

Wrongful Convictions: Is It Proper For the Crown to Root Around, Looking For Miscarriages of Justice?

B R U C E A . M A C F A R L A N E , Q . C . *

I. INTRODUCTION

In 2003, the Province of Manitoba embarked on a controversial experiment. The government established an independent and multi-disciplinary committee of experts for the purpose of reviewing all murder files prosecuted during the previous fifteen years: the Manitoba Forensic Evidence Review Committee. At issue was whether any miscarriages of justice may have occurred as a result of the use of a particular form of forensic evidence. The Province had no legal mandate to do so; there is nothing in the *Criminal Code* requiring, or even authorizing, such a review, and the move was without parallel in Canadian history.

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Other provinces and the federal government watched the review unfold over the next several years with a degree of anxiety, and perhaps a healthy dose of scepticism. After all, is this really a proper role for the Crown? Isn't the *Criminal Code* based on the fundamental proposition that the Crown prosecutes alleged offenders, leaving to the private bar and legal aid societies the responsibility to defend and pursue individual cases where there is reason to believe that a miscarriage of justice may have occurred? To be sure, Crown counsel may quite properly stay or withdraw proceedings, or even concede an appeal against conviction in individual cases where it becomes evident that the evidence does not support prosecution. But that occurs in individual cases on the basis of specific facts. Is it a proper function for the Crown to conduct what is essentially an unfocused "sweep" of cases to see if a miscarriage of justice may have occurred? If it is a proper role, where does the authority come from? And what prompted such an unusual step in Manitoba?

By 2012, the review had been completed, at least one and possibly two miscarriages had been discovered, a Commission of Inquiry led by a former Chief Justice from Ontario had recommended that a review of this nature be undertaken at the national level, and all provinces had subsequently followed suit with similar reviews. In this essay, I will describe the "backstory" to this legal experiment, hatched initially in Manitoba but subsequently embraced widely throughout Canada.

II. THE BIFURCATED ROLE OF PROSECUTORS IN CANADA

The starting point in this discussion necessarily involves an understanding of the role and responsibilities of prosecuting counsel. At law, Crown counsel in Canada, and more widely throughout the Commonwealth, have two separate and distinct roles. The first, that of "advocate", is well understood and publicly very visible. In respect of this role, the Supreme Court of Canada has observed that it is "both permissible and desirable" that the Crown "vigorously pursue a legitimate result to the best of its ability".¹ "Indeed", the Court added, "this is a

¹ *R v Cook*, [1997] 1 SCR 1113 at para 21, 146 DLR (4th) 437 [Cook]. To paraphrase Justice Moldaver, then of the Ontario Court of Appeal and now of the Supreme Court of Canada, a criminal trial is not a tea party: *R v Baltrusaitis* (2002), 58 OR (3d) 161 at para 34, 162 CCC (3d) 539. In this respect, see Robert J Frater, *Prosecutorial*

critical element of this country's criminal law mechanism".² As a consequence, prosecuting counsel are expected to be firm and press the evidence to its legitimate strength.

The second role, facially at odds with that of advocate, is the role of Crown attorneys as "ministers of justice". The *locus classicus* concerning this responsibility was first described in 1954 by Rand J on behalf of the Supreme Court of Canada. It has since been affirmed repeatedly by the Supreme Court, and has been adopted with approval by such diverse appellate courts as the Privy Council in the UK, the House of Lords, the Supreme Court of Ireland, the High Court of Australia and the Supreme Court of Appeal of South Africa:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.³

In short, the prosecutor does not act in the largely partisan sense usually required of defence counsel by the adversarial system, but as a promoter of the public interest in achieving a just result. Significantly, the

Misconduct (Aurora, Ont: Canada Law Book, 2009) at 2-3.

² Cook, *supra* note 1. See also *R v Assoun*, 2006 NSCA 47 at paras 226-228, 244 NSR (2d) 96, leave to appeal to SCC refused [2006] 2 SCR iv, 359 NR 392 (note).

³ *Boucher v The Queen* (1954), [1955] SCR 16 at 23-24, 110 CCC 263; re-affirmed in: *R v Regan*, 2002 SCC 12 at paras 19, 62, 65, 137, 151, 153 and 155, [2002] 1 SCR 297 [Regan]. Note especially para 155, where it is observed that this role is not confined to the courtroom, but extends to all dealings with the accused. See also *Miazga v Kvello Estates*, 2009 SCC 51 at paras 7, 47, and 88-89, [2009] 3 SCR 339; *R v Stinchcombe*, [1991] 3 SCR 326 at 341, 68 CCC (3d) 1; *Nelles v Ontario*, [1989] 2 SCR 170 at 191, 60 DLR (4th) 609. Outside Canada, the *Boucher* principle has been approved in *Randall v The Queen*, [2002] UKPC 19; *Benedetto v The Queen*, [2003] UKPC 27; *R v H*, [2004] UKHL 3; *Libke v R*, [2007] HCA 30; *DO v DPP*, [2006] IESC 12; and *Van der Westhuizen v S*, [2011] ZASCA 36. Frater, *supra* note 1 at 2, says that "[t]he enormously influential nature of that statement cannot be gainsaid".

Supreme Court has noted that this role as minister of justice is not confined to the courtroom, but extends to all dealings with the accused.⁴

This legal framework provided Manitoba Justice with an appropriate basis for conducting a review designed to assess whether murder convictions entered in the Province may be insecure. The very prosecution service that urged conviction during the 1980s and 1990s on the basis of its role as advocate was, therefore, where the circumstances demanded, fully entitled to discharge its “minister of justice role” by doing a “double check” in the 21st century to ensure that justice had truly been served during the previous fifteen years.

But what was the “triggering event”? What prompted Manitoba Justice to take such an unprecedented step, and place into issue convictions for murder that had been entered by a unanimous jury and confirmed on appeal? And what process was followed to guide a review that was not contemplated by either the *Criminal Code* or the common law?

III. HAIR MICROSCOPY

The intersection of law with forensic science and medicine is not always an easy one. Trial processes seek facts, certainty and finality. Forensic science and medicine, on the other hand, provide an opinion, sometimes nuanced, which may change as professional views become more refined or are completely overtaken by the emergence of new technologies.⁵

In the last decade, it has become painfully clear that flawed scientific evidence has contributed to the conviction of persons who were innocent of the crimes with which they had been charged.⁶ Indeed, recent studies suggest that flawed forensic science is the second leading cause of wrongful

⁴ Regan, *supra* note 3 at para 155.

⁵ Portions of this essay are based on an earlier paper I presented to the annual Crown/Defence Conference in Winnipeg, MB on September 22, 2011 entitled “Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting”.

⁶ See Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (Washington, DC: The National Academy Press, 2009) at 4ff, online: <<https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>> [NRC].

convictions—acting as a contributing factor in half of the cases in which inmates have been exonerated through DNA testing.⁷

How can this be? After all, aren't these the men and women in white lab coats who tirelessly pursue justice through independent, truth-seeking scientific and medical processes? What has happened? Has science and medicine failed to live up to the standards demanded by the courts and expected by the public? Or have we expected too much of the forensic sciences?

Perhaps the weakest form of forensic science traditionally relied upon by police and prosecutors is known as “forensic microscopy”. In its simplest terms, forensic microscopy involves the side-by-side comparison, under a microscope, of a “known” substance, often strands of hair taken from a suspect, to other strands of hair, the “questioned” evidence, taken from the crime scene. The object is to see if the two groups of evidence came from the same source. The probative value, it is argued, is simply this: if there is a “match”, the suspect must have been at the crime scene, often despite repeated denials by that person.

Law enforcement agencies throughout North America regularly used this comparative procedure as an investigative tool. Hairs, for example, are routinely shed, and thus are capable of being transferred from an individual to the crime scene, and from the crime scene to an individual.⁸ During the 1970s and 1980s, and into the 1990s, the policing community

⁷ A conclusion made on the basis of the first 232 persons in the US exonerated through post-conviction DNA testing: The Innocence Project, “National Academy of <http://www.innocenceproject.org/Content/National_Academy_of_Sciences_Urges_Comprehensive_Reform_of_US_Forensic_Sciences.php>. At the time of writing, June 2012, there have been 292 post-conviction exonerations in the US.

While the statistics in Canada and elsewhere tend to be more anecdotal than systemic, it is clear that flawed forensic evidence has played a significant role in other countries: in Canada: Morin: (hair and fiber played a major role); Lamer Commission (forensic practices); Driskell (hair microscopy); Goudge Inquiry (pathology). In Australia, the Royal Commission of Inquiry into Chamberlain Convictions (1987) (blood analysis); in New Zealand, the Royal Commission to Inquiry into the Convictions of Arthur Allan Thomas (1980) (bullets and rifling), and in the U.K., a series of tragic wrongful convictions due to faulty if not malicious pathology. I have described several of these cases, along with equally disconcerting miscarriages of justice involving alleged IRA sympathizers in the UK, in: “Convicting the Innocent: A Triple Failure of the Justice System” (2006), 31:3 Man LJ 403 at 417–421 and 454–465.

⁸ NRC, *supra* note 6 at 155-156.

placed considerable emphasis on hair microscopy. The RCMP alone maintained a staff of approximately 35 hair examiners across Canada.⁹ But it was just a tool: hair comparisons were simply intended to provide a “class association”; that is, as the National Research Council of the National Academies put it in 2009:

a conclusion of a “match” means only that the hair could have come from any person whose hair exhibited—within some levels of measurement uncertainties—the same microscopic characteristics, but it cannot uniquely identify one person. However, this information might be sufficiently useful to “narrow the pool” by excluding certain persons as sources of the hair.¹⁰

So it was fundamentally an investigative tool intended to “narrow the pool” of suspects. Despite this, prosecution services sometimes used the results of the comparison as evidence in criminal prosecutions. Hair microscopy faded from prominence during the early to mid-1990s (at least on the court side) with the advent of DNA technology.

