

could hear the relief in his voice; Commissioner Cory had felt so much for this man who was truly a victim of wrongful conviction.

The tragedy of this event is the depth of harm it created: a family lost their child; an innocent man went to jail and was haunted for years; the real perpetrator, Terry Arnold, was free, and had the opportunity to kill again.

Commissioner Cory made a series of recommendations. I am happy to say many of them were accepted and adopted both in Manitoba and across Canada. I am extremely proud to have been a small part in the process. I will leave you with this small thought, that if we are not diligent, it could happen again. Thank you.

## VI. JUSTICE JEFFREY OLIPHANT

Thank you very much Bruce. I have never conducted an inquiry into a wrongful conviction but I have been exposed to several lectures and listened to people who have talked about what has happened. As my friend Richard said, with Thomas Sophonow it was a perfect storm. Just about every contributing factor to wrongful convictions that you can think of could be found there. I should tell you that although I have never done a public inquiry on a wrongful conviction, I played a small role in the James Driskell matter because prior to any inquiry being called, I made an order on the application of Mr. Driskell's lawyer that compelled the Winnipeg Police Service to disclose a report that had been secret for many years. It was a report that was done very much like the one that John did on Sophonow. Mr. Driskell had been convicted of murder, and the report that I had in my possession disclosed to me, to my horror, that James Driskell was probably innocent.<sup>40</sup> I ordered the disclosure of the report, and opened the Pandora's Box with the result that there was a public inquiry; he was wrongly convicted and the inquiry demonstrated that.

### A. Wrongful Convictions

My first exposure to wrongful convictions was when I was at Cambridge University in the UK attending a conference of lawyers, judges, and other interested people, where I had the benefit of hearing from a man by the name

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<sup>40</sup> *Ibid* at 89-91; in September 2003 the *Hall/Ewatski Report* was completed which suggested several key witnesses in the Driskell trial had exchanged testimony for compensation and one witness was threatening to recant.

of Guido Calabresi. The academics in the room will recognize Calabresi as the former dean of Yale Law School in the United States. At the time I heard from him, he was sitting as a Court of Appeal judge in the Second Circuit Court of the Federal court system in the United States in New York City. Justice Calabresi spoke on the causal factors of wrongful convictions, but he also touched on something else that has not been mentioned yet today. When you look at the roster of people wrongly convicted in Canada (provably wrongly convicted because there have to be others who have not been proven to be wrongfully convicted), you will appreciate what Calabresi had to say. He referred to the frailty of eyewitness identification evidence, but went on to say that in almost every case where a wrongful conviction has occurred there has been a horrible crime of violence with corresponding public outrage and pressure on the police to solve the crime quickly. The most common feature alluded to by Calabresi was that the targets of the investigations were people who could be described as marginalized. According to Calabresi, they became scapegoats. Look at the people who we know were wrongly convicted in Canada. We have Marshall, an alcoholic, in Nova Scotia, who was an Aboriginal person living a very marginal lifestyle. He was wrongly convicted.<sup>41</sup> David Milgaard, a young kid 16-17 years of age, wandering across Western Canada smoking "Mr. Weed", and probably using lots of other drugs.<sup>42</sup> Marginalized. Morin in Ontario, a very strange man convicted of killing a little girl and later found to have been wrongly convicted.<sup>43</sup> And others, including Driskell himself living a marginal lifestyle. All scapegoats. You know I sit as a judge and listen to people and I have to tell you having heard what I have, one of my worst nightmares ever would be to participate in the wrongful conviction of an individual. I try and I know my colleagues try to be so careful.

Richard mentioned the work that Bruce MacFarlane has done in this area, and I think Bruce is a true hero. I think that not only is he highly recognized in Canada, but around the world for the work he has done in terms of wrongful conviction. Bruce organized the conference<sup>44</sup> that we had

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<sup>41</sup> See *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Halifax: Province of Nova Scotia, 1989).

<sup>42</sup> See *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1-2 (Saskatoon: Ministry of Justice Saskatchewan, 2008).

<sup>43</sup> See *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, vol 1-2 (Toronto: Queen's Printer for Ontario, 1998).

