The Commission
on
Proceedings Involving
Guy Paul Morin

EXECUTIVE SUMMARY

and

RECOMMENDATIONS

The Honourable
Fred Kaufman, C.M., Q.C.

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EXECUTIVE SUMMARY

Chapter 1: The Scope and Nature of the Inquiry

The Background

Christine Jessop, a nine-year old girl, "who loved life, her family, school and sorts," was murdered on or after October 3, 1984. Guy Paul Morin, her next-door neighbour, was charged with her murder. He was acquitted in 1986, but a new trial was ordered by the Court of Appeal for Ontario and this Order was affirmed by the Supreme Court of Canada. A new trial was held, and Mr. Morin was found guilty of first degree murder. He appealed, and on January 23, 1995, on a basis of fresh evidence tendered jointly by the Crown and the defence, he was acquitted of the charge. "This course of events," as the provincial cabinet later said, "has raised certain questions about the administration of justice in Ontario."

Accordingly, on June 26, 1996, the Lieutenant Governor in Council directed that a Public Inquiry be held, and a commission was issued appointing the Honourable Fred Kaufman, Q.C., a former judge of the Quebec Court of Appeal, as Commissioner under the designation " The Commission on Proceedings Involving Guy Paul Morin."

The Mandate

The Order in council directed the Commission to "inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop. "The Commission was also directed to "make such recommendations as it considers advisable relating to the administration of criminal justice in Ontario." The Order in Council specified that the Commission shall "perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization." This prohibition has been observed in the Report.

The mandate of the Commission was threefold: investigative, advisory and educational. The investigative role required the Commissioner to determine, to the extent possible, why the investigation into the death of Christie Jessop and the proceedings which followed resulted in the arrest and conviction of an innocent person. The advisory role required the making of recommendations for change intended to prevent future miscarriages of justice. The educational role meant that the public inquiry should serve to educate members of the community as to the administration of justice generally and as to the criminal proceedings against Guy Paul Morin in particular.

The Hearings

Public hearings began on February 10, 1997, and continued for 146 days. One hundred and twenty witnesses were called. The Commission also considered the transcripts of evidence and exhibits from both trials, as well as documents filed with the Ontario Court of Appeal. These totaled well over 100,000 pages. Twenty-five parties were given either full 'standing' , or standing limited to particular factual issues or to systemic issues only. The media were present throughout the proceedings.

The Inquiry was divided into eight phases to address the relevant issues raised. Phase VI of the Inquiry heard systemic evidence - that is, evidence from witnesses generally unconnected to the Morin proceedings who could cast light on the issues which transcend the facts of the Morin case and extend to the administration of criminal justice in Ontario generally. This evidence came from experts and participants in the administration of criminal justice from around the world. The Commissioner heavily drew upon this systemic evidence, together with the submissions of all parties, in framing his 119 recommendations for change.

The Innocence of Guy Paul Morin

Guy Paul Morin was 25 years old at the time of his arrest. He had no criminal record. He lived with his parents in Queensville, Ontario. He had a Grade 12 education. He had attended various courses in auto upholstery, spray painting, gas fitting, air conditioning and refrigeration.

He worked as a finishing sander with a furniture manufacturer in October, 1984, when Christine Jessop disappeared. His acquittal by the Court of Appeal on January 23, 1995, was based on fresh DNA evidence, which established that he was not the donor of semen stains found on Christine Jessop's underwear. Senior Crown counsel and then the Attorney General of Ontario conceded that Mr. Morin was innocent, and apologized to him for the 10-year ordeal he and his family had undergone. Ultimately, compensation was paid to him and his parents by the Government of Ontario.

The Facts of the Case

The Jessops and the Morins were neighbours in the small town of Queensville, about 35 miles north of Toronto. On the afternoon of October 3, 1984, the school bus returned Christine to her home at about 3:50 p.m. No one was there. Her mother, Janet, had taken Christine's older brother, Ken, to the dentist in Newmarket. The precise time of their return to the Jessop home was a major issue at the second trial. Guy Paul Morin left work at 3:32 that afternoon and could have arrived home no sooner than 4:14 p.m.. Accordingly, the Jessop's time of return had an impact on any 'window of opportunity' for Mr. Morin to have committed this crime. Mr. Morin gave evidence to demonstrate that he arrived home well after the Jessops and therefore had no opportunity to abduct Christine Jessop. The prosecution vigorously disputed his alibi and suggested that he changed his time of arrival in various statements to avoid responsibility for the murder.

Christine was not in the house when the Jessops returned, but there was no immediate cause for alarm. But when she failed to show up by early evening, Ms. Jessop called the police. A search of the area was organized and it continued for several days. No trace of Christine was found. As time passed, concerns heightened that she had been the subject of foul play. York Regional Police conducted the investigation into her disappearance.

Her body was found on December 31, 1984, near the town of Sunderland in Durham Region, about 56 kilometers east of Queensville. Her body was on its back with her knees spread apart in an unnatural position. An autopsy determined that she had been stabbed in the chest several times and this had been the cause of death. The presence of semen on her underpants irresistibly suggested that she had been sexually assaulted. Her body was badly decomposed, and death could have occurred three months before its

discovery. Because her body was found in Durham Region, the Durham Regional Police Service took charge of the case.

John Scott prosecuted Mr. Morin at his first trial. Susan MacLean assisted Mr. Scott. Clayton Ruby and Mary Bartley defended Mr. Morin. Leo McGuigan was the lead prosecutor at the second trial, assisted by Alex Smith and Susan MacLean. Jack Pinkofsky, Elizabeth Widner and Joanne MacLean defended Mr. Morin. Brian Gover was leading prosecutor during a lengthy motion by the defence to stay the proceedings at the second trial.

Chapter II: Forensic Evidence and the Centre of Forensic Sciences

Background

Phase II of the Inquiry examined the role that forensic evidence played in Guy Paul Morin's criminal proceedings and, more particularly, the role played by the Centre of Forensic Sciences.

The Centre of Forensic Sciences (*CFS*) in Toronto is the principal laboratory where forensic examinations are conducted for criminal investigations in Ontario. It is publicly funded and accountable to the Ministry of the Solicitor General. Two CFS forensic analysts, Stephanie Nyznyk and Norman Erickson, gave evidence as to hair and fibre comparisons at the instance of the prosecution.

The prosecution relied on the hair and fibre findings made by these scientists to demonstrate that there was physical contact between Christine Jessop and Guy Paul Morin, and that Christine was transported in the Morin Honda to her death by Mr. Morin. The evidence was said to refute Guy Paul Morin's denial that he had any physical contact with Christine and his specific assertion that Christine had never been in the Honda. Stephanie Nyznyk testified at both trials; Norman Erickson at the second trial only.

The Hair Findings

When Christine Jessop's body was discovered , a single dark hair was found

embedded in skin tissue adhering to her necklace. This came to be known as the ‘ necklace hair’. This hair was not Christine’s and it was presumed to have come from her killer. This hair was said to be microscopically similar to Guy Paul Morin’s hair and *could have* originated from him. After Guy Paul Morin’s first trial and before his second, an analysis of hairs belonging to Christine Jessop’s classmates revealed that two classmates had hairs which were also microscopically similar.

Three hairs found in Mr. Morin’s car were said to be dissimilar to Mr. Morin’s hairs. It was said that these were similar to Christine Jessop’s hairs and *could have* come from her.

The Commissioner found:

- Properly understood, the hair comparison evidence had little or no probative value in proving Mr. Morin’s guilt. Generally, hair comparison evidence (absent DNA analysis) is unlikely to have sufficient probative value to justify its reception as circumstantial evidence of guilt at a criminal trial.

- Ms. Nyznyk did not adequately or accurately communicate the limitations upon her hair comparison findings to police and prosecutors prior to the second trial.

- Prior to Guy Paul Morin’s arrest, Ms. Nyznyk conducted a hasty, preliminary comparison of the necklace hair and Guy Paul Morin’s hairs in the investigators’ presence. She communicated a preliminary opinion to the officers. That opinion was overstated and, to her knowledge, left the officers with the understanding that the comparison yielded important evidence implicating Mr. Morin.