For reasons I will now examine, hair microscopy probably yielded nothing more than an educated guess.¹¹ Its probative value was slight, the prejudicial effect on the conduct of the trial was significant, and its use ought to have been confined to investigations and not extended into the courtroom.¹²

⁹ *Report of the Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell*, (Winnipeg: Government of Manitoba, 2007) (The Honourable Patrick J Lesage, QC), at 174, online: <<http://www.driskellinquiry.ca>> [Driskell Report].

¹⁰ NRC, *supra* note 6 at 156.

¹¹ To adopt the phrase used consistently (albeit in a different context) in the following appellate decisions: *R v Ranger* (2003), 67 OR (3d) 1 at para 82, 178 CCC (3d) 375 (CA); *R v Clark* (2004), 69 OR (3d) 321 at para 78-79, 182 CCC (3d) (CA); *R v Klymchuk* (2005), 203 CCC (3d) 341 at paras 33-37 (available on WL Can) (Ont CA) [Klymchuk].

¹² Even if the test for admissibility of expert evidence is met, a trial judge may reject the proffered evidence if its prejudicial effect on the conduct of the trial outweighs its probative value: *R v DD*, 2000 SCC 43 at para 11, [2000] 2 SCR 275. I will turn to this later on in this section, but the Ontario Court of Appeal has powerfully observed that items of evidence amounting to nothing more than an ‘educated guess’ “... can play a valuable role in the investigation of crime by directing the police to fruitful areas of investigation. They cannot, however, be admitted as evidence under the guise of expert opinion”: *Klymchuk*, *supra* note 11 at para 37.

A. The Morin Inquiry

The modern assessment of the probative value of hair microscopy evidence, at least in Canada, starts with the Commission of Inquiry into the Proceedings Involving Guy Paul Morin.¹³

On October 3, 1984, Christine Jessop, a nine-year old girl, was murdered. Suspicion fell on her next-door neighbour, Guy Paul Morin. In short order, he was charged with her murder.

The case was entirely circumstantial. Amongst other things, the Crown relied on hair comparisons to demonstrate that there had been physical contact between Christine Jessop and the accused, and that Christine had been transported in Morin's car to her death. This evidence was said to refute the accused's denial that he had not had any contact with Christine, and that she had never been in his car.

When Christine's body was discovered, a single dark hair was found embedded in skin tissue adhering to her necklace. This hair was not Christine's, and was presumed to have come from her killer. On microscopic analysis, experts concluded that the hair could have originated from Morin. Three hairs found in Morin's car were likewise said to be dissimilar to the accused's hairs; experts contended that they were similar to Christine's hairs, and "could have" come from her.

After multiple trials and appeals, Morin was acquitted on appeal in 1995 on the basis of fresh DNA evidence tendered jointly by the Crown and the defence. Ontario called a public inquiry to find out what had happened and appointed the Honourable Fred Kaufman, a former judge of the Quebec Court of Appeal, to preside over it. The hair comparison evidence played a significant role in Commissioner Kaufman's conclusion that Morin had been wrongly convicted. He cited three central concerns.

First: "[h]airs are not unique, and the assessment of the similarities, differences and importance of hair characteristics is highly subjective."¹⁴ Hair microscopy cannot yield a conclusion that a particular person was the donor of a hair.¹⁵

¹³ Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin, (Toronto: Queen's Printer for Ontario, 1998) (The Honourable Fred Kaufman), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>> [Morin Report].

¹⁴ *Ibid* at 88.

¹⁵ *Ibid*.

Second:

the strongest conclusion that can be drawn is that a hair or fibre is *consistent with* having come from a particular source. The second strongest conclusion is that a hair or fibre could have come from a particular source. ... Another conclusion which is sometimes drawn is that a hair or fibre cannot be excluded as having come from the same source.¹⁶

None of these conclusions identifies the source of the unknown hair. The nuances developed by scientists in this area are easily miscommunicated and misapprehended by lay triers of fact; in this case, the language used contributed to Morin's wrongful conviction.¹⁷

And third: the experts failed to adequately communicate the limitations on their findings to both the prosecutors and the court.¹⁸

In these circumstances, Commissioner Kaufman noted cautionary words from the Supreme Court of Canada to the effect that expert evidence can easily be misused and distort the fact-finding process. Famously, that Court had said:

Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves.¹⁹

In the result, Commissioner Kaufman recommended that trial judges should:

- i. undertake a more critical analysis of hair comparison evidence, and where it only shows that an accused cannot be eliminated, exclude the evidence;²⁰
- ii. if admitted, charge the jury that as the trier of fact it should not be overwhelmed by any aura of scientific authority or infallibility of the evidence, and explain the limitations that should be applied to the expert's findings;²¹ and

¹⁶ *Ibid* at 88 [emphasis in original].

¹⁷ *Ibid* at 88-89 and 101-110.

¹⁸ *Ibid* at 103.

¹⁹ *R v Mohan*, [1994] 2 SCR 9 at 21, 114 DLR (4th) 419 [Mohan].

²⁰ Morin Report, *supra* note 13 at 311.

²¹ *Ibid* at 328.

- iii. not permit experts to use demonstrably misleading language such as “consistent with” and “match” in the context of forensic hair comparisons.²²

B. The Driskell Inquiry

The indictment of forensic microscopy did not stop there. In 1990, in Manitoba, James Driskell was charged, convicted and imprisoned for first degree murder, in part because of hair evidence. An inquiry into his case was commissioned in 2005, and in 2007, a retired Chief Justice from Ontario ultimately concluded that Driskell had been wrongfully convicted.²³ Though his report was issued well after the Manitoba Forensic Evidence Review Committee completed its mission, its discussion of hair microscopy shows the context in which the Review took place.

Driskell had been charged with the murder of Perry Dean Harder. The case for the Crown was largely circumstantial, but had been contaminated with unsavoury witnesses, inexplicable non-disclosure of critical evidence by the prosecutors and police, and a heated out-of-court confrontation between the lead prosecutor and counsel for one of the Crown witnesses. To make matters worse, the prosecution had tendered and relied upon hair comparison evidence that was said to implicate the accused in the offence.²⁴

At trial, the Crown called an RCMP expert, Tod Christianson, to testify with respect to the hair evidence.

In 1990-91, Mr. Christianson was one of about five hair and fibre examiners in the Winnipeg Laboratory of the RCMP Forensic Laboratory Services (“RCMP FLS”). He had been a hair and fibre examiner for approximately seven years (including one year as a trainee), and had worked on almost 470 prior hair and fibre cases. He had presented microscopic hair comparison evidence in 26 previous cases.²⁵

Seemingly he had all the qualifications and experience that a prosecutor would want.

Mr. Christianson testified that three of the questioned hairs from the accused’s van (said to have been used in the murder) were microscopically

²² *Ibid* at 338-343 of the report and at 47 of the Executive Summary.

²³ Driskell Report, *supra* note 9 at 1.

²⁴ *Ibid* at 146-149.

²⁵ *Ibid* at 147.

“consistent with” the known hairs attributed to the deceased “within (a) normal range of variation”.²⁶ When asked what he meant by “consistent with”, he provided this explanation:

[W]hen I say that a hair is consistent, as I have in this case, that means that the hairs have all of the features that the known samples have, within normal biological variation, and there’s nothing, nothing you would—that you can’t account for. So that if there was some feature, for example abnormal colour or something like that, that would cause that hair to be eliminated. So, it falls exactly within the range of the variation of the known sample with no unaccounted for differences whatsoever.

And the point about this type of analysis is that it’s not a positive identification, all right, because the only way you could do that is to look at all the hairs from all the person’s head that exist, and that’s an impossibility. But I can tell you, based on my experience, that the chances of just accidentally picking up a hair and having it match to a known sample are very small. So if the hair is consistent, that means it either came from the same person as that known sample or from somebody else who has hair exactly like that.²⁷

Mr. Christianson’s evidence at the Driskell trial was in most respects typical of how hair microscopy evidence was presented in Canadian courts during the early 1990s.²⁸ There were, however, several problems with it. First, his conclusions had not been “peer reviewed” by a second hair examiner, despite that fact that several examiners were available in the same office.²⁹ Second, like most other forensic labs at the time, the RCMP FLS did not conduct microscopic hair comparisons “blind”—i.e., the examiner knew something about the police theory of the case, and

²⁶ *Ibid* at 147-148.

²⁷ *Ibid* at 150 [emphasis added].

²⁸ This was the conclusion reached by Douglas M Lucas MSc, DSc (Hon), the former head of the Centre of Forensic Sciences of Ontario, who had been retained by the resulting Commission of Inquiry into the Driskell case to provide advice on Mr. Christianson’s lab work and trial testimony: Driskell Report, *ibid* at 165. The Lucas report is attached to the Inquiry report: *ibid* in Appendix G at 19.

It may well be that Mr. Christianson’s manner of testifying was reflective of the practice in the US as well. In 1985, the FBI convened a symposium bringing the community of hair comparison analysts together. The purpose of the symposium was to develop and agree upon standards. They agreed to avoid use of the term “match”; that the strongest statement that would be made was that a hair was “consistent with” or “could have” come from the accused; and not to give evidence about probabilities: Brandon L. Garrett, *Convicting the Innocent* (Cambridge: Harvard University Press, 2011) at 99. To the same effect, see NRC, *supra* note 6 at 159-160.