<sup>44</sup> *Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction*,

here in 2005 that drew people of international acclaim to speak. These included Janet Reno, the former Attorney General of the United States, and people from all over Europe. We had people from every continent except South America, I think, attending the conference in Winnipeg, and everyone learned. You know the saying, that from little acorns tall oaks grow. Out of that conference, the National Judicial Institute, which is the educational arm of the Federal Judiciary in this country, now holds an annual conference on the role of the judge in avoiding wrongful convictions. In fact, I happen to be going to the conference in Montreal in March of next year to see what has developed since we started this in 2005.

I was on circuit out in Brandon in the month of June 2008, and I got a message from the receptionist that the deputy clerk of Privy Council, who is the second most senior bureaucrat in Canada, and the second most senior bureaucrat reporting to the Prime Minister, was on the phone and wanted to talk to me. I said sure. Believe it or not my colleagues are a playful bunch and like to play practical jokes. But I answered the phone and indeed it was Yvan Roy who told me there was going to be a public inquiry. It was all very confidential at this point, and the inquiry was to deal with certain allegations that had been made about certain business affairs of a former Prime Minister, Brian Mulroney, and a man described to me, not by Yvan Roy, as a very notorious arms dealer by the name of Karlheinz Schreiber. He told me that the Prime Minister wanted a judge from Western Canada to lead this inquiry, and I was the one who had been selected. He said to me "Will you do it?" I said I could not agree to do it at the moment. I guess Mr. Roy is not used to hearing that kind of response from people he is phoning on behalf of the Prime Minister because he asked why not. I said I needed to speak with my commander in chief. He thought I was speaking of the Chief Justice, but I was talking about my wife. I also had to speak to my Chief Justice to get permission, which I did. That began a two year odyssey for me and for other people that were involved in the inquiry. I can truly describe probably the most exciting and interesting professional experience of my now 28 year career as a judge.

## B. Public Inquiries

While the inquiry that I headed did not deal with wrongful conviction, let me tell you that all inquiries have certain common principle functions and features. I see people in the audience that I know have been involved in inquiries, and I think they would agree with me that the principle function of a commission of inquiry dealing with the wrongful conviction of a person must include, in my view, a review of the judicial or administrative branches. When I use the term administrative branches, I include the police and prosecution branches. Indeed, where there is an inquiry into the wrongful conviction, the commissioner may well also want to ask how, if at all, members of the judiciary played a role in the conviction of the individual whose conviction was said to be wrongful. One of the interesting things about Peter Cory, who is a true gentleman, is that in addition to heading the Sophonow inquiry, he has written more about public inquiries than any judge of the Supreme Court of Canada. I was looking last night and of the 27 Supreme Court decisions that deal with public inquiries one way or other, Peter Cory has written judgments in several of them.<sup>45</sup> Speaking about the role of judges let me tell you that Peter Cory wrote the judgement in what I will call the Blood Inquiry case, the tainted blood inquiry headed by Justice Krever, former Justice of Ontario Court of Appeal.<sup>46</sup> He followed up on something that is always included in the mandate of commissioner. It was included, I believe, in the Sophonow inquiry and certainly in mine. In the mandate, it states a commissioner should not imply or state that a person is guilty of any crime, or in any way liable on a civil basis for what that individual did in the course of the incident or incidents that lead to the inquiry. So you have that prohibition, but Justice Cory then went further in the Tainted Blood case. That had an impact on me because he said not only should you not make findings of criminal or civil liability but as Commissioner great care should be taken to avoid giving impression of criminal or civil liability, although commissioners may ultimately make

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<sup>45</sup> See e.g. *Phillips v Nova Scotia* (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 SCR 97, 124 DLR (4th) 129 [Westray Mine]; *Mackeigan v Hickman*, [1989] 2 SCR 796, 61 DLR (4th) 688; *Canada (Attorney General) v Canada* (Commission of Inquiry on the Blood System), [1997] 3 SCR 440, 151 DLR (4th) 1 [Blood System].

<sup>46</sup> *Final Report of the Commission of Inquiry on the Blood System*, vol 1-3 (Ottawa: Commission of Inquiry on the Blood System, 1997).

findings of fact that have adverse effects upon reputations.<sup>47</sup> As I said, that statement played a role in the commission that I headed, and if I had time I would tell you about that.

Any inquiry has a number of stages: the beginning, the team building stage, getting organized; the investigation stage, preparing for hearings, conducting hearings, and writing the report. Those are the areas where I, as Commissioner, played a role in the Mulroney-Schreiber case and where Richard played a role in the Sophonow case where Justice Cory was the Commissioner. Every commissioner deals with that.

The Commission that we had, had two functions: the first was a factual inquiry into the dealings between Schreiber and Mulroney; the second was a policy review, where we heard from very highly qualified people about the issue of conflict of interest. I am not going to deal with the policy parts except to say a professor here in the Political Science department, Paul Thomas, played a major role. I commissioned him to write a paper about the relationship between the Prime Minister's Office and the Privy Council Office. I will not say any more about the Privy Council Office except to touch briefly on it.

Inquiries in Canada are statutory vehicles. Inquiries at the federal level are under the *Inquiries Act*,<sup>48</sup> and inquiries at the Manitoba level are under the *Evidence Act*.<sup>49</sup> Almost every inquiry into wrongful convictions, I think, has been under provincial legislation and not under the *Inquiries Act*. Bruce knows the explanation for that and you can ask him about it if you wish.

A commission of inquiry is an agency of the executive branch of government and therefore acts in the parameters set by the Governor in Council federally or, provincially, by the Lieutenant Governor in Council. Operating in the parameters means that the jurisdiction of the commissioner appointed to head the inquiry is confined to responding to the questions and directions set forth in the mandate or the terms of reference set by the order in council respecting or establishing the commission. We have already heard about the mandate given to Justice Cory in the Sophonow Inquiry, dealing with inquiring into the conduct of the investigation and the circumstances surrounding the resulting criminal proceedings. On occasion, the Supreme Court of Canada has dealt with issues of public inquiries. The case I will refer

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<sup>47</sup> *Blood System*, *supra* note 45 at paras 51-2.

<sup>48</sup> *Inquiries Act*, RSC 1985, c I-11 s 2.

<sup>49</sup> *The Manitoba Evidence Act*, RSM 1987 c E150 s 83.1; CCSM c E 150 s 83.1.

to is an inquiry into what I will call the Westray Mine Tragedy.<sup>50</sup> That was an inquiry established after the death of several people in a mine tragedy in Nova Scotia, and the case emanating from that is called *Phillips v Nova Scotia*.<sup>51</sup> Justice Cory wrote that decision, and he referred to public inquiries in the following way:

They are often convened in the wake of public shock, horror, disillusionment, or skepticism in order to uncover the “truth”. Inquiries are, like the judiciary, independent; unlike the judiciary, they are endowed with wide ranging investigative powers. ... At times of public questioning, stress and concern, they provide the means for Canadians to be appraised of the conditions pertaining to a worrisome community problem and to be part of the recommendations aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearings help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.<sup>52</sup>

That is in my view a very apt description of what a public inquiry is and does. I use, and have quoted, the term “worrisome community problem”. I do not think there is anyone in this room – I hope that there is not anyone in this room – who would disagree with the proposition that a wrongful conviction is a worrisome community problem.

Edward Ratushny in his text *The Conduct of Public Inquiries*<sup>53</sup> talks of the common features of commissions of inquiry. The first of which is that it inspires public confidence in its independence. Second, the confidence the public has in the effectiveness of the commissioner to get to the bottom of the problem, and third, that it enhances public confidence in the transparency of proceedings. Getting to the bottom of the problem means to follow the commission’s mandate addressing the very questions that have to be answered. These are questions that have given rise to public concern, and this is of particular importance, I think, when it comes to public inquiries whose mandates are the establishment and investigation of the reasons behind a wrongful conviction.

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<sup>50</sup> *The Westray Story: A Predictable Path to Disaster – Report of the Westray Mine Public Inquiry* (Halifax: Westray Mine Public Inquiry, 1997).

<sup>51</sup> *Westray Mine*, *supra* note 45.

<sup>52</sup> *Ibid* at 62.

<sup>53</sup> Ratushny, *supra* note 22.

### **C. The Mulroney-Schreiber Inquiry**

After I got the phone call from Yvan Roy, I recalled the situation that led up to this calling for a public inquiry. I had occasion to watch the news and watch proceedings of a Parliamentary committee, the Ethics Committee, which I thought was a pretty strange name for the committee in light of the way they were conducting themselves. But this committee was investigating the same allegations as the inquiry would, and Brian Mulroney, the former Prime Minister, had testified, as had Karlheinz Schreiber. I watched politicians try to play Perry Mason and ask questions of those guys and others. I thought it was a terrible exercise unless you were trying to score political points, and for anybody who appreciates due process, what I had observed was a nightmare. And I was absolutely adamant that the same thing was not going to happen at the Commission of Inquiry I had agreed to head. There likely would not have been a commission of inquiry called in this matter except for one fact: Karlheinz Schreiber had talked about giving Brian Mulroney money in cash; thousand dollar bills in brown envelopes. He was sort of a disreputable guy (I am referring to Schreiber). I will not comment on the money in brown envelopes, but that was not enough for Schreiber as he then made an allegation that he had written to Prime Minister Harper disclosing all of this on more than one occasion, but had never received a response. It was that allegation that caused the Prime Minister to act. I remember listening to something Bud Estey said. Willard Estey was a Justice of the Supreme Court of Canada who had done a number of inquiries<sup>54</sup> after he retired. He said every time he was asked to head a public inquiry there was a worried politician on the other end of the line. I will not say that was true of Prime Minister Harper, to whom I spoke at great length, but he was concerned with the allegations that had been made and wanted me to get to the bottom of this.

But even once I had agreed to the job of commissioner, one important thing preceded a final decision. I said I needed to speak with my wife, and my Chief Justice, but I also wanted to ascertain whether Richard Wolson was interested in the role as lead counsel. I was not prepared to take the job unless Richard was prepared to do this. I do not say that to flatter him; I felt that Richard was not only one of the best lawyers in Manitoba but one of the best

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<sup>54</sup> Justice Estey headed such inquiries as the Commission of Inquiry into the Events of March 18, 1996 at Queen's Park, Inquiry into the Collapse of the CCB and Northland Bank (Canada), and the Air Canada Inquiry.

lawyers in Canada. I felt that if he took the job, a lot more Canadians would learn that and appreciate that pretty darn soon, and they did. You know, it is funny talking about ethics. My appointment was announced by the Prime Minister at 2 o'clock in the afternoon in Ottawa, and within about ten minutes I had a telephone call from a lawyer asking if I would retain his services as counsel — it was not Richard by the way, it was somebody else. I indicated I had already made a selection. Some period of time went by between when I spoke to Richard and when the inquiry was announced and I did not really announce that he had been retained until after the inquiry was announced because it was all so confidential. But I had probably fifty letters and phone calls from lawyers across Canada seeking to become counsel on the Commission of Inquiry. I had always thought touting was not supposed to be done by lawyers but even if that is the case there certainly was a lot of touting done.

We had a mandate and one of the things judges and commissioners of inquiry can do is to negotiate that mandate with the government because, after all, you are the commissioner and this is the road map you are going to follow. However, with Richard's advice, I did not do that with this case, because leading up to the calling of the Commission of Inquiry, Prime Minister Harper had retained the services of Dr. David Johnston.<sup>55</sup> Dr. Johnston had written two reports on this issue for the Prime Minister; the first one dealt with whether an inquiry was called for, whether it was desirable, and he thought it was. The second report was, well, okay if you want to do an inquiry what should the commission inquire into? And he wrote a report there. Perhaps more importantly from our perspective (because this became a bit of a bugbear) he told us what we ought not to do, and that was to deal with Airbus.<sup>56</sup>

So we received the mandate and we started to build. The first thing we had to do was to design rules. Richard went over a number of rules, and we put them on to our website. I should say while all of this was going on, Richard chose the team. I chose one other senior counsel, and I ended up

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<sup>55</sup> At that time, Dr. David Johnson was the Vice-Chancellor and President of the University of Waterloo. He served in this capacity from 1999-2010.

<sup>56</sup> There had been allegations made that Prime Minister Mulroney had received secret commissions from Schreiber on the sale of Airbus aircraft to Air Canada, which at the time was a Crown corporation. These allegations had been thoroughly investigated by the RCMP over a twenty year period but no evidence of such payments was ever found.

with four senior counsel and maybe at most ten junior counsel, four permanent and others used from time to time. I selected Nancy Brooks as Senior Counsel as well because I know Richard well; he is a criminal lawyer and I know criminal lawyers well, and they hate paper. I wanted a civil litigator, who knew paper and knew how to organize paper and deal with it, so I got Nancy Brooks. Then I said, "Richard, build the team," and he did. He got the other members of the senior team as well as the junior team, except for one that I hired personally, and that was his daughter. Then I said, "we've got a federal inquiry going here, let us get a francophone," so off Richard and other members of the team go to Quebec. They came back and said, "we've got your francophone lawyer." I asked who it was, and was told it was Giuseppe Battista. I thought that does not sound like a francophone to me; that sounds like an Italian. But I was told the common wisdom in Quebec now is that if you are fluently bilingual, you are considered to be a francophone whether your name is Bastista or Levesque. So away we went.

The junior lawyers did a terrific job right from the start. We had thousands of documents to look at and they did the job. Now you know that we ran into a real serious problem because every document from the Government of Canada or any agency had to flow through the Department of Justice. They had a team of eight to ten lawyers working on the documents before they would disclose them to us. Believe it or not, despite the fact that the federal government had document management systems that are electronic, different departments use different systems. The RCMP used a system that was not used by the Department of Justice so every document that the Department of Justice got from the RCMP – and believe me there were tons of them as there had been a 20 year investigation into this – had to be converted into the Justice Department's system and into the system we used called Ring Tail. The RCMP used a system called SuperText. Unbelievable! It held us up for six months, while I kept pressing to start. This was the only serious disagreement I had with my lawyers. They did not want to start because they were not ready to go, which sounded pretty reasonable to me, but I wanted to get going.

Finally, we got going, and Richard and the legal team did an extremely good job. Just for the law students let me tell you, you know real estate agents talk about location, location, location; in your job its preparation, preparation, preparation. I can tell you about an example of just how hard the lawyers worked. Because they were pretty well all from Winnipeg, except Giuseppe and Nancy and some junior Quebecois lawyers we had, the lawyers

had to fly from Ottawa to Winnipeg and back. Two of the lawyers from Winnipeg flew back one Sunday night to Ottawa. There's a flight that gets in about 11:30 pm Ottawa time (about 10:30 Winnipeg time). They went for a smoked meat sandwich to a restaurant called Dunn's, and then they worked from about 12:30 to 4 o'clock in the morning to prepare for the next day. Then they got up at 7am and were in the Inquiry for the rest of the day. Now, that is dedicated and that is preparation. The guy that worked the hardest is sitting to my left [indicating Richard Wolson]; he was Senior Counsel, but his secret was preparation and that was shown by the job that he did.

I am going to tell you a story that is true. Brian Mulroney's 70<sup>th</sup> birthday was celebrated and there were a lot of former Progressive Conservatives there to help him celebrate. And there happened to be another man who had been a witness at another inquiry, and Richard had cross examined him there at the inquiry. Anyway this man goes up to Brian Mulroney, this is way after the inquiry had finished, and says "Mr. Mulroney we have shared a common experience." Prime Minister Mulroney responds "what was that?" The man says, "we have both had the pleasure of being examined by Richard Wolson." Mulroney responded: "it might have been a pleasure for you." If you want to see a master at work, you can go to CPAC and plug in Oliphant Inquiry, and watch Richard Wolson perform surgery on the witnesses he examined. Because it was a great job.

We had a great relationship with the media - we stayed absolutely clear of them. They respected that, and we had a communications guy and we had no problems with anyone, with the exception of the Fifth Estate, who wanted us to go after Mulroney for Airbus. They had done a number of shows where they had made all kinds of allegations and they really wanted us to go after it. But David Johnston had done a report asking us to stay away from it, as it was well tilled ground, and there had been a 20 year investigation by the RCMP. I will tell you how anxious they were to get Mulroney. We had disclosed every document given to us on our website. There was one document with Schreiber's notes stating "PM \$400,000". Fifth Estate implied this was a \$400,000 commission paid to the Prime Minister, who was Brian Mulroney at the time. As this is all coming out we had as a junior lawyer from Montreal, Paul Grondan. He was bilingual and he also spoke German. He came to me and he said, "Commissioner I want to tell you something: I speak German and Schreiber's notes are in German. PM \$400 000 does not refer to the Prime Minister. The words "per machine" in German start with a P and an

M. This is the payment of a commission to Schreiber on the sale of an Airbus to Air Canada. This has nothing to do with Mulroney."

So we dealt with the facts, and I made my recommendations and there it was. Let me just say that I think the making of the recommendations and the report are the most important part of the role of the Commissioner. Justice Cory in *Sophonow* has made recommendations that I read just about every time I start a criminal trial, especially where eye witness identification is involved or photo line ups are involved. And also on the use of jailhouse informants, because he has written the text and I hope every judge in Canada reads that over and over and over again. If they do, they will play a role in avoiding wrongful convictions, which is something that all of us that toil in the vineyards of the system of justice should be trying to achieve on a day to day basis. Thank you very much.

## VII. QUESTION AND ANSWER PERIOD

**Bruce MacFarlane:** Thank you very much Justice Oliphant, we have some time for questions, and all of the panelists have indicated that they are prepared to take questions if there are any.

**Question:** I have a question regarding the nature of an inquiry versus the nature of a criminal trial which would be an adversarial system. How would you compare it to an inquiry, how do you view your role as counsel?

**Richard Wolson:** Well when I represent an accused for instance, I advocate for that accused. I try to take all the evidence and diminish it or enhance it if I can. The simple way is to accentuate the positive and to diminish the negative. When you are doing a public inquiry, you have no mandate in a sense, the mandate you have is the Order-in-Council, but my job as Commission Counsel is to simply put everything before the Commissioner in a fair and public way so that I would not take a side. I would not become involved in one side or the other. If these were arguments to be made to the Commissioner during the Inquiry, the various parties would advance them, and the Commissioner make a ruling. Commission counsel should be impartial and be seen that way. I can say a lawyer as Commission Counsel has a lot of power; the reputations of various people are involved. I wanted to use that power to try and level the playing field. I have never been a prosecutor, but prosecutors have that same power. I have seen too often that it has been

abused. For me as Commission Counsel, I wanted it said at the end of the day that I did what I did in a fair way or at least that's how I perceived my role.

**Justice Oliphant:** I would just like to add to that from my perspective, if I could. Commission Counsel are counsel to the Commissioner, often referred to as the alter ego of the Commissioner. Where the Commissioner has to be impartial, has to be seen as impartial, so does Commission Counsel have to be impartial, have to be seen as impartial. So Richard has told you that when an issue arose in the inquiry that he and I did, and the Commission of Inquiry is not adversarial but it can certainly run it in situations like that in ours because you had two guys who were bitter opponents, Commission Counsel would not make a submission. No closing submission was made, except Richard made a closing statement, a basic statement about the Commission of Inquiry and what had occurred. But he took one other step to demonstrate the impartiality that he had shown from day one and that was he gave an undertaking to all counsel involved that my Senior Counsel would not help me write my report. That is contrary to a lot of cases, a lot of commissions the lawyers actually write the report or at least participate to a large degree in writing the report. Richard undertook to ensure that would not occur in our case. Which of course meant I was out to dry, to write the report myself. That was an interesting experience let me tell you. With days starting at 6 in the morning going to about 9 at night with a half hour lunch at my desk. Day after day after day; starting at about the first of February 2010 and going to the end of April. It was a pretty arduous exercise. But that's the big difference. The other thing you should know is being Counsel to the Commissioner we met on a daily basis, and at a trial the judges do not meet with counsel in private. At the Commission we met several times a day, I sat around the big table with the lawyers dealing with issues of strategy, etc. Which is totally different, it is a real different experience for lawyers and for the person heading the inquiry, if that person is a judge.

**Richard Wolson:** I can tell you in Sophonow's Inquiry when the Inquiry was over I said to Peter Cory what can I do? He said your job is done. I said there must be something you want me to do. With Peter I saw the second draft of his report, he asked me to comment only as to facts, as he wanted to make sure he had the facts right. The same was true with Justice Oliphant in the Mulroney inquiry. For me I prefer it that way, I think it goes the distance to

demonstrate that I want to prepare and put it before the Commissioner and let them deal with it after that.

**Question:** My question is for Mr. Burchill, given that you have dual perspectives, that of a police officer and a lawyer, do you feel that the type of training that law students undertake in law school with courses like *Miscarriages of Justice*, could it help police officers prevent errors in cases like *Sophonow*?

**John Burchill:** Well I can tell you it was my experience as a policeman, and I certainly had more experience dealing with Mr. Simons who is with Mr. Wolson's law firm and some of the Crown attorneys that gave me the perspective made me want to go to law school to learn more to help me be a police officer. The goal at the beginning was not to end up leaving the police service to become a lawyer. I wanted to learn more about my own job from what I saw going on in the courtroom that I thought perhaps I was missing in policing, and try to understand things. For me it was the other way around.

I can tell you that certainly from this Inquiry it changed the way the Winnipeg Police Service does their practices: they videotape all their statements with the accused and with very important witnesses; the way they do their photopacks; they do not do line ups anymore more really, the physical ones; the jail house informants, it came from a provincial policy but its adopted with the City of Winnipeg. So it changed a lot of our policies that will hopefully prevent some of the things that had happened in the past. It would not hurt but for me it was the other way around.

**Question:** Are there mechanisms within the police or Department of Justice to look into cases again?

**John Burchill:** Within the police service, something would need to prompt it because my experience has been that the police were pretty convinced that Thomas Sophonow was the person. They went to three trials. And if he had not written a letter when he did to the right person, who thought maybe it should be looked at, I don't know that it would have been.

**Richard Wolson:** At the time of the Sophonow case, the climate in this city was much different from where it is now: Crown and Defence had a cool relationship, not cool in the modern sense but cool in terms of distant. It was

frosty. Crown attorneys, I would say, did not have a good view of defence counsel. And the police on the other hand had a close relationship with the Crown. You would have a jury trial and the jury would go out and the police and the Crown would go downstairs in the Robing room together. It was unbelievable the connection between the two, it was actually one not two. Since Sophonow, time has changed matters. The Crown and Defence have a much better relationship than ever before. The police and the Crown have a much more distinct role and they do not have the same friendship that they used to. I would say things have changed markedly. The Commissioner is reminding me to mention that every year we have a Crown-Defence conference, which is attended by lawyers (Crown and Defence), policemen, and judges. It is a product that came out of the Sophonow Inquiry<sup>57</sup> in terms of humanizing the whole process a little more. I must say while I have done defence work my whole life, I have strong positive feelings towards the police. I have no problem with police officers. They have a most difficult job. The problem in the Sophonow investigation was that errors were made and major errors of judgement. While police have a difficult job, they can surely do much better than they did in the Sophonow investigation.

**John Burchill:** What I might point out, when I started as a policeman it might be hard for you to believe if you have been down to the Remand Centre right now. There is the Public Safety building as it is now, on the third and fourth floor were the men's and women's jail and the courts were there. The defence did not have their offices there but the Crown did, the police interacted on a regular basis with the Crown. Some of those relationships go back historically, that is where the preliminary courts were, the jails were, and the police departments were all in one building. I was never in those jails but I cannot imagine what those jails were like. You look at the size of the Remand Centre now and I cannot imagine the jails crammed in those two floors of the Public Safety Building.

**Richard Wolson:** Well Thomas Sophonow spent so much time in the Remand Centre as a prisoner, waiting for his trials. Because compensation was an issue for Commissioner Cory all of those issues had to be explored. Now I had been going to the Remand Centre for some time, it was just a brutal place. But one of the guards that was there testified that it was a hell

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<sup>57</sup> *Sophonow Inquiry*, *supra* note 9 at 60.

hole; hell hole was an understatement, and it was right in the police station so the police could have access to the accused. The police had a great relationship with Crowns and the jailers. It was not a good time. Maybe a good time was had but it was not a good time for justice.

**Bruce MacFarlane:** I would just like to add one further comment about changing of cultures which is hard to do. One of the products of the Sophonow Report was an emphasis on Crown and Defence liaising more closely, an annual event of some description. I was not sure where that was going to go but it blossomed into a huge event every September where we have the Crown, Defence, RCMP, city police, correctional officials just about everyone involved in the criminal justice system together for two to three days. The agenda is developed jointly between Crown and Defence. A few years ago we invited Brian Stephenson, who is a leading lawyer in the United States in Alabama and New York and he looked around the room – he was one of the keynote speakers – he looked around the room and saw judges and defence lawyers and police and Crown, and said where I came from we could not even get all you in the room, let alone organize an event like this. It was very telling that we have changed the culture in this province. I am not sure how other provinces are faring but that was a direct result of the Sophonow Report. I would like to thank all our panelists and all of you for coming out on a Friday afternoon.