- Had the limitations on Ms. Nyznyk’s early findings been adequately communicated by her, Mr. Morin may not have been arrested when he was - if, indeed, ever.

- Detective Bernie Fitzpatrick testified about Ms. Nyznyk’s early hair and fibre findings at Guy Paul Morin’s bail hearing. His evidence was inaccurate. This was not deliberate, but can be explained. In large measure, by the inadequate way Ms. Nyzynk’s findings (and their limitations) were communicated by her.

- The hair comparison evidence was misused by the prosecution in its losing address at the second trial (though the Commissioner did not find that this was dine malevolently). Particulars of this misuse are contained in the Report.

The Fibre Findings

Fibres were collected from the taping of Christine Jessop's clothing and recorder bag found at the body site, from the taping and vacuuming of the Morin Honda and from tapings of the Morin residence. Many thousands of fibres (perhaps hundreds of thousands) were examined. *Several* became significant. Ms. Nyznyk and Mr. Erickson testified at the Morin criminal proceedings that several of the fibres from the Morin-related locations were similar and *could have* come from the same source as several fibres found at the body site.

The Commission found that the similarities, even if they all existed, proved nothing. His findings included:

- The fibre evidence was contaminated within the Centre of Forensic Sciences. The timing and precise origin of the contamination cannot not be determined. However, it remains possible that this contamination tainted Ms. Nyznyk's earliest findings. No inferences can safely be drawn from any alleged fibre similarities, given the existence of this in-house contamination.

- This contamination was known to Ms. Nyznyk and Mr. Erickson prior to the first trial and withheld by them from the police, the prosecution, the defence and the Court. This may have been done to avoid embarrassment to themselves and to the CFS; it was not done out of personal malice towards Guy Paul Morin or with any desire to convict an innocent person. They believed, rightly or wrongly, that the contamination was unrelated to Ms. Nyznyk's original findings, but this afforded them no excuse.

- There was no real interest in documenting the contamination, how it had occurred, whether it had affected other cases within the Centre and how it might be prevented in the future. Indeed , Ms. Nyznyk declined to retain

- The existence of in-house contamination was known generally within the biology section of the CFS.

- Further examination on already contaminated fibres was ordered by Mr. Erickson for possible use at the second trial. This further examination yielded potentially exculpatory findings which were not communicated by Mr. Erickson to the prosecution or to the defence.

- Apart from internal contamination, the fibre similarities were not probative in demonstrating direct contact between Christine Jessop and Guy Paul Morin - instead, they were equally explainable by random occurrence or environmental contamination; the number and nature of the fibre similarities did not support the prosecution's position.

- Ms. Nyznyk and Mr. Erickson failed to communicate accurately or adequately the limitations on their findings to the police, the prosecutors and the Court.

- Mr. Erickson (and likely Ms. Nyznyk provided the prosecution with a published study on fibre transference (the Jackson and Cook study) which did not support an inference that the fibre similarities in the Morin case were at all significant in proving direct contact.

- The study, properly understood, did not support the case for the prosecution. The details of the study were irrelevant to the Morin proceedings. They were elicited from both CFS scientists. Mr. Erickson and Ms. Nyznyk failed to accurately or adequately communicate the limited relevance of the study to the prosecutors or to the Court.

- The fibre findings and, more particularly, the Jackson and Cook study, were misused by the prosecution in its closing address. Although the Crown's closing address, in some respects, took the study farther than anything that the scientists had said about it, the Commissioner did not find that the study's misuse by the prosecution was deliberate.

The Commissioner also reflected the fact that original evidence was lost at the CFS between the first and second trials. Finally, he noted that certain terms, such as 'match' and 'consistent with' were used unevenly and were potentially misleading. The use of these terms contributed to misunderstanding of the forensic findings.

Conclusions

The contribution of the CFS to Mr. Morin's wrongful arrest, prosecution and conviction was substantial. Hair and fibre evidence elevated Guy Paul Morin to prime suspect status; formed the justification, in large measure , for his arrest and for the searches of his car and home; was cited by the Crown to support his detention pending trial; was cited by the Ontario Court of Appeal and Supreme Court of Canada as evidence relevant to their consideration of whether his acquittal should be overturned; formed a substantial part of the case against Guy Paul Morin at his first and second trials; and undoubtedly was relied upon by the jury at the second trial to convict him.

The Centre of Forensic Sciences plays a vital role in the administration of criminal justice in Ontario. It cannot perform its duties unless its scientists are objective, independent and accurate. Further , they must be perceived to be independent by the participants in the criminal justice system. A large number of CFS scientists perform their work with distinction. On the other hand, it would be a serious mistake to assume that the failings identified are confined to two scientists. A number of those failings are rooted in systemic problems, many of which transcend even the CFS and have been noted in cases worldwide where science has been misused. Dr. James Young, Assistant Deputy Solicitor General with responsibility for the CFS, apologized on behalf of the CFS for any role in Guy Paul Morin's conviction and advised the Commissioner that he had not appreciated the depth of issues which would arise at the Inquiry. He outlined corrective measures undertaken by the CFS , a number of which were in direct response to the problems identified at the Inquiry. The ministries of the Attorney General and Solicitor General also introduced a new policy guideline addressing the relationship between CFS scientists and prosecutors and the responsibilities of each. The Commissioner commended these initiatives. Recommendations 2 to 35 further addresses the systemic problems identified at the Inquiry.

'Indications' of Blood

The prosecution also tendered CFS expert evidence that there were microscopic 'indications of blood' in the Morin Honda. This was a 'presumptive' or ' preliminary' test which did not prove that there was, indeed, blood in the vehicle, let alone human blood, let alone Christine Jessop's blood. The Commissioner found that Mr. White, the

CFS serologist, accurately articulated the limitations upon his findings. However, the evidence did not have sufficient probative value to justify its reception.

Chapter III: Jailhouse Informants

Background

Phase 1 of the Inquiry examined issues arising from a confession to the murder of Christine Jessop allegedly made by Guy Paul Morin to Robert Dean may, a fellow inmate in Whitby Jail; it was allegedly overheard by Mr. X., an inmate in the next cell. Mr. X's identity is the subject of a publication ban imposed by the trial judge and upheld by the Ontario Court of Appeal.

May has a substantial criminal record for crimes of dishonesty. He admitted that he had a problem with lying in the past and had lied to the police and correctional authorities. He wanted badly to be released from jail in 1985 and would do whatever was necessary to accomplish this. He offered to implicate other inmates. (So did Mr. X.)

May was diagnosed by mental health experts at the second trial as a pathological liar. He had a deficient social conscience and was skilled in deceiving others. After the second trial, May recanted his trial evidence. He told a number of people that he had lied about having heard Mr. Morin confess and that he had committed perjury at the trials. Then he attempted to recant his recantations and took the position that his evidence at the trial about the purported confession was indeed true. The Commissioner found that he 'spun a web of confusion and deceit about the issue of the confession'.

Mr. X has a lengthy criminal record for sexual offences, particularly for offences against young children. He was diagnosed in 1988 as having a personality disorder with sociopath tendencies. At the second trial of Mr. Morin, an expert testified that this is characterized by exaggeration, lying, suggestibility and disregard for social norms. Mr. X. agreed that he has lied to the police and correctional authorities in the past. He told the Inquiry that at times he apparently lost contact with reality; he heard voices in his head which, sometimes, were so loud that he thought his head was going to explode. He explained his history of sexual misconduct by the fact that he heard the voice of his uncle telling him to commit the illegal acts. X also bargained with the police for his information about Morin's purported confession. In June 1985, he was desperate to get out of the Whitby Jail and in the Temporary Absence Program. He told the police he would give them anything they wanted if they got him into a halfway house. After the first trial, he was convicted of another sexual assault. The Commissioner found that Mr. X is an untrustworthy person whose testimony cannot be accepted on any of the issues before the Inquiry.

Both May and X claimed that they reported the confession and gave their evidence because they were morally outraged at the crime committed by Morin. The Commissioner rejected that motivation and found that they were both seeking to further their own ends when they reported the confession and testified. The Commissioner accepted Guy Paul Morin's evidence that he did not confess to Mr. May.