²⁹ Driskell Report, *supra* note 9 at 148.

therefore knew if the police were expecting to find a hair “match”.³⁰ Third, Mr. Christianson’s evidence was carefully nuanced, but it is doubtful that the jury properly understood the limited probative value of the microscopic observations he had made.³¹

And, as it turned out, Mr. Christianson was wrong. Very wrong. Subsequent DNA examination established that there was “extremely strong support for the proposition that the hairs in question did not originate from the [deceased];” more seriously, the three questioned hairs were shown to have originated from three different persons, none of whom were Mr. Harder.³²

The scientific sands shifted several times in the case of James Driskell. During his testimony at the trial, Mr. Christianson fairly pointed out that the examination did not lead to a positive identification. However, he nuanced that observation by saying that the chance of a coincidental match was very small. Indeed, “he presented his results as highly probative on the issue of identity”.³³

The sands continue to shift, even now. Like Commissioner Kaufman in the Morin Inquiry, Commissioner LeSage in the resulting Driskell Report emphasized that, even at the time of the Driskell prosecution, it was widely recognized in the forensic community that microscopic hair comparisons were (and are) highly subjective, and that different examiners sometimes disagree.³⁴ Most seriously, the debate as to the role and usefulness of hair microscopy was raging at the time that it was being used in investigations and court proceedings, and the reality is that the “science” itself had never and still has not been properly validated. Dr. Joel Mayer, an expert called at the Driskell Inquiry, pointed out that the forensic community itself had contributed to the problem by putting the cart before the horse:

In fact, when hair microscopy and hair examination was being used by many forensic science laboratories, the debate as to the usefulness and the significance of the findings was still raging on. And that’s the wrong way to go about it. That debate should have taken place first, and once there was consensus and

³⁰ *Ibid* at 162-163.

³¹ *Ibid* at 166.

³² *Ibid* at 155.

³³ *Ibid* at 161 and 163.

³⁴ *Ibid* at 161.

agreement, then turn around and employ this technique. So it should have been validated first. Unfortunately, as I look at it, the validation was ongoing while the information was being produced and evidence was given. At the end of the day, is this science?³⁵

Commissioner LeSage thought not. He felt that supposed scientific evidence should not be presented in criminal trials as probative on the issue of identity unless the process itself, and the conclusions reached, had a strong empirical or theoretical foundation.³⁶ Hair microscopy fails that test, as it is fundamentally experience-based, not scientifically anchored.³⁷ Indeed, in 2009, the National Research Council of the National Academy of Sciences in the US reported that “[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population” and that any effort to link a specific defendant to hair evidence on the basis of microscopy alone has “no scientific support”.³⁸ A study which double-checked FBI laboratory hair microscopy work through mitochondrial DNA analysis showed it to have an 11% error rate.³⁹ Other studies and proficiency tests of hair examiners dating back to the 1970s found error rates ranging from 28% to as high as 68%.⁴⁰ In the end, DNA testing would reveal that in four separate Manitoba murder cases, the hair microscopy examination had been incorrect.⁴¹

That being the case, does hair microscopy evidence have any further role in criminal trials, or has it been consigned it to the forensic scrap-heap? Commissioner LeSage still saw one last legitimate, albeit narrow, post-investigation role:

³⁵ *Ibid* at 173.

³⁶ *Ibid* at 172.

³⁷ The RCMP examiners’ handbook suggested that if examiners are asked to explain the basis for their opinion, they should refer to “publications”, “attendance at workshops and seminars”, “discussions with others in the field”, “understudy training”, the “100 hair exercise” and other “proficiency tests”, and their years of casework experience: *ibid* at 168-169.

³⁸ NRC, *supra* note 6 at 160-161.

³⁹ Driskell Report, *supra* note 9 at 172.

⁴⁰ Barry Scheck et al, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: Signet Books, 2001) at ch 7.

⁴¹ Driskell Report, *supra* note 9 at 172. These cases were those of Driskell, Unger, Sanderson, and of Robert Starr. See *R v Starr*, 2000 SCC 40 at para 200, [2000] 2 SCR 144.

I agree with the views expressed by the panelists and in the *Morin Inquiry Report* that if hair microscopy evidence remains admissible, any conclusions should be expressed in “exclusionary” rather than “inclusionary” terms (i.e., framed as a statement that the source of the known hairs cannot be excluded as the source of the questioned hairs).⁴²

The US National Research Council of the National Academies expressed a similar view two years later:

Because of the inherent limitations of hair comparisons and the availability of higher-quality and higher-accuracy analyses based on mtDNA, traditional hair examinations may be presented less often as evidence in the future, although microscopic comparison of physical features will continue to be useful for determining which hairs are sufficiently similar to merit comparisons with DNA analysis and for excluding suspects and assisting in criminal investigations.⁴³

C. The Triggering Event

To sum up: during the 1970s and 1980s and into the 1990s, the policing community placed considerable emphasis on hair microscopy. Prosecution services likewise relied upon it in court, primarily to assist in establishing the identity of the suspect in murder cases. Testimony in court was often nuanced, but “dressed up in scientific language which the jury does not easily understand, and submitted through a witness of impressive antecedents,”⁴⁴ triers of fact inevitably gave the evidence considerable weight. What was not well understood was that at the very time the evidence was being tendered in court, there was considerable dispute within the forensic community on whether the evidence was reliable, and how far a witness could go in suggesting that it was probative of critical facts in issue.

The sand started to shift markedly in the early 1990s, with the advent of, and increasing reliance on, DNA evidence. A trend developed in the US to exclude admission of hair microscopy evidence on the basis that it was simply unreliable.⁴⁵ In 1998, the Morin Commission of Inquiry

⁴² Driskell Report, *supra* note 9 at 172.

⁴³ NRC, *supra* note 6 at 160.

⁴⁴ Mohan, *supra* note 19.

⁴⁵ *Williamson v Reynolds*, 904 F Supp 1529, 1558 (ED Okla 1995); Clive A Stafford Smith & Patrick D Goodman, “Forensic Hair Comparison Analysis: 19th Century Science or 20th Century Snake Oil?” (1996) 27 Colum HRL Rev 227.

demonstrated that hair microscopy evidence amounted to little more than an educated guess.

All this was brought home to Manitoba by the case of James Driskell. In 2002 and 2003 counsel for Driskell conducted a reinvestigation of his case. It was accompanied by a fair bit of media coverage. As part of this, Manitoba Justice arranged for a DNA test of the hair evidence from his case. That test showed that hair microscopy evidence could be and had been wrong. Something had to be done, and the Province decided to embark upon an unprecedented experiment.

IV. THE MANITOBA FORENSIC EVIDENCE REVIEW

In April 2003, in my former life as Deputy Minister of Justice for Manitoba, I announced the creation of the Forensic Evidence Review Committee. Multi-disciplinary in nature, the committee was composed of a senior crown attorney as Chair (Richard Saull, now a superior court judge), a defence lawyer designated by the Association in Defence of the Wrongly Convicted (AIDWYC),⁴⁶ senior investigators from each of the RCMP and the Winnipeg Police Service, a crown attorney, and a forensic expert from the University of Manitoba with no connection to law enforcement. The written mandate of the Committee was as follows:

The Committee shall examine all cases of culpable homicide:
 prosecuted in Manitoba during the past 15 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; and
 appealed the conviction to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed,

⁴⁶ The Association in Defence of the Wrongly Convicted is a non-profit organization dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit and to preventing such injustices in the future through education and reform. Relying primarily on the *pro bono* work of a few defence counsel in Toronto following the discovery of a miscarriage of justice in the case of Guy Paul Morin during the early 1990s, AIDWYC has since grown into a funded, national organization with a strong track record for identifying those who have been wrongly convicted, then advocating on their behalf: AIDWYC, online: The Association in Defence of the Wrongly Convicted <<http://aidwyc.org/>>.

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

Amongst other issues, the Committee shall consider:

1. the nature of the evidence tendered in the context of the trial record;
2. whether, with the benefit of current scientific expertise, the conclusions tendered by the Crown at trial were incorrect;
3. the extent to which the Crown relied upon this evidence to prove the case;
4. any comments made by the trial judge concerning the probative value or weight to be given to this evidence;
5. any other factors that may assist in assessing whether a miscarriage of justice has occurred.⁴⁷

In essence, the committee was asked to do a double check on murder cases that had been prosecuted in the province during the preceding 15 years, to see if there were any inmates still behind bars who had been convicted, in part or largely, on the basis of hair microscopy evidence. AIDWYC had been consulted on the initiative, was supportive, and attended the public announcement to express its support.⁴⁸ The committee was given one year to report, and was empowered to do any testing it thought necessary to complete the task.

On August 19, 2004 the committee filed its report, which was made public the following month. From an initial inventory of 175 cases, 136 were eliminated for various reasons (such as an appeal against conviction was allowed). That left 39. The trial transcripts of each of the remaining cases were reviewed, and 37 were eliminated for various reasons—for instance, that hair comparison evidence had not been tendered, or the defence had been run on a basis other than factual innocence. Two cases remained: Kyle Unger and Robert Sanderson.⁴⁹

⁴⁷ Forensic Evidence Review Committee, *Final Report* (Winnipeg: Manitoba Department of Justice, 2004) at 3–4, online: <<https://www.gov.mb.ca/justice/publications/forensic/finalreportaug2004.pdf>> [FERC Final Report].

