Innocence Canada

SUBMISSIONS OF INNOCENCE CANADA

ON

CRIMINAL JUSTICE REFORM

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INTRODUCTION

1. The Directors, case review lawyers, staff and volunteers of Innocence Canada are grateful for the opportunity to contribute ideas to the Minister of Justice for legislative reforms directed to the prevention and correction of miscarriages of justice. As an organization that has closely examined many wrongful convictions, we believe we can bring a valuable perspective to the process of improving the law of evidence, the conduct of trials and the appellate process. There is, we believe, some advantage in digging into individual cases and thinking deeply about how faulty verdicts have come about and what can be done to lessen the frequency of these tragic cases.

2. With that said, we stress that there are limits on what can be achieved through legislation. Many of the problems we list under the heading "causes of wrongful conviction" cannot be remedied by new sections of the *Criminal Code* or the *Canada Evidence Act*. Some are the product of human nature and almost ineradicable. Some are built into the adversarial system and likely to last as long as we have police and prosecutors on one side of a courtroom and defence counsel and clients on the other side. Some problems are historical and have become embedded in our legal culture. So, the recommendations we make here, even if enacted in total, are not a panacea for the ills of a justice system that all too often is forced to admit its errors. The progress we foresee from implementing our recommendations would be incremental – but no less real for that.

3. It will be apparent that our focus is on practical measures that will have an effect on how things are done throughout the justice system on a day-to-day basis. In the pages that follow we say little about the *Canadian Charter of Rights and Freedoms*, despite the extraordinary, and beneficial, changes it has brought about in Canadian law and practice since 1982. The problems we identify have little or no constitutional dimension. Our proposals are addressed mainly to areas of law and practice that carry a particularly acute risk of causing juries and judges to go wrong by reading too much into superficially attractive but deeply flawed forms of evidence.

4. One consequence of days, weeks and years spent trying to unravel wrongful convictions is an appreciation for measures that *work*, in practice, in the gritty business of adjudicating upon guilt and innocence. An important premise of our submissions is that if the reforms we recommend are implemented, their effects will be felt far beyond the courtrooms where we hope they will contribute to more just verdicts. We believe that rules about the evidence courts may act upon, and the legal standards set by Parliament, shape decision-making throughout the entire justice system, from the police officer arriving at a crime scene to the appellate judge surveying a trial record. To reform the law is to reform practice.

5. With each of our recommendations, we attempt to illustrate the problem we are addressing by reference to judicial authorities, academic studies, reports of commissions of inquiry, and our own cases. It should also be clear that our recommendations do not, for the most part, originate with us. Many have been the subject of earlier reports by inquiry commissioners which have been, in our view, ignored for far too long by Ministers of Justice. They provide a rich, untapped vein of law reform ideas. [1] Some are derived from practices in foreign jurisdictions and some come from Canadian judgments, in either majority opinions or dissents, which have urged Parliament to act. We have, from all these potential sources, selected thirteen reforms that meet our twin goals of feasibility and effectiveness.

6. Our treatment of the issues is intended to be suggestive rather than exhaustive. We have not attempted to collect, much less quote from, all of the available judgments and scholarly sources on each issue. We have, however, quoted at length where we think it will help the reader understand a line of analysis or grasp the dimensions of a problem.

[1] Though it is outside the ambit of this paper, Innocence Canada would also welcome the restoration of the Law Reform Commission of Canada, or the creation of a similar body, as a clearing house for ideas on how to improve the administration of criminal justice. The challenges are endless and a systematic approach to addressing them is in the public interest.

7. Innocence Canada does not specialize in legislative drafting so, while we do make quite specific recommendations for changes, we leave the question of how an enactment should be phrased, and usually, where it should be placed, to experts. Our approach is to identify a problem, urge a solution and distill it into a recommendation. We hold strong views on where the law stands and where it should go but we do not address how to get from one place to the other.

8. Finally, we would like to convey our appreciation for the Minister's willingness to consider legislation directed to basic issues that go to the heart of how our society investigates and adjudicates allegations of criminality. For too long, the *Criminal Code* would swell each year not with measures designed to achieve fair and accurate verdicts but with expanded definitions of criminality, enhanced police powers and harsh punishments. A return to fundamental questions about how to make our justice system work better is long overdue and greatly welcome.

STATEMENTS OF DEFENDANTS

9. Our courts have recently begun to acknowledge that confessions of defendants – once the gold standard of prosecutorial proof – come with inherent risks of unreliability combined with an attractiveness to juries that have led to their being a major cause of miscarriages of justice. We have seen this in our own cases and have made submissions about the problem to the Minister of Justice and appellate courts. Regrettably, however, the law has not responded to this problem with solutions commensurate with its gravity. Responsibility for some reforms in this area may lie with the courts, whose diffidence we can only regret. Other aspects of the problem, however, invite action by Parliament.

The Problem of False Confessions

10. False confessions are a reality that went unrecognized through much of our legal history. However, it is now undeniable. Research on documented, confirmed wrongful convictions in the United States shows that a startlingly high percentage of cases where a

defendant was found guilty – yet, was factually innocent based on post-conviction DNA testing – included admissions of guilt as part of the prosecution case. These cases provide a data set of demonstrably false confessions. The original and most frequently cited study of confirmed wrongful convictions reports that of 250 "exonorees," forty had given false confessions, many with details that sounded compelling and were factually correct.[2] This analysis has been adopted by Canadian courts.[3] It tells us that the problem is pervasive and not confined to marginalized defendants or anomalous cases.

11. The problem is especially acute for vulnerable minority segments of the population, who often have a different relationship with figures of authority than those who live comfortably in the economic and cultural mainstream. This is particularly true of Indigenous peoples in Canada. As one commentator – a police detective – has stated:

> Vulnerable suspects pose a number of significant risks for investigators, including:
>
> > - A tendency to provide misleading or unreliable information, or to falsely confess
> > - A tendency to be compliant, suggestible and to acquiesce to police suggestions
> > - Increased difficulty understanding their legal rights, and appreciating the consequences of waiving those rights, in particular, the right to silence.[4]

12. Compounding the problem of false confessions is their allure for juries. This is not surprising – for most people, there is no clearer line from an accusation of guilt to proof of guilt than the admission by a defendant that he is guilty. The reasoning rests on a familiar conception of human motivations and agency captured in the common law concept of an

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[2] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2012) at 5-6, 8, 18-21 [Garrett, *Convicting the Innocent*].

[3] *R v Hart,* 2014 SCC 52 at para 70 [*Hart*].

[4] Kerry Watkins, "The Vulnerability of Aboriginal Suspects When Being Questioned by Police: Mitigating Risks and Maximizing the Reliability of Statement Evidence" (2016) 63 Crim LQ 475 at p 478 citing: G. Gudjonsson, *The Psychology or Interrogations and False Confessions.* (West Sussex: John Wiley & Sons Ltd, 2003), at 316-327; MB Powell, "Specialist training in investigative and evidential interviewing: Is it having any effect on the behaviour of professionals in the field?" (2002) *Psychiatry, Psychology and Law*, 9 at 44-55; at 44; S Kassin, S. Applyby & J Torkildson Perillo, "Interviewing suspects: Practice, science and future directions" (2010) *Legal and Criminological Psychology*, 15 at 39-55.

"admission against interest." On the whole, people are unlikely to expose themselves to police accusations, judicial punishment and social opprobrium unless they deserve it; thus, *saying* you are guilty means that you *are* guilty. Confidence in this straightforward line of reasoning, however, is undermined by what we know about the dynamics of police interrogation and the counter-intuitive effect it often has on individuals locked in a stark white room for hours wishing for nothing more than the end of their ordeal, and facing a battery of carefully honed techniques aimed at breaking down their resistance to police interrogation.[5]

13. The undue confidence juries tend to have in admissions of guilt by defendants has been recognized by Canadian courts. In *R. v. Oickle*, Justice Iacobucci identified the problem:

> The history of police interrogations is not without its unsavoury chapters. Physical abuse, if not routine, was certainly not unknown. Today such practices are much less common. In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. *And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely*. See S. M. Kassin and L. S. Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts" (1981), 11 J. Applied Soc. Psychol. 489.[6](emphasis added)

14. There is no simple way to tell that a confession is false. A false confession often looks very much like a true confession, just as the innocent defendant, sitting in the prisoner's box, looks very much like the guilty defendant. There is no identifiable cluster of characteristics that make a suspect prone to confessing falsely. It is comforting but wrong to suppose that some "trait" or "disorder" must exist in defendants who have confessed falsely which, once diagnosed, allows us to exclude or exercise special caution about such persons. As the Manitoba Court of Appeal has noted:

> *Why someone would falsely confess to a particular crime is often difficult to pinpoint*. Legal and academic sources cite frequent causes of a false confession in the context of a custodial interrogation as being a combination of factors such as: (1) the vulnerability of a suspect (e.g., low intelligence, poor memory, mental illness, youth or extreme age, a significant personality trait or disorder, the fulfillment of a psychological need such as a desire for

[5] See for example: Cutler, B.C., Findley, K.A., and Moore, T.E. "Interrogation and False Confessions: A Psychological Perspective" (2014) 18 Can Crim L Rev 153 at p 160-164.

[6] *R v Oickle*, 2000 SCC 38 at para 34 [*Oickle*]. See also *R v Pearce*, 2014 MBCA 70, at para 50 [*Pearce*]

> notoriety or a temporarily diminished condition for reasons such as hunger, sleep deprivation or intoxicant withdrawal); (2) the circumstances and nature of the custodial confinement and interrogation; and (3) the manner of police interrogation (e.g., use of fabricated evidence) (*Oickle* at paras. 38-43, and *The Psychology of Interrogations and Confessions* at 173).[7] (emphasis added)

15. The pervasiveness, gravity and elusiveness of the problem demand an effective effort to fix it. So far, the courts have let us down. The reforms to long-standing practices that judges have been willing to entertain have not been proportional to the problem. We next discuss the state of the law and practice in key areas.

The "Person in Authority" Criterion

16. The many factors which can make a confession of guilt seductive, but unreliable, may be at play in any setting where there is an imbalance in power between a suspect and an interlocutor; indeed, those factors may be at play even when there is no such imbalance. Yet the primary screening mechanism for ensuring that convictions do not rest on faulty evidence – the common law "voluntariness" *voir dire* – is applicable to only one kind of confession made to one kind of interlocutor. Under our current law, a *voir dire* can be convened only when the Crown seeks to adduce the statement of the accused to a person who possesses *state authority* and who is *known* to possess such authority by the accused.[8]

17. This limitation on the power of judges to examine the dangers of a confession is deeply embedded in our law, yet it has not served the ends of justice. Perhaps the best that can be said for it is that it is better than nothing. The "person in authority" criterion takes as its implicit premise that the only kind of confession likely to be unreliable and mislead a jury is one given to a visible state agent who embodies the coercive and intimidating power of the government over the individual. While there is no doubting that premise as far as it goes, it leaves defendants with no forum to resist the admissibility of equally dangerous confessions of guilt where the criterion does not apply.

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[7] *Pearce*, *supra* note 6 at para 56.

[8] *R v Hodgson*, [1998] 2 SCR 449, at paras 22-30 [*Hodgson*]; *R v Wells*, [1998] 2 SCR 517, at paras 16-17 [*Wells*].

18. The most obvious illustration of the problem is a confession to an undercover officer who pretends – sometimes in a jail cell, sometimes in a longer, carefully cultivated relationship – to be a friend or fellow criminal. Unfortunately, dressing the police officer in jeans and a sweatshirt and asking him to solicit admissions from an accused does not redress the inequality of the parties' power or the potential unreliability of the confessions the undercover technique yields – though such confessions can be particularly appealing to juries as a glimpse into the gritty truth. Undercover operations are carefully planned in which the false friend is provided with a psychological profile of the suspect, a dossier of investigative information about the case, a script to get the suspect talking, and state resources to create elaborate illusions, compelling inducements and an atmosphere of pressure. The inequality between suspect and interlocutor is not qualitatively different when it does not rest on the exercise of overt state authority. There are a host of reasons why such a confession might be false – there can be threats, subtle or blunt, promises of advantage, rewards (pecuniary and psychological), and a climate of oppression, all created in an undercover operation directed and funded by the state.

19. This is illustrated by the Mr. Big strategy with which Canada has become so familiar in recent years, culminating in the landmark 2014 judgment of the Supreme Court of Canada in R. v. *Hart*. We welcomed *Hart*, and Innocence Canada intervened in the Supreme Court of Canada in support of a reformed approach to Mr. Big cases. Ultimately, however, Mr. Big is merely an extreme example of a broad problem and, while its result is gratifying, it also highlights the need for further reform. As the Court said in *Hart*:

> Attempts to extend existing legal protections to Mr. Big operations have failed. This Court has held that Mr. Big operations do not engage the right to silence because the accused is not detained by the police at the time he or she confesses (see *R. v. McIntyre*, [1994] 2 S.C.R. 480; *R. v. Hebert*, [1990] 2 S.C.R. 151). *And the confessions rule - which requires the Crown to prove an accused's statement to a person in authority is "voluntary" - is inoperative because the accused does not know that Mr. Big is a police officer when he confesses* (see *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27).
>
> **…**
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> At present, however, these operations are conducted in a legal vacuum. The legal protections afforded to accused persons, which are often intended at least in part to place limits on the conduct of the police in their investigation and interrogation of accused people, have no application to Mr. Big operations. The confessions rule, for example, is intended not only to guard against the risk of unreliable confessions, but

> also to prevent abusive state conduct (see *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 20). *Yet its protection does not apply because the accused does not know the person he is speaking to is a person in authority*. Other protections - like the right to counsel under s. 10(*b*) of the *Charter*- are rendered inapplicable because the accused is not "det[ained]" by the police while the operation is ongoing. And the doctrine of abuse of process - intended to protect against abusive state conduct - appears to be somewhat of a paper tiger. To date, it has never operated to exclude a Mr. Big confession, nor has it ever led to the stay of charges arising from one of these operations.[9] (emphasis added)

20. With admissions to non-state actors, we see a similar disjuncture between a serious risk of unreliable confessions and the law's feeble protection against them. This issue reached the Supreme Court of Canada in 1998 in a pair of cases in which civilians obtained confessions from suspects through coercive measures that would have led to swift exclusion had they been employed by the police. In the result, the Court affirmed the traditional limits on the voluntariness *voir dire* in a series of propositions that present a compelling target for law reform. The list of propositions reads, in part:

> *The rule which is still applicable in determining the admissibility of a statement made by an accused to a person in authority is that it must have been made voluntarily and must be the product of an operating mind.*
>
> The rule is based upon two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state. This results in the requirement that the admission must not be obtained by either threats or inducements.
>
> The rule is applicable when the accused makes a statement to a person in authority. *Though no absolute definition of "person in authority" is necessary or desirable, it typically refers to those formally engaged in the arrest, detention, examination or prosecution of the accused. Thus, it would apply to person such as police officers and prison officials or guards*. When the statement of the accused is made to a police officer or prison guard a voir dire should be held to determine its admissibility as a voluntary statement, unless the voir dire is waived by counsel for the accused.
>
> Those persons whom the accused reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her may also be persons in authority. That question will have to be determined on a case-by-case basis.
>
> The issue as to who is a person in authority must be resolved by considering it subjectively from the viewpoint of the accused. There must, however, be a reasonable

[9] *Hart, supra* note 3 at paras 64, 79.

> basis for the accused's belief that the person hearing the statement was a person in authority.
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> *The issue will not normally arise in relation to undercover police officers*. This is because the issue must be approached from the viewpoint of the accused. On that basis, undercover police officers will not usually be viewed by the accused as persons in authority.
> …
>
> If the trial judge is satisfied that the receiver of the statement was not a person in authority but that the statement of the accused was obtained by reprehensible coercive tactics, such as violence or credible threats of violence, then a direction should be given to the jury. The jury should be instructed that if they conclude that the statement was obtained by coercion, they should be cautious about accepting it, and that little if any weight should be attached to it.[10]

21. The Court in *R. v. Hodgson* extended a pointed invitation to legislators to reform the law of confessions and eliminate the person in authority limitation for examining their reliability on a *voir dire*. After reviewing legislative developments in Australia and the United Kingdom, the Court issued what amounts to a direct challenge to Parliament:

> *It is significant that these changes to the common law of England and Australia were effected through legislative reform*. Indeed, the House of Lords refused to eliminate the person in authority requirement judicially. In Deokinanan v. R., [1968] 2 All E.R. 346 (P.C.), Viscount Dilhorne, for the court, stated as follows at p. 350:
>
> > The fact that an inducement is made by a person in authority may make it more likely to operate on the accused's mind and lead him to confess. If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession. *There is, however, in their lordships' opinion, no doubt that the law as it is at present only excludes confessions induced by promises when those promises are made by persons in authority*.
>
> The last sentence quoted reflects the present law in Canada. The confessions rule, including the burden on the Crown to prove voluntariness beyond a reasonable doubt, is carefully calibrated to ensure that the coercive power of the state is held in check and to preserve the principle against self-incrimination. *The elimination of the person in authority requirement would represent a fundamental change to the confessions rule, and a significant change to the common law which could bring about complex and unforeseeable consequences for the administration of justice. This change involves the recognition of a new concept. It does not, as in other cases, simply involve the interpretation of an amendment to a statute, such as the Criminal Code. The*

[10] *Hodgson, supra* note 8 at para 48; *Wells, supra* note 8 at para 14.

> *unfairness of admitting statements coerced by private individuals should be recognized. However, it is the sort of change which should be studied by Parliament and remedied by enactment.* [Emphasis added] See Watkins v. Olafson, [1989] 2 S.C.R. 750; R. v. Salituro, [1991] 3 S.C.R. 654; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210, at para. 93; Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925. Because of the very real possibility of a resulting miscarriage of justice and the fundamental unfairness of admitting statements coerced by the violence of private individuals, *I would hope that the study will not be long postponed.*[11] (emphasis added)

22. Nineteen years later, Innocence Canada urges the Minister of Justice to take up the call to study – and then implement – the "fundamental change" which the Court has signaled its desire to see and its inability to effect. If the wisdom of the Court's call in *Hodgson* needed reinforcement, *Hart* has provided it. One of the main reasons the Court in *Hart* had to create a tailor-made common law rule to deal with Mr. Big confessions was the person in authority limitation, which allowed the police to deploy vast state resources in creating an inverted moral universe for the suspect that is filled with frank inducements and implicit threats, but is beyond the reach of the law despite its undermining of the law's values.[12] A straightforward amendment to the *Canada Evidence Act* would achieve a significant advance in the law's protection of the innocent.

> **<u>Recommendation 1</u>: The *Canada Evidence Act* should be amended to provide that when the prosecution alleges that the defendant made an admission against penal interest to a witness, a *voir dire* must be held, upon request by the defence, to determine whether the alleged admission should be received in evidence. On the *voir dire*, the Crown should bear the onus of establishing the admissibility of the evidence beyond a reasonable doubt.**

<u>The Test on the *Voir Dire*</u>

23. The current legal approach concerning admissions to persons in authority is too narrow to identify and eliminate unreliable evidence capable of causing wrongful

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[11] *Hodgson*, *supra* note 8 at paras 28-29.

[12] *Hart*, *supra* note 3 at para 64.

convictions. The focus on "voluntariness" presupposes that if the conduct of the police does not "overbear the will" of the suspect, then the admission may be safely acted upon by a jury.[13]

24. The typical *voir dire* on voluntariness consists of police officers looking at their notebooks, describing their contact with the accused, and then responding in the negative to questions about whether they used threats, employed violence, offered inducements, created an atmosphere of oppression, or observed signs of intoxication. This is a traditional but unsatisfactory means of deciding whether a court should entertain evidence as consequential as a confession.

25. *R. v. Oickle* marked an inflection point in the law of confessions, but much more is needed to complete the process of reform. The Supreme Court was alive to all the factors that make a confession a perilous form of evidence. Its survey of the literature on false confessions was encouraging. So, too, was its recognition that the inquiry into voluntariness should be more than a formalistic checklist of questions about threats, inducements, oppression and an operating mind. *Oickle* was an attempt to move the law toward a functional approach to confessions with an emphasis on the effect of police conduct on the individual defendant.

26. The problems with *Oickle* are at least two-fold. The first is that its focus remains on what was done by the *police* and whether their questioning violated one of a list of prohibitions. As the Court put it: "The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise."[14]

27. That is an inadequate test. The police may have to do something wrong – in the traditional sense – in order to create a legally *involuntary* confession, but they do not have

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[13] *Oickle, supra* note 6 at paras 57-58, 98.

[14] *Oickle, supra* note 6 at para 57.

to do anything wrong to create an *unreliable* one. The test for voluntariness, and hence admissibility, has always rested on an uneasy amalgam of objectives – screening for unsafe evidence while constraining police abuse. These are, however, *separate* objectives that merit separate legal analyses. Not all unreliable and misleading confessions are the product of police abuse. Nor will all police abuses produce unreliable confessions. It is commendable that in the era before the *Canadian Charter of Rights and Freedoms* courts strove to use the mechanisms available to them in order to right an easily abused imbalance of power in the interrogation room.[15] But it has become apparent that the police do not have to *do* anything – certainly not anything abusive – for their questioning to elicit a false confession. It is the peculiar dynamic between interrogator and suspect that produces any confession, including a false one, and that will vary from case to case and depend on the makeup of both sides. Building into the *voluntariness* inquiry an implicit critique of the police limits the scope of the *reliability* inquiry into whether the evidence should be heard and used to determine guilt. The *Charter* has provided a powerful set of tools for identifying and remedying police abuse. It is best not to muddle the reliability inquiry by placing it in a framework also intended to police the police.

28. The second problem in *Oickle* is the focus on the *will* of the accused as being the decisive question. This is understandable if the focus of the law is limited to "voluntariness", which is literally a product of the will. But this is too limited a lens when it comes to determining whether a confession should be acted upon as proof of guilt. *R. v. Phillion* illustrates as well as any case can that a false confession may well be anything but "involuntary".[16] Mr. Phillion patently *wanted* to confess that he had done "something big, like a murder" when he was arrested by the Ottawa police on a robbery charge in 1972. He said to a detective who had not raised the murder in question and did not suspect Mr. Phillion of committing it: "Get me a coffee and we'll talk about it." He then provided to the police, and signed, a false confession to a notorious murder that he had not committed, all without anything having been done by the investigator to "overbear his will". The

[15] *Oickle, supra* note 6 at paras 24-31.

[16] *R v Phillion*, 2009 ONCA 2002 [*Phillion*].

confession was a catastrophically unreliable piece of evidence but it was impossible to find threats, inducements or oppression in the circumstances in which it was given. The legal test of voluntariness was of no use as a marker of unreliability – Mr. Phillion truly *did* volunteer his fabricated confession. He renounced it within hours, but it kept him in prison for 31 years.

29. The law can be greatly improved by disentangling issues of police conduct from the question of reliability and focusing the admissibility *voir dire* on the latter, while opening up the lens to examine everything relevant to the determination. *Hart* points the way.

30. The Supreme Court in *Hart* shook off the shackles that had bound the law of confessions to that point. The Court decided that the traditional approach was inadequate to address Mr. Big, a method clearly designed to weave a path to admissibility by avoiding legal safeguards – including the voluntariness rule – while offending the values the safeguards were created to preserve.[17] This gap in legal protections led the Supreme Court to turn to a principle rarely invoked in the treatment of confessions – the inquiry into the balance between probative value and prejudice. This analytical framework has come to pervade much of the law of evidence because it squarely captures the tension between competing policy objectives that should be weighed in assessing admissibility. The test may be difficult to apply in a particular case, but the concept it rests upon is simple and satisfying – a comparison between the value of an item of evidence to the litigation and the cost of receiving it.

31. In *Hart*, application of the prejudice and probative value test lent itself to a list of considerations that help with the assessment of probative value. The Court majority said:

> What factors are relevant in assessing the reliability of a Mr. Big confession? A parallel can perhaps be drawn between the assessment of "threshold reliability" that occurs under the principled approach to hearsay. Under the principled approach, hearsay becomes admissible where it is both necessary and reliable. Reliability can generally be established in one of two ways: by showing that the statement is trustworthy, or by establishing that its reliability can be

[17] *Hart, supra* note 3 at para 64.

sufficiently tested at trial (*R. v. Khelawon*, 2006 SCC 57 (CanLII), [2006] 2 S.C.R. 787, at paras. 61-63). The latter route to reliability is often met through an opportunity to cross-examine the hearsay declarant, but this has no application in the present context because the accused is not a compellable witness.

However, the factors used to demonstrate the trustworthiness of a hearsay statement are apposite. In assessing the trustworthiness of a hearsay statement, *courts look to the circumstances in which the statement was made, and whether there is any confirmatory evidence* (*Khelawon*, at paras. 62 and 100).

Confessions derive their persuasive force from the fact that they are against the accused's self-interest. People do not normally confess to crimes they have not committed (*Hodgson*, at para. 60). But the circumstances in which Mr. Big confessions are elicited can undermine that supposition. Thus, the first step in assessing the reliability of a Mr. Big confession is to examine those circumstances and assess the extent to which they call into question the reliability of the confession. *These circumstances include — but are not strictly limited to — the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health.*

Special note should be taken of the mental health and age of the accused. In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing (Garrett, at p. 1064).[7] A confession arising from a Mr. Big operation that comes from a young person or someone suffering from a mental illness or disability will raise greater reliability concerns.

In listing these factors, I do not mean to suggest that trial judges are to consider them mechanically and check a box when they apply. That is not the purpose of the exercise. Instead, trial judges must examine all the circumstances leading to and surrounding the making of the confession — with these factors in mind — and assess whether and to what extent the reliability of the confession is called into doubt.

After considering the circumstances in which the confession was made, the court should look to the confession itself for markers of reliability. *Trial judges should consider the level of detail contained in the confession, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (e.g., the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it (e.g., the presence or absence of particular objects at the crime scene). Confirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability*. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.[18] (emphasis added)

[18] *Hart, supra* note 3 at paras 100-105.