Inspector Shephard was candid in acknowledging that a number of things that the informants said and did should have been more carefully scrutinized and investigated. The Commissioner found:

- Apart from their core evidence, some of the things that the informants said were patently unreliable. The prosecutors at the second trial did not *objectively* assess the reliability of these informants. When confronted prior to the second trial with the informants' personal records, which showed their diagnosed propensities to lie, emphasis was placed upon denigrating or minimizing this evidence, rather that introspectively questioning whether the informants' reliability should be revisited.

- Having said that, the prosecutors did regard May and X as truthful on the critical issue. There was some support for this view (most particularly, both informants passed polygraph tests though the polygraphist reflected the danger in placing undue reliance upon those results.) The prosecutors' views were no doubt coloured by their genuine views on Guy Paul Morin's guilt; as a result, evidence which undermined the informants was more easily discarded and largely inconsequential evidence became confirmatory. However, no existing law or ethical standards prevented the prosecutors from calling even suspect evidence, so long as they did not know that the evidence was perjured. There was no misconduct in the prosecutorial decision to call these informants. Nonetheless, the decision to call these witnesses raises important systemic issues.

Tunnel Vision

The commissioner also found that certain parties at the Inquiry continue to suffer from tunnel vision that is ‘ staggering ‘.

Mr. McGuigan still believes that the informants were telling the truth and that Guy Paul Morin lied about his ‘confession’. Detective Fitzpatrick holds similar views. Indeed, though Mr. McGuigan believes that Mr. Morin is innocent, he also believes that he and his family deliberately concocted a false alibi. An innocent person has been known to tender a false confession - though mostly in the context of a police investigation. An innocent person has been known to tender a false, concocted alibi. I have found that Mr. Morin did not confess to May; I also have no doubt that Mr. Morin and his family (however imperfectly conveyed) did not concoct his alibi. The fact that Mr. Mc Guigan still accepts Mr. Mayu’s evidence, in the fact of Mr. Morin’s proven innocence, May’s recantations, May’s non-rehabilitation, and most importantly, in the face of May falsely alleging that McGuigan himself was a conspirator in framing Morin is ‘tunnel vision” in the most staggering proportions. The fact that Detective Fitzpatrick still accepts Mr. May’s evidence, in the face of these facts and May’s false claims that Fitzpatrick had threatened to kill May, etc. demonstrates an equally persistent “tunnel vision’. These findings of ‘tunnel vision also explain the need for the recommendations which later follow.

The Offer

At some point during the second trial, both informants were given the opportunity to choose not to testify at the trial. Both rejected the offer. This information was not disclosed to the defence. It only became public knowledge after Mr. May divulged it in his response to the last question asked of him in re-examination by the prosecution. Mr. X. then testified and also divulged it during his cross-examination. It was later used to full effect in Mr. McGuigan's closing address to demonstrate that the witnesses were testifying voluntarily and at their own option and therefore unmotivated to lie.

The Inquiry was told by the three prosecutors at the second trial that the offer was made for compassionate and humanitarian reasons only and was not an attempt to artificially bolster the credibility of the informants. Mr. McGuigan testified that he brought up the idea of making the offer to the informants after he learned of the abuse that Mr. X had suffered as a result of testifying at the first trial. He was mindful of his obligation to be kind and gentle to witnesses and knew that X would be dealt with harshly on cross-examination, as evidenced by the tenor of Mr. Pinkofsky's cross-examinations to that point in the trial. The idea first arose in mid-December 1991, shortly before the Christmas recess. Mr. McGuigan may have expressed his motivation by saying that he "was moved by the Christmas spirit". It was said that the offer was made to May as well so that he would not complain that he was being treated worse than Mr. X. Detective Fitzpatrick was delegated to speak to May and X. He told them that the Crown "might" give them the option not to testify. Both said they would decline such an offer. Accordingly, Fitzpatrick reported back that both elected to testify. Despite this, the offers were again made "formally" by Crown counsel to each informant.

Mr. McGuigan testified that the offer was not to come out in evidence at the trial. He suggested at one point that the witnesses would have been told not to mention the offer. Ms. MacLean's evidence, which was inconsistent with Mr. McGuigan's, was that the prosecutors discussed that the witnesses had the right to say they were there voluntarily, and she so advised Mr. X when he raised the matter with her in trial preparation. (She correctly noted that telling Mr. X not to mention the offer would be tantamount to telling him to lie.)

During his opening address on November 12, 1991, Mr. McGuigan had told the jury that both informants would be called as witnesses to Morin's confession. He described the informants and their anticipated evidence, including the words purportedly uttered by Guy Paul Morin. Mr. McGuigan testified that he forgot about his opening statement when he authorized the offers. He conceded that if the offers had been accepted and neither of the informants testified, a mistrial might have been caused because of his mention of the confession in his opening address, but that eventuality never occurred to him.

In lengthy reasons, the Commissioner found that the offers were made "for tactical reasons with the hope or expectation that their rejection would be revealed to the jury, and in the knowledge that, if revealed, it would enhance the credibility of the informants." He found that the offers were not intended to be unconditional and genuine as Mr. McGuigan claimed they were, He noted, *inter alia*, that:

- Mr. McGuigan's position that he never thought about a possible mistrial was inconsistent with his wide trial experience and his submissions to the Court on January 20, 1992, when he made reference to his earlier opening address on this very topic.

- On Mr. McGuigan's interpretation of the offers, it was possible that only Mr. May might have accepted it, leaving the prosecution with nothing but the evidence of the person who simply overheard the confession; it is inconceivable that Mr. McGuigan would not have foreseen this possibility.

- Had the informants accepted the offer, it would have deprived the Crown of the only direct evidence against Guy Paul Morin and might have resulted in his acquittal; there was a real possibility that the Jessops and the public would have been outraged if a murderer of a nine-year-old girl went free because the prosecutors tendered an offer out of compassion. None of the prosecutors considered any of these consequences.

- May and X were not persons likely to evoke the degree of compassion put forward by Mr. McGuigan at the Inquiry. Indeed, it was uncontested that neither of these witnesses had even asked the prosecutors to excuse them from testifying.

- Mr. McGuigan contemplated that the informants would be challenged by the defence on their motivations for testifying. If it were disclosed to the jury that such witnesses declined an offer permitting them not to testify, it would seriously undermine such a line of attack. It was inconceivable that it never occurred to Mr. McGuigan until the offers were revealed in evidence that the declining of the offers would enhance the informant's credibility.

The Commissioner also found that Detective Fitzpatrick, an experienced officer, "knew that the offers were not made as the result of compassion for X and a consequent need to treat May in the same manner as X." If it appeared likely that the two informants (or either of them) would accept the offers, Mr. McGuigan would have ensured that the offers were not pursued. He sent Detective Fitzpatrick to find out what their reaction would be. "Apparently, the informants gleaned the real message because both of them purported to reject the offers, although one would have thought that they would receive such news with sighs of relief at the opportunity not to be exposed to intensive cross-examination".

The Commissioner considered the respective involvement in the making of the offers of the three Crown attorneys. He found that the evidence did not warrant a conclusion that Mr. Smith and Ms. MacLean, having regard to their junior position in relation to Mr McGuigan, were aware that the offers were not genuine. When Mr. McGuigan said that he was imbued with the Christmas spirit, Ms. MacLean may have accepted the truth of that statement "because of her respect for him and his stature".

Recommendations

The informants were motivated by self-interest and unconstrained by morality. It follows that they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed to May was easy to make and difficult to disprove. These facts, taken together, were a ready recipe for disaster. The systemic evidence emanating from Canada, Great Britain, Australia and the United States demonstrated that the dangers associated with jailhouse informants were not unique to the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informants.

During this Inquiry, the Crown Policy Manual was changed to reflect a new policy on in-custody informers. The commissioner found that Crown policy to be a laudable first step in addressing difficult policy issues. Recommendations 36 to 69 address the systemic issues arising out of the use of jailhouse informants in criminal proceedings.

Chapter IV: The Investigation by the York Regional Police

Phase III of the Inquiry examined the investigation conducted by York Regional Police into Christine Jessop's disappearance.