⁴⁸ Although, in fairness, it should be noted that AIDWYC would have preferred the scope to be wider. The recommendation advanced by AIDWYC during the Driskell inquiry in support for a national review mirrors to a certain extent the mandate prepared by Manitoba: Driskell Report, *supra* note 9 at 181.

⁴⁹ Both had been found guilty at trial, and had their convictions affirmed unanimously by the Manitoba Court of Appeal: *R v Unger* (1993), 83 CCC (3d) 228, 85 Man R (2d) 284 [Unger cited to CCC]; *R v Sanderson*, 134 Man R (2d) 191 (available on WL Can) [Sanderson cited to Man R].

Both inmates were approached, agreed to provide DNA samples, and with the support of counsel and members of the committee, DNA testing was performed by an accredited lab in the US. The results were not surprising. DNA showed that the original microscopy examination had been wrong in both cases. The committee referred both back to Manitoba Justice for review, noting that one of the cases, involving Kyle Unger, should be given priority attention.⁵⁰

The Manitoba review raised some complex and multi-faceted issues. There are a number of ways to analyze those issues, but in my view the best and most practical way is to examine both the process and the results of the review through the lens of the various affected parties and stakeholders. Their reactions ranged from complete support, to a more nuanced lukewarm reception, to outright rage and bewilderment.

A. Manitoba Justice's Reaction

The review process raised some eyebrows within the Department. Was it a proper role for the Crown to deliberately seek out potential wrongful convictions? Where did that mandate come from? Was not the role of the Crown to prosecute crime in an adversarial setting—leaving the interest of accused persons and inmates to be represented and protected by the private bar or Legal Aid? And what if an inmate wanted to be left alone—preferring, instead, life in an institution? Remember, this was not a situation where an inmate had raised his hand and said, “Please review my case; I am innocent”. The Department did not know what any particular inmate’s position was, and had no idea whether inmates even wanted a review of their cases. There was, surely, the right to be left alone—free from government interference, as long as you are adhering to the institution’s rules and are abiding by the law.

Nonetheless, as described earlier in this essay, Manitoba Justice took the institutional view that the Crown has a broad role as “minister of justice” to ensure that justice has been done in cases where evidence now recognized as unreliable had been tendered and relied upon by the prosecution.⁵¹ In the case of hair microscopy, the sands of scientific opinion had shifted during the previous 30 years, and the Department

⁵⁰ FERC Final Report, *supra* note 47 at 20.

⁵¹ See the discussion and cases *supra* note 3.

concluded that there was a responsibility to do a double check to ensure that no innocent persons had been convicted on the basis of faulty forensic evidence.

On a more personal level, most of the Crown attorneys in the department were supportive as well. One prosecutor, arguably the most experienced in the Province, said that he had been involved in a few cases that caused him a degree of concern afterward; it was quite appropriate, he said, for the Province to do a double check after the fact. In the result, contrary to my initial expectations, prosecutors in the province generally supported the review. With the benefit of hindsight, I'm not sure why I expected any resistance: in my experience, prosecutors understand their responsibilities as ministers of justice.

B. Kyle Unger's Reaction

Based on the forensic evidence review, Mr. Unger's counsel filed an application to the Minister of Justice for a review of his conviction pursuant to sections 696.1–696.6 of the *Criminal Code*. In November 2005, Mr. Unger was granted bail pending the Minister's decision.⁵² On March 11, 2009 the Minister of Justice ordered a new trial because "there [was] a reasonable basis to conclude that a miscarriage of justice likely occurred in [his] 1992 conviction".⁵³ On October 23, 2009 four important announcements were made: Manitoba's senior Crown attorney advised the court that after a full review of the evidence it had been concluded that "... it would be unsafe to retry Unger on the available evidence".⁵⁴ He

⁵² While not authorized under the *Criminal Code*, the law is now clear that an inmate under sentence has a Charter-based right to apply for and be granted bail where a section 696.1 application has been made and a defined evidentiary threshold has been met: *R v Phillion*, [2003] OJ No 3422 at paras 104-105 (QL) (Sup Ct J); *Driskell v Canada*, 2004 MBQB 3 at para 48, [2004] 4 WWR 182 [*Driskell v Canada*]; *Unger v Canada*, 2005 MBQB 238 at paras 49-51, 196 Man R (2d) 280 [*Unger v Canada*]; *R v Ostrowski*, 2009 MBQB 327 at paras 57-59, 250 CCC (3d) 123 [*Ostrowski*].

⁵³ "Police made evidence fit the crime in convicting Kyle Unger: lawyer" CBC News (11 March 2009), online: <<http://www.cbc.ca/news/canada/manitoba/story/2009/03/11/manitoba-kyle-unger-new-trial-murder.html>>.

⁵⁴ See the submission of Don Slough, Assistant Deputy Attorney General for Manitoba, in an unusually lengthy and detailed history of the case and accounting on the record why Manitoba was not offering any evidence on the re-trial of the accused: *R v Unger*, (23 October 2009), Winnipeg, CR91-01-11124 (Man QB) (Crown Submission),

advised that the Crown would not be calling any evidence, and the court entered an acquittal as a result. A few hours later, the Minister of Justice for Manitoba announced that no public inquiry would be called. While he was surely innocent of the offence with which he had been charged, a seemingly incriminating reaction to a “Mr. Big” sting operation⁵⁵ implicated him at trial, and the province would not be offering any compensation as it was Unger’s own comments that contributed to his conviction. Concurrently, the RCMP announced that it did not intend to re-open the investigation into the murder. Criminal proceedings were over, and Mr. Unger was freed. However, the case was not yet over. It was about to move into civil court.

On September 21, 2011 Unger filed a \$14.5 million wrongful conviction lawsuit. In the statement of claim filed in the Manitoba Court of Queen’s Bench, he named as defendants the RCMP, individual RCMP members, specific Crown attorneys as well as both the federal and provincial Attorneys General. The action remains pending as I complete this essay.⁵⁶

There is a postscript to the issue of Unger’s reaction to the province’s review. He initially had a hard time coping with the notion that he should be released. He had spent almost all of his adult life in jail. In a sense, jail had become home for him. He had become institutionalized. His obscene gesture to the media after being released on bail spoke volumes about his raw mental and emotional state at that point in his life. A year after his

online: CBC <http://www.cbc.ca/manitoba/includes/pdfs/unger_submission.pdf>.

⁵⁵ In which, typically, a police officer poses as a major crime figure who is seeking to recruit the accused to become part of his criminal “gang”. A pre-condition to joining the gang is to admit to previous criminal activity committed by the accused—which, through police steering of the conversation, invariably focuses on the crime under investigation by police: see *R v Mack*, 2012 ABCA 42 at para 27, 522 AR 262. For an analysis of this investigative strategy, see Bruce A MacFarlane, Robert Frater & Chantal Proulx, *Drug Offences in Canada*, loose-leaf (consulted on July 2012), 3d ed (Toronto: Canada Law Book, 2011) ch 25 at 25.960ff.

⁵⁶ Steve Lambert, “Kyle Unger files \$14.5M wrongful conviction lawsuit” *The Globe and Mail* (21 September 2011), online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/kyle-unger-sues-for-wrongful-conviction-in-murder-of-manitoba-teen/article4256694/>> [Unger News Article]. The case is entitled *Kyle Unger v George Dangerfield et al* (court registry CI 11-01-74071). Its progress can be tracked online at <<http://www.jus.gov.mb.ca/Domain/FileSearch/SearchByOtherInfo.aspx>>.

release on bail, he threw a stone at a window with a police officer beside him so that he could be re-arrested and sent back to jail. His ploy did not work. Overall, his post-release conduct demonstrated an anti-social psychological profile that is somewhat disconcerting. Whether he was like that to begin with, or became that person as a result of his experience in jail, is clearly a debatable issue. It may have been a bit of both. But it illustrates one of the implications of the Crown conducting an unsolicited if not an unwanted “sweep” of cases in search of miscarriages of justice.

C. The Victim’s Family’s Reaction

Although the issue of wrongful conviction is often portrayed as a “liberal” issue focusing on the rights of an accused person, it is very much an issue that affects public safety and confidence in the justice system. Every time someone is convicted of an offence for which they are innocent, the justice system fails in three separate ways. Along with the direct impacts on the person who is wrongfully convicted, the actual perpetrator remains free to continue victimizing others. Equally disconcerting, we re-victimize the victim or the family of the victim by undoing the emotional closure that has already taken place, and reopen a wound which, with an increasingly cold evidentiary trail, may never be healed.

Regrettably, that is precisely what occurred in the case of Kyle Unger. Seventeen years after conviction, Unger was ultimately acquitted of the charges laid against him. The co-accused, Timothy Houlahan, committed suicide while on bail.⁵⁷ No one has since been charged or held accountable for the murder that unquestionably took place. And there is reason to believe that no one will ever be held accountable.

To understand the reaction of the victim’s family to the Forensic Evidence Review, it is important to have some idea of the nature of the crime that had been committed. The victim, whom I will simply refer to as “BG,”⁵⁸ was a typical 16 year-old girl who attended a rock concert near a small town in rural Manitoba. She loved to dance, and be with her friends. Houlahan and Unger also attended, and consumed considerable amounts

⁵⁷ Unger News Article, *supra* note 49.

⁵⁸ I recognize that the name of the victim, and those of her family, have been published in a variety of different media. Nonetheless, I do not wish to add to the pain felt by the family, so I will not name BG or her family in this essay.

of alcohol—as did many others. There was evidence that Unger had consumed LSD. There was also evidence that BG had consumed some beer. BG's main pre-occupation was dancing, which she continued to enjoy until around 1:30 AM. After that, things went seriously wrong.⁵⁹

The next day, BG's nude body was found in a creek in a heavily wooded part of the grounds. She had been brutally murdered and sexually mutilated. The Court of Appeal described the horrific scene in this fashion:

The victim had suffered a terrible beating. Severe blows to the head had caused subarachnoid bleeding. She had been strangled. Long sharp sticks had been forced into both her vagina and anus. These were described as having been inserted with great force. There were many other injuries about the body. There were no signs of any "defence" wounds, that is to say injuries to the victim—usually to be found on the arms or hands—indicating that she had attempted to ward off her attacker.⁶⁰

Understandably, BG's parents were devastated and horrified. This was not the sort of thing that any loving parent could easily cope with. Eventually, as the charges against the two accused worked their way through the court system, "Mr. and Mrs. G" started to come to grips with what had happened. And with the conviction of Unger, they started to feel a sense of closure. Not necessarily relief or joy; just closure. At least they had some sense of what had happened to their daughter, and who was responsible. Twelve years later that began to unravel, when Mr. and Mrs. G first learned that a review had been conducted of Unger's case. That is where I come in again.⁶¹

⁵⁹ These facts are drawn exclusively from *Unger*, *supra* note 49 at 234-236.

⁶⁰ *Ibid* at 235.

⁶¹ A timeline of the Unger case: BG killed (June 24, 1990); Unger convicted at trial (February 28, 1992); Court of Appeal affirmed Unger's guilt (July 7, 1993); Leave application denied (December 2, 1993); Forensic Review Committee established (April 23, 2003); DNA testing done on Unger case samples (June 2004); Forensic Review Committee reports to Deputy Minister, and recommends Unger case receive priority review (August 19, 2004); Deputy Minister meets with Mr. and Mrs. G (early September 2004); Public announcement and release of the report (September 15, 2004); Unger files section 696.1 application with Minister of Justice (late fall 2004, continued in 2005); bail granted (November 4, 2005); Federal Minister orders new trial (March 11, 2009); three Crown announcements in Winnipeg: Unger will not be re-tried, no public inquiry will be ordered, and no compensation will be offered (October 23, 2009); Unger files \$14.5 M. civil lawsuit (September 21, 2011).

The Forensic Evidence Review had commenced in April 2003. The Committee reported to me on August 19, 2004. On the basis of the Committee's report, it was clear that Unger's conviction was insecure. The Report was going to be made public. In view of the Province's emphasis on and respect for the plight of victims of crime, it was important to meet with BG's parents in advance of my announcement, to advise them of the review, and its results, so they would not be caught by surprise. One thing was clear to me: this was not going to be an easy meeting.

In early September 2004, several days before the announcement, I met with Mr. and Mrs. G. We exchanged the usual pleasantries at the beginning, but body language made it clear that Mr. G was not at all happy. He had been given a "heads up" on what I was going to say. I described the establishment of the review, its purpose, and the conclusions reached by the Committee. Mr. G. could barely conceal his rage. His first question came out of the blue. It was an important one, and demonstrated his understanding of what had been going on during the previous decade. He asked, "Who decided to do this review, and why?" I advised him that I had made the decision. He continued in a firm and ever-increasingly agitated voice, "What was your mandate, and where do you get your authority to open up a case that was decided by a unanimous jury more than a decade ago?"

After a pause that seemed endless, I explained that hair comparison evidence had been used at trial to convict Unger, and that type of evidence had been called into question in the years following Unger's conviction. As a result, I continued, the Province had decided to do a review to see if any murder convictions in the Province deserved a closer look. That review, I said, led to the conclusion that Unger may be innocent.

Mr. G. slammed his fist on the table, and thundered, "Hair evidence? What hair evidence? I don't even recall that evidence being used at trial!" He was right in a sense: it had not been a flashy piece of evidence, and might even have been missed by those in attendance at the trial.⁶² But it

⁶² Hair found on a sweatshirt worn by the deceased BG was "... consistent with having originated from the known scalp hair samples reportedly from Unger": Forensic Evidence Review Report, *supra* note 47 at 8-13, particularly at 10. The only other evidence that implicated Unger at trial carried little if any probative value: a now discredited jailhouse informant, and the Mr. Big "admission" which did not match the known facts of the crime.

had been tendered by the Crown, relied upon by prosecuting counsel during his closing address to the jury, and was expressly relied upon by the Court of Appeal when affirming conviction.⁶³ As Mr. G. got up to leave at the end of the meeting, he turned around, paused briefly, and said in a faltering voice choked with emotion, “You know, you got the right guy to begin with. And now I assume he’s going to get millions of dollars out of this!”

My initial instincts were right: it had not been an easy meeting. But it showed in very clear terms that despite the writings of some academics, wrongful convictions do involve a third tragic dimension: the family of the victim is left twisting in the wind, not able to accept that the person they have grown to hate may be innocent. They are often utterly unable to undo the passionate feelings that have been built up against that person.

The Forensic Evidence Review had also called into question a second case: that of Robert Sanderson.⁶⁴ His case was a little different, as there was other evidence that implicated him in the murder, and Manitoba Justice announced that it was going to review the case once again to see if there was a basis to believe that a miscarriage of justice had occurred. The victim’s family reacted in much the same way as in the case of Unger:

Christa Zurstegge, 66, said she remains convinced that Robert Stewart Sanderson helped with the killing of her son Stephan Zurstegge, despite the new DNA evidence that eliminates the only forensic link between Mr. Sanderson and the bloody scene where three men were beaten, shot and stabbed to death in 1996. “I’m telling you, I cannot believe this,” Ms. Zurstegge said. “This is unreal. Our system stinks”.⁶⁵

⁶³ Unger, *supra* note 49 at 235 and 254. For an account of what prosecuting counsel said in his closing address, see: *R v Unger*, (26 February 1992), Winnipeg, CR91-01-11124 (Man QB) (transcript), online: CBC <http://www.cbc.ca/fifth/2009-2010/the_wrong_man/documents/1992%20Feb%2026%20Unger%20trial.pdf>.

⁶⁴ Sanderson, *supra* note 49. Hair comparison evidence was referred to at paragraphs 3 and 5 of the judgment of the Court of Appeal, although, as noted at para 95, that evidence was not raised as an area of concern on appeal. The primary issues were severance of accused and a *Vetrovec* witness (an unsavoury witness central to the Crown’s case who has an unsavoury or disreputable character: see *R v Vetrovec*, [1982] 1 SCR 811, 136 DLR (3d) 89).

⁶⁵ As recorded by Graeme Smith for the Globe and Mail: “Faulty analysis of hair samples sparks calls for case reviews”, *The Globe and Mail*, September 16, 2004, online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/faulty-analysis-sparks-call-for-review-of-cases/article1141680/>>.

Subsequently, in October 2005, Manitoba announced that, despite the conclusions reached by the Forensic Evidence Review Committee, “there continues to be a strong case implicating Robert Sanderson in the murders, even with new information related to hair evidence used during his trial”. It was not, the Department concluded, “an obvious miscarriage of justice and the province should not endorse a federal review of it”. The province did, however, pledge to “fully co-operate with the process if Robert Sanderson pursues a federal review under Section 696 of the Criminal Code”.⁶⁶ At the time of writing, seven years later, no application has yet been brought under that provision.

D. Manitoba’s Further Reaction

Public reaction to the review, and the results of the review, was quite positive. The only criticism was that it was too narrow, and should be expanded beyond homicide cases. Manitoba Justice agreed. On behalf of the Province, I announced on September 15, 2004 that the review would continue—this time focusing on cases of sexual assault and robbery. Defence counsel were also invited “to make submissions in relation to individuals convicted of other indictable offences” involving microscopic hair comparison evidence. Once again, the Province gave the Committee one year to do its work, and once again committed in advance to release the results of the review.⁶⁷

On September 13, 2005 the Committee reported the results of its review. Unanimously, the six-person multi-disciplinary review team concluded that there were no further cases in Manitoba falling within its terms of reference that required attention. Significantly, however, the Committee concluded its report with this observation:

That said, this Committee feels that a review process, similar to the one currently in place, is essential to maintain public confidence in the administration of

⁶⁶ Government of Manitoba, News Release, “Sanderson Case Review Complete” (October 28, 2005) online: Legislative Electronic Publications <<http://www.gov.mb.ca/chc/press/top/2005/10/2005-10-28-03.html>>. See also Shannon Kari, “Triple-Murder case against Robert Sanderson looks very different now than 1997”, *The National Post*, November 14, 2009. (reproduced online at: Pro Bono Law Ontario <<http://www.pblo.org/lawyers/search/item.284530>>).

⁶⁷ “Forensic Evidence Review Committee #2: Terms of Reference”, online: <http://www.gov.mb.ca/justice/publications/forensic/assaultrobbery.html>.

justice. This in turn will require vigilance in keeping abreast of developments in forensic science.⁶⁸

The gauntlet was thus thrown down. The forensic sciences required constant vigilance. And the issue was public confidence. Further reviews were required, similar to those already done. The Committee had been established provincially, and its authority was confined to Manitoba. There was, however, a subtle message: a much broader review was essential, perhaps even at the national level. That message was not lost on retired Chief Justice Patrick LeSage, who was about to start a public inquiry into yet another wrongful conviction in Manitoba.⁶⁹

E. Commissioner LeSage's Comments in the Driskell Report

Earlier in this essay I described Commissioner LeSage's thoughts on the probative value of hair microscopy evidence found in the Driskell report. In his report, he also considered whether there were any systemic recommendations that he ought to make in light of the experience in the Driskell case.⁷⁰ Noting AIDWYC's recommendation to the Commission that Manitoba's review be conducted on a national level, he expressed his agreement, and said this:

I am concerned that the problems identified relating to hair microscopy evidence in Driskell's case are not unique to his case or unique to Manitoba. I accept that a more extensive review of cases from across the country would be advisable, and encourage the Attorneys General of the Provinces and Territories to work together to examine how a case review similar to that conducted in Manitoba might be performed on a national level, and consider the appropriate parameters of such a review.⁷¹

F. Canadian Heads of Prosecutions' Reaction

Since the mid-1990s the heads of all prosecution services in Canada ("Heads"), both federal and provincial, have met semi-annually to discuss

⁶⁸ Forensic Evidence Review Committee #2, *Final Report* (Winnipeg: Government of Manitoba, 2005) at: <<http://www.gov.mb.ca/justice/publications/forensic/finalreportsep2005.pdf>>.

⁶⁹ Commissioner LeSage was given his mandate by Order in Council dated December 7, 2005, and reported to Manitoba on his conclusions on January 29, 2007. See Driskell Report, *supra* note 9 at 1.

⁷⁰ *Ibid* at 156.

⁷¹ *Ibid* at 182.

issues of concern to all prosecution services. These are very much “roll up your sleeves” meetings that consider and plan such things as responses to newly emerging challenges to the Crown, the implications of recent court decisions and the most effective approach to professional development for young Crown Attorneys.

Following release of Commissioner Cory’s report into the wrongful imprisonment of Thomas Sophonow,⁷² in 2002 the Heads established a working group on the prevention of miscarriages of justice. The mandate of the group was to develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions, and, more importantly, to recommend proactive policies and education to guard against future miscarriages of justice. Their resulting 165 page report, released in 2005, was well received—largely because, for the first time in any Anglo-based common law country, prosecutors and police joined forces on a national basis to take positive steps to reduce the risk of wrongful convictions.⁷³ The report has subsequently been cited in all levels of courts, applauded by the Canadian Bar Association and academia, has worked its way into the curricula in several law school courses, and has been studied at conferences internationally.⁷⁴

In February 2007, the Heads met informally to “take the temperature” of provincial and federal reactions to the Driskell recommendation that the Manitoba review be performed on a national level. What, exactly, did that mean? Should there be one, overall review? If so, was it realistic to think that there could be unanimity on the terms of reference? Who

⁷² The Inquiry Regarding Thomas Sophonow, *The Investigation, Prosecution and Consideration of Entitlement to Compensation* (September 2001), online: <https://www.gov.mb.ca/justice/publications/sophonow/toc.html>.

⁷³ Buy-in from the most senior levels of the Crown and police communities was critical to the success of this initiative. All Federal/Provincial/Territorial Ministers of Justice supported the report, and released it publicly on January 25, 2005. The Canadian Association of Chiefs of Police issued a statement endorsing the report, asked all police agencies to review their practices to ensure consistency with the report’s recommendations, and said this: “It is important that all players in the justice system—police, prosecutors, the judiciary and defence bar—work together and thereby effectively reduce the risk of wrongful convictions”: FPT Heads of Prosecutions Committee, *The Path to Justice: Preventing Wrongful Convictions* (Fall 2011) at ix, online: <http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ptj-spj-eng.pdf> [*Path to Justice*].

⁷⁴ For instance, see the comments of Professor Christopher Sherrin, “Comment on the Report on the Prevention of Miscarriages of Justice”, (2007) 52 Crim LQ 140.

should lead the review—the federal government, who has only a modest role when it comes to *Criminal Code* prosecutions? Or a province, or combination of provinces? If so, which one(s)? Given provincial rather than federal responsibility for criminal justice in each province, was it more realistic for the provinces to set up a review mechanism that made sense in each individual jurisdiction?

In 2011, the Heads released a detailed report on the progress that had been made since the release of their first report. One section of the report dealt specifically with the response by prosecution services to the Driskell Report recommendation concerning a “national” hair microscopy case review.⁷⁵

Heads noted that since Commissioner LeSage’s recommendation in 2007, “all Canadian jurisdictions have conducted reviews in different forms. The most formal were in Ontario and British Columbia.”⁷⁶

In Ontario, the review was conducted in two phases, with the Honourable Patrick LeSage overseeing the work of the Ontario Criminal Conviction Review Committee. The focus was on homicide cases from 1985 to 2000, where, as in Manitoba: the accused had pleaded not guilty, asserting factual innocence; s/he had unsuccessfully appealed to the Court of Appeal; hair evidence was tendered at trial; and hair was available for testing. Cases meeting the phase one criteria would then be subject to further review to determine the importance of the hair evidence in the context of the conviction. Cases raising a concern would then be referred for DNA testing.⁷⁷

British Columbia likewise followed the Manitoba model, but expanded the scope of the review. A review committee was established, consisting of retired judges from British Columbia’s Supreme Court and Court of Appeal, a defence lawyer nominated by the UBC Law Innocence Project, a Deputy Chief of the Vancouver Police Department and a Regional Crown Counsel, who supervised the process. The committee was directed to examine all cases of culpable homicide, sexual assault, robbery and other indictable offences including the use or attempted use of violence which: were prosecuted during the preceding 25 years; involved

⁷⁵ *Path to Justice*, *supra* note 73 at 153-154.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 154.

hair microscopy evidence; where the accused pleaded not guilty, asserting factual innocence and had been unsuccessful in attempts to appeal on the merits to the Court of Appeal.⁷⁸

In their report, the Heads reported that the BC review committee ultimately reviewed two homicide and two sexual assault cases, and “unanimously concluded that there was no reasonable basis to believe that, by virtue of the hair microscopy evidence, a miscarriage of justice ha[d] taken place in the convictions against the four individual accused persons”.⁷⁹

V. SOME CONCLUDING OBSERVATIONS

The criminal trial has traditionally been seen as the epicentre of substantive and procedural protections designed to avoid miscarriages of justice. That is the point in the criminal justice continuum where: an accused is presumed innocent; the prosecution bears the burden of proving its case beyond a reasonable doubt; the accused is entitled to the effective assistance of counsel; prosecution witnesses may be cross-examined in public; and the prosecution is required to provide the accused with “open file” disclosure, subject to very narrow exceptions which are judicially-supervised. And, in an overarching sense, the trial process in Canada accepts Blackstone’s admonition that at trial “it is better that ten guilty persons escape, than that one innocent suffer”.⁸⁰

In recent years, developments both nationally and internationally have forced a re-examination of whether the trial is actually the best—and only—setting for the determination of substantive innocence. Some have argued forcefully that while the trial process is reasonably well equipped to make

⁷⁸ *Ibid* at 153.

⁷⁹ *Ibid* at 154.

⁸⁰ William Blackstone, *Commentaries on the Laws of England* [Book the Fourth] (Oxford: The Clarendon Press, 1769) at 352 (in later editions it is often cited as 358). Though usually attributed to Blackstone, this proposition can be traced back in time through Benjamin Franklin, Fortescue, Maimonides and the Bible (Genesis 18: 23-32). See Glanville Williams, *The Proof of Guilt* 2d ed (London: Stevens and Sons Limited, 1958), at 155-158; and Alexander Volokh, “Guilty Men”, 146 U Pa L Rev 173 (1997), who trace the doctrine back as far as ancient Greece and Rome.

determinations of guilt or innocence, “the reality is that substantive innocence is often detected most accurately either before or after trial”.⁸¹

In Canada, post-conviction disclosure requirements have led to the discovery of new evidence sufficient to overturn long-standing guilty verdicts in a wide variety of circumstances.⁸² Intense and often unrelenting media or *pro bono* defence investigations have placed trial verdicts under unprecedented scrutiny. And internationally, the rapid escalation in the quality of medical and scientific evidence has meant that, perhaps for the first time in history, certain types of evidence can actually become more explainable and infinitely more precise through the passage of time.⁸³

Where does that leave the foundational principles that underlie our criminal justice system? What about the high premium that we traditionally have placed on the finality of criminal proceedings?⁸⁴ Is it even appropriate to engage in a post-conviction fact finding process? Isn’t that the very purpose of a trial, with all of the safeguards under the *Charter of Rights and Freedoms* that are guaranteed to an accused whose liberty is at stake—not to mention the trial protections that have been crafted by the courts over the centuries? And just what are the procedural protections for an accused once all trial and appellate proceedings are complete? Or is it a procedural free-for-all in pursuit of the truth?

American courts have been greatly influenced by these concerns. The judiciary and scholars in that country continue to debate whether an inmate is entitled to advance a “freestanding innocence claim”—i.e., an

⁸¹ Robert J Smith, “Recalibrating constitutional innocence protection,” 87 Wash L R 139 at 144.

⁸² There are a number of cases illustrating this point, but perhaps the most well-known are *re: Truscott*, 2007 ONCA 575, 225 CCC (3d) 321; the case of James Driskell, *supra* note 69; the case of Thomas Sophonow, *supra* note 72; and the case of Guy Paul Morin, *supra* note 13. The scrutiny was perhaps the most intense in the case of Thomas Sophonow.

⁸³ Robert J Smith, *supra* note 81 at 142. Obvious examples include some of the forensic sciences, eyewitness identification and confessions later shown to be false.

⁸⁴ *R v Wigman*, [1987] 1 SCR 246 at para 21, 38 DLR (4th) 530 in dissent, but not on this point: “Finality in criminal proceedings is of the utmost importance”; *R v Mahalingan*, 2008 SCC 63 at paras 30, 38, 46–47 and 75, [2008] 3 SCR 316; *R v Brown*, [1993] 2 SCR 918 at 923, 105 DLR (4th) 199; *R v Rollocks* (1994), 19 OR (3d) 448 at 453, 91 CCC (3d) 193 at 199 (CA); *R v EGM*, 2004 MBCA 43, [2006] 2 WWR 433; *R v Shologin*, 2005 MBQB 255 at para 11, 200 Man R (2d) 318.

assertion detached from the Due Process Clause which contends that new evidence of factual innocence warrants relief, despite the fact that the conviction came as a result of a constitutionally secure trial.⁸⁵ Robert J. Smith, presently a Visiting Assistant Professor at DePaul University College of Law in Chicago, quite fairly frames the issue in the United States in this fashion:

[O]nce the trial is over and the prosecution has met its heavy burden, the presumption of innocence disappears. The accused is now the convicted. Considerations other than the interests of the convicted person come into play. The need for society to obtain finality in criminal judgments, to preserve scarce judicial resources, and to respect the judgment of other courts that decided the case must be factored into how we treat challenges to a conviction. The question at this stage is not whether the Constitution permits the incarceration or execution of an innocent person. Instead, the issue is whether the Constitution requires a court to revise a jury determination of guilt if the prisoner subsequently demonstrates his factual innocence to some predefined degree of certainty.⁸⁶

The US Supreme Court has been reluctant to provide post-conviction relief on the basis of a claim to actual innocence. On three occasions over the past 18 years, most recently in 2009, the Supreme Court has been prepared to assume, *arguendo*, that there may be a constitutional right to challenge a conviction based on “truly persuasive” evidence of “actual innocence”. But in all three cases, the Court declined to affirm that such a right exists, effectively keeping it hypothetical in nature.⁸⁷ This state of affairs prompted a US judge to write an essay asking whether innocence was even relevant any longer—rather than being, as he argued it should be, the main preoccupation of judges hearing criminal cases.⁸⁸

In Canada, innocence is not just relevant; when established, it is dispositive. The approach in this country has been typically Canadian: less dogma; more pragmatism. That takes us full circle back to the Manitoba “experiment”, and how that fits within the innocence protection

⁸⁵ Robert J Smith, *supra* note 81 at 147.

⁸⁶ *Ibid* at 152.

⁸⁷ *Herrera v Collins*, 506 US 390 (1993); *House v Bell*, 547 US 518, (2006); *Osborne v District Attorney’s Office*, 129 S Ct 2308, (2009). And see *Skinner v Switzer*, 562 US (2011) [slip op, p 2], 131 S Ct 1289, where the Court explained its refusal in *Osborne* to order post-conviction DNA testing that could establish innocence, or confirm guilt.

⁸⁸ Henry J Friendly, “Is Innocence Irrelevant? Collateral Attack on Criminal Judgments”, 38 U Chi L Rev 142 (1970).

framework that has developed in this country. As I will now show, Canada's legal policy concerning miscarriages of justice has developed at the "top end" of the justice system, and over the years has cascaded downward—shaping the approach of appellate and trial courts, the legal profession, and the law enforcement community.

At the "top end", Parliament and the Supreme Court of Canada have both expressed concern over the prospects of wrongful convictions, in different ways of course. Section 696.1 of the Criminal Code provides an avenue for review to anyone convicted under a federal enactment whose right to an appeal has been exhausted. That remedy has been in place since Canada's first *Criminal Code* was passed in 1892.⁸⁹ Over the years, the precise mechanism for review has been controversial, and has evolved,⁹⁰ but everyone is in agreement on three things: the review standard is described in law, has been in place for 120 years, and is applied on a uniform basis throughout the country.

The Government of Canada, likewise, has been prepared to order References to the Supreme Court where there was reason to believe that a wrongful conviction may have occurred,⁹¹ and in no less than seven separate cases provincial governments have ordered judicial commissions of inquiry to determine why a miscarriage of justice occurred.⁹² Government's message to the public has been dramatic: more judicially-led inquiries have been called on the issue of wrongful conviction than any other single issue facing Canadians since Confederation. Some were focused on error correction in the case under consideration; most,

⁸⁹ *The Criminal Code, 1892*, 55-56 Victoria, c 29, s 748.

⁹⁰ The controversy is well examined in a series of essays published in the *Criminal Law Quarterly* in 2012. They are conveniently summarized by Kent Roach, Professor of Law and Prichard-Wilson Chair in Law and Public Policy at the University of Toronto, and Managing Editor of the *Criminal Law Quarterly*: "Editorial: Criminal Case Review Commissions and Ministerial Post-Conviction Review" (2012), 58 *Crim LQ* 135.

⁹¹ *Re R v Coffin*, [1956] SCR 191, 114 CCC 1; *Re Steven Murray Truscott*, [1967] SCR 309, 62 DLR (2d) 545; *Re Milgaard*, [1992] 1 SCR 866, 71 CCC (3d) 260. And once to a provincial Court of Appeal in *Re Truscott*, 2007 ONCA 575, 225 CCC (3d) 321.

⁹² Donald Marshall, Jr (Nova Scotia, 1989); Guy Paul Morin (Ontario, 1998); Thomas Sophonow (Manitoba, 2001); Ronald Dalton, Gregory Parsons and Randy Druken (Newfoundland and Labrador, 2006); James Driskell (Manitoba, 2007); David Milgaard (Saskatchewan, 2008) and the Inquiry into Pediatric Forensic Pathology in Ontario (2008).

however, were broadly-based, and sought advice on the systemic forces at play to avoid miscarriages of justice in the future.

The judiciary has been no less concerned. During the past two decades, the Supreme Court of Canada has delivered a lengthy and powerful line of decisions that signal the need to interpret Canadian criminal law—and if necessary re-shape it—in light of the reality that a number of wrongful convictions have occurred in this country.⁹³ And the Court itself has not hesitated to remand a case to a court of appeal for consideration of fresh evidence and an assessment of whether a conviction constituted a miscarriage of justice—even 11 years after the Court of Appeal had entertained an appeal and affirmed conviction.⁹⁴ Even when an application for leave to appeal is simply pending, that Court has confirmed that it has jurisdiction to release a trial exhibit for testing—a step undoubtedly inspired by the incidence of wrongful convictions.⁹⁵

This overarching philosophy has cascaded down to provincial courts of appeal in a variety of different scenarios. Most demonstrate a willingness to allow a case that has otherwise exhausted available appellate remedies to be reconsidered where it appears that a miscarriage of justice has probably occurred. The rationale for reconsideration so many years after convictions had been entered and affirmed on appeal (and in the face of the principle of finality) has varied with the circumstances, and on occasion could be characterized as innovative.

The easiest scenario is where a prosecution resulted in a conviction, and was not appealed at the time. Applications for leave to extend the time within which an appeal can be brought before the Court of Appeal can be commenced even decades later—although it is certainly helpful to have developed the defence case to the point where the Crown is prepared

⁹³ *R v Starr*, *supra* note 41; *USA v Burns*, 2001 SCC 7 at paras 1-3, [2001] 1 SCR 283; *R v McClure*, 2001 SCC 14 at para 40, [2001] 1 SCR 445; *R v Mapara*, 2005 SCC 23 at para 54, [2005] 1 SCR 358; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 36 and 43, [2007] 3 SCR 129; *R v Trochym*, 2007 SCC 6 at para 1, [2007] 1 SCR 239; *R v Khela*, 2009 SCC 5 at paras 2 and 12, [2009] 1 SCR 146; *R v Sinclair*, 2012 SCC 35 at para 90, [2010] 2 SCR 310, Binnie J in dissent; *R v DAI*, 2012 SCC 5 at paras 1, 65 and 91, 345 DLR (4th) 385.

⁹⁴ *R v Marquardt*, before the Supreme Court at [2009] SCCA 17 (available on WL Can), and subsequently before the Court of Appeal at: 2011 ONCA 281 (available on WL Can).

⁹⁵ *R v Hay*, 2010 SCC 54, [2010] 3 SCR 206.

to consent to the extension.⁹⁶ Even where the accused entered a plea of guilty at trial, Courts of Appeal retain a discretion, to be exercised in the interests of justice, to receive fresh evidence explaining the circumstances leading to the plea, and may set aside the guilty plea, allow the appeal and set aside the original conviction—despite the passage of many years.⁹⁷

In 2007, the Ontario Court of Appeal examined the interrelationship between the principle of finality and the importance of maintaining the integrity of the criminal justice system in the context of a Reference back to the courts pursuant to section 696.3(3)(a)(ii) of the *Criminal Code*. In *Re Truscott*,⁹⁸ the court was asked to consider the case “as if it were an appeal by the convicted person”.⁹⁹ It had several extraordinary features: almost fifty years had passed since the time of the offence; the conviction entered at trial had proceeded through the normal appellate process; even after that, the defendant had been given a rare opportunity to challenge the Crown’s case and present a defence before the Supreme Court of Canada; and the case had been subject to intense scrutiny in a variety of non-judicial forums. As the court put it: “Probably no other case in Canadian history has engaged the same level of judicial analysis and sustained public interest over so many decades”.¹⁰⁰

In the 2007 Reference, the Minister of Justice noted that new information had been brought forward which had not been presented at either the trial or on the first Reference to the Supreme Court of Canada.

⁹⁶ *Criminal Code*, RSC 1985, c C-46 s 678(2). While the Code is silent on the criteria to be considered on a motion to extend, appellate courts have generally suggested that an applicant should be able to demonstrate that they had a *bona fide* intention to appeal within the appeal period: *R v Meidel* (2000), 2000 BCCA 39, 148 CCC (3d) 437; *R v Menear* (2002) 162 CCC (3d) 233 (available on WL Can) (Ont CA); *Re Hayes and The Queen* (2007), 226 CCC (3d) 417 (Ont CA). In these types of situations that will not generally have been the case, so in the absence of Crown consent the argument will have to be advanced in terms of an overriding need to avoid a miscarriage of justice: *R v Truong* 2007 ABCA 127 at para 6, 404 AR 277; *R v Arganda* 2011 MBCA 24 at para 6-7, 269 CCC (3d) 88.

⁹⁷ *R v M(C)*, 2010 ONCA 690 (available on WL Can); *R v F(C)*, 2010 ONCA 691 (available on WL Can); *R v Brant*, 2011 ONCA 362 (available on WL Can); *R v Kumar*, 2011 ONCA 120, 268 CCC (3d) 369; *R v Hanemaayer*, 2008 ONCA 580, 234 CCC (3d) 3; *R v Sherret-Robinson*, 2009 ONCA 886 (available on WL Can).

⁹⁸ 2007 ONCA 575, 225 CCC (3d) 321.

⁹⁹ *Ibid* at para 69.

¹⁰⁰ *Ibid* at para 71.

On his review of this new information, the Minister was “[...] satisfied that there is a reasonable basis to conclude that a miscarriage of justice has occurred.”¹⁰¹ The Court of Appeal was not, of course, bound by the Minister’s conclusion. However, the Court observed that the Minister’s concerns “[...] must influence our approach to concerns associated with the integrity of the criminal justice system when this court considers whether to admit evidence proffered on behalf of the appellant in these proceedings.”¹⁰²

Put simply, normal rules respecting the reception of fresh evidence on appeal, and the importance of the principle of finality could not be allowed to trump a case which otherwise established that a miscarriage of justice had occurred. The Court’s pivotal conclusion in this respect was as follows:

Moreover, the public interest in preserving the finality of trial verdicts may be different when considering the “interests of justice” on a reference directed under s. 696(3)(a)(ii). The Minister, exercising the statutory authority given to him by Parliament, has directed this court to consider whether the appellant’s conviction represents a miscarriage of justice in the light of new information. By directing this Reference, the Minister has reopened the appellant’s conviction for further judicial scrutiny. This is obviously an extraordinary step, and even more so in this case where there has already been one reference. By ordering this Reference, the Minister has determined that the integrity of the criminal justice system demands a reassessment of the reliability of the conviction and the result of the first Reference, with the advantage of any fresh evidence that this court decides to receive.¹⁰³

In the result, the Court concluded that “having regard to the highly unusual circumstances of this Reference”, the most appropriate remedy was to allow the appeal, set aside the conviction for murder, and enter an acquittal.”¹⁰⁴

The high-water mark in the granting of a judicial pathway to remedy an apparent miscarriage of justice may well be the case of Ivan William Mervin Henry, decided by the BC Court of Appeal in 2010.¹⁰⁵ In 1983,

¹⁰¹ *Ibid* at para 57.

¹⁰² *Ibid* at para 58.

¹⁰³ *Ibid* at para 107.

¹⁰⁴ *Ibid* at para 787; to the same effect, see *R v White*, 2010 ONCA 474 (available on WL Can).

¹⁰⁵ *R v Henry*, 2010 BCCA 462, 262 CCC (3d) 307.

Henry was charged with and convicted of 10 counts of sexual assault involving eight complainants. The Crown's case was razor-thin; perhaps non-existent. Henry had insisted on representing himself. After conviction, he was declared a dangerous offender, and sentenced to an indefinite period of imprisonment.

For the next three decades, Henry asserted his innocence in a battery of applications before the trial court, Court of Appeal, and the Supreme Court of Canada. He was unsuccessful in all of them.¹⁰⁶ But the evidentiary sands started to shift in 2002. Police re-investigated his case. Prosecutors started to believe that he may have been innocent. British Columbia appointed an independent counsel to investigate the case; he recommended that the Crown not oppose a motion to re-open the case—even though the verdict had literally been etched in stone for 25 years.

In 2010, the British Columbia Court of Appeal ruled that despite an intensive judicial examination of the case during the preceding three decades, including two unsuccessful appeals to the Court of Appeal itself,¹⁰⁷ the interests of justice required “that the order dismissing (this) appeal in 1984 be set aside and [this] appeal [be] re-opened for consideration on its merits.”¹⁰⁸

Because a miscarriage of justice appeared to have occurred, the Court was prepared to overlook what might otherwise have been significant procedural impediments, including the principle of finality, and provide a route back into the court system in circumstances that it described as “exceptional”.¹⁰⁹

Put simply, as in the *Truscott* case, process was not allowed to outweigh considerations of fairness. After a full hearing before the Court of Appeal, the appeal launched in 1984 was re-opened 26 years later, the convictions were quashed, and acquittals were entered on all counts.¹¹⁰

¹⁰⁶ *Ibid* at paras 20-23.

¹⁰⁷ The first, in 1984, was dismissed for want of prosecution; the second, in 1997, was dismissed on the basis that the notice of appeal raised issues of fact, not law: *ibid* at paras 20 and 23. See also *R v Henry*, 100 BCAC 183 (available on WL Can).

¹⁰⁸ *Supra* note 105 at para 32.

¹⁰⁹ *Ibid* at paras 23 and 32.

¹¹⁰ *Ibid* at para 155. It should be noted that this is not a case where forensic science changed; rather, the case is cited to provide an illustration of how the courts can find a route to provide a remedy where the facts call out for one. It should also be noted that this case resulted in an acquittal—not just a new trial, as often occurs despite

The philosophy that innocence really does matter continues to cascade down to the trial courts, the profession and the law enforcement community.

In 2003, a trial court in Ontario surprised many in the legal community when it concluded that, despite the absence of any statutory authority, the courts are empowered to grant bail to serving inmates while their section 696.1 application is pending before the Minister of Justice. That ruling has since been followed by three more trial courts, through to at least 2009.¹¹¹

The cascade hit street level, so to speak, in 2005 when prosecutors and police joined forces in the issuance of a report recommending a series of proactive policies and education designed to guard against future miscarriages of justice.¹¹² As I noted earlier in this essay,¹¹³ the report was well received by the profession, and led to the issuance of an even more detailed update report in 2011, which was intended to keep the momentum of change ongoing. That report recounted the Manitoba forensic evidence review, and described the steps taken by other provinces to conduct similar forensic double checks.

The Manitoba initiative raised a number of difficult issues at the time it was launched. But, as I have shown, two things are clear: first, the review had a strong legal foundation, as the Crown was discharging its well-established “minister of justice” role, albeit in an innovative and proactive way. Second, the initiative was entirely consistent with a much bigger legal movement in Canada—one which encourages every justice system participant from Parliament and the Supreme Court, to trial judges, practitioners and police officers, to be aware of the risk of convicting the innocent, and to take whatever steps are within their power to reduce that risk.

vigorous arguments that the facts of the case justify an outright termination of the case through an acquittal: concerning the latter, see *R v F(C)*, *supra* note 97; *R v M(C)*, *supra* note 97; *Marquardt*, *supra* note 94; and, especially, *R v Phillion*, 2010 ONSC 1604, 256 CCC (3d) 63 [Phillion].

¹¹¹ *Phillion*, *ibid*; *Driskell v Canada*, *supra* note 52; *Unger v Canada*, *supra* note 52; *Ostrowski*, *supra* note 52.

¹¹² Within the defence bar, the cascade hit street level a bit earlier. See the discussion of AIDWYC *supra* note 46.

¹¹³ *Supra* notes 66–73 and accompanying text.

Against that backdrop, it is not surprising that the Crown in Manitoba was willing to reach back and do a double check, to ensure that there was no one in jail who had been improperly convicted as a result of hair microscopy evidence. And it is particularly reassuring that all provinces were ultimately prepared to follow Manitoba's lead, and participate in a national double check.

In the fullness of time, prosecution services in Canada may wish to consider the establishment of permanent conviction review mechanisms within each Ministry to ensure the continued integrity of guilty verdicts in contentious cases. Indeed, "Conviction Integrity Units" embedded within prosecution offices have recently been established in several jurisdictions in the US.¹¹⁴ In the meantime, what Canadians can expect now is a prosecution service that is willing, on an ongoing basis, to root around and do a principled and credible double check on cases where there is a reasonable basis to believe that miscarriages of justice may have occurred, and Crown action could uncover the truth of what happened. After all, truth-seeking does form a critical objective of the criminal justice system, and everyone in the legal profession has a special duty to ensure that the public has and continues to have confidence in our legal system.

¹¹⁴ The first was established by the District Attorney in Dallas, Texas in 2007: http://dallasda.co/webdev/?page_id=73. A similar initiative was announced in March, 2010 in New York: <<http://manhattanda.org/preventing-wrongful-convictions>>. Since then, like initiatives have been established in Illinois, Michigan and California. For a thought-provoking commentary on the subject, see: Barry Scheck, "Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them", 31 Cardozo Law Review 2215 at 2248 (2010): found online at <http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/burns_ethics-145/Barry%20Scheck.pdf>.