32. The *Hart* framework is adaptable to assessing the reliability of confessions in settings very different from Mr. Big stings. It gets at the essence of what can go wrong with confessions and why they demand special scrutiny. The formulation recognizes traditional categories of voluntariness analysis (threats, inducements, oppression) but invites examination of the larger context, the relationship between the suspect and the interlocutor, and factors personal to the defendant. It is as close as the law is likely to come to a comprehensive, purposive treatment of the reliability of confessions, in whatever setting they occur.

33. We would, however, alter and expand the *prejudice* side of the *Hart* balance, in which the Court emphasized the portrayal of the defendant as an aspiring member of a criminal gang, as the main risk to accurate fact-finding:

> Weighing the prejudicial effect of a Mr. Big confession is a more straightforward and familiar exercise. Trial judges must be aware of the dangers presented by these confessions. Admitting these confessions raises the specter of moral and reasoning prejudice. *Commencing with moral prejudice, the jury learns that the accused wanted to join a criminal organization and committed a host of "simulated crimes" that he believed were real. In the end, the accused is forced to argue to the jury that he lied to Mr. Big when he boasted about committing a very serious crime because his desire to join the gang was so strong.* Moral prejudice may increase with operations that involve the accused in simulated crimes of violence, or that demonstrate the accused has a past history of violence. As for reasoning prejudice — defined as the risk that the jury's focus will be distracted away from the charges before the court — it too can pose a problem depending on the length of the operation, the amount of time that must be spent detailing it, and any controversy as to whether a particular event or conversation occurred.[19]

34. Mr. Big is virtually unique in the damning portrait it paints of the character of an accused as he aspires to join a violent criminal organization. That form of "moral prejudice" is not an element of most confessions. In our conception of a reformed test for the admissibility of all confessions, we would identify the primary form of prejudice associated with *any* alleged admission as the risk associated with its high, but sometimes unjustified, appeal to triers of fact – a species of "reasoning prejudice." There is ample

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[19] *Hart, supra* note 3 at para 106.

judicial authority – and statistical proof – for the proposition that juries are unduly impressed by the words "I did it," and considering this reality fits comfortably into the law's recognition of reasoning prejudice as a factor militating against admissibility of evidence. It is this tendency to accord great weight to a defendant's acknowledgement of guilt that can skew fact-finding and has to be guarded against. It is the very phenomenon that the probative value of the evidence – its *real* worth – has to be weighed against. What the law should seek to identify, then, is the appropriate balance between a jury's perception that *any* confession is likely to be reliable with the court's determination of the value of a *particular* confession.

35. We note as well that the *Hart* test allows for consideration on the *voir dire* of evidence outside the confession that corroborates it and elevates confidence in its truthfulness. In this regard, the *voir dire* contemplated by *Hart* parallels the evolution of the law of hearsay where reliability concerns are also paramount. Our law has evolved to recognize that if an item of hearsay can be confirmed by other evidence, this tells in favour of its admission despite limitations on the ability of the trier of fact to test its truthfulness.[20] The same is true of confessions (which, on one view, are themselves a form of hearsay). If a confession lines up with other evidence – especially evidence likely known only to the perpetrator of a crime – its reliability will be enhanced.[21] This is subject to the caveat that "holdback" evidence is far more prone to be leaked than the police often assume and can be communicated to suspects in a variety of ways, both intentional and inadvertent. On the other hand, we regard convictions that depend entirely on the confession of the accused, which has not been corroborated in any material respect by other evidence, to be extremely dangerous and, indeed, facially unreliable. When the police have obtained such a confession, they should be expected to keep investigating until they have shown some reason, independent of the statement itself, to believe it is true.

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[20] *R v Khelawon,* 2006 SCC 57 at paras 94-100.

[21] This is subject to the reality that "hold back" evidence is far leakier than the police often assume or intend and can be communicated to suspects in a variety of ways, intentional and unintentional. See Garrett, *Convicting the Innocent, supra* note 2 at 19-31.

36. For these reasons, we propose that the *Canada Evidence Act* provide for a *voir dire* relating to all alleged confessions that adopts the approach contemplated by *Hart*. At this *voir dire* the trial judge should be explicitly required to consider the entire range of factors known to be relevant to reliability, whether or not they are embraced by the traditional voluntariness analysis related to confessions to persons in authority.

> **<u>Recommendation 2</u>: The *Canada Evidence Act* should be amended to provide that any alleged admission against interest by a defendant should be received in evidence only upon proof by the Crown that the probative value of the evidence outweighs the prejudice associated with its reception. The *Act* should provide a non-exhaustive list of factors to be considered in weighing the reliability of an admission which include considerations outside the traditional voluntariness inquiry, such as the interaction and relationship between the defendant and the interlocutor, the psychological makeup and vulnerabilities of the defendant, and the effect of evidence tending to demonstrate the truth or falsity of the admission.**

<u>The Admissibility of Expert Evidence on Reliability</u>

37. The problem of how to identify unreliable confessions will remain, regardless of how thoughtfully procedures for examining the issue are crafted. It will arise on a *voir dire* to consider admissibility as well as before a trier of fact who is deciding whether to act on a confession and enter a conviction. The problem is complex and requires examination of interrogation methods (including those used in undercover operations), police-suspect relationships, psychological traits of the suspect, and personal vulnerabilities.

38. Can the determination whether to admit, and then act upon, a confession be safely left to common sense and the collective wisdom of judges and juries? We believe it cannot. The prevalence of false confessions in miscarriages of justice and the elusiveness of means to identify them in individual cases, suggests that the courts should welcome and draw upon the insights of experts who have studied the problem and achieved a better

understanding of it than a judge or jury could expect to attain. In our view, an improved process for assessing confessions requires an improved base of evidence to make it effective.

39. Judicial acceptance that false confessions are regular occurrences and that they can cause miscarriages of justice by misleading juries is welcome but it demands a serious substantive response if it is to be more than lip service. There are experts qualified to express opinions on the reliability of confessions. To be sure, they are not seers or sages with the ability to gaze into the human heart. But they have developed a systematic typology of false confessions, an appreciation of interrogation techniques likely to elicit them, and tests for identifying people prone to making them. This body of knowledge is far better than nothing, which is the level of insight that most judges and juries now bring to the issue.

40. The law's treatment of expert evidence tendered to challenge confessions is discouraging. In *Phillion*, where a needy and troubled man confessed to a publicly prominent murder and quickly recanted, the confession was virtually the *only* basis for a conviction that kept him in prison for most of his adult life. On a reference to the Court of Appeal for Ontario, Innocence Canada led testimony from a respected forensic psychologist and from Dr. Gisli Gudjonsson who – literally – "wrote the book" on false confessions.[22] The Court of Appeal concluded, however, that these witnesses brought nothing to the case that the jury had not heard at trial about Mr. Phillion's personality traits and fragile state of mind. The Court said:

> Dr. Gudjonsson, who examined the appellant in 2002, is put forward by the appellant as the world's leading expert on the subject of the psychology of false confessions. His resume attests to the breadth and depth of his work in the area, which includes numerous publications and clinical studies, as well as consultations involving the reliability of confessions in over 700 cases worldwide. In addition, Dr. Gudjonsson has testified in more than 140 criminal proceedings, including prominent cases in the United Kingdom and elsewhere in which miscarriages of justice have been linked to false confessions.

[22] The book is *The Psychology of Interrogations and Confessions* by Dr. Gisli Gudjonsson, (John Wiley & Sons Ltd., 2003) Dr. Gudjonsson's work was cited in *Oickle, supra* note 6 at paras 35, 38-39.

Although not apposite to this case, Dr. Gudjonsson has developed two widely-used instruments for testing personality features relevant to the reliability of confessions: the Gudjonsson Suggestibility Scale and the Gudjonsson Compliance Scale. Pertinent to this case is Dr. Gudjonsson's participation in the development of a three-part classification scheme or "typology" for describing the nature and cause of false confessions. The category relevant to the appellant is labeled, "voluntary false confessions", the characteristics of which are outlined in the appellant's factum as follows:

> Voluntary false confession: These are provided by people without external pressure from the police and are common in high profile cases. They may be motivated by:
>
> (i) a desire for notoriety, where the person confessing "has a pathological need to be infamous or draw attention to himself";
> (ii)an unconscious need to expiate guilt over unrelated transgressions;
> (iii)an inability to distinguish fact from fantasy;
> (iv)a desire to aid and protect someone else, typically the real criminal;
> (v)revenge -- either on someone who the confessor also implicates or on the police whose time is wasted by the false admission.

Dr. Gudjonsson's testing of the appellant largely confirmed Dr. Turrall's findings, as demonstrated in the following passage from his report:

> *I concur with the conclusions of Dr. Graham Turrall, dated 11 September 2002, that Mr. Phillion has "Personality configuration composed of the following: depressive and dependent personality traits and borderline personality features*." This is probably the best descriptive diagnosis of his personality. A review of Mr. Phillion's psychiatric and psychological records indicate that he has been diagnosed as suffering from "antisocial personality disorder" and "borderline personality disorder." These are appropriate diagnoses for his condition. Phillion still exhibits a number of features associated with these diagnoses, including *antisocial personality traits, impulsivity, dependency, attention seeking, poor self-esteem, paranoid personality traits, and mood disturbance*. ... I am in no doubt that *his major vulnerability in the past, and presently, has been his poor self-esteem, and lack of confidence in himself when interacting with others*. [Emphasis added.]

Dr. Gudjonsson commented in his report on several motivating factors that may have led the appellant to falsely confess, including his relationship with Neil Miller, the "emotional build up" from his arrest for the armed robbery of a taxi driver, his "severe emotional and self-esteem problems", as well as his "antisocial orientation, impaired rational judgment, dislike of the police, and disregard for the consequences of his actions." Of these factors, Dr. Gudjonsson identified the appellant's low self-esteem and need for notoriety to enhance his self-esteem as the "single best explanation for the confession, if he truly made a false confession."

…

In support of the claim that Dr. Gudjonsson's evidence lacks scientific reliability, the Crown relies heavily on his acknowledgement that his research merely provides a "conceptual framework for understanding" why people falsely confess; it does not enable anyone to state scientifically that a particular confession is reliable or

unreliable. The Crown also relies on Dr. Gudjonsson's further acknowledgment that the field of giving opinions on the reliability or unreliability of confessions is not one "where you can get error rates."

The Crown points out that in seeking to exclude Dr. Gudjonsson's evidence, it is not, as the appellant claims in his factum, seeking to "exclude the insights of psychology into the disordered personality of those making false confessions". Rather, the Crown contends that:

> There is nothing wrong with leading evidence of a person's personality defects to suggest that he lied when confessing. Phillion's trial proceeded this way. What is objectionable is allowing an expert, under the guise of science, to state whether a confession is reliable or not, when there is, in fact, no scientific foundation for such an assertion. What is being objected to is allowing an expert to tell a jury that he knows what is a reliable confession simply because he is an expert.

On the issue of necessity, the Crown maintains that much of Dr. Gudjonsson's proposed evidence relates to matters that ordinary people can understand and form a correct judgment about without the assistance of an expert. Moreover, there is the ever-present danger, especially with someone like Dr. Gudjonsson, that members of the jury could be overwhelmed by his credentials and would not be able to objectively assess his evidence and thus the proposed expert evidence might usurp the role of the jury.

As for the appellant's contention that Dr. Gudjonsson's evidence is necessary to shed light on the fact that false confessions do occur and to rebut the commonly-held view that people would not confess to a serious crime they have not committed, the Crown maintains that the trial judge could alert the jury to this possibility in the instructions to the jury, thereby removing the possible need for an expert.

I have identified the Crown's objections to the admission of Dr. Gudjonsson's evidence in considerable detail because, at the very least, they show that the admissibility of expert evidence on false confessions is anything but obvious and should be approached with considerable caution. Of particular concern is whether the proposed evidence reaches the level of scientific reliability required by *Mohan* to warrant its reception.

That said, I want to be clear that, in cases such as this where the reliability of a confession is in issue, expert evidence regarding an accused's personality traits that is relevant to and probative of the issue will be admissible. As the Crown points out, that type of evidence was properly led at the appellant's trial. I turn to that evidence now, since in my view, the expert evidence called at the trial is dispositive of the question posed to this court by the Minister of Justice. This is because the expert evidence called at trial shows that the proposed new evidence is not "fresh" evidence and therefore not admissible under *Palmer*.[23]

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[23] *Phillion*, *supra* note 16 at paras 202-205, 213-218.

41. This restrictive approach to evidence on the reliability of confessions has permeated the law, even in cases where there was not already a foundation of expert evidence for the court to consider. In *R. v. Pearce*, the Manitoba Court of Appeal considered a conviction for murder where two credible experts, both psychologists, were tendered to address a case entirely dependent on a confession – one that, the police said, included correct information about the location of the dead body that had not been publicly released. At trial, the judge ruled that one psychologist could give only very limited evidence and the other none at all. What is important is the narrow view taken by the Court of the factors underlying false confessions and the qualifications that may entitle an expert to offer opinions on them. The Court summarized the evidence the defence had sought to adduce:

> On the proposed area of how interviewing techniques affect the reliability of responses, Dr. Peterson's opinion was that suggestive or leading questions, such as the style of questioning of O'Donovan and Depencier, can cause the interviewee to infer the desired or correct response through deduction as opposed to stating what they actually remember. The judge ruled that Dr. Peterson's opinion had two shortcomings. He was not properly qualified as he had no experience in the area of the psychology of police interrogations. Also, his opinion had no scientific qualities and was unnecessary. The judge held that the jury was quite capable of viewing the confession and coming to their own conclusions about its reliability in light of the other testimony in the trial and the submissions of counsel.
>
> On the proposed area of how personality traits can make a person more prone to suggestion, Dr. Peterson's opinion was based on an online personality assessment that the appellant had completed called "the Unfakeable Big Five." The Unfakeable Big Five purports to scientifically measure the five recognized areas of a person's personality (agreeableness, stress tolerance, conscientiousness, openness and extraversion). The Unfakeable Big Five was devised by Dr. Peterson for his private consulting business and is used as a tool for hiring employees. According to this online personality assessment, the appellant was a highly agreeable adult (97th percentile) as well as being above average in tolerating stress (71st percentile).
>
> Dr. Peterson's opinion was that people with an agreeable personality trait like the appellant are susceptible to being manipulated during questioning.
>
> The judge summarized Dr. Peterson's opinion of why the appellant's confession was unreliable as follows (at para. 18):
>
>> Dr. Peterson opined that there are a number of factors which affect the reliability of [the appellant's] confession and which he summarized in the conclusion to his written report:
>>
>> In conclusion: [the appellant] was subject to an extremely leading interrogation, conducted after he convincingly cleared a polygraph test, in the aftermath of a

> drug-related suicide attempt, by detectives who completely and explicitly accepted the validity of a (sic) unsubstantiated theory of repressed memory. His susceptibility to a confession under these conditions is not surprising, 1) given the nature of his personality and his recent emotional experiences and 2) given the contents of the psychological literature on the distortion of autobiographical memories as a consequence of interrogation.

The judge concluded that Dr. Peterson's methodology about the appellant's personality lacked a sufficient scientific basis and was unreliable. Dr. Peterson had never met the appellant, nor watched the confession and his opinion (at para. 45):

> .... [D]id not explain how the significance of these results on the reliability of [the appellant's] confession or how the other traits identified by the test scores interrelated or informed the interpretation of the results. There was no explanation as to the legitimacy of isolating one personality trait from the others in determining a person's response to interrogation.

Dr. Moore

Dr. Moore was called to testify on the areas of how police investigative techniques can affect the reliability of a confession and to give his opinion on the reliability of the appellant's confession. Part of his proposed expert evidence was to explain the police interviewing strategy known as "the Reid Technique." The Reid Technique has coercive aspects such as the use of confrontation, deception, false empathy and minimization of the suspect's conduct. According to Dr. Moore, this can cause a false confession. Dr. Moore's opinion was that the appellant's confession was not reliable because of the manner of interrogation, the lack of confirmatory evidence as to the details of the confession and the personal circumstances of the appellant.

The judge ruled, for reasons similar to her conclusions about Dr. Peterson, that Dr. Moore's proposed evidence did not meet the requirements of *Mohan* because it lacked any scientific foundation and was unnecessary evidence. The judge noted that the factors Dr. Moore uses to assess the reliability of a confession are not "matters of scientific study" (at para. 62). She said such factors "are routinely canvassed by counsel and can be understood by the jury without the assistance of an expert" (*ibid*).

The judge also held that Dr. Moore lacked the necessary objectivity of an expert witness.

…

In the case at bar, no credible evidence was adduced at the *voir dire* that the appellant had distinctive behaviourial characteristics" (*Mohan* at p. 37). The appellant had not historically suffered from a mental illness, mental defect or severe personality disorder analogous to *Dietrich* or *Ward* that might render his confession unreliable. *The appellant said when he confessed he was emotionally upset to the point of being suicidal because his homosexuality had been revealed and he was fearful he may have AIDS. Such stress was transitory in nature and not a distinctive behaviourial characteristic outside the experience and knowledge of the jury*. Moreover, Dr. Peterson's opinion is drawn, in part, from the technique of measuring personality (the Unfakeable Big Five) that lacks a proper scientific basis when it is subjected to the special scrutiny that *Mohan* requires.

…
In both *R. v. Warren* (1995), 35 C.R. (4th) 347 (N.W.T. S.C.), and *Phillion 2009*, expert evidence regarding a technique devised by Dr. Gudjonsson specifically to measure the probability or possibility that a confession to police is unreliable based on an accused's personality trait(s) was not permitted because the technique lacked a proper scientific foundation
…
I would also add that Dr. Peterson's evidence on the appellant's personality does not meet the *Mohan* criterion of necessity. A properly instructed jury is quite able to assess the credibility of ordinary individuals in stressful situations (*R. v. Turner* (1974), 60 Cr.App.R. 80 at 83 (C.A); *R. v. Dubois* (1976), 30 C.C.C. (2d) 412 at 414 (Ont. C.A.); *R. v. Weightman* (1991), 92 Cr.App.R. 291 at 297 (C.A.)). The fact that the appellant was emotionally distraught when he confessed was not human behaviour likely to be outside the experience and knowledge of the jury (*R. v. Burns*, [1994] 1 S.C.R. 656 at 666*). I fail to see why a jury cannot assess credibility during a police interrogation in such circumstances, given they have the assistance of a video recording of it, the testimony of the witnesses to the interrogation, the submissions of counsel and instructions from the trial judge.*
…
The thesis of Dr. Moore is that while the Reid Technique is quite successful in getting true confessions from genuinely guilty people, it can also result in false confessions from innocent people. *He conceded at the voir dire that the error rate of the Reid Technique is unknown and there is no interrogation procedure he knows of "that will elicit genuine valid confessions from the guilty but not from the innocent."*

The methodology Dr. Moore uses to prepare an opinion about a confession's reliability is to review the context of the confession to identify what he believes are reliability risks. He explained his methodology during the *voir dire* as follows:

> .... So when I look at the disclosures that I get, I mean I also look at the context, I mean where did this come from, I mean what was the crime, what other evidence, if there is any other evidence, is accompanying the so-called confession, how was the interrogation conducted, over what period of time, what do we know about the suspect, do they have any idiosyncratic susceptibilities. ....

Expert evidence directed solely to the question of credibility is not admissible because it usurps the function of the jury (*Marquard* at p. 248). I fail to see how Dr. Moore's opinion evidence is necessary for the jury. There is nothing unique or scientific to his methodology. He does exactly what the jury is asked to do, consider all the evidence in assessing the weight to give to a confession. *If Dr. Moore's methodology can be described as a field of expertise, it would have to be treated as novel science* requiring greater threshold reliability before being admissible. Sopinka J. explained in *Mohan* (at p. 25):

> In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence

> approaches an opinion on an ultimate issue, the stricter the application of this principle.
>
> *Dr. Moore conceded in his evidence that his methodology is not "an exact science," nor does he claim that it is.* The subject matter of his evidence is not outside the experience and knowledge of a jury; a jury is quite capable of determining the reliability of a confession looking at the overall context without the help of an expert (*Mohan* at p. 23-24). There is also a danger to the fact-finding process in allowing such expert evidence. *Such evidence usurps the jury's province and the jury may simply attorn to the expert's opinion* (*D.D.* at para. 53).[24](emphasis added)

42. The same result, based on a similar analysis, was reached in *R. v. Osmar* where the Court of Appeal for Ontario held, regarding the evidence of a widely-hailed American expert on false confessions, that it did not satisfy the criteria in *R. v. Mohan*:

> As is well known, in *Mohan*, Sopinka J., speaking for the court, held that the admission of expert evidence depends on relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert (p. 20 S.C.R., p. 411 C.C.C.). He described necessity in these terms at p. 23 S.C.R., p. 413 C.C.C.:
> What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from Beven on Negligence, 4th ed. (1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".
>
> In my view, the three areas about which Dr. Ofshe proposed to testify did not meet this test. In particular, given the particular circumstances, his evidence was not about matters on which ordinary people are unlikely to form a correct judgment.
>
> I start with his evidence about the bias among lay people against the idea that someone who is indeed innocent might falsely confess. As I have said, unfortunately Dr. Ofshe did not explain the reason for this phenomenon. I suspect that it comes from the difficulty that lay people have in applying their own experience to the circumstances of police interrogation. While most people would understand how a person could come to admit to almost anything, true or false, under torture or physical coercion, they would find it hard to understand why someone would admit to a crime they did not commit and thus place themselves in greater legal jeopardy than they would encounter from simply tolerating the psychological coercion of interrogation. If that is the explanation, Dr. Ofshe's evidence would not be helpful to the jury since it was anchored in formal police interrogation. If there is some other explanation for this bias, it was not forthcoming from Dr. Ofshe.

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[24] *Pearce, supra* note 6 at paras 33-40, 85, 87, 89, 92-95.

> Similar considerations apply to Dr. Ofshe's evidence concerning the manner in which interrogations are conducted and the motivators for false confessions. I repeat a portion of Dr. Ofshe's evidence quoted above: "The significant question would be what's the motivator that is being offered to elicit the compliance. If the motivator is strong, if there is a powerful inducement, then depending on the power of that inducement, the risk of possibly eliciting a false confession goes up." In this case, the motive for a possible false confession was obvious, as was the fact that there was no downside to confessing to men the appellant believed were criminals. There were no myths to be dispelled; Dr. Ofshe would simply be describing what was obvious from the testimony of the police officers and, indeed, from the appellant's own evidence. The jury did not require Dr. Ofshe's evidence to arrive at a correct conclusion on this issue. He did not purport to offer an opinion as to how powerful the inducement was in this case nor whether it could have led to a false confession.
>
> The final theme of Dr. Ofshe's evidence was that the way to determine whether the confession was true or false was to compare it to the known facts about the killing. He would also testify about the risk from contamination. Dr. Ofshe's evidence would have been helpful on this issue, but, as the trial judge observed, helpfulness is not enough. The entire defence was focused on this very issue. The defence theory was that the details in the confession came from the police. The defence also pointed out that some details that the killer would have known [page344] about were not contained in the confession. The jury did not need help understanding this point. As Dr. Ofshe testified, this is a straight-forward element of police investigation.[25]

43. Three assumptions knit together these courts' resistance to expert evidence on the reliability of confessions. We submit that none of them nor all of them together can justify the result, which has been a blanket refusal to entertain experts' insights on the issue except of the most limited kind.

44. First, the courts conflate the term "expert" and "scientific" and adopt a needlessly restrictive definition of the latter term. Expertise, for the purposes of the *Mohan* test and across the law in general, is not limited to methodologies that can be characterized as scientific. A person who attains a superior understanding of a complex subject does not cease to be an expert in it simply because his analysis does not rest on a rigorous application of the "scientific method". It is discouraging to watch Crown counsel cross-examining capable and conscientious experts who agree that they cannot affix an "error rate" for their methods or render them experimentally "falsifiable," after which judges incorporate these concepts from the physical sciences into rules rejecting valuable testimony. The equation between expertise and the scientific method is a false one, particularly if the subject is one

[25] *R v Osmar*, 2007 ONCA 50 at paras 68-71 [*Osmar*].

as immune to comprehensive study as human relationships and behaviour. Setting this unrealistic threshold for the reception of credible, useful evidence, from students of an arcane subject, is a disservice to the interests of justice.

45. Second, the law extends a sort of olive branch to proponents of expert evidence by accepting, as in *Phillion*, that "where the reliability of a confession is in issue, expert evidence regarding an accused's personality traits that is relevant to and probative of the issue will be admissible."[26] That is, however, not seriously in dispute and not responsive to the scope of the problem. It would be comforting if false confessions were given only by people with "personality traits" or mental disorders that makes them prone to self-destructive inventions or submission to authority. But that is not so. The pervasiveness of false confessions by innocent defendants refutes the notion that they come from a discrete and readily identifiable subset of those questioned by the police. *Hart* accepts that a carefully crafted combination of atmospherics, inducements and menace can impel fundamentally ordinary people to admit the commission of grave crimes. The police are so aware of people driven to confess notorious offences that they often hold back details in media reports for the purpose of screening for that very problem. It is simply not true that pointing out the pathology of some of those who confess falsely will eliminate or significantly alleviate the problem. To take but one well known and widely accepted example, the so-called “Reid technique" – on which expert evidence was rejected in *Pearce* – uses strategies which can make confession appear to be a rational choice for even innocent accused; the technique’s primary psychological lever is the persuasion of the suspect that the evidence against him is utterly conclusive and the confession may help him to advance mitigating facts and secure more lenient treatment.[27] The law is in an unsatisfactory state when the evidence of a scholar such as Dr. Timothy Moore, who has studied and written about the Reid technique in detail, is deemed inadmissible in a case such as *Pearce*.[28]

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[26] *Phillion*, *supra* note 16 at para 218.

[27] See for one of many descriptions of the Reid technique *R v Jorgge*, 2010 ONSC 6272.

[28] See the reliance of the Supreme Court of Canada on Professor Moore in *Hart*, *supra* note 3 at paras 57 and 59.

46. Third, the courts show a distressing tendency to fall back, in the end, on a homely reliance on the wisdom and intuition of juries.[29] Resort to these truisms simply elides the problem of false confessions and wrongful convictions. The role of false confessions in miscarriages of justice shows that the combined human experience of juries does *not* equip them to assess the foreign and manufactured atmosphere of the interrogation room, much less the dynamics of an undercover operation and the through-the-looking glass world of a Mr. Big sting.

47. Juries need help, and we submit that it is most unfortunate that the law, as it is applied today, denies them the guidance of reasonable, knowledgeable experts. Sending juries off to deliberate with a short instruction to be cautious because people have been known to confess falsely is a fig leaf without elaboration.[30]

48. To be clear, Gisli Gudjonsson is the *world's* leading expert in false confessions. Richard Ofshe, whose evidence was excluded in *Osmar*, is among America's leading experts – as a witness and a scholar in the area. Tim Moore is certainly among Canada's top experts on the subject. There is no hidden team of superior experts, able to support anything they say with experimental data, waiting to emerge and enlighten juries. If Canadian law rejects the contribution of witnesses such as Gudjonsson, Ofshe and Moore, it shuts the door to expertise in general about a subject where it is sorely needed. Trusting a jury to grope its way to the truth in this most challenging of areas is a recipe for injustice.

49. We urge the Minister to ask Parliament to step in. We appreciate that crafting legislation that deems a certain category of evidence to be admissible in a particular type of case is not straightforward and that it is not an area in which legislatures typically tread.

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[29] See *Phillion*, *supra* note 16 at para 15; *Pearce*, *supra* note 6 at paras 33, 39 and 95 and; *Osmar*, *supra* note 25 at para 71.

[30] Gary Trotter, "False Confessions and Wrongful Convictions" (2004) 35:2 Ottawa L Rev 179 [*Trotter*]

The case for reform, however, is compelling. Gary Trotter (now Trotter J. A.) put the argument well in a 2004 article:

> For reasons discussed above, a cautionary instruction is really not an option in the context of false confessions. The fact that people confess to crimes to which they did not commit might work well as a cautionary instruction. But this is only the beginning of the analysis because research suggests that false confessions do not merely "happen"; they are obtained in particular situations, using certain techniques, with particular types of individuals. Mock jury studies have demonstrated that expert evidence makes jurors more sensitive to eyewitness identification evidence. Research replicating this finding in the false confession context would make the case for admissibility more powerful in terms of the application of this criterion.
>
> *On a more general level, the cost-benefit analysis ought to bend toward the admissibility of expert evidence in terms of false confessions*. The Supreme Court has, on more than one occasion, held that the accused ought to be permitted to lead evidence in his or her defence, so long as its probative value is not substantially outweighed by its potential prejudice. This ought to factor into the test for legal relevance in this context. *More importantly, in engaging in the cost-benefit analysis mandated by* Mohan *and subsequent cases, consideration must be given to the potential for avoiding wrongful convictions.* This, of course, is an animating force behind the probative value versus prejudicial effect formula forged by the Supreme Court. Indeed, courts, including the Supreme Court, advert to the potential for miscarriages of justice in many contexts. Sometimes these general references to miscarriages of justice, as well as specific references to reports into miscarriages of justice, are little more than a rhetorical devise added to give deeper meaning to a conclusion reached on a plain application of the law. However, it ought to have currency in those areas in which research and experience tells us to be especially cautious about generating wrongful convictions. Relying on this research and experience, the Court in Oickle has raised a real concern about this potential. *The learning reflected in Oickle suggests that this type of evidence ought to be given favourable consideration in terms of cost-benefit, more so than other evidence that has not been so directly linked with the potential for serious errors in the criminal justice process.*[31]

We agree and commend this analysis to the Minister.

> **<u>Recommendation 3</u>: The *Canada Evidence Act* should be amended to provide that at a *voir dire* on the admissibility of an admission against interest, and at a trial where the Crown adduces evidence of such an admission, the opinion of an expert should be received if it is relevant to the traits or state of mind of the defendant; to the psychological effect of a particular interrogation or**

[31] *Trotter*, *supra* note 30 at 198-199. See also Lisa DuFraiment, "Regulating Unreliable Evidence: Can Evidence Rules Guide Jurors and Prevent Wrongful Convictions?" (2008) 33 Queens LJ 261 at para 79.

investigative technique; or to reasons why the admission of a defendant would be reliable or unreliable.

50. In offering this recommendation, we realize that it is difficult to reduce all of the relevant policy objectives to legislative language and that it will remain for the courts to decide in individual cases if the tendered "expert" is indeed sufficiently schooled in these issues to give evidence. Not all evidence tendered by defendants under such a provision is likely to be admitted. Nonetheless, we see significant value in a clear signal from Parliament that expert evidence in this area can be helpful and that traditional barriers to its admission should be set aside.

Videotaping Police Statements

51. With videotaping equipment inexpensive and ubiquitous, we believe it is past time for its use in police interrogations to be made mandatory and excuses for failing to employ it to be rejected. In light of the fact that the courts have recognized and commended the advantages of taped statements for years, yet declined to exclude them when their directives have been ignored, it is appropriate for Parliament to step in.

52. In *Oickle*, decided 17 years ago, the Supreme Court of Canada distilled from academic literature the following summary of the advantages associated with videotaping police questioning:

> First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.[32]

[32] In *Oickle, supra* note 6 at para 46, citing Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. CR-CLL Rev 105.

53. For those concerned with the capacity of false confessions to produce wrongful convictions, the judgment of the Court of Appeal for Ontario in *R. v. Moore-McFarlane*, the year after *Oickle,* held the promise of transformational change. The Court of Appeal went as far as any court is likely to go without a legislative mandate in insisting that police station interrogations be taped or else face the risk of exclusion at trial. Noting the comments of the Supreme Court in *Oickle,* and the undisputed advantages of recording statements, the Court of Appeal said:

> One of the main issues raised on these appeals is the police officers' failure to record the statements allegedly made by either appellant. Counsel for the appellants submit that there should be both a common-law and a constitutional obligation on the police to create a record, preferably by videotape, of all custodial interrogations and waivers of the s. 10(b) right to counsel. The appellants have noted some of the numerous decisions in Ontario where courts have either excluded confessions where the failure to videotape was deliberate or have strongly urged the recording of interrogations.
> …
> *I agree that there is no absolute rule requiring the recording of statements*. It is clear from the analysis in both Hodgson and Oickle that the inquiry into voluntariness is contextual in nature and that all relevant circumstances must be considered. Iacobucci J. says so expressly in *Oickle* in the following words (at para. 47, p. 31 S.C.R., p. 345 C.C.C.):
>
> > The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over-and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.
>
> However, the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. *Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.*[33]

[33] *R v Moore-McFarlane,* (2002), 56 OR (3d) 737 (CA) at paras 61, 64-65. See also *R v. Ahmed* (2002), 170 CCC (3d) 27 (Ont. CA) [*Ahmed*].

54. Many years later, the feasibility of videotaping statements has advanced by orders of magnitude but the law has not kept pace. Courts have been far more indulgent than necessary of statements that could have been fully recorded but, for one proffered reason or another, were not. The reason most commonly relied upon by detectives is that, when they approached the suspect and received the confession, they had been caught by surprise and had entered the interview room for a different purpose, without having activated the video equipment.[34]

55. The new era promised by *Moore-McFarlane* could be realized only if the courts applied its principles resolutely in later cases. This has not happened and the presumption against the admissibility of non-recorded statements is overcome on the slenderest of bases.

56. The treatment of *Moore-McFarlane* and a brief upsurge in judicial scrutiny of untaped confessions can be seen in *R. v. Ducharme*, a judgment of the Manitoba Court of Appeal which highlights the need for legislative reform in this area:

> An extended review of the reported cases dealing with concurrent recordings and voluntariness will not shed any further light on this subject. I will, however, make reference to some of the other material which was referred to in argument or discovered in our research. In recent years, there have been commissions and inquiries into several cases involving high-profile, wrongful convictions. I refer in particular to two reports: Toronto, The Commission on Proceedings Involving Guy Paul Morin (The Commission, 1998) (The Honourable Fred Kaufman, C.M., Q.C.), and Winnipeg, The Inquiry Regarding Thomas Sophonow - The Investigation, Prosecution and Consideration of Entitlement to Compensation (Manitoba Justice, 2001) (The Honourable Peter deC. Cory), which followed soon after. *There can be no doubt that both reports endorse the videotaping of statements to police by accused persons or that Justice Cory went as far as to recommend that all unrecorded statements from an accused should be excluded.*
>
> Aside from the fact that these useful inquiries are not judicial precedents, the case before us has never been about the desirability of videotaping. The trial judge forcefully expressed his views and lest there be any doubt, it seems inconceivable to me that one could argue against the practice. *The difficulty is that until either the Supreme Court articulates or Parliament legislates the duties of the police and lays out a protocol to be followed, the common law definition of voluntariness will remain in effect. That being the case, it cannot be said that the failure to videotape or electronically record will automatically mean the exclusion of the evidence on a voir dire.*

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[34] *Ahmed*, *supra* note 33 at para 16.

> Of further interest is a paper written by Associate Professor Gary T. Trotter, Faculty of Law, Queen's University, Kingston, Ontario, entitled False Confessions and Wrongful Convictions. This paper is based on a presentation made at the Supreme Court of British Columbia Education Seminar, May 1, 2003, in Victoria, British Columbia. There he deals extensively with the question now before us. He leaves little doubt that, as a matter of policy, the recording of confessions is the best way to resolve issues regarding admissibility. *Nonetheless, it was this author's unqualified opinion that Oickle is still authoritative*.[35] (emphasis added)

57. *Ducharme* cited the Honourable Peter Cory on this issue from his *Report on the Inquiry Regarding Thomas Sophonow* where he said:

> The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. *That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.*
>
> *I would recommend that videotaping of interviews with suspects be made a rule* and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.
>
> *Further, interviews that are not taped should, as a general rule, be inadmissible*. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect.[36](emphasis added)

58. The Sophonow Report was released in 2001, the same year as the Court of Appeal for Ontario decided *Moore-McFarlane*. It is striking to note how close the Court of Appeal came in *Moore-McFarlane* to holding that a failure to record a prisoner's statement will necessitate exclusion, and then to compare the dilution of that important standard in a more recent case. In *R. v. Williams,* the same court, in declining to apply *Moore-McFarlane* to a lengthy interaction between officers and an accused, said:

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[35] *R v Ducharme*, 2004 MBCA 29 at paras 45-47.

[36] The Honourable Peter Cory, Commissioner, *The Inquiry regarding Thomas Sophonow* (Government of Manitoba 2001) [*The Inquiry Regarding Thomas Sophonow*]

> The appellant does not point to weaknesses in the Crown's evidence or the trial judge's reasons. Rather, he merely asserts that a "myriad of factors", including the seriousness of the charge and the length of the appellant's detention, demanded that the officers record each and every interaction with the appellant. I am not persuaded by this submission. *While a failure to record police interactions with an accused may, in some circumstances, raise questions about the voluntariness of the accused's statements,* such circumstances are not present here. The police here acted reasonably and did not "deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record": *Moore-McFarlane*, at para. 65.[37] (emphasis added)

59. We recommend legislation in this area not solely from a litigation perspective but also to improve the investigative phase of the criminal process. We believe reform will enhance public confidence in what occurs in both the interview room and the courtroom. This theme, which runs through all of our submissions, is of special importance here. In his 2004 paper "False Confessions and Custodial Interrogations", Gary Trotter (now Trotter J.A.) commended the advance in *Moore-McFarlane* and discouraged any retreat from it, while at the same time noting the risk of an "automatic" rule of exclusion. It is important for Parliament to appreciate the incentives that would be created by firmer rules in this area. Mr. Trotter wrote:

> Seemingly everyone writing on interrogations supports the requirement of recording confessions. As Richard Leo observes, "both liberal and conservative legal scholars have recommended the use of videotaping inside the interrogation room." The benefits that accrue from recording might be separated into three related categories: epistemological, behavioural and systemic. After exploring these benefits of recording, the issue of what ought to flow from a failure to record properly is considered.
>
> *From an epistemological perspective, a taped record helps to provide an authentic account of what happened in the confines of the interrogation room.* While written confessions by the accused or notes of admissions made by police officers may adequately convey the substance of what occurred (and even this is debatable), a videotape or audiotape recording preserves and conveys both the tone in which words were uttered and the body language of those present. Of course, these nuances are lost with a mere written record. *A properly recorded record will be helpful for judges in determining voluntariness. The visual cues may also assist the trier of fact in determining whether the statement is true or false.*
>
> These features of recording, especially videotaping, which focus on "what happened and what was said," can equally benefit both the accused person and the police. *A proper recording will prevent the police from convincingly asserting that the accused said things that were never said*. Similarly, an indelible record will prevent the accused from saying "I never said that" or from suggesting that the confession was made but was the product of psychological or physical abuse. A comprehensive record will minimize the guess-work of

[37] *R v Williams,* 2014 ONCA 431 at para 46. See also *R v Crocket,* 2002 BCCA 658.

> which version of the interrogation will be accepted by the trier of fact, and thereby permit prosecutors and defence lawyers to make more straightforward choices about their respective positions. *This will also translate into more efficient and accurate fact-finding by judges and jurors and better safeguards against wrongful convictions based on false confessions.* Of course, this depends on the integrity of the recording process, and the continuity of an unedited record.
>
> *The potential effects of videotaping on the behaviour of the police are obvious. Knowing that they are being videotaped, police officers will be more likely to conduct their interrogations in a professional and fair manner.* A police officer will be less likely to engage in abusive and illegal conduct if he or she knows that the interrogation is being recorded for the world to see. In turn, this ought to reduce the number of untrustworthy confessions and consequentially the number of wrongful convictions. Moreover, videotaping may foster a greater sense of professionalism in the police. *The fact that their work is being recorded leads to the possibility that it may be evaluated, not just for court purposes, but also for employment purposes*. Moreover, and in the longer term, exemplary interrogations may provide a good teaching model for new police officers or interrogators and thereby further enhance a culture of professionalism in police forces.
>
> *In a broader systemic sense, the videotaping of confessions bolsters the reputation of the justice system as a whole*. Widespread knowledge that the police videotape interrogations can only enhance confidence in the criminal justice system by conveying the message that citizens have nothing to fear in the interrogation process because it will all be captured on videotape and subjected to review by others.
>
> The salutary benefits of videotaping, as stated above, are well accepted in the relevant social science literature; they appeal equally to those interested in crime control and those interested in due process. For crime control adherents, a properly recorded confession will undoubtedly aid in convicting the guilty. As for due process, the recorded interrogation ensures police fairness and prevents against coerced or otherwise false confessions.[38](emphasis added)

60. There is, in our submission, no doubt about the advantages of a law promoting the videotaping of statements from persons in custody. If Parliament takes the lead in this area, police agencies will provide the – now very modest – budgetary allocation to meet the legislated standard and police practices will quickly conform to the law's expectations. We accept that "automatic" exclusion without exceptions may "lead to an unwarranted windfall for the accused in the litigation process."[39]However, legislation with teeth need go very little further than *Moore-McFarlane* in order to achieve the objectives set for it, first among them the prevention of false confessions and wrongful convictions. While this is an area

[38] Trotter, *supra* note 30 at 201-202.

[39] Trotter, *supra* note 30 at 208.

that calls for artful legislative drafting, we are confident that creating a legal proscription against the admissibility of unrecorded confessions will serve the interests of justice; police agencies that might have skirted the expectations of courts will not do so if there is a statutory presumption against the admission of unrecorded statements.

<u>Recommendation 4:</u> At a *voir dire* to consider the admissibility of evidence of an admission against interest by a defendant who was in the custody of the police at the time of the alleged admission, such evidence should be presumptively inadmissible where the admission is not recorded on videotape. The presumption of inadmissibility should be sufficiently firm that it can be overcome only by:

- **Evidence explaining to the court's satisfaction the failure of the police to possess and employ the necessary videotaping equipment, whether on their person, in police vehicles, or at the police station;**
- **Where a person in custody is alleged to have declined to speak on videotape, evidence that he or she was told that videotaping is required by law;**
- **Where an admission is made in circumstances that prevented its recording on videotape, evidence that attempts were made as soon as practicable thereafter to have the admission recorded and the circumstances at which it was originally provided explained on videotape, with the person in custody provided an opportunity to recount the events related to the unrecorded statement.**

61. There is undoubtedly room for refinement to these proposals in legislation, regulation and judicial decisions.[40] But the case for casting the law in terms that permit optimal clarity on a *voir dire* and transparency for jurors who must assess confessions, can only enhance the court's truth-seeking capacities. It will also improve investigative

[40] In the United Kingdom, statement-taking under the *Police and Evidence Act*, 1984, is governed by the very detailed "Code of Practice on Visual Recording with Sound of Interviews with Suspects" which offers a template of guidelines easily adaptable to Canadian interrogations.

practices in many important ways. Excuses for not taping a custodial interview are largely hollow and, we submit, should no longer be entertained.

The Use of a Defendant's Statement at Trial

62. The law has long treated the statements of the defendant given to the police during an interrogation as the property of the Crown, to be deployed as the prosecutor sees fit in the interests of justice or – far more often – for tactical advantage. Thus, a statement that contains damaging admissions, or amounts to a confession, is likely to be adduced by the Crown. A clear, cogent denial of guilt is likely to be kept out of evidence. This decision has traditionally been the exclusive purview of the Crown, unreviewable by a trial judge.[41] A defendant who wishes to adduce her own statement is barred from doing so.

63. We regard this as an unjust rule and we would urge Parliament to build on the recent work of the courts to reform it. There are sound reasons for allowing the accused to lead her own statement as evidence at trial and no persuasive objection to the practice.

64. The 2010 judgment of the Court of Appeal for Ontario in *R. v. Edgar*[42] seemed to open a crack in a door that had been tightly closed against admissibility. *Edgar* provides a starting point for discussion of the issue. It has, however, met with a cool reception in later cases.[43] We think the *Edgar* judgment should be built upon, not pared back.

65. In *Edgar*, after a lengthy examination of the traditional law and its rationale, Sharpe J.A. found room in the common law for this proposition:

> I conclude, therefore, that it is open to a trial judge to admit an accused's *spontaneous out-of-court statements made upon arrest or when first confronted with an accusation as an exception to the general rule excluding prior consistent statement*s as evidence

[41] *R v Campbell* (1977), 17 O.R. (2d) 673 (Ont. CA) at para. 44.

[42] 2010 ONCA 529 [*Edgar*].

[43] *R v Badhwar*, 2011 ONCA 266; *R v Kailayapillai*, 2013 ONCA 248; *R v Liard*, 2015 ONCA 414; *R v McCallum*, 2010 BCCA 587; *R v Pattison*, 2011 BCSC 1594.

> of the reaction of the accused to the accusation and as proof of consistency, *provided the accused takes the stand and exposes himself or herself to cross-examination*. As the English cases cited above hold, the statement of the accused is not strictly evidence of the truth of what was said (subject to being admissible under the principled approach to hearsay evidence) but is evidence of the reaction of the accused, which is relevant to the credibility of the accused and as circumstantial evidence that may have a bearing on guilt or innocence.
>
> As a practical matter, once the accused has testified, he or she should be entitled to call in reply the police officer who heard and recorded the statement to verify to the jury the fact that it was made.[44] (emphasis added)

66. The Court stressed that its ability to advance the law was circumscribed by the recent holding of the Supreme Court of Canada in *R. v. Rojas*, which seemed to reaffirm the traditional limitations on the admissibility of prior consistent statements.[45] Sharpe J.A. noted that, in light of *Rojas*, "this is neither the right court nor the right case to reassess the broad issue of the treatment to be accorded prior consistent statements generally."

67. *Edgar* also recognized some exceptions to the prohibition against the adducing of prior consistent statements by a defendant. They are to be found in niches of Canadian law and a broad swath of British law – broad enough that the exceptions in the UK may be said to have ousted the rule, so that the defendant will generally be able to lead her own statement if she testifies.[46]

68. Before summarizing our arguments for reform, it is useful to address three of the main justifications cited for the current rule. They are peppered throughout judgments and commentary on the issue but comprehensively collected in *Edgar*.

69. ***Lack of cross-examination***: In *Edgar* (para. 31) Justice Sharpe referred to the Supreme Court of Canada's judgment in *R. v. Simpson*[47] for the "sound proposition that an accused person should not be free to make an unsworn statement and compel its admission

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[44] *Edgar, supra* note 42 at paras 72-73.

[45] *R v Rojas,* 2008 SCC 56 at paras 36-37.

[46] *Edgar, supra* note 42 at paras 42-51.

[47] [1998] 1 SCR 3 at 22.

into evidence and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination." There is a certain appeal to this notion in cases where the accused declines to testify while attempting to rely on a statement to the police, but there is almost none where she *does* testify and can be questioned on her evidence, her statement, and any differences between the two. Moreover, the law of evidence has evolved a great deal since *Simpson* was decided in 1988. We recognize today that there may be substitutes for cross-examination that imbue an out-of-court statement with reliability even in the absence of cross-examination. We have already discussed our view that investigators should always place defendants who have been arrested under oath and on videotape, as they do with other key witnesses; this often furnishes juries with a sound means of assessing credibility even without formal cross-examination. We observe, as well, that the typical statement of a defendant in custody contains much more in the way of confrontational questioning – often a good substitute for courtroom cross-examination – than does the typical interview of a witness.

70. ***The risk of fabrication***: It was this concern, in part, which prompted the *Edgar* court to limit its broadening of the law to statements by defendants that were "spontaneous" or were provided when she was "first confronted with an accusation." This, however, is a misplaced – and ironic – concern. Despite the presumption of innocence, we routinely admit *KGB* statements and other out-of-court accounts of prosecution witnesses under the principled exception to the hearsay rule despite the possibility that they may be self-serving concoctions designed to deflect blame. Juries exist primarily for the purpose of detecting fabrications. That any particular source of evidence *may* be fabricated is no basis for rejecting it at the level of admissibility, particularly when its source is a defendant whose innocence is legally presumed.

71. The concern for fabricated statements is ironic because it rests on the very best reason for *allowing* prior statements of the defendant into evidence. In many cases, a suspect who is arrested has had time to think through a story, imagining what evidence the police may have acquired and what allegations she may have to answer before giving a statement (the same is true of prosecution witnesses in most cases). But in an early

statement, there will also be many ways for the defendant to go wrong – if she is lying, and attempting to fit a story to the facts, she has to do so without the benefit of a full investigation. She is likely to say something that can be disproved if she is fabricating.

72. Now, picture the same defendant in the witness box at trial before a jury. The prosecution has closed its case and the jury knows everything the defendant has to answer. But the jury also knows that the *defendant* knows everything she has to answer. That very suspicion about fabrication which helps drive the law opposing the use of prior consistent statements becomes one of the best reasons for permitting the defence to adduce them – the *jury* will inevitably suspect that the testimony of the accused, given in response to the details of the Crown case, is a fabrication, calculated to explain away all the evidence the jury, and the defendant, have just heard. This is a natural, perfectly human suspicion. One antidote to it is allowing the jury to hear a statement given by the defendant much earlier in the history of the case, when the facts were less clear and the evidence the accused had to answer had yet to be laid out in detail by the Crown. If the accused has given a credible account at that stage - when allegations of calculated perjury tailored to the Crown case are much less convincing - then the statement has powerful probative value. This is illustrated by the fact that if the early statement is shown to *contradict* independent evidence, the prosecution, which controls the jury's access to the statement, will certainly cross-examine the defendant on it and allege that the trial evidence is a convenient fabrication. By this standard – assessing what the defendant said before all the facts were known – prior consistency can be just as probative as prior inconsistency. For some truly innocent defendants, it can be the difference between their evidence being believed and being rejected.

73. ***The statement is repetitive and adds nothing of value***: This appeal to "trial efficiency" (*Edgar,* para. 33) is the least persuasive of the rationales for the traditional rule. A statement given early in the history of the case - in a setting far less formal than a courtroom; in the absence of a lawyer to guide the narrative; and before all the facts are known - is not a useless recapitulation of trial evidence. Such a statement provides completely different grounds for assessing credibility. A defendant who is stilted, wooden

and unconvincing in the ritualized environment of a courtroom, may make a completely different – and authentic – impression in the earlier stages of a case in a less intimidating environment. Again, we emphasize the question of simple fairness – if the defendant under interrogation looks shifty, evasive or simply guilty, it is certain that the jury will be shown the statement, since its admissibility is now controlled by the Crown. If she looks credible, convincing and innocent, there is no justification for the Crown having the authority to withhold the evidence on the spurious footing that it adds nothing of value.

74. We count on the judgment of counsel throughout the adversarial process to determine what evidence will and will not assist the fact-finding process. We can do the same here. If evidence of a prior consistent statement truly adds no value to a trial for either side, counsel will have no reason to place it in evidence. In our view, concerns about trial efficiency in regard to this important issue of basic fairness are overblown.

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75. With that, we commend to the Minister several reasons for legislative action in this area.

76. The first reason is that statutory reform will help prevent wrongful convictions. Innocence Canada has a good deal of experience in trying to understand how innocent people are convicted of serious crimes and one of the reasons is that the jury often just does not accept the testimony of the defendant – even where it is plausible, well-delivered and consistent with confirmed facts. That, we are confident, is at least in part because the defendant is not looked upon by a jury (or most judges) in the same way as other witnesses. The presumption of innocence is a thin shield where a person is charged with a serious crime and stands up in court to deny it. Suspicion falls on the defendant from the moment the jury panel enters the courtroom for selection and continues through the verdict. It would deny human nature to suppose that, when a lawyer leads a client through a point-by-point refutation of the Crown evidence, suspicion that it is a scripted response to the story told by the prosecution witnesses dissolves. We believe that the testimony of accused persons is given a built-in discount because of the stage of the trial at which it is given, and the

highly formalized manner in which it is presented. Allowing the jury to see a more authentic, raw and unpolished version of the defendant's account can only help jurors separate the innocent from the guilty. This is the essential justification for our recommendation in this area.

77. Second, the *practical* ramifications of reform of this antique rule are potentially far-reaching yet rarely mentioned in the case law or commentaries. The current law powerfully discourages defendants from giving statements to the police at any stage of an investigation. That is true even of defendants who have a credible account to give that *might* prevent a prosecution from going forward from the outset. This is because the law of evidence shapes the advice a lawyer will give about co-operating with the police. Unless a suspect's story is *conclusive* of innocence – so that the charge is not going to be laid if the suspect speaks – there is little point in the defendant's giving it under the law as it now stands. If the statement helps, it is destined never to be heard by the jury. If it hurts, the Crown controls the decision to place it in evidence. Legislative reform would completely transform this calculus to the great advantage of society at large. There is an important social advantage in persons suspected of crimes speaking to the police. It can turn up new witnesses, put the police on the right investigative track, save resources and prevent wrongful convictions. Law reform which makes the giving of a statement a rational choice for a defendant would result in far more suspects speaking to the police rather than exercising a right to silence which the law of evidence renders the only logical decision at the investigative stage of a case.

78. Third, as we have stressed, this is also a matter of simple fairness. There is no reason why a defendant's early claim of innocence should be kept from a jury when it suits the Crown, who can lead it where it helps make the defendant appear guilty and suppress it when it suggests innocence.

79. Fourth, the current state of the law is simply unsatisfactory and in itself calls out for reform. As matters stand, the *Edgar* court would likely have welcomed broader reform but was confined by the traditional rules endorsed by the Supreme Court of Canada. The

Edgar judgment has met with a mixed and still uncertain reception and it is fair to say the law now differs across the country, at least in its practical application. There are threads in Canadian case law[48] that might support admissibility in some cases but, overall, add to the haphazard quality of the legal *status quo*. This is unfortunate and, in our view, enhances the case for legislative reform.

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80. We have looked at a good deal of judicial and academic commentary on this issue – much of it favouring reform – but the most cogent case for a change in the law is, in our view, the recommendation of the Honourable Fred Kaufman which captures the practical dynamics that can make the statement of the defendant so crucial at a trial. In his report on the miscarriage of justice in Guy Paul Morin's case, Mr. Kaufman wrote:

> Juries are likely to draw adverse inference from the absence of evidence about what an accused said upon arrest;
>
> An early exculpatory statement may be important to rebut the suggestion or potential inference that the *accused tailored his or her evidence based upon pre-trial disclosure, or having heard the Crown's evidence in advance of testifying*; and
>
> Admitting such statement would encourage counsel to be *more receptive to clients making statements upon arrest*.[49](emphasis added)

This recommendation deserves attention now, perhaps more than ever, given the uncertain state of the law across Canada.

81. We note that the British practice, set out in detail in *Edgar*, allows statements of defendants to be introduced on a very liberal basis whether or not they are spontaneous and whether or not the defendant testifies and can be cross-examined.[50] The British model, and the closely-reasoned judgments that have led to it, can provide Parliament with assurance that our recommendations in this area are not unbalanced, impractical, or radical, but are

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[48] Identified in *Edgar, supra* note 42 at paras 52-61.

[49] Ontario, Ministry of the Attorney General, *Report of Kaufman Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen`s Printer for Ontario 1998) at Volume 2, p 1157 [*Morin Inquiry*].

[50] *Edgar, supra* note 42 at paras 42-51.

rather a means of shedding dated conceptualism in favour of straightforward measures that will reduce both wrongful convictions and pointless prosecutions.

> **<u>Recommendation 5</u>: A defendant who has given a statement to the police prior to, or coincidental with, the laying of a charge regarding the subject matter of the charge should be permitted to tender that statement in evidence at trial where he or she elects to give evidence at the trial.**
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> **A defendant who has given a statement to the police prior to, or coincidental with, the laying of a charge should be permitted to tender that statement in evidence at trial where he or she elects not to give evidence at trial upon application to the trial judge who should grant leave to adduce the statement where its probative value exceeds its prejudicial effect.**

82. In our view, the case for admissibility of investigative statements where a defendant testifies is overwhelming and answers any plausible objections discussed in the authorities. The availability of cross-examination, and the likelihood that the police statement will be videotaped, provide the court with ample assurance that the exercise will be neither misleading nor superfluous.

83. Where the defendant does not testify, the calculus is different. However, the case for admissibility may still be powerful depending on the reason for the defendant's not testifying and the content and cogency of the prior statement. There are innumerable reasons for counsel to advise an innocent defendant not to testify related to the attributes of the client, the strength of the Crown case, and considerations of legal strategy. It is appropriate that if the defendant elects to remain silent at trial she should not have an unfettered right to adduce a statement given to the police without being questioned on it. But in many cases a judge could reasonably decide – as British judges have – that the interests of justice are best served by allowing the statement to be heard, perhaps with accompanying cautions about the absence of cross-examination. The balancing of

prejudice and probative value is, in our submission, an appropriate framework for making these determinations following a *voir dire* on the issue.

GUILTY PLEAS OF INNOCENT DEFENDANTS

The Problem

84. Once referred to as the justice system's "dirty little secret,"[51] guilty pleas by innocent defendants have now been documented and acknowledged. A false plea of guilty by an innocent accused person is the only statement a defendant can make that will result in an immediate wrongful conviction. When it occurs, it is a fundamental failure of justice. For that reason, it merits special attention. When asked about the frequency with which innocent accused enter false guilty pleas, Andras Schreck – then a defence lawyer, now a judge of the Ontario Court of Justice – replied "I would think that it probably happens hundreds of times a day."[52] In 2011, former Supreme Court of Canada Justice Frank Iacobucci was asked to investigate the underrepresentation of First Nations persons on the jury rolls in Ontario. In his report he concluded that "inadequate legal representation of First Nations individuals, particularly in the north, [is] resulting in virtually automatic guilty pleas."[53]

85. There is now enough experience with wrongful convictions based on guilty pleas to justify Parliamentary intervention. Although our proposals are ultimately more ambitious, Parliament would improve the *Criminal Code* considerably if it simply enacted provisions requiring that the defendant understand the charge, and that the judge be satisfied that there is a factual basis for the guilty plea, as required under ss.32 and 36 of the *Youth Criminal Justice Act.* Attempts to distinguish the *YCJA* from the *Criminal Code*

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[51] Joan Brockman "An Offer You Cannot Refuse: Pleading Guilty When Innocent" (2010) 56 Criminal Law Quarterly 116 [Brockman].

[52] Brockman, *supra* note 51 at 122

[53] Ontario Ministry of the Attorney General, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (February 2013) under the heading "recommendations respecting systematic concerns about the justice system" at para 372.

are in our view not persuasive. We know with certainty that adults – those who suffer discrimination; those with mental disabilities; those who struggle in the language used by the Court; and many others – suffer from vulnerabilities similar to those experienced by youthful defendants. It is telling that Canada's acknowledged guilty plea wrongful convictions come disproportionately from disadvantaged groups.

86. In the first section of this submission, we survey several well-known miscarriages of justice based on false guilty pleas. Most of these are cases that Innocence Canada helped to correct. We then draw on those cases to illustrate some of the causes of guilty plea wrongful convictions. In the second section, we propose a variety of reforms to s.606 of the *Criminal Code* designed to minimize the risk of false guilty pleas and provide workable and flexible procedures so that judges can determine whether there is a factual basis for the plea and ensure that the defendant is truly aware of the charges and the consequences of pleading guilty.

The Cases and Causes

87. ***Simon Marshall***: Mr. Marshall, a young man with serious intellectual disabilities, was arrested in Quebec City in 1995 and charged with a series of sexual assaults. He was interrogated by police, falsely confessed, and, in 1997, pleaded guilty to 13 counts of sexual assault. The actual perpetrator of these assaults had left DNA behind but it was never compared to Mr. Marshall's profile. Instead, defence counsel allowed his client to enter a guilty plea. Mr. Marshall "spent more than five years in jail for crimes he did not commit. While in prison he was beaten, routinely sodomized, scalded with boiling water by other prisoners, leaving him with permanent mental and physical scars that at one point left him catatonic with fear."[54]

After his release in 2003, Mr. Marshall confessed to another series of sexual assaults but these confessions were disproved by DNA evidence. When the police then tested samples

[54] Rhéal Séguin *Mentally handicapped Quebec man receives millions for injustice* Globe and Mail December 21, 2006 Online: https://www.theglobeandmail.com/news/national/mentally-handicapped-quebec-man-receives-millions-for-injustice/article20418207/.

from the original prosecution against Mr. Marshall's DNA, his 1995 confessions were confirmed to be false as well. He was entirely innocent. His convictions were overturned by the Quebec Court of Appeal in 2005. [55]

88. ***Anthony Hanemaayer:*** In 2008, the Ontario Court of Appeal reversed Anthony Hanemaayer's convictions for breaking and entering and assault. Mr. Hanemaayer had pled guilty during the course of his trial on these charges in 1989 and received a sentence of two years less a day. The Crown agreed to the reversal of the convictions on the basis of new evidence pointing to serial murderer Paul Bernardo as the man who broke into a residence at night and held a knife to the throat of a teenage girl.

89. Justice Rosenberg prefaced his judgment by noting that "the story of how [the guilty plea] happened is an important cautionary tale for the administration of criminal justice in this province."[56] He recognized that Mr. Hanemaayer had faced "a terrible dilemma" because he had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted after a trial.[57] The homeowner was "a very convincing witness" and at the trial Mr. Hanemaayer "could tell that his lawyer was not making any headway in convincing the judge otherwise. Further, since his wife had left him and wanted nothing more to do with him, he had no one to support his story that he was home at the time of the offence."[58] Justice Rosenberg noted that Hanemaayer received a greatly reduced sentence for pleading guilty in the middle of his trial.

90. The *Hanemaayer* case reflects several of the most prominent causes of most wrongful convictions. The prosecutor played a role, but so too did a sincere but mistaken eyewitness, a defendant who, however, understandably "lost his nerve", the police who assisted in the identification without following best practices, the defence lawyer who

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[55] *R v Marshall*, 2005 QCCA 852.

[56] *R v Hanemaayer*, 2008 ONCA at para. 2 [*Hanemaayer*].

[57] *Hanemaayer*, *supra* note 56 at para 17.

[58] *Hanemaayer*, *supra* note 56 at para 11.

recommended the plea and the judge who accepted it. More broadly, the criminal justice system itself was at fault allowing "powerful inducements" for defendants to plead guilty which effectively penalize testing potentially faulty evidence at trial.

91. ***Dinesh Kumar:*** In *R. v. Kumar*[59], the accused, who had been charged with second degree murder, pled guilty to criminal negligence causing the death of his infant son, Gaurov. He received a 90-day sentence to be served on weekends with an assurance of no immigration consequences from the conviction. Mr. Kumar was one of the many innocent defendants convicted of child homicides through the appalling errors of Dr. Charles Smith, the pediatric pathologist whose work led to *The Inquiry into Pediatric Forensic Pathology in Ontario* under the Honourable Stephen Goudge.

92. As recounted by Justice Rosenberg, on behalf of the Court of Appeal for Ontario, Mr. Kumar:

> explained that he was in a new country with its own culture, and he did not speak English very well. He was told that he would be deported if convicted of murder or manslaughter but assured that the police would not report his case to immigration if he accepted the plea. The appellant explained how the plea would alleviate many pressures for him and his family. At the time, his wife was recovering from surgery and could not cope alone with an infant and no income. The family was afraid of the murder charge, and his defence counsel told him there was no way to challenge the testimony of Dr. Smith. They wanted to put the charge behind them. So after much discussion with his family, the appellant decided to plead guilty even though he maintained that he never harmed Gaurov in any way.[60]

The Court again recognized that the accused "faced a terrible dilemma" because the system "held out a powerful inducement: a reduced charge, a much-reduced sentence (90 days instead of a minimum of ten years), all but elimination of the possibility of deportation, and access to his surviving child."[61]

93. ***Richard Brant:*** Mr. Brant, an Indigenous person, pled guilty to aggravated assault in the death of his son and accepted a six-month sentence in part because of concerns that

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[59] 2011 ONCA 120 [*Kumar*].

[60] *Kumar*, *supra* note 59 at para 13.

[61] *Kumar*, *supra* note 59 at para 34.

if he testified his criminal record would be used to discredit him[62] Dr. Smith's flawed pathological assessment had underpinned an extremely dubious prosecution which, nonetheless, elicited a plea of guilty from an anxious and vulnerable defendant. Indigenous people are shamefully overrepresented in the incarcerated population and among those with criminal records. Defendants such as Mr. Brant often plead guilty because they are concerned that they will not be deemed credible if they testify in their own defence.

94. ***C.F. and C.M.:*** Both of these young mothers were originally charged with murder but entered pleas to infanticide after being unable to find expert evidence to challenge Dr. Smith's testimony.[63] One was 21 years old and gave birth in a toilet because she did not believe that she was pregnant. The other was an 18-year-old who gave birth at home and also said that she did not know she was pregnant. Both of the young women had received non-custodial sentences in exchange for their guilty pleas. Both had their convictions set aside on appeal after the opinions of Dr. Smith were undermined at the *Goudge Inquiry.*

95. ***Maria Shepherd:*** Ms. Shepherd's case[64] is the most recent wrongful conviction for a child homicide to be quashed following evidence examined at the *Goudge Inquiry*. The Court of Appeal for Ontario recognized again that "the justice system held out a powerful inducement to Maria Shepherd to change her plea to guilty of manslaughter." Ms. Shepherd feared that her three children would be apprehended by child welfare officials. Her guilty plea came with the assurance of "custody in a nearby correctional centre, minimum security, open family visits and the likelihood of early parole."[65]

96. Canada is not alone. The examination by Prof. Garrett of confirmed wrongful convictions in the United States led him to the following observation:

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[62] *R v Brant*, 2011 ONCA 362.

[63] *R v C.F.*, 2010 ONCA 691; *R. v. C.M.*, 2010 ONCA 690.

[64] *R v Shepherd*, 2016 ONCA 188.

[65] *Ibid* at paras 14 and 16.

> Just as the cases of exonorees show that innocent people can falsely confess, they also show us that innocent people can plead guilty. Although people who plead guilty swear in court that they understand that they are admitting their guilt and the consequences of doing so, DNA testing has shown that innocent people can plead guilty for some of the same reasons that innocent people can falsely confess. They succumb to pressure from prosecutors or even from their own defence lawyers. They believe that pleading guilty is a better option than the severe sentence they might receive at a trial. They may have previously confessed, they may be vulnerable or mentally disabled, or they may feel as if they have little choice but to plead guilty.[66]

97. There is growing evidence of guilty plea wrongful convictions – especially of Indigenous people – in other countries with justice systems very similar to our own. In April 2017, Gene Gibson, a Pintupi man from the remote desert community of Kiwirrkurra who suffers from cognitive impairment, had his conviction for manslaughter quashed by the Western Australia Court of Appeal. Mr. Gibson had pled guilty to manslaughter in 2014 after spending approximately two years in pre-trial custody. He served a total of almost five years in prison for a crime he did not commit. The Court of Appeal recognized that his plea was "induced by false or materially unreliable evidence…cognitive defects and language difficulties [that] significantly compromised his ability to understand what was happening to him after he was arrested, charged and remanded."[67]

The Vulnerability of the Innocent Who Plead Guilty

98. The cases involving Dr. Smith demonstrate how vulnerable people may be pressured into pleading guilty even when they are innocent. They suggest that s.606 of the *Criminal Code* should be amended to alert trial judges to these dangers and to require them to determine not only that a guilty plea is voluntary and informed, but that there is a factual basis for it.

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[66] Garrett, *Convicting the Innocent*, *supra* note 2 at 150-153.

[67] Tim Clarke, WA Court of Appeal overturns Gene Gibson conviction for manslaughter of Josh Warneke Perth Now online: http://www.perthnow.com.au/news/western-australia/wa-court-of-appeal-overturns-gene-gibson-conviction-for-manslaughter-of-josh-warneke/newsstory/5a408185881522d22682ff4bb9975030

99. Systemic discrimination is a pervasive factor in guilty plea wrongful convictions which disproportionately afflict the disadvantaged. Women charged with murder for killing abusive partners face a desperate dilemma when a prosecutor offers to reduce the charge to manslaughter and allow a family the chance to stay together.[68] The cases illustrate how a false guilty plea can become a rational choice when defendants fear that their children will be apprehended by child welfare authorities, a fear that is felt disproportionately by Indigenous, racialized and poor women. The Charles Smith cases also reveal the overwhelming pressures that Indigenous people like Richard Brant can face to plead guilty because of prior convictions. Defendants such as Dinesh Kumar, who fear collateral immigration consequences or who struggle with the language used by lawyers, prosecutors and judges, may also feel irresistible pressures to plead guilty. These pressures, it should be stressed, do *not* come about because of some extraordinary *departure* from the normal functioning of the legal system. They are built squarely into the routine operation of the prosecutorial process. That makes them especially dangerous and especially hard to detect.

The Need for Reform of Section 606 of the *Criminal Code*

100. An obvious and essential reform is the amendment of s.606 of the *Criminal Code* to reflect the safeguard in s. 36 of the *Youth Criminal Justice Act* which requires that the trial judge be "satisfied that the facts support the charge."

101. Section 36 of the *YCJA* exists because its drafters recognized that "youths are unlikely to understand the charges that they face or appreciate the significance of a guilty plea as fully as an adult."[69] It is based on the premise that "age is relevant to a person's capacity to make an appropriate plea"[70]

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[68] Elizabeth Sheehy, *Defending Battered Women on Trial* (Vancouver: University of British Columbia, 2014).

[69] Nick Bala and Sanjeev Anand *The Youth Criminal Justice Act* 3rd ed (Toronto: Irwin Law, 2012 at 445 [Bala and Anand].

[70] Bala and Anand, *supra* note 69 at 445 footnote 31.

102. However, providing protections only for youth is underinclusive. There is abundant evidence that the capacity of those caught up in the criminal justice system is limited by factors apart from age. For instance, studies performed by Correctional Services of Canada establish that the prevalence of intellectual disabilities – including but not limited to fetal alcohol spectrum disorders[71], learning disabilities[72], and mental health disorders[73] is higher in the incarcerated population than in the general population. Factors such as stress, language barriers, illiteracy and many more can also diminish an accused person's capacity to make an appropriate plea. For these reasons, the *Code* should be amended so that the judge must be satisfied that the facts support the charge. It is a straightforward reform with a great capacity to prevent many corrosive failures of justice.

103. At present, s.606(1.1) of the Code requires the court to be satisfied that the accused is making the plea voluntarily and understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea and the fact that the court is not bound by any agreement between the accused and the prosecutor. In many of the cases of guilty plea wrongful convictions examined above, these requirements would have been satisfied but did not prevent injustices. In Innocence Canada's view, this suggests that the current safeguards are inadequate to address the problem.

104. At present, s.606 (1.1) (b) (ii) requires the court to be satisfied that a defendant understands "the nature and consequences of the plea". This should be expanded to make explicit reference to *all reasonably foreseeable consequences of the plea* including the

[71] MacPherson, P.H., Chudley, A.E. & Grant, B.A. (2011). *Fetal Alcohol Spectrum Disorder (FASD) in a correctional population: Prevalence, screening and characteristics,* Research Report R-247. Ottawa (Ontario), Correctional Service Canada.

[72] Correctional Service Canada, "Forum on Corrections Research" online: http://www.csc-scc.gc.ca/research/forum/e073/e073g-eng.shtml

[73] Beaudette, J.N., Power, J., & Stewart, L. A. (2015). National prevalence of mental disorders among incoming federally-sentenced men offenders (Research Report, R-357). Ottawa, ON: Correctional Service Canada. Also see Mental Health Strategy for Corrections in Canada Report which was the product of a Federal-Provincial-Territorial Partnership.

collateral consequences of a guilty plea. The Canadian Bar Association has recently issued an important report on the collateral consequences of a guilty plea.[74] These include:

- The consequences of a criminal record including registries, DNA and other consequences;
- Deportation, citizenship and other immigration consequences;
- That a guilty plea can be used as evidence in a subsequent civil or criminal trial, or as similar fact evidence, or to attack a person's credibility
- Civil disabilities relating to jury service, possessing firearms, etc.;
- Child welfare consequences;
- Employment consequences relating to a criminal record;
- Difficulties in obtaining pardons or criminal record suspensions.

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105. The cases examined in the first part of this section show that many of the known victims of guilty plea wrongful convictions have been vulnerable people. They include people such as Richard Brant who was Indigenous; Simon Marshall who had mental disabilities; Dinesh Kumar who feared immigration consequences and struggled with the language used in court; Maria Sheppard who feared that child welfare officials would seize her children; and the two young mothers who had unexpected deliveries that resulted in their being charged with killing their newborn children.

106. Judges need to be alerted to these vulnerabilities. We have something in mind like s. 718.2(e) of the *Criminal Code* which is an ameliorative provision that recognizes that Indigenous people are overrepresented in the justice system and that we must take concrete action to reduce the overrepresentation. A defendant might be vulnerable to entering a false guilty plea for reasons such as Indigenous identity, language, literacy and other communication difficulties, immigration status, mental illness, intellectual disability, youth, cultural differences, the denial of bail, an inability to retain counsel, or for reasons related to the known causes of wrongful convictions.

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[74] Canadian Bar Association *The Collateral Consequences of Criminal Convictions: Considerations for Lawyers* (2017) at https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf

107. In addition, a non-exhaustive statutory list of the indicia of wrongful convictions could help to remind trial judges and other justice system professionals of the indicia of wrongful convictions and in particular of guilty plea wrongful convictions. These could include factors such as flawed eyewitness identification evidence, false confessions, racism, police and prosecutorial misconduct, tunnel vision, misleading expert evidence, deceptive informants, ineffective assistance of counsel, sentence reductions for pleading guilty, mental health difficulties, language difficulties and guilty pleas by those who are innocent or may have a defence to the charge.

108. If a judge finds that these indicia of vulnerability or markers of wrongful convictions are present and they raise a doubt about the validity of the plea, the judge should be authorized and encouraged to invoke additional procedures designed to place the court in a better position both to assess the factual basis of the guilty plea and to determine that the defendant is making the plea voluntarily, with an awareness of its natural and foreseeable consequences.

109. A reality that must be confronted, especially in cases involving vulnerable groups, is that it is not enough to rely on the effectiveness of defence representation. One tool that trial judges should have available is the power, pursuant to legislation, to appoint *amicus curiae* who would meet with the accused. This power should be available whether or not the accused is represented by counsel. Defence counsel should be able to participate in the defendant's meeting(s) with the *amicus* and the *amicus's* report should only address the validity of the plea and not contain incriminating evidence from the accused. Before the report is provided to the Court, the defendant should have an opportunity to review its contents and consent to its submission to the judge.

110. The appointment of *amicus* would recognize the large power imbalance between the defendant and the judge and concerns that many, particularly Indigenous defendants, may engage in gratuitous, deferential concurrence where they simply agree with every proposition put to them by a person of authority.

111. A complementary option would be to give the trial judge explicit statutory powers where there is any indication that the accused struggles with the language of the Court or speaks a dialect of the language of the Court that varies from the standard version of the language of the Court, to appoint an interpreter to assist with communication by the defendant, not only with the court but also with their own lawyers and/or *amicus.*

112. We are aware that the requirements for a valid guilty that we propose could in some cases cause adjournments and that some may fear that halting a guilty plea could harm the interests of the defendant. For this reason, we believe that the judge should also be able to trigger a bail review if determining the validity of the plea requires an accused in custody to be returned to custody.

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113. Section 606(1.2) now provides that the failure of the court to inquire into whether the conditions for a valid plea in s. 606 (1.1) "does not affect the validity of the plea." This provision values efficiency over both fairness to the accused and social interests in the accuracy of guilty pleas. It does not reflect our experience of guilty plea wrongful convictions and makes the *Code's* protections ring hollow. Making the plea inquiry optional will, frankly, cause miscarriages of justice. The amendments that Innocence Canada proposes will only make a difference if they have teeth.

114. We also note that the previous government in 2015 enacted as part of the *Victims Bill of Rights* amendments to s.606 that are more elaborate than those proposed by Innocence Canada. They revolve around attempts to ensure that victim impact statements are provided following convictions. In our criminal justice system, which is built around the presumption of innocence and the reasonable doubt standard, and which has experienced a regrettable number of guilty plea wrongful convictions, it is more important to ensure that innocent people do not plead guilty than it is to encourage the provision of victim impact statements.

115. The guilty plea is the primary vehicle by which facts are found, convictions are entered, and punishment is assigned under our justice system. Yet it is often a summary process where the outcome is dictated by negotiations held outside the court's gaze and subject to pressures and motivations that are not made part of the record. This is a formula for miscarriages of justice and, in our view, an area ripe for legislative action. Judges need better information about what is taking place before them, better cues to tell them when something is wrong, and better tools for setting it right. That is the impetus for our recommendation.

116. As we do throughout these submissions, we emphasize here the value of these reforms as a means of shaping the conduct of participants in the justice system. The goal of our proposals is not only to provide judges with authority to peer behind the swift efficiency of guilty pleas and ferret out injustice. We also want to encourage prosecutors, defence lawyers and police officers to ensure that the resolution of cases through guilty pleas is undertaken with the same attention to detail, the same solicitude for rights, and the same focus on substantive justice as they bring to a contested trial. If the professionals who bring a guilty plea to court are as vigilant as they should be, the need for judges to look behind the process will be reduced. In this respect, provisions which set a standard and provide a remedy will also serve as an incentive and a deterrent to those whose decisions shape guilty pleas.

> **<u>Recommendation 6:</u> Legislation should be enacted to govern in greater detail the process through which findings of guilt are made based on pleas of guilty. The *Criminal Code* should provide courts with information to assess the voluntariness of a guilty plea, the defendant's awareness of its consequences, and the factual footing on which it rests. It should also provide the court with tools to ensure that it does not rely on false guilty pleas. In particular:**
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> - **The *Criminal Code* should be amended to parallel s.36 of the *Youth Criminal Justice Act* requiring the trial judge to determine that there is a factual basis for a guilty plea.**

- **Section 606(1.1)(b)(ii) should be amended to include reference to "*all reasonably foreseeable consequences of the plea including collateral consequences*."**
- **Section 606 should be amended to alert judges, other justice system participants and the public to the indicia of wrongful convictions and to those groups of people, including Indigenous people, who may be particularly vulnerable to wrongful convictions, including wrongful convictions based on guilty pleas.**
- **The *Code* should allow a trial judge to appoint *amicus curiae* and interpreters to assist in determining whether the requirements for a valid guilty plea in s.606(1.1) are satisfied, including the new requirements of a factual basis for the plea and awareness by the defendant of all reasonably foreseeable consequences of the plea, including collateral consequences.**
- **Section 606(1.2), which provides that the failure to observe the requirements in s.606 (1.1) does not affect the validity of a guilty plea, should be repealed to ensure that the existing and new requirements for a valid plea are observed and enforced.**

EYEWITNESS IDENTIFICATION

The Problem

117. A striking feature of Canadian law is the wide gap between its recognition that mistaken eyewitness identifications cause wrongful convictions and the measures it has approved to correct the problem. The daily experience of jurors is not likely to condition them to understand the range of subjective and circumstantial factors which may lead a person to claim with unjustified certitude that she recognizes a defendant as the person she saw in a moment of trauma and distress. The law has accepted that identification evidence (in a manner similar to false confessions) has an impact on juries wholly out of proportion to its intrinsic value. Yet, besides stating that fact to juries, in more muted language, the

courts have done almost nothing to fix the problem. And with lax standards set by the courts come lax procedures from the police. The result is a problem that has lingered for generations after it was first acknowledged.[75] It is not necessary to pile up proof of the problem. Fifteen years ago, Justice Arbour said, for the Supreme Court of Canada:

> I think it is important to remember that *the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere*. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it. I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded "little weight", goes far enough to displace the danger that the jury could still give it weight that it does not deserve.
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> *The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented*. Most recently the Honourable Peter Cory, acting as Commissioner in the Inquiry regarding Thomas Sophonow, made recommendations regarding the conduct of live and photo line-ups, and called for stronger warnings to the jury than were issued in the present case (Peter deC. Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation" (2001) ("Sophonow Inquiry"), at pp. 31-34).
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> While it is unnecessary to consider these recommendations in detail, I share the concern expressed by the Commissioner….[76] (emphasis added)

These well-documented truths about identification evidence are borne out in statistics from the study of confirmed wrongful convictions in the United States. Professor Brandon Garrett's book-length study, *Convicting the Innocent*,[77] documented misidentification by eyewitnesses in 190 of the 250 cases of verified miscarriages of justice examined by him. The devastating personal effects of the problem have been illustrated in the Kaufman and Cory inquiries into the convictions of Guy Paul Morin and Thomas Sophonow, and are familiar to Innocence Canada most recently in the case of *R. v. Leighton Hay* where an eyewitness's identification which was, by any objective measure, dreadfully shaky, became the foundation for a misconceived murder prosecution (and, not incidentally, for the failure to apprehend the real killer).[78] In *R. v. Hanemaayer,* a concern that a false identification

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[75] See, for example, *R v Goldhar*, [1941] 2 DLR 470 (Ont. CA); *R v Dwyer*, [1925] 2 KB 799.

[76] *R v Hibbert*, 2002 SCC 39 at paras 50-52 [*Hibbert*].

[77] Garrett, *Convicting the Innocent*, *supra* note 2 at 48-52.

[78] *R v Hay*, 2013 SCC 61.

might be accepted by a jury led to a guilty plea by an innocent man, prompting the Court of Appeal to say, two decades later, when the miscarriage was corrected with the assistance of Innocence Canada:

> I wish to make a few comments about the identification evidence in this case. We now know that the homeowner was mistaken. No fault can be attributed to her. She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses. *Even the appellant, who knew he was innocent, was convinced that the trier of fact would believe her. The research shows, however, that there is a very weak relationship between the witness' confidence level and the accuracy of the identification. The confidence level of the witness can have a "powerful effect on jurors*": see Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) at 28; see also *R. v. Hibbert* (2002), 2002 SCC 39 (CanLII), 163 C.C.C. (3d) 129 (SCC) at 148.
>
> […] As to the witness, as I have said, she honestly believed she had made a correct identification. That identification was made in difficult circumstances; she was naturally under considerable stress when she encountered the assailant; she only had a brief opportunity to make her observations and she was identifying a stranger. […]
>
> However, this case represents an example of how flawed identification procedures can contribute to miscarriages of justice and the importance of taking great care in conducting those procedures. *Mistaken eyewitness identification is the overwhelming factor leading to wrongful convictions.* A study in the United States of DNA exonerations shows that mistaken eyewitness identification was a factor in over 80 per cent of the cases: see *The Inquiry Regarding Thomas Sophonow* at p. 27.[79] (emphasis added)

118. In a nation whose citizens and residents come from all over the world, and from every race and culture, it is worth emphasizing that racial minorities, immigrants, and Indigenous peoples are much more likely than others to be victimized by mistaken identifications. It has been established beyond doubt that eyewitnesses have a much harder time accurately identifying persons from another racial group and are much more prone to pick someone from a minority group in an identification procedure simply because they

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[79] *Hanemaayer, supra* note 56 at paras 21, 28-29.

are of the same race as the perpetrator or bear a superficial resemblance. As Prof. Garrett says:

> One explanation for why so many DNA exonorees were minorities, out of proportion even to their overrepresentation among rape and murder convict, is that so many of these cases involved cross-racial identifications. At least 49% of the exonorees identified by eyewitnesses had a cross-racial identification (93 of 190 cases). In 71 of those cases, white women misidentified black men.
>
> Racial disparity is glaring in these exonorees' cases. Many more DNA ex-honourees were minorities (70%) than is typical even among average and already racially skewed populations of rape and murder convicts. Most striking, 75% of the exonorees who were convicted of rape were black or Latino, while studies indicate that only approximately 30% to 40% of all rape convicts are minorities. Why were so many of these exonorees minorities? Is being black a risk factor for being wrongly convicted?[80]

119. In the face of an epidemic problem – the single most prominent cause of wrongful convictions – Canadian law has done next to nothing. It has endorsed jury warnings about the "frailties" of identification evidence but it has not offered any other useful solutions to the intractable problem it so often acknowledges. In particular, the law has failed in four key ways:

- Courts have not insisted that the police follow best practices in procedures to test the ability of eyewitnesses to recognize the perpetrator of a crime.
- Courts have failed to provide for the systematic examination on a *voir dire* of the reliability of identifications, with exclusion a meaningful possibility where the real value of the evidence is outweighed by its capacity to mislead a jury.
- Courts have resisted to a bewildering extent the use of expert witnesses to inform judges and juries of the perils associated with false identifications and how they may be detected in a particular case.
- Courts have permitted worthless "in-dock" identifications of defendants by eyewitnesses.

120. We will examine each of these issues and offer recommendations for reform of a legal *status quo* we consider unacceptable.

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[80] Garrett, *Convicting the Innocent*, *supra* note 2 at 72-73.

Conducting Identification Line-ups

121. Law enforcement and psychology have produced an impressive, and evolving, set of optimal techniques for testing the ability of an eyewitness to recognize a person suspected of committing a crime. These practices, as they have for decades, test recognition by assessing the ability of the witness to select a suspect's face from a field of other faces generally fitting the description of a perpetrator. It has been discovered, however, that there are many refinements in this testing process that improve its accuracy as a measure of recognition. Taken together, these methods, with their refinements, constitute the best that investigators can do to gauge the reliability of a witness identification. They certainly do *not* eliminate the risk of wrongful convictions from mistaken identification but they set a standard which should be universally applied by police agencies. The best way to ensure this occurs is to give them the force of law.

122. The ideal identification line-up seeks to achieve several objectives:

- It avoids contamination of the witness's perceptions or recollections in advance of the testing procedure.
- It presents a suspect and "fillers" in a field of comparable facial images.
- It avoids suggestiveness in the actual conduct of the lineup.
- It records the responses and reactions of the witness and his interactions with the officer conducting the procedure.
- It avoids communicating to the witness whether the selection made by him conforms to the belief of investigators about the identity of the perpetrator.

123. An approach that captures the features of a properly conducted identification procedure was set out by the Supreme Court of New Jersey in its sweeping review and revision of the state's law in this area in *State v. Henderson*. The Court said that to trigger a *voir dire* into the admissibility of scientific evidence, a trial judge should consider these variables:

> Blind Administration. Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the “envelope

> method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?
>
> Pre-identification Instructions. Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?
>
> Lineup Construction. Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?
>
> Feedback. Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?
>
> Recording Confidence. Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?[81]

124. In *The Inquiry Regarding Thomas Sophonow*, the Honourable Peter Cory posited a series of practical measures to mitigate the risk of eyewitness misidentification. They were developed in the course of dissecting one of Canada's most troubling miscarriages of justice. Mr. Cory proposed:

> **Photo pack line-up**
>
> The photo pack should contain at least 10 subjects.
>
> The photos should resemble as closely as possible the eyewitnesses' description. If that is not possible, the photos should be as close as possible to the suspect.
>
> *Everything should be recorded on video or audiotape from the time that the officer meets the witness**,** before the photographs are shown through until the completion of the interview*. Once again, it is essential that an officer who does not know who the suspect is and who is not involved in the investigation conducts the photo pack line-up.
>
> Before the showing of the photo pack, *the officer conducting the line-up should confirm that he does not know who the suspect is or whether his photo is contained in the line-up*. In addition, before showing the photo pack to a witness, the officer should advise the witness that it is just as important to clear the innocent as it is to identify the suspect. The photo pack should be presented by the officer to each witness separately.
>
> *The photo pack must be presented sequentially and not as a package.*

[81] *State v Henderson*, 27 A.3d 872 at 289-290 (Supreme Court of NJ 2011) [*State v Henderson*].

> In addition to the videotape, if possible, or, as a minimum alternative, the audiotape, there should be a form provided for setting out in writing and for signature the comments of both the officer conducting the line-up and the witness. All comments of each witness must be noted and recorded verbatim and signed by the witness.
>
> *Police officers should not speak to eyewitnesses after the line-ups regarding their identification or their inability to identify anyone.*
>
> This can only cast suspicion on any identification made and raise concerns that it was reinforced. [82](emphasis added)

125. There are three features of these recommendations which we believe are essential to sound identification testing but frequently absent from current practice, even where genuine efforts have been made to ensure a lineup of similar images.

126. The first critical feature is double-blind testing with the officer supervising the test as ignorant as the witness of the person suspected of the crime by investigators. This is a protection against the almost irresistible temptation of officers who have located a suspect they believe is guilty to signal by word, gesture or attitude, the person in the line-up that they hope the witness will recognize and select. These effects can be sub-conscious and unintentional or overt and calculated, but their impact on the reliability of an identification will be, in either event, catastrophic.

127. The second critical feature of proper testing is the presentation of photographs *separately* and *sequentially*, so that an individual determination is made by the witness about each image. A helpful article on eyewitness identification explains the difference between sequential "photo packs" and the traditional "composite" photo lineup or photo array:

> To use another example, consider so-called "composite" photo lineups, in which a number of photographs (usually 8 to 12) are presented to an eyewitness as a group. This has been the standard manner of presenting a photo lineup for years, and all criminal lawyers will have seen one at some point. Yet experiments have shown that compared to sequential photo lineups, in which the witness is asked to view photographs one at a time, composite lineups have a significantly higher risk of "false positives", where the witness picks out an innocent foil or non-suspect. The experts believe this happens because, when shown a composite photo lineup, the witness does

[82] *The Inquiry Regarding Thomas Sophonow, supra* note 36 at 31-32.

> not examine the photos individually. Rather she compares them all and asks herself, "Which photo most closely resembles the perpetrator?" *In the sequential lineup, the witness instead examines each photo individually and compares it to her memory, a significantly more accurate approach.* Like cross-racial bias, this phenomenon is arguably something that a trier of fact would not know from common experience.[83](emphasis added)

128. In our view, this is not a slight or marginal improvement over past practice but a fundamental one which should become the standard for investigators throughout Canada. Recommendations in this area have circulated in legal and policy circles for years. Given what is at stake, the law should take specific measures to ensure that this important reform becomes the national standard.

129. Third, the video recording of the eyewitness identification process is as important as the manner in which it is conducted. Most people have watched someone struggle with the process of recognition and identification, whether at an introduction at a social event, or in conversation, or in surveying a group of people or images. Assessing the reliability of a purported identification is very much a matter of weighing factors such as the time taken by the witness, her facial expression, her vocal inflections and the tone with which she delivers her final opinion. Videotaping of the entire process – including the witness's verbal description of the perpetrator in advance of the testing procedure – provides information to a jury for which the notes of an observing police officer are no substitute. Here, as in our recommendation concerning the taping of witness statements, a starting point is our assumption that videotaping technology has become universally available and affordable. There is no practical excuse for the failure of a police agency in Canada to have at hand videotaping equipment of reasonable quality and a room to deploy it during a photo pack testing procedure.

130. In this regard, we add that technology to create a bank of available, high definition colour photographs with a uniform background that capture the spectrum of facial descriptions, for use in identification procedures, should be made available to police

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[83] David Schermbrucker, "Eyewitness Evidence: The Role of Experts in the Criminal Courts." (Paper delivered at the Canadian Bar Association (Nova Scotia) Conference on Key Developments in the Law of Evidence Halifax, April 23 2004 Posted in Alan Gold's Collection of Criminal Law Articles 2004.

agencies everywhere. Canadian law has struggled for years with issues about the format and composition of lineups, the availability of similar "filler" or “foil” photos, the use of photos of the suspect that stand out due to their format, and other shortcomings. These are problems that could be solved by a relatively modest investment in technology. The investment will certainly be made when the law declares that it must.

131. It is not easy to craft legislation that will shape police practices in an area such as this, remaining flexible enough to accommodate atypical cases, while setting a standard rigorous enough to impel reform and a commitment to use of the best procedures. In our view, it is appropriate for Parliament to set objective standards for identification procedures without specifying precisely how they are to be met but with an insistence that departures from them trigger an inquiry, on a *voir dire*, at which admissibility will be an issue (the subject of our next discussion).

Recommendation 7: Legislation should expressly require adherence by police investigators to best practices in the conduct of eyewitness identification testing procedures. The best practices should be particularized to include:

- **(i) The use of ten or more high quality photographs of similar format resembling the description of the suspect.**
- **(ii) The presentation of the photographs to the witness separately, sequentially and in random order.**
- **(iii) The conduct of the testing procedure by a person with no knowledge of which photograph is the person of interest to police investigators.**
- **(iv) Instruction to the witness in advance of the testing to confirm that the officer presenting the photographs has no knowledge of the suspect and that the person seen by the witness may or may not appear in the photographs to be shown.**
- **(v) Videotaping of the entire testing procedure, such that the photograph being viewed is visible, the face of the witness is**

visible, and the comments of the witness and the officer presenting the photos are audible.

(vi) No communication to the witness by the officer conducting the lineup or the investigators on the case regarding their view of the result of the lineup, either on the occasion of its occurrence or on any subsequent occasion before the appearance of the witness to testify at trial.

132. We acknowledge that it is unusual for legislation to prescribe in detail the steps to be taken by police officers to test the evidence they have acquired during an investigation. But precision is well-justified in this setting which has been responsible for so many injustices and which demands a firm commitment to the best practices available. While psychology, working in tandem with the law, may well develop enhancements to the identification process in the years ahead, it is difficult to imagine the new procedures that will ever oust those on this list or render them superfluous; we regard these as basic protections justified by Canada's extensive experience with past miscarriages of justice and efforts made to learn from them.

The *Voir Dire* on Identification

133. The objectives of a law that requires the employment of optimal methods for testing identification evidence is not the exclusion of the evidence but the improvement of the methods. We believe that if evidence that results from shoddy practices faces exclusion at trial, the police practices will improve and the risk of wrongful convictions will decline appreciably. We also believe that leaving it to courts, adjudicating individual cases, to effect meaningful reform is futile. This is understandable because the primary goal of any trial is reaching a correct verdict, not the reform of investigative methods. Most judges, without clear legislative direction, will tend to allow even tainted, prejudicial evidence to be relied upon rather than see a serious prosecution founder due to a *voir dire* ruling that excludes it altogether, or a trial judgment that deems it too unsafe to support a conviction.

This tendency extends from trial courts to the Supreme Court of Canada.[84] One need not condemn the result in all of these cases to lament the poor quality of the identification testing that left the courts so poorly equipped to make difficult decisions on serious matters. It is inevitable that in a hundred convictions where poorly tested identification constitutes the core of the Crown's case, many guilty defendants will have been caught and punished. So, too, will some innocent defendants. It is this grim reality that proper testing procedures, backed by legislation and enforced by the courts, can help alleviate.

134. Canadian courts have almost uniformly rejected the exclusion of identification evidence on the basis of inadequate, or even overtly suggestive, identification procedures. It is possible to seek exclusion of so-called "in-dock" courtroom identification of a defendant where it is not preceded by some form of out-of-court procedure.[85] But even that remedy is rare – we recommend below that in-dock identification simply be precluded as a matter of law.[86] More importantly, we recommend that Canadian law provide for a robust pre-trial screening procedure where identification evidence that does not meet the standards set out above is tendered by the Crown.

135. The authorities cited in this section illustrate the reluctance of the courts, in the absence of a legislative mandate, to engage in the kind of scrutiny of identification evidence on a *voir dire* that could reduce the risk of wrongful convictions. If the prescriptive legislation in the preceding section is paired with the remedial rules we recommend in this section, we believe that the risk of wrongful conviction can be mitigated, at no cost to the effectiveness of law enforcement.

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[84] See for example *R v Braich,* 2002 SCC 27; *R v Araya,* 2015 SCC 11; *R v Doyle,* 2007 BCCA 587; *R v Grant,* 2005 ABCA 222; *R v Zurowski,* 2003 ABCA 315; *R v H (D.R.),* 2007 MBCA 136, *R v Frimpong,* 2013 ONCA 243 [*Frimpong*]; *Petigny c R,* 2010 QCCA 2254; *Arseneault c R,* 2016 NBCA 47; *R v Martin,* 2007 NSCA 121; *R v Dunn,* 2006 PESCAD 19; *R v Maharaj,* [2007] OJ 3499 (S.C.); *R v Benmore,* 2011 CanLii 77762 (NLPC).

[85] *R v Holmes* (2002) 62 O. R. (3d) 146, at para 40.

[86] *R v Wong* (2001) 153 CCC (3d) 321; *R v Woodcock,* 2010 ONSC 1112.

136. The judgment of the New Jersey Supreme Court in *State v. Henderson* provides a useful approach to reform. After laying out criteria for a satisfactory identification process, the Court ruled that the failure of the police to adhere to the promulgated standards will trigger an in-depth examination of the identification process and the reliability of the eyewitness evidence which may be excluded. In *Henderson*, the court considered both the *procedures* used by the police to test identification (which it called "systemic" factors) and the *circumstances* in which an eyewitness's observations were made ("estimator" factors). The court held:

> Remedying the problems with the current Manson/Madison test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness[87]; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory—because we recognize that most identifications will be admitted in evidence.
>
> *Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.*
>
> The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence and then explain its details and the reasoning behind it.
>
> *First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification.* See State v. Rodriquez, supra, 264 N.J.Super. at 269; State v. Ortiz, supra, 203 N.J.Super. at 522; cf. State v. Michaels, 136 N.J. 299, 320 (1994) (using same standard to trigger pretrial hearing to determine if child-victim's statements resulted from suggestive or coercive interview techniques). That evidence, in general, must be tied to a system—and not an estimator—variable. But see Chen, supra (extending right to hearing for suggestive conduct by private actors).
>
> *Second, the State must then offer proof to show that the proffered eyewitness identification is reliable*—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony

[87] "Suggestiveness" in the very broad *Henderson* analysis is likely to be satisfied by a demonstrated departure from the requirements for the preparation and presentation of a proper photo pack.

> that defendant's threshold allegation of suggestiveness is groundless. We discuss this further below. See infra at —— (slip op. at 114–15).
>
> Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. See Manson, supra, 432 U.S. at 116, 97 S.Ct. at 2254, 53 L. Ed.2d at 155 (citing Simmons, supra, 390 U.S. at 384, 88 S.Ct. at 971, 19 L. Ed.2d at 1253); Madison, supra, 109 N.J. at 239 (same). To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.[11]
>
> *Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence*. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.[88] (emphasis added)

137. *Henderson* illustrates how a demonstrated departure from best "systemic" practices can trigger an inquiry into the reliability of identification evidence and we cite it for that purpose. We do *not*, however, urge adoption of either the threshold or ultimate criterion in the judgment which, in our view, unduly favours reliance on potentially dangerous evidence and shifts a burden to the defence which the prosecution should logically bear.

138. In our view, building on nascent Canadian law regarding unreliable identifications, Parliament should require that when the Crown seeks to adduce evidence of an eyewitness identifying a defendant as the perpetrator of a crime (or in some other matter relevant to the prosecution), the Crown should have to satisfy the trial judge that the identification has been subjected to testing which is in compliance with the criteria set out in the preceding section. If it fails to do so, this should trigger the holding of a *voir dire* at which admissibility would be determined. The Crown possesses all of the relevant information about how identification evidence was dealt with during an investigation. The police are wholly in control of the methods employed. The prosecution is the proponent of the evidence which our history demonstrates has inherent frailties. Accordingly, the Crown should bear the threshold onus of showing that the police dealt with the identification evidence according to law.

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[88] *State v Henderson*, *supra* note 81 at 288-289.

139. Once the *voir dire* (the "pre-trial hearing" in *Henderson*) is convened, we believe the onus should remain on the Crown to justify the departure from legally mandated practices and satisfy the court as to the admissibility of the evidence. This, again, is a rational allocation of the burden of proof and persuasion in an area where the Crown asks the court to take a risk with inherently suspect evidence.

140. Canadian authorities, in so far as they exist, apply the standard of prejudice and probative value to this determination regarding in-dock identification and it can be usefully broadened for application on the *voir dire* we recommend. We also urge, however, that in this area the standard be modified so that if the state has employed sub-standard identification procedures, the burden on it should be heavier and more sharply defined than the mere tipping of a balance that is already difficult to assess.

141. We also believe that legislation in this area would benefit from the inclusion of features relevant to the assessment of the balance between prejudice and probative value. Issues which the court should address on a *voir dire* could include the following:

- **The seriousness of the departure from express statutory standards.** A court should recognize, for example, that a failure to use similar photographs, presented sequentially, in a videotaped procedure, is a very significant deviation from acceptable practice.
- **The reason for the departure from statutory standards.** In our conception of a reformed procedure, the logistical requirements for conducting a proper testing procedure will be readily available to investigators. It follows that the departure from legislated expectations may invite an inference that employing proper procedures would have resulted in a failure to identify the suspect and was wilful. This will tell significantly in favour of exclusion.
- **The detail and accuracy of the witness's description of the perpetrator of the offence.** In many respects, the description given by a witness is as important a measure of an identification's accuracy as any procedure employed by the police to test it. It is highly relevant to the reliability of an identification. Where the

description is vague or in some respect different from the suspect, *and* the police have employed sub- standard practices, this should tell in favour of exclusion.

- **The objective level of confidence of the witness at the time of the procedure**. The level of confidence of a witness *in court* is irrelevant and often one of the most dangerous features of eyewitness testimony. But if an identification was tenuous or uncertain, or highly qualified, *when it is made* and it was made during a flawed testing process, then it is highly suspect and the danger of admitting it is elevated.
- **The availability and probative value of confirmatory evidence of the guilt of the defendant or the accuracy of the identification.** As in *voir dires* on hearsay admissibility, courts can find support for the admissibility of evidence that has inherent risks in the presence of other evidence that suggests the same inculpatory inferences as the challenged evidence. This factor, however, should be invoked with great caution since two bodies of weak evidence may lead juries to a spurious confidence in the reliability of both.
- **The capacity of other measures to address the flaws in the identification process.** In the next section, we discuss an expanded role for expert evidence in mitigating the risks of eyewitness identification. Canadian law also endorses strong jury cautions as an antidote to these risks. If the Crown persuades the trial judge that these or some other measures will reduce the prejudicial effect of a flawed identification so that it is substantially less than its probative value, this could support admissibility.

142. As the last of these points suggests, our view is that the *voir dire* we recommend should not be limited to a simple question of admissibility as a binary choice for trial judges. Rather, once triggered, the *voir dire* should serve as a forum for the resolution of *all* issues associated with sub-optimal identification evidence, so that the parties begin the trial itself with a good understanding of what evidence will be admitted (including expert testimony on identification), what claims can be made for it by counsel, how it will be presented to the jury, and what will be said about it in the charge. This planning will, of course, be subject to developments in the trial, as with any issue addressed on a *voir dire*, but it will provide the participants in the trial with clear guidance about how the Crown can

make its case, with the dangers of its identification evidence eliminated or mitigated. This is vastly preferable, in an area of such consequence, to leading flawed identification evidence without advance scrutiny and attempting to deal with the consequences in a pre-charge conferences and the jury charge.

<u>Recommendation 8:</u> The *Criminal Code* should be amended to provide that in cases where the Crown seeks to adduce the evidence of an eyewitness who inculpates the defendant and whose identification is in question, it must establish that the identification was tested according to the standards in Recommendation 7.

If the evidence was not tested in accordance with these standards, its admissibility should be subject to a *voir dire* in which the Crown bears the onus of establishing that the evidence is sufficiently reliable that its probative value substantially outweighs its prejudicial effect.

In determining the admissibility of the identification evidence under these standards, the court should have regard to all relevant factors including:

- **The seriousness of the departure from the statutory standards.**
- **The reason for the departure from statutory standards.**
- **The detail of the eyewitness's description of the perpetrator of the offence and the extent to which it corresponds to the appearance of the defendant.**
- **The objective level of confidence of the witness at the time of the procedure.**
- **The availability and probative value of confirmatory evidence of the guilt of the defendant or the accuracy of the identification.**
- **The capacity of other measures to address the flaws in the identification process.**

> **At the conclusion of the *voir dire*, the trial judge may make rulings related to the admissibility of the identification evidence, the manner in which it may be presented to the trier of fact, and other related matters.**

143. We appreciate that legislation which dictates the course of an investigation and provides a process for determining the admissibility of the evidence which results, and issues ancillary to it, is not typical in our law. Neither, however, is the outsized potential for causing miscarriages of justice, through unreliable evidence to which juries assign meretricious weight, a "typical" problem. It is, rather, a blight on the justice system and a call to Parliament for action. The *Criminal Code* makes reference to other categories of evidence, the collection, admissibility and presentation of which are governed by statute – for example, breathalyzer evidence and wiretap evidence – where the public interest is heavily implicated, and there is no less at stake than in identification evidence. Regrettably, the courts have shown no sign of taking steps that are responsive to the gravity of the problem, preferring to place their faith in jury cautions, and overly indulgent appellate review. There is a vacuum in our law which Parliament can, and should, act to fill.

Expert Evidence on Identification

144. Lawyers for defendants have periodically attempted, with almost no success, to adduce in their clients' defence evidence from experts on the risks associated with identification evidence. We consider the courts' attitude to such evidence to be an unfortunate chapter in our legal history and one which Parliament should re-write. Experts have a great deal to contribute to this area which should not be left to the common experience of jurors supplemented by cautionary instructions from judges. We believe that expert evidence has an important role to play both in *voir dires* on identification evidence and before juries considering it at trial.

145. Canadian law in this area remains heavily influenced by the withering disparagement of expert evidence of this type in *R. v. McIntosh* where the Court of Appeal for Ontario considered the proposed evidence of Dr. Daniel Yarmey, a psychologist who

had researched the process of eyewitness identification extensively. The Court (per Finlayson J.A.) ruled:

> I am astonished at the passivity of the Crown at trial and on appeal with respect to this type of evidence. At trial, Crown counsel contented himself with the early observation that the witness had said nothing that would convince him that a psychologist would know what information would be "probative" to the trial. However, he did not cross-examine Dr. Yarmey on his qualifications, or at all, and seemed to accept that the substance of his testimony was properly the subject-matter of expert evidence. On appeal, Crown counsel limited his argument to the submission that we should defer to the trial judge who rejected the evidence in the exercise of her discretion. He was careful, however, to state that there could be cases in which this evidence could be admitted.
>
> *This posture is not surprising given the reliance by the Crown on the "soft sciences" in other cases.*
> …
>
> *In my respectful opinion, the courts are overly eager to abdicate their fact-finding responsibilities to "experts" in the field of the behavioural sciences*. We are too quick to say that a particular witness possesses special knowledge and experience going beyond that of the trier of fact without engaging in an analysis of the subject-matter of that expertise. I do not want to be taken as denigrating the integrity of Dr. Yarmey's research or of his expertise in the field of psychology, clearly one of the learned sciences, but simply because a person has lectured and written extensively on a subject that is of interest to him or her does not constitute him or her an expert for the purposes of testifying in a court of law on the subject of that specialty. It seems to me that before we even get to the point of examining the witness's expertise, *we must ask ourselves if the subject-matter of his testimony admits of expert testimony. Where is the evidence in this case that there is a recognized body of scientific knowledge that defines rules of human behaviour affecting memory patterns such that any expert in that field can evaluate the reliability of the identification made by a particular witness in a given case?*
>
> Paraphrasing freely from the definition of "science" in The Shorter Oxford English Dictionary on Historical Principles, it seems to me that before a witness can be permitted to testify as an expert, *the court must be satisfied that the subject-matter of his or her expertise is a branch of study in psychology concerned with a connected body of demonstrated truths or with observed facts systematically classified and more or less connected together by a common hypothesis operating under general laws. The branch should include trustworthy methods for the discovery of new truths within its own domain. I should add that it would be helpful if there was evidence that the existence of such a branch was generally accepted within the science of psychology.*
>
> …
>
> Further to these comments, I would caution courts to scrutinize the nature of the subject-matter of the expert testimony. Any natural or unnatural phenomenon may become the subject of an investigation conducted according to the scientific method. *The scientific method requires the formation of a hypothesis, the testing of the*

> *hypothesis using reliable methodology, the examination of the results (usually with statistical analysis) and the formation of a conclusion*. However, the fact that the testimony recites the application of the scientific method does not necessarily render the original object of study a matter requiring opinion evidence at trial.
>
> As is implicit in what I have written above, *I have some serious reservations as to whether the "Psychology of Witness Testimony" is an appropriate area for opinion evidence at all*. I acknowledge that the subject is interesting and Dr. Yarmey's presentation is informative. I also applaud his evidence that he lectures on the subject to police officers. We should all be reminded of the frailties of identification evidence. However, I would have to be persuaded that the subject is a recognized branch of psychology. Even if it is, I do not think that it meets the tests for relevance and necessity set out in Mohan, supra.
>
> …
>
> *This is not to say that a reminder as to cross-racial identification is not appropriate in a case where it is an issue. However, the argument that impresses me is that such a reminder from the trial judge is more than adequate*, especially when it is incorporated into the well-established warnings in the standard jury charge on the frailties of identification evidence. Writings, such as those of Dr. Yarmey, are helpful in stimulating an ongoing evaluation of the problem of witness identification, but they should be used to update the judge's charge, not instruct the jury.
> …
>
> We were referred to a number of cases from courts in the United States where expert evidence on identification has been accepted. We were also referred to William Daubert v. Merrell Dow Pharmaceuticals Inc., 113 S.Ct. Rep. 2786 (1993), a decision of the United States Supreme Court which considered the admissibility of expert testimony generally under the Federal Rules of Evidence, Rule 702, 28 U.S.C.A. *These cases must be approached with caution because the rules of court under consideration are dissimilar to ours. Moreover, juries in this jurisdiction receive significantly more assistance from the trial judge in their instruction than do juries in the United States.* For this reason alone, expert testimony on matters which are covered by the jury instruction has less appeal. Our judges are not only encouraged to comment on the evidence, there are some cases in which they are obliged to do so.[89](emphasis added)

146. The Court of Appeal was correct that American courts are far more welcoming of expert opinion on the dangers of identification evidence than Canada's. Why this should be regarded as the product of "dissimilar" "rules of court" rather than a concern about miscarriages of justice is not clear. Because we have cited *Henderson*, from the New Jersey Supreme Court, as a starting point for our analysis throughout this discussion, we note what it says on expert evidence:

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[89] *R v McIntosh*, (1997) 35 OR (3d) 97 (C.A.) [*McIntosh*]

> *Expert testimony may also be introduced at trial, but only if otherwise appropriate. The Rules of Evidence permit expert testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue*." N.J.R.E. 702. Expert testimony is admissible if it meets three criteria:
>
> > (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [State v. Jenewicz, 193 N.J. 440, 454 (2008) (citations omitted).]
>
> Those criteria can be met in some cases by qualified experts seeking to testify about the import and effect of certain variables discussed in section VI. That said, experts may not opine on the credibility of a particular eyewitness. See State v. Frisby, 174 N.J. 583, 595 (2002); see also State v. W.B., 205 N.J. 588, 613 (2011) (precluding "expert testimony about the statistical credibility of victim-witnesses").
>
> Other federal and state courts have also recognized the usefulness of expert testimony relating to eyewitness identification. See, e.g., Bartlett, supra, 567 F.3d at 906; Brownlee, supra, 454 F.3d at 141–44; Chapple, supra, 660 P.2d at 1220; McDonald, supra, 690 P.2d at 721; Benn, supra, 978 A .2d at 1270; LeGrand, supra, 867 N.E.2d at 377–79; Copeland, supra, 226 S.W.3d at 300; Clopten, supra, 223 P.3d at 1108.[90]

147. The dampening effect of *McIntosh* on a potentially valuable body of evidence is apparent in many succeeding cases, with very few shedding its constraints. The cases which disparage expert evidence on admissibility, it should be noted, involve the most highly qualified and learned of proposed witnesses – scholars who know immeasurably more about the weaknesses and strengths of eyewitness evidence than any juror or judge, and who could be trusted to share their knowledge in a helpful and balanced manner if called to testify. Again and again, however, trial and appellate courts conclude that their expertise is not "necessary" (under the *Mohan* criteria) and that its value can be distilled into a jury charge.[91]

148. Two themes underlie the courts' resistance to expert evidence on identification issues: the supposition that expertise in this area does not rest on "the scientific method" and the belief that jury instructions on the frailties of identification evidence will provide

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[90] *State v. Henderson, supra* note 81 at 297-298.

[91] *Frimpong, supra* note 84; *R v Myrie*, [2003] O.J. No. 1030; *R v Henderson*, 2012 MBCA 93; *R v Woodard*, 2009 MBCA 42.

all the protection that expert evidence could, with less time and expense. We disagree with both of these arguments.

149. There is often a false equivalence drawn between expertise and employment of the scientific method. It is possible to acquire expertise in many areas from thorough systematic study or practical experience without employment of the classic scientific method with its array of techniques for collecting and analysing experimental data, testing conclusions and ensuring reproducibility. The scientific method in its pure form was born in the physical sciences and is best adapted to analysing physical phenomena. Human behaviour, the target of the social sciences, is no less appropriate as a subject of systematic scholarly study but the variability of human behaviour makes it inapt for some of the methods used to measure and predict events in the more stable physical sphere.

150. Our views here are similar to those discussed in our critique of the authorities on expert evidence regarding false confessions. There is no reason to preclude employment by the courts of experts who have engaged in comprehensive study of areas of human behaviour which are relevant to legal issues.[92] For this reason, a judgment such as *McIntosh*, which rejects expert evidence from a respected social psychologist, in part, on the ground that it departs from the scientific method which "requires the formation of a hypothesis, the testing of a hypothesis using reliable methodology, the examination of the results (usually with statistical analysis) and the formation of a conclusion" sets too high a bar for admissibility and excludes from trials evidence which could surely help to prevent wrongful convictions.[93]

151. We submit that it is unwise for the law to keep from juries the insights of accomplished students of human behaviour because of inherent limits on the application of scientific methodology to their subject matter. It is apparent that experts have a great deal of value to say about the process of identification that is highly relevant to a pivotal legal

[92] *R. v. R. (W.D.)* (1994), 35 CR (4th) 343 (Ont. C.A.); *R v Formaniuk* (1958), 29 CR 19 (Man.C.A.); *R. v. Kinnie* (1989), 52 CCC (3d) 112 (BCCA).

[93] *McIntosh*, *supra* note 89 at para 18.

issue. Indeed, it is anomalous that practices in police stations and the content of courtroom jury charges regarding eyewitness identification are both heavily shaped by the findings of social scientists while the scientists themselves remain barred from the witness stand.

152. We also do not believe that warnings to juries about the pitfalls of identification are a substitute for expert evidence on the subject. Juries are schooled from the first minutes of their service in the proposition that they are to act on *evidence*. They are also routinely told that it is *their* view of a case, not the judge's, that governs their deliberations. Judges overestimate their influence with juries when they suppose that their mere pronouncement about the risks built into identification evidence will neutralize the appeal of dramatic eyewitness testimony, accompanied by an account of a photo line-up – even a flawed one – at the police station. A few paragraphs in a jury charge, untethered to actual *evidence* about the flaws in an identification procedure and the human frailties that cause them, is simply not an adequate protection against mistaken identification. Yet it is virtually all our law, despite its sad familiarity with wrongful convictions, now offers. It is not enough and jurisprudence in the area makes it clear, twenty-two years after *McIntosh*, that courts are not going to open themselves to better solutions without a legislative prod.

153. We expect that if expert evidence is welcomed into trials where identification is a key issue, it will work in tandem with jury instructions to educate jurors and reduce the incidence of miscarriages of justice. If a juror hears a judge's instruction on the law's accumulated experience with identification evidence and can tie that instruction to an expert's explanation of the *reasons* for mistaken identifications, the beneficial effect of both the instruction and the evidence will be amplified. In our view, this is all to the good – it should not be forgotten that every jury which has convicted someone of a murder he did not commit, based on eyewitness identification, has heard a judge’s warning about the risks of doing so. Approaching the problem with evidence as well as judicial reminders is likely to help and it certainly will not hurt.

154. The courts have had an open invitation for sixteen years to reform their policy in this regard and they continue to cite *McIntosh*. In 2001, in his report on the *Inquiry*

Regarding Thomas Sophonow, the Honourable Peter Cory wrote as one of his key recommendations the following:

> *Further, I would recommend that judges consider favourably and readily admit properly qualified expert evidence pertaining to eyewitness identification. This is certainly not junk science. Careful studies have been made with regard to memory and its effect upon eyewitness identification. Jurors would benefit from the studies and learning of experts in this field.* Meticulous studies of human memory and eyewitness identification have been conducted. The empirical evidence has been compiled. The tragic consequences of mistaken eyewitness identification in cases have been chronicled and jurors and Trial Judges should have the benefit of expert evidence on this important subject. The expert witness can explain the process of memory and its frailties and dispel myths, such as that which assesses the accuracy of identification by the certainty of a witness. The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial. [94] (emphasis added)

155. We believe that legislation which takes up this invitation would be a significant contribution to the administration of justice and result in fewer wrongful convictions. We also believe that it would contribute to the use of more rigorous procedures by the police to test identification evidence and to better choices by Crown counsel about which cases to prosecute. It is notable that Mr. Cory did not think that cautionary jury instructions and expert evidence are mutually exclusive or that one must be seen as a substitute for the other.

156. In addition, we believe that experts can make a valuable contribution to the question of admissibility on the *voir dire* we recommend in cases where the police have fallen short of optimal practices in their testing of identification evidence. It makes little sense for courts to consider the shortcomings of an identification procedure by referring to literature on the topic in general when an expert could testify on the *voir dire* about the specific issues in the case before the court. In our submission, where police procedures have fallen short of the standards set by legislation, expert evidence should be admitted as a matter of routine on *voir dires* inquiring into the problem.

> **<u>Recommendation 9:</u> Parliament should enact legislation which provides that the evidence of an expert should be admitted where it will assist the court on a *voir dire* and the trier of fact in understanding the process of identification, the**

[94] *The Inquiry Regarding Thomas Sophonow*, *supra* note 36 at 78.

value of procedures for testing identification, and the significance of the failure to employ optimal methods.

The legislation should specify that a witness may be qualified to give opinion evidence in this area based on systematic, peer-reviewed study of the subject matter.

In-Dock Identification

157. The law still allows eyewitnesses – often emotional, highly sympathetic victims of crime – to point to defendants sitting alone in the prisoner's box and say, "He did it. That's the person who assaulted [or robbed or raped] me." The effect on a courtroom is often electrifying, as though an issue shrouded in uncertainty has suddenly had a bright light shined on it. Yet the impact of this moment is wholly emotional and its capacity to steer a jury away from the truth is profound. It represents a substitution of drama for reason and adds nothing to a jury's deliberations. It should simply be eliminated from Canadian courtrooms. Where a witness has participated in an out-of-court testing procedure, it is sufficient if, at some point in testimony, she points to a photograph she has selected during the procedure; if the photo selected is of the defendant, then it will be apparent to the jury. If the eyewitness has not identified the defendant in a credible out-of-court testing procedure, a purported in-dock identification should be barred outright – its prejudicial effect far outstrips its probative value, which is nil.

158. We submit this is an obvious and overdue reform which follows naturally from the law's own acknowledgement that in-dock identifications are a worthless form of evidence, requiring a firm instruction to the jury about their dangers. In *R. v. Hibbert* the Supreme Court of Canada said:

> The appellant argues that by asking Mrs. McLeod and Mrs. Baker to make such a distinction, the Crown was asking the impossible: the witnesses simply could no longer tell where their recognition of the appellant originated from. Furthermore, the appellant argues, after so much exposure to the appellant, whom neither witness had positively identified prior to the television newscast of his arrest, their in-court identification should be accorded no weight whatsoever.

> One might ask, if that were the case, why the in-court identification should be permitted to occur. In this case, as in most, it of course served to confirm that the accused was, in the opinion of Mrs. McLeod and Mrs. Baker, the same man they saw throughout the chain of events (from arrest through to the second trial). In that sense, despite its almost total absence of value as reliable positive identification, the evidence of the witnesses may be given some weight at least for that purpose. In addition, generally, a jury might be concerned if a witness was not asked to identify an accused in court as the perpetrator and might draw an unjustified adverse inference against the Crown if the question was not asked. Moreover, the inability of a witness to identify the accused in court as the perpetrator is entitled to some weight. This in fact happened here in the case of Ms. Visscher who, as the trial judge reminded the jury, was unable to identify the accused in court as the man she saw on the dyke.
>
> I am of the view that, in the circumstances of this case, the trial judge should have cautioned the jury more strongly that the identification of the accused in court, by Mrs. McLeod and Mrs. Baker, was highly problematic as direct reliable identification of the perpetrator of the offence. I think it is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. *The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.* I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded "little weight", goes far enough to displace the danger that the jury could still give it weight that it does not deserve.[95](emphasis added)

159. In our view, the Court did not answer its own question correctly. The in-court identification should *not* be permitted to occur. There is no realistic issue in the overwhelming majority of cases that the defendant is the person arrested and that affords no meaningful ground for allowing an in-dock identification. An inability by an eyewitness to identify the accused in court is rare and not in itself of significance. If defence counsel wishes to run the risk of eliciting an in-dock identification in the hope that it will not be forthcoming, counsel should pose the question; it should not form a part – usually the dramatic climax – of a prosecutor's examination in chief of an eyewitness. Formulating legal policy in a highly sensitive area, that allows for the "dramatic impact" of evidence with "distorted value", based on rare possibilities, is unwise. If the in-dock identification is simply done away with, we believe that judges, experts and open-minded counsel on both sides will applaud.

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[95] *Hibbert, supra* note 76 at paras 48-50.

<u>Recommendation 10</u>: Prosecutors should be prohibited by legislation from asking questions of eyewitnesses in court intended to elicit an in-dock identification of the defendant.

THE APPELLATE ROLE IN CORRECTING WRONGFUL CONVICTIONS

160. Every case of wrongful conviction corrected through the ministerial review process in Part XXI.1 of the *Criminal Code*, many with the support of Innocence Canada, has been through at least one and often two stages of appellate review. In all of those cases, the provincial Court of Appeal had before it the full trial transcript, reasoned arguments from both sides, the judicial experience of at least three highly-trained judges and all the time they could require to examine the evidence. They were not judicial neophytes locked in a room with eleven strangers and sent to a hotel at night until they agreed on a decision. The appellate judges knew the law and had the time to apply it with care. Yet Innocence Canada's roster of exonerees all failed when they engaged the standard appellate process and had to seek relief in a process that the *Criminal Code* itself labels "extraordinary".[96]

161. We believe Parliament should ask why the appellate process has done so poorly in identifying wrongful convictions and correcting them before years of unjust imprisonment have gone by, often mounting into decades. It should also ask what it can do to correct this institutional problem.

162. In considering these questions, it would assist Parliament to keep in mind that courts of criminal appeal – creatures of statute – came into being in the common law world precisely for the purpose of addressing wrongful convictions. Canada's 1923 legislation was modeled on the English and Welsh *Criminal Appeals Act*, *1907* which was, in turn, a response to a series of notorious cases in which legal experts had come to share the public view that innocent people had been convicted of serious crimes. Courts of appeal were

[96] *Criminal Code*, RSC 1985 c C-46 s.696.4(c).

created not with the primary purpose of providing guidance on abstract legal principles to trial judges, but to make sure that no one had been incarcerated for a crime he or she did not commit.[97]

163. Parliament has created rights of appeal by convicted defendants, consistent with the goal of preventing miscarriages of justice. Section 675 (1) of the *Criminal Code* provides an avenue of appeal on questions of *fact* as well as law:

> 675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii*) on any ground of appeal that involves a question of fact* or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
>
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.(emphasis added)

164. The *Code* also includes three heads under which a court of appeal can grant relief to a convicted appellant. Only one of them is directed to what we think of as legal errors. Section 686 (1) says:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

[97] See Ken Whiteway, "The Origins of the English Court of Criminal Appeal" (2008) 33 Can. L. Libr Rev. 309.

(iii) on any ground there was a miscarriage of justice;

165. Despite this ample statutory mandate for appellate courts to dirty their hands in the muck of evidence review and fact-finding, our law reports are filled with judgments on appeals in which the facts are cited for no more than the legal issues to which they give rise and the strength or weakness of the evidence of guilt is given little more than passing attention. A purpose of appellate adjudication which is valuable but secondary – pronouncements on issues of law under s. 686 (1)(b) – has largely subsumed direct engagement with the facts under paragraphs (a) and (c).

166. This is regrettable and unnecessary. Each time that Innocence Canada attempts to dissect a wrongful conviction and sees how far from the core issues the appellate process has strayed, we are conscious of how much more valuable our courts of appeal could be. There is no doubting the impressive intellectual capacity of Canada's appellate judiciary and no denying their role in shaping, for close to a century, a coherent, consistent, and largely fair body of legal principles and statutory interpretations. The courts have breathed life into the *Canadian Charter of Rights and Freedoms* and thereby reshaped both the investigative and adjudicative stages of the criminal process. Yet to acknowledge that is to wish that this adjudicative capacity could be harnessed more effectively for the crucial task of deciding whether a body of evidence truly establishes guilt beyond a reasonable doubt. An appellate bench that enthusiastically took on the role of reversing convictions for factual error could have a transformative effect on the justice system. It could serve as the first, and best, remedy for wrongful convictions.

167. The inefficacy of appellate review is not primarily due to shortcomings in the legislation governing appeals but rather in the appellate courts' shrunken interpretation of their mandate under the legislation. This increasingly parsimonious understanding of what was intended as a generous mandate requires a legislative correction. Courts of appeal are not going to do it themselves and their tendency is, if anything, to withdraw ever further from the role we would like to see them assume and for which they were originally created.

168. There are five areas in which the retreat of the appellate courts from effective factual scrutiny of convictions is most apparent:

- A needlessly narrow interpretation of the power in s. 686 (1)(a)(i) of the *Criminal Code* to quash verdicts that are "unreasonable or cannot be supported by the evidence."
- A resistance to the admission of fresh evidence on appeal, which under s.683(1)(d) is to be received if it is in "the interests of justice."
- The widespread imposition on decisions regarding legal error of "standards of review" which find no support in the *Criminal Code* but limit the power of courts of appeal to overturn erroneous legal rulings and order new trials.
- The courts' unduly high threshold for finding that the ineffective assistance of counsel has led to a miscarriage of justice.
- A hesitancy to deal directly with factual issues raised on appeal, illustrated by the very rare invocation of the power to appoint a special commissioner to inquire into evidence under s. 683 (1)(e) of the *Code.*

169. In these submissions, we discuss the first two issues – the unreasonable verdict standard and the fresh evidence standard – at some length and make specific recommendations. We also offer briefer comments on the other three at the conclusion of this section.

Section 686(1)(a)(i): The Unreasonable Verdict Test

170. If provincial courts of appeal and the Supreme Court of Canada were disposed to use s.686(1)(a)(i) as an affirmative check on wrongful convictions, they could do so. "Unreasonable" seems to set a high bar for overturning guilty verdicts but "not supported by the evidence" is generally the exact problem with an erroneous conviction. The Supreme Court of Canada, however, has discouraged either a broad application of this potentially expansive language or the substitution of tests such as "unsafe" or "lurking doubt" to assist

in the provision's application. A review of the Court's judgments in this area over the past 42 years shows an ebb and flow in the scope afforded appellate courts by the Supreme Court but in no case has the full potential of this section been unleashed.

171. In *R. v. Corbett*, the majority of the Supreme Court adapted a narrow definition of the standard:

> Of course, if the judges of the majority had held that their function was only to decide whether there was evidence, this would be reversible error. The Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is "unreasonable", not "unjustified". *The jurors are the triers of the facts and their finding is not to be set aside because the judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no twelve reasonable men could possibly have reached it acting judicially*.[98] (emphasis added)

With this passage, the Court majority linked the words "cannot be supported by the evidence" to the traditional test for a directed verdict and stripped them of any real value in the correction of wrongful convictions. A better interpretation would have been that a conviction should be quashed when a finding of guilt *beyond a reasonable doubt*– the criminal standard of proof – is not "supported by the evidence" but this view of the section has never taken hold.

172. More significantly, the *Corbett* majority expressly accepted that a panel of appellate judges may find a conviction to be "unjustified" – because they would have acquitted themselves – yet still uphold it because it is not "unreasonable". The test the majority settled on – a verdict that "no twelve reasonable men could possibly have reached" – has constricted the reach of the section ever since.

[98] *R v Corbett,* [1975] 2 SCR 275 at 278-279.

173. The majority also rejected the plea of Justice Laskin, in dissent, to interpret the section so that a verdict might be quashed if the appellate court regarded it as "unsafe". Justice Laskin would have held that a verdict is "not supported by the evidence" if the evidence could not sustain the Crown's burden of proof, and not merely if it could not survive a directed verdict application. If this approach to the provision had been adopted, the role of the appellate courts in correcting wrongful convictions would doubtless be very different from the arm's-length approach we see today.

174. In 1987, in *R. v. Yebes,* the Supreme Court addressed the test for finding an unreasonable verdict in a case depending on circumstantial evidence and, in more encouraging language, said:

> The function of the Court of Appeal, under s. 613(1)(*a*)(i) of the *Criminal Code*, *goes beyond merely finding that there is evidence to support a conviction*. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, *in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence*. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.[99] (emphasis added)

175. Judicially imposed limitations on the scope of appellate review in cases turning on the credibility of witnesses were highlighted in *R. v. Francois*, in 1994, where McLachlin J. (as she then was) said:

> Review for credibility may involve consideration of the basis for conclusions which the witness has drawn. For example, a witness may say, "That is the man who hit me". If other evidence indicates that the witness was unable to see the person who hit him at the time of the assault, the witness's identification might be considered unreasonable and a verdict dependent solely upon it overturned under s. 686(1)(*a*)(i). This sort of challenge for credibility is not much different in practice than the challenge on other grounds in *Corbett* and *Yebes*. *More problematic is a challenge to credibility based on the witness's alleged lack of truthfulness and sincerity, the problem posed in this appeal.* The reasoning here is that the witness may not have been telling the truth for a variety of reasons, whether because of inconsistencies in the witness's stories at different times, because certain facts may have been suggested to her, or because she may have had reason to concoct her accusations. In the end, the jury must decide whether, despite such

[99] *R v Yebes*, [1987] 2 SCR 168 at para 25.

> factors, it believes the witness's story, in whole or in part. That determination turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. *The latter domain is the "advantage" possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable*: *R. v. W. (R.), supra*.
>
> In considering the reasonableness of the jury's verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness's evidence in its entirety. Or the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. *It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable*. A verdict of guilty based on such evidence may very well be both reasonable and lawful.[100](emphasis added)

176. A bid was made to have the Court take a more justice-oriented approach to the unreasonable verdict test in the companion appeals *R. v. Biniaris* and *R. v. A.G* in 2000. Drawing on British authorities and the recommendation of the Honourable Fred Kaufman in his report on the Morin Inquiry, the appellants asked the Supreme Court to quash convictions under s.686(1)(b)(i) on the basis that the evidence should leave the court with a "lurking doubt" about guilt. Justice Arbour, for the Court, rejected this approach, saying:

> The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury. If there are no errors in the charge, as must be assumed, there is no way of determining the basis upon which the jury reached its conclusion. *But this does not dispense the reviewing court from the need to articulate the basis upon which it finds that the conclusion reached by the jury was unreasonable. It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury.* In other words, if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a

[100] *R v Francois*, [1994] 2 SCR 827 at paras 13-14.

> non-judicial manner. In that case, the court of appeal must proceed further with its analysis.
>
> …
>
> When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. *It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.*[101](emphasis added)

177. In the years that followed, appellants attempted to build on the notion that "judicial experience" compelled the conclusion that a verdict was fatally flawed in some respect, but to little avail. The law in this area took its most sharply conservative turn in 2013 with the Supreme Court's unanimous judgment in *R. v. W.H.* where the Newfoundland and Labrador Court of Appeal had closely scrutinized the credibility of a youthful sexual assault complainant and found it so suspect that a conviction resting on her uncorroborated testimony was quashed. On the Crown's appeal, the Supreme Court pared back the slender advances of *Yebes* and *Biniaris* to formulate the test in the least generous terms in the Court's history. Justice Cromwell first repeated the Court's earlier rejection of the "lurking doubt" standard and emphasized, perhaps more than any other judgment, deference to the fact-finding role of juries:

> Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries**.** *On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.*

[101] *R v Biniaris,* 2000 SCC 15 at paras 38 and 40.

> On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris*, at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience[102](emphasis added)

178. The Court also drew a boundary around "judicial experience" as a gauge of unreasonableness, tying it tightly to matters on which there exists clear legal precedent establishing the risk of an erroneous verdict:

> While it is not possible to catalogue exhaustively the sorts of cases in which accumulated judicial experience may suggest that a jury's verdict is unreasonable, a number of examples may be offered. Circumstances in which a special caution to the jury is necessary about a certain witness or a certain type of evidence are reflective of accumulated judicial experience and may well factor into an appellate court's review for reasonableness. Some examples include the evidence of jailhouse informants and accomplices, and eyewitness identification evidence. Other circumstances that generally do not require, as a matter of law, any particular warning to the jury may nonetheless, in light of accumulated judicial experience, contribute to a conclusion of an unreasonable verdict, for example the risks of accepting bizarre allegations of a sexual nature and the risk of prejudice in relation to psychiatric defences: *Biniaris*, at para. 41. What all of these examples have in common is that accumulated *judicial experience has demonstrated that they constitute an explicit and precise circumstance that creates a risk of an unjust conviction***.**[103] (emphasis added**)**

Relief based on "judicial experience", then, is to be granted only where the evidence gives rise to an "explicit and precise" basis for quashing a conviction, founded on the direct experience of judges and not where the court finds the case as a whole lacking the cogency to erase reasonable doubt. Stressing throughout the judgment the "great advantage" of a jury that has seen witnesses testify, the Supreme Court overturned the Newfoundland and Labrador Court of Appeal's decision and restored the conviction at trial.

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[102] *R v W.H.,* 2003 SCC 22 at paras 27-28 [*WH*].

[103] *WH, supra* note 77 at para 29.

179. The result of the Supreme Court's holdings has been a pervasive reluctance by provincial appellate courts to invoke s.686(1)(a)(i) to quash dubious convictions. A relatively straightforward (if less than scientific) survey of online cases suggests that for every ten claims of unreasonableness made by appellants, fewer than two are successful. Again and again, the pinched interpretations seen in the Supreme Court's authorities are cited to uphold convictions based on evidence that the courts candidly admit is dubious. For example, in *R. v. E.F.H.*, the Court of Appeal for Ontario said:

> It follows therefore that the appeal from conviction must be dismissed. In coming to this conclusion, *we are mindful of the fact that this type of case, perhaps more so than any other, carries with it the potential for a serious miscarriage of justice. Our uneasiness in this case has been heightened due to a number of concerns,* including the complainant's apparent ability to recall in detail repressed memories of events which allegedly occurred when she was less than two years old; the bizarre nature of certain events described, including the murder of the hitchhiker, the appellant's act of splitting the family dogs' stomach and then engaging in bestiality with the animal followed immediately by anal intercourse with the complainant, the appellant's act of fellatio with the complainant while she was recuperating from a tonsillectomy, the complainant's apparent repression of an abortion which the appellant caused her to undergo when she was 12 of 13 years old, and others.
>
> *None the less, in view of the constraints which inform our powers of review, we can see no basis for interfering with the decision of the trial judge*.[104] (emphasis added)

180. Similarly, in *R. v. I.P.* an Alberta appellate justice wrote:

> *This whole case leaves me with an uneasy feeling*. A number of aspects of it appear to fall outside the scope of review of a Canadian appellate court, but not very far outside. Present Canadian law instructs me that we must dismiss the appeal, and for that reason I concur in doing so.[105] (emphasis added)

181. Parliament should find cases such as these alarming. In any one of them, the trial verdict may have been correct. But if appellate courts across Canada are comfortable rejecting appeals under s. 686(1)(a)(i) on the logic of *Corbett, Francois, W.H.* and similar cases, then they are expressly accepting that among the appeals turned down there will inevitably be many by appellants who are factually innocent. This leaves us a long way from the intention of Parliament almost a century ago when it created our criminal appellate structure.

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[104] *R v E.F.H* (1996), 105 CCC (3d) 233 (Ont.CA) at paras 26-27.

[105] *R. v. I.P.*, [1997] AJ No 8 (AB CA.) (per Cote J.A.) at para 29.

182. We maintain that the current state of the law, which is as hostile to appellate review of the merits of trial verdicts as it has ever been, reflects unsound judicial policy. Having regard to the history and origins of s. 686 and to the language of the section, the appellate courts' retreat from the hard task of deciding whether a verdict should stand or fall is a major loss in the battle against injustice. This is legal ground upon which much is at stake. Appellate courts should be on the front lines.

183. We do not accept the main premise of the Supreme Court's reasoning which is that jury verdicts should be deferred to because of the jury's "great advantage" as a fact-finder that had the opportunity to observe the witnesses. Far too much is made of this. There may be some advantages in seeing a witness, to be sure, but if the witness is a clever and convincing liar who tells a good story that does not stand up to logical scrutiny, then the advantage may actually lie with the Court of Appeal which can substitute analysis for impression.

184. In addition, the technological revolution has changed the nature of many prosecutions. Key events are often on videotape, as are witness statements. Important evidence in serious cases often rests on electronic communications or cellular phone records that are perfectly accessible to appellate judges. Circumstantial and expert evidence is overtaking ordinary witness testimony as the core of the Crown's case. As evidence becomes more complex, the advantages of personal presence in the courtroom recede and the advantage of methodical, detailed appellate review rise.

185. It is crucial in this area not to overstate or romanticize the capacity of juries. They can certainly be capable, perceptive fact-finders. But they come to complex cases as raw neophytes and face a barrage of complex evidence and often impenetrable legal instruction. They have little to no opportunity to absorb it and they are under pressure to reach a decision. Very often their questions show them to be at sea. Juries are not immune to the emotional pressures created by major crimes nor to the controversial social contexts in which these crimes may arise. We agree with the observations of Justice Deane of the

Australian High Court in *Chamberlain v. The Queen,* the notorious wrongful murder conviction of a couple for the death of a child attacked by a dingo:

> The principle that no person should be convicted of a serious crime except by a jury on the evidence has no corollary requiring that every person who is found guilty by a jury's verdict should remain so convicted. The safeguard required by trial by jury is not dependent upon assumption of the infallibility of the verdict of a jury. *It would be foolish to deny that a jury may be prejudiced, perverse or wrong.* Any notion that a jury's verdict should be given the degree of finality which the principle of double jeopardy requires to be accorded to a verdict of acquittal has long been rejected: it is, for example, quite inconsistent with the existence of the "common form" ground of appeal that the verdict of the jury "is unreasonable or cannot be supported by the evidence." Nor is the cause of continued acceptance of trial by jury likely to be served by treating a jury's verdict of guilty as unchallengeable or unexaminable. To the contrary, so to treat a jury's verdict could sap and undermine the institution of trial by jury in that it would, in the context of modern views of what is desirable in the administration of criminal justice be able to be seen as a potential instrument of entrenched injustice."[106] (emphasis added)

186. The issues of legal policy in this area can be reduced to one central question: Before a defendant is sent to prison for life, should the evidence against him be required to withstand *both* the scrutiny of twelve ordinary citizens, of common sense and experience, *and* the scrutiny of three trained judges, schooled in the law and familiar with the ways in which evidence can mislead and inferences go awry? We say the answer to that question is yes and that close appellate examination of convictions at trial is a critical protection that safeguards against wrongful convictions. With the stakes as high as they are in major criminal trials, there is no reason for the second level of scrutiny to be diluted by unnecessary deference to the first.

187. We take this position in part because at Innocence Canada we undertake a form of scrutiny that bears some similarity to the form we recommend for the appellate courts. We know it is both feasible and indispensable. Requests for help flood into our office. Lawyers, on a volunteer basis, read closely through trial transcripts looking for evidence that does not add up; for flawed identifications that were uncorroborated and oversold; for circumstantial cases that left a reasonable possibility of innocence; for prosecutions where the credibility of an accomplice was "confirmed" through circular reasoning; for

[106] *Chamberlain v The Queen* (1984), 153 CLR 5 at 618.

interrogations that could easily have caused an innocent person to confess falsely. Innocence Canada does this work for the most part without the benefit of submissions from counsel, without the other advantages and resources available to appellate judges such as clerks, research staff and – above all – without time for reflection. The work is done collegially and ideas and impressions are tested and debated, just as they can be within a panel of appellate judges.

188. This scrutiny is not easy and it is surely not perfect, but it can be done. Leaving it undone is unacceptable. We believe that if appellate judges were provided with an unambiguous statutory mandate to dig deeply into trial records and to learn as much about a case as the jury learned, the result could be a change in the culture of the appellate courtroom. We could utilize the extraordinary analytical capacity of our elite judges for the task that Parliament originally assigned them – actively, conscientiously, diligently working to keep innocent defendants out of jail.

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189. "Lurking doubt" is odd phrasing to consider enshrining in legislation but it has a specific and meaningful history. In 1968, the English *Criminal Appeal Act* was amended to provide that the Court of Appeal "shall allow an appeal against conviction if they think that the conviction is *unsafe or unsatisfactory*." (emphasis added)[107] This was the standard urged on the Supreme Court majority by Justice Laskin in his 1975 dissent in *Corbett*. In interpreting this new jurisdiction for the first time in the United Kingdom, Justice Widgery, for the Court of Appeal, said:

> This is a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing up was indeed impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 ... it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that under all the

[107] *Criminal Appeal Act,* 1968 (U.K.), 1968 C19. By later amendment, "unsatisfactory" was removed from the test.

> circumstances of the case it is unsafe or unsatisfactory. *That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it.*[108](emphasis added)

190. The United Kingdom Court of Appeal would later move away from "lurking doubt" as a synonym for "unsafe", though without diminishing the scope of the review called for by the *Criminal Appeal Act* or retreating from its purpose.[109] The phrase "lurking doubt", meanwhile, made it into a recommendation of the Inquiry into the Wrongful Conviction of Guy Paul Morin in which the Honourable Fred Kaufman wrote:

> *[A]n appellate court can overestimate the importance of seeing or hearing the witnesses*. A substantial part of credibility is the internal consistency of a witnesses' testimony (however well or badly that witness presents) and its consistency with other known facts. *If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt?* No doubt, many appellate judges who sense a potential injustice do this sometimes indirectly through their determination of whether there was a legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. *It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly*. *It recognizes the most important, though not exclusive, function of a criminal appellate court: to ensure that no person is convicted of a crime that he or she did not commit*.[110] (emphasis added)

191. We commend this analysis to the Minister and to Parliament. Juries are capable of error, even when properly instructed. Their advantage in fact-finding is not as great as is sometimes supposed. Convictions that leave three experienced judges with a lurking doubt as to guilt should *not* be upheld on appeal. In addition, the prevention of wrongful convictions is, indeed, "the most important, though not exclusive function of a criminal appellate court." It is a function that requires specific direction from Parliament if judges are to perform it as they should.

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[108] *R v Cooper* (1969), 53 Cr App R 82 at 85-86 (C.A.)

[109] *R v F.*, [1998] TNLR No 703.

[110] *Morin Inquiry*, *supra* note 49 at 1187-1188.

192. What we consider essential is that a signal be sent from Parliament to courts of appeal to the effect that they should engage more closely and directly with the correctness of verdicts and the issue of guilt or innocence. We would not wish to see reform thwarted by a failure to reach consensus on legislative language. It is possible to fit the language of British judges and the Kaufman Report directly into s. 686(1)(a)(i) by providing that "the verdict should be set aside on the ground that it is unreasonable, that it cannot be supported by the evidence, or that the evidence leaves a lurking doubt [or a lingering doubt, or simply a doubt] about the guilt of the appellant." The section could also adopt the term "unsafe or unsatisfactory", with its English pedigree.

193. We believe that "unsatisfactory" is a useful addition to "unsafe" for two reasons. First, it implies that the appeal court has detected features of the evidence that leave important questions unconsidered or unanswered, without passing direct judgment on the verdict's ultimate correctness.

194. Second, the term “unsatisfactory” invites what we consider to be an important point of reform in this area – the use by the appellate court of its power to order a *new trial* when it quashes a conviction under s. 686(1)(a)(i). This is important, in our view, because of the case law surrounding the unreasonable verdict standard which has uniformly held that if the Court of Appeal deems a verdict to be unreasonable or not supported by the evidence, it must quash the conviction and *enter an acquittal*.[111] This is bound to make appellate judges reluctant to give effect to their "lurking doubt" about the correctness of a conviction because it would mean that they must make an order effectively halting the prosecution and ending the inquiry into the case – all of this, without having heard a witness and without giving the Crown a chance to address flaws in its case that could be curable with a new trial. We note the observations of Mr. Kaufman (himself a former appellate judge) about stealthy efforts made by the courts to order new trials in cases where they are disquieted by a verdict but do not feel the standard in s. 686 (1)(a)(i) has been met. We believe that the law would benefit from a new test in the sub-paragraph that liberates appeal courts to

[111] *R. v. Morrissey* (1995), 22 OR (3d) 514 (C.A.); *R v George* (2000), 49 OR (3d) 144 (C.A.).

direct new trials when the test is satisfied *and* by express authority to order new trials under an amended provision. If a court of appeal quashes a conviction as unsafe or unsatisfactory on the record before it and orders a new trial, with reasons which analyze why the verdict cannot be sustained on the trial record, it will allow trial judges, prosecutors and defendants at the new trial to make sound decisions about what to do next. It may result in further investigation that fortifies, or undermines, evidence in a crucial area. It might lead to withdrawal of the charge. It might lead to a resolution because the evidence establishes guilt of an offence other than the one on which the conviction was originally obtained. The point is that more intense appellate review of convictions, when the stakes are not all-or-nothing, can have significant benefits in correcting miscarriages of justice.

> **<u>Recommendation 11</u>: Section 686(1)(a)(i) of the *Criminal Code* should be amended to provide that a verdict may be set aside where it is unreasonable, where it is not supported by the evidence, or where it is unsafe or unsatisfactory.**
>
> **Section 686 (2) should be amended to provide expressly that where a conviction is quashed under s. 686 (1)(a)(i), the court may enter an acquittal or order a new trial.**

195. This recommendation rests on our assumption that "unsafe or unsatisfactory" is the practical equivalent of the "lurking doubt" standard. If it were thought to set a higher bar for appellate relief, we would urge direct incorporation of the term "lurking doubt", or a suitable synonym, into s. 686(1)(a)(i). We also note that a small minority of judges have equated the language *already* in the sub-paragraph with the "unsafe or unsatisfactory" standard.[112] Though we take that equivalency to have been rejected by the majority of the Supreme Court of Canada in *Corbett* (since it was the basis of the dissent), we would

[112] For example, *R v Izzard* (1990), 54 CCC (3d) 252 (Ont. C.A.) and *R v Malcolm* (1993), 81 CCC (3d) 196 (Ont. C.A.).

obviously discourage an amendment that might be deemed to add nothing to the jurisdiction of the appellate courts.

196. We close this discussion with another reference to our belief that reform of judicial standards will ripple throughout the justice system in ways that will be largely invisible but profoundly important. Appellate courts set the standard for everything that happens below them in the criminal process. That is obviously true of the trial courts where we believe that more probing appellate review will quickly sharpen the analytical approach taken by trial judges and sensitize them to the practical application of the reasonable doubt standard that defines the bulk of their decision-making. It will be true as well of prosecutors who will realize that their case need not convince just the presiding judge or a local jury but may be subjected to intense appellate scrutiny as well. This expectation will percolate into discussions among prosecutors on close cases about whether to withdraw a charge, press ahead with it or—the best outcome for society—direct the police to investigate it further. And the same will eventually happen within police precincts as investigators realize that cut corners and uncorroborated theories cost them convictions. An awareness that the senior courts in the country demand high standards of every participant in the process and that they will enforce this demand through vigorous engagement with the facts, will lead the police to do a better job of examining dubious evidence, tying up loose ends, corroborating suspect witnesses and questioning their own assumptions. These are enormous gains available at little cost.

The Test for Fresh Evidence on Appeal

197. The statutory basis for an appellate court to consider evidence not heard at trial is s. 683(1)(d) of the *Criminal Code* which stipulates that such evidence shall be received where it is "in the interests of justice". That is a notoriously imprecise standard for invoking a series of important powers, the reception of fresh evidence chief among them.[113] Its

[113] See *R v Manasseri*, 2016 ONCA 703 at paras 198-199 where Watt J.A. calls it “an undifferentiated or amorphous discretion.”

meaning has been elaborated upon in cases which, since 1980, have cited the judgment of the Supreme Court of Canada in *Palmer v. The Queen* where McIntyre J. wrote:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d) [now s. 683(1)(d)]. The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them -- see for example Regina v. Stewart [(1972), 8 C.C.C. (2d) 137 (B.C.C.A.)]; Regina v. Foster [(1977), 8 A.R. 1 (Alta. C.A.)]; Regina v. McDonald [[1970] 3 C.C.C. 426 (Ont. C.A.)]; Regina v. Demeter [(1975), 25 C.C.C. (2d) 417 (Ont. C.A.)]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> > (1)The evidence should generally not be admitted if, by *due diligence*, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen [[1964] S.C.R. 484].
> >
> > (2)The evidence must be *relevant* in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3)The evidence must be *credible* in the sense that it is reasonably capable of belief, and
> >
> > (4)It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have *affected the result*.[114]

198. This test has recently been restated in form, though not substance, by the Court of Appeal for Ontario in *Re Truscott*, a reference by the Minister of Justice of a wrongful conviction:

> Is the evidence admissible under the operative rules of evidence?
>
> Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
>
> What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?[115]

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[114] *Palmer v The Queen*, [1980] 1 SCR 759 at para 22.

[115] *Re Truscott*, 2007 ONCA 575 at para 92 [*Re Truscott*].

199. Both of these formulations look to the reason for the failure of the defence at trial to lead the evidence that it seeks to adduce on appeal. The concern underlying this inquiry was described by the Court of Appeal in *Truscott* as follows:

> The third and final component of the admissibility analysis under s. 683(1) examines any explanation offered for the failure to adduce the evidence at trial. The explanation, or the absence of one, is sometimes referred to as the due diligence inquiry. This inquiry is important because the interests of justice that must be considered under s. 683(1) go beyond the interests of the appellant and include the preservation and promotion of the integrity of the criminal justice process. *The integrity of the trial process would be destroyed by the routine admission of evidence on appeal that could have been adduced at trial. The finality of the verdict returned at trial would be rendered illusory*.
>
> The failure to offer an adequate explanation for not producing material at trial that is tendered on appeal will not necessarily lead to the exclusion of the evidence on appeal. Evidence may be so cogent that it should be received on appeal despite the absence of a satisfactory explanation for not leading the evidence at trial. *It is also true, however, that evidence which is sufficiently cogent to warrant its admission on appeal may be excluded because of the absence of any adequate explanation for not adducing that evidence at trial*. The failure to lead evidence at trial that is tendered for the first time on appeal becomes particularly important where the decision not to lead the evidence at trial was a considered, tactical decision by the defence.[116](emphasis added)

200. *Truscott*, and a series of cases from the Court of Appeal for Ontario that have followed it, represent a change in both the articulation and application of the test for the interests of justice in s. 683(1)(d). These cases presuppose that where evidence could have been led at trial but, for some reason, was not, it may be excluded on appeal unless it achieves an elevated level of cogency, greater than that demanded by the *Palmer* criteria. This analysis was adopted and elaborated upon in *R. v. Maciel* where the Court of Appeal, *for the first time*, rejected fresh evidence from a convicted defendant on "due diligence" grounds that it acknowledged would have been admissible (though marginally) under the other three *Palmer* criteria – it was relevant, credible and could have affected the verdict. The Court of Appeal said:

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[116] *Re Truscott, supra* note 115 at paras 101-102.

I agree that at some point, the cogency of the proposed evidence must trump the failure to lead that evidence at trial, even though it was available. The difficulty lies in fixing that point.

There are at least three discernible markers on the cogency continuum. At one extreme is evidence that satisfies the court of appeal that the appellant is innocent. Next on the continuum is evidence that, when considered with the evidence adduced at trial, satisfies the court of appeal that no reasonable jury could convict. If the new evidence reaches this degree of cogency, an appellant is entitled to an acquittal. Finally, there is evidence that is sufficiently cogent to meet the criteria for the admission of fresh evidence on appeal in that it could reasonably have affected the verdict at trial, but is not sufficiently cogent to exclude the reasonable possibility of a conviction. Evidence at this level of cogency requires a new trial: see R. v. Stolar (1988), 40 C.C.C. (3d) 1 at 10 (S.C.C.).

It is safe to say that evidence which satisfies the court of appeal that the appellant is innocent must be received on appeal regardless of whether it was available at trial. It can never be in the interests of justice to maintain a verdict where the court is satisfied that the verdict is factually incorrect.

I also think that evidence should be received on appeal, regardless of whether it was available at trial, at least in the context of criminal cases where an appellant's liberty is at stake, if the evidence is sufficiently cogent to warrant an acquittal. It is not in the interests of justice to maintain a conviction where, on the totality of the evidence available to the appellate court, that court is satisfied that no reasonable jury could convict the appellant: see also Toronto (City) v. C.U.P.E. Local 79, [2003] 3 S.C.R. 77 at 109-110. Finality concerns are also diminished where the court of appeal is satisfied that an acquittal is the appropriate order. The proceedings will end with an acquittal in the court of appeal. The concerns to the due administration of justice associated with conducting a retrial many years after the event at which the evidence used to acquire the new trial may or may not be adduced do not arise where an acquittal is entered in the court of appeal.

It is equally clear to me that to be "compelling", the evidence offered on appeal must do more than simply meet the conditions precedent to the admissibility of that evidence. Evidence offered on appeal to challenge factual findings at trial is inadmissible unless it is relevant to a material issue, reasonably capable of belief and sufficiently cogent that it could reasonably be expected to have affected the result at trial when considered in combination with the rest of the evidence: Palmer and Palmer v. The Queen, supra, at 205. In short, if the evidence is not sufficiently strong to compel the ordering of a new trial, it cannot be received on appeal.

If the evidence could have been led at trial, but for tactical reasons it was not, some added degree of cogency is necessary before the admission of the evidence on appeal can be said to be in the interests of justice. Otherwise, the due diligence consideration would become irrelevant. An accused who did not testify at trial could secure a new trial by advancing an explanation on appeal that was reasonably capable of belief. It would not serve the interests of justice to routinely order new trials to give an accused an opportunity to reconsider his or her decision not to testify at the initial trial.

> Exactly where on the continuum between evidence that is sufficiently probative to meet the preconditions to the admissibility of evidence on appeal and evidence that is so probative as to warrant an acquittal, evidence will become "compelling" must depend on the totality of the circumstances. *Where the proffered evidence was not led at trial because of a calculated decision made by an accused, the integrity of the criminal justice system will suffer if the evidence is received on appeal and a new trial is ordered. That harm can only be justified if the proffered evidence gives strong reason to doubt the factual accuracy of the verdict.*
>
> The court of appeal must weigh the evidence to decide whether it is sufficiently cogent to merit admission despite its availability at trial. Both counsel carefully reviewed the proffered evidence in their detailed written and oral submissions. I will not review all of their arguments. *The evidence tendered on appeal, considered as a whole, meets the preconditions to the admission of evidence on appeal*. The relevance of the evidence to a material issue is not disputed. There are many reasons to doubt the ultimate credibility of significant parts of the evidence, however, I cannot say that it is not reasonably capable of belief insofar as it offers an alternate explanation for the relevant parts of intercepts 74 and 75. I am also satisfied that a reasonable jury considering the evidence tendered on appeal with the rest of the evidence at trial could reasonably be left with a doubt as to whether the references in intercepts 74 and 75 were to the murder of Silva or the shooting of Mr. Camara.
>
> *The evidence proffered by the appellant, considered in its best light from his perspective, barely meets the preconditions to admissibility. While it may be said to be sufficiently cogent that it could reasonably be expected to have affected the result at trial, it is far from convincing evidence*.[117](emphasis added)

201. This mode of analysis has not been applied by the Supreme Court of Canada and may be viewed as inconsistent with long-standing authority that the "due diligence" criterion is of negligible significance in criminal cases. Most recently, in *R. v. G.B.D.* (decided in 2000, six years before *Truscott* and seven years before *Maciel*) the Supreme Court of Canada, after citing an earlier judgment on the value of finality, said:

> However, jurisprudence pre-dating Palmer has repeatedly recognized that due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases. That criterion must yield where its rigid application might lead to a miscarriage of justice. McMartin v. The Queen, [1964] S.C.R. 484, per Ritchie J. at p. 491:
>
> > In all the circumstances, if the evidence is considered to be of sufficient strength that it *might reasonably affect the verdict of the jury*, I do not think it should be

[117] *R v Maciel*, 2007 ONCA 196 at paras 45-53.

> excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

In R. v. Price, [1993] 3 S.C.R. 633, per Sopinka J. at p. 634:

> ... we agree with the conclusion of the Court of Appeal that the evidence should be admitted as fresh evidence and the conclusion to direct a new trial. While the exercise of due diligence is one of the significant factors, it is not applied strictly in criminal cases and must be applied in light of the other relevant factors. The amount [page530] of weight to be given to this factor depends on the strength of the other factors, in other words, on the totality of the circumstances.

Also Warsing, supra, at para. 51. The due diligence requirement is one factor to be considered in the "totality of the circumstances". The importance of this criterion will vary from case to case.

In determining whether or not the due diligence required by Palmer has been met, an appellate court should determine the reason why the evidence was not available at the trial. The reason for the evidence not being available at first instance is usually one of fact. In this appeal the evidence was available. The reason it was not used, placed in its most favourable light for the appellant, was the unilateral decision of his counsel that the tape would be more prejudicial than helpful in the trial.

It was submitted by the appellant's new counsel that the decision not to use the tape was incompetent, and that the appellant's obligation to exercise due diligence was met by this alleged incompetence. The argument concluded that the test of due diligence was therefore met, the tape as new evidence should be admitted, and a new trial ordered.

In the absence of a miscarriage of justice, that submission fails.[118](emphasis added)

202. This analysis suggests a peripheral role for due diligence in criminal appeals based on fresh evidence and emphasizes that if the new evidence "might reasonably affect the verdict of the jury" or expose a miscarriage of justice, it should be admitted. It provides no warrant for the exclusion of cogent evidence of innocence because it is not *so* cogent that it outweighs concerns for finality in the criminal process.

203. The *Truscott/Maciel* reasoning has not been the decisive factor in any judgment outside Ontario since the two cases were decided but they have been commented on with

[118] *R. v G.B.D.* 2000 SCC 22 at paras 19-22 [*GBD*].

some favour and may shortly be taken as established law if not addressed by legislation.[119] Since we regard the reasoning as incorrect in principle, we urge Parliament to act now and return the law in this area to its basic values.

204. There are many reasons why a defendant may have potentially exculpatory evidence available him but not lead it at trial. He may, like the appellant in *Maciel*, have made a grave tactical miscalculation, perhaps without counsel's advice. Counsel may have perceived one defence as inconsistent with another and chosen to stick with a preferred, but ultimately unsuccessful approach. The evidence may have been *available* at trial but its full credibility or impact not been recognized until afterwards. The lawyer may have made a mistake, in good faith and reasonably, that falls well short of incompetence but resulted in a fatal disadvantage to his client. The implication of the *Truscott/Maciel* principle should be clearly understood: It allows fresh evidence powerful enough that it could ultimately lead to acquittal rather than conviction to be rejected on appeal simply to vindicate a principle of finality that is to some degree compromised by *any* appeal – indeed by the appellate process itself.

205. The exercise mandated by the Ontario approach to fresh evidence is, in our view, unworkable in practice and unsound in principle. It attempts to place on the same scale two different kinds of values, one fundamentally *procedural* and the other *substantive*. It is simply not possible to achieve a just balance between these different considerations without running an unacceptable risk of injustice. Finality of verdicts and the integrity of the trial process are procedural values. They are important but they simply cannot be vindicated at the expense of accepting wrongful convictions. It is not possible to weigh the risk of wrongful conviction against the value of finality in an individual case without the result dictating the reasoning. To put it differently, a case that ends on appeal with the justice

[119] See in Ontario *R v Dooley*, 2009 ONCA 910; *R v Hartman*, 2015 ONCA 498; *R v Richmond*, 2016 ONCA 134; *R v N.L.P.*, 2013 ONCA 773. See in other provinces *R v West*, 2010 NSCA 16; *R v A.O.D.*, 2015 BCCA 514; *R v G.M.*, 2012 NLCA 47.

system excluding from consideration evidence that *could* establish innocence *in itself* offends the objective of finality and devalues the integrity of the verdict. It has the potential to force appellants who have lost on appeal with fresh evidence that could have satisfied the *Palmer* test to resort to the ministerial review process under Part XXI.1 of the *Criminal Code*, which upsets the finality of jury verdicts in the most exceptional manner possible.

206. We do not agree that there is no miscarriage of justice under s. 686(1)(b)(iii) of the *Criminal Code* when evidence that is sufficiently cogent to satisfy the second, third and fourth *Palmer* criteria is excluded from consideration by a trier of fact on procedural grounds. We also do not think this is a sufficiently realistic concern that it should shape the law of fresh evidence. Virtually every defendant wants to win his case at trial and attempts to do so, as does counsel. It is never reasonable to hope that by holding back evidence at one trial, it may be possible to admit it on appeal and win with it at a second trial. The reasons that evidence is sometimes available but not adduced are generally much more complex and much less cynical. Such decisions often result, in part, from the nature of the adversarial process itself which may punish defendants who rely on inconsistent defences or who, like Maciel, expose their acts of prior bad character. It is poor policy to uphold the finality and integrity of the adversarial process by excluding evidence that was omitted in the first place because of inherent problems in the adversarial process.

207. We urge a legislative solution to this problem which is likely to expand if not checked. It is difficult enough already, as Innocence Canada well knows, to find and present to court the fresh evidence necessary to correct wrongful convictions without having to fight a parallel battle to explain why it was not led years earlier. We know this is a problem in the correction of wrongful convictions because we have encountered it in our own cases under Part XXI.1 of the *Code*, at the level of ministerial review.

208. Parliament in the past has left issues related to the admissibility of fresh evidence almost entirely to the courts, with only the imprecise guidance afforded by the "interests of justice" test in the opening words of s. 683(1). Fresh evidence is, however, an important enough issue to merit legislative intervention. We submit it should be simple and

unambiguous, placing the focus of the test squarely on the correction of wrongful convictions:

> **<u>Recommendation 12</u>: Section 683 of the *Criminal Code* should be amended to provide that when new evidence is tendered on appeal by a person who has been convicted of a crime, its admission will be in the interests of justice where the evidence is sufficiently credible and cogent that it could lead a reasonable trier of fact to return a verdict of acquittal on the matter under appeal.**

<u>Other Appellate Reforms</u>

209. The two recommendations for reform in the appellate process discussed above both involve areas where the courts have placed unjustified limits on their power to correct miscarriages of justice by grafting needlessly restrictive interpretations onto well-intentioned legislation. Part XXI of the *Criminal Code*, which creates appellate jurisdiction in criminal cases, is not poorly conceived or drafted. Judicially imposed limitations on provisions intended to ensure substantive justice reflect a culture in the appellate courts that we would like to see altered, so that they become active, enthusiastic participants in the process of examining potentially erroneous verdicts. To read the appellate courts' jurisprudence on s. 686(1)(a)(i) or s. 683(1)(d) is to see a long-standing reflexive resistance to plunging into messy factual controversies. If this culture were to change, we would see appellate judges reading trial transcripts, or their most important parts, looking at crime scene photographs and witness interview videos, and immersing themselves in the facts of cases brought before them.

210. This cultural shift may not be amenable to legislation, though we hope that the recommendations we have made and elaborated upon will encourage the role we envision.

211. In an altered appellate climate, other reforms could be added to those we have recommended, whether by the courts themselves or by legislation. We refer briefly to three here.

212. ***Standards of Review:*** Canada's greatest criminal appellate judge was probably G. Arthur Martin of the Court of Appeal for Ontario whose command of the law and lucid analysis of complex issues made him a model to the generation of judges which followed him at Osgoode Hall. While Justice Martin, who retired about thirty years ago, would occasionally refer to the advantage juries or trial judges had in fact-finding, we dare say he never began a judgment dealing with an issue of law by identifying the standard of review of a trial ruling and deciding whether a decision he regarded as wrong should, nonetheless, be affirmed on appeal because it was "reasonable". It would not generally have occurred to him or his colleagues to do so since if a question of law was wrongly decided at trial, he would expect to say so and then determine whether it was a "harmless" error under the curative proviso in s. 686 (1)(b)(iii). If it was not, it would lead to the quashing of the conviction.

213. In the years since Justice Martin retired in 1988, a preoccupation with standards of review has crept into the criminal law, no doubt influenced by administrative law which is dominated by the issue. Although it is a complex subject, we regard this on the whole as being a retrograde step in the law's development and another example of courts of appeal shrinking their own capacity to correct injustice.

214. To highlight the significance of this, it is worth noting that when evidence of bad character or discreditable conduct – including "similar fact evidence" – is introduced at trial, the standard of review on appeal will be "deferential", a change that has resulted from the altered test for the admission of such evidence.[120] This is a most regrettable evolution in the law and it has accelerated in recent years. There is, however, little evidence more significant that can make its way before a jury than prior discreditable conduct by a defendant, especially when it consists of proof of similar acts. If this evidence is admitted in error, it has the capacity to prejudice the accused irreparably in the eyes of the jury and to determine a verdict. Admitting similar act evidence is likely to be the single most consequential ruling made by a judge at a jury trial. Many wrongful convictions are, in our

[120] *R v Stubbs*, 2013 ONCA 514 at para 58; *R v Handy*, 2002 SCC 56 at para 153.

experience, the product, in whole or in part, of prejudice against the defendant from exposure to his bad conduct on other occasions. When an issue of this nature, which has a factual component but is substantially a question of law, comes before the court on appeal, it should be decided on a standard of correctness. Allowing a matter of that significance to be decided on an essentially discretionary footing, with wide latitude for error, invites miscarriages of justice.

215. Though this is a subject beyond our present submissions, we believe that fixing standards of review under Part XXI of the *Code* is a task for Parliament – if such standards are to be preserved at all. Where a ruling under review is one on which guilt or innocence could turn, the law should simply insist on correctness. If a legal ruling is both incorrect under s. 686(1)(a)(ii) and capable of affecting the verdict under s. 686(1)(b)(iii), it should result in a new trial.

216. ***Ineffective Assistance of Counsel***: Our experience in representing the wrongly convicted has given us a keen awareness of the critical role defence counsel often play in miscarriages of justice. It is apparent that there is a wide range of professional ability across the defence bar and it has become axiomatic for us that some cases that were lost by inferior lawyers could have been won by superior ones.

217. That fact suggests that in deciding what weight should be assigned to counsel's representation as a cause of wrongful convictions, appellate courts should adopt a nuanced approach, focused less on grading performance and more on the effect of particular steps counsel took, or failed to take, on behalf of their clients. Canadian law, however, has developed a bright line test for assessing incompetence and made it extremely hard to satisfy. As a result, appeals on the basis of ineffective assistance of counsel (IAC) are more a theoretical than a practical remedy for injustice.

218. The formula for assessing IAC reflects our concern in this area:

> All of these factors justify a *cautious approach* to ineffective representation claims. This court's task has been to devise an approach which permits the court to fulfil its obligation to quash convictions which are the product of a miscarriage of justice while

at the same time avoiding the negative consequences inherent in appellate scrutiny of counsel's conduct of the defence. The approach taken by this court has three components:

> -The appellant must establish the facts on which the claim of incompetence is based.
>
> -The appellant must establish that the representation provided by trial counsel was *incompetent.*
>
> -The appellant must establish that the incompetent representation resulted in a *miscarriage of justice.*

The first component requiring that the appellant establish the facts on which the claim is based is consistent with the generally accepted rules governing pleadings. It is the appellant who is making the allegation and it is the appellant who, as between the appellant and the Crown, is in the better position to establish the underlying facts. The cases involving allegations of ineffective representation based on conflict of interests provides a good example of the operation of this first component. In those cases, the appellant must demonstrate the existence of an actual conflict of interests. It is not enough for the appellant to show that there may have been a conflict of interests: *R. v. Widdifield and Widdifield,* supra, at pp. 16-23.

The second prong of this approach requires a measurement of counsel's performance against a competence standard. The standard developed by O'Connor J. in *Strickland v. Washington* has been adopted in this jurisdiction: *R. v. Silvini,* supra, at pp. 263-264; R. v. Garofoli, supra, at pp. 151-152; R. v. Collier, supra, at p. 573; see also *R. v. Strauss*, supra, at paras. 4-10 ; *R. v. Sarson* (1992), 77 C.C.C. (3d) 233 at 238-39 (N.S. C.A.*); R. v. Brigham* (1992), 79 C.C.C. (3d) 365, per Fish J.A. at 386-390 (Que. C.A.). The following extracts from the reasons of O'Connor J. capture the essential elements of the competence standard announced in *Strickland v. Washington*, supra:

> ... The defendant must show that counsel's performance was deficient. This requires showing that counsel made *errors so serious that counsel was not functioning as the "counsel"* guaranteed the defendant by the Sixth Amendment. ... [p. 2064]
>
> ... The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. [p. 2065]
>
> *Judicial scrutiny of counsel's performance must be highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defence after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [citations omitted] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct*

> *falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [citations omitted] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [p. 2065]
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time the court should recognize that *counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment*. [p. 2066][121] (emphasis added)

219. This test, pitched so high that only cartoonish incompetence will generally satisfy it, has effectively moved IAC to the sidelines of Canadian law, despite the pivotal role counsel play in shaping trial records and jury verdicts. It is another example of a concern for the "integrity" of the trial process dictating the approach on appeal to issues of miscarriage of justice. It is paired in Canada with the distressing trend in the appellate jurisprudence of the last thirty years to reject grounds of appeal on the basis that objection to an alleged legal error was not made by counsel at trial—an analysis that has become a dominant motif in appellate jurisprudence, often figuring in the rejection of several arguments in a single appeal.[122] If arguments on appeal are rejected because trial counsel failed to see the error, and almost any level or performance by counsel will be deemed "competent", then a wide zone is created for appellate injustice.

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[121] *R v Joanisse* (1995), 102 CCC (3d) 35 (Ont. C.A.), at paras 69-71. For the Supreme Court of Canada's adoption of the *Strickland* test see *GBD*, *supra* note 118.

[122] *R v Van*, 2009 SCC 22; *R v Daley*, 2007 SCC 53; *R v Jacquard*, [1997] 1 SCR 314; *R v M.T.*, 2012 ONCA 511.

220. The issue is, again, a complex one with broad implications, but we believe that a more justice-oriented analysis is called for. Courts of appeal should not concern themselves with the broad question of lawyers' competence or performance but should, instead, focus on any decisions they made, or steps they took (or omitted) and their effect on the verdict. If the defendant's protagonist in the adversarial contest miscalculated in some respect, the inquiry should not be on whether the error was "reasonable" or whether it meant the lawyer was not functioning as counsel *at all,* but on its effect on the verdict in light of the other evidence. If the appellant satisfies the court that even a single improvident decision may have shaped the outcome, the court should direct a new trial without trying to assess the severity of the lapse. The current law, with its "highly deferential" approach, its "strong presumption" in favour of lawyers' competence, and its insistence that counsel be effectively *absent* before a remedy can be granted, is not faithful to the meaning of "miscarriage of justice" in the *Criminal Code* nor to the mandate Parliament has given to our appellate courts.

221. ***Appellate Factual Inquiries:*** Innocence Canada is aware from experience in many cases referred by the Minister of Justice to courts of appeal that a panel of appellate judges can hear live testimony – with the fact-finding advantages that may provide – and rule on it with great clarity and authority. The detailed, historic judgment of the Court of Appeal for Ontario in *Re Truscott* is one example but there are many others. Two such cases are in progress now, in 2017. Even the Supreme Court of Canada has engaged in a primary fact-finding role.[123]

222. A sadly typical pattern in courts of appeal across Canada is that an appellant will argue on the basis of a trial record that a key witness, on whose credibility a verdict depends, was not credible, citing illogical answers at trial, inconsistencies with other statements, and a motive to lie. The appellate court will acknowledge the potential flaws in the witness's credibility but ultimately reject the appeal on the basis that fact-finding is the domain of the jury which is in a better position to assess credibility than three judges

[123] *Reference Re Milgaard,* [1992] 1 SCR 866.

reviewing a transcript. With that line of reductive logic, countless appeals are dismissed across the country. Inevitably, some of these appellants will be innocent defendants denied their last chance at exoneration.

223. We believe there is a better approach. When the essence of an appeal is the claim that factual findings at trial were wrong, it should be open to the appellant to apply to have key witnesses brought before the court for further questioning so that any disadvantage of the appellate court from not seeing witnesses in person would be eliminated. Once this authority was enacted, courts of appeal would, we hope, look favourably on such applications where the appellant could establish that the evidence of the witness or witnesses was central to the conviction and had little or no corroboration.

224. If it is objected that this would be unduly time-consuming and costly, we disagree. On appeal, there is no dispute about the vast majority of the trial testimony which is either unchallenged narrative evidence or physical evidence on which there is no need for appellate re-examination. Moreover, much of the evidence of even a controversial witness is not in question following a conviction. Points of serious controversy are usually few and it is open to the appeal court that grants an appellant leave to recall a witness to direct that questioning to focus on those points. This process would still be exceptional and would rarely take more than a few hours of court time, but its capacity to encourage meaningful, bold factual review by a court of appeal is enormous. A new sub-section of s. 683 of the *Criminal Code* could create the necessary authority.[124]

225. The power of courts of appeal to appoint special commissioners under s. 683(1)(e) and (f) is also an under-utilized vehicle for giving the appellate process a more meaningful role in correcting wrongful convictions. On its face, the two sub-paragraphs provide a court of appeal with an efficient and economical means of resolving complex factual questions by appointing a single judge or lawyer to conduct a quasi-inquisitorial investigation. Years go by in most provinces, however, without the power being invoked even once. We believe

[124] The authority might even be said to exist now, in s. 683 (2), but this sub-section is not generally understood by counsel to apply to witnesses who have testified at trial and whose credibility is directly in issue on appeal.

the appointment of a special commissioner can help overcome the reticence of appellate judges to deal in greater depth with factual issues. If courts were granted an explicit authority to order that trial witnesses reappear to undergo focused questioning on an appeal, the appointment of a special commissioner could allow the process to take place with little cost to the efficiency of the court.

Conclusion

226. The reforms discussed in this section would entail the introduction of more inquisitorial procedures at the appellate level and would, we recognize, require a shift in the traditional Canadian conception of the appellate function. It may be that the justice system is not yet ready for such a change. We note, however, that there is no constitutional impediment to appellate courts' taking a more active and self-directed role in the review of criminal convictions. The *Canadian Charter of Rights and Freedoms* expressly incorporates aspects of the common law adversarial process as constitutional guarantees but says nothing about the conduct of appeals.

227. The common law world was given a look at the capacity of engaged appellate courts to correct miscarriages of justice in the famous case of Amanda Knox and Raffaele Sollecito, convicted of murder in Italy after a trial that left important factual questions unresolved and had many of the hallmarks of a wrongful conviction. At a third level of appeal, in the Italian Supreme Court of Cassation, an acquittal was finally entered and both defendants were pronounced innocent. The case is striking for Canadian observers because of the active role taken by the appellate judges in not only examining but also supplementing the trial record, especially with regard to hotly contested DNA evidence. We think there is room for a comparable approach in Canadian law where the primary issues on appeal are difficult questions of fact.

THE FAILURE OF THE DEFENDANT TO TESTIFY

228. We conclude with a recommendation that we consider straightforward, well-grounded in current law, and of immense benefit to the interests of justice. We submit that juries should be expressly instructed that they are to attach no weight to the fact that the defendant has elected not to give evidence.

229. It is impossible to appreciate the importance of this reform without an awareness of two facts about which our organization, composed mostly of defence lawyers, is well-equipped to speak. First, the choice of a defendant not to give evidence, and advice from counsel to that effect, rarely has *anything* to do with an acknowledgement by the client to the lawyer that she is, in fact, guilty. Whatever the plausibility of their claims, the great majority of clients who plead not guilty take the position with their lawyers, and others in their circle, that they are, in fact, not guilty. The widespread suspicion that clients and counsel routinely work on the assumption that the client committed the crime but that counsel can raise a reasonable doubt on the Crown evidence is not based in reality. Rather, there are a host of reasons why the defendant may not testify in a particular case. These reasons may include the articulateness, intelligence, personality, confidence and character of the defendant as well as perceptions by counsel of the strength of the Crown case, the holes that the defendant might fill in for the prosecution, the atmosphere in the courtroom, the forensic skills of Crown counsel, and the ability of the defendant to explain – rather than simply deny – the evidence against her. This means that as a purely practical matter, the fact that a defendant does not enter the witness box is of negligible significance to a conclusion about her guilt or innocence. This, quite apart from lofty constitutional considerations[125], is a sound reason for telling juries that they are not to weigh the absence of evidence from the defendant on the question of whether the Crown has proven its case—it is just faulty reasoning.

[125] *R v Noble*, [1997] 1 SCR 874.

230. The second fact to which defence lawyers can attest is that juries *do* draw negative inferences against the defendant who does not testify. This is an example of another theme that runs throughout these submissions – our concern for facts that take on a significance to juries far beyond their true value as evidence.

231. In 1981, the United States Supreme Court held that a defendant who has not testified has the right, based on the protection against self-incrimination in the Fifth Amendment to the US Constitution, to an instruction that this decision is irrelevant to the jury's determination. In *Carter v. Kentucky*, Justice Stewart, for a unanimous Court, said:

> The principles enunciated in our cases construing this privilege, against both statutory and constitutional backdrops, lead unmistakably to the conclusion that *the Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so.*
>
> In Bruno, the Court declared that the failure to instruct as requested was not a mere "technical erro[r] . . . which do[es] not affect . . . substantial rights . . . ." It stated that the "right of an accused to insist on" the privilege to remain silent is "[o]f a very different order of importance . . ." from the "mere etiquette of trials and . . . the formalities and minutiae of procedure." 308 U.S., at 293 -294. Thus, while the Bruno Court relied on the authority of a federal statute, it is plain that its opinion was influenced by the absolute constitutional guarantee against compulsory self-incrimination.
>
> The Griffin case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in Griffin by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when *the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.*
>
> The significance of a cautionary instruction was forcefully acknowledged in Lakeside, where the Court found no constitutional error even when a no-inference instruction was given over a defendant's objection. The salutary purpose of the instruction, "to remove from the jury's deliberations any influence of unspoken adverse inferences," was deemed so important that it there outweighed the defendant's own preferred tactics.
>
> We have repeatedly recognized that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice," Lakeside, 435 U.S., at 342 , is often necessary. *Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who*

> *should be better advised, view this privilege as a shelter for wrongdoers*. They too readily assume that those who invoke it are . . . guilty of crime . . . ." Ullman v. United States, 350 U.S. 422, 426 . And, as the Court has stated, "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court . . . ." Bruno, 308 U.S., at 294 . 20 [450 U.S. 288, 303]
>
> A trial judge has a powerful tool at his disposal to protect the constitutional privilege - the jury instruction - and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. 21[126]

232. After *Noble*, *supra*, and *R. v. Prokofiew*, the law regarding self-incrimination is no different in Canada – the election of the defendant not to testify *cannot* be used as the basis for any inference against him by the trier of fact. *Prokofiew* was a case in which counsel for an antagonistic co-defendant argued to the jury that the failure of the defendant to testify should be looked upon as an indication of guilt. In holding that the trial judge erred in failing to give an explicit instruction that no such reasoning was permitted, Justice Moldaver addressed the question of what juries can, and should, be told about the issue in light of s. 4(6) of the *Canada Evidence Act* which directs that the failure of the defendant (or his spouse) to testify "should not be made the subject of comment by the judge or by counsel for the prosecution." Justice Moldaver said:

> My colleague and I agree that s. 4(6) of the *CEA* does not prohibit a trial judge from affirming an accused's right to silence. In so concluding, I should not be taken — nor do I understand my colleague to suggest — that such an instruction must be given in every case where an accused exercises his or her right to remain silent at trial. Rather, *it will be for the trial judge, in the exercise of his or her discretion, to provide such an instruction* where there is a realistic concern that the jury may place evidential value on an accused's decision not to testify.
>
> *In cases where the jury is given an instruction on the accused's right to remain silent at trial, the trial judge should, in explaining the right, make it clear to the jury that an accused's silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case.* In other words, if, after considering the whole of the evidence, the jury is not satisfied that the charge against the accused has been proven beyond a reasonable doubt, the jury cannot look to the accused's silence to

[126] *Carter v Kentucky*, 450 US 288 at 301-303.

> remove that doubt and give the Crown's case the boost it needs to push it over the line.[127](emphasis added)

233. Canada's Supreme Court, then, has held that it will always be *possible* for a trial judge to instruct a jury that no inference against a defendant can be taken from the election not to testify and that in some cases such a direction will be required.

234. We submit that Parliament should go a step further and make this instruction mandatory upon request by the defendant. We make this recommendation for the following reasons:

- The fundamental constitutional right against self-incrimination is at stake[128], along with a serious risk that a jury may rely on flawed reasoning to reach a conclusion of guilt. In our view, that risk is present in the great majority of cases where an accused does not testify and it is difficult to measure in any particular case how serious it is.
- It follows that protection of the defendant's rights should not be a matter of virtually unregulated discretion by different trial judges in different courts; it should be a matter of law, requiring uniform practices across the country.
- Because it is a basic principle that a right can be waived by the person holding the right, the instruction should be given at the request of the defendant and not otherwise. There may be sound reasons in any individual case why the defendant would consider himself better off with the issue of the failure to testify left unmentioned. In such cases, a harmful instruction should not be imposed upon him in the guise of protecting his rights.

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[127] *R v Prokofiew*, 2012 SCC 49 at paras 3-4.

[128] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution* Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c, 11, s. 11(c).

<u>Recommendation 13</u>: The *Canada Evidence Act* should be amended to provide that, upon request by the defendant, a jury must be instructed that no inference is to be drawn by the jury against the defendant from the fact that the defendant did not give evidence at the trial.

It follows that s. 4(6) of the *Evidence Act* should be amended to provide that the fact that the defendant did not testify should not be the subject of *adverse* comment by the judge or prosecutor.