The Commissioner found certain failings in the investigation by York Regional Police. These included:

- The failure to preserve evidence at the Jessop residence.
- The failure to 'dust' the residence (and particularly Christine Jessop's room) for fingerprints either to preserve her fingerprints or determine if foreign fingerprints were present. The house was not fingerprinted even in the ensuing weeks following Christine's disappearance.
- The failure to conduct an in-depth canvassing of the Queensville homes to meticulously document and clarify the memories of prospective witnesses at the earliest opportunity.
- An inadequate system to ensure that all reports were read and processed in a timely way. The potential for leads and follow-ups to slip through the cracks was present and, unfortunately, this did occur. There was a failure to systematically prioritize and follow up on " hot leads." In one case (the sighting of a man who appeared to keep a child forcibly in a car) the follow-up came 12 days after the information was passed on to the police.

- The indexing system for reports was archaic. It did not permit an officer to search for all apparent sightings of Christine Jessop or vehicle sightings, without having the actual name of the author of each report or the name of the claimant for the sighting.

The Commissioner considered at what point a missing person investigation should be converted into a serious crime investigation. He concluded that this depends on the circumstances of each case, but he pointed to events which should have alerted the police to the possibility that a major crime was involved sooner than they were. The Report states: " The problem here was not that the police characterized their initial involvement as a missing person investigation. The problem was that the officers did not conduct themselves mindful of the possibility that they were dealing with a serious crime." The Commissioner did note, however, that " the searches were wide-ranging and civilians and police were well mobilized in the circumstances." He also reflected that "whatever the deficiencies in the search, police and civilian participants spared no effort and showed great dedication to this task."

The Commissioner concluded that the investigation by York Regional Police was "'flawed," resulting in "missed opportunities, an inadequate investigation, at times, of potentially significant leads, and a failure to document important information." He could not determine whether the true perpetrator of the crime would have been apprehended if the investigation had been differently conducted.

The Report recognizes that "there have been significant changes in the organization and conduct of an investigation since then," but further improvement is possible. Recommendations 70 and 72 address these issues.

The York Regional Police Association expressed serious concern that the commitment backed by financial resources, shown in Durham to enhanced training and quality assurance for Durham officers has not been shown in York Region. The Commissioner's recommendations address this concern as well.

Chapter V: The Investigation by Durham Regional Police and the Prosecution of Guy Paul Morin

The Body Site

On December 31, 1984, citizens were walking on a tractor path in the Durham Region near their home. They spotted something off the path. It was the remains of Christine Jessop. They contacted the Durham Regional Police who came to the scene. Her body was on its back and only partially clothed. A sweater was pulled over head. Panties and blue corduroy pants were near her feet.

Sergeant Michael Michalowsky, of the Durham Regional Police Service arrived at 2:10 p.m. He was the chief identification officer, responsible for the collection and preservation of original evidence found at the scene. Inspector Robert Brown, then in charge of Durham's Crimes Against Persons squad, took charge of the investigation. Officers Shephard and Fitzpatrick ultimately became the lead investigators, once Guy Paul Morin was identified as the suspect.

A severe snowstorm was predicted for that evening and Detective Fitzpatrick suggested that a tarpaulin be used to cover the scene until the next day. Unfortunately, his suggestion was not followed. The area around the body was cordoned off. Officers were organized to search the ground around the body site on their hands and knees. No formal 'grid search' was conducted. The Commissioner found inadequacies in the conduct of the search, which was not completed when darkness fell that night.

Sergeant Michalowsky

In March 1990, during the preparation for Guy Paul Morin's second trial, Crown attorney Susan MacLean learned that Sergeant Michalowsky had two notebooks for the Jessop investigation, containing a number of divergent entries for the same events. Following an investigation by the Ontario Provincial Police, Sergeant Michalowsky was charged with perjury and attempting to obstruct justice in connection, *inter alia*, with his evidence at the first trial relating to his notebook(s) and in relation to his evidence that a cigarette butt tendered as an exhibit at the first trial was the one found at the body site.

The charges were judicially stayed in 1991 for reasons relating to Sergeant Michalowsky's health. The Commissioner ruled, after receiving independent medical evidence, that Sergeant Michalowsky would not be compelled to testify at the Inquiry.

Smoking Paraphernalia Found at the Scene

It was uncontested that Guy Paul Morin was not a smoker. Evidence that the perpetrator was a smoker would support his innocence. During the first trial and, to a greater extent, the second trial, the defence focused on the evidence found at the body site which, arguably, supported the inference that the perpetrator had left behind smoking paraphernalia: a cigarette butt or butts, a lighter, and possible a cigarette package. The prosecution took the position that these items were irrelevant to the identity of the killer and, indeed, could be explained, in large measure, by searchers leaving items at the scene. The Commissioner found that the smoking paraphernalia identified at the body site may have had absolutely nothing to do with the identity of the perpetrator , but bore upon the quality of the police investigation and, further, upon the quality of some of the testimony which was elicited from the officers who were confronted with this issue at trial.

At least one cigarette butt, and possibly a second, was found at the body site on December 31, 1984. Constable Cameron had attended at the body site that day and butted out a cigarette while on duty. At the first trial, Michalowsky produced the cigarette butt which purportedly was found at the scene. It was marked as an exhibit. Cameron testified at the first trial as to his smoking at the body site. The position of the Crown was that the cigarette butt found at the scene could be explained by Cameron's actions. The Crown took this position in good faith. Subsequently, Cameron determined that the cigarette butt that was found could not have been his. That butt was located before Cameron arrived at the scene. It was of a different brand and was found at a different location than the butt Cameron had left behind.

At the second trial, the Crown conceded that the cigarette butt introduced into evidence at the first trial was not the butt found at the scene and introduced as an exhibit.

Another officer allegedly told the OPP investigating Michalowsky in 1990, that he had found a cigarette package at the scene. He later did not adopt that position, but suggested that he may have and so advised an identification officer shortly after his return to the station. Then there was evidence that the lighter may have been found in a different location than that in which the first officer was searching. The evidence of various officers 'developed' or 'changed' as the criminal proceedings continued and the differences between officers' recollections narrowed.

The Commissioner found the quality of the evidence before the Inquiry bearing upon the smoking paraphernalia to be quite unsatisfactory at times. The 'development'

seen a milk carton instead. Michalowsky, in a second notebook, attributed the finding of a milk carton to yet another officer who, however, truthfully denied that he found anything at the scene.

Yet another officer found a cigarette lighter at the scene several days after the initial search at the site. He bagged this lighter and said that he turned it over to Michalowsky. Michalowsky denied that he received a lighter from anyone and it was never produced, Another officer was to claim that he had dropped the lighter at the scene on December 31, 1984, of the evidence and the absence of contemporaneous records *before* Guy Paul Morin was arrested or became a suspect invite concern that details later supplied are tailored to support the prosecution's case or refute the defence position.

Michalowsky's Court Attendances

At the second trial, Mr. Justice Donnelly ruled that Michalowsky should testify at the instance of the defence, but that special conditions would apply to his evidence. Michalowsky's doctor was to sit beside him throughout his evidence and monitor his health and the need for recesses; no one, including the trial judge, would robe; everyone would remain seated throughout, including the questioner, counsel and judge would sit at the same level as the witness; Michalowsky's back would be placed to the audience and a screen was to be placed between him and the spectators. The videotape of his evidence was shown to the Commissioner.

In the presence of the jury, the registrar shook Michalowsky's hand prior to swearing him in. The trial judge explained to the jury that the altered conditions were bsed upon medical advice to make the matter less discomfiting to the witness. Other comments were made by the trial judge in the jury's presence. As well , the trial judge shook Michalowsky's hand in the absence of the jury, stating, *inter alia*; " it's nice to see you again".

The Commissioner found that the trial judge's actions, while well-intentioned, were unfortunate. Accommodations to a witness must have limits, for otherwise the jury may get the wrong impression. Some comments may have seemed like a judicial stamp of approval of Michalowsky's testimony and may also have conveyed the impression that, for some unfathomable reason, the defence forced this poor man to testify, unmindful of the potential consequences. Though well-intentioned, the trial judge's conduct, in the absence of the jury, raised concerns as to the appearance of partiality - particularly given Michalowsky's alleged Morin-related crimes.

Continuity Evidence and Constable Robinet

At the second trial, Constable Robinet, another identification officer, was called by the prosecution to address, *inter alia*, the continuity of items found at the body site (such as Christine Jessop's clothing) which the prosecution sought to introduce at trial. Fibres relied upon by the CFS were said to come from this clothing.) It was alleged both at the trial and at the Inquiry that, given the Crown's decision that it would not call Sergeant Michalowsky as a witness, Robinet's evidence 'developed' to meet the needs of the prosecution.

The Commissioner found that Constable Robinet demonstrated considerable, if not remarkable, improvement in his recollection respecting his involvement in the items collected at the body site. The Commissioner concluded that, despite the absence of any finding that Robinet deliberately gave false evidence, he was left with the concern that Robinet's ultimate testimony no longer reflected an accurate recollection of his involvement in the events of October 3, 1984. He found that the prosecutors did not deliberately 'feed' information to police witnesses, but, at times, failed to take appropriate measures to preserve the integrity of the interviewing process. They were affected by the fact that these were police officers.

Conclusion

The Commissioner summarized in these terms:

> In this case, it is truly remarkable the extent to which the memories of a number of Crown witnesses improved as the proceedings progressed. Some of this, as I have said, was expected and was responsive to the more detailed demands placed upon them in the later proceedings. I find that some of this was a product of an interviewing process (such as collective meetings or overly informative questioning of witnesses) that was not designed to create unreliable evidence, but which nonetheless had that very effect. I find that a number of witnesses adopted and incorporated into their evidence things they were told by others - often, done subconsciously; sometimes, I regret to say, done deliberately.

The General Investigation

The Commissioner identifed certain failings in the Durham investigation. One was that the investigators placed undue reliance, at times, upon the polygraph as a quick and ready means of clearing suspects. The structural failings in the investigation were also discussed. One failing was that investigators who developed the best suspect became the lead investigators. The most significant failing, an investigation coloured by the officers' early views, is discussed below.

Guy Paul Morin - The Suspect

On Febrary 14, 1985, Fitzpatrick and Shephard met with Janet and Ken Jessop who mentioned that their neighbour, Guy Paul Morin, was a 'weird-type guy' and a clarinet player. This directed some suspicion towards Mr. Morin. In his notes for February 19, 1985**,** Inspector John Shephard referred to 'suspect Morin,' but at the Inquiry he denied Mr. Morin was a suspect at that time. He said it was only 'police jargon.' The Commissioner found that both officers regarded Mr Morin as a suspect prior to their first interview with him on February 22,1985. This finding bore upon the attitude with which the two officers approached Mr. Morin that day and which, quite subconsciously, had an impact on the inferences they drew from some of his remarks.

The February 22, 1985 Interview

On February 22,1985, Officers Fitzpatrick and Shephard interviewed Guy Paul Morin outside his residence. They had arranged to tape-record the interview surreptitiously, but the 90-minute tape in their machine ran on one

side for only 45 minutes; they did not know that they had to turn it over. During their discussion, according to the officers, Mr. Morin said some things that they found unusual. Some of them were:

- “Otherwise I'm innocent,” which was said after a pause in a discussion about his work;

- ″All little girls are sweet and innocent but grow up to be corrupt"' which was said during a conversation about Christine;

- "(The body] was found across the Ravenshoe Road." Neither officer was familiar with the Ravenshoe Road, although it was a paved east-west route north of Oueensville known to local residents as such.

In the recorded portion of the interview, Mr. Morin told the officers that he left work at 3:30 p.m. on the day Christine disappeared and got home around 4:30. He referred to the fact that he had shopped on the way. In the unrecorded portion, he extended his time of arrival home to "between 4:30 and 5:00.″ This aroused suspicion in the officers' minds.

In the face of Guy Paul Morin's proven innocence, his comments on February 22, 1985 were innocuous. Some of his comments perhaps should not have excited any suspicion at the time. For example, suspicions about Morin's Ravenshoe Road comment were based more upon the officers' ignorance of the area, than upon anything else.) It is difficult (and not terribly helpful) to assess now which items should have prompted further inquiry then. That analysis misses the point. Officers are entitled to investigate even based upon hunches. However, the comments here were not 'hard evidence' of anything. Nothing was said even remotely to constitute an admission, or a demonstration of knowledge exclusive to the killer. The information in the officers' possession did not justify any fixed view as to Morin's guilt. However, Fitzpatrick and Shephard did 'fix their sights' on Guy Paul Morin - they, themselves, may not have appreciated the extent to which they did so. Subsequent interviews were unduly coloured by their premature, overly fixed views. This affected the quality of those interviews.

Timing and Morin 's Place of Work

After the interview, the officers obtained Mr. Morin's time card at work. It disclosed that he left work at 3:32 p.m. on October 3, 1984. A timing run from his workplace to his home (57.1 kilometers) took 42 minutes, and would bring him home at 4:14 p.m. if he did not stop on the way. This raised an issue as to his opportunity to commit the crime, given Janet and Ken Jessop's early accounts to the police that they arrived home at 4:10 p.m.

After their timing run, Shephard and Fitzpatrick went to the office in Newmarket of Dr. Paul Taylor, Ken Jessop's dentist, and briefly spoke to him and his receptionist, Lorraine Lowson. Those witnesses claimed that the Jessops left their office at 4:20 p.m. (Both of them testified to that effect in the criminal proceedings). The officers did a timing run from Dr. Taylor's office to the Jessop residence; it took 14 minutes. This led the officers to question the 4:10 arrival time originally provided to the police by the Jessops.

The Time That Janet and Ken Jessop Arrived Home

At the second trial, Janet Jessop testified for the prosecution and indicated that she and Ken came home at 4:30 to 4:35 or even later. Ken Jessop was called by the defence. On cross examination, Mr. McGuigan, through extrapolation, elicited from Ken Jessop testimony that supported, though less firmly, the later time home. Then, at this Inquiry, Janet Jessop and Ken Jessop firmly maintained that they got home at 4:10 p.m. Ken Jessop stated that he lied at the second trial. Ms. Jessop's evidence as to her state of mind was less clear.

The Commissioner reflected that the issue at this Inquiry was 'How did it come about that the Jessops' evidence or proposed evidence came to change in the way it did?'

On March 6, 1985**,** Fitzpatrick and Shephard interviewed Janet and Ken Jessop at their residence regarding the timing of their activities on October 3, 1984. The interview went on for 2 ½ hours. No formal statement was taken from them, nor did the officers preserve any detailed notes. Fitzpatrick admitted that they told the Jessops that their times were wrong, having regard to the times provided by Dr. Taylor and Ms. Lowson. The officers suggested to Ms. Jessop that her kitchen clock (by which she had checked her time that day) might be slow. After the interview, the officers recorded that it was found that the Jessops arrived home around 4:35 p.m. and that Janet Jessop said it was possible that her clock could have been slow “as they are having problems with the electric clock.”

The Commissioner found that the March 6, 1985 interview was flawed. First, the officers should not have told the Jessops that their earlier times were wrong and were impossible, whatever their own views. Second, they should not have suggested to Janet Jessop that her kitchen clock could have been. slow, believing this suggestion to be untrue. Ms. Jessop not only came to adopt this suggestion as truth, but came to later add that the faulty clock was thrown out for that reason. This, too, was incorrect, as Ms. Jessop herself now admits. Third, the whole interview process was inappropriately calculated to persuade Ken and Janet Jessop that their earlier times were wrong and to modify those times. The investigators genuinely believed that to be true, and they may have been right. However, the risk is that the evidence collected becomes a self-fulfilling prophecy. Fourth, the officers failed to preserve any detailed notes of this lengthy meeting at which the Jessops' evidence purportedly changed. Indeed, the Report details inaccuracies in the supplementary report summarizing that meeting.

At the second trial, Ken and Janet Jessop testified that they were not pressured by the officers to change their times. At the Inquiry, Janet Jessop spoke of "pressure," with some qualification, but not “bullying." The Commissioner found that Janet and Ken Jessop were not prepared to say anything at the second trial that might adversely affect the prosecution's case. Inspector Shephard denied that the officers pressured the Jessops to change their times, but could appreciate the Jessops' perception, in hindsight, that they had been pressured.

Once Guy Paul Morin was charged, Janet and Ken Jessop were satisfied of Guy Paul Morin's guilt. Ken Jessop testified that the officers 'poisoned' his attitude towards Morin and his family. The Report finds that the officers did communicate their strongly held views to the Jessops as to Mr. Morin's guilt and other things which contributed to the Jessops' perception of Guy Paul Morin. The Jessops were understandably not reticent about contributing to this kind of dialogue themselves. The officers' approach lacked a certain professionalism and potentially heightened the unreliability of evidence emanating from the Jessops. The Commissioner found nothing untoward in the prosecutors' personal dealings with Ken Jessop.

Janet Jessop testified at the stay motion that her kitchen clock (upon which her 4:10 arrival time had been based) had been thrown out because it was not keeping proper time. She repeated this evidence to the jury. She was confronted with the

facts which undermined this position (including a later re-enactment of the events on television which showed the clock still hanging in the background.) Ms. Jessop conceded that this aspect of her testimony was initiated by her and that her strong desire to see that Morin not 'get off' may have factored into this inaccurate evidence. Mr. Cover told the Inquiry that there was a general feeling among the prosecutors that Ms. Jessop was capable of saying anything, if she thought it would further the prosecution.

The Commissioner found that Mr. McGuigan believed that the core evidence given by Janet Jessop - that she and Ken arrived home at 4:30 to 4:30 p.m. or thereafter - was true. However, he knew that her 'clock' evidence was false. Though. he thought (with some justification) that this would be obvious to the jury, he should have advised the jury that he placed no reliance upon it and should have re-evaluated, with some true introspection, the extent to which, if at all, the Crown should place any reliance upon her evidence, in light of what was known about her reliability generally, the 'clock' evidence and what she said about the 'funeral screams.'

The Commissioner accepted that Janet and Ken Jessop believed when they initially spoke to the police that they had arrived home at 4:10 (and that Janet Jessop was not lying about that time out of guilt over the late return home.) He also accepted that, rightly or wrongly, Janet and Ken Jessop genuinely now believe that they did return home at 4:10.

The Interview Process Generally

The evidence revealed numerous instances where interviews, sometimes lengthy, were held with witnesses, whose evidence was ultimately highly contentious and respecting whom it was alleged that their evidence had been 'developed' through the interviewing process. A number of times there would be a wholly inadequate written record of those interviews. Hours of untaped interviews might be reflected in a single entry in a notebook or in an incomplete *precis* or description of the interview contained in a supplementary report.

Some interviews with witnesses were tape-recorded. The tape-recording was always surreptitious. The Commissioner found some

selectivity in which interviews remained unrecorded - the officers were more inclined, though not invariably so, not to tape-record witnesses who potentially would give contentious evidence favouring the Crown.

The Commissioner also found that certain interviews, such as those conducted with Frank Devine, Guy Paul Morin's brother-in-law, Ken Doran, Mr. X's cellmate at the Whitby Jail, and Paddy Hester (dealt with below) were inappropriately conducted.

The Use of Criminal Profiling

The Durham Police obtained FBI profiler John Douglas' assistance in preparing a profile of the killer of Christine Jessop. Criminal profiling involves the analysis of the details of a crime and clues left behind, in conjunction with an understanding of similar cases, to prepare a psychological profile of the killer. The Commissioner found that the information investigators provided to Douglas may have been contaminated by their pre-conceived views. This highlights the wisdom of not conducting a profile once a suspect has been identified. Though features of the profile did parallel Guy Paul Morin, it could not reasonably be said that it matched or even closely resembled Morin. This caused no introspection on the part of the investigators. Inspector Shephard's candid comment was that "if [the profile] said a female was responsible, probably we would have looked in the other direction."

A *modified* profile was released to the public. Characteristics which corresponded to Morin were released to the press; those which did not were excluded or amended to conform. The Commissioner found that the use of a modified profile was problematic. It was intended to 'spook' Morin. However, by tailoring the profile to fit him, the police helped ensure that he could never get a fair trial in that region.

The Arrest -April 22,1985

Detective Fitzpatrick and Inspector Shephard arrested Guy Paul Morin in the evening of April 22, 1985. Over the next six hours he repeatedly protested his innocence. At the second trial, the defence sought to introduce in evidence the statements made by Morin at the time of his arrest, both in the car and at the station. The statements were ruled inadmissible as self-serving.

The Commissioner's recommendations address the admissibility of such statements at the instance of the defence.

Contentious Witnesses of the Crown

The Report specifically examines the evidence of a number of contentious witnesses tendered against Guy Paul Morin. Some were witnesses at the second trial only and this frequently raised issues as to the veracity of 'late-breaking' revelations. A number of these witnesses were tendered to demonstrate that Guy Paul Morin exhibited, through his words and conduct, a *consciousness of guilt* or *strange conduct or demeanour consistent with guilt.* The Report concludes that much of this evidence had little or no probative value (apart from its unreliability) and should not have been so left with the jury. The Report reflects that there is no doubt that this evidence, which was a prominent part of the trial, Crown's closing address and trial judge's jury instructions, when viewed cumulatively, contributed to the miscarriage of justice. The Commissioner also found various instances where the prosecutors called evidence which, objectively viewed was highly suspect. At times, their perspective was coloured by their strong views as to Morin's guilt. However, the decision to call these witnesses did not amount to misconduct.

Constable Robertson and his dog Ryder

Officer Robertson was a member of the York Regional Police in October 1984. The York Regional Police did not have a canine unit. Robertson had an interest in dogs and in their use in police work. He testified at the second trial that his dog, using the scent of a blue sweater given to him from Christine Jessop's bedroom, indicated that Christine Jessop had been in the Morin Honda. The dog's 'indications' were led as evidence that Christine Jessop had been in the Morin Honda. The Commissioner found Officer Robertson's account to be implausible for a number of reasons, including:

- There is no record or recollection of anyone that the blue sweater was provided to Robertson. Everyone was searching for the blue sweater for months thereafter, including his fellow officers. It was Robertson's evidence that not only was the sweater in open view in Christine's bedroom, but he returned it to the York Regional officers at the command post for the investigation.

- There is no suggestion that his partner that night, his supervising officers or anyone else knew that the dog had detected anything at the Morin property.

- Robertson took no action to search the vehicle or even try the door of the vehicle where Christine's scent was purportedly detected.

- He has notes and supplementary reports made at the very time of the events or shortly thereafter, documenting the most minute details of the objects and locations searched. These records contain no mention of the Morin vehicle, the dog's indications, or the use of the sweater as a scent object.

- When Guy Paul Morin, Christine Jessop's neighbour, was arrested, Robertson did not tell his fellow officers that his dog detected Christine Jessop's scent in the neighbour's Honda; indeed, he told no one in authority during Morin's first trial. His claim only came forth after Guy Paul Morin had been acquitted and was facing a new trial, and then only in the context of a collective meeting which explored police officers' potential relevance at a second trial.

- Robertson exaggerated the extent of his training and the extent of any relationship he had with an RCMP dog trainer, Peter Payne.

Apart from Robertson's credibility, the Commissioner expressed serious concerns about the admissibility of evidence as to the dog's 'indications' that Christine Jessop had been in the Morin Honda.

Constable McGowan and the 'Stare'

Constable McGowan was another witness whose evidence surfaced only at the second trial. He was a York Regional Police officer who was the first to attend the Jessop residence in response to Janet Jessop's phone call to police. During the second trial, he testified that on the night of October 3, 1984, at approximately 8:18 p.m., he went to the Morin household to speak with the neighbours. He was greeted by Ida Morin. While questioning her, he observed a side profile of a person who appeared to be looking straight ahead. When he later saw the news report of Guy Paul Morin's arrest on television, it triggered the memory of what he had witnessed at the Morin house that evening.

He was "astonished," he said, to see that Mr. Morin was the person who had been sitting in the chair, seemingly unconcerned about his questions relating to the missing child.

The Commissioner was left with serious doubt as to whether McGowan even attended the Morin residence that evening. More problematic was McGowan's evidence as to what he saw at the Morin residence and when it was that his impressions of Guy Paul Morin and his family were first recorded.

His notebook says nothing about his attendance at the Morin residence. No supplementary report reflects any such attendance. At the second trial, Mr. Pinkofsky cross-examined McGowan vigorously on his 'late-breaking' allegation. McGowan conceded that his claims about Morin were not reflected in his early will-say. At the Inquiry, he swore that his claims about Morin were reflected in his earliest will-say; everyone just got the order of his three will-says confused at the second trial. The Commissioner found McGowan's reconstruction of the order of his will-says was seriously flawed.

The Commissioner found that he could not safely rely upon anything that Officer McGowan said on the critical issues. Apart from his credibility, the prosecution should not have been permitted to use the testimony that Guy Paul Morin stared straight ahead as evidence of Morin's conduct or demeanour consistent with guilt. Further, characterizations such as "I was not made welcome", I had *a feeling* that my presence was bothersome. Morin was "seemingly unconcerned" and "I felt [Morin's demeanour) *strange* for an immediate neighbor" are easy to allege, difficult to disprove; easily tainted by the impressions of fellow officers in a collective meeting and easily coloured by the charge against an accused.

Paddy Hester

Ms. Hester, a Queensville resident, was yet another witness who testified only at the second trial. Her present ill-health precluded her from testifying at the Inquiry. The Commissioner had the benefit of hearing her on tape, in the context of a February 1987 interview conducted by Officer Fitzpatrick. This tape, which seriously undermined her credibility, was not provided to the prosecutors or to the defence.

The day after Guy Paul Morin's arrest, Paddy Hester came forward with a story. It described a discussion with Christine Jessop's neighbour whose “heart was not in the search effort". She was not called as a witness at the first trial. Prior to the second trial, she was motivated to come forward to assist the prosecution. She alleged that she had witnessed a strange encounter with the Morins in a pickup truck (with Guy Paul Morin staring straight ahead, dressed in a trench coat) and a second incident where Morin had chased her away from the Morin Honda before she could search it. She claimed that her story had been reported to the York Regional Police in a timely way. However, there was no contemporaneous record that confirmed that report. (The Commissioner found that perhaps some, but not all, of the 'late-breaking' evidence could be explained away by inadequacies in the records kept or preserved by York Regional police. At some point, the absence of any confirmatory records defies coincidence and raises serious issues as to the reliability of claims made years later and well after Mr. Morin's arrest and first trial.)

The Commissioner found the February 1987 interview that Officer Fitzpatrick conducted with Paddy Hester disturbing, both in what it said about her attitude and what it said about Fitzpatrick's approach. Her animosity towards Guy Paul Morin was patent. Her admission that "she almost did cartwheels and flips” when Morin was charged was particularly illuminating. In the interview, Officer Fitzpatrick shared with Ms. Hester the evidence which existed against Guy Paul Morin. In particular, he told her what forensic evidence was found in the Morin Honda as an introduction to questions as to what she saw in the car. He shared with her his and Shephard' s views as to Guy Paul Morin's guilt. He expressed how much he wished they had known about her evidence before. The Commissioner found this was "a text book example of how *not* to conduct an interview." This was an example, albeit an extreme example perhaps, of what was happening with a number of witnesses.

The Report concluded that Paddy Hester's evidence could not be safely relied upon.

Leslie Chipman

Leslie Chipman was Christine Jessop's best friend. She testified at the second trial that she and Christine talked with Guy Paul Morin several times. During these conversations, Morin had his hedge clippers in hand and he held them so tightly that his knuckles were white. Mr. McGuigan invited the jury to look at Morin's very unusual and strange type of conduct and demeanour:

> Why was the accused on three occasions during that period clipping the hedge between the Jessop and the Morin property? He denies that this happened. And I submit Miss Chipman is worthy of your belief in that regard. I submit that this was his vehicle for watching those two young girls.

Ms. Chipman testified for the prosecution at the second trial only. To Mr. Scott's credit, he chose not to call her at the first trial. Ms. Chipman testified at the Inquiry that her trial evidence was untrue and made several serious allegations against the authorities who collected her evidence and prepared her for trial. This was said to explain why her evidence at Guy Paul Morin's trial was untrue.

The Commissioner found that Ms. Chipman attempted to be truthful in her testimony before the Inquiry, but that her most serious allegations were unfounded. She did not deliberately lie at Guy Paul Morin's second trial, but came to believe, and to communicate to the Court, things about Guy Paul Morin which, on reflection, were untrue. She was swept away by the accusation against Guy Paul Morin.

The Commissioner concluded:

> I do not believe that police or prosecutors told Ms. Chipman what to say. I also do not believe that police or prosecutors knew that her recollections were false ones. She admitted that she never indicated that to them either. I do find that the interviewing process by the authorities contributed to the added strength and detail in her trial evidence and that this may have been brought about through very pointed questions which she may have felt constrained to answer. I have no doubt that Mr. McGuigan, given his considerable skills as an advocate, could 'squeeze every drop' from a witness, without violating any ethical rules. This was a highly impressionable crimes, who was very young at the material time, who regarded the police and prosecutors with respect and awe, was alone with them, who wished to assist and who was coloured by the charge existing against

> Guy Paul Morin. As well, her evidence was based upon impressions of what were then insignificant moments, where subtle changes in her evidence could turn her observations from suspicious conduct (even assuring it showed that much) on Morin's part to complete innocuousness. In those circumstances, the importance of the interviewing process is manifest; the dangers of suggestibility considerable.
>
> Again, it is my view that this evidence should not have been introduced and used in the way that it was. Further, it is clear that extreme care is needed when dealing with the evidence of children, and this must begin at the very first interview. Certainly, an adult should have been present, even if this would have meant a delay.

Evidence of Funeral Night Screams

On January 7, 1985, Christine Jessop was buried in the cemetery in which she used to play behind the Jessops' home. After the funeral, friends and relatives congregated at the Jessop residence. During the second trial, Janet Jessop testified that she and some guests were in the den at approximately 7:00 p.m. when a scream was heard coming from the north of her house. She ran outside with three of the visitors. A male voice screamed "Help me, help me, Oh God, help me." She described it as sounding frightened, troubled or scared. Ms. Jessop said that she recognized it as Guy Paul Morin's voice. She and her brother-in-law, Wally Rabson, Barb Jenkins and Wally's brother, Lloyd Rabson, went to the driveway, looked around, but saw nothing. Snow had fallen that day but had stopped by this time. Ms. Jessop then heard footsteps in the snow and saw a silhouette of a person moving quickly into the back door of the Morin house. She asked "Can I help you?", "Are you alright?" and "Does anyone need help?". She did not think she used Guy Paul's name. There was no reply. As no one answered her call, she assumed everything was all right The group remained outside for a minute before returning indoors. Ms. Jessop testified that she and her husband reported this to the police later that evening or the following day.

There was no record of any contemporaneous suggestion to this effect by Ms. Jessop. Her identification of Guy Paul Morin as the screamer was not brought to anyone's attention for years thereafter, even though Ms. Jessop met with police and prosecutors on a regular basis and was highly motivated to assist the prosecution. It was only after Guy Paul Morin's acquittal that these claims came forth. Some aspects were only revealed to the Crown during the second trial proceedings.

The Commissioner found that Ms. Jessop did not hear or see footsteps in the snow or see a silhouette of a person moving quickly into the back door of the Morin house and could not identify the voice as that of Guy Paul Morin. Fueled by her understandable rage towards Guy Paul Morin and her concern that he not be again acquitted for Christine's murder, she may have convinced herself that she had seen and heard these things. Objectively viewed, this aspect of her evidence, given all the circumstances outlined above, was patently unreliable.

An experienced counsel should have known that. Brian Gover was suitably skeptical about her evidence. Mr. McGuigan indicated that he had some skepticism about her evidence that she heard the footprints in the snow. However, he gave no thought to why she was giving that evidence. Otherwise, he said that he accepted her evidence because it was circumstantially supported. As for the other problematic aspects of her evidence, those were for the defence to address and the jury to explore. The Commissioner found that an objective assessment of Ms. Jessop's evidence, giving full value to the Crown and defence roles in an adversarial proceeding, may well have compelled the Crown to advise the jury that aspects of Ms. Jessop's evidence, albeit perhaps well-intentioned, could not safely be relied upon. Mr. McGuigan did not have the requisite objectivity, as did, for example, Mr. Gover and as Mr. Scott may well have, had these untimely claims been made to him. The evidence of the 'funeral night screams' was more evidence led to show Mr. Morin's 'consciousness of guilt.' Its reliability was highly doubtful.

Mandy Patterson

Mandy Patterson and Guy Paul Morin were fellow band members. Ms. Patterson testified that in February 1985, approximately four months after Christine Jessop had disappeared from her home, she spoke to Mr. Morin about Christine's death. She claimed that the issue appeared to upset him and she got the distinct feeling that he did not want to talk about it, so she did not pursue it As she said at the first trial, “I was shocked to hear about it... before." She added that this surprised her because she had always found Mr. Morin to be a very caring person he lived right beside her and hadn't wanted to talk. On April 15, 1985, one week before Morin's arrest, she again raised with him the subject of Christine's death: "He just said, those things happen, what can you do. He said, 'The poor, sweet, innocent little girl. Things like that happen."

While there was nothing in the words that was unusual or inappropriate, it was the manner in which he expressed them that struck Ms. Patterson. She thought he had said this in a "very uncaring" way. She later testified that she expected more animation in his voice: his tone displayed no expression; it "didn't sound normal. I was surprised. I thought he would be a lot more concerned, him being her neighbour."

When Ms. Patterson expressed the hope that Christine had not been held captive before she was killed, Mr. Morin replied that Christine was murdered the night she was taken.

Ms. Patterson reflected the mind-set of various Crown witnesses: she felt like 'part of the prosecution team'; she was enveloped to some extent by the confidence and determination of the authorities, and she labeled the defence as 'the bad guys.'

The Commissioner found that Ms. Patterson did not intentionally mislead the Court or the Inquiry. But she did take sides and it did colour her approach to the evidence.

The real problem with much of Ms. Patterson's evidence is that it should have formed no part of the trial. Her feelings or perceptions that Guy Paul Morin should have sounded more concerned or caring when speaking about Christine Jessop was evidence that contributed little more than prejudice and constituted the most dangerous kind of evidence. Its use at this trial as yet more evidence 'consistent with Guy Paul Morin's guilt' -coming, from the last witness for the Crown - was inappropriate. In that regard, the Crown cannot be faulted; it sought and obtain a ruling favouring its admission as evidence.

Morin's Failure to Search, Attend the Funeral or Express Condolences

One of the elements of consciousness of guilt that was put forward to the jury by the Crown attorneys was Mr**.** Morin's failure to join the search for Christine Jessop, his failure to attend her funeral and his failure to express his condolences to the family.

Much of the 'consciousness of guilt' evidence not only should not have been left with the jury on that basis, but should not have been admitted at all. The failure to search for Christine Jessop was worthless evidence and ought to have been excluded. The situation was compounded in that Morin's answer as to why he did not search on one day was shown to be wrong, and his explanation was left to the jury as further evidence of his consciousness of guilt.

Mr. Morin's failure to express condolences also was worthless evidence and ought not to have been admitted.

Mr. Morin's failure to attend the funeral or funeral home was worthless evidence and ought not be have been admitted. Again, the situation was compounded in that Morin's answer (that he was not invited) was, not surprisingly, used to reflect upon his credibility. The issue should never have been before the jury in the first place.

The introduction of all of this evidence, together with other problematic evidence of consciousness of guilt, was bound to have had, in its accumulation, a significant effect on the jury. The leading of this evidence demonstrated that the prosecution sought to squeeze every drop out of the information available to them, to support their case. However, there was no impropriety in the leading of this evidence, since it was presented to the trial judge who ruled on it. Further, in fairness to both the trial judge and Crown counsel, there has been some greater sensitivity to the limited use of consciousness of guilt evidence expressed by appellate courts more recently than was the case during the currency of the trial.

The Alibi Defence

At both trials, Mr. Morin testified that he did not murder Christine Jessop and told the jury of his whereabouts on October 3, 1984. The defence led evidence as to the time Mr. Morin left work on that day, his subsequent shopping activities and his arrival time home. Alphonse and Ida Morin supported their son's evidence that he came home with groceries, took a nap and worked on renovations to the family home after dinner.

There was a lengthy debate at the Inquiry over the Crown's conduct in connection with the alibi. The position advanced on behalf of the prosecutors was, simply put, that they regarded the alibi to be false and were fully entitled to draw upon any perceived weaknesses in the alibi to full effect. The position advanced on behalf of the Morins was that the prosecution converted exculpatory evidence and innocent conversations into incriminating evidence as a result of their tunnel vision or their desire to secure a conviction.

Mr. Morin's proven innocence casts a different light upon many of the problems which the Crown attorneys identified with the alibi defence. This is not surprising. However, the Commissioner found no impropriety in the approach taken by the prosecutors to the alibi at trial. They believed that the alibi was false. This necessarily

followed from their view, also genuinely held, that Guy Paul Morin was guilty. There were weaknesses that could be exploited in the alibi. The prosecutors were highly skilled in doing so. Of course, their approach meant that they gave sinister interpretations to conduct which is equally capable of an innocent explanation. However, in this instance, their approach was not unreasonably coloured by tunnel vision. (Though Mr. McGuigan does have a certain tunnel vision now about the truth or falsity of the alibi.) The inferences which they asked the jury to draw could be supported by the evidence (and indeed, in some instances, by uncontested evidence of prior statements made by Mr. Morin). They were entitled, as well, to rely upon the 'improvements' in the recollections of the defence witnesses to try to undermine the alibi.

Conduct of the Defence and Crown

It was suggested, by counsel for Messrs. McGuigan and Smith, in particular, that the conduct of the defence be considered as a factor contributing to the wrongful conviction of Mr. Morin. Mr. Levy cited the testimony of a number of witnesses heard at the Inquiry:

- Constable McGowan, who testified that when he was being cross-examined by Mr. Pinkofsky, the jurors appeared unfocused and "as though they didn't want to be there." During a break, a member of the jury told McGowan in the washroom that he had done "okay" and "Mr. Pinkofsky is really being an asshole."

- Guy Paul Morin, to the effect that the jury members eventually developed a distaste for Mr. Pinkofsky and, indirectly, for himself. He agreed that he saw the trial judge's distaste for Mr. Pinkofsky.

- Mr. Scott, who had dealt with Mr. Pinkofsky previously, advised Susan MacLean how to deal with him in the light of his lengthy and contemptuous treatment of witnesses. He suggested that Ms. MacLean maintain her focus; it would be difficult. He told her Pinkofsky’s cross-examinations could seem abusive.

- Brian Gover, who testified that Mr. Pinkofsky tended to take a sarcastic tone with witnesses which appeared to ‘batter' them. Mr. Gover agreed that Pinkofsky's approach might court the displeasure of the jury and that his demeanour and tactics might sorely test the trial judges patience. Mr. Pinkofsky's nickname among the Crown attorneys was ‘The Prince of Darkness.’

- Ms. Pike felt that Pinkofsky was very condescending in his cross-examination of her.

- David Robertson grew to hate Pinkofsky due to his dealings with him.

- Detective Fitzpatrick said that a number of witnesses were upset at their treatment in the courtroom by Mr. Pinkofsky.

- Alex Smith testified that the cross-examination of some of the witnesses by Pinkofsky was abusive and vigorous; sometimes it was full of sarcasm.

- Susan MacLean swore that Pinkofsky's tone of voice, when he questioned the witness John Carruthers, was mocking and sarcastic, and that the jury looked upset by it. One of the jurors was red in the face and had his fist clenched.

- Mr. McGuigan testified that Pinkofsky ridiculed and harassed some witnesses; he was vigorous and sarcastic. The jury were not pleased with the manner in which he conducted the case.

The Report concludes, in part:

> Having regard to all the evidence, to the submissions which have been made to me, and the considerations which I have outlined, I have concluded that some tactical decisions taken by the defence at Mr. Morin's second trial were not the best, and it may be argued that they adversely affected the jury. However, some of the forensic skills demonstrated at that trial were exceptional. Unlike the situation in a number of the notorious cases of wrongful convictions cited by some of the systemic witnesses, I do not see this as a case of defence incompetence, neglect or misconduct. Any criticisms of Mr. Pinkofsky are idiosyncratic to his style and approach and are not reflective of systemic issues or to be addