THE STRUCTURE, OPERATION, AND IMPACT OF WRONGFUL CONVICTION INQUIRIES: THE SOPHONOW INQUIRY AS AN EXAMPLE OF THE CANADIAN EXPERIENCE

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I. INTRODUCTION

Historically, the official stakeholders in the criminal justice system—politicians, judiciary, bench, bar, and law enforcement agencies—have taken great pride in the near certain infallibility of the adversarial system of criminal justice. Today, the rising tide of postconviction DNA exonerations has shed a harsh and unflattering light on the staples of classic investigative tools and trial evidence: investigative and prosecutorial tunnel vision, eye-witness fallibility, hair and fibre junk science, opportunistic jailhouse informants, self-induced and other induced false confessions, and disclosure failures. These tools, alone and in combination, have been the cause of numerous wrongful convictions. In Canada, with the veneer of systemic infallibility now breached in numerous cases,[1] the key structural response for the investigation and analysis of errors and for the dissemination of remedies is the public inquiry process.

While the public inquiry process has multiple goals, the primary goal is to determine the particular errors that contributed to the wrongful conviction in the instant case. This backward-looking process is essential to determine the specific causes that contributed to a particular wrongful conviction, and it may inform the compensatory aspect of any inquiry. It is the forward-looking application, however, that has broader social policy impacts, because the publication of findings and, more importantly, recommendations, while not carrying any binding precedential value,[2]

1. *See, e.g.*, HON. FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/ (discussing the wrongful conviction of Guy Paul Morin); ROYAL COMM'N ON THE DONALD MARSHALL, JR., PROSECUTION, COMMISSIONERS' REPORT: FINDINGS AND RECOMMENDATIONS 1989 (discussing the wrongful conviction of Donald Marshall, Jr.); *see also* Reference re Milgaard, [1992] 1 S.C.R. 866, 873-74 (quashing the wrongful conviction of David Milgaard). Milgaard was exonerated by DNA evidence in 1997. *Some High-Profile Wrongful Conviction Cases*, WINNIPEG FREE PRESS, Nov. 29, 2003, at A5, *available at* 2003 WL 68690976. An Inquiry has been commissioned by the Saskatchewan Provincial Government as of September 30, 2003. *Milgaard Wins Review: Saskatchewan to Hold Inquiry into Wrongful Conviction for Murder*, WINNIPEG FREE PRESS, Oct. 1, 2003, at B1, *available at* 2003 WL 64395986.

2. Referring to Commissioner Cory's comments regarding the need to record statements by audio or video, in *R. v. Kjelshus*, Judge Halderman stated that the recommendations are "persuasive, and are entitled to great weight." R. v. Kjelshus, [2001] S.J. No. 693 (Sask. Prov. Ct.), at ¶ 32; *see* R. v. Paul, [2002] M.J. 540, at ¶ 29

provides stakeholders with a weighty reminder of pitfalls that must be avoided. This Article will briefly consider the structure, operation, and impact of the Canadian wrongful conviction inquiry process, with specific attention to the Thomas Sophonow Inquiry, which was presided over by retired Supreme Court of Canada Justice Peter deC. Cory.[3]

II. THE THOMAS SOPHONOW CASE: ARREST, TRIALS, AND APPEALS

On December 23, 1981, sixteen-year-old Barbara Stoppel was alone, working the evening shift at the Ideal Donut Shop.[4] At around 8:30 p.m., she was strangled with a piece of nylon twine.[5] Her attacker was seen both inside and leaving the donut shop by no less than four eye-witnesses.[6] Lorraine Janower, who worked nearby, went for coffee, only to find the donut store locked.[7] She peered inside and saw the killer heading toward the washroom.[8] Her husband, Norman Janower, arriving to pick up his wife, watched as the killer moved around the store.[9] Later, he approached the door as the killer turned the "open" sign to "closed" and left the store.[10] Mildred King saw a tall man in a cowboy hat pass her in the parking lot shortly after the murder.[11] Norman Janower told John Doerksen, a Christmas tree salesman who worked in the parking lot, to follow the man.[12] Doerksen watched the man exit the store, followed the killer, and grappled with him on an adjacent bridge before the killer got away.[13]

Sadly, Barbara Stoppel died in a hospital a few days later.[14] There was a great deal of public sentiment over the killing.[15] No arrest had been

("While these comments of Commissioner Cory are not binding on me per se, as comments in his previous incarnation as a justice of the Supreme Court of Canada would have been, nonetheless they are very persuasive.").

3. MAN. JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW app. A, at 137 (2001), *available at* http://www.gov.mb.ca/justice/sophonow/toc.html.

4. *Id.* at 5.

5. *Id.* at 1.

6. *Id.* at 5-6.

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 5-6.

10. *Id.*

11. *Id.* at 26.

12. *Id.* at 6.

13. *Id.*

14. *Id.* at 1.

15. *Id.*

made, and the trail was growing cold. Multiple police composite sketches were produced and were released across the city.[16]

On March 3, 1982, Thomas Sophonow was interviewed by a Vancouver Police Detective, Detective Barnard, at the request of Winnipeg Police, who had received a tip that Sophonow resembled the police sketch.[17] A nonverbatim notebook statement was taken.[18] The most salient comment recorded was "'I could have been in Ideal Donut Shop 49 Goulet.'"[19] However, at the Inquiry, Sophonow testified "the statement should have read 'I could *not* have been in Ideal Donut.'"[20] He testified that while he indeed signed the notebook sometime after, he did not read the statement.[21]

On March 12, 1982, two Winnipeg officers travelled to Vancouver to interview Sophonow.[22] He was interrogated five times over four hours.[23] While the detectives claimed to have taken verbatim notes, it was clear that this was not the case and that on critical points, the notes taken were significantly different.[24] Additional failures in the process included:

- Not giving Sophonow a full police caution that any comments made could be used against him;[25]
- Not advising Sophonow that he could call a lawyer;[26]
- Though there was no positive identification, the officers told Sophonow that he was seen leaving the donut shop, which the officers conceded, was done to elicit a confession;[27]
- The officers interrogated Sophonow as to whether he had any mental disorders, in an attempt to break his will;[28]

16. *Id.* at 7.
17. *Id.* at 13.
18. *Id.*
19. *Id.*
20. *Id.* (emphasis added).
21. *Id.*
22. *Id.* at 14.
23. *Id.*
24. *Id.* at 14-15.
25. *Id.* at 15. This was all the more egregious because Sophonow was, according to detectives, a suspect at the time of his interview. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 15-16.

- The officers accused Sophonow of lying;[29]
- The officers cross-examined Sophonow as to matters discussed during his initial interview with Detective Barnard;[30] and
- The officers subjected Sophonow to a strip search, solely for the purpose of humiliating him and breaking his will.[31]

Sophonow was arrested, brought back to Winnipeg, and charged with murder.[32] Between his arrest in March 1982 and April 1986, Sophonow, while in custody throughout, underwent a preliminary inquiry and three trials.[33] The trials resulted in a hung jury, followed by two convictions, two appeals to the Manitoba Court of Appeal (which found grounds for new trials in both instances, but given that the last appeal would have resulted in a fourth trial, entered an acquittal at the last appeal), and two leave applications to the Supreme Court of Canada (the former refused and the latter dismissed).[34]

The eyewitnesses expressed some degree of uncertainty that Sophonow was the man they saw at the donut shop upon their photo or lineup presentation prior to the preliminary hearing.[35] This uncertainty is especially troubling because the lineup and photo gallery pack processes utilized were seriously tainted.[36] Further, one key eyewitness had

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29. *Id.* at 16.

30. *Id.*

31. *Id.*

32. *Id.* at 2.

33. *Id.*

34. *Id.* The following represents the full list of reported decisions in the Sophonow case, in chronological order: R. v. Sophonow (No. 1), [1983] 6 C.C.C. (3d) 394 (Man. Q.B.) (concerning the Crown's ability to cross-examine an accused on unsworn testimony given at his preliminary inquiry and sworn testimony given at his first trial, which resulted in a mistrial); R. v. Sophonow (No. 2), [1983] 6 C.C.C. (3d) 396 (Man. Q.B.) (concerning an application for a publication ban); R. v. Sophonow, [1984] 12 C.C.C. (3d) 272 (Man. C.A.) (quashing the decision of a second trial conviction and ordering a new trial); R. v. Sophonow, [1984] 2 S.C.R. 524 (upholding the Manitoba Court of Appeal's decision to quash the conviction and order a new trial); R. v. Sophonow, [1985] M.J. No. 9 (Man. C.A.) (quashing the conviction after the third trial and entering an acquittal); R. v. Sophonow, [1985] M.J. No. 10 (Man. C.A.) (quashing the conviction after the third trial and entering an acquittal); R. v. Sophonow (No. 5), [1986] 16 W.C.B. 223 (S.C.C.) (denying leave to appeal without reasons given).

35. MAN. JUSTICE, *supra* note 3, at 21-26.

36. *See id.* at 24-25 (noting that Thomas Sophonow's picture stood out from others in one photo lineup because it had a border and appeared to have been taken outside).

previously identified two different suspects for the murder.[37] Both identifications were investigated and refuted.[38] The defence was never given this disclosure.[39] As time went on in the trial process, all of these witnesses, under oath, unwaveringly identified Thomas Sophonow as the man they saw at, in, or leaving the donut store on December 23, 1981.[40] This phenomenon and the error it created was compounded by the lack of disclosure to the defence.[41] Today, we know that each witness was mistaken.

In addition to the three jailhouse informants called in the case, police had offers from nine other jailhouse informants, including Terry Arnold, who is currently the prime suspect in the killing, to testify against Sophonow.[42] In the end, one of the three called, Thomas Cheng, had twenty-six counts of fraud withdrawn.[43] While proclaiming the best of motives for his testimony, a police report from a polygraph operator, which was not disclosed to the defence, confirmed Cheng's primary motive was to secure his liberty and have his charges dropped.[44] After testifying at the first and second trials, he was released and never seen again.[45] The Crown read in his evidence at the third trial.[46] The second jailhouse informant, Adrian McQuade, was a career informant, who upon his arrest as a material witness, threatened to perjure himself unless released.[47] He was told that if he failed to testify in accordance with a taped conversation, he would be exposed as an informant and face whatever consequences may come.[48] Additional records that were never disclosed to the defence but were available at the Inquiry confirmed that while McQuade offered to be placed in the cell block with Sophonow, he admitted never receiving a confession from him.[49] The third informant, Douglas Martin, is best described by the words of the Commissioner himself: "[Douglas Martin] . . . is a prime example of the convincing mendacity of jailhouse informants.

37. *Id.* at 21.
38. *Id.*
39. *Id.* at 23.
40. *Id.* at 23, 25-26.
41. *Id.* at 23.
42. *Id.* at 1, 69, 73.
43. *Id.* at 64.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 65-66.
48. *Id.* at 66.
49. *Id.*

He seems to have heard more confessions than many dedicated priests."[50] Martin had testified as a jailhouse informant in at least nine cases in Canada and had a record for perjury.[51] According to the police, at the time, he appeared to be a credible witness.[52]

In fact, at the time of the offence, Sophonow was in Winnipeg, having driven from Vancouver in what was to be a rebuffed attempt to make a Christmas visit to his estranged wife and their young daughter.[53] After numerous unsuccessful pleas to see his child, Sophonow went to a garage to have his car repaired and, while waiting, went to a grocery store and purchased Christmas stockings, which he then delivered to sick children at a number of Winnipeg hospitals.[54] This alibi was tendered, investigated, and dismissed by police and prosecutors, despite numerous confirmatory elements and witnesses.[55]

Indeed, at the time, police investigated and dismissed a number of suspects, one of whom is the current prime suspect in the police re-investigation.[56] Amongst others, this suspect resembled the composite sketch, knew the deceased, wore a cowboy hat, lived minutes from the crime scene, visited the hospital to inquire about Barbara Stoppel, and had no alibi.[57] Despite all of these facts, he was dismissed as a suspect.[58] An insidious case of tunnel vision was at work.

After being ultimately acquitted by the Court of Appeal in 1985, Sophonow maintained his innocence.[59] He spent the better part of the next fourteen years attempting to clear his name and prove his innocence.[60] His dogged determination succeeded when a re-investigation of the case by the Winnipeg Police Service, concurred in by the Provincial Department of Justice, determined he was factually innocent and recommended his exoneration.[61]

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50. *Id.* at 68-69.
51. *Id.* at 69.
52. *Id.*
53. *Id.* at 8.
54. *Id.*
55. *Id.* at 57-59.
56. *Id.* at 35.
57. *Id.*
58. *Id.*
59. *Id.* at 1.
60. *Id.* at 2.
61. *Id.* at 1.

III. THE SOPHONOW INQUIRY: STRUCTURE AND OPERATION

The Commission of Inquiry into this matter was established by an Order in Council of the Manitoba Provincial Government, pursuant to section 83(1)(c) and (f) of the Manitoba Evidence Act.[62] This section empowers the Lieutenant Governor in Council to cause an inquiry into matters concerning "the administration of justice within the province" or when "any matter . . . is of sufficient public importance to justify an inquiry."[63] Standing was sought and granted to Mr. Sophonow, the Stoppel family, the Manitoba Association of Prosecution Attorneys, the City of Winnipeg (representing the Winnipeg Police Service), the Province of Manitoba, the Provincial Department of Justice, the Winnipeg Police Association (representing individual officers), the four prosecution attorneys who prosecuted the trials, and the Association in Defence of the Wrongly Convicted.[64]

The Rules of Practice and Procedure were adopted and modified from the Krever Blood Inquiry.[65] The Krever rules were approved by the Supreme Court of Canada[66] and also used in the wrongful conviction inquiry of Guy Paul Morin.[67]

The Winnipeg Police Service turned over the entirety of its records concerning the re-investigation of the Stoppel murder to the Commission Counsel. This material comprised more than 15,000 pages. The material included transcripts of all prior proceedings, current and historical police reports, officers' notes, defence counsel files and memos, court filings, internal prosecution notes and files, documentary court exhibits, and other materials that were provided by witnesses or parties with standing. The material was indexed and provided to all parties with standing. Certain materials concerning the current re-investigation that related to a different perpetrator were provided to counsel on nondisclosure undertakings, and when referred to in the course of the Inquiry, those matters were dealt with in camera. Given the state of the law of disclosure in Canada at the time, the vast majority of documents available to Inquiry counsel were not available to defence counsel at trial.[68] Had they been, the results may have

62. *Id.* app. A, at 135-41.
63. Manitoba Evidence Act, R.S.M., ch. E-150, § 83(1)(c), (f) (2000) (Can.).
64. MAN. JUSTICE, *supra* note 3, at 4.
65. *Id.* at 5; *see id.* app. C (setting forth the rules).
66. Canada (Attorney Gen.) v. Canada (Comm'n of Inquiry on the Blood Sys.), [1997] 3 S.C.R. 440, 478-79.
67. MAN. JUSTICE, *supra* note 3, at 5.
68. *See infra* note 126 and accompanying text.

been quite different.

The Inquiry heard from approximately sixty-five witnesses, including original police and civilian witnesses from the trials, and experts, including Dr. Elizabeth Loftus, Mr. Peter Neufeld, and Dr. Adrian Grounds.[69] The Inquiry identified a number of problem areas, including eyewitness identification (including gallery packs and lineups), tunnel vision, statement recording, use of jailhouse informants, the role of counsel, disclosure, alibi, and compensation.

IV. FINDINGS OF THE INQUIRY

The Order in Council that established the Inquiry had two specific objects: (1) "to inquire into the conduct of the investigation into the death of Barbara Stoppel, and the circumstances surrounding the resulting criminal proceedings commenced against Thomas Sophonow for the murder of Barbara Stoppel"; and (2) to advise on whether, in the circumstances of this case—including the entry of a final verdict of acquittal by the courts—Thomas Sophonow was entitled to financial compensation because of his imprisonment during trial, appeals, and re-trials for an offence that he had not committed, and if so, the basis for entitlement on the facts of this case.[70] Commissioner Cory made recommendations in seven areas, which are summarized in the next Part.

A. *Statements*

- To prevent the admission of inaccurate, misrepresented, and false statements, statements by an accused person should be excluded unless they are recorded by machine.[71]
- All suspect statements should be videotaped.[72] Audiotaped statements will be admissible if a satisfactory explanation is given as to why a videotape was not used.[73]
- As a general rule, untaped interviews should be inadmissible.[74]

69. MAN. JUSTICE, *supra* note 3, app. D-F.
70. *Id.* app. A, at 137.
71. *Id.* at 19.
72. *Id.*
73. *Id.*
74. *Id.*

B. *Eyewitness Identification*

1. *Live Lineups and Photo Gallery Pack Lineups*

- The officer conducting the lineup "should have no knowledge of the case or whether the suspect is contained in the line-up" and should so advise the witness, emphasising that the suspect may or may not be present.[75] The witness should be told "it is just as important to clear the innocent as it is to identify the suspect."[76]
- All proceedings involving viewing the lineup should be videotaped, and all statements made by the viewer must be recorded verbatim and signed by the witness.[77]
- Upon completion, the witness should be immediately escorted from the premises to avoid the risk of contamination.[78] Police should not talk to witnesses "regarding their identification or their inability to identify anyone."[79]
- Fillers should match the description given by the eyewitness.[80] If that is not possible, they should "resemble the suspect as closely as possible."[81] A minimum of ten persons or photos should be used in a lineup.[82]
- If there is an identification, the witness should be asked his or her degree of certainty.[83] Both question and answer must be recorded verbatim.[84]
- Photo gallery packs should be administered sequentially, not concurrently.[85]

2. *Trial Instructions*

- The trial judge should give "strong and clear directions . . .

75. *Id.* at 31.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 32.
80. *Id.* at 31.
81. *Id.*
82. *Id.* at 32.
83. *Id.*
84. *Id.*
85. *Id.*

emphasizing the frailties of eyewitness identification," including the instruction that confidence is not positively correlated to accuracy.[86]

- Additionally, the court should instruct the jury "that the vast majority of the wrongful convictions of innocent persons have" occurred due to honest but mistaken eye-witnesses.[87] Such warning may make reference to specific cases by name.[88]
- Judges should favourably consider and readily admit experts to give evidence on the weaknesses of eyewitness identification.[89]
- Specific warning must be given when identification has progressed from tentative to certain.[90]

C. *Tunnel Vision*

- The insidious problem of tunnel vision should be included as mandatory entry-level training for police, with refresher courses prior to promotion.[91]
- Courses should also be made available to counsel and the judiciary.[92]

D. *Police Notebooks and Exhibits*

- Officers should not be the custodians of their notebooks upon retirement, lest they be lost or damaged by accident.[93] The police force should be responsible for safely warehousing notebooks for a period of twenty to twenty-five years after an officer's retirement.[94]
- Exhibits, whether filed in court or not, should be stored by the courts or police service for a similar period.[95] In addition, no exhibit should be released to any person except by court order and with notice to

86. *Id.* at 33.
87. *Id.*
88. *Id.* at 33-34. As a chilling example of this phenomenon, and despite Sophonow's exoneration, at the Inquiry, eyewitness Norman Janower continued to maintain that he correctly identified Thomas Sophonow as the man he saw at the donut shop. *Id.* at 25.
89. *Id.* at 33.
90. *Id.* at 34.
91. *Id.* at 37.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 38.

the Attorney General and the accused.[96]

E. *Evidence of Material Origin*

- When "the police seek to link material at a crime scene to a particular geographic location . . . which, in turn, links an accused to a crime," the onus is on the prosecution to have the item tested, if such testing can be done, to determine its place of origin.[97] The failure to do so should render the evidence of origin inadmissible.[98]

F. *Prosecutorial Discretion on Potentially Prejudicial Matters*

- The prosecution must "maintain high standards of fairness" and must carefully consider issues and "exercise great restraint before raising an issue which will be highly prejudicial to the accused in situations where there is little evidence to support [the issue]."[99]

G. *Alibi*

- To reduce the levels of mistrust between police, prosecution, and defence, and in order to encourage the timely disclosure and fair investigation of alibi evidence, regular meetings should be held between the prosecution and defence bar and should include high-ranking members of the police.[100] The purpose of the meetings is to "discuss [problems] and seek mutually satisfactory solutions to them."[101] The judiciary and media should be occasionally invited so that all members of the community are apprised of the problems and can assist in providing solutions.[102]
- "The alibi defence should be disclosed within a reasonable time after" complete disclosure has been made.[103] An alibi should be in the form of a signed witness statement.[104]
- Alibi investigation by police should be undertaken by officers not

96. *Id.*
97. *Id.* at 43.
98. *Id.*
99. *Id.* at 52.
100. *Id.* at 60.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

investigating the offence itself.[105] Interviews should be taped in their entirety or be held inadmissible.[106] The interview should not be intimidating or characterised as a cross-examination.[107] Witnesses should be advised "to tell the truth and of the consequences of a failure to do so."[108]

- If, as a result of the alibi investigation, it is necessary to re-interview prosecution witnesses, the subsequent interviews should be conducted by officers not investigating the case, be devoid of leading questions, and should be taped in their entirety, lest they be inadmissible.[109]

H. *Jailhouse Informants*

- "As a general rule, jailhouse informants should be prohibited from testifying."[110]
- When permitted to testify, it should only be in circumstances when multiple circumstantial guarantees of trustworthiness and credibility are evident.[111]
- In the rare case when such testimony is allowed, the jury should be warned of the danger of accepting the evidence, and it may be advisable to refer to specific cases in which convincing, but untruthful jailhouse informant evidence has been the cause of the wrongful conviction of the innocent.[112]
- The failure to warn should result in a new trial.[113]

V. COMPENSATION

As a result of the Inquiry, Thomas Sophonow was awarded damages of slightly more than two million Canadian dollars in pecuniary and

105. *Id.* at 61.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 72.
111. *Id.* app. F, at 195. The Commissioner outlined a number of factors to consider, which here, are too numerous to include. *Id.* app. F, at 195-96.
112. *Id.* at 73.
113. *Id.* at 74.

nonpecuniary damages.[114] The cost was borne by the municipal, provincial, and federal governments in unequal proportions.

VI. THE IMPACT OF THE INQUIRY AND RECOMMENDATIONS

It is a difficult task to assess the impact of an inquiry. The public nature of the hearings resulted in significant and protracted local and national attention in newspaper, radio, television, and Internet media. Measuring these impacts is beyond the scope of this Article. One may postulate that by merely raising public awareness as to the existence of wrongful convictions and the causes leading to these tragic results, there is a general educational improvement within the jury pool, the police force, the prosecutions branch, the judiciary, and the political and bureaucratic actors in our system.

To date, the Inquiry report has been referred to in reported decisions thirty-one times[115] across various Canadian jurisdictions, including twice by the Supreme Court of Canada.[116] The citing cases overwhelmingly refer to

114. *Id.* at 129-34.

115. Electronic searches were made through the LexisNexis QuickLaw research system using the CJP database utilizing three-word, restrained-proximity searches for "Inquiry," "Sophonow," and "Cory."

116. R. v. Hibbert, [2002] 2 S.C.R. 445, 469 (eyewitness identification); United States v. Burns, [2001] 1 S.C.R. 283, 340 (referring generally to the Inquiry); R. v. Lundrigan, [2003] N.B.J. No. 399 at ¶ 27 (N.B. Ct. App.) (eyewitness identification); R. v. Trudel, [2004] O.J. 248, at ¶ 76 (Ont. Ct. App.) (jailhouse informants); R. v. Dimitrov, [2003] O.J. No. 5243, at ¶ 17 (Ont. Ct. App.) (identification evidence); R. v. Tebo, [2003] 175 C.C.C. (3d) 116, 124 (Ont. Ct. App.) (noting the *Hibbert* court's approval of the Inquiry's recommendation on identification evidence); R. v. Dhillon, [2002] 166 C.C.C. (3d) 262, 272-73 (Ont. Ct. App.) ("[W]e do not view the Sophonow Report as having changed the law concerning the admissibility of jailhouse informant evidence . . . ."); R. v. Baltrusaitis, [2002] 162 C.C.C. (3d) 539, 559 (Ont. Ct. App.) (jailhouse informants); R. v. Ticknovich, [2003] A.J. No. 1292, at ¶ 283 (Alta. Q.B.) (eyewitness identification); Dix v. Canada (Attorney Gen.), [2002] A.J. No. 784, at ¶¶ 483, 597 (Alta. Q.B.) (jailhouse informants); R. v. Trang, [2002] 168 C.C.C. (3d) 145, 159 (Alta. Q.B.) (disclosure); R. v. Miller, [2003] B.C.J. No. 215, at ¶ 13 (B.C. S. Ct.) (eyewitness identification and photo gallery packs); R. v. Cook, [2002] B.C.J. No. 1303, at ¶ 42 (B.C. S. Ct.) (eyewitness identification); R. v. Moyou, [2003] B.C.J. No. 540, at ¶ 26 (B.C. Prov. Ct.) (photo gallery pack preparation and presentation); R. v. McKay, [2003] M.J. No. 208, at ¶ 33 (Man. Q.B.) (recording statement); R. v. Toribio, [2002] M.J. No. 534, at ¶ 13 (Man. Q.B.) (relying on the Inquiry to exercise discretion to exclude evidence); R. v. Paul, [2002] M.J. No. 540, at ¶¶ 28-29 (Man. Prov. Ct.) (recording of statements); R. v. Sheppard, [2002] M.J. No. 237, at ¶ 35 (Man. Q.B.) (eyewitness identification); R. v. Tomasetti, [2002] M.J. No. 70, at ¶¶ 52, 60 (Man. Q.B.) (eyewitness identification); R. v. Burns, [2003] N.B.J. No. 445, at ¶ 25 (N.B. Q.B. Trial Div.) (eyewitness identification); R. v. Hann, [2002] N.J. No. 177, at ¶ 77 (Nfld. S.

the weaknesses and frailties of eyewitness identification, including photo gallery pack construction or presentation (eighteen references), followed by concerns over the need to audiotape or videotape statements (six references), and issues concerning jailhouse informants. The number of times the report and its recommendations have been referred to in argument or in unreported decisions is unknown.

Perhaps the most powerful reference to the Inquiry was a reference made by Judge Schulman in *R. v. Toribio*,[117] which did not refer to any particular recommendation, but rather to the spectre of wrongful conviction that lurks in the shadows of evidentiary shortcuts, improper practice, and inferences stretched too far.[118] In *Toribio*, the key witness, who had implicated himself under charge and caution, but who was not ultimately charged, was procured to testify at the preliminary inquiry under unusual circumstances, which were not disclosed to the defence.[119] After the preliminary inquiry, he disappeared.[120] At trial, the prosecution sought to introduce his preliminary inquiry evidence under a "principled exception to the hearsay rule."[121] Relying upon the court's residual discretion to exclude evidence, Judge Schulman concluded admission could result in a miscarriage of justice.[122] The court concluded by quoting Commissioner

Ct. Trial Div.) (recording statements); R. v. Gould, [2003] N.J. No. 78, at ¶¶ 26, 29, 35 (Nfld. Prov. Ct.) (eyewitness identification); R. v. Basha, [2002] N.J. No. 328, at ¶ 50 (Nfld. Prov. Ct.) (eyewitness identification); R. v. T.L.H., [2002] N.J. No. 222, at ¶ 4 n.3 (Nfld. Prov. Ct.) (recording of statements); R. v. Hurley, [2002] N.J. No. 119, at ¶ 20 (Nfld. Prov. Ct.) (eyewitness identification); R. v. M.(B.), [2003] 64 O.R. (3d) 299, 315 (Ont. Super. Ct. Justice) (eyewitness identification); R. v. Richards, [2002] O.J. No. 2830, at ¶¶ 42, 44-45 (Ont. Super. Ct. Justice) (photo gallery packs); R. v. Chenier, [2001] O.J. No. 4708, at ¶¶ 4-7, 10 (Ont. Super. Ct. Justice) (jailhouse informants); R. v. Delmorone, [2002] O.J. No. 3988, at ¶¶ 102-04, 108 (Ont. Ct. Justice) (recording statements); R. v. Simard, [2001] O.J. No. 4757, at ¶ 14 (Ont. Ct. Justice) (eyewitness identification); R. v. Kjelshus, [2001] S.J. No. 693, at ¶ 30 (Sask. Prov. Ct.) (recording statements).

117. R. v. Toribio, [2002] M.J. No. 534, at ¶ 13.

118. *See id.* (expressing concern "that the evidence was obtained unfairly; and . . . that the admission of the evidence would render the trial unfair and create a realistic probability of a miscarriage of justice being caused," and explaining that courts "must always be concerned about the possibility of yet another wrongful conviction being entered and the harm that such an event would cause, not only to the accused, but also to the public," because "'[f]ailures lead to a lack of confidence in police and the courts . . . . [which] can lead to a fear that anyone may be wrongfully convicted'") (quoting MAN. JUSTICE, *supra* note 3, at 99).

119. *Id.* at ¶¶ 4-5.

120. *Id.* at ¶¶ 5-6.

121. *Id.* at ¶ 6.

122. *Id.* at ¶ 13.

Cory's comments:

> "It is not surprising that the right to be free from capricious imprisonment has for centuries been a fundamental right of citizens of democracies. 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 [sic]. Society must do all that is humanly possible to prevent wrongful convictions . . . ."[123]

Since the investigation and trials of Thomas Sophonow began more than twenty years ago, a number of the errors that were revealed in the Inquiry have been remedied. In July 2000, arising out of the Morin Inquiry[124] and its scathing indictment of jailhouse informants, the Manitoba Department of Justice, along with many of its provincial counterparts, developed a new policy concerning the use of jailhouse informants. The new policy requires a number of steps, and the ultimate decision rests with a committee of senior counsel.[125] In addition, while the photo gallery pack that was shown to witnesses in the Sophonow case in 1982, was comprised of six photos—five prison photos and a suspect photo, which, unlike the others, was a Polaroid photo taken of a man standing outside, wearing a cowboy hat—in a case in which the killer was seen leaving the scene in a cowboy hat, such a practice would not be used due to technology and policy that now typically ensures ten today photographs of a similar style will be used. Issues of disclosure, a problem in 1982, have now been addressed by the arrival of the Canadian Charter of Rights and Freedoms and the case law that subsequently developed.[126]

Unfortunately, while some of the recommendations have been accepted and adopted, other recommendations have not been endorsed by the courts. Particularly, recommendations as to the inadmissibility of

123. *Id.* (quoting MAN. JUSTICE, *supra* note 3, at 99).

124. KAUFMAN, *supra* note 1, at 194-200.

125. MAN. JUSTICE, *supra* note 3, app. F, at 197.

126. *See, e.g.*, R. v. Stinchcombe, [1991] 3 S.C.R. 326, 328 (granting the defendant a new trial because the prosecution failed to disclose evidence).

unrecorded statements, the ability to call expert evidence in eyewitness cases, and the need for caution when using jailhouse informants have not been adopted by the Canadian courts. The unfortunate risk is an increasing likelihood of additional wrongful convictions.

The impact of the Sophonow Inquiry, its predecessors, and those inquiries that are yet to come will no doubt change the landscape of criminal law. Judge Learned Hand wrote, in an oft-quoted decision, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."[127] Sadly, the dream is all too real.[128] Each subsequent exoneration reinforces the fallibility of our application of the laws of the criminal justice system. We must not be too quick to reformulate laws that have evolved over hundreds of years, informed by experience. Efficiency should not displace the notion that it is better that ten guilty men go free rather than one innocent man be convicted. For the innocent man convicted has been wrongfully convicted by the state. That is the greatest tragedy a civilised society can inflict upon its citizenry. As Commissioner Cory so eloquently stated, such treatment is akin to "capricious[] imprison[ment] by tyrants."[129] To this extent, each exoneration and every inquiry stands as a public testament to be remembered by every police officer, prosecutor, defence counsel, judge, jury, and citizen, that reminds each to take pride in honourably and honestly carrying out his or her task and that proclaims at every moment "lest we forget."

127. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

128. *See generally* Bruce A. MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System* (2003), *available at* http://www.canadiancriminallaw.com/PDF/Convicting%20the%20Innocent.pdf (reviewing and historically analyzing the cases and causes of wrongful conviction).

129. MAN. JUSTICE, *supra* note 3, at 99.