incomplete list of 21 wrongful convictions, of which four are Indigenous persons, far higher than the 4.3% of the population who are Indigenous persons.

As a further indication of the seriousness of the problem, according to Innocence Canada, the organization is currently reviewing 81 cases involving first degree murders (34), second degree murders (33), manslaughters (10), and other serious crimes (4). Of those cases, at least 19 involve First Nations persons, close to 25 percent of the total, far exceeding the proportion of First Nations persons in Canadian society.



One of the earliest Inquiries into a wrongful conviction in Canada was that of Donald Marshall Jr., a 17-year-old Mi'kmaq man from Nova Scotia convicted of a murder for which he was factually innocent. Marshall was eventually exonerated and a Royal Commission later determined that the case demonstrated a litany of examples of institutional and individual racism.⁵³⁷ The Inquiry into his wrongful conviction concluded that the police investigation was incompetent; that had Marshall been white, police would have been far more careful; and that both Crown and defence lawyers did not “discharge their professional obligations.”⁵³⁸ Unfortunately, Marshall’s case was not a catalyst for research into the specific

537 Dawn Anderson and Barrie Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada*, 2nd ed, (Fernwood Publishing, 2009).

538 Royal Commission on the Donald Marshall, Jr., Prosecution (1989), Nova Scotia, retrieved March 10, 2017 from: https://www.novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf.

vulnerabilities of Indigenous persons. In fact, until the mid-2000s when some such research began to emerge, there was virtually no research in Canada focused on this particular issue.⁵³⁹

Of particular concern is that Indigenous persons are more likely to plead guilty to offences, including offences of which they are factually innocent, or for which they have a valid defence. Recent Canadian research concludes that aspects of the justice system that provide incentives for guilty pleas disproportionately affect Indigenous people compared to the population at large, and there are several other factors that influence Indigenous people to confess and/or plead guilty:

These include delays/adjournments, “unreasonable” bail conditions, remand, plea bargains, and legal representation. Some of these issues disproportionately affect Indigenous people, as evidenced by a greater likelihood of being denied bail and held in remand. Second, like other socially vulnerable groups, Indigenous people may be at greater risk of justice system contact and guilty pleas because of their income, housing, addictions, or mental health status. Finally, there are unique aspects of Indigenous culture that contribute to guilty pleas, including language barriers, a distrust in the justice system, and a “cultural premium” placed on taking responsibility, agreement, and cooperation. These cultural values can lead Indigenous accused to plead guilty even if they are not legally guilty, to provide full confessions to police, and to agree in court whether or not they agree or even understand.⁵⁴⁰

Professor Roach has written extensively about criminal justice system issues, and in 2015 authored an article titled *The Wrongful Conviction of Indigenous People in Australia and Canada*. He identified that Indigenous people fall victim to wrongful convictions for the commonly understood causes of wrongful convictions generally, including mistaken eyewitness identification, lying witnesses, lack of disclosure, forensic errors, and false confessions. He also identified that Indigenous people have additional disadvantages, including language and translation challenges, defence lawyers who are inadequate and

539 See for example, Roach, “The Wrongful Conviction of Indigenous People, *Flanders Law Journal*”; Kerry G. Watkins, “The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence,” *The Criminal Law Quarterly* 63, 2016; L. Fadden, “Quantitative and Qualitative Analyses of Police Interviews with Canadian Aboriginal and Non-aboriginal Suspects,” in *Language and the Law: International Outlooks*, eds., Krzysztof Kredens and Stanislaw Gozdz-Roszkowski (Frankfurt: Peter Lang, 2007); and Joseph MacFarlane and Greg Stratton, “Marginalisation, Managerialism and Wrongful Conviction in Australia,” *Current Issues in Criminal Justice* 27, no. 3 (2016).

540 Angela Bressan and Kyle Coady, “Guilty Pleas Among Indigenous People in Canada,” p. 5. Research and Statistics Division, Department of Justice Canada. (Note: The views expressed in this publication are those of the authors and do not necessarily represent the views of the Department of Justice Canada or the Government of Canada.)

insensitive, and racist stereotyping. Finally, he noted that Indigenous people are subject to various pressures to plead guilty, particularly because of their higher likelihood to be detained without bail.

Research indicates that:

Indigenous people sometimes plead guilty even if they are innocent (or “innocent to a degree”), have a valid defence, or have grounds to raise *Charter* issues. Despite lawyers and judges conducting a plea inquiry (e.g., whether the accused understands and is not merely pleading guilty to get it over with), it happens because of disadvantages in the justice system, other vulnerabilities, or a cultural sense of responsibility that conflicts with the legal notion of guilt.⁵⁴¹

This section will focus on just two reasons – the vulnerability of Indigenous persons to making inculpatory but untrue statements, and to entering guilty pleas to avoid remaining in custody until trial. These are significant problems that may be more pronounced with Indigenous persons, and both lend themselves to recommendations to mitigate their influence.

d) Problems Associated with Police Interviews of First Nations, Inuit and Métis People

Kerry Watkins is an expert police interviewer with many years’ experience in Canada. He has provided very helpful analysis on the issue of interviews of Indigenous persons in an article setting out the reasons for their vulnerability and strategies to mitigate the risks.⁵⁴² Watkins notes that Indigenous persons are more likely to be misinterpreted when being interviewed by police, because of their vulnerabilities, which produces unjust outcomes, including:

- A tendency to provide misleading or unreliable information, or to falsely confess;
- A tendency to be compliant, suggestible, and to acquiesce to police suggestions; and
- Increased difficulty understanding their legal rights, and appreciating the consequences of waiving those rights, in particular, the right to silence.⁵⁴³

541 Ibid., 9.

542 Kerry G. Watkins, “The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence,” *The Criminal Law Quarterly* 63, 2016.

543 Ibid., 63.

In *Oickle*, the Supreme Court of Canada noted that special care must be taken when police interview vulnerable persons. Writing for the Court, Justice Iacobucci stated:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics or situation, suspects who have compliant personalities, and, in rare circumstances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.⁵⁴⁴

Watkins has identified several reasons for Indigenous persons' vulnerability, including the differences between Indigenous and non-Indigenous culture, which makes them more likely to waive their right to silence under police questioning. Further, police officers may misunderstand certain behaviours common to Indigenous persons, such as being non-confrontational, displaying little emotion, or not making eye contact, when accused of a crime. This can lead to inferences of guilt, when the behaviour may simply reflect their cultural norms.

Other vulnerabilities described by Watkins include those associated with language and comprehension. He points out that the solution is not just to ensure adequate translation services, but also to recognize that some Indigenous persons may not comprehend the concepts behind terms used in the justice system, which can be challenging to anyone who isn't a criminal justice system player. Further, Watkins identifies that Indigenous persons, for cultural reasons, may not be accurate regarding measurements, such as time and distance, but may acquiesce to the suggestions of an authority figure, to their detriment. Moreover, he notes that when Indigenous persons under investigation have mental health challenges or cognitive impairment, these factors may result in incorrect statements and false confessions. Given that Indigenous persons may suffer from such challenges at a higher rate than Canadians generally,⁵⁴⁵ their vulnerability is heightened. Finally, Watkins recognized that stereotypical beliefs about Indigenous persons may result in police officers being more likely to believe an allegation made against them, and less likely to believe their denial.

The research and experience of a noted expert in Indigenous justice issues, Amanda Carling, supports Watkins' findings. She has also noted that in addition to not making eye contact when dealing with police, Indigenous persons may often pause during responses to police questioning, which may be inferred as a sign of deceit. In addition, Carling has described the phenomenon of "gratuitous concurrence," which occurs when an Indigenous person may appear to acquiesce

544 *R. v. Oickle* [2000] 2 S.C.R. 3, at para 42. Retrieved on March 10, 2017 from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1801/index.do>.

545 Webster and Miller, "Gendering and Racing Wrongful Conviction," *Albany Law Review*.

to a suggestion from police even though they do not agree with it. Carling also notes that inferences can be drawn about Indigenous persons' intelligence or sobriety, or what they intend to say, because they speak "Aboriginal English," a dialect characterized in part by different pronunciations (e.g., replacing "they" with "dey"), which can easily be misinterpreted by police. Carling notes the communication challenges for Indigenous persons are exacerbated by a significant lack of interpreters capable of properly interpreting Indigenous dialects.⁵⁴⁶ Further, Watkins notes that even where an interpreter is used, there may be a "lie bias" that results in a tendency to find those speaking in a second language as untruthful, possibly because of cues associated with deception that are actually simply reflective of different cultural norms.

Watkins describes strategies to address each of the identified vulnerabilities of First Nations, Inuit and Métis People, including:

- Asking baseline questions to assess vulnerabilities;
- Electronically recording all interviews (now a common practice for police in Canada⁵⁴⁷);
- Taking great care to ensure the suspect understands his rights, e.g., by having the person explain them back in their own words, not just repeat it;
- Asking short, simple, open-ended questions, slowly and one at a time;
- Limiting the length of interviews, taking breaks as appropriate;
- Taking a non-confrontational approach to interviewing, as discussed in Chapter 4;⁵⁴⁸
- Taking all reasonable steps to corroborate any admissions, recognizing the potential for inaccuracies.⁵⁴⁹

546 Amanda Carling is a specialist in Indigenous justice issues and former Legal Education Counsel with Innocence Canada. She is currently the Manager of Indigenous Initiatives at University of Toronto's Faculty of Law. Commentary attributed to her in this report is based on her oral presentation at a meeting attended by the author on February 22, 2017 at Osgoode Hall, Toronto, Ontario. Also, see: Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions," *The Criminal Law Quarterly* 64, no.3 (2017).

547 The RCMP's national policy on interviewing requires that "When possible, statements from suspects or accused persons should be video and/or audio recorded, and secured as evidence."

548 Brent Snook et al., "Reforming Investigative Interviewing in Canada," *Canadian Journal of Criminology and Criminal Justice* 52, no.2 retrieved on March 10, 2017 from: http://www.mun.ca/psychology/brl/publications/Snook_et_al_CJCCJ.pdf.

549 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," Ontario Ministry of the Attorney General, pp. 493-498.

Recommendations

1. Police agencies should consider adopting a policy that would provide for the presence of a support person when interviewing vulnerable Indigenous persons. In several jurisdictions in Australia, police are required to provide adult Aboriginal detainees with an appropriate support person during interviews.⁵⁵⁰ This is not dissimilar to the requirement in Canada under the *Youth Criminal Justice Act* that police are required to give a young person who has been arrested or detained or is otherwise a suspect a reasonable opportunity to consult a parent, or adult relative or other appropriate adult, prior to giving a statement to the police, unless the young person has waived that right. Police agencies should likewise consider adopting policy that would obligate police to offer the opportunity of a support person to be present when interviewing vulnerable Indigenous persons;⁵⁵¹
2. All police agencies in Canada should review their interviewing techniques to ensure they are consistent with current best practices, which include gathering information in a non-confrontational manner, particularly for vulnerable persons, including Indigenous persons; and
3. More effort should be made to develop increased capacity for interpreters who speak Indigenous languages and dialects to assist in police investigations and in trials.

e) False Guilty Pleas by First Nations, Inuit and Métis People

The problem of false guilty pleas is discussed in detail in Chapter 8. According to Roach, “there is mounting evidence even in non-capital cases innocent [Indigenous persons] are making rational and irrational decisions to plead guilty to crimes that they did not commit.”⁵⁵² He suggests Indigenous persons in Canada are more likely to plead guilty for several reasons. First, because Indigenous persons are significantly over-represented in the criminal justice system, they are more likely to have a criminal record than other Canadians. This puts them at a disadvantage in terms of testifying in their own defence, because of the impact their criminal record may have on their credibility.⁵⁵³ Indigenous persons are also more likely to have “substance abuse issues, poverty, lower educational attainment, social isolation, and other forms of marginalization,”⁵⁵⁴ as well as convictions for failing to appear in court or for breaching bail conditions. As a result, they are more likely to be detained without bail.

550 See for example: *Police Powers and Responsibilities Act (2000), Division 3 Special requirements for questioning particular persons*, p. 460. Available at: http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/qld/consol_act/ppara2000365/.

551 *Youth Criminal Justice Act*, s 146(2) (c) (ii) and (4).

552 Statistics Canada, *Aboriginal Peoples in Canada*, National Household Survey, 2011.

553 Ibid.

554 Ibid.

The number of adults overall in remand custody has been increasing year over year for over a decade,⁵⁵⁵ and according to the Canadian Civil Liberties Association, has tripled since the early 1980s.⁵⁵⁶ Indigenous persons have disproportionately suffered the impact of this trend. Statistics Canada reports that in 2008/2009, those who self-identified as Indigenous persons represented 21 percent of all adults held on remand, despite only being about 3 percent of the Canadian population.⁵⁵⁷ Further, according to one report, “the number of Indigenous people denied bail jumped 92 percent in the 15 years leading up to 2009...”⁵⁵⁸ The result of the likelihood of being held without bail is that Indigenous persons are more likely to plead guilty:

Many plead out, even when they’re innocent, because they can’t make bail, putting them at risk of losing jobs, housing, and custody of their children, defence lawyers told *Maclean’s*. The simple act of having an Indigenous lawyer, meanwhile, can almost double the number of “not guilty” pleas at first appearance to 49 percent, according to one federal study.

Eddy Cobiness, a 49-year-old member of the Buffalo Point First Nation in Manitoba, told *Maclean’s* he pleads guilty every time he’s charged, even when he didn’t commit the crime he is accused of: “I just say: ‘Okay, yeah’—just to get out. Every day away from your kids is another day of making memories you lose.”

Denied bail and faced with the prospect of a lengthy stay in an overcrowded jail, more and more are pushed into perverse choices in this era of mandatory minimums. “What would you do?” says Winnipeg criminal lawyer Greg Brodsky. “Do you want to lose your kids? Your job? Or do you [take the plea, and] just go home?” Increasingly, he says, justice resembles a “rush to resolve cases by the best bargain you can make.”

An additional compounding factor is the trend to give “deep discounts” for guilty pleas, which may further disadvantage Indigenous persons, most dramatically exemplified in the case of *R. v. Brosseau*:

555 Lindsay Porter and Donna Calverley, “Trends in the Use of Remand in Canada,” *Juristat: Statistics Canada*, p. 5. Retrieved on March 13, 2017 from: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm>.

556 Sigurdsson and Gudjonsson, “The Psychological Characteristics of ‘False Confessors’” *Personality and Individual Differences*.

557 Parks and Cunliffe, “Women and Wrongful Convictions,” *International Journal of Law in Context*, p. 19.

558 Nancy Macdonald “Canada’s Prisons are the ‘New Residential Schools,’” *MacLean’s Magazine*, February 18, 2016, retrieved on March 13, 2017 from: <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>

I wish to appeal my conviction and sentence on the grounds that I only have a grade 2 education and my lawyer told me that if I didn't plead guilty to the charge that they would sentence me to hang. When he told me this I was scared and pleaded guilty.⁵⁵⁹

Researchers suggest the likelihood of an Indigenous person pleading guilty to an offence of which they are factually innocent is greater than for non-Indigenous persons, because they are more likely to have a criminal record and suffer the other disadvantages described earlier. Former Supreme Court justice Frank Iacobucci noted (in an independent review regarding First Nations representation on juries) additional systemic reasons factually innocent Indigenous people may plead guilty:

Many [First Nations] persons accused of crimes plead guilty to their offences, rather than electing trial, in order to have their charge resolved quickly but without appreciating the consequences of their decision. In fact, many First Nations individuals explained that they have never known a friend or family member who, when charged, proceeded to trial. Many of these accused persons believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members.⁵⁶⁰

Further, Carling has noted that lawyers may work less diligently for Indigenous clients,⁵⁶¹ and Roach has described how lawyers may not believe their clients' claims of innocence. Roach also notes other factors, such as "defence lawyers not understanding Indigenous accused for reasons relating to language and culture," and points out the problems created by the alienation of Indigenous persons from the criminal justice system, causing a lack of trust.⁵⁶² Finally, it is clear that because of their vulnerabilities, Indigenous persons may plead guilty even when factually innocent, and/or without understanding the foreseeable consequences of a plea.⁵⁶³

With respect to First Nations accused being more likely to be detained – which may lead to guilty pleas of factually innocent persons – the federal government has taken a positive step with the introduction of Bill C-75, on March 29, 2018. If passed, this legislation will amend s. 493 of the Criminal Code as follows:⁵⁶⁴

559 *R. v. Brosseau* [1969] SCR 181, 186, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4836/index.do>, as cited in: Roach, "The Wrongful Conviction of Indigenous People," *Flanders Law Journal*.

560 Honorable Frank Iacobucci, "First Nations Representation on Ontario Juries: Report of the Independent Review," Ontario Ministry of the Attorney General, 2013, at para 215.

561 Canadian Civil Liberties Association, *Set Up to Fail*.

562 Brzozowski, Taylor-Butts and Johnson, "Victimization and Offending," *Juristat*, p. 261.

563 Carling, "A Way to Reduce Indigenous Overrepresentation" *The Criminal Law Quarterly*, pp. 415-461.

564 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, accessed on April 13, 2018 from http://www.parl.ca/Content/Bills/421/Government/C-75/C-75_1/C-75_1.PDF.

Principle of restraint

493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in 5 subsection 498(1.1) or 515(10), as the case may be.

Aboriginal accused or vulnerable populations

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

- a) Aboriginal accused; and
- b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

This legislation has the benefit of addressing systemic biases faced not only by First Nations accused, but other vulnerable groups as well; if they are less likely to be detained, and if they are less likely to be “set up for failure” by release on conditions that are unreasonably difficult for vulnerable accused to comply with, then these factors may lead to a reduction in wrongful guilty pleas.

Summary and Recommendations

Indigenous persons are wrongfully convicted for the same reasons as others in Canada, as has been well-documented in the literature. Indigenous persons, however, are particularly vulnerable to wrongful convictions for specific reasons that have been identified.

Two significant themes in the available research are cited as contributing to the wrongful convictions of Indigenous persons. The first is that Indigenous persons are disadvantaged when being interviewed by police, which can cause mistaken inferences of guilt. The second is that there are a variety of factors that contribute to Indigenous persons who are factually innocent (or who at least have valid defences) pleading guilty. This occurs because the alternative for many Indigenous persons is that they will be detained pending trial, an outcome that occurs at a dramatically higher rate than for non-Indigenous persons.

There are a variety of strategies that should be explored to address the factors that contribute to the wrongful convictions of Indigenous persons. These include new rules for police interviews of Indigenous persons (whether achieved through legislation, standards, or police policies); improving the capacity of defence lawyers to competently advocate for Indigenous persons, including increasing the availability of culturally and linguistically suitable support persons and interpreters; and committing to actions to reduce the rate at which Indigenous persons are detained without bail, given the rate of guilty pleas among factually innocent Indigenous persons who are denied bail. Further research into guilty pleas among Indigenous persons, such as that which began in 2017 by the Department of Justice Canada's Research and Statistics Division, should be strongly supported.

1. More resources should be allocated to develop increased capacity for interpreters who speak languages and dialects spoken by Indigenous persons to assist them and their defence counsel immediately after arrest, at bail hearings, in deciding on whether to plead guilty or go to trial, and any other discussions where understanding both language and concepts is important;
2. There should be better training available for defence lawyers who represent Indigenous persons to address cross-cultural issues that may create barriers to effective communication;
3. In recognition of the disproportionate impact of detention orders against Indigenous persons and to reduce the potential for a factually innocent Indigenous person to plead guilty to avoid time in detention, *Gladue* factors, as is contemplated in s. 515(10) of the *Criminal Code*, may be a relevant consideration at the bail stage of a prosecution.⁵⁶⁵
4. When Indigenous persons are released on bail, care should be taken to avoid imposing conditions where there is an insufficient nexus to public safety and which are likely to be breached, creating problems in the future for Indigenous persons qualifying for bail;⁵⁶⁶
5. There should be further study into problems created by offering significant sentence reductions to those who plead guilty, given that an unintended consequence has been the wrongful convictions of factually innocent persons, including Indigenous persons. Not only is this an unacceptable outcome, it also creates barriers in the future to seeking legal redress, given the prejudicial impact of a guilty plea;

565 Sigurdsson and Gudjonsson, "The Psychological Characteristics of 'False Confessors'" *Personality and Individual Differences*. Also see *R. v. Daniels*, 2012 SKPC 189, 104 W.C.B. (2d) 1136.

566 *Ibid.* Also see *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509.

6. As recommended earlier for female accused persons, a review of Crown policies across the country should be conducted to ensure all require an admission of all elements of an offence prior to a plea being accepted; and
7. The research that began in early 2017 by the the Department of Justice Canada's Research and Statistics Division (RSD) on the issue of guilty pleas among Indigenous people should be strongly supported and its eventual recommendations carefully considered and appropriately resourced.
8. Consideration should be given to amending s. 606 of the *Criminal Code* to ensure that Indigenous persons (and other vulnerable individuals) understand and consider all reasonably foreseeable consequences of a guilty plea.

IV. YOUNG PERSONS

Ample research now suggests that young persons⁵⁶⁷ are also more vulnerable to wrongful convictions, as compared to adults, for a variety of age-related reasons.⁵⁶⁸ The nature of the young developing brain is considered a key factor. In essence, youthful brains are wired differently, and those underdeveloped brains result in young persons being poor decision-makers, in contrast to adults. Experts across disciplines point to a trilogy of judgments by the United States Supreme Court, including *Roper v Simmons*⁵⁶⁹ where the Court acknowledged the scientific evidence that young persons are less mature, less able to assess risks and long-term consequences of their conduct, more vulnerable to external pressures and more compliant to authority.⁵⁷⁰ As a result, the traits that make young persons different from adults cognitively, socially and emotionally, may also make them particularly susceptible to the recognized systemic factors that contribute to wrongful convictions.⁵⁷¹

567 For the purposes of the Canadian criminal law, young person is defined as a person who was at least 12 but under 18 at the time of the alleged offence.

568 See Allison D. Redlich, "The Susceptibility of Juveniles to False Confessions and False Guilty Pleas," *Rutgers Law Review* 62, no.4 (2010): 943, at 943-945; Steven Drizin and Greg Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" *Northern Kentucky Law Review* 34 (2007): 257 at 257-262 ; and Joshua Tepfer, Laura Nirider and Lynda Tricarico, "Arresting Development: Convictions of Innocent Youth," *Rutgers Law Review* 62 (2010): 887 at 892.

569 *Roper v. Simmons*, 543 US 551 (2005), 578 at 569.

570 As discussed in Tepfer, Nirider and Tricarico, "Arresting Development," *Rutgers Law Review*, 887 at 893. See also Laurence Steinberg, *Age of Opportunity* (Boston: Houghton, Mifflin Harcourt, 2014): "Chapter 10: Brains on Trial," at pp. 182-204.

571 *Ibid.*

For example, experts contend that young persons are at increased risk of falsely confessing to crimes they did not commit, compared to adults.⁵⁷² The Supreme Court of Canada recognized the particular vulnerability of certain categories of accused persons, including young persons, to falsely confess to crimes in *R. v. Hart*. Justice Moldaver, for the majority, said the following:

Special note should be taken of the mental health and age of the accused. In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing (Garrett, at p. 1064).^{7 ...}⁵⁷³

While there is a lack of Canadian research regarding the pervasiveness of false confessions among young persons, some Canadian academics contend that false confessions are “a serious and underestimated problem” generally in the Canadian criminal justice system, and that certain categories of people, including youth, may be particularly vulnerable in part because young persons are more suggestible. Canadian Professor Christopher Sherrin points to research suggesting that young persons “may be unusually prone to giving false statements” under pressure from authority figures.⁵⁷⁴

There is considerably more research regarding young persons and the risk of false confessions in the United States, which is typical of the subject of wrongful convictions generally. The International Association of Chiefs of Police recognizes false confessions as a leading cause of wrongful convictions of youth.⁵⁷⁵ The New York-based Innocence Project, which seeks to exonerate the factually innocent based on DNA evidence, states that confessions obtained from juveniles are “often unreliable.”⁵⁷⁶ A spate of American studies suggests just how unreliable. Experts there say that studies of proven false confessions show that juveniles (defined as those under 18) are over-represented in false confession cases.⁵⁷⁷

572 See Redlich, “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, 943, at 943-944; Drizin, and Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions?” *Northern Kentucky Law Review*, 257 at 259; and Tepfer, Nirider and Tricarico, “Arresting Development,” *Rutgers Law Review*, 887 at 893-894.

573 *R. v. Hart*, 2014 SCC 52, at para. 103.

574 See Christopher Sherrin, “False Confessions and Admissions in Canadian Law,” *Queen’s Law Journal* 30 (2005): 601-659 at Sections B., V. and VI. D. (Youth). At the time of writing in February 2018, Professor Sherrin was a law professor at the University of Western Ontario.

575 International Association of Chiefs of Police, *Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation*, Office of Juvenile Justice and Delinquency Prevention, September 2012. Available online at: <http://www.theiacp.org/portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>

576 <https://www.innocenceproject.org/causes/false-confessions-admissions/>.

577 Drizin and Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions,” *Northern Kentucky Law Review*, 273. See also Steven Drizin and Richard Leo, “The Problem of False Confessions in the Post-DNA World,” *North Carolina Law Review* 82 (2004): 941-943.

The research shows that young persons are actually about two to three times more likely to falsely confess than adults,⁵⁷⁸ and that between 30 to almost 40 percent of those who falsely confess are young persons. For example, data from the National Registry of Exonerations shows that 38 percent of exonerees who falsely confessed were under 18.⁵⁷⁹ A study by US law professor Brandon Garrett of the first 250 wrongfully convicted persons exonerated through DNA testing in the U.S. found that 33 percent of those who falsely confessed were juveniles.⁵⁸⁰ A study by known American experts Steven Drizin and Richard Leo of 125 cases of proven interrogation-induced false confessions found that 33 percent of them involved young persons under 18 (63 percent were under 25).⁵⁸¹

Young persons are less mature than adults and have less life experience, say experts, and may thus be more easily intimidated by police power and more vulnerable to persuasion and coercion. They tend to be more suggestible and impulsive, exhibit a particular eagerness to obey or agree with those in authority, and generally appear at greater risk of falsely confessing in the face of psychological interrogation techniques.⁵⁸² “They are thus less equipped to cope with stressful police interrogation and less likely to possess the psychological resources to resist the pressures of accusatorial police questioning.”⁵⁸³ In both Canada and the United States, the highest courts have recognized that young persons are more susceptible to the pressures of police interrogation.⁵⁸⁴

578 A 2005 study by Samuel R. Gross et al., of 340 exonerees, “Exonerations in the United States 1989 through 2003,” *Journal of Criminal Law and Criminology* 95, no.2 (2005). Article 5, found that of the 340 exonerees studied, 33 were under eighteen at the time of the crimes for which they were convicted; 14 of these juveniles falsely confessed, which is 42%, compared to 13% of older exonerees. Overall, 55% of all the false confessions identified in the study were from defendants who were under eighteen, or mentally disabled, or both. Among adult exonerees without known mental disabilities, the false confession rate was 8%. The study can be accessed at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7186&context=jclc>. In Tepfer, Nirider and Tricarico, “Arresting Development,” *Rutgers Law Review*, p. 904, researchers found that 31.1% of youthful exonerees had falsely confessed, compared with 17.8% of adult exonerees, which suggests young persons falsely confess almost twice as often.

579 National Registry of Exonerations, False Confession Table: <https://www.law.umich.edu/special/exoneration/Documents/Table-%20Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess.pdf>

580 Brandon Garrett, *Convicting the Innocent* (Cambridge, MA: Harvard University Press, 2011) p. 38.

581 Drizin and Leo “The Problem of False Confessions,” *North Carolina Law Review*, pp. 941-942.

582 Ibid., 1001. The work and research of various other experts is cited at this page of the article as well as at footnotes 346 and 719.

583 Ibid., 942.

584 In Canada, see for example *R. v. LTH*, 2008 SCC 49 at paras. 1 and 24, and *R. v. JTJ* 1990 2 SCR 755 at para 18. In the United States, see *In re Gault*, 387 US 1 55 (1967), but see more recently *JDB v. North Carolina*, 564 US, 131 S.Ct. 2394 (2011).

The exact manner in which a young person reacts during a police interrogation and the ultimate breaking point or catalyst for a false confession or admission will vary from case to case. In the American study by Drizin and Leo, one of the most common reasons cited by teenagers for falsely confessing during police interrogations was that they believed that, by doing so, they could end the questioning and be allowed to go home.⁵⁸⁵ In other cases, young persons, faced with what appears to be overwhelming evidence that they committed the crime, despite their factual innocence (such as false evidence presented to them by the police that the victim's blood was found in their bedroom, a false suggestion that the police lifted their fingerprints from the crime scene, etc...), falsely confess to secure more lenient treatment. In some cases, they actually become convinced during the interrogation, at least temporarily, that they must have committed the crime based on the false evidence against them that the police say they have, even though they say they have no memory of committing the crime.⁵⁸⁶

It is important to emphasize that most of the research in this area is American and based on American law, practices and experience. Canadian police interrogation techniques are guided by the *Canadian Charter of Rights and Freedoms*, as well as the Canadian statutory and common law. There are clear differences between the interrogation techniques used by Canadian police and those employed by their American counterparts, particularly regarding the interrogation of young persons. As discussed in Chapter 4, among other things, Canadian police must comply strictly with the requirements of section 146 of the *Youth Criminal Justice Act* when interviewing young persons who are suspects. Otherwise the statement made to the police officer by the young person is unlikely to be admissible against him or her. That section provides that a person in authority, generally a police officer, cannot take a statement from a young person who is detained, under arrest, or otherwise suspected of having committed a crime, unless the young person has first been given a reasonable opportunity to consult with a lawyer, and also with a parent or adult relative or other appropriate adult person. If the young person chooses to consult with a lawyer and/or with a parent or other adult, the young person must also be given a reasonable opportunity to make the statement in the presence of that person. The young person can waive these rights but any such waiver must be recorded electronically or be in writing and signed by the young

585 Drizin and Leo, "The Problem of False Confessions," *North Carolina Law Review*, p. 966.

586 The American case of 14-year-old Michael Crowe, who was wrongly accused of murdering his younger sister in 1998 is a classic example of this. See *Crowe v. County of San Diego*, 608 F. 3rd 406 (2010), in which the nature of the police interrogation is recounted at pages 6-11 of a printout of the decision. The real perpetrator was eventually identified based on DNA evidence; the victim's blood was found on his clothing. Michael Crowe was never tried for the murder. The Crowe family eventually received a settlement of \$7.25 million for the false accusations against their son. See also discussion of the Central Park Five case in Garrett, *Convicting the Innocent*, "Chapter 2: Contaminated Confessions," at p. 22; Sharon L. Davies, "The Reality of False Confessions- Lessons of the Central Park Jogger Case," *New York University Review of Law and Social Change* 30 (2005): 209, at last para of Section A, and Drizin and Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" *Northern Kentucky Law Review*, p. 274.

person.⁵⁸⁷ The Supreme Court of Canada said clearly in *R. v. LTH* that in order for this waiver to be valid, it must be established by clear and unequivocal evidence that the young person waived the procedural safeguard with full knowledge of the rights the procedure was designed to protect and the effect the waiver will have on those rights.⁵⁸⁸ In a case where defence challenges the validity of the waiver of a young person, the Crown must prove beyond a reasonable doubt the validity of the waiver. The judge must be satisfied that the waiver is based “on a true understanding of the rights involved and the consequences of giving them up.”⁵⁸⁹

The Canadian common law imposes additional obligations on the police. That said, the common law by which Canadian police officers are bound permits the police to engage in trickery against an accused, including deception, so long as police do not use tactics that would shock the conscience of the community.⁵⁹⁰ Nevertheless, Justice Iacobucci, for the majority of the Supreme Court in *Oickle*, pointed out the danger of the police presenting entirely fabricated evidence to the suspect because it “has the potential either to persuade the susceptible suspect that he did indeed commit the crime, or at least to convince the suspect that any protestations of innocence are futile.”⁵⁹¹ But Justice Iacobucci did not go so far as to say that fabricated evidence can never be presented to an accused. The Supreme Court of Canada has also established clear rules regarding undercover operations such as *Mr. Big* regarding when evidence derived from such operations will be admissible in court.⁵⁹²

Similar to the concerns that young persons may be at particular risk of false confessions, academics are also asking to what degree young persons are also more vulnerable than adults to entering false guilty pleas.⁵⁹³ The research on this question is relatively sparse and conflicting. Experts acknowledge that only some, but not all, of the current research indicates that young persons, particularly the younger ones, are more likely to plead guilty than adults.⁵⁹⁴ For example, at least one study found that young persons are entering false guilty pleas at a slightly lower rate than adults, 6.8 percent compared to 7.9 percent for adults.⁵⁹⁵ Some experts explain this by suggesting that young persons, being inherent risk-takers, may be more willing than adults to tolerate the risks of going to trial rather than

587 *Youth Criminal Justice Act*, s. 146.

588 *R. v. LTH*, 2008 SCC 49, at paras. 7, 26, 40.

589 *Ibid.*, at paras 39-40.

590 *R. v. Oickle* [2000] 2 SCR. 3, at para. 66.

591 *Ibid.*, at para. 43.

592 *R. v. Hart*, 2014 SCC 52. See detailed discussion of *R. v. Hart* in Chapter 4, False Confessions.

593 See: Redlich, “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, 943 at 944; and Drizin and Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions,” *Northern Kentucky Law Review*, 292-293; also see Tepfer, Nirider, and Tricarico, “Arresting Development,” *Rutgers Law Review*, pp. 913-914.

594 Redlich, “The Susceptibility of Juveniles to False Confessions,” *Rutgers Law Review*, p. 951.

595 Tepfer, Nirider, and Tricarico, “Arresting Development,” *Rutgers Law Review*, pp. 913-914.

pleading guilty when innocent.⁵⁹⁶ Other American scholars suggest false guilty pleas are higher among youths for a multitude of reasons: heavy caseloads, juvenile court culture in the U.S. that disapproves of lawyers who advocate zealously for their young clients rather than co-operating with the prosecution and the judge in focusing on a child's best interests, lawyers who do not spend adequate time investigating cases and preparing their youthful clients, which leads to situations where youths do not understand the plea system, including the fact that they are waiving their right to trial and admitting guilt. Some also argue that false guilty pleas, like false confessions, may be higher for young persons for the various developmental reasons already cited: Young persons tend to focus on the short term, they are more likely to acquiesce to adult authority and they are less mature in their decision-making and judgment.⁵⁹⁷ Nevertheless some experts who have studied the question carefully suggest that we simply do not know whether young persons are more or less likely than adults to plead guilty to crimes they did not commit, that there are arguments on both sides of the question, and that this subject requires greater attention and more research.⁵⁹⁸

Young persons may be more vulnerable to being wrongfully convicted as compared to adults for other reasons as well, the research suggests. The same traits mentioned above that relate to the youthful brain, such as poor judgment, immaturity, challenges assessing risks, sensitivity to peer pressure and an inability to see long-term consequences of their conduct, can also make them less capable trial defendants, some experts say.⁵⁹⁹ Young persons are also more likely to have ineffective counsel, particularly in juvenile court (the American term for what in Canada is called youth justice court), in contrast to adult accused, American academics contend.⁶⁰⁰ Again, this observation regarding ineffective legal representation is based on American research and the nature of juvenile court in the U.S.⁶⁰¹ American researchers found in a study of 103 youth exonerations cases that the court ruled in 13 (or 13.6 percent) of the cases that the defence counsel provided ineffective assistance whereas the same ruling was made in only seven (or 3.3 percent) of the 214 adult DNA exoneree cases.⁶⁰² While researchers qualified the difference by saying that the exculpatory DNA results in the adult sample provided enough basis for overturning the conviction that the court did not need to find ineffective legal representation, they also made the point that it would be hard to deny that inadequate legal representation may affect young persons more than adults.⁶⁰³

596 Redlich, "The Susceptibility of Juveniles to False Confessions," *Rutgers Law Review*, p. 952.

597 Drizin and Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions," *Northern Kentucky Law Review*, 292-293.

598 See a thoughtful discussion of this in Redlich, "The Susceptibility of Juveniles to False Confessions," *Rutgers Law Review*, pp.953-957.

599 Drizin and Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions," *Northern Kentucky Law Review*, 260.

600 Tepfer, Nirider, and Tricarico, "Arresting Development," *Rutgers Law Review*, p. 894.

601 *Ibid.*, 898, footnote 52 and at 912.

602 *Ibid.*, 911.

603 *Ibid.*, pp. 911-912.

Some scholars also argue that young persons are less capable of understanding their rights, such as the right to silence, and the consequences of giving it up, and that they also frequently waive their right to counsel, both of which can make them more vulnerable to wrongful convictions.⁶⁰⁴

...[I]t is difficult for a waiver to be either knowing or voluntary when children often relinquish their right to counsel without any explanation of what the right means or how they may choose to exercise it. When children appear in juvenile court without counsel, they will almost undoubtedly plea to a crime that they may or may not have committed.⁶⁰⁵

The U.S. government has recognized that in some jurisdictions up to 80 to 90 percent of youth waive their right to a lawyer because they do not know the meaning of the word “waive” or understand its consequences.⁶⁰⁶ The Canadian courts have raised similar concerns that young persons in Canada are less able than adults to understand their legal rights and thus the consequences of waiving them⁶⁰⁷ but there is no data regarding the rates at which young persons in Canada waive their right to counsel under s 146 of the YCJA.

Recommendations Particular to Young Persons

1. The federal government should consider conducting research regarding the rate at which young persons in Canada waive their right to consult counsel under s 146 of the *Youth Criminal Justice Act*;
2. The federal government should consider conducting research regarding the extent to which young persons, particularly those between the ages of 12 and 14, who are under arrest or detention or otherwise suspects, understand the meaning and implications of waiving their rights to counsel and their right to silence before giving a statement to police.

604 Drizin and Luloff, “Are Juvenile Courts a Breeding Ground for Wrongful Convictions,” *Northern Kentucky Law Review* beginning at 266 Part II, Procedural Deficiencies in Juvenile Court.

605 *Ibid.*, 284.

606 *Ibid.*, 285. At the time of writing in February 2018, there was no similar research from the federal Department of Justice regarding the rate at which young persons in Canada waive their right to counsel under s 146 of the *Youth Criminal Justice Act*.

607 See *R. v. LTH*, 2008 SCC 49, at para. 33.

V. UPDATED RECOMMENDATIONS

General Recommendations⁶⁰⁸

1. When an accused is giving a recorded statement to police regarding an alleged offence, the entire interview should be recorded, from beginning to end, not just the portion where the accused confesses to the crime;
2. Police forces should review their policies to determine if it is ever appropriate for the police to lie during interrogations to particularly vulnerable persons about the strength of the evidence against them, for example, by informing the accused that the police discovered their fingerprints or DNA evidence at the crime scene, when no such evidence exists;
3. The federal government should consider conducting research regarding whether certain segments of the population are at increased risk of wrongful convictions, and if so, why, and what can be done to reduce the risks of wrongful convictions within these at-risk groups;
4. There should be further study into problems created by offering significant sentence reductions to those who plead guilty, given that an unintended consequence has been the wrongful convictions of factually innocent persons, including Indigenous persons. Not only is this an unacceptable outcome, it also creates barriers in the future to seeking legal redress, given the prejudicial impact of a guilty plea;
5. All Prosecution Services should review their policies regarding resolution discussions to ensure that the policies require that :
 - (i) the offender is admitting all elements of the offence to which a plea is being entered;
 - (ii) the facts and evidence against the accused support the offence for which a plea is being entered;
 - (iii) the Crown is satisfied there is a reasonable prospect of conviction;
 - (iv) the prosecution service policy states clearly that the Crown cannot accept a guilty plea from an accused where the Crown has knowledge or concerns that the accused is factually innocent, and

608 The general recommendations apply to all accused persons, but may be of particular importance when the accused is from a population that is considered at particular risk of wrongful convictions, such as women, First Nations, Métis and Inuit People, and young persons.

- (v) the Crown is particularly sensitive to guilty pleas being entered by accused persons from identified groups who are recognized as being at particular risk of wrongful convictions;
6. Greater training should be provided for police, Crowns and judges generally regarding why certain populations may be at particular risk of wrongful convictions; and
 7. In particular, police officers across Canada should receive special training regarding best practices in relation to the interrogation of accused persons from at-risk populations.

Recommendations Particular to Women

1. A review should be undertaken of the admissibility and proper use of demeanor evidence, specifically in cases where the accused are women and/or members of other vulnerable, at-risk groups.
2. All prosecution services should review their relevant policies to ensure they alert prosecutors to the risk of falling victim to gender stereotypes, as well as other forms of discrimination, during the course of their prosecutions, from the initial file assessment to the resolution of the case.
3. A standard jury instruction should be developed to caution juries about placing undue weight on the demeanor presentation of a witness, particularly in cases which involve female and other at-risk accused, whose emotional reaction may have been noted by the court as “unusual” or “unexpected”, and not in compliance with typical gender and cultural stereotypes.

Recommendations Particular to First Nations, Inuit and Metis People

1. Police agencies should consider adopting a policy that would provide for the presence of a support person when interviewing vulnerable Indigenous persons. In several jurisdictions in Australia, police are required to provide adult Aboriginal detainees with an appropriate support person during interviews.⁶⁰⁹ This is not dissimilar to the requirement in Canada under the *Youth Criminal Justice Act* that police are required to give a young person who has been arrested or detained or is otherwise a suspect a reasonable opportunity to consult a parent, or adult relative or other appropriate adult, prior to giving a statement to the police, unless the young person has waived that right. Police agencies should likewise consider adopting policy that would obligate police to offer the opportunity of a support person to be present when interviewing vulnerable Indigenous persons;⁶¹⁰

609 See for example: *Police Powers and Responsibilities Act (2000)*, Division 3 Special requirements for questioning particular persons, p. 460, available at: http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/qld/consol_act/ppara2000365/.

610 *Youth Criminal Justice Act*, s. 146(2) (c) (ii) and (4).

2. All police agencies in Canada should review their interviewing techniques to ensure they are consistent with current best practices, which include gathering information in a non-confrontational manner, particularly for vulnerable persons, including Indigenous persons;
3. More effort should be made to develop increased capacity for interpreters who speak Indigenous languages and dialects to assist in police investigations and in trials.
4. More resources should be allocated to develop increased capacity for interpreters who speak languages and dialects spoken by Indigenous persons to assist them and their defence counsel immediately after arrest, at bail hearings, in deciding on whether to plead guilty or go to trial, and any other discussions where understanding both language and concepts is important;
5. There should be better training available for defence lawyers who represent Indigenous persons to address cross-cultural issues that may create barriers to effective communication;
6. In recognition of the disproportionate impact of detention orders against Indigenous persons and to reduce the potential for a factually innocent Indigenous person to plead guilty to avoid time in detention, Gladue factors, as is contemplated in s. 515(10) of the *Criminal Code*, may be a relevant consideration at the bail stage of a prosecution.⁶¹¹
7. When Indigenous persons are released on bail, care should be taken to avoid imposing conditions where there is an insufficient nexus to public safety and which are likely to be breached, creating problems in the future for Indigenous persons qualifying for bail.⁶¹²
8. The research that began in early 2017 by the the Department of Justice Canada's Research and Statistics Division (RSD) on the issue of guilty pleas among Indigenous people should be strongly supported and its eventual recommendations carefully considered and appropriately resourced.
9. Consideration should be given to amending s. 606 of the *Criminal Code* to ensure that Indigenous persons (and other vulnerable individuals) understand and consider all reasonably foreseeable consequences of a guilty plea.

611 Sigurdsson and Gudjonsson, "The Psychological Characteristics of 'False Confessors'" *Personality and Individual Differences*. Also see *R. v. Daniels*, 2012 SKPC 189, 104 W.C.B. (2d) 1136.

612 Sigurdsson and Gudjonsson, "The Psychological Characteristics of 'False Confessors'" *Personality and Individual Differences*. Also see *R. v. Antic*, 2017 SCC 27, [2017] 1 SCR. 509.

Recommendations Particular to Young Persons

1. The federal government should consider conducting research regarding the rate at which young persons in Canada waive their right to consult counsel under s 146 of the *Youth Criminal Justice Act*;
2. The federal government should consider conducting research regarding the extent to which young persons, particularly those between the ages of 12 and 14, who are under arrest or detention or otherwise suspects, understand the meaning and implications of waiving their rights to counsel and their right to silence before giving a statement to police.

CHAPTER 11 – CONCLUSION

Canada has become a leader in trying to understand the causes of wrongful convictions and what can be done to prevent them. Seven commissions of inquiry in Canada have highlighted, among other factors, investigative and prosecutorial conduct that can contribute to wrongful convictions. Further, the recommendations from these inquiries, coupled with the commitment of police forces and prosecution services in Canada to make systemic improvements to reduce the likelihood of wrongful convictions, have led to the work of this Subcommittee. That work has inspired extensive changes in policy, practice and procedure in Canada, as described in this *Report* and its two predecessors. The findings of Canada's inquiries, as well as the work and recommendations of this Subcommittee in its two previous reports, have also attracted national and international attention, and been cited in the case law and extensive academic literature. In fact, the important learning and sharing of information in this field over the decades among countries, including Canada, has led to increased awareness on an international scale, as well as ongoing improvements to police and prosecutorial training and best practices.

Canadian Research Centre

That said, a consistent theme in this *Report* and its recommendations is the need for more research into the causes of wrongful convictions in Canada and what can be done by criminal justice system participants to reduce the risk of miscarriages of justice. To that end, the Subcommittee strongly supports more systemic research into the causes of wrongful convictions in Canada and effective strategies to prevent them, perhaps through the creation of a research centre, at a university law school or elsewhere.

Canada has several prolific legal academic writers on the subject of wrongful convictions, such as Professor Kent Roach from the University of Toronto⁶¹³, Christopher Sherrin from Western University⁶¹⁴ and former Manitoba Deputy Attorney General Bruce MacFarlane.⁶¹⁵ There is also a great deal of social science research on issues such as eyewitness identification and false confessions. But, unlike the United States, the research in Canada is far less extensive, and appears sporadic rather than systemic and sustained, with the exception of several special issues of the *Criminal Law Quarterly*⁶¹⁶ devoted to wrongful convictions. The last

613 See: University of Toronto, Faculty of Law Web site, <https://www.law.utoronto.ca/faculty-staff/full-time-faculty/kent-roach>.

614 See: Western Law Web site, https://law.uwo.ca/about_us/faculty/christopher_sherrin.html.

615 For an example of his work, see footnote 4.

616 “Special Issue on Wrongful Convictions,” *The Criminal Law Quarterly* 63, No. 4 (October 2016).

national conference on the topic was in 2005⁶¹⁷ and there is no centre in Canada devoted to the study of wrongful convictions as exists in the United States.

In addition to a national research centre dedicated to the prevention of wrongful convictions in Canada, the Subcommittee suggests there are two developments in the United States that are worth identifying and examining in terms of their possible application and adaptation to the Canadian context. While the Canadian criminal justice system differs from the American system in various ways, federal and provincial governments, as well as prosecution services in Canada, may wish to consider studying these developments with a view to determining to what degree, if at all, they could be useful in the Canadian context.

A National Registry

Many times throughout this *Report*, reference has been made to the National Registry of Exonerations (“the Registry”) in the U.S.⁶¹⁸ The Registry is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. The Registry was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989 – cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. Recently, it added a new database with stories and data about 369 earlier exonerations, from 1820 through 1988. Unlike the exonerations recognized by the New-York based Innocence Project, the National Registry does not restrict itself to recognizing exonerations only where DNA evidence eliminates the accused as the offender.

The Registry’s stated mission is to provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions by learning from past errors.

The Registry collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States, from 1989 to the present. We publish their stories and we provide accessible, searchable online statistical data about their cases. We also conduct empirical studies of the process of exoneration and of factors that lead to the underlying wrongful convictions.

617 “Unlocking Innocence: An International Conference on Wrongful Conviction,” Winnipeg, 2005.

618 The National Registry of Exonerations, Web site, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

We study false convictions—their frequency, distribution, causes, costs and consequences—in order to educate policy makers and the general public about convictions of innocent defendants. We focus on exonerations because the only false convictions that we know about are those that end in exoneration.

We rely entirely on publicly available information. We do not practice law or investigate cases of possible innocence. We do not collect, maintain or use confidential information of any sort, or work on behalf of any individuals. We do not make our own judgments about the guilt or innocence of convicted defendants. Our criteria for classifying cases as exonerations are based on official actions by courts and other government agencies.⁶¹⁹

As this *Report* has illustrated, the Registry is a highly valuable tool – one which Canada might wish to consider emulating. While there is often disagreement over what constitutes a wrongful conviction or how innocence should be defined, and whether a particular case, absent a definitive court ruling, constitutes a miscarriage of justice, it would be useful both for research and the public discourse to create a central database of cases in Canada based on a clear definition of wrongful conviction. Innocence Canada had begun work on such a registry but the work was put on hold due to the organization’s caseload priorities and financial pressures. Recently, a working group at the University of Toronto, Faculty of Law, supported by Innocence Canada, has picked up work on what will be a Canadian Registry of Exonerations. The working group is led by Professor and Prichard Wilson Chair in Law and Public Policy, Kent Roach, and Amanda Carling, Manager of Indigenous Initiatives and former Legal Education Counsel for Innocence Canada. The group hopes to launch the Registry in late 2019. The Subcommittee supports this initiative.

Conviction Integrity Units

The second U.S. development worthy of mention concerns the recent phenomenon of conviction integrity units (CIUs) in various U.S. states, sometimes described as in-house innocence projects or post-conviction review programs. These are special divisions of prosecutorial offices that are dedicated to preventing, identifying, and correcting wrongful convictions, post-conviction. They investigate allegations of wrongful convictions among cases that the office has already successfully prosecuted. The Registry reported that there were 33 CIUs in the United States in 2017, more than double the number in 2013 and more than six times the number in 2011 (although there are 2,300 prosecutor’s offices in the U.S.) Forty-two CIU-exonerations took place in 2017. Overall, CIUs have helped secure 269 exonerations from 2003 through 2017; more than 80 percent occurred since 2014. CIU’s worked with innocence organizations to varying degrees.⁶²⁰

619 Ibid.

620 “Exonerations in 2017,” National Registry of Exonerations.

When Michael Dougherty, Boulder County, Colorado's new District Attorney announced recently that his office has created a Conviction Integrity Unit, he stated: "A prosecutor's mission is to do justice in every single case, and not to rack up convictions like notches in a gun belt. If there is reason to believe someone is wrongfully convicted, prosecutors should have an open mind and a process to examine those cases."⁶²¹

Observers suggest not all CIU's are created equal and keys to success include a close working relationship with the defence bar, independence, flexibility and transparency.⁶²²

Conviction Integrity Units are a positive development, but they are not a panacea. Prosecutors who take on the task of reviewing convictions won by their own colleagues and predecessors may find it difficult to be objective and thorough. Particular units have been criticized as mere window dressing or public relations ploys. These criticisms may be fair when a prosecutor's office benefits from the positive publicity it gets from announcing the creation of a unit that ultimately produces no exonerations and is difficult even to access.

The variability in the performance of CIUs reflects the fact that they are internal organizational choices of the elected prosecutors who create them. The prosecutor may choose to create a unit with the resources and authority to conduct rigorous reexaminations of questionable convictions, or they may be satisfied with something more passive.

A few CIUs have been highly active; several show no real signs of life. Some are just getting underway; the rest have been involved in one exoneration, or a couple, over a period of years. Some CIUs are accessible and transparent; some are inaccessible and opaque. The structure and the operating procedures of the units, to the extent that we have been able to determine, are extremely variable. The short history of CIUs reflects the extraordinary and largely unreviewable power vested in elected prosecutors. CIUs have proliferated rapidly because local prosecutors have the authority to create such units as a matter of administrative discretion. They are as variable as the circumstances and preferences of the prosecutors who founded them, and change over time as priorities and administrations change. Their future will turn on the policies of the prosecutors who lead those offices in the years to come, and on the political contexts in which they operate.⁶²³

621 "Longmont's New District Attorney Announces Formation of Conviction Integrity Unit," *Longmont Observer*, March 29, 2018: <https://longmontobserver.org/boulder-county/longmonts-new-district-attorney-announces-formation-of-conviction-integrity-unit/>.

622 John Holloway, "Conviction Review Units: A National Perspective," *Quattrone Center for the Fair Administration of Justice*, University of Pennsylvania Law School: April 2016.

623 "Exonerations in 2017," *supra*.

MacFarlane comments on the applicability of the new U.S. model to Canada;

In the fullness of time, prosecution services in Canada may wish to consider the establishment of permanent conviction review mechanisms within each Ministry to ensure the continued integrity of guilty verdicts in contentious cases. Indeed, “Conviction Integrity Units” embedded within prosecution offices have recently been established in several jurisdictions in the US. In the meantime, what Canadians can expect now is a prosecution service that is willing, on an ongoing basis, to root around and do a principled and credible double check on cases where there is a reasonable basis to believe that miscarriages of justice may have occurred, and Crown action could uncover the truth of what happened. After all, truth-seeking does form a critical objective of the criminal justice system, and everyone in the legal profession has a special duty to ensure that the public has and continues to have confidence in our legal system.⁶²⁴

In Canada, much of the innocence work – researching and investigating cases and filing applications to the federal Minister of Justice – is done by largely volunteer or university-based innocence projects. Though these projects do valiant work, they are all financially challenged and the university-based programs are hamstrung by turnover among students and the length of time the cases take.

Of course, as discussed earlier, the Canadian context is vastly different. Our prosecutors are not elected and indeed enjoy a great deal of independence from elected officials. Nonetheless, the Subcommittee believes the CIU model, with appropriate alterations to meet the Canadian reality, may be worth examining for Canada. The Subcommittee believes Canadian prosecution services should study the CIU’s to determine whether they are suitable for Canada, not as a replacement for existing processes, but rather as a supplement to them. There is no reason innocence projects alone should bear the burden of this important work.

Need for continued vigilance

Finally, as this *Report* has illustrated, and as its title suggests, continued vigilance is crucial on the part of all criminal justice participants, but especially police and prosecutors, to reduce the risks of wrongful convictions in this country.

624 Bruce MacFarlane, “Wrongful Convictions: Is it Proper For the Crown to Root Around, Looking For Miscarriages of Justice?” *Manitoba Law Journal* 36, No. 1, 2012.

For this reason, this Subcommittee cannot lapse into complacency; its work remains ever important. Therefore, this Subcommittee will continue to monitor the cases and the research in this area to provide ongoing information to police and prosecutors, and to the public at large, and continue to harness the passion and knowledge of its members to advance this important criminal justice imperative.

To do less would be a disservice to those individuals at risk of being wrongfully convicted of a crime of which they are factually innocent. Equally important, to do less would be a disservice to Canadian society for when the wrongfully convicted person languishes in prison, the true perpetrator may be free, committing further crimes.

SUMMARY OF RECOMMENDATIONS

Chapter 2 – Understanding Tunnel Vision

1. Information on vicarious trauma should be provided to Crown prosecutors. Crowns should understand the symptoms of vicarious trauma, and how it affects the decision making-process. Those affected should receive appropriate support.
2. Where resources permit, prosecution services should consider formalizing the “devil’s advocate” position in Crown offices and on Crown Prosecutions Teams.
3. Case assessment tools or guidelines aimed at preventing wrongful convictions should be developed by the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, for consideration by prosecution services across the country.
4. Tunnel vision guidelines and policies should be developed by police and prosecution services which don’t currently have them.
5. Police services should be encouraged to continue to support delivering MCM training to those involved with major case investigations, as such training specifically addresses causes of failed investigations and gives strategies to mitigate them.
6. Other jurisdictions should be encouraged to consider British Columbia’s Major Case Management Team Commander accreditation process as a method to ensure only highly qualified personnel are assigned to lead major investigations.

Chapter 3 – Eyewitness ID and Testimony

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:
 - a) If possible, an officer who is independent of the investigation should be in charge of photo-pack presentation. This officer should not know who the suspect is, avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness’s degree of confidence afterward.
 - b) The witness should be advised that the actual perpetrator may not be in the photo-pack, and therefore the witness should not feel that they must make an identification.

- c) The suspect should not stand out in the photo-pack as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.
 - d) All of the witness's comments and statements made during photo-pack viewing should be recorded verbatim, by video and audio recording, or if that is not feasible, in writing. When an eyewitness makes an identification, a statement should be obtained from that eyewitness indicating how confident they are that the person identified is the perpetrator.
 - e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness as soon as possible upon completion of the photo-pack presentation to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.
 - f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.
 - g) A photo-pack should be provided sequentially, and not as a package, thus preventing 'relative judgments'.
2. For prosecutors, the following practical suggestions should be considered:
- a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
 - b) Allow the witness a reasonable opportunity to review all previously provided statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.
 - c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.

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

Chapter 4 – False Confessions

1. All interviews of suspects and key witnesses in investigations involving offences of significant personal violence (e.g., murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be audio and video recorded. Audio and video recording should not be confined to a final statement made by the suspect, but should include all contacts with the suspect through the course of the investigation.

2. Investigation standards should be continuously reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview. This should include an understanding of the case law and academic literature related to the appropriate balance between “persuasion” and “accusatory” interview strategies.
3. Police investigators and Crown prosecutors should receive ongoing training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.
4. Investigation standards should be reviewed to ensure there is a consideration of the inherent risk of false confessions in Covert Operations. These risks are not limited to a “Mr. Big” operation but also may be a factor in any type of undercover scenario where the suspect is unaware that he/she is speaking with the police or a police agent.

Recommendations Specific to Mr. Big Undercover Operations

5. Police should ensure there is no release of holdback evidence, such as the specific details of the offence, for example, the murder weapon used and the nature of the deceased’s injuries, either to the public before the operation is mounted or to the target during its course. This care should be taken in recognition of the fact that the most significant marker of reliability of a confession to Mr. Big is the target’s knowledge of the details held back by investigators. In addition, the undercover operator(s) working closely with the target should also not be provided with any information concerning the holdback evidence.
6. Police should take great care to ensure that a target’s vulnerabilities, such as his or her young age, mental health, social isolation or dire financial straits, are not exploited or taken advantage of during the operation.
7. Police should take care in the use of scenarios portraying violent or threatening conduct seemingly perpetrated by undercover officers. Their convincing portrayals that they are members of a criminal organization not ill-disposed to violence should not be created without first giving thought as to whom the violence or threats of violence are being directed, that individual’s connection to the criminal organization, and the closeness of his or her relationship to the target.

8. Prosecution services should consider offering in house training on the lessons to be learned from *Hart* and its new analytical framework, given the serious nature of the charges for which the technique is most often employed.
9. Crown counsel conducting a trial involving a Mr. Big undercover operation should have a clear understanding of the Supreme Court's ruling in *Hart* and the limitations imposed on such operations. Counsel should obtain from investigators a written breakdown of all the scenarios employed in the course of the operation, from pre-operation background checks to initial contact through to the culminating confession to Mr. Big and any post-confession re-enactments or attendances at the crime scene with the target. Crown should determine how many of these scenarios were recorded and obtain transcripts, if available. Crown should either listen to the recordings or review the transcripts, or both. Special attention should be paid to scenarios involving violence or threats of violence. If these are viewed as potentially problematic to the prosecution, either due to their prejudicial effect or due to abuse of process concerns, discussions with the officer(s) who designed the operation should occur so that timely decisions can be made about adducing contextual evidence to address the specific operational decisions made to include them. In making decisions about leading this type of contextual evidence, Crown should bear in mind the permissible bounds of such evidence.
10. Crown counsel should consult with prosecutors in the various prosecution services across Canada who have conducted trials in which Mr. Big undercover evidence was led or appeals in which admissibility and abuse of process rulings are in issue, to share experiences and to benefit from lessons learned.

Chapter 6 – Forensic Evidence and Expert Testimony

The recommendations of the *2005* and *2011 Reports* continue to be relevant and are endorsed by the Subcommittee. Education, in particular, is a continuing and continual priority. In addition, the following recommendations are made:

1. The federal, provincial and territorial governments should support the creation of a permanent national multidisciplinary group to study and make recommendations concerning aspects of forensic sciences in Canada.
2. The federal, provincial and territorial governments should consider amendments to the *Criminal Code* and other provincial legislation, including rules of criminal procedure, to codify, clarify and enhance the common law rules concerning the admissibility of expert opinion evidence.

3. All levels of court should consider amendments to Practice Directions concerning the requirements for the admissibility of expert opinion evidence.

Chapter 7 – Education

1. A national course with modules for police and Crown that can be delivered on-line should be developed and updated periodically;
2. An on-line course should be complemented by the development of a curriculum intended to be delivered in person once the on-line course had been completed;
3. Once the on-line and in-person curriculum is developed, a national “train the trainers” course should be developed so that all police and prosecution services can ensure that appropriate staff are trained in delivering the curriculum; and
4. All police agencies and police training institutions should be encouraged to review current investigative training programs (e.g., major case management and team commander training, forensic interviewing courses, general investigator courses) to ensure that the causes and solutions for wrongful convictions are integrated in this training given that such training is entirely consistent with promoting investigative excellence.

Chapter 8 – False Guilty Pleas

1. The federal government and other appropriate federal and provincial entities in Canada should undertake research regarding:
 1. the circumstances that lead to false guilty pleas in Canada;
 2. the extent of the phenomenon;
 3. the extent to which certain groups may be particularly vulnerable to false guilty pleas, and, if so, why; and
 4. what changes, if any, should be made to reduce the risk of false guilty pleas in Canada.

In particular, this research should examine:

- the factors that have been identified as playing a role in false guilty pleas, to determine the significance of each factor, such as the impact of being denied bail or being offered more lenient sentences in exchange for guilty pleas;

- the impact of the proposed amendment to s. 606 of the *Criminal Code* in Bill C-75, if it becomes law, to assess whether it addresses concerns about this section that have been raised in the academic literature;
 - the longstanding principle that an early guilty plea is a mitigating factor at sentencing and its relationship to false guilty pleas;
 - the experience of other countries, such as Britain and various United States jurisdictions, which have either limited the size of the sentence discount that is offered to an accused in exchange for an early guilty plea, or banned or curtailed plea bargaining, to assess the impact of such approaches on reducing the risk of false guilty pleas;
 - whether other *Criminal Code* amendments are required to better guard against false guilty pleas;
 - whether an accused person in Canada should have additional plea options; and
 - whether the mandatory use of a model uniform plea comprehension form in Canada would assist in reducing the risk of false guilty pleas.
2. Prosecution services in Canada should review Crown policies regarding resolution discussions and other relevant policies, such as the Decision to Prosecute and bail policies, to ensure they contain adequate safeguards, guidelines and clear direction to prosecutors, to assist in guarding against false guilty pleas.

In particular:

- (i) All prosecution services have policies that indicate that a criminal charge cannot proceed unless there is a reasonable prospect of conviction, or words to that effect. All Decision to Prosecute policies of Crown prosecution services should be reviewed to ensure they clearly state that the Crown can proceed with a prosecution only if the decision to prosecute test has been met, and that plea resolution discussions cannot proceed where this standard is not met;
- (ii) During resolution discussions, Crown prosecutors should be alive to the risks that:
 - a) an early guilty plea offer may create an incentive for a factually innocent person to plead guilty, and
 - b) a factually innocent person who has been detained, particularly for a minor offence, may be motivated to plead guilty.

3. The Federation of Law Societies of Canada, as well as provincial and territorial law societies, should examine their rules of professional conduct to ensure they provide adequate and clear direction to defence counsel and Crown counsel, to the extent appropriate, to better guard against factually innocent persons pleading guilty.
4. The National Judicial Institute and other organizations that provide educational programs and resources for judges in Canada, should be encouraged to continue to provide content that includes the state of the research concerning the phenomenon of false guilty pleas in Canada, and the role of judges in the prevention of false guilty pleas.

Chapter 9 – Crown Advocacy

1. Training

Ensuring that prosecutors participate in training designed to reinforce ethical advocacy is an important obligation of a modern prosecutorial agency. Such training should not be limited to junior counsel; in fact, many of the most notable examples of prosecutorial misconduct were committed by senior counsel. Both the Lamer and Kaufman reports recommended that training on Crown advocacy be implemented to help protect against wrongful convictions. It is also common for law societies to require a certain number of hours of professional development every year, and some require a professionalism component.

2. Mentoring

Mentoring may be seen as a particular type of training, and is a venerable tradition in the legal profession. Ensuring that young lawyers, in particular, partner with a senior practitioner may be particularly important where a prosecutor without any significant background in criminal law starts employment.

3. Policy Manuals

All prosecution agencies in Canada should review their policies on a wide variety of matters dealing with the proper exercise of prosecutorial discretion. As members of law societies, prosecutors are bound to follow the ethical code of their law society, but policy manuals are capable of reinforcing the ethical messages of these codes. Policies that give guidance on jury addresses, for example, can help avoid some of the most blatant forms of prosecutorial misconduct.

Chapter 10 – At-Risk Populations

General Recommendations

1. When an accused is giving a recorded statement to police regarding an alleged offence, the entire interview should be recorded, from beginning to end, not just the portion where the accused confesses to the crime;
2. Police forces should review their policies to determine if it is ever appropriate for the police to lie during interrogations to particularly vulnerable persons about the strength of the evidence against them, for example, by informing the accused that the police discovered their fingerprints or DNA evidence at the crime scene, when no such evidence exists;
3. The federal government should consider conducting research regarding whether certain segments of the population are at increased risk of wrongful convictions, and if so, why, and what can be done to reduce the risks of wrongful convictions within these at-risk groups;
4. The federal government should consider conducting research into the current practice of offering significant sentence reductions in return for guilty pleas, given that an unintended consequence has been the wrongful convictions of factually innocent persons, including populations that have been identified as being at particular risk of entering false guilty pleas. Not only is this an unacceptable outcome, it also creates barriers in the future to seeking legal redress, given the prejudicial impact of a guilty plea;
5. All Prosecution Services should review their policies regarding resolution discussions to ensure the policies require that:
 - (i) the offender is admitting all elements of the offence to which a plea is being entered;
 - (ii) the facts and evidence against the accused support the offence for which a plea is being entered;
 - (iii) the Crown is satisfied there is a reasonable prospect of conviction;
 - (iv) the prosecution service policy states clearly that the Crown cannot accept a guilty plea from an accused where the Crown has knowledge or concerns that the accused is factually innocent, and
 - (v) the Crown is particularly sensitive to guilty pleas being entered by accused persons from identified groups who are recognized as being at particular risk of wrongful convictions;

6. Greater training should be provided for police, Crowns and judges generally regarding why certain populations may be at particular risk of wrongful convictions; and
7. In particular, police officers across Canada should receive special training regarding best practices in relation to the interrogation of accused persons from at-risk populations.

Recommendations Particular to Women

1. A review should be undertaken of the admissibility and proper use of demeanor evidence, specifically in cases where the accused are women and/or members of other vulnerable, at-risk groups.
2. All prosecution services should review their relevant policies to ensure they alert prosecutors to the risk of falling victim to gender stereotypes, as well as other forms of discrimination, during the course of their prosecutions, from the initial file assessment to the resolution of the case.
3. A standard jury instruction should be developed to caution juries about placing undue weight on the demeanor presentation of a witness, particularly in cases which involve female and other at-risk accused, whose emotional reaction may have been noted by the court as “unusual” or “unexpected”, and not in compliance with typical gender and cultural stereotypes.

Recommendations Particular to First Nations, Inuit and Metis People

1. Police agencies should consider adopting policy that would provide for the presence of a support person when interviewing vulnerable Indigenous persons;
2. All police agencies in Canada should review their interviewing techniques to ensure they are consistent with current best practices, which include gathering information in a non-confrontational manner, particularly for vulnerable persons, including Indigenous persons; and
3. More effort should be made to develop increased capacity for interpreters who speak Indigenous languages and dialects to assist in police investigations and in trials.
4. More resources should be allocated to develop increased capacity for interpreters who speak languages and dialects spoken by Indigenous persons to assist them and their defence counsel immediately after arrest, at bail hearings, in deciding on whether to plead guilty or go to trial, and any other discussions where understanding both language and concepts is important;

5. There should be better training available for defence lawyers who represent Indigenous persons to address cross-cultural issues that may create barriers to effective communication;
6. In recognition of the disproportionate impact of detention orders against Indigenous persons and to reduce the potential for a factually innocent Indigenous person to plead guilty to avoid time in detention, *Gladue* factors, as is contemplated in s. 515(10) of the *Criminal Code*, may be a relevant consideration at the bail stage of a prosecution.
7. When Indigenous persons are released on bail, care should be taken to avoid imposing conditions where there is an insufficient nexus to public safety and which are likely to be breached, creating problems in the future for Indigenous persons qualifying for bail;
8. The research that began in early 2017 by the the Department of Justice Canada's Research and Statistics Division (RSD) on the issue of guilty pleas among Indigenous people should be strongly supported and its eventual recommendations carefully considered and appropriately resourced.
9. Consideration should be given to amending s. 606 of the *Criminal Code* to ensure that Indigenous persons (and other vulnerable individuals) understand and consider all reasonably foreseeable consequences of a guilty plea.

Recommendations Particular to Young Persons

1. The federal government should consider conducting research regarding the rate at which young persons in Canada waive their right to consult counsel under s 146 of the *Youth Criminal Justice Act*;
2. The federal government should consider conducting research regarding the extent to which young persons, particularly those between the ages of 12 and 14, who are under arrest or detention or otherwise suspects, understand the meaning and implications of waiving their rights to counsel and their right to silence before giving a statement to police.

