Commission of Inquiry into certain aspects of the trial and conviction of James Driskell

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Systemic Submissions made on behalf of James Driskell and the Association in Defence of the Wrongly Convicted

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James Lockyer and Alan Libman
on behalf of James Driskell

Jerome Kennedy, Q.C. and Paul Copeland on behalf of the Association in Defence of the Wrongly Convicted (AIDWYC)

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Editorial - New trial warranted
Winnipeg Free Press
Monday, March 17, 2003

MANITOBA Justice Minister Gord Mackintosh should become actively involved in ensuring that James Patrick Driskell was not a victim of a miscarriage of justice when he was convicted of murder 12 years ago. Mr. Mackintosh should begin by ordering Winnipeg Police Chief Jack Ewatski to release a 175-page review of the prosecution that Mr. Ewatski himself conducted in 1993. Mr. Mackintosh should also make common cause with Driskell 's lawyers in petitioning the federal justice minister to review the conviction for the purpose of ordering a new trial.

Driskell was convicted in 1991 of the shooting death of Perry Dean Harder, a thief with whom he was involved in a chop shop operation. Driskell and Harder were jointly charged with possession of stolen property. Five days before the preliminary hearing into those charges was to begin, Harder disappeared. His badly decomposed body was discovered nine months later in a shallow grave. He had been shot three times in the chest. Driskell was subsequently charged and convicted of the killing. It was argued that Driskell killed Harder to prevent Harder from giving testimony that would have been damaging to Driskell .

As a motive, killing Harder to shut him up was always weak. Evidence showed Harder was prepared to accept a plea bargain that would have prevented him from testifying against Driskell , and Driskell knew it. Nevertheless, Driskell was convicted largely on the testimony of two informants, both of whom gained from their actions. One of the informants was paid a lump sum of $20,000 at the conclusion of the trial, in addition to myriad other payments for the necessities of life while he was under a witness protection program. The same informant had admitted under oath to setting fire to a house in Saskatchewan, the investigation of which was never concluded and no charges were laid despite the admission to arson. The jury was not aware of the advantages the informants obtained in return for their testimony.

Another key piece of evidence at the time has since been discredited. Three strands of hair found in a van belonging to Driskell, a van that was purported to have been used to remove Harder's body to the place of the shallow grave, were said to have been identical to Harder's hair. DNA tests of the hair, conducted in Britain last year at a cost to the province of $20,000, have established that the strands could not have been Harder's hair.

That the jurors, who deliberated 28 hours before reaching a verdict, were not aware that witnesses at the trial might have been compromised by deals they were making with police and the Crown, and that hair evidence (the only physical evidence that even remotely linked Driskell to Harder's corpse) was false, strongly suggest Driskell 's initial trial was a miscarriage of justice.

But there is more. The review undertaken by Mr. Ewatski in 1993 was ordered after the media sensationally reported that the RCMP had been informed of allegations that Driskell was innocent and that it was a member of the Winnipeg Police Department who had killed Harder. In addition, Mr. Ewatski's review uncovered evidence to the effect that one of the informants had

tried to renounce his testimony after the trial, claiming that he had been coerced by police into giving false testimony.

Mr. Ewatski refuses to release his 10-year-old report. That he both wrote the report as an investigator and that he now refuses to release it as chief of police appears to be a clear conflict of interest for Mr. Ewatski. Mr. Macintosh should dispel any hint of conflict by ordering Mr. Ewatski to release the report so that lawyers representing Driskell can see whether it contains information helpful to an appeal for a new trial.

Mr. Macintosh should also order the release of the report in order to dispel any suspicion that the original and subsequent investigations of Harder's slaying were in no way tainted. Long memories and the Curry report on the wrongful prosecution of Thomas Sophonow both remind us that the era in which Driskell was convicted was not an era in which police methods could be said to have been the best. Tunnel vision, which occurs when investigators become convinced of a suspect's guilt and focus on only those facts that support the prejudice, and the use of questionable testimony from informants, were common at the time. It must also be remembered that department was recovering from the conviction of two officers in the killing of a snitch and had been under fire for questionable sting operations aimed at catching thieves. That time too was the era of the speedy exoneration of the police officer who shot J.J. Harper.

But mostly Mr. Macintosh should accept that it is possible that Driskell is a victim of a miscarriage of justice and appeal to his federal counterpart to review the case with an eye to a new trial. He has said that he believes a new trial is not necessary, that he is convinced a jury would come to the conclusion that Driskell is guilty without misleading evidence to the effect that Harder's hair was found in Driskell 's van. But he cannot know that, and if he cannot know it, how then can he conclude it?

As Alan Libman, one of Driskell 's lawyers, said yesterday, "I am not convinced that he is factually innocent, but I believe without doubt he is a victim of a miscarriage of justice."

Editorial - Unsettled lies the Crown
Winnipeg Free Press
Monday, December 1, 2003

MANITOBA Justice Minister Gord Mackintosh has been saying for the better part of a year that he finds the James Driskell case "unsettling." And no doubt he does find it unsettling that so many sins of omission and commission contributed to Mr. Driskell 's conviction for murder in 1991.What Mr. Mackintosh should also find unsettling, and what Manitobans most certainly should find unsettling, is that Mr. Mackintosh has been consistently on the wrong side of the issues in this case at most every turn.

How wrong he has been was made clear on Friday when Court of Queen's Bench Justice John Scurfield released Mr. Driskell on bail while a review of his conviction is conducted. Mr. Justice Scurfield required less than 24 hours to see in the Driskell file what Mr. Mackintosh has been unable to see for more than a year -- that Mr. Driskell is the victim of a miscarriage of justice.

Before looking at Mr. Justice Scurfield's conclusions, however, it first is necessary to recall that Mr. Driskell was convicted of killing Perry Dean Harder, in large measure on the testimony of two witnesses who together were paid at least $80,000, that one of the witnesses, Ray Zanidean, was given immunity from an arson to testify, and that Mr. Zanidean attempted to recant his testimony after the trial during which he perjured himself, a fact that had been made clear to Manitoba authorities by their counterparts in Saskatchewan. Recall that evidence at the trial indicated that hairs found in Mr. Driskell 's van were said by experts to have been Harder's but that subsequent DNA tests found that they were not, that instead the three hairs came from three different people, none of them Harder. Recall that none of this damaging information was given to the defence, not during the trial, nor prior to a later appeal, even though the Supreme Court had ruled that such information must be revealed to the defence, which most certainly would have shared it with the jury.

Based on this information and more, Mr. Justice Scurfield said:

> "I find that there is a high probability that the new evidence would have been admissible at the trial if it had been available and that it could have affected the result. Thus, I have very serious concerns as to the accuracy of the conviction. I point out that my focus must be on whether the new evidence could reasonably have affected the jurors' deliberations. In that regard, the DNA evidence alone is sufficient to lead me to this conclusion..It proves that a material piece of evidence upon which the jury may have relied is wrong.
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> "Further, I do not accept the Crown's argument that the failure to disclose evidence as to payments made to two of the key witnesses, and in the case of (Zanidean), his belief that he had an immunity agreement, would not have changed the outcome of the trial. In order to convict (Driskell), the jury must have placed significant weight on the evidence of (Zanidean) and (John Gumieny). It is reasonable to conclude that the evidence of payment to the witnesses together with (Zanidean's) belief that he was obtaining immunity in respect of a serious charge could have constituted the straw that broke the jury's confidence in these witnesses.
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> "I find that the non-disclosure in this case could have affected the outcome of (Driskell 's) trial.
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> "Finally, I am satisfied that if all of the new evidence had been presented to the Court of Appeal following the original trial, the conviction would probably have been set aside and he would probably have been granted a new trial."

It seems naive to send the invitation to more than 100 defence lawyers for a variety of reasons. First is that in many recent cases it was the Crown that contributed to miscarriages by failing to disclose evidence to defence lawyers, and then it was the Crown that dismissed the evidence as immaterial to their appeals for reviews. Now, the department of justice expects defence lawyers to believe that the leopard has changed its spots in the few short months that have elapsed since its last embarrassment -- the ordering of a new trial for James Driskell . It's naive, too, to think that defence lawyers trolling through old files will find evidence that might have been withheld. Surely, it is the police and Crown that would better know what might be missing from those files. And finally it is naive to invite hundreds of lawyers to identify miscarriages of justice when there are not available funds to challenge the mistakes should they be identified.

No doubt efforts of the department since the Driskell debacle -- the review of hair evidence in high-profile prosecutions and now the invitations -- are well intentioned. But equally, they could be seen as initiatives to polish the image of the Doer administration, which was shown to be unjust in its dismissal of claims of wrongful conviction.

In any event, it is wrong-headed to think that this is an issue that should be tackled locally.

It is wrong-headed to propose that officials responsible for prosecuting persons who claim to be victims of miscarriages of justice should be the same officials charged with reviewing their own work. What is needed is an independent body, established at the federal level and charged with reviewing all claims of wrongful conviction. Such a body -- the Criminal Cases Review Commission -- was established in Britain in 1997. It has since reviewed thousands of claims of wrongful conviction, leading to more than 130 exonerations. The commission has a broad mandate to review any claim, not simply capital cases, but everything from assaults to traffic violations.

Federal Justice Minister Irwin Cotler has said that the time might be right for Canada to follow Britain's lead. Manitoba should invite him to do so.

Editorial - Justice obstructed
Winnipeg Free Press
Friday, March 4, 2005

JAMES Driskell is a free man, having served 12 years of a life sentence for the 1990 murder of Perry Dean Harder. Who killed Mr. Harder is likely to remain a mystery and that, loosely speaking, is a crime. Mr. Driskell sat in prison for more than a decade when prosecutors knew the evidence against him was tainted. In fact, a judge has determined now the actions, or inactions, of those involved in that prosecution bordered upon obstruction of justice. Attorney General Gord Mackintosh has called an inquiry into the case, to review the Driskell affair. He must also launch a review by an outside agency into whether police or prosecutors quite literally committed a crime.

To call the Driskell affair a failure of justice or a shame is a gross understatement. The key witnesses against Mr. Driskell had been given deals of immunity and compensation for their testimony and one, Ray Zanidean, did not tell the truth when asked about this on the stand at trial in 1991.Police had offered Mr. Zanidean immunity from an arson charge -- unbeknownst to officials in Saskatchewan where the charge was laid. Senior Manitoba prosecutions officials were aware of this, at least shortly after trial and before Mr. Driskell 's appeal in 1992. Inquiries from defence lawyers about the deal and the lack of disclosure by prosecutors gave police and Justice officials opportunities to set things right. There have been numerous reviews of the evidence and into allegations of conspiracy among Justice officials regarding disclosure, but all of these resulted in findings that there was no fault, that the prosecution was clean and by the book.

Subsequent DNA tests on hair samples that were used to convict Mr. Driskell indicated they were not his. Finally, a federal review in 2003 indicated reason to believe a miscarriage of justice "likely occurred", and only then did Manitoba begin to look seriously into the lack of disclosure. As a result of an official review, federal Justice minister Irwin Cotler yesterday announced he was directing a new trial be held. Yesterday, Mr..Mackintosh also released a review by Judge John Enns, who concluded that officials did not disclose to defence lawyers Mr. Zanidean's possible perjury at the 1991 trial, and this amounted to "gross negligence bordering on the criminal offence of obstruction of justice."

Justice officials yesterday conceded what many have known or suspected for years. Put to the test, the key witnesses would not hold up, would likely not be believed. Mr. Zanidean may have committed perjury in describing at trial the deal for his testimony and why he burned down his sister's house, senior Crown Bob Morrison said yesterday. The second witness has continued a life of serious crime.

Mr. Morrison said possible perjury by Mr. Zanidean will be investigated, as, apparently, will be the arson incident. A criminal investigation into the conduct of police or prosecutors who did not disclose critical truths about the deal with and actions of the witness at trial should be distinct from the wider inquiry that is needed into the miscarriage of justice against Mr..Driskell. Manitobans need to know an independent investigator will be asked to look into Judge Enns' concerns that someone might have thwarted justice intentionally.

Editorial - Why justice miscarried
Winnipeg Free Press
Friday, December 16, 2005

JUSTICE Minister Gord Mackintosh finally has appointed a commissioner for a public inquiry into the wrongful conviction of James Driskell , a man who spent 12 years of a life sentence in jail for first-degree murder. Patrick LeSage, former chief justice of Ontario's Superior Court, will have full powers under the Evidence Act and can recommend criminal or professional review of the actions of Crown attorneys, Justice officials and police involved in the investigation and

prosecution of Mr. Driskell . Mr. LeSage is expected to begin his review in January. This delays, likely by another year, a necessary criminal investigation of those who failed -- clearly, grossly and perhaps deliberately -- in their professional duties.

That failure is not theoretical. It has been widely recognized that evidence a witness gave under oath to convict Mr. Driskell in 1991 was offered in exchange for money and immunity from an arson charge. Asked about any such deals by the defence during the trial, Ray Zanidean insisted there had been no arrangement. Shortly after Mr. Driskell was convicted of first-degree murder, Manitoba Justice officials were informed by Saskatchewan police, who had charged Mr. Zanidean with burning down his relative's house, that Winnipeg police offered him immunity without their authorization. This was months before his appeal in December 1992. No one before, during or after the trials bothered to disclose this to Mr. Driskell 's lawyer, although they were compelled by law to do so. Mr. Driskell was released on bail in 2003, pending further review of the evidence against him and earlier this year, federal Justice Minister Irwin Cotler overturned his conviction. The lack of disclosure formed the backbone of the decision and caused former Manitoba judge John Enns, who privately reviewed the facts of the case for Mr. Mackintosh, to conclude senior Crown officials demonstrated "gross negligence bordering on the criminal offence of obstruction of justice..."

Judge Enns was hampered in his review of the sordid affair that enmeshed a senior Crown attorney, who handled the prosecution, the department's director of prosecutions (who has since died) and a former assistant deputy minister. He found there were documents missing and so he could not say whether there was criminal wrongdoing. He did not have the power under the Evidence Act to subpoena evidence. It was clear enough to the judge, however, that what was done (or not done) was close to criminal. That should have spurred Mr. Mackintosh immediately to call in an independent police force to investigate. Now Mr. Driskell and Manitobans will have to wait some more; Mr. LeSage's orders are to report back to Mr. Mackintosh by December 2006.

Despite the evident miscarriage of justice, Manitoba officials have not concluded Mr. Driskell is innocent of murdering Perry Dean Harder. Mr.LeSage may not be able to draw that conclusion either. But a careful review of the evidence and, where evidence is missing, an examination of why documents cannot be found, will help Manitobans piece more of this story together. The judge can then, evidence amassed, turn it all over to the relevant professional bodies or police authorities.

Mr. Harder's murder is unlikely ever to be solved. Mr. Driskell may have to pursue the wrongdoing in civil court. There can be little justice in any of this. It rests with Mr. LeSage to explain why that is, and what can be done to prevent it from happening again.

EDITORIAL - A needed inquiry
Winnipeg Free Press
Tuesday, April 4, 2006

MANITOBANS spend more than $450 million every year on cops, courts and law-making because civil society requires law, order and a justice system that is trustworthy. Rarely, however, do citizens get a good look inside the administration of justice. Such a peek should come, beginning today, with the launch of the public inquiry into the wrongful murder conviction and 12-year imprisonment of James Driskell . On the stand will be both police and prosecutors who helped to undermine justice and who acted in ways one judge found bordered on criminal misconduct.

Mr. Driskell was declared a free man last year. Much evidence was unearthed that he had not had a fair trial, and then the Manitoba Justice department decided against retrying him. A senior Crown attorney explained there was no sense bringing him back to court for the 1990 murder of Perry Dean Harder because the two witnesses upon whom the case against Mr. Driskell rested were not credible. Both men, criminals themselves, had received compensation for their testimony at trial and one was shielded from an arson charge for his co-operation. The latter man, Ray Zanidean, is believed to have lied on the stand when asked if he was testifying in exchange for favours.

The actions of Mr. Zanidean and John Gumieny are not surprising -- they acted as criminals do, without regard for the law or the people they hurt..Much more troublesome are the actions of police and prosecutors. Winnipeg police thwarted a charge of arson against Mr. Zanidean for the torching of his sister's house in Saskatchewan. Police and Justice officials then kept to themselves the warnings from Saskatchewan police that this fact affected the quality of the prosecution of Mr. Driskell . Police Chief Jack Ewatski refused to release a review he conducted in 1993 of the investigation despite repeated requests he make public his findings. He was ordered in2003 to make it public by a judge who found it contained damning details that pointed to a miscarriage of justice.

Many of the actors involved in this collective wrongdoing still work in law and prosecutions. It is time Manitobans heard their explanations, first hand, under oath. There is little justice now for Perry Dean Harder, but there can be some relief for Mr. Driskell . Ultimately, there must be some accountability for a man's unsolved murder, a wrongful conviction due to truly lousy evidence, and the gross misconduct that followed. And, maybe, those responsible can be removed from the public payroll.

Editorial - Good start on Driskell
Winnipeg Free Press
Tuesday, July 18, 2006

It was good to hear, at the outset yesterday of the inquiry into the wrongful conviction of James Driskell that some police authorities had abiding concerns about the investigation and prosecution that led to Mr.Driskell 's incarceration for murder in 1991. Granted, the testimony came from a former officer with the Saskatchewan RCMP, not local police. But, finally, Winnipeggers heard someone in law enforcement publicly discussing a critical flaw in the case built against Mr. Driskell .

Until now, anyone intimately involved in the investigation and prosecution of Mr. Driskell has only defended the actions by police and prosecutors. Their defence, attacked by numerous reviews and media reports, unravelled a bit more at the inquiry 's first public day of hearings. Mandated to poke around the conduct of individual police and prosecutors, commissioner Patrick LeSage heard that former RCMP constable Ross Burton specifically singled out in a written report, submitted to the inquiry , a Winnipeg investigator's actions. He called police officer Tom Anderson's conduct dishonest and deceitful. On the stand, Mr. Burton further criticized the Winnipeg Police Service's handling of the investigation.

Shortly after Mr. Driskell was convicted of murdering Perry Dean Harder, Saskatchewan Justice officials gave their Manitoba counterparts notice that Winnipeg police wrongly offered a chief witness in the matter, Ray Zanidean, immunity from an arson prosecution in Saskatchewan. As well, they said Mr.Zanidean appeared to have committed perjury on the stand, and that this information had to be given to Mr. Driskell 's lawyers. It wasn't.Mr. Driskell sat in a prison for 12 years of a life sentence while Manitoba police and justice officials dismissed all complaints about the weakness of the evidence against him until it could be ignored no longer. In fact, early reviews by Winnipeg police and Manitoba Justice found none of their own acted improperly.

More recently, as indications of a wrongful prosecution mounted, a former Manitoba judge concluded there was evidence of professional misconduct, bordering on criminal obstruction of justice.

This affair has entangled a number of highly placed justice and police officials, including a former assistant deputy attorney general, a director of prosecutions and Jack Ewatski, now chief of police. Their actions will be examined, too. Indeed, more ought to be heard about what Tom Anderson did or didn't do -- the inquiry yesterday showed there is so much detail still to be heard. Without this inquiry , Mr. Driskell would have been set free, but there would have been no accountability either for his conviction or for Mr. Harder's killing. Mr. LeSage may get somewhere near the truer story as to how and why people in positions of authority and public trust failed profoundly in their duties. Yesterday was a good start.

Editorial - Ewatski and the law
Winnipeg Free Press
Saturday, August 12, 2006

POLICE Chief Jack Ewatski told an inquiry this week that it was not his job, nor that of the Winnipeg Police Service, to ensure that a man on trial for-- and then convicted of -- murder was told that a chief prosecution witness had ulterior motives, and had committed perjury when testifying. Legally, Mr. Ewatski is right: The obligation to have fully disclosed such information to James Driskell rested with the Crown's office. But it is a feeble justification for ignoring a miscarriage of justice.

Mr. Ewatski was an inspector in 1993 when he reviewed the police investigation of the murder of Perry Dean Harder. A number of questions had been raised in the media about the quality of the evidence at trial, specifically the motivations of witness Ray Zanidean. Mr. Ewatski's report concluded there was no reason to doubt the conviction, and that police handled the case correctly. Mr. Ewatski came to this conclusion even though the investigating officers refused to be interviewed by him and his partner during their review.

To date, the inquiry has shown there is much to be concerned about in the investigation, the conviction and the Winnipeg Police Service's conduct during and after trial. Chief witness Ray Zanidean told the investigators he and Mr. Driskell set his sister's Saskatchewan house on fire to collect on insurance money. Mr. Zanidean never faced an arson charge: The Saskatchewan RCMP say Winnipeg police wrongly granted him immunity; Winnipeg officers say that was done by Saskatchewan. Further, they say that they told Justice officials here about the immunity deal. The officers knew Mr. Zanidean lied on the stand when asked if he was compensated for his testimony. Mr. Ewatski knew this when he did his review three years after Mr. Driskell 's conviction. No one, including Manitoba Justice officials, told Mr. Driskell 's lawyers about any of this despite repeated inquiries. That, ultimately, led to Mr. Driskell 's freedom.

Mr. Ewatski refused to be drawn into a discussion with Mr. Driskell 's lawyer at the inquiry about whether he cared that a man had sat in prison for years following his review, as a result of a miscarriage of justice. It is a pressing question because citizens have reason to expect police officers not only to act within the law, but ethically and morally, too. Winnipeg police believed they had put the right guy behind bars, but that only counts if he got a fair trial. Mr. Driskell did not.

In contrast, Saskatchewan RCMP cared about the quality of the conviction. They wrote to Manitoba Justice just prior to Mr. Driskell 's appeal of his conviction, expressing concern about the lack of disclosure to the defence, and Mr. Zanidean's seeming perjury on the stand. No one in Winnipeg who shared in that information was sufficiently moved to see that a wrong was set right. Mr. Ewatski and other officers are content that they followed the letter of the law. Justice, though, demanded more.

EDITORIAL - A damning silence
Winnipeg Free Press
Wednesday, August 16, 2006

IT took George Dangerfield 15 years to concede, as he has now at the Driskell inquiry , that he acted wrongly in the trial that convicted James Driskell of the first degree murder of Perry Dean Harder. For 15 years, the now retired senior prosecutor harboured information that indicated Mr. Driskell did not get a fair trial, details he was bound by a judge's order and a professional duty to disclose to that man, his lawyer and the jurors..Mr. Dangerfield was professionally negligent.

Mr. Dangerfield was among a number of people -- police officers and prosecution officials -- who knew of, or were involved in a deal with Ray Zanidean, chief witness against Mr. Driskell , in exchange for his damning testimony. He is just the latest to appear before the inquiry into Mr. Driskell 's wrongful conviction and to be exposed for his role. At the 1991 trial, Mr. Zanidean told defence lawyer Greg Brodsky there was no deal, although he was negotiating a deal for money and immunity from prosecution on a Saskatchewan arson he committed. Mr. Dangerfield was an experienced prosecutor, described as a careful professional. He knew a possible perjury when he heard it, he heard the denial and said nothing of it. He has stayed quiet in the ensuing years, while numerous internal reviews and reports were written and the evidence of a wrongful conviction accumulated and became public. Two reports were written in 1993: One by an inspector, now Chief of Police Jack Ewatski, and the other a memo by Mr. Dangerfield. Both knew of the apparent perjury and how it weighed upon the conviction. Both said there was nothing to trouble the conviction. Mr. Dangerfield went further, assuring an assistant deputy minister that nothing was withheld from the defence: "Every care was taken to see that Driskell was given the fairest trial possible."

Inquiry commissioner Patrick LeSage's mandate includes considering whether the actions of prosecutors or police amounted to misconduct, if they ought to be referred to independent or professional review bodies. Police must ensure prosecutors have all the relevant material, and it is the duty of prosecutors to pass that on to the defence. Mr. Dangerfield's dereliction of duty might be reviewed, but he is retired. Outside of civil litigation, he may be beyond the reach of official sanction.

The inquiry will also consider if something systemic contributed to a miscarriage of justice. It is instructive, then, to recall that Mr..Dangerfield and other prosecutors involved in this case were instrumental in the murder conviction of Thomas Sophonow, also overturned due to unreliable witnesses and a lack of disclosure. In 1991, Crown attorneys were informed of their duty for full disclosure of evidence by the Supreme Court of Canada. Manitoba Justice believes that its Crown attorneys are well-educated, now, about their responsibilities and about the danger of tunnel vision, in which a belief the accused is guilty overtakes a critical examination of the evidence. This inquiry gives fresh reason for Justice Minister Gord Mackintosh to ensure prosecutors know that the duty to set right a wrong is a moral obligation and a professional responsibility that lives on after a trial ends.

EDITORIAL - A culture of cover-up
Winnipeg Free Press
Saturday, August 19, 2006

THE inquiry into the murder conviction of James Driskell has heard two senior actors in the Manitoba prosecutions branch apologize for failing in their duties, contributing to the miscarriage of justice that put Mr.Driskell in jail for 12 years. Mr. Driskell should not expect to be declared an innocent man -- his conviction was overturned but he was not exonerated -- because that is not the inquiry 's mandate. Yet he and Manitobans are beginning to see some accountability.

The evidence heard by Commissioner Patrick LeSage to date makes clear there were many people in positions of authority who knew the chief witness had lots to gain from testifying against Mr. Driskell , who was found guilty in 1991 of the murder of Perry Dean Harder. One of the senior officials -- former senior prosecutor George Dangerfield, knew enough about the facts behind a deal with the witness, Ray Zanidean, either during the trial or afterwards, that he had a responsibility to disclose that to the defence. He failed in his duties. Former assistant deputy attorney general Stu Whitley took responsibility because the events took place on his watch. Mr. Whitley was involved in a review of the evidence after the trial that talked about the deal with Zanidean. The acts of contrition now have a perfunctory veneer because both men said they did not directly negotiate a deal with Mr.Zanidean, and so someone else had a more direct responsibility.

But between the lines, lawyers at the inquiry were able to draw from Mr.Whitley an admission that a culture of denial pervaded the Crown's office, denying justice in the conviction and, in the years following, thwarting any attempt in the numerous reviews of that trial and the quality of evidence, to set things right. He said Crown attorneys are human, they make mistakes and are apt to defend their work for fear of being made a scapegoat. He agreed that "a sham" had been perpetrated by both prosecutors and the police -- a number of them have deflected responsibility for disclosing the deal to the defence. Further, he explored the idea that Crown attorneys work in a do-no-wrong culture that makes it very difficult to admit to a mistake. It is the commission's job to decide if such a culture derailed for so long Mr.Driskell 's attempts to get an honest answer out of someone in Manitoba Justice.

Mr. LeSage would do Manitoba and Canada a service by launching the discussion on whether a culture of cover-up threatens the administration of justice in the country's courts. The medical community knows how tough it is to get health care practitioners to confess to errors -- their mistakes, too, can have terrible, lasting consequences -- in order to prevent mistakes from repeating. A prosecutor's first job is to ensure a trial is fair, because it is the best means available to see that justice is done. As Mr.Whitley implied, all the workshops and pamphlets in the world will not make a dent in a culture of cover-up if prosecutors believe admitting mistakes will cost them dearly.

EDITORIAL - Continue to illuminate
Winnipeg Free Press
Monday, September 25, 2006

AS judicial inquiries go, the public review into the wrongful murder conviction of Manitoban James Driskell has been illuminating. The inquiry's public deliberations have all but wrapped up now -- only one more witness is expected to testify. Amid the denials and buck-passing by some parties to the investigation and the 1990 conviction that robbed Mr. Driskell of 12 years of freedom, Manitobans are well armed now to make up their minds about who shared some blame in this miscarriage of justice.

The commissioner, Justice Patrick LeSage, has in hand documents and testimonies on the actions of almost all the police, prosecutors, lawyers and Justice officials who had a hand in the conviction of Mr. Driskell for the first-degree murder of Perry Dean Harder. It is evident that many of them failed in their professional duties, that the evidence was not reliable, and witnesses had ulterior motives. Fatal to the case was that Mr.Driskell and his lawyers were never told there was a deal made with the man accusing him of murder. That meant Mr. Driskell could not have defended himself fully, and that his demands for a review of his conviction suffered a lengthy delay. This colossal injustice implicated the police, the chief of police, senior Crown attorneys and prosecution officials in the Justice Department. They wear the stain of negligence of duty.

The inquiry did not hear from pivotal players, namely chief witness Ray Zanidean. The man is roundly believed to be a liar and perjurer. That would have cast a pall on whatever he might have said to the inquiry, but Mr.Zanidean had intimate knowledge of who, among the police officers and Justice officials in Manitoba and Saskatchewan, offered him immunity from an arson charge in exchange for his co-operation. Mr. LeSage should have heard his version of events. The other missing testimony was that of former director of prosecutions, Bruce Miller, who died prior to the inquiry. Mr.Miller was involved in the Zanidean deal and with an exchange of memos about whether the defence was told about the deal. It had not been, and no one admitted that publicly until 2003. Many involved in the deal and the memos noted Mr. Miller was central to that indefensible failure. It cannot escape notice, however, that Mr. Miller cannot defend himself.

Mr. LeSage's review has revealed much, even though documents have gone missing, memories were tested and central actors can plausibly say they don't remember details. His mandate encompasses a referral to professional bodies of those individuals he believes may have failed to do their jobs, who were negligent or unethical. This report, due by the year's end, should send a number of people on for further investigation.

EDITORIAL - Ewatski must go
Winnipeg Free Press
Friday, September 22, 2006

POLICE Chief Jack Ewatski told an inquiry this week that he believes James Driskell did not get a fair trial when he was convicted in 1990 of first-degree murder. Mr. Ewatski said that first occurred to him in 2003. That is incredible, given that Mr. Ewatski's own 1993 review of the police investigation revealed serious weaknesses in the evidence in the case against Mr. Driskell .

Mr. Ewatski was an inspector when then police chief Dale Henry asked him and another officer in 1993 to review the investigation of the murder of Perry Dean Harder. There were allegations immediately raised in the media about a chief witness recanting his testimony against Mr. Driskell , that the witness was given immunity from an arson charge in exchange for the testimony and that he was compensated for the testimony. Mr. Ewatski's report confirmed all three allegations, yet concluded there was no evidence to indicate Mr. Driskell was not guilty. How a seasoned cop could reconcile that without questioning the quality of the prosecution and integrity of the conviction is bewildering.

Mr. Ewatski's involvement in the Driskell affair did not stop when he handed over the report to his boss. There were a number of inquiries from a variety of actors questioning the conviction, and a prevailing discomfort that his various lawyers had not been given full disclosure of the facts, particularly with respect to the deal struck with the chief witness. His report was sought by many people who believed it contained new evidence that would help overturn Mr. Driskell 's conviction. In 1998, Mr. Ewatski became chief of police and in 1999 he was questioned pointedly by Free Press reporter Dan Lett about the facts not disclosed to the defence. He told Mr.Lett he would have to "trust" his word that nothing in his review would help Mr. Driskell . At every turn, Mr. Ewatski steadfastly refused to release his report, which he pronounced an internal affair. Finally, in 2003, a judge ordered the report be made public. That judge, John Enns, concluded sufficient material collected by Mr. Ewatski in 1993 called the conviction into doubt. On Wednesday, Chief Ewatski told the inquiry into the wrongful conviction of Mr. Driskell it dawned on him only in 2003 that there had not been full disclosure to the defence -- which he stressed was the responsibility of Crown attorneys, not police.

Mr. Ewatski cannot escape his intimate role in the fact a miscarriage of justice was permitted to stand for the 12 years Mr. Driskell sat in prison, wrongly convicted. Mr. Ewatski's lack of judgment in the conclusions drawn from his review of the Harder investigation, and in maintaining a silence that prolonged the injustice is breathtaking and worrisome. Mr. Ewatski is not fit to remain chief of police. He should resign. If he does not, Mayor Sam Katz should remove him from office.

Top cops show stunning lack of respect for justice Winnipeg Free Press Wednesday, October 4, 2006

MANITOBANS have just been treated to their second instance in a few months of the head of a police force acknowledging his force mistreated a citizen causing serious consequences, and apologizing to the victim long after the fact.

On Thursday, Giuliano Zaccardelli, the Commissioner of the Royal Canadian Mounted Police -- its senior officer -- apologized publicly to Maher Arar, a Canadian citizen born in Syria, for blunders his force committed resulting in Arar erroneously being sent to his birth country where he was imprisoned for a year, tortured and then released, no charges having been laid.

The commissioner was testifying before a House of Commons committee to answer for the RCMP's conduct in the Arar affair after a highly condemnatory report by a special commission of inquiry headed by Mr.Justice Dennis O'Connor. Amongst other things, Mr. Justice O'Connor found the Mounties had sent incorrect and unfounded information to American authorities on Mr. Arar as a security risk and terrorist suspect when he was apprehended in New York, prompting them to send him to Syria.

A few months ago, Jack Ewatski, chief of the Winnipeg Police Service -- its senior officer -- publicly apologized to James Driskell for errors made in the course of Driskell's trial for the murder of Perry Dean Harder, for which, following conviction, Driskell spent 12 years in jail.

Ewatski acknowledged before the inquiry commission being conducted by Mr. Justice Patrick LeSage that essential prosecution evidence concerning a deal made with a key witness was not made available to defence counsel. Its non-revelation might well have altered Driskell's defence and perhaps avoided conviction. In any event, he did not have a fair trial.

Driskell was released from penitentiary by order of the federal Justice minister when it was established by DNA evidence that hairs used to convict him were not Harder's.

In both instances, the heads of their respective police forces knew that a miscarriage of justice had taken place long before their victim's ultimate release, but kept quiet about it. In Arar's case it was while he was in the Syrian prison. But instead of trying to right a wrong, the Mounties continued to leak false information about him.

Ewatski learned of the impropriety in 1993 when, as a senior officer with the police service, he conducted an internal inquiry on the handling of the case. However, he chose to remain mute about his findings.

It should be noted that both of these damning revelations came to light as a result of special commissions of inquiry, and, apparently, only because of them. That's the stunning part of both travesties. Not only did the forces make serious errors, described by some as blunders. But when

these errors became known within their chains of command, senior officers sworn to uphold the rule of law, rather than coming forward and rescuing their victim, chose to remain silent. In Arar's case he continued to be beaten and tortured in a Syrian prison. In Driskell's, he continued to languish in penitentiary.

One must assume that Winnipeg's chief of police and the commissioner of the RCMP are decent and honourable men. What, then, could possibly have prompted them not to come forward and rescue these victims, rather than allowing additional abuse and miscarriages of justice to continue to take place? Once publicly confronted there was genuine contrition and sincerity in their apologies.

The culture of police forces, and particularly the RCMP, has been described as "lie, deny and then act surprised." Police forces are paramilitary organizations with a reputation for fierce loyalty within their lines of command, and not washing their dirty laundry in public. On occasion, they are used to feeling they are a law unto themselves, maybe even, at times, above the law they have sworn to uphold. Some have been know to dismiss or disparage their political masters, because they are the constant and the politicians come and go.

Fortunately, in a democratic society they are clearly not above the law. The O'Connor and LeSage commissions are proving this, if proof were needed. Between the courts and special inquiry commissions they continue to be held accountable for actions the average citizen wouldn't want to believe possible.

What's the remedy? Can the RCMP and the Winnipeg Police Service clean up their acts where needed? Not likely, because of their ingrained culture of stonewalling and cover-up. You don't send the person who caused the problem to fix it. An externally stimulated housecleaning is probably what's required.

The extent that this culture has taken hold will not make this an easy task.

Editorial - Getting away with murder
Winnipeg Free Press
Saturday, October 21, 2006

SHELLY Marshall , whose son Benjamin was lured to his to death five years ago, gave a victim statement in a courtroom on Thursday that moved many to tears. At one point, she addressed one of the men accused of shooting him twice in the chest and then dumping his body on a golf course. "One day you will face a far greater judge than anything this world could offer," she said. Her words were doubly poignant because everyone in the courtroom knew that because of alleged Crown misconduct the two accused -- Derek Zarichanski and Luke Pujol -- had not faced even what the world could offer.

In a development that raised disturbingly familiar issues, Justice officials dropped a first degree murder charge against Pujol in exchange for his pleading guilty to conspiring to kill a different man. He was sentenced to five years in prison. The first degree murder against Zarichanski was reduced to second degree murder. He was sentenced to life with no chance of parole for 12 years. Both men would have faced sentences of life with no chance of parole had the case gone to trial and had they been found guilty as originally charged.

The case didn't go to trial, however, because the defence filed an "abuse of process" motion demanding that all charges be dismissed and alleging that Crown had withheld for too long police notes, discussions between witnesses and justice officials and possible inducements including money and "holding off" charges. The Crown's actions -- or reactions -- spoke volumes. It brought in an independent lawyer to represent it at the hearing and then moved quickly to obtain the plea bargains favourable to the accused rather than risk losing the entire case.

It has been five years since the inquiry into the wrongful prosecution of Thomas Sophonow forced the Justice department to take serious measures toward bringing an end to practices that lead to miscarriages of justice, such as failing to disclose information about to the defence and giving inducements to witnesses. Even as this latest debacle was playing itself out, the Driskell inquiry continues to look into how failure to disclose information to the defence resulted in James Driskell being imprisoned for12 years as a result of a miscarriage of justice.

Throughout the current inquiry, Justice officials have said that they have been diligent in ensuring that all Crowns attend "Crown schools" , seminars and conferences to ensure that everybody knows and plays by the rules so as to ensure that justice is done and is seen to be done.

But those who watch the courts closely report that nondisclosure concerns are regularly raised with mush finger pointing at police and at prosecutors. Much of that is off the radar screens because the crimes are not often as sensational as murder.

Mrs. Hamilton says that "someone got away with murder here." She is correct, and it is disgraceful that she is correct.

(This article accompanies the editorial of Oct 21, 2006 and explains its factual underpinnings)

Killing suspects get deals; Crown misconduct alleged Winnipeg Free Press Friday, October 20, 2006 Byline: Mike McIntyre

ALLEGATIONS of Crown misconduct, secret deals with witnesses and withholding key evidence forced Manitoba justice officials to strike a controversial plea bargain yesterday with two alleged killers.

Derek Zarichanski and Luke Pujol were both set to begin their Queen's Bench trial for the November 2001 slaying of Benjamin Marshall , whose body was found wrapped in plastic and duct tape and dumped outside the city.

Marshall had been lured to his death and then shot twice in the chest over an apparent drug-related dispute. A second man was also targeted to be shot, cut up with a chainsaw and buried, but an informant tipped him off before the plan could be executed.

Crown attorney Brian Bell told court yesterday that an "abuse of process"motion filed last week by defence lawyers -- in which they were asking a judge to dismiss all charges -- had backed prosecutors into a corner.

Rather than risk losing the entire case, the Crown dropped the first-degree murder case entirely against Pujol and accepted a guilty plea to second-degree from Zarichanski, who was then sentenced to life in prison with no chance of parole for 12 years. He faced 25 years without parole for a first-degree conviction.

Pujol pleaded guilty to conspiracy to murder a second man and was sentenced to five years in prison, in addition to two years pre-trial custody. Both Pujol and Zarichanski have lengthy, violent criminal records.

Bell told court his office was forced to hire an independent lawyer to represent them on the serious defence allegations, which largely revolve around late disclosure of police notes and discussions between key witnesses with justice officials, including possible inducements in exchange for their testimony.

Bell said that he recently took over the case from Crown attorney Bob Morrison, who left Manitoba this past summer to work in Ontario, and has had difficulty finding answers to the defence questions.

"We have received very limited co-operation from Mr. Morrison," Bell told Queen's Bench Justice Deborah McCawley.

Defence lawyers planned to subpoena Morrison to testify about his dealings with the case, including incomplete disclosure of police notes from 2002 that appear to talk about "holding off" on charging a witness with breaching his probation because he is a "material witness" in the murder case.

Previously, lawyers say they were told by the Crown that no such offers were made to witnesses.

Another example cited by defence lawyers was the recent revelation that two witnesses received payments totaling more than $1,100 for "food and accommodations." In a May 9, 2005 letter from the Crown, lawyers say they were told there had been "no financial agreements whatsoever."

Morrison, who was considered Manitoba's top prosecutor in recent years, couldn't be reached for comment yesterday.

"Someone has gotten away with murder here," Shelly Marshall, the victim's mother, told reporters outside court.

"I have no control over what the people in that courtroom did. Five years ago I had absolute faith both men would be (convicted) of first-degree. But the reality is, the system isn't always fair."

Marshall, who has taken on an active role with the Manitoba Organization of Victim Advocates, had many people in the packed courtroom gallery in tears yesterday while delivering a powerful, heart-wrenching victim impact statement.

She looked directly at Pujol and Zarichanski, with a picture of her slain son at her side, while speaking in a strong and steady tone.

"Luke, my family and I know what you did. And one day, you will face a far greater judge then anything this world can offer," she said.

"Each night before I go to bed I say to my Ben 'I'm sorry, Mommy is so sorry.' I imagine his face as he felt the bullet tear through him. Did he have time to call out for God? Did he call out for me?"

Zarichanski shot Marshall after arranging a late-night meeting between the two men on the guise of brokering a drug deal with a third party, court was told. Marshall's body was then driven in a stolen truck to a remote location outside the city and dumped on the River Oaks golf course.

Commission of Inquiry into certain aspects of the trial and conviction of James Driskell

Systemic Submissions

Introduction

1. In *USA v. Burns and Rafay*, the Supreme Court of Canada said:

> "Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution."

In his Report prepared for *The Commission on Proceedings Involving Guy Paul Morin*, Commissioner Kaufman wrote:

> The principal focus of my mandate is to make recommendations for change intended to prevent future miscarriages of justice. The criminal proceedings against Guy Paul Morin have enabled me to identify certain 'systemic issues' – this is, issues which transcend the particular case and speak generally to the administration of criminal justice in Ontario.
>
> . . . . .
>
> The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future. As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened to Guy Paul Morin's case and by education as to the causes of wrongful convictions.

The Commission on Proceedings Involving Guy Paul Morin, 1998; Vol. 1, p. 9 and Vol. 2, "*The Conclusion*"

2. Wrongful convictions, their causes and their consequences, have received considerable exposure in the Province of Manitoba. The number of editorials generated in the *Winnipeg Free Press* just on Mr. Driskell's case is indicative of this. The *Inquiry Regarding Thomas Sophonow*, and Commissioner Cory's recommendations, have played a significant role in the administration of justice in the Province. The *Driskell Inquiry* provides a further opportunity to improve the administration of justice in Manitoba, and in the rest of Canada. Identification of systemic problems, and recommendations that arise from their identification, serve a dual purpose. As well as improving the quality of the justice system and ensuring that wrongful convictions will be less likely to occur in the future, they assist in the identification of wrongful convictions that have already occurred but have not yet been corrected. Recognizing the need for systemic changes is an acknowledgment of past problems that need to be rectified. James Driskell's wrongful conviction was one of those cases. There are many more that still need to be uncovered and addressed.

3. Clause 1(e) of the *Terms of Reference* mandates the Commissioner:

> To give advice about whether any aspect of this case should be further studied, reviewed or investigated and by whom, and to make systemic recommendations arising out of the facts of the case which the Commissioner considers appropriate.

Commissioner Kaufman said at the *Morin Inquiry*:

> Any recommendations should be reasonably related to the systemic issues arising out of the present case. Nevertheless, some recommendations may address problems not directly associated with Mr. Morin's wrongful conviction, but which were incidentally identified during the Inquiry.

A number of systemic issues arise out of Jim Driskell's case, some of which have been addressed in previous Inquiries, and others which have not.

The Commission on Proceedings Involving Guy Paul Morin, 1998; Vol. 1, p. 9

4. As Commissioner LeSage said at the outset of the evidence:

> "This is not a re-trial, a re-hearing of the Driskell murder trial..."

Nevertheless, It is important to remember that it is individuals who are the victims of wrongful convictions. Commissioner Lamer recognized this in his recent Report out of Newfoundland in what may best be described as a tribute to one of the three men whose cases he was reviewing:

> The resilience of Gregory Parsons and those who supported him bears witness to the strength of the human spirit. This observation is not to be critical of those who have experienced serious injustice in our legal system and have not coped as well. When Mr. Parsons finished testifying, I made the following statement to him:
>
> > At the time of your conviction, I was Chief Justice of this country, the head of the system that convicted you, and I'm publicly inviting all those that were judges at the time to join me in accepting joint and several responsibility for the system having done to you what it did.
>
> I wish to indulge in this opportunity to extend my apology to all of whose who may have suffered injustice in our legal system while I held this role. Since the ultimate problem is inevitably systemic, those of us who form that system cannot simply say that any particular injustice has noting to do with me.
>
> I hope that the personal observations of Gregory Parsons in this section will help all of us involved in the criminal justice system to give pause. We should consider Oliver Cromwell's plea just before the Battle of Dunbar:
>
> > I beseech ye in the bowels of Christ, think that ye may be mistaken.
>
> Justice Learned Hand said decades ago that he would like to have these words written over the portals of every courthouse of the nation. It is an important reminder for all police officers, counsel and judges.

First and foremost, we ask the Commissioner in this Inquiry to direct some personal remarks to Mr. Driskell himself. His attendance at each day of the evidence heard at this Inquiry cannot have been easy for him but his presence has contributed enormously to the Inquiry. In this regard, we note that Mr. Dangerfield, Mr. Whitley, Chief Ewatski, Mr. Lawlor and Mr. Schille all apologized to Mr. Driskell to a greater or lesser degree. These apologies were appreciated by Mr. Driskell and will help bring the case to an end for him.

He hopes that the Minister of Justice for the Province of Manitoba will follow suit after the Report on his case is released.

The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken at pp. 100-101
Commission transcripts, July 17/06, p. 7

5. The Commissioner knows that Mr. Driskell has an outstanding civil claim for his wrongful conviction. Mr. Maher Arar was in the same position during his Inquiry before Commissioner O'Connor. After noting that he was precluded by statute from making findings of civil liability, the Commissioner made some comments:

> First, in addressing the issue of compensation, the Government of Canada should avoid applying a strictly legal assessment to its potential liability. It should recognize the suffering that Mr. Arar has experienced, even since his return to Canada.
>
> . . . . .
>
> Based on the assumption that holding a public inquiry has served the public interest, Mr. Arar's role in it and the additional suffering he has experienced because of it should be recognized as a relevant factor in deciding whether compensation is warranted.

Commissioner O'Connor then made the following recommendation:

> **Recommendation 23**
>
> **The Government of Canada should assess Mr. Arar's claim for compensation in the light of the findings in this report and respond accordingly.**

We ask that the Commissioner consider making a similar recommendation in Mr. Driskell's case. Commissioner Cory, after reviewing the civil process in a wrongful conviction context at the *Sophonow Inquiry* wrote:

> In summary, it can be seen that there are a great many difficulties besetting an accused who seeks a tort-based remedy for wrongful conviction and imprisonment.

There is no reason why Mr. Driskell's claim for redress should be left to the slow, uncertain process of civil litigation. Prompt and adequate compensation for the wrongly convicted serves the public interest in restoring confidence in the justice system as well as the personal interests of the claimant.

See *Report of the Events Relating to Maher Arar*, 2006' "Analysis and Recommendations" at pp. 362-363
See *Inquiry Regarding Thomas Sophonow*, p. 95

6. An unusual feature of the *Terms of Reference* for this Inquiry is their focus on accountability for the Crowns and police involved in this case. The *Winnipeg Free Press* has, correctly, noted this aspect of the Inquiry in its editorials:

> Although it was his government's position for more than a year that there was insufficient evidence to warrant a new murder trial for Mr. Driskell , Mr. Doer this week reversed that stand. He declared "there is going to be a day of reckoning" for Mr. Driskell and for any members of the justice system who might have created this miscarriage of justice by withholding information that could have been instrumental in finding that Mr. Driskell was innocent. The day of reckoning is to be achieved through the creation of a public inquiry.
> (Editorial - Winnipeg Free Press for December 5, 2003)
>
> .....
>
> Many of the actors involved in this collective wrongdoing still work in law and prosecutions. It is time Manitobans heard their explanations, first hand, under oath. There is little justice now for Perry Dean Harder, but there can be some relief for Mr. Driskell . Ultimately, there must be some accountability for a man's unsolved murder, a wrongful conviction due to truly lousy evidence, and the gross misconduct that followed. And, maybe, those responsible can be removed from the public payroll.
> (Editorial - Winnipeg Free Press for April 4, 2006)

The point is made elsewhere in these submissions that the lack of individual and institutional accountability in past cases of wrongful conviction is itself a systemic problem.

7. The systemic issues that we address in this submission may be categorized as follows:

1. Problems in the Winnipeg Police Service.
2. Problems in Manitoba Justice.
3. Post-conviction disclosure issues.
4. Special rules for unsavoury witnesses.
5. The use of the Stay as a governmental method of terminating a wrongful conviction, and the need for an *Innocence Hearing* Model in Manitoba.
6. Problems in the RCMP Laboratory system.

1. Problems in the Winnipeg Police Service

8. The Winnipeg Police Service has not come out of this Inquiry well. Much of the original investigation is highly suspect, especially the manner in which four sets of two officers were able to produce four witnesses, Ray Zanidean, John Gumieny and Ashif and Shafik Kara, whose statements all told seemingly similar stories. The authors of the *Perry Dean Harder Homicide Review* expressed their own doubts about the methods used with Mr. Zanidean and the Kara brothers. Questions have been raised at the Inquiry regarding the timing of police contacts with Mr. Gumieny and Mr. Zanidean, and Mr. Hymie Weinstein raised related questions when retained to represent Manitoba Justice's interests at Mr. Driskell's bail hearing in 2003. Time constraints have prevented their further exploration. Mr. Schille has acknowledged that the *Homicide Review's* assessment of police dealings with the Kara brothers was a significant concern for him. His statement to Commission Counsel included the following:

> "In [Mr. Schille's] mind, the main strength of the Crown's case had always been the apparent independence of Zanidean, Gumieny and the Kara brothers and the similarities between their stories. However, his views about the Kara brothers and the potential admissibility of their out-of-court statements that he had expressed at the time of 2000 review were affected by the release of the 1993 Winnipeg Police Homicide Review. In view of the favourable impression the Kara brothers appear to have made on Ewatski and Hall, and the fact that the current Chief of Police appeared willing to entertain the possibility that there had been some police impropriety in the Kara interviews, Schille was significantly less confident about the prospects of the Crown obtaining a conviction on a re-trial.

Mr. Schille's statement to Commission Counsel at p. 11
Evidence of Mr. Schille, Sept. 27/06, pp. 6213 to 6217

9. The Inquiry has only examined the investigative roles of Sgt. VanderGraf, Sgt. Anderson and Sgt. Paul in any depth. Their dealings with Mr. Zanidean, and the Crowns and Swift Current police officers, were rarely recorded in any form. This obviated their ability to disclose them. Then, when direct disclosure requests were made, the officers were prepared to engage in direct deception.

10. The Winnipeg Police Service's decision to re-investigate the case after the flurry of articles in the Winnipeg Sun was, in one sense, laudable. It would have been better to have arranged for an independent police force to review the case. Nevertheless, the review was quite thorough and the Report itself was fairly candid. Indeed, it was probably because of this candour that successive police chiefs had no desire to disclose it, or its contents, to Manitoba Justice or Mr. Driskell's counsel.

11. Despite one demand after another, Chief Ewatski and his predecessors refused to disclose the *Review*, or its contents, to Mr. Driskell. Then, they refused to disclose it to Manitoba Justice who, in turn, refused to demand that it be disclosed to them. This conduct is indefensible and reprehensible. The law is clear. The Crown and police cannot evade their disclosure obligations by hiding behind each others' coat tails. The Courts, including the Manitoba Court of Appeal, have made it clear that the Crown cannot plead police intransigence as a defence to non-disclosure. In *R. v. Jack* (1992), 70 C.C.C. (3d) 67 (Man.C.A.) aff'd (1994) 2.S.C.R. 310, Scott C.J.M. of the Manitoba Court of Appeal, in discussing what they referred to as "belated" disclosure in that case, said under the heading "Crown disclosure":

> There can now be no doubt that there exists a duty on the part of the Crown in a criminal case involving an indictable offence to make full, fair and timely disclosure of all relevant facts. *For these purposes, the Crown includes the police*: see *R. v. C.(M.H.)* (1991), 63 C.C.C. (3d) 385 at p. 394, [1991] 1 S.C.R. 763, 4 C.R. (4th) 1, citing with approval the Supreme Court decision in *R. v. Caccamo* (1975), 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, [1967] 1 S.C.R. 786. The significance of the duty is such, that "Failure to disclose may constitute grounds for appeal where it results in an unfair trial" (*C.(M.H.), supra*, at p 394). This is a different issue from the discretion which a prosecutor undoubtedly still has to determine which witnesses to call (subject nevertheless to production of all material facts): *Lemay v. The King* (1952), 102 C.C.C. 1, [1952] 1 S.C.R. 232, 14 C.R. 89, but, even then, "courts must not hesitate to interfere where the conduct of the Crown suggests that there was an unfairness at trial" (*C.(M.H.) supra*, also at p. 394). (emphasis added)

In *T.(L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont.C.A.), a case of late disclosure to the defence, Lacourciere J.A. said:

"The leading authority in this area is *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326, 9 C.R. (4th) 277 (S.C.C.). There is a duty on the Crown to make full disclosure *and, accordingly, the Crown has a duty to obtain from the police - - and the police have a corresponding duty to provide for the Crown - - all relevant information and material concerning the case.* In *R. v. V.(W.J.)* (1992), 72 C.C.C. (3d) 97 at p. 109, 14 C.R. (4th) 311, 10 C.R.R. (2d) 360 (Nfld.C.A.), Goodridge C.J.N. states:

> *The duty rests upon Crown counsel to obtain from the police all material that should be properly disclosed to defence counsel. It is not for the court to direct what should pass between the police and Crown counsel but both should be aware that, if Crown counsel is unable to make proper disclosure because he or she has not obtained from the police all such material, a new trial may be ordered. It is, once again, a matter of common sense."* (emphasis added)

In *L.(P.S.)* (1996), 103 C.C.C. (3d) 341 (B.C.C.A.), Cumming J.A. said:

> The Scope of the Crown's Disclosure Obligation
>
> The Crown has a duty to disclose all relevant, non-privileged information in its custody or control. As stated in *R. v. Stinchcombe...*, the duty extends to all relevant information the Crown has in its "possession". See also *R. v. Egger*, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193 at 204, *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225 at 233.
>
> *This Court has confirmed that the scope of the Crown's possession extends to information which is in the hands of the police. R. v. O'Grady* (8 September 1995) Vancouver CA017621. Some courts have further extended the possession doctrine to materials in the custody of other government ministries which could reasonably be considered to be in possession of evidence from the circumstances of a case: *R. v. Arsenault* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.); *R. v. Lenny* (1994), 155 A.R. 225 (Alta.C.A.). (emphasis added)

We will be submitting a recommendation in this regard from the Crown perspective; we now make one from the police perspective.

RECOMMENDATION 1-1

Note-Taking and Statement Taking – The Winnipeg Police Service should review its policies on note-taking, interviewing and statement taking, and make the *Driskell Inquiry* Report required reading for all members of the Service.

RECOMMENDATION 1-2

Disclosure to the Crown – The police manual should be amended to include a provision that it is a disciplinary offence to withhold material information about a case from the Crown, whether the information is obtained or compiled pre-conviction or post-conviction. Relevant information should always be reduced to writing. Further, the police shall, in all cases, provide any information to the Crown on demand whether or not they believe that the Crown is already aware of the content of the information.

RECOMMENDATION 1-3

Wrongful Conviction Training – Police training and refresher courses should include training on wrongful convictions, how they can occur, and the role that police officers may play in their creation, their prevention and their detection.

2. Problems in Manitoba Justice

12. Clauses 1(a) and (c) of the *Terms of Reference* provide as follows:

> (a) To inquire into the conduct of Crown counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction, and consider whether that conduct fell below the professional and ethical standards expected of lawyers and agents of the Attorney General conducting prosecutions at the time. ...
>
> (c) To give advice about whether the conduct of Crown Counsel or members of the Winnipeg Police Service should be referred to the Law Society of Manitoba, or to the Law Enforcement Review Agency or an appropriate independent police service, for review and possible investigation by those bodies.

13. Manitoba Justice shares an enormous responsibility for James Driskell's wrongful conviction. Members of Manitoba Justice failed him at his trial, on his appeal, and throughout his subsequent attempts to obtain post-conviction relief. For over 13 years, he paid a huge price for their conduct.

14. In written submissions to the *Lamer Inquiry*, now Mr. Justice Melvyn Green wrote:

> Social science research has long recognized the existence of a "police culture", a set of beliefs and attitudes that influence the thinking, loyalties and conduct of individual officers. Crown counsel are no more immune than the police to the laws of social dynamics. They too share a belief system that arises from their institutional mandate – in short, a "Crown culture." The phrase itself is neutral. That prosecutors share values and norms is of no concern to the administration of justice. What is of concern is a Crown culture that places paramount value on winning, that confuses its functions with those of the police, and that stubbornly resists the prospect of factual error. It is this historical concentration of attitudes, practices and beliefs that gives rise to the tunnel vision, blinkered exercise of discretion and institutional tenacity that contributes to the wrongful conviction of innocents.

In a published article, Mr. Justice Green wrote:

> The entry of terminal stays is but one means by which the Crown contributes to the perpetuation of wrongful convictions. In *Sophonow,* the Attorney General of Manitoba sought leave, unsuccessfully, to reverse the "technical" acquittal entered by the Court of Appeal and, thereby, conduct a fourth trial of a factually innocent man whose conviction the Court came within a hair's breadth of describing as perverse. In *Morin*, the Ontario Attorney General persuaded the Court of Appeal, and then the Supreme Court of Canada, to set aside the accused's jury acquittal in a case in which it knew (but the appellate courts did not) that suppressed disclosure (respecting, for example, the defendant's window of opportunity, the unreliability of two jailhouse informants and the results of various forensic experiments) only buttressed the defence claim of innocence. In *Milgaard*, the Saskatchewan Attorney General resorted to a stay of proceedings rather than permit either a retrial or an acquittal; Milgaard was not publicly cleared until years later when DNA testing both excluded Milgaard and positively identified Larry Fisher, the now-obvious culprit who had been tunnel-visioned off the police and Crown radar screens. The post-conviction treatment of *Parsons* and *Druken* in Newfoundland and Labrador mirrored this cultural temperament.
>
> Prosecutorial resistance to righting wrongful convictions is deeply ingrained. There is a profound reluctance to acknowledge even the possibility of error, and an equally profound reluctance to admit any responsibility for a miscarriage of justice once incontrovertibly exposed. This posture is an endemic form of institutional denial that inhibits the reforms necessary to eliminate further wrongful convictions.

Melvyn Green's Submissions to the *Lamer Inquiry* on behalf of AIDWYC at pp. 6-7
Melvyn Green: "Crown Culture and Wrongful Convictions: A Beginning" [2005] 29 C.R. (6th) 262 at 271-272

15. Commissioner Lamer has recently written about these problems in his Report on the trilogy of Newfoundland cases. The problems exposed by those cases are similar to the problems exposed by Mr. Driskell's case. There is a complacency and a sense of

entitlement in Manitoba Justice. How else could several Crown reviews of the case which, one after another, endorsed the conviction without any concern right up to the week of Mr. Driskell's bail application in November, 2003 be explained? The more questions that were raised about the case, and the more repetitive the demands and the questions became, the less Manitoba Justice officials were impressed. This is not hindsight at work. Manitoba Justice was repeatedly warned that there were problems in the case but to no avail. DNA results, large payments to witnesses, witness immunity, and the contents of the *Harder Homicide Review*, were all dismissed as irrelevant. Only the existence of a pervasive Crown culture can explain this 13 year pattern of conduct.

16. Education of Crowns is a starting point but all of the workshops and seminars in the world will not change prosecutors' attitudes. Manitoba Justice's Crowns must accept that wrongful convictions not only occur from a theoretical perspective but have happened in Manitoba, and will happen again. It is incumbent upon Manitoba Justice officials to scrutinize cases in which claims of innocence are made especially if it is the same Crown prosecutors who are repeatedly involved in those cases. There is no evidence, and no reason to believe, that things have changed for the better, and that Manitoba Justice now sees the need for reform of its attitude towards claims of wrongful conviction. On May 24, 2006, the Attorney General of Ontario announced the creation of the *Ontario Criminal Conviction Review Committee* (OCCRC) whose tasks he defined as follows:

- Reviewing criminal convictions where a miscarriage of justice is alleged, including cases that engage reviews by the Federal Minister of Justice under the *Criminal Code*
- Providing expert advice and guidance to Crowns across the province in dealing with some of the difficult issues relating to potential miscarriages of justice
- Developing educational and policy initiatives aimed at the prevention of miscarriages of justice
- Developing protocols and best practices for dealing with these cases and preventing future miscarriages of justice.

The formation of a similar Committee in Manitoba could be helpful.

News Release: "Attorney General Taking Steps to Help Prevent Wrongful Convictions; May 24, 2006, www.attorneygeneral@jus.gov.on.ca; *Book of Documents*, Tab 1

17. We suggested from time to time during the proceedings that an independent review of Manitoba Justice was needed in the same manner as one was recommended for the Office of the Director of Public Prosecutions by Commissioner Lamer. Mr. Whitley offered some support for this review when asked about it:

> Q. One of the things, sir, that was recommended by the Lamer Inquiry in Newfoundland, and I'm sort of synopsizing one of the recommendations, is that a person of high repute and high reputation be appointed to review practices and procedures in the Justice Department in that Province, by way of recommending changes that could improve the department. And pursuant to that, the Government immediately appointed a retired member of the Newfoundland Court of Appeal, a Mr. Justice Marshall, to conduct that very exercise. I am going to ask you, sir, and I don't know if it's easier for you now you've left here or harder for now you've left here, whether that may not be a good idea for Manitoba Justice as well?
>
> A. I suppose the answer is going to depend, in part, on how such a review would be undertaken and what would flow from it. I think that looking back over -- even over our discussion yesterday and the questions that were asked of me yesterday, and my reflection of what I tried to do in the department 15 years ago, 20 years ago, is that simply developing new policies and new guidelines and handing them out in a pamphlet or a desk book doesn't necessarily ensure that justice will occur. It doesn't do that. It provides some comfort. But in terms of changing a culture, in terms of changing an orientation towards a job that is in very large part being seen as adversarial, there has to be a different process. There has to be a different process than simply a blue collar -- sorry, a blue ribbon panel establishing guidelines and new sets of instructions. I believe it has to happen at the grass roots level. I think Crown attorneys have to be engaged in discourse around these issues.
>
> We can't any longer ignore the fact that simply imposing, as I did, a code of ethics that was developed in our management team, but essentially the rank and file were told: These are instructions you must follow, and these are the standards by which you will be governed. It didn't seem to change very much. And I think they were enforced, well enforced by the time this case took place, yet something happened where they weren't enough. And that's the principal source of my regret to -- as I expressed it this morning to Mr. Driskell. They weren't enough.
>
> Is it a good idea? It is always a good idea to take a look at yourself and re-evaluate how you do business, always. But if it's more of the same, I don't see fundamentally the culture changing..

Such a review has not been conducted in the past. It could help bring about some necessary changes, and help restore public confidence in Manitoba Justice, something which has been demanded by the *Free Press* as recently as its October 21, 2006 editorial.

Evidence of S. Whitley, Aug. 17/06, pp. 4692 to 4694

18. The repeated use of the direct indictment in serious cases, thereby bypassing the protection provided by a preliminary hearing, suggests the same sense of entitlement in Manitoba Justice. It may be that Mr. Driskell would have been acquitted at his trial if his counsel had had the benefit of a preliminary hearing to probe and challenge the evidence. Serious constraints on the use of the preferred indictment need to be exercised at the political and administrative levels; it should be employed only in an exceptional case, not as a habit.

Evidence of Greg Brodsky, pp. 3157 to 3168

Ex. 22, Letter dated June 27/06 from the Assistant Deputy Minister to Mark Wasyliw ; *Book of Documents*, Tab 3

19. All Crown prosecutors can quote from *Boucher v. The King* but this did not help Mr. Driskell. No one in Manitoba Justice seems to have much cared whether or not he had a fair trial. The *only* explanation for the Crown's conduct is that their lawyers justified their approach to themselves because, to them, Mr. Driskell was obviously guilty. This sentiment is encapsulated in the conclusion of Dale Schille when he, once again, justified Crown opposition to Mr. Driskell's claim of wrongful conviction in his November 26, 2003 memorandum to Rob Finlayson, one day before arguments were scheduled to commence at the bail hearing:

> The problems identified clearly impact upon the fairness of the trial and the appeal process but the available evidence on the whole is likely more compelling than the evidence that led to the conviction at trial.

For Mr. Schille, the end – sustaining the conviction of a person whom he decided was surely guilty – justified the unacceptable means that enabled the conviction. Prosecutors need to realize the close connection between fair trials and just outcomes. It is the most cynical of reasoning that excuses the unfair trial by deciding that the verdict cures it.

Memorandum from D. Schille to R. Finlayson, Nov. 26/03

20. Accountability is not about seeking retribution or vengeance. It is about ensuring that individuals involved in making serious decisions know that they should always be ready to account for them. People's lives are forever affected by decisions made by Crown Attorneys. Innocent defendants can go to jail and often, like Mr. Driskell, find themselves asserting their innocence in a vacuum of ignorance. Justice Green wrote:

> A blend of incentives and disincentives could also re-orient prosecuting counsel. Performance evaluations that rewarded prosecutors for identifying, and endeavoring to rectify, police misconduct would go some way to reducing the risk of miscarriages of justice, as would encouragement of post-conviction innocence-review initiatives. At the same time, prosecutorial misconduct that contributes to wrongful convictions should result in discipline proceedings and, where proven, public sanction. It is a constant source of discouragement that no Canadian prosecutor – or police officer or forensic scientist, for that matter – has ever been held accountable for his or her misdeeds (including continuing instances of material non-disclosure) in the course of a wrongful conviction prosecution.

Green: "Crown Culture and Wrongful Convictions: A Beginning" *supra* at 273

RECOMMENDATION 2-1

Direct Indictments – Manitoba Justice must provide the defence with reasonable notice of an intention to seek a preferred indictment, and the reason that the preferred indictment is being sought, and provide the defence with the opportunity to make written submissions to the Minister. Written reasons should be given when a request for a preferred indictment is approved by the Minister. Their use should be reserved for exceptional cases.

RECOMMENDATION 2-2

> An Independent Review of Manitoba Justice – The Minister of Justice should establish an independent review of Manitoba Justice with a view to ensuring that steps have been taken, or will be taken, to eliminate the Crown culture that contributed to the wrongful conviction of James Driskell. (see Recommendation 18(a); *Lamer Inquiry*)

RECOMMENDATION 2-3

> A Criminal Justice Committee – A Criminal Justice Committee should be established with representatives of the Chief Justice, Minister of Justice, Defence Bar, Manitoba Justice, Legal Aid and the Winnipeg Police Service to identify problems, engage in dialogue and seek improvements to the administration of justice on an ongoing basis. (see Recommendation 19; *Lamer Inquiry*)

21. Neither Mr. Driskell nor AIDWYC consider it to be their role to seek accountability for *particular* individuals (or institutions). That is the Commissioner's role. However, we do believe that there is reason for considerable alarm about the propriety of Mr. Dangerfield's prosecutions. He prosecuted Thomas Sophonow (twice) and it was discovered at the Inquiry into his case that disclosure was seriously wanting at those prosecutions. Commissioner Cory, in the chapter of the *Sophonow Report* entitled "Disclosures", after listing a number of undisclosed items, concluded by saying:

> "In summary, it is clear that there was a great deal of very significant material that Crown counsel agreed should have been disclosed to Defence counsel. It was not. There can be no doubt that, if this material had been disclosed, it may have had a significant effect on the trial process. Crown counsel must bear the responsibility for these omissions.

Commissioner Cory's assessment of Mr. Dangerfield's prosecutions of Mr. Sophonow, the evidence heard at this Inquiry as to his prosecution of Mr. Driskell, the concerns that must now exist in Frank Ostrowski's case, and that he was the prosecutor of Kyle Unger and Robert Sanderson whose cases were mentioned at the Inquiry, operate as a red flag for all his prosecutions.

The Inquiry Regarding Thomas Sophonow: 2001; "Disclosures"; pp. 75-83

RECOMMENDATION 2-4

Audit of George Dangerfield's Homicide Prosecutions – There should be an audit of all homicide trials conducted by George Dangerfield in which a conviction was entered and the convicted person has continued to maintain his/her innocence to the present day.

3. Post-Conviction Disclosure Issues

22. Mr. Driskell's case kept coming to the attention of the Winnipeg Police Service and Manitoba Justice from several quarters after his conviction. It came from Saskatchewan Justice, Mr. Driskell's counsel, the Winnipeg Sun, advocacy groups including AIDWYC, the Winnipeg Free Press and Mr. Driskell himself, but all to no avail. Time after time Manitoba Justice and the Winnipeg Police Service failed to fulfill their professional and ethical commitments. It is reasonable to conclude that as the pressure increased, the authorities became more resistant to carrying out their duties. One has only to recall from 1993 the continuing Saskatchewan Justice revelations, and Manitoba Justice's growing awareness of them, at the same time that the Winnipeg Sun was printing its series of stories on the case, and the resulting 'lock-down' on the information by Manitoba Justice.

23. The need for a post-conviction disclosure regime in Manitoba, and the rest of Canada, has never been so apparent. There is very little law in the area. It was talked about at the *Marshall Inquiry*. The Commissioners made one comment that is particularly apt in Mr. Driskell's case:

> Consider the number of people associated with the Donald Marshall. Jr. case who had information that – if had reached the right ears – might have uncovered Marshall's wrongful conviction much earlier.

The information in Mr. Driskell's case was in the hands of Manitoba Justice and the Winnipeg Police Service but never reached Mr. Driskell's ears. In the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, Martin J.A., who authored the Report, took the position that the Crown's disclosure obligations extend into the appeal period and beyond. He wrote:

> The need to disclose extends into appeal periods following conviction. The factual findings of the Marshall Commission demonstrate clearly the need to disclose evidence that Crown counsel realizes raises a doubt about the guilt of someone who has already been convicted, no matter when such evidence comes to Crown counsel's attention. The Commissioners conclude, at Vol. 1, p. 87, that had certain evidence, which came to light only after Mr. Marshall's conviction in 1971, been brought to the attention of the Crown counsel responding to the conviction appeal, and through Crown counsel to the defence and the Court of Appeal, a new trial would have been 'all but inevitable'.
>
> While the obligation to disclose extends throughout any appellate litigation that follows a conviction, it is not tied to the currency of any appeal periods. In a number of recent cases, the disclosure of evidence, whether fresh or otherwise, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered, or convictions quashed outright. See, for example, R. v. Marshall; Reference re Milgaard [citations omitted] where the Supreme Court concluded that the original trial and appeal were error free and fair, but ordered a new trial based on fresh evidence; and Reference Re: Nepoose (1992), 71 C.C.C. (3d) 419 (Alta.C.A.). The Nepoose reference is particularly instructive on the importance of police disclosure to Crown counsel. The Alberta Court of Appeal, in ordering a new trial based on the fresh evidence, commented, at page 423, that much of the fresh evidence 'was either known to the investigators or in the possession of the investigators, but not made available either to the Crown prosecutor or to the accused.'"

Royal Commission on the Donald Marshall Jr. Prosecution, (1989), Commissioners Report *at* 143
Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, at p. 207

24. In the recent case of *R. v. Trotta*, the Ontario Court of Appeal laid down a test for the Crown's disclosure obligations for the post-conviction pre-appeal period. Doherty J.A. was of the opinion that the Crown's obligations were less than those demanded in the pre-trial period:

> There are at least two reasons for this different approach. A convicted accused is no longer presumed innocent. In fact, the opposite is presumed. The conviction stands unless the appellant can convince the appeal court that it should be set aside. A convicted person has also exhausted his or her right to make full answer and defence. It is inappropriate at the

> appellate stage to speak either of the presumption of innocence or the right to make full answer and defence. It is equally inappropriate to describe the boundaries of the Crown's disclosure obligation on appeal by reference to the presumption of innocence or an accused's right to make full answer and defence.

Doherty J.A. ruled that, on an appeal, the Crown's disclosure obligation only extended to the information in the Crown's possession which "there is a reasonable possibility may assist the accused in the prosecution of his or her appeal". Doherty J.A. continued:

> In the present case, the applicant seeks disclosure in aid of a proposed fresh evidence motion. To obtain production, the applicant must first demonstrate a connection between the request for production and the fresh evidence he proposes to adduce. The applicant must show that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence. By assist, I mean yield material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence. The applicant must next demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal. Unless the appellant can make both links, there is no reasonable possibility that the material sought could assist in the prosecution of the appeal and, consequently, no reason for this court to require the Crown to disclose it.

R. v. Trotta, [2004] C.R. (6th) 261 (Ont.C.A.) at 296, 270 (leave to appeal to SCC granted); *Book of Documents*, Tab 4

25. *Trotta* is not a satisfactory solution for post-conviction disclosure. It places the obligation on the convicted person to seek the disclosure. But usually he will have no idea that new material has come into the Crown's possession until he sees it. It requires the convicted person to demonstrate a reasonable possibility that the materials will assist his case. But how will he know until he sees them? It gives the Crown a premium for pre-trial non-disclosure. Surely if the materials for which production is sought were in existence at the time of trial, met the *Stinchcombe* tests for production, but were not disclosed at trial, an applicant should not be in a worse position to demand disclosure on appeal then he was at trial. Otherwise the Crown can obtain a benefit from its failure to disclose at trial.

26. There is no reason in principle why evidence that has come into existence after a conviction – for example, a post-conviction recantation by a witness – should be treated under a different disclosure regime than evidence that existed prior to trial. Mr. Driskell's case is a good example of the problems presented by *Trotta* if it remains the law. Applying *Trotta* to Mr. Driskell's case, the Crown could have deceived itself into thinking that each new fact that came to its attention was of little significance; that none of it, in itself, raised the kind of 'possibility' of which Doherty J.A. spoke. *Trotta* gives the Crown a licence to avoid post-conviction disclosure, rather than imposing a duty on the Crown to make it. If the Crown is required to adhere to a *Stinchcombe* standard of disclosure after trial, making all evidence potentially relevant to the case discloseable, its actual use on appeal will continue to be subject to the *Dixon/Taillefer* and *Palmer* regimes, which preclude the admission of trivial and inconsequential information as fresh evidence. Through a continuing *Stinchcombe* regime for post-conviction disclosure, counsel for the appellant, not the appellant's adversary who is seeking to preserve a conviction already obtained, will be the one to decide if the new evidence ***might*** satisfy the fresh evidence tests, so that the Court of Appeal will be able to decide if it ***does***. This is the way of the adversarial system, and it is when a wrongful conviction appears on the horizon that the system becomes most adversarial. The *Trotta* rule preempts the process to the great detriment of wrongful conviction claims, and so to the detriment of the administration of justice.

27. A particular problem that has arisen in Mr. Driskell's case is a finger-pointing syndrome – so many people failed in their responsibilities that each could blame others by purporting to assume that they had done their duty. Police blame Crowns, Crowns blame police, Crowns blame each other, and police blame each other. Mr. Driskell's case vividly demonstrates the need for a senior Crown(or Crowns) to be assigned the responsibility to receive and make post-conviction disclosure in all cases.

RECOMMENDATION 3-1

Post-Conviction Disclosure – Manitoba Justice should develop a procedure in its Crown policy manual for dealing with post-conviction disclosure. A Crown, or Crowns, should be appointed as recipients of post-conviction disclosure in all cases, whether pre- or post-appeal. Police forces across the Province should be notified of their identity. It is recommended that inventories of materials provided by the police to the Crown, and the Crown to the defence, be prepared so that there will be a record of all disclosed and undisclosed material in each case.

RECOMMENDATION 3-2

Appeal Crown – The Crown who conducted the trial should not be the Crown to conduct the appeal. The appeal Crown should be aware of his post-conviction obligations and should keep the appellant's counsel up to date by disclosing newly discovered materials in a timely manner.

RECOMMENDATION 3-3

Assignment of a Crown – Whenever Manitoba Justice is notified that a wrongful conviction claim is being advanced, a senior Crown who has had no previous involvement in the case should be assigned to review it forthwith. In appropriate cases, the services of counsel outside Manitoba Justice should be retained for this purpose. Assigned counsel must approach the case in a non-adversarial manner, and with an open mind.

See Bruce MacFarlane's paper "*Wrongful Conviction Claims: How Should the Crown Respond?*", May 5, 2005 ; *Book of Documents*, Tab 5

28. Two more issues need to be addressed. Firstly, the Government of Manitoba must provide adequate Legal Aid assistance to wrongful conviction claimants. Without it, almost all claims will be doomed from the outset. Jim Driskell's case is an example of the consequences of a lack of funding – there was a great deal of 'shouting from the rooftops' from 1993 on, but no funding to enable counsel to apply themselves to the daunting task at hand.

See Evidence of Greg Brodsky, pp. 3145 to 3147

29. Secondly, it must be made absolutely clear to the Winnipeg Police Service, if necessary through legislation, that it is their duty to provide complete disclosure to the Crown of all post-conviction information, and to fully document it, whether or not they believe the Crown already has, or knows of, the information. The notion that the police can keep information to themselves is unacceptable. So as to avoid any excuses in the future, the police should be given the identity of the Crown or Crowns who have been assigned the role of receiving post-conviction disclosure in any and all cases. At the same time it is the duty of the Minister to ensure that all disclosure demands made by the Crown to the police are made in writing, and are carried though until full disclosure has been provided.

4. Special Rules for Unsavoury Witnesses

30. The *Morin Report* and the *Sophonow Report* recognized and addressed the problems presented by jailhouse informant testimony. The unsavoury witness shares many of the characteristics of the jailhouse informant. The present law requires that an unsavoury witness be the subject of a *Vetrovec* caution, defined as a "clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness."

R. v. Vetrovec (1982), 67 C.C.C. (3d) 1 (S.C.C.) at 17

31. But, as Jim Driskell's case shows, a *Vetrovec* warning is not enough. As in the case of jailhouse informants, unsavoury witnesses will often claim that they act from the highest motives. Thus Mr. Zanidean claimed altruistic motives for 'coming forward'. The authors of the *Harder Homicide Review* were unimpressed by them. They wrote:

> In explaining why he came forward with this information, Zanidean stated he had been watching a television show about unsolved murders and his conscience got the better of him. He felt if only one person came forward in each of these murder investigations they would all be solved. This appears to be a very noble gesture on his part However, it appears the real reason he came forward was because he had observed Gumieny with the police and he was concerned about being linked to Driskell.

Unfortunately, the defence, and consequently the jury, did not have the information that the authors of the *Review* did so that they could come to the same conclusion.

Perry Dean Harder Homicide Review at p. 70

32. Mr. Justice Scurfield confronted this issue in his reasons for releasing Mr. Driskell in November, 2003. Following are extracts from his judgment:

> Suffice it to say that the Crown's case relied heavily on the evidence of Mr. Zanidean and Mr. Gumieny. Both had lengthy, serious criminal records. At trial, defence counsel was able to attack their general credibility because of their bad character. However, he did so without knowing the full extent to which these witnesses were specifically compromised by deals that they had made or believed they had made with the Crown.
> The new evidence proves that Mr. Zanidean was paid approximately $70,000 as a result of his cooperation with the police. This fact was not disclosed to the defence until recently. Mr. Gumieny was also paid money as a consequence of his role as a witness. However, most of the records of such payments were destroyed before the recent disclosure. Thus, the exact amount that he was paid has not yet been ascertained.
>
> In 1993, as a consequence of publicity that suggested that Mr. Driskell had been wrongfully convicted, the Winnipeg Police Service conducted an internal review of the case referred to as the "Perry Dean Harder Homicide Review". Most of the investigators and witnesses in the case were re-interviewed. The authors of the report concluded that Mr. Zanidean was a very important witness whose credibility was "suspect". They also discovered that the investigating officers knew that Mr. Zanidean was strongly focused on obtaining money from them. This report was not disclosed until after the current application had been filed.
>
> <u>IMMUNITY</u>
>
> In addition, the evidence establishes that Mr. Zanidean was offered immunity, or believed that he would receive immunity, in respect of an arson charge in Saskatchewan as a result of testifying for the Crown. While it is not yet clear who led Mr. Zanidean to believe he would receive immunity, it is clear that he received such immunity.
>
> None of this important information was revealed to defence counsel on a timely basis. Indeed, it would appear that Mr. Zanidean misled the jury as to the benefits he was receiving in exchange for his testimony. At trial, he painted a picture that would have led the jury to conclude that he was experiencing financial hardship as a result of his decision to give

evidence. That impression is inconsistent with the new evidence. Similarly, he was not candid with the jury about his understanding that he was to receive immunity on the arson charge in exchange for his testimony. These inconsistencies were known, or at least ought to have been known by the Crown, before the appeal of Mr. Driskell's conviction was concluded.

. . . . .

FAILURE TO DISCLOSE

The case of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, was decided on November 7, 1991. That decision imposed a clear legal obligation on the Crown to disclose all evidence material to the defence. However, the duty to disclose all material evidence existed long before *Stinchcombe* (see *Taillefer*). Mr. Driskell's appeal was heard in December 1992. Prior to that time, the Saskatchewan Justice Department had reminded Manitoba Justice of the duty to disclose. Yet, no disclosure of the important information concerning Mr. Zanidean's credibility was made to defence counsel prior to the appeal

. . . . .

The new evidence does not simply identify procedural irregularities as suggested by the Crown. It goes to the heart of the Crown's case. Further, the evidence itself is not contentious. No credibility finding is required to give it weight.

. . . . .

Further, I do not accept the Crown's argument that the failure to disclose evidence of the payments made to Mr. Zanidean and Mr. Gumieny, and Mr. Zanidean's belief that in exchange for his testimony he would receive immunity on the serious charge of arson, and Mr. Zanidean's attempted recantation, could not have changed the outcome of the trial. In so finding, I reject the Crown's argument that the new evidence is immaterial because the jury already knew that these individuals were doubtful characters who were prone to lying.

I acknowledge that the trial judge instructed the jury to be very careful with their evidence because of their general bad character. ***However, the fallacy in the Crown's argument is that a credibility decision, and the weight attributed to suspect witnesses, is often assessed cumulatively after weighing all of the evidence that impacts on their trustworthiness.*** It is reasonable to conclude that the evidence of payment to the witnesses together with Mr. Zanidean's belief that he was obtaining immunity in respect of a serious arson charge could have constituted the straw that broke the jury's confidence in these witnesses. Certainly it would have been a factor in their proper deliberations.

In order to convict Mr. Driskell, the jury must have placed significant weight on the evidence of Mr. Zanidean and of Mr. Gumieny. That was the conclusion of the Homicide Review. I agree. Therefore, evidence that might reasonably have altered that credibility assessment cannot be dismissed as inconsequential. (emphasis added)

R. v. Driskell (2004),M.B.Q.B. 3 at pp. 9-15 per Scurfield J.

33. A continual refrain heard during the Inquiry, explicitly or implicitly depending on the witness, was that disclosure of payments made to Mr. Zanidean and Mr. Gumieny was not required because they were merely compensatory payments for the sacrifices being made by the two witnesses. Witness after witness relied on this *ex post facto* justification. It is an unworthy excuse and the Crowns and police surely knew this back then, and know it now. One person's 'compensation' is another person's reward. Failure to disclose payments amounted to a presumption on the part of the authorities that their unsavoury witnesses did have altruistic motives. We now know that they did not believe this for an instant. Sgt. Anderson, Sgt. Paul, Sgt. VanDerGraaf, George Dangerfield and Gregg Lawlor now admit that they all knew only too well that Mr. Zanidean was in the case for his own advancement. But they were content to deceive the jury in this regard if it would help convict Mr. Driskell of the murder that they had decided he committed. This kind of behaviour is best captured in the phrase "noble cause corruption". This phrase was coined in 1992 by Sir John Woodcock, then Chief Inspector of Constabulary in England. In his book, "*In the Name of the Law*", David Rose described its origins during a commentary on the history of police reaction to wrongful convictions in England:

> The following year, in September 1992, Sir John Woodcock, the Chief Inspector of Constabulary, went several stages further. In an early public statement of an analysis which has since come to dominate police arguments about criminal justice, he admitted that the artificial 'improvement' of evidence had been widespread. However it derived from the workings of the rest of the criminal justice system, he insisted, which had for decades connived in the practice. He coined a memorable phrase, 'noble cause corruption'; the idea held by some officers, that it was permissible for police to fabricate evidence or commit perjury in order to convict 'factually guilty' suspects who would otherwise be acquitted.
>
> For example, before the compulsory introduction of contemporaneous note-taking in 1986, police officers had to tell the courts they had performed what Woodcock described as 'the amazing feat of memory', in recording complete conversations with a suspect verbatim, hours or days after the event. If interrogations were carried out with two officers present, both would routinely claim to have produced the same identical record – while maintaining they had not collaborated. Woodcock said that the toleration of such evidence by the courts had allowed officers to believe this was 'only part of the game', essential to shore up the judicial system's eccentricities.

> 'The result is malpractice', Sir John went on, 'not out of malice or desire for personal gain, but which begins out of good intentions. Once an officer has lied in one case and got away with it, then he or she feels less compunction another time.

David Rose: "*In the Name of the Law*", 1996, Vintage, at p. 12

34. One of the benefits of *Stinchcombe* is that it helps defeat noble cause corruption. Crowns and police cannot hide behind their beliefs to justify non-disclosure. And so, once disclosure of any and all payments is mandated and no exceptions are allowed, it comes to pass that whether payments to a witness are to be classified as 'compensation' or 'reward money' becomes a matter for the jury to decide, not the Crown or the police.

35. A difficulty presented by unsavoury witnesses (and jailhouse informants) is that often their benefits are held back until ***after*** the trial has been held. Mr. Zanidean got his $20,000.00 payment months ***after*** the trial but he had every reason to believe he was going to get it ***when*** he testified (in fact, he then had reason to think he would be getting $30,000.00). Benefits that are to bestowed must be bestowed in full before the testimony is given, not after. The witness must be told in clear and certain terms, in writing, of the benefits that he will be receiving and that there will be no additional benefits at a later date. Any benefits bestowed, ***or requested***, after trial, financial or otherwise, must be fully disclosed pursuant to a post-conviction disclosure regime, and should be viewed on a subsequent appeal, or ministerial review application, as fresh evidence potentially of considerable significance. Only then will the Crown and police understand that benefits received by a witness post-conviction may upset that conviction.

Evidence of Greg Brodsky, Aug. 9/06, pp. 3172 to 3176

36. Post-conviction benefits, or requests, are bound to raise the suspicion that the witness knew, assumed, or suspected when he gave his evidence that the benefits would

be forthcoming. That is why so much shock (and we assume it was genuine) was expressed at the supposed Zanidean and Lovelace (Ostrowski) decisions that "we'll tell them after they've testified". The veil of deniability is transparent – the deals may not have been 'official' when they gave their evidence, but both witnesses knew what was coming.[1] Mr. Whitely was scornful of the practice:

> ...It's an artifice. It is a way of a witness being, strictly speaking, literally honest when they testify, but in the background is this understood arrangement that no, things are going to be just fine, that's implicit in this deal. It doesn't pass the smell test, never mind any question of ethical propriety. That's -- I mean, these are the kinds of things that our policy directions were trying to get at. You don't make these kinds of deals. You don't not share these kinds of arrangements with the defence counsel. How could they possibly address the issues around credibility of a witness without knowing that?

Our proposals for recommendations for the Commissioner attempt to address all these issues.

Evidence of S. Whitley, Aug. 16/06, pp. 4570 to 4571; Aug. 17/06, pp. 4644 to 4648

RECOMMENDATION 4-1

Recording of All Dealings with Unsavoury Witnesses – Insofar as possible, all dealings with unsavoury witnesses should be recorded on tape and, in the case of the taking of statements, video-recorded. The witnesses should be explicitly told on videotape of the benefits that they will, *and will not*, receive and of any other considerations that they will, *or will not*, receive, and asked to respond to this on video and explicitly acknowledge that they understand that these are the *only* benefits that they will (and will not) receive. Requests made by the witness, whether accepted or rejected, must be documented and confirmed in videotaped interviews.

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[1] Use of this ploy to keep the witness happy but preserving the witness's credibility in the process had its parallel in the offers made to the jailhouse informants in Guy Paul Morin's case.
See *Morin Report*, Vol. 1, pp. 490-506, 545-556

RECOMMENDATION 4-2

Payments to Unsavoury Witnesses – Payments to unsavoury witness must be fully documented and signed for by the witness and an official.

RECOMMENDATION 4-3

Disclosure Involving Unsavoury Witnesses – There shall be full disclosure of all dealings with, and payments to, and considerations requested by or provided to, unsavoury witnesses. If the unsavoury witness has counsel, the witness and his counsel should be advised, in writing, from the outset that their negotiations with the authorities are not privileged, that they will be recorded on tape, and that they will be fully disclosed to the defence. A witness who refuses to accept these terms should not be called to testify for the Crown.

RECOMMENDATION 4-4

Negotiations Between Police Forces or Crown Officials – All negotiations and dealings conducted between police officers and with other police forces, and between Crowns or outside Crown officials, regarding the unsavoury witness must be disclosed pursuant to the *Stinchcombe* rules, whether they take place in, or outside, the Province, or between different Provinces.

RECOMMENDATION 4-5

Psychiatric and Other Records – Unsavoury witnesses should be requested to sign releases for their psychiatric records, their criminal records, records of their contacts with police, prison records, and any other relevant records so that they can be disclosed to the defence. If the witness refuses to sign releases, the prosecution should provide the utmost co-operation in obtaining these records for the defence, including supporting third party record applications brought by the defence.

RECOMMENDATION 4-6

Post-conviction Dealings with Unsavoury Witnesses – All post-conviction dealings with unsavoury witnesses must be fully documented including, for example, the provision of information to a Crown official or Court regarding a criminal charge that the witness is facing, or has since been charged with. These documented post-conviction dealings must then be disclosed to the convicted person pursuant to a *Stinchcombe* regime of disclosure.

RECOMMENDATION 4-7

Intended Further Consideration for Unsavoury Witnesses – Neither the police nor Crown may conceal intended post-conviction benefits from an unsavoury witness, nor purport to do this.

There should be an investigation conducted within Manitoba Justice to ascertain the cases in the past in which these kinds of arrangements for 'unannounced' post-conviction benefits have been set up. In each case that is discovered, including the case of *Regina v. Ostrowski*, an immediate investigation should be conducted to determine whether a miscarriage of justice has likely occurred.

5. The Use of the Stay as a Governmental Method of Terminating a Wrongful Conviction, and the Need for an Innocence Hearing Model in Manitoba

37. Clause 1(f) of the *Terms of Reference* provides that the Commissioner is:

(f) To consider whether and in what way a determination or declaration of wrongful conviction can be made in cases like this, where

- the Minister of Justice for Canada directs a new trial under section 696.3(3)(a)(i) of the Criminal Code (Canada), and

- after a review of the evidence, Crown Counsel directs a stay of proceedings under section 579 of the Criminal Code (Canada).

These are issues that have been touched on in the wrongful conviction Inquiry conducted by Commissioner Lamer in Newfoundland. This Inquiry has been asked to pave the way for a new approach to these issues.

38. On March 3, 2005, Minister Cotler directed a new trial for Mr. Driskell 13 years after his wrongful conviction. He accompanied his Order with a pointed press release that included the following remarks:

> The Crown failed to disclose that its two key witnesses – Reath Zanidean and John Gumieny – who testified that Mr. Driskell planned the murder, had received substantial financial consideration. This denied Mr. Driskell's right to full disclosure and right to challenge the credibility of key witnesses. For 11 years after Mr. Driskell's trial, the Crown failed to disclose information that Mr. Zanidean likely committed perjury at the trial. For ten years, Winnipeg Police failed to disclose an investigative report regarding the murder which included important and relevant information that would have been helpful to Mr. Driskell's defence. The Crown's two key witnesses (Zanidean and Gumieny) have, since Mr. Driskell's trial, either recanted or threatened to recant their trial testimony regarding Mr. Driskell's involvement in the murder. The failure to disclose this information to the defence was not only a serious breach of the constitutional duty to disclose, but the information also significantly undermined the credibility of these key witnesses. Cotler said that these new matters taken and weighed together "clearly denied Mr. Driskell the right to a full and fair hearing. They so seriously prejudiced the fairness of the original trial and the validity of the original conviction that the only appropriate remedy is to quash the conviction and grant a new trial."

39. Within hours of the press release, Manitoba Justice entered a Stay of Proceedings in the Court of Queen's Bench, and filed a letter of justification for its action with the Court which was signed by 'General Counsel Robert H. Morrison Q.C.'. There was no attempt in this document to respond to Minister Cotler's remarks, not even to his criticisms of Manitoba Justice. Instead, it was a self-serving, self-congratulatory letter, written with reference to Manitoba Justice's "ethical standards", and presented as if Manitoba Justice was doing Mr. Driskell a favour in entering a Stay. Of course it was not. Almost 14 years after his arrest,

Mr. Driskell was denied the chance to appear in a public courtroom after the Minister quashed his conviction, and was further denied the opportunity to respond in a public courtroom to Mr. Morrison's letter to the Court. It was a remarkable manipulation of the process by Manitoba Justice through the use of section 579 of the *Criminal Code*.

See the two letters in the *Book of Documents*, Tab 2

40. At least two members of the panel of experts heard at this Inquiry, both Crowns, suggested that a Stay of Proceedings was a satisfactory conclusion to a wrongful conviction case because, under section 579 of the *Code*, after a year "the proceedings shall be deemed never to have been commenced", as if this would somehow provide comfort to the wrongly convicted person. This belief, no doubt honestly held, is reflective of Crown culture at its worst. Their position was strikingly similar to that advocated by Tom Mills, the then Director of Public Prosecutions for Newfoundland and Labrador, before Commissioner Lamer when discussing the case of Randy Druken. Commissioner Lamer made the following comments about Mr. Mills's position:

> Counsel for the DPP's Office took issue with any such view [of the Stay of Proceedings power]. She argued that the presumption of innocence prevails throughout the charging and the one-year period in which the stay is operative. Once that period expires, the accused is deemed never to have been charged so that:
>
> > "...in this respect he is the same as any other person. The assertion that a Stay of Proceedings leaves a cloud of suspicion over a person is a specious argument that undermines the presumption of innocence. This position has no foundation in law and is arguably misleading."
>
> With respect, this analysis is legally correct but practically unrealistic. For example, a person facing a charge of murder is also presumed innocent but is there not a cloud hanging over such an accused?
>
> In contrast to a stay of proceedings a statement by the Crown, in open court, that it has no evidence to present often carries an implicit message that this person should not have been charged. Once the Crown has decided to prosecute (i.e. not to withdraw the charges laid by the police), the accused should be given an acquittal where that decision proves to be ill-founded.

The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken at pp. 318-319

41. The Crown had entered a Stay of Proceedings against Gregory Parsons in 1998 after DNA evidence proved that he had not murdered his mother. Mr. Parsons, with the assistance of AIDWYC, filed an application to set aside the Stay on the grounds that it had been entered by the Crown in bad faith. Mr. Parsons' affidavit filed in support of his application included the following:

> When I was charged with the murder of my mother in early 1991 I was 19 years old. I am currently 26 years old and have spent my entire adult life fighting this murder charge. I cannot express in words the living hell which I have endured during this period. Although I have done my best to lead a normal life that has proven impossible due to, among other reasons, media coverage surrounding this case. For example, I could not walk through the Avalon Mall without people pointing at me and whispering about me, and I could not obtain employment.
>
> I cannot express the frustration I have felt in not having people believe I am innocent. To be charged and convicted of a crime I did not commit is horrendous. Although my mother was a troubled woman and our relationship was not without problems she was still my mother and I loved her. Due to my ongoing court battle I have been denied the opportunity of properly grieving for my mother...
>
> Although DNA evidence confirms my innocence the Crown continues to act unfairly towards me, as indicated by the entry of a stay of proceedings. This stay of proceedings has left a cloud of suspicion hanging over my head and many members of the public have the impression that I must have had something to do with my mother's death.

42. Much has been written about the consequences to a person who has been convicted of a crime that he/she did not commit, and to society. It was best summarized by Commissioner Cory in his *Sophonow Report*:

> Wrongful conviction and imprisonment similarly results in the deprivation of this most basic freedom. It has dire consequences for the individual. The wrongfully convicted must experience the same sense of outrage, frustration, isolation and deprivation as those capriciously imprisoned by tyrants. The result is the same for both victims. It must have very serious consequences for the State when it wrongfully takes away from one of its citizens that basic and fundamental right to liberty. It demonstrates the failure of our system of justice. Failures lead to a lack of confidence in police and the courts. That, in turn, can lead to a fear that anyone may be wrongfully convicted and imprisonment. Society must do all that is humanly possible to prevent wrongful convictions and, when they occur, to adequately and fairly compensate the victim.

Report on The Inquiry Regarding Thomas Sophonow, p. 99

43. Professor Roach in his paper wrote:

> The general public, including those who interact with the wrongfully convicted, may need a more formal and official exoneration than a not guilty verdict to truly restore a person who has been wrongfully convicted to full standing in the community. Once a person has been convicted and imprisoned, something more than a not guilty verdict may be needed to fully and truly restore the presumption of innocence.

Mr. Justice Marshall referred in his testimony to a wrongly convicted person who has been subjected to a Stay as being in "stigmatic limbo". He continued:

> And there is no tragedy worse than a wrongful conviction, and it does happen. It happens to innocent people. And when that occurs, it requires the most stringent attention of the justice system. And the justice system that does not do that, and does not respond to it, the consequences are huge for the wrongfully convicted, but they are also huge for society itself. There is nothing that can call or bring the administration of justice into [dis]repute and go to shake the portals of our society more than a lack of confidence by the general public in the justice system. And when they see people having been wrongfully convicted, something has gone wrong, that something has to be determined.
>
> But it should not be dealt with -- if you are going to use a – I was given to using a stay in those instances anyway before a year, but there should be reasons given with respect to it. To me it's not good enough to say that the charge is deemed, you know, deemed as it didn't exist, because it does exist. And the people have it, have had to live with it. And society is going to have to live with it in the future with a loss of confidence in the justice system.

Professor Roach's Report relating to Paragraph 1(f) of the Order-in-Council at p. 36
Roundtable Discussion Panel, Sept. 18/06, p. 4923

44. We believe that past precedents have proven that the State cannot be trusted to do the right thing in a wrongful conviction case. In AIDWYC's experience, as soon as a wrongful conviction is alleged, the Crowns circle the wagons, they multiply in number, and every conceivable procedural impediment is raised. Crying 'Wrongful conviction!' in the legal process is like crying 'Fire!' in the theatre. How then can a declaration of wrongful conviction be obtained in the face of State intransigence, when it refuses to concede actual innocence? The history of wrongful convictions in Canada tells us that even post-conviction DNA results that demonstrate actual innocence, as in Greg Parsons's case, may not suffice. The issue has arisen in cases like those of Ronald Dalton in Newfoundland and Clayton

Johnson in Nova Scotia, cases in which no crime was ever committed. It has as well arisen in cases in which the identity of the perpetrator of a crime is in issue, as in the case of Jim Driskell and, as another example, David Milgaard at least until his DNA results. Practically speaking, as Professor Roach points out in his paper, there will always be "some evidence" (the quality of the evidence being a different issue) which connects a wrongly convicted person to a crime. As a consequence, even when the integrity of the conviction has been brought into question, despite the claimant having maintained his innocence for many years of imprisonment, the State usually refuses to acknowledge the person's innocence because of a continuing belief in guilt, a misguided desire to 'protect' the system, financial considerations, etc.. There is presently no mechanism in Canadian law to force the State to address a demand for an acknowledgment of actual innocence.

45. In 2005, Mr. Justice Marshall wrote a paper on the issue for an AIDWYC conference in St. John's, Newfoundland. He said:

> In any case, where egregiousness influenced the conviction, surely the wrongly convicted should be entitled to the same redress as the wronged whose factual innocence has been established by DNA or any other means. Both are re-cloaked with the presumption of innocence that was dissolved on conviction.
>
> In neither instance does the case for redress arise as a civil claim where the burden of proof lies on the proponent. Each case arises as a direct offshoot of a criminal matter. If considered innocent when criminal liability was being tried, it appears incongruous that the victim of a conviction tainted by flagrant error should not be similarly considered for purposes of redress. To do otherwise would appear to heap injustice on rank injustice.
>
> It is noted that the foregoing will not open redress in every case where convictions are overturned in the normal appellate process for error at any stage of the proceedings by agents or officers of the state. While it would extend to errors of all such representatives, including police and judiciary as well as prosecution, it is confined to instances where official inquiries have been deemed warranted, and where convictions were tainted by egregiousness. However, the possibility of further extension should not be foreclosed.

46. The problems addressed herein arise in two types of cases:

(a) Cases in which the applicant has always maintained his innocence and in which a Reference has been ordered by the Minister pursuant to his powers under section 696.3 of the *Criminal Code*.

(b) Cases in which the person concerned has always maintained his innocence, and in which his wrongful conviction has been quashed by an appellate court and a new trial ordered, or acquittal entered on appeal or at the conclusion of a new trial.

Examples of such cases are those of Guy Paul Morin (Ontario), Peter Frumusa (Ontario), Gregory Parsons (Newfoundland), Ronald Dalton (Newfoundland), Randy Druken (Newfoundland), Rejean Hinse (Quebec), Clayton Johnson (Nova Scotia), Thomas Sophonow (Manitoba) and, of course, James Driskell (Manitoba). It is them, and those like them to come, that a process in the form of an *Innocence Hearing* can finally set free.

47. Mr. Driskell's innocence was given a significant boost by Minister Cotler's statements to the media. They were of great comfort to him. The practice of the Minister's office has been to give reasons when it rejects an application for ministerial review, but not to give them when it allows an application whether by way of a Court of Appeal reference or by directly ordering a new trial. This is unfortunate. There seems to be no reason in principle why the Minister, like a Court of Appeal when it allows an appeal and quashes a conviction, cannot give reasons. The Minister does not have the power to acquit or exonerate an applicant but it may be that in some cases he would do that if it were within his power. It seems that, in light of what he said to the media, the Minister would have done this in Mr. Driskell's case if he had been able. The Minister should be urged to give reasons in all cases when he renders a decision on a Ministerial Review application.

Roundtable Discussion Panel, Sept. 18/06, pp. 4904 to 4912

48. On whom should the burden of proof lie at an *Innocence Hearing*? Professor Roach submitted in his paper that it should be on the claimant but agreed in the Panel discussion that he might reconsider his position in this regard. The claimant should not be the one who, usually years after the event, has to prove the negative. We submit that the onus must be on the Crown if it wishes to deny factual innocence. It is the Crown who initiated and carried on the prosecution in the first place. In these circumstances, it should fall on the Crown to establish on a balance of probabilities that a declaration of innocence should not be made.

49. Professor MacFarlane suggested that an *Innocence Hearing* should be a truth-seeking exercise. He said:

> ...it ought to be truth-seeking. I would caution against developing all sorts of evidentiary rules and procedural rules. This is an attempt to really get to the bottom of what happened here. So the objective, I believe, has to be truth-seeking.

We agree. Mr. Justice Marshall spoke of the onus being satisfied If egregious Crown conduct could be shown from the original proceedings. We agree. Our position was summarized in some of our comments to the Panel during its discussion:

> [We] agree with Professor MacFarlane's idea that it should be a truth seeking process, certainly, that's what our Association is all about. If it is a truth seeking process, it should take into account the presumption of innocence, it should take into account that something hasn't happened unless you have proved that it has happened, which effectively means the onus is on the prosecution once you allege a wrongful conviction. But to call it a truth seeking process is fine with [us], which brings us back to the issue of the onus, if you like. And I completely agree with Professor Quigley that it has to be an onus on the powers that be, and not the onus on the individual to try and prove that something didn't happen, as opposed to the onus being on the prosecution to prove that something did.
>
> .....
>
> The other feature that we think should play in this kind of thing that we are talking about is what Justice Marshall has talked of, and that is, it seems to us that you have to take into account the notion of fault on the part of the authorities, because that does arise in so many of these cases. The individual, for example, it may be far too late for him to be able to establish who actually committed the crime. It may be that, to take, you know, 20 years have passed, for example, Mr..Phllion's case, 37 years have passed and it is still going strong. Mr. Truscott's case 47, and it is still going strong. In other cases the prosecution, by that we mean the authorities as a whole, may not have preserved evidence. They may not have videotaped

> interviews, there should have been interviews, so we will never know quite what was said or how it was said. They may have destroyed evidence that would have been capable of producing DNA results. It seems to us whether fault or not, whether actual negligence or malfeasance exists, it seems to us that where that kind of circumstance exists that it should play a huge, if not decisive, role in any attempt by an applicant to establish actual innocence.

Roundtable Discussion Panel, Sept. 18/06, pp. 4975, 4996 to 5006

RECOMMENDATION 5-1

The Minister Should Give Reasons – The Minister of Justice is urged to give reasons for *all* decisions that he makes in response to an application for ministerial review under Part XXI.1 of the *Criminal Code*.

RECOMMENDATION 5-2

The Only Possible Use of the Stay Power under Section 579 of the Criminal Code – In a case in which the person has continued to claim innocence after his conviction, and his conviction is subsequently quashed whether by the Minister or an appellate court, and the Crown elects not to proceed with a new trial, the Crown shall elect to offer no evidence and ask for an acquittal to be entered unless the Attorney General is satisfied that a Stay of Proceedings is necessary because of a reasonable likelihood of additional incriminating evidence coming to light.

In a case in which an acquittal is entered, the Crown should consider apologizing to the person concerned in open court, and requesting the presiding justice to make an apology to the person on behalf of the administration of justice.

RECOMMENDATION 5-3

Federal and Provincial Study for an *Innocence Hearing* Model – A joint study should be undertaken at the Federal and Provincial levels for the creation of an *Innocence Hearing* model for persons who have been wrongly convicted.

50. Professor MacFarlane thought that a pilot project in Manitoba might be a good idea to get the ball rolling across the country for *Innocence Hearings*:

> It is often helpful to have an incubator to start off with. And I certainly have a preference for consistency across the country as a vision, but I can see some merit to starting on a smaller level, and then having the experience of that small pilot project which could then act as a basis for a larger approach.

Roundtable Discussion Panel, Sept. 18/06, p. 5010

RECOMMENDATION 5-4

A Pilot Project in Manitoba for an *Innocence Hearing* Model – A pilot project for an *Innocence Hearing* model should be set up by the Government of Manitoba in cooperation with representatives of Manitoba Justice and the defence bar, and other interested parties including a representative of the Association in Defence of the Wrongly Convicted (AIDWYC). Following are some proposals for guidelines for the model:

1. An innocence hearing shall be held at the request of a person who is seeking a declaration that he/she was wrongly convicted.

2. The person must have met a qualification threshold (see paragraph 46 *supra*).

3. The decision-maker (Commissioner) shall be a person approved by the claimant and Manitoba Justice.

4. The Commissioner will choose the procedure to be adopted at the hearing on a case by case basis.

5. The burden will be on the Crown to prove on the balance of probabilities that the claimant should not be found factually innocent.

6. In a case of past egregious Crown conduct which the Commissioner finds has substantially interfered with the claimant's ability to demonstrate his innocence, including the means to identify the actual perpetrator(s) of the crime, the Crown will presumptively be unable to meet its burden.

7. The proceedings will be conducted *in camera* unless the parties agree otherwise.

8. The Commissioner may hear evidence *viva voce* within his discretion. In such circumstances, the parties will have a right to attend, and the Commissioner may, in his discretion, allow the opposing party to cross-examine witnesses.

9. Funding should be provided to the claimant though the Legal Aid Plan.

10. If a declaration of wrongful conviction is made, the Commissioner shall announce it in public. Otherwise, he will transmit his decision in confidence to the parties.

11. If a wrongful conviction is found, the Commissioner may make a recommendation for compensation.

6. Addressing Problems in the RCMP Laboratory System

51. The RCMP *Forensic Laboratory Services* advertises itself on its website as follows:

> Forensic Laboratory Services is an integral part of the RCMP's National Police Services (NPS) program. NPS supports the law enforcement community with data, knowledge and technical tools in order to contribute to public safety. Forensic Laboratory Services are available to Canadian police agencies, courts and government agencies in most provinces (Ontario and Quebec have their own provincial forensic laboratories).
>
> Laboratory analyses and examinations are conducted on evidence from crime scenes, reports are issued and expert court testimony is given on the results obtained and on the conclusions which might be formulated on the basis of these results. New and advanced forensic methods are developed through research.
>
> Forensic Laboratory Services consists of approximately 370 forensic scientists, technologists, and administrative personnel. Services are delivered through six sites across Canada. A laboratory is located in Vancouver, Edmonton, Regina, Winnipeg, Ottawa, and Halifax. The investigator's first point of contact is the Case Receipt Unit. The National DNA Data Bank is located in Ottawa.

> Each RCMP Forensic Laboratory is accredited to the international quality standard ISO 17025. This exacting process, carried out by the Standards Council of Canada, provides formal recognition that a laboratory is competent to perform specific tests.
>
> Working as a team, Forensic Laboratory Services aims to provide state-of-the-art service and forensic science capabilities in a diverse range of scientific disciplines:
>
> - Biology
> - Bureau for Counterfeit and Document Examinations
> - Chemistry
> - Case Receipt Unit
> - Evidence Recovery Unit
> - Explosives
> - Firearms and Trace Evidence
> - Toxicology Services
>
> http://www.rcmp-grc.gc.ca/fls/home_e.htm

52. *Forensic Laboratory Services* played a major role in the Crown's case against Mr. Driskell. Through its employee Mr. Christianson it provided the only forensic evidence that linked Mr. Driskell to Mr. Harder's murder. In 2002, that forensic evidence was proved to be disastrously wrong. From that point on, no one had any doubts that the post-conviction mtDNA results proved that the three hairs retrieved from Mr. Driskell's vehicle, that had been said by Mr. Christianson to be the same as those of Mr. Harder such that a chance of random match was 'very small', were not from Mr. Harder. Manitoba Justice officials presumed it, Mr. Driskell's counsel presumed it, the media presumed it, and Mr. Justice Scurfield presumed it in his reasons for releasing Mr. Driskell. In these reasons, Scurfield J. focussed on the importance of the post-conviction results:

> THE FORENSIC EVIDENCE
>
> Tod Steven Christianson was called as a hair and fiber expert on behalf of the Crown. He testified that three hairs were found in the back of Mr. Driskell's van that matched the hairs that came from Mr. Harder's head. This evidence was important because it supported the evidence given by Mr. Zanidean and Mr. Gumieny. In effect, it was used to support or rehabilitate the evidence of witnesses whose credibility was suspect. They testified that Mr. Driskell had told them that he intended to kidnap and kill Mr. Harder. One of the methods for executing this plan involved using his van. Mr. Driskell has always denied the fact that Mr. Harder had ever been in the van.

> Mr. Christianson told the jury that he was able to observe 20 characteristics in a hair. He said that when he examined the hairs from Mr. Harder's head and those found in Mr. Driskell's van, they were "exactly within the range" and there were "no variations". He told the jury that the chances were not very high that these hairs were not from the same person. Quite properly, the trial judge, in his charge to the jury, summarized this evidence by saying that the chances were small that the hairs came from someone other than Mr. Harder. Taking his evidence as a whole, the impression that this expert left with the jury was that Mr. Harder had probably been in Mr. Driskell's van.
>
> Surprisingly, indeed perhaps shockingly, the DNA evidence indicates that the three hairs, which Mr. Christianson examined, were from three different people and none of those people were Mr. Harder. Whether this is a comment on Mr. Christianson's skill or on the science itself does not matter for my purposes. Suffice it to say that his testimony was invested with the aura of science. Moreover, it was used by the Crown attorney in his final address to the jury in a very skillful manner to support the evidence of Mr. Zanidean and Mr. Gumieny.
>
> . . . . .
>
> In my opinion, there is a high degree of probability that the new evidence would have been admissible at the trial of this matter if it had been available and that it might reasonably have affected the result. Thus, I have very serious concerns as to the reliability of the conviction. In so saying, I point out that if this were a simple appeal of the conviction, the court's focus would be on whether the appellant has demonstrated by the new evidence "a reasonable possibility that the verdict might have been different". See *R. v. Dixon*, [1998] 1 S.C.R. 244, and *R. v. Taillefer.* In that regard, the DNA evidence alone is sufficient to lead me to this conclusion. It proves that a material piece of evidence upon which the jury may have relied was wrong.

R. v. Driskell (supra) at 12-14

53. The first hint that the *Forensic Laboratory Services* might not accept the validity of the mtDNA results came in the form of a letter dated August 14, 2006 from their counsel Mr. Gates. In the letter, Mr. Gates urged that the Commission should hear testimony from an mtDNA scientist to:

> ... assist the Commission to assess (and possibly resolve) the apparently inconsistent results obtained by the RCMP Crime Lab Hair and Fibre Section and the UK independent lab, respectively.

This was the first time the suggestion had been made by anyone that the "apparently inconsistent results" needed to be "resolve[d]". Until then, everyone, including Manitoba Justice, had assumed that the resolution was a simple one – the mtDNA results excluded

Mr. Harder as the source of the three questioned hairs, a finding that the discredited business of hair microscopy could not possibly refute.

Letter dated Aug. 14/06 from Mr. Gates to Commission Counsel; *Book of Documents*, Tab 6

54. Mr. Gates letter continued as follows:

> My client has asked me to write to you to urge you to reconsider your apparent decision in this regard. Specifically, my client has asked me to convey to you the concern that the Commissioner and other parties appearing before the Commission may, in the absence of explanatory expert evidence, confuse mtDNA with nuclear DNA and associate the high power of discrimination of nuclear DNA analysis with the mtDNA results obtained in this case.[2] The issues of contamination prevention and proper removal of the mounting media from the hair prior to mtDNA analysis should, we suggest, be fully explored in order to ensure that there is a full and proper consideration of both scientific techniques. My client is concerned that, absent a proper scientific explanation, the Commissioner will be left with no option but to conclude that the mtDNA evidence is "right" and the microscopic hair comparison evidence is "wrong". We are of the view that this possible result would be a disservice to the Commission.

The 'client' to whom Mr. Gates was referring was the *Forensic Laboratory Services* as became clear in the penultimate paragraph of the letter:

> I would simply add that Mr. Christianson is not an expert in DNA. While he had some training relative to nuclear DNA, he is not an expert in this area. Moreover, the RCMP Forensic Laboratories do not conduct mtDNA testing. As such, Mr. Christianson is most certainly not considered ***by my client*** to be an expert in this form of DNA testing and is not authorized to offer any opinion or information on the mtDNA testing conducted in this case.
> (emphasis added)

Letter dated Aug. 14/06 from Mr. Gates to Commission Counsel; *Book of Documents*, Tab 6

55. Counsel for Mr. Driskell commissioned a report on the 2002 mtDNA typing by the *Forensic Science Services* in the United Kingdom from Dr. Terry Melton of *Mitotyping Technologies* in Pennsylvania. In a letter dated September 8, 2006, she advised as follows:

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[2] The difference between the discriminatory powers of nuclear DNA profiling and mtDNA profiling is relevant to ***inclusionary*** results. So long as more than one allele in mtDNA typing is different, ***exclusionary*** mtDNA profiling results and nuclear DNA profiling results are equally reliable and equally certain.
See Dr. Melton's report dated Sept. 8/06; *Book of Documents*, Tab 6

> By perusing the final report of Mr. Bark, I can conclude that, based on the data I have access to, the contributor of the grave hairs (and his maternal relatives) is clearly excluded with 100% certainty as the donor of the three questioned hairs. FBI guidelines direct that two or more mtDNA sequence differences between samples be interpreted as an exclusion; this is a protocol followed by all mitochondrial DNA laboratories (including North American and European). As stated by Mr. Bark, there are four, nine and five differences between the grave hair samples and the #5, #13, and #29 questioned hairs, respectively. FSS protocol in 2002 was apparently to increase the degree of certainty of exclusion as the number of DNA base differences increases; however, by current generally accepted scientific principles, two or more differences constitute an exclusion.
>
> I next address Mr. Gates's request to examine "the issues of contamination prevention and proper removal of mounting medium prior to mtDNA analysis". For a single known hair sample, Mr. Bark reported the presence of minimal contamination in a negative control that did not affect the final result on the sample, Based on this observation, it is only reasonable to conclude that other instances of contamination would also have been documented in the report if present. Because there was none, there is no further evidence of contamination that would cause doubt as to the conclusions reached in the report.

Dr. Melton's letter was immediately forwarded to the Commission.

Letter dated Sept. 8/06 from Dr. Melton to Mr. Lockyer; *Book of Documents*, Tab 6

56. On September 12, 2006, Commission Counsel wrote to Mr. Gates, and advised him that it was their opinion that no further information was needed to supplement the record – the mtDNA results were self-explanatory and conclusive. Mr. Dawe added:

> Accordingly, it appears to us that the Commissioner should have no particular difficultly interpreting and understanding the significance of the FSS mtDNA Report. Of course, if you or your client disagree and believe that the Commissioner will require further information in this area, you are free to tender additional documentation or direct him (and us) to the appropriate published sources.

Mr. Gates's client did not take him up on either of these suggestions so nothing was forthcoming in these regards from the *Forensic Laboratory Services*. Dr. Melton's report is the only additional documentation, and counsel for Mr. Driskell provided it.

Letter dated Sept. 12/06 from Commission Counsel to Mr. Gates; *Book of Documents*, Tab 6

57. This, then, was the situation when Mr. Tod Christianson testified before the Commission on September 18, 2006. Mr. Christianson, himself trained and qualified as an

expert in nuclear DNA testing, put up the 'defence' anticipated in Mr. Gates's letter of August 14.. He purported to be unable to express an opinion on the validity of the mtDNA results because "I'm not an expert in that field". Mr. Gates then intervened and presented the position of his client in the following terms:

> We are not saying that the microscopic hair evidence trumps the mitochondrial DNA evidence. Our position is that there are inconsistent results from these two scientific processes. And my position with Mr. Code from the very beginning has been that the inconsistency requires explanation, particularly for the non scientists who are the participants in this hearing, including with great respect to you, sir, your own role as the Commissioner. We are not scientists[3], we are lawyers. And my position with Mr. Code is that we need help with this.
>
> . . . . .
>
> We don't challenge the results. But the results are, on their face, inconsistent with the evidence, which are the results of Mr. Christianson's microscopic hair analysis work in 1991. And we say that inconsistency requires some further examination, because we say it would be overly simplistic to take a position that one of those tests is right and the other one is wrong, that this is necessarily a situation of black and white.

Mr. Gates did not explain his client's failure to follow-up on either of Commission Counsel's suggestions in his September 12 letter. Mr. Driskell's counsel next sought clarification of the witness's position. Mr. Gates then consulted with Mr. J. Bowen, the Director of the *Laboratory*. This was captured in the following exchange:

> MR. LOCKYER: Could Mr. Gates answer this one really simple question? Is Mr. Gates prepared to acknowledge, on behalf of Mr. Christianson, that the three hairs that were seized from Mr. Driskell's van and said to microscopically match those of the deceased, in fact, most definitely, without qualification, did not come from the deceased. Is he prepared to agree with that proposition? If he is, then that changes --
>
> MR. GATES: Just one moment, sir.
>
> MR. LOCKYER: Because I'm going to read from a letter he wrote which says otherwise.
>
> MR. GATES: No, sir, I'm not prepared to say that.

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[3] Mr. Gates was, of course, receiving instructions from scientists.

In this way, the Director of the *Forensic Laboratory Services* took the position, more than 3 ½ years after the results from the *FSS*, that the *Laboratory* was not prepared to accept that the mtDNA exclusionary results were conclusive. For Mr. Driskell, this was a seminal moment at the Inquiry, to hear Mr. Christianson,and the *Laboratory*'s Director through his counsel, take the position that the hairs found in his van could ***still***, in their opinion, have come from Mr. Harder. If they did, of course, then Mr. Driskell was Mr. Harder's murderer. Mr. Christianson's testimony had come back to haunt him. It is legitimate to ask whether either party had given consideration to the consequences for Mr. Driskell of their belated claims.

Evidence of Christianson, Sept. 18/06, pp. 5071-5103

58. Thereafter, counsel for Mr. Driskell wrote on September 25, 2006 to Mr. Gates:

> Further to our discussion last week, could you please provide me with details of events that led up to the position taken by the RCMP laboratory's at the Inquiry on the Forensic Science Service's mtDNA results. I would very much like to know:
>
> - Who participated in the decision-making exercise?
> - What form did the decision-making process take? Are their minutes of the process?
> - What was the actual decision?
> - How 'high' did the process go?
> - What investigations, if any, were conducted after the DNA results in, first, Driskell, then Starr and then Unger and Sanderson?

Mr. Gates first responded on October 17, 2006. He wrote:

> Dr. Bowen responded quickly and cautiously on September 18th to a somewhat unexpected question couched in terms of absolutes - "most definitely and without qualification". Upon reflection, Dr. Bowen welcomes the opportunity to offer a more considered response to an obviously important question. As such, he advises me that the position of the Forensic Laboratory Services is that the mtDNA evidence is correct and that the 3 hairs came from someone other than Perry Harder.

> Scientists, especially forensic scientists, do not like to deal in absolutes. Even today, in the much more powerful nuclear DNA analysis there are qualifications surrounding a "match" i.e. in the absence of identical twins, in the absence of a bone marrow transplant etc. [4] that must be stated on a case by case basis. In the case at hand, even in his report, Mr. Bark makes the proper statement that "these findings provide extremely strong support for the proposition that the hairs from the van originated from the three individuals, none of whom was Perry Harder". To the forensic scientist this is a well-considered statement that does not speak in terms of "absolutes". Dr. Melton simply parses Mr. Bark's report and declares that the exclusion is 100%. As a forensic scientist, Dr. Bowen advises me that he would have preferred a quick review of the original case notes to ensure that the notes fully support the findings in Mr. Bark's report.

The *Laboratory*'s new position is welcome but it is difficult to balance Dr. Bowen's need for "reflection" against the contents of Mr. Gates's August 14, 2006 letter which set out the *Laboratory*'s position more than a month ***before*** the issue was raised during Mr. Christianson's evidence. In all these circumstances, the *Laboratory* might consider making a direct apology to Mr. Driskell for its earlier position.

Letter dated Sept. 25/06 from Mr. Lockyer to Mr. Gates; *Book of Documents*, Tab 6
Letter dated Oct. 17/06 from Mr. Gates to Mr. Lockyer; *Book of Documents*, Tab 6

59. Mr. Gates responded further on October 24, 2006 and has helpfully provided the composition and mandate of the *Forensic Laboratory Services Advisory Group*. He further enclosed a letter from Dr. Bowen dated October 19, 2006 in which he recounted the *Laboratory*'s review of Mr. Christianson's work in Mr. Driskell's case after the release of the 2002 mtDNA results. Dr. Bowen did not respond to the request for a recounting of the *Laboratory*'s response upon being informed of the DNA results in the *Unger*, *Sanderson* and *Starr* cases.

Letter dated Oct. 19/06 from Dr. Bowen to Mr. Gates; *Book of Documents*, Tab 6
Letter dated Oct. 24/06 from Mr. Gates to Mr. Lockyer; *Book of Documents*, Tab 6

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[4] At one point in his testimony, Mr. Christianson attempted to suggest that nuclear DNA exclusion was not necessarily an exclusion, suggesting that chemotherapy could cause "mutations" in a person's DNA profile. As far as we know, there is no scientific basis for this suggestion.
See Evidence of Mr. Christianson, Sept. 18/06, 5100 to 5102; *Book of Documents*, Tab 6

60. The history of hair microscopy comparison demonstrates the cultural problems that exist in the RCMP Laboratory system. Dr. Barry Gaudette became the continent's primary proponent of the value of hair microscopy comparison and came up with the 1 in 4,500 figure for a false match based on highly suspect so-called empirical methods. The experience in Manitoba derived from the cases of Jim Driskell, Robert Starr, Robert Sanderson and Kyle Unger exposes the 'science' as being little more than a masquerade for science. As Peter Neufeld explained in the Panel Discussion, it was never really a science in the first place.

61. The cryptic note in Dr. Bowen's letter of October 19, 2006 to Mr. Gates that the internal review of Mr. Christianson's testimony in 1991 concluded that it was "unremarkable" does not do credit to the cultural problems evident in his evidence. The 'very small' comment, and other descriptive phrases that Mr. Christianson used, may have been crucial to the jury's decision in the case, and was likely viewed by them, and Mr. Christianson, as the most important component of his testimony. Mr. Christianson's overreaching in his trial testimony was noted by *counsel for AIDWYC* more than a year *before* the December, 2002 mtDNA results. In a letter dated September 7, 2001 to Mr. Finlayson, AIDWYC's counsel wrote:

> AIDWYC'S Concerns
>
> Our position that the RCMP Laboratory is not the appropriate choice for DNA testing can be briefly summarized as follows:
>
> - Mr. Christianson's trial evidence is subject to serious criticism because he claimed that a value could be given to his results significantly beyond the limited probative value that can be ascribed to microscopic hair comparison work. In these circumstances, the Laboratory in which I understand he still works may be seen to have a stake in the outcome of any DNA analysis.
>
> . . . . .

On January 20, 2003, six weeks after the mtDNA results, AIDWYC's counsel again wrote to Mr. Finlayson. After quoting extracts from Mr. Christianson's testimony at Mr. Driskell's trial, counsel continued:

> This testimony [of Mr. Christianson] was, with respect, unacceptable. No conscientious hair examiner would make claims like this for the value of hair microscopy comparisons. This raises the question – Why would Mr. Christianson have extolled his results beyond the limits of his profession? Were external pressures placed on him by the investigators and/or the Crown to venture well beyond his professional expertise?
>
> The mitochondrial DNA results are compelling in this regard. Not only is it now known that none of three hairs came from Mr. Harder; it is also now known that each hair came from three different as yet unidentified individuals. Mr. Christianson's results and his testimony demand an explanation. In our opinion, it is not enough for him to simply claim to have been in error. His opinions, now shown to be grossly in error, were put too strongly for that.

The complacency implicit in the RCMP review of Mr. Christianson's testimonial overreaching is very troubling.

Letter dated Sept. 7/01 from AIDWYC counsel to Mr. Finlayson
Letter dated Jan. 20/03 from AIDWYC counsel to Mr. Finlayson

62. Mr. Christianson was recorded as telling Commission Counsel in his interview:

> There was nothing particularly distinctive about the known hairs in this case, and Christianson considered the three comparisons referred to in his report to be "Positive" comparisons, but not "Strong Positive" comparisons within the meaning of [the Methods Manual guidelines].

He was asked at the Inquiry:

> Q You didn't tell the jury that in Mr. Driskell's case, did you?
>
> A I don't recall exactly what --
>
> Q I can assure you that you didn't. Why not?
>
> A Well, the hairs are still a match, and it's like a threshold, and the match, or the consistent conclusion does not rely on there being some kind of distinctive individualizing features.
>
> Q Don't you think, sir, that the jury trying Mr. Driskell for first degree murder was entitled to know that there was nothing particularly distinctive about the three hairs in the van, so the three comparisons were only positive, rather than strong positive, in your own discipline. Don't you think they were entitled to know that?

A Well, I worded my conclusion in a way, in this term, or this guideline, I worded my conclusion as a positive. So I did indicate that to them.

Q You worded your conclusion in terms of "exactly" is a word you used, do you remember that? I'm going to take you through these words?

A Yes, I understand.

Q Those kind of words. There is a very small chance that it wasn't Mr. Harder's hairs. Do you remember that?

A Yes.

Q You never said to the jury, though, that unlike some cases, all I have here is [a] positive comparison because there's nothing particularly distinctive about the hairs?

A No, I didn't say that.

Q You never gave a hint of that in your evidence, did you, sir?

A No.

Q Why not? You're the expert. The jury needs to know that, don't they, sir?

A Because I declared the hairs a match, they are consistent, and my conclusion stands whether I use that terminology or not.

Q Don't you think as a forensic scientist, sir, you are obliged to give the jury all the information, not just the information that helps the prosecution, but also the information that might assist the defence?

A I go to a trial to present my evidence and tell the truth. I can't always control the information that comes out in the trial.

Q You swear you're going to tell the whole truth, sir?

A Yes, and I answered the questions.

Q Well, the questions that were asked of you, sir, were to give your assessment of the hairs that were found in the van and compare them to those of Mr. Harder. And you did, but you failed to tell the jury what you told Commission Counsel 15 years later. And I simply can't imagine why you'd do that?

A I'm conducting an interview 15 years later with a couple of lawyers and we are discussing the nature of the evidence. I am happy with the way the evidence was presented in Driskell. I think it was as good as I really could have done it, and I don't see how I can be taken to task on the fact that my statement, 15 years, is not quite identical to what I said in court previously.

Mr. Christianson, who still works at the Manitoba Laboratory in a senior administrative position, also criticized the kind of language that was recommended for use by forensic scientists at the *Morin Inquiry*.

Evidence of Mr. Christianson, Sept. 18/06, pp. 5117 to 5121
Statement of Mr. Christianson to Commission Counsel at p. 15

63. The testimony of Mr. Christianson, and the positions that it reflects, and the involvement of Dr. Bowen, the *Laboratory*'s Director, at the Inquiry suggests cultural bias within their system to a remarkable and unexplored degree. It is deeply disturbing and transcends Mr. Driskell's case. The *Laboratory*'s inability to accept responsibility for its past work, and its refusal to acknowledge, without scientific basis, that the hair microscopy was conclusively wrong and the exclusionary mtDNA results were conclusively right, calls into question the integrity of the *Laboratory* as a whole.

64. These problems were not identified in Mr. Lucas's Report but were recognized by the members of the *Forensic Sciences Panel*. Dr. Lucas was, perhaps understandably, somewhat reluctant to accept the facts as they had occurred but, when asked to assume them as such, said:

> ...then I would have considerable concern about all of the levels within the organization that were involved in that decision.

Dr. Lucas was further asked:

> Q. Dr. Lucas, can I -- I sort of alluded to this but I just want to flesh it out a little better. Can we assume that the decision that resulted in counsel's response, Mr. Gates' response on Tuesday, was as a result of a decision made by higher levels of management within the RCMP, and was not a decision that stopped at the level of Dr. Bowen, a DNA scientist I might say, who is now the director of the lab. If that were the case, would your concerns be greater in the circumstances?
>
> A. I have always heard that you shouldn't respond to hypothetical questions, but I never listened, so I will respond to it. Yes, clearly you would have greater concern.

Mr. Neufeld gave his opinion:

> The scary thing is, I guess, when an institution then takes a position that, despite being confronted with overwhelming and irrefutable scientific data which says that these hairs did not belong to the deceased, nevertheless for whatever reason decides to maintain that position, is a cause of grave concern. Because what it means is that instead of trying to bring people to the table and move constructively and pro-actively to sort of make things better, there is a defensiveness that controls the process. And that's just not good. It is not good for forensic science, it is not good for criminal justice, it is not good for the people of Canada or the people anywhere. So you don't want that dynamic, it is just not healthy. And it is dangerous, because what it does is it can result in erroneous results in the future being utilized in all kinds of situations which allow innocent people to be convicted and allow guilty people to get off, just because you are defending a result for the sake of defending a result. It is, in fact, why there is a movement afoot in a lot of other jurisdictions now to have outside oversight for different forensic sciences or forensic science laboratories, because the feeling is that if other people are involved who are truly independent, who don't have the same stake in the outcome, there is a greater opportunity to make sure that that kind of culture doesn't take hold.
>
> And, frankly, that seems what you are really addressing here is kind of an institutional culture where you dig your heels in and you circle the wagons, as opposed to saying, you know what, we were wrong and we should move forward from that and make things better.

Glidewell L.J. made the same points in the Court of Appeal decision in Judith Ward's case, a case in which forensic scientists had played a key role in her wrongful conviction for 13 IRA-related murders:

> For the future it is important to consider why the scientists acted as they did. For lawyers, jurors and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisans. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process. Forensic scientists employed by the government may come to see their function as helping the public. They may lose their objectivity. That is what must have happened in this case.

It should be noted that Mr. Bowen's recent letter to Mr. Gates did not respond to the questions raised in Mr. Lockyer's September 25, 2006 letter regarding who participated in the decision-making process, how 'high' it went, whether minutes were kept, and what the actual decision was.

Forensic Science Panel, Sept. 21/06, pp. 5698-5707
R. v. Ward ([993] 1 W.L.R. 619 (C.A.)

65. The *Forensic Science Panel* was asked whether it was time for a national audit of cases in which hair microscopy comparisons had been used to incriminate, in the same manner as the Province of Manitoba had conducted a successful audit in 2003-2005.[5] The *Panel* approved the idea. Dr. Mayer provided an important contribution in this regard:

> ... having gone through this ourselves at the Centre of Forensic Sciences, having seen other jurisdictions in fact try to deal with issues of review of cases, or turning back the clock to determine whether improper science was carried out, the only comment that I can offer at this point, not to the issue of whether this should be undertaken, but once a decision is made that a review is necessary, I would suggest that forensic science laboratories, any self-respecting forensic science laboratory should not only fully cooperate, but become a partner in this. They should in fact be part of what moves the process forward. That's critical, and that I think at the end of the day nets much better results. I've seen situations where a siege mentality develops. And that's very destructive at the end of the day. And it serves no one's purpose, and certainly not the individual that is behind bars. So I say be part of it, be part of the solution because it always moves things a lot more effectively.

We agree entirely with these sentiments.

Forensic Sciences Panel, Sept. 21/06, pp. 5644-5645
See Forensic Review Committee (Manitoba), *Terms of Reference*; April 23/03; *Book of Documents*, Tab 7

66. The issue of whether the *Laboratory* should continue to be affiliated with the RCMP was raised with the *Forensic Sciences Panel*. Some of the panelists agreed that, at the very least, its affiliation created a problem of perception. We submit that this issue needs further consideration.

RECOMMENDATION 6-1

An Independent Review of the RCMP *Forensic Laboratory Services* – An independent review Committee of interested parties should be established to examine and make recommendations for the improvement of the system of RCMP *Forensic Laboratory Services* across Canada. Its mandate should include both the

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[5] The *Advisory Board* for the Centre of Forensic Sciences, and the Attorney General of Ontario, are presently considering a comparable audit for historical cases in the Province of Ontario.

scientific practices and the institutional culture of the *Laboratory*. The same Committee should consider whether it is in the public interest, and the interests of the administration of justice, for the *Laboratory* to move out of the jurisdiction of the RCMP.

RECOMMENDATION 6-2

A National Audit of Hair Microscopy Comparison Cases – A national audit of cases in which the accused was convicted of murder, and the prosecution rested, in whole or in part, on hair microscopy evidence presented by analysts employed by the *Forensic Laboratory Services*, should be conducted. A Committee should be established, nationally or province by province, to examine all cases of culpable homicide:

- prosecuted in Canada during the past 20 years
- in which the Crown tendered and relied upon microscopic hair comparison evidence
- where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

67. The probative value of hair microscopy evidence is minimal; in one study it was concluded that the likelihood of hair microscopy producing an accurate result was no better than chance. The prejudicial effect of hair microscopy evidence is considerable. It has produced documented miscarriages of justice, Mr. Driskell's case being but one. It is unknown how many other miscarriages have not yet been uncovered. Hence the critical need for a national audit. The *Forensic Science Panel*, with the exception of Dr. DeForest, himself a hair microscopist, gave the profession no endorsement. Peter Neufeld was particularly scathing about its misuse in criminal courts noting that

> ... at the Innocence Project, we have now had, I guess as of currently, probably two dozen cases where people were initially included through hair microscopy and ultimately exonerated to the satisfaction of all parties involved through post-conviction DNA testing. We have gone back and looked at those cases, we have deconstructed them, and I think there are several conclusions that are relevant to the point that you are asking us about.

One of these conclusions was that hair microscopy comparison evidence had no place in a court of law. Commissioner Kaufman questioned its continued use in his *Morin Report*. The Ontario Court of Appeal has questioned its admissibility in *R. v. Bennett*. Even the RCMP *Forensic Laboratory Services* have phased out its use. The time has come to eliminate hair microscopy comparison evidence from criminal courts when it is used to incriminate. As Dr. Melton said in a 2005 paper that she wrote:

> Since recently published reports on hair microscopy showed that paired microscopic evaluations and mitochondrial DNA examinations are inconsistent approximately 10% of the time (17 [hairs in total]), the need to perform mtDNA analysis in conjunction with microscopic hair analysis has never been greater. We have observed cases where the microscopic evaluation was discordant with respect to the mtDNA analysis; however, we have observed many cases in which the microscopic evaluation was concordant with respect to the mtDNA. In these cases, a microscopic evaluation performed by an experienced hair examiner was extremely useful in limiting the number of hairs which were then recommended for DNA testing. ***Therefore, we advocate hair microscopy as an adjunct to DNA testing, if the examiner is experienced and understands the limitation of this largely descriptive science.*** Because of the high cost of mtDNA analysis, it is likely that hair microscopy will long be a useful tool for screening large numbers of hairs prior to submission and we urge the continued training and availability of hair examiners to aid the DNA testing community. (emphasis added)

The Commission on Proceedings Involving Guy Paul Morin at p. 311-324 (Recommendation 2)
R. v. Bennett (2003), 179 C.C.C. (3d) 244 (Ont.C.A.)
Melton et al: "*Forensic Mitochondrial DNA Analysis of 691 Casework Hairs*", 2005 SOJ Forensic Sci. 73 at p. 80
Forensic Science Panel, Sept. 21/06, pp. 5584 to 5585

RECOMMENDATION 6-3

> The Elimination of Hair Microscopy Comparisons from the Criminal Trial – Hair microscopy comparison evidence does not have the necessary probative value to be admissible at a criminal trial, and its value in the criminal justice system should be limited to its use as an investigative tool.

A FINAL RECOMMENDATION

68. The system for uncovering wrongful convictions failed Mr. Driskell. Because of the nature of the ministerial review process, he had to wait 11 years until his application was filed by AIDWYC on his behalf. This is not to be critical of the *Criminal Conviction Review Group*'s (*CCRG*) work on his case. David McNairn, and the *CCRG* as a whole, did first-rate work on his application, discovered many facets of the case that had not been made available to AIDWYC, and worked with commendable speed. It is the ***process*** which is at fault. Chief Ewatski raised the issue of his own accord during his testimony before the Commission:

> Q. Just before the break, Chief Ewatski, we were talking about the portion of your statement. where you talked about wanting the process followed, or the process followed I think were your words. And perhaps you can explain your thinking in that?
>
> A. I think when I made reference to following the process, it was certainly in relation to the application of, I guess back then it would be a 690, under section 690 of the Criminal Code. It is now a 696 application to it. You know, in the early discussions we had with Mr. Driskell's counsel, we certainly -- I certainly voiced my opinion that the Winnipeg Police Service would follow that process and if an application was filed that we would cooperate fully with it. I guess --
>
> Q. Now -- sorry, go ahead. I don't want to cut you off.
>
> A. No. I think that, if I may, Mr. Commissioner, I would like to comment on that itself.
>
> THE COMMISSIONER: Absolutely, absolutely.
>
> THE WITNESS: Because there was an interaction between Mr. Lockyer and myself relative to that process, and I think he used the term catch 22, which I agreed that he was in a catch 22. And quite frankly, I could certainly understand the frustration that Mr. Lockyer had and, more importantly, Mr. Driskell's frustration relative to this matter. And I guess it leaves me with the thoughts of whether or not the process in place right now, under section 696 of the Criminal Code of Canada, really serves us well, the citizens in this country. And I think that we have learned a lot as a result of -- at least, I have learned a lot as a result of my involvement in this matter itself. And I would really question whether or not the process that's in place right now, a process that I followed, really does serve everyone well in this country and, most importantly, people who have felt that they have been wrongfully convicted.
>
> THE COMMISSIONER: What would you do to change it?

THE WITNESS: Well, I think I would very popular if I could come up with an answer that would meet everybody's needs. I think that having an inquiry such as this to look at the issues surrounding that type of process would be a good first step to try to identify how it could be improved and changed. I am certainly well aware of the frustration and the angst that this has caused Mr. Driskell and Mr. Lockyer, and probably everybody. Because when you talk about a wrongful conviction, we are talking about the erosion of our confidence in the criminal justice system. And I think that it's incumbent on all of us who are players within that criminal justice system to try to find something that's much more palatable, something that is much more -- that would serve everybody's purposes much better. I wish I had a silver bullet to this, but I think we are probably going in the right direction in terms of trying to address these issues.

Evidence of Ewatski, Sept. 20/06, pp. 5447-5450

69. Mr. Schille's testimony was revealing in this regard. During questioning about his disclosure of the "correspondence file" to Mr. Libman in the spring of 2003, he was asked:

Q. So internal correspondence came to include some external correspondence you didn't disclose as well.

A. Well, as I've said, I have used the terminology "correspondence" but there were a lot of things on that internal correspondence file that technically weren't correspondence such as newspaper clippings. And as I have already said, we are attempting to cooperate prior to you perfecting your application. And it was always our intention, as a department, to forward everything lock, stock and barrel to the criminal conviction review group and have them disclose it as they saw fit. That would have been, in our view, that would have been our preference as the correspondence sets out.

Q. Well, okay. My silence in that regard isn't meant to mean that I agree. You say the correspondence sets out, back in these days, that you only want to deal with the Federal Department of Justice and not counsel?

A. Well, the correspondence between our department and AIDWYC sets out we would prefer that you file your application. And the correspondence, your response to that, was that we can't really bring an application alleging a wrongful review if we haven't had access to the file to review it fully to perfect our application.

Q. Catch 22?

A .Yes.

Q. And not an unreasonable catch 22?

A I don't disagree with you, Mr. Lockyer, but you're asking me why this was withheld. And it wasn't withheld in the sense you were never getting it. Our preference would have been to

have you file your application and we could have simply -- it would have been a simple matter for us to send all the matter down to the criminal conviction review group for reasons which I agree are not unreasonable. You were not prepared to do that. We were attempting to cooperate. And again, at the end of the day, everything was going to go down there for the criminal conviction review group. The only thing that was not granted access to was the internal correspondence file and my review at the time.

Q. From a systemic point of view, Mr. Schille, would you agree that that's not a satisfactory way to deal with a claim for wrongful conviction, to simply tell the claimant that file your application and we'll send the stuff to Justice. That's not a satisfactory way of dealing with a claim?

A. Well, I don't set policy, Mr. Lockyer. But one of the concerns we had, and that's part of the reason why the most senior members of our department were involved in this, as one of the initial allegations of wrongful conviction, it posed questions of policy on a larger scale. I appreciate AIDWYC takes the position that they are fairly discriminating given you are an unfunded organization, that you're very discriminating about which cases you accept. But in terms of what approach might be taken with other individuals, our concern very much was whether or not we had an obligation to reconstitute modern *Stinchcombe* era disclosure in cases that were pre-*Stinchcombe* such as this one. So I appreciate your consideration is particular to your client at the time. Our considerations were on more global scale.

Evidence of Mr. Schille, Sept. 28/06, pp. 6090 to 6092

70. The *CCRG* responds to ministerial review applications and investigates them. It does not (save for very exceptional cases[6]) respond to a ***simple claim*** of wrongful conviction by undertaking a thorough review of the case. This is not surprising since the *CCRG* works within the Federal Department of Justice. A wrongful conviction claimant, who will in most cases still be serving his sentence in prison, needs counsel, or the intervention of an organization like AIDWYC, to be able to present his case. The creation in the United Kingdom of the *Criminal Cases Review Commission* (*CCRC*) solved this problem in that country. It has the sole power of referral to the Court of Appeal. The *CCRC* itself adopts an inquisitorial mode and takes a case once a wrongful conviction claim is made, and performs counsel's role as well as the adjudicative role. It has proved to be an

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6 Recently the *CCRG* agreed to undertake a review of the Wilbert Coffin case without even a formal application being made on Mr. Coffin's behalf.

excellent model for uncovering wrongful convictions. Since its inception in March, 1997 it has referred 341 cases back to the Court of Appeal. 115 of these have been homicide cases. As of September 30, 2006, 291 of these cases had been heard by the Court of Appeal, resulting in 199 convictions being quashed, 89 being upheld, with 3 under reserve. Included within the 199 quashed convictions are 71 homicide convictions.

See *Criminal Cases Review Commission*; www.ccrc@gov.uk/about.htm

71. Three Inquiries into wrongful convictions in Canada have posited the creation of an independent tribunal to take over the role of the *CCRG*. The Commissioners at the *Marshall Inquiry* wrote:

> Although it is important to note that the RCMP's 1982 investigation did lead to Marshall being freed from prison – implying that one cannot always assume that a police force will not be able or willing to conduct a proper investigation into allegations of wrongful conviction – we believe most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system, or directly or indirectly involved in the original investigation. We believe it makes more sense to expect citizens to provide information to a body that would not seem to have any sort of vested interest.
>
> In order for such an independent body to function effectively, people must not only know about that body's existence and role, but also have confidence that such a body has the power and the resources to conduct a thorough reinvestigation of the conviction. There are two issues here. The first is the constitution of a reinvestigative body and the second is the nature of its powers.

The Commissioners made two recommendations:

> Recommendation 1
>
> We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism – an individual or a body – to facilitate the reinvestigation of alleged cases of wrongful conviction.
>
> Recommendation 2
>
> We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.

Commissioner Kaufman made a recommendation at the *Morin Inquiry*:

- Recommendation 117: Creation of a Criminal Case Review Board.

  The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice pursuant to section 690 of the *Criminal Code*.

Commissioner Cory made a particularly pointed recommendation at the *Sophonow Inquiry*:

> RECOMMENDATION
>
> • I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.

Royal Commission on the Donald Marshall Jr. Prosecution, (1989), Commissioners Report *at* pp. 143-145
The Commission on Proceedings Involving Guy Paul Morin at pp. 1237-1241
Inquiry Regarding Thomas Sophonow at p. 101

72. In 1998-1999, the Department of Justice conducted a review of the then section 690 of the *Criminal Code*. AIDWYC made submissions to the Minister in this regard (of which a copy is being filed with the Commission). In 2002, Parliament enacted Part XXI.1 of the *Code* which left the existing system in place and codified what was largely existing practices within the *CCRG*. As far as we are aware, there is no present consideration being given by the Justice Department to the creation of an independent tribunal to replace the present system.

73. We therefore request that the Commissioner add his voice to those who have already considered this issue in past Inquiries, and recommend the creation of an independent

tribunal to receive, assess and adjudicate wrongful conviction claims in the same, or similar, manner as the *Criminal Cases Review Commission* in the United Kingdom.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this day of October, 2006.

James Lockyer
Counsel for James Driskell

Alan Libman
Counsel for James Driskell

Jerome Kennedy, Q.C.
Counsel for AIDWYC

Paul Copeland
Counsel for AIDWYC

APPENDIX

LIST OF RECOMMENDATIONS

RECOMMENDATION 1-1

Note-Taking and Statement Taking – The Winnipeg Police Service should review its policies on note-taking, interviewing and statement taking, and make the *Driskell Inquiry* Report required reading for all members of the Service.

RECOMMENDATION 1-2

Disclosure to the Crown – The police manual should be amended to include a provision that it is a disciplinary offence to withhold material information about a case from the Crown, whether the information is obtained or compiled pre-conviction or post-conviction. Relevant information should always be reduced to writing. Further, the police shall, in all cases, provide any information to the Crown on demand whether or not they believe that the Crown is already aware of the content of the information.

RECOMMENDATION 1-3

Wrongful Conviction Training – Police training and refresher courses should include training on wrongful convictions, how they can occur, and the role that police officers may play in their creation, their prevention and their detection.

RECOMMENDATION 2-1

Direct Indictments – Manitoba Justice must provide the defence with reasonable notice of an intention to seek a preferred indictment, and the reason that the preferred indictment is being sought, and provide the defence with the opportunity to make written submissions to the Minister. Written reasons should be given when a request for a preferred indictment is approved by the Minister. Their use should be reserved for exceptional cases.

RECOMMENDATION 2-2

An Independent Review of Manitoba Justice – The Minister of Justice should establish an independent review of Manitoba Justice with a view to ensuring that steps have been taken, or will be taken, to eliminate the Crown culture that contributed to the wrongful conviction of James Driskell. (see Recommendation 18(a); *Lamer Inquiry*)

RECOMMENDATION 2-3

A Criminal Justice Committee – A Criminal Justice Committee should be established with representatives of the Chief Justice, Minister of Justice, Defence Bar, Manitoba Justice, Legal Aid and the Winnipeg Police Service to identify problems, engage in dialogue and seek improvements to the administration of justice on an ongoing basis. (see Recommendation 19; *Lamer Inquiry*)

RECOMMENDATION 3-1

Post-Conviction Disclosure – Manitoba Justice should develop a procedure in its Crown policy manual for dealing with post-conviction disclosure. A Crown, or Crowns, should be appointed as recipients of post-conviction disclosure in all cases, whether pre- or post-appeal. Police forces across the Province should be notified of their identity. It is recommended that inventories of materials provided by the police to the Crown, and the Crown to the defence, be prepared so that there will be a record of all disclosed and undisclosed material in each case.

RECOMMENDATION 3-2

Appeal Crown – The Crown who conducted the trial should not be the Crown to conduct the appeal. The appeal Crown should be aware of his post-conviction obligations and should keep the appellant's counsel up to date by disclosing newly discovered materials in a timely manner.

RECOMMENDATION 3-3

Assignment of a Crown – Whenever Manitoba Justice is notified that a wrongful conviction claim is being advanced, a senior Crown who has had no previous involvement in the case should be assigned to review it forthwith. In appropriate cases, the services of counsel outside Manitoba Justice should be retained for this purpose. Assigned counsel must approach the case in a non-adversarial manner, and with an open mind.

RECOMMENDATION 4-1

Recording of All Dealings with Unsavoury Witnesses – Insofar as possible, all dealings with unsavoury witnesses should be recorded on tape and, in the case of the taking of statements, video-recorded. The witnesses should be explicitly told on videotape of the benefits that they will, *and will not*, receive and of any other considerations that they will, *or will not*, receive, and asked to respond to this on video and explicitly acknowledge that they understand that these are the *only* benefits that they will (and will not) receive. Requests made by the witness, whether accepted or rejected, must be documented and confirmed in videotaped interviews.

RECOMMENDATION 4-2

Payments to Unsavoury Witnesses – Payments to unsavoury witness must be fully documented and signed for by the witness and an official.

RECOMMENDATION 4-3

Disclosure Involving Unsavoury Witnesses – There shall be full disclosure of all dealings with, and payments to, and considerations requested by or provided to, unsavoury witnesses. If the unsavoury witness has counsel, the witness and his counsel should be advised, in writing, from the outset that their negotiations with the authorities are not privileged, that they will be recorded on tape, and that they will be fully disclosed to the defence. A witness who refuses to accept these terms should not be called to testify for the Crown.

RECOMMENDATION 4-4

Negotiations Between Police Forces or Crown Officials – All negotiations and dealings conducted between police officers and with other police forces, and between Crowns or outside Crown officials, regarding the unsavoury witness must be disclosed pursuant to the *Stinchcombe* rules, whether they take place in, or outside, the Province, or between different Provinces.

RECOMMENDATION 4-5

Psychiatric and Other Records – Unsavoury witnesses should be requested to sign releases for their psychiatric records, their criminal records, records of their contacts with police, prison records, and any other relevant records so that they can be disclosed to the defence. If the witness refuses to sign releases, the prosecution should provide the utmost co-operation in obtaining these records for the defence, including supporting third party record applications brought by the defence.

RECOMMENDATION 4-6

Post-conviction Dealings with Unsavoury Witnesses – All post-conviction dealings with unsavoury witnesses must be fully documented including, for example, the provision of information to a Crown official or Court regarding a criminal charge that the witness is facing, or has since been charged with. These documented post-conviction dealings must then be disclosed to the convicted person pursuant to a *Stinchcombe* regime of disclosure.

RECOMMENDATION 4-7

Intended Further Consideration for Unsavoury Witnesses – Neither the police nor Crown may conceal intended post-conviction benefits from an unsavoury witness, nor purport to do this.

There should be an investigation conducted within Manitoba Justice to ascertain the cases in the past in which these kinds of arrangements for 'unannounced' post-conviction benefits have been set up. In each case that is discovered, including the case of *Regina v. Ostrowski*, an immediate investigation should be conducted to determine whether a miscarriage of justice has likely occurred.

RECOMMENDATION 5-1

The Minister Should Give Reasons – The Minister of Justice is urged to give reasons for *all* decisions that he makes in response to an application for ministerial review under Part XXI.1 of the *Criminal Code*.

RECOMMENDATION 5-2

The Only Possible Use of the Stay Power under Section 579 of the Criminal Code – In a case in which the person has continued to claim innocence after his conviction, and his conviction is subsequently quashed whether by the Minister or an appellate court, and the Crown elects not to proceed with a new trial, the Crown shall elect to offer no evidence and ask for an acquittal to be entered unless the Attorney General is satisfied that a Stay of Proceedings is necessary because of a reasonable likelihood of additional incriminating evidence coming to light.

In a case in which an acquittal is entered, the Crown should consider apologizing to the person concerned in open court, and requesting the presiding justice to make an apology to the person on behalf of the administration of justice.

RECOMMENDATION 5-3

Federal and Provincial Study for an *Innocence Hearing* Model – A joint study should be undertaken at the Federal and Provincial levels for the creation of an *Innocence Hearing* model for persons who have been wrongly convicted.

RECOMMENDATION 5-4

A Pilot Project in Manitoba for an *Innocence Hearing* Model – A pilot project for an *Innocence Hearing* model should be set up by the Government of Manitoba in cooperation with representatives of Manitoba Justice and the defence bar, and other interested parties including a representative of the Association in Defence of the Wrongly Convicted (AIDWYC). Following are some proposals for guidelines for the model:

1. An innocence hearing shall be held at the request of a person who is seeking a declaration that he/she was wrongly convicted.

2. The person must have met a qualification threshold (see paragraph 46 *supra*).

3. The decision-maker (Commissioner) shall be a person approved by the claimant and Manitoba Justice.

4. The Commissioner will choose the procedure to be adopted at the hearing on a case by case basis.

5. The burden will be on the Crown to prove on the balance of probabilities that the claimant should not be found factually innocent.

6. In a case of past egregious Crown conduct which the Commissioner finds has substantially interfered with the claimant's ability to demonstrate his innocence, including the means to identify the actual perpetrator(s) of the crime, the Crown will presumptively be unable to meet its burden.

7. The proceedings will be conducted *in camera* unless the parties agree otherwise.

8. The Commissioner may hear evidence *viva voce* within his discretion. In such circumstances, the parties will have a right to attend, and the Commissioner may, in his discretion, allow the opposing party to cross-examine witnesses.

9. Funding should be provided to the claimant though the Legal Aid Plan.

10. If a declaration of wrongful conviction is made, the Commissioner shall announce it in public. Otherwise, he will transmit his decision in confidence to the parties.

11. If a wrongful conviction is found, the Commissioner may make a recommendation for compensation.

RECOMMENDATION 6-1

An Independent Review of the RCMP *Forensic Laboratory Services* – An independent review Committee of interested parties should be established to examine and make recommendations for the improvement of the system of RCMP *Forensic Laboratory Services* across Canada. Its mandate should include both the scientific practices and the institutional culture of the *Laboratory*. The same Committee should consider whether it is in the public interest, and the interests of the administration of justice, for the *Laboratory* to move out of the jurisdiction of the RCMP.

RECOMMENDATION 6-2

A National Audit of Hair Microscopy Comparison Cases – A national audit of cases in which the accused was convicted of murder, and the prosecution rested, in whole or in part, on hair microscopy evidence presented by analysts employed by the *Forensic Laboratory Services*, should be conducted. A Committee should be established, nationally or province by province, to examine all cases of culpable homicide:

- prosecuted in Canada during the past 20 years
- in which the Crown tendered and relied upon microscopic hair comparison evidence
- where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

RECOMMENDATION 6-3

The Elimination of Hair Microscopy Comparisons from the Criminal Trial – Hair microscopy comparison evidence does not have the necessary probative value to be admissible at a criminal trial, and its value in the criminal justice system should be limited to its use as an investigative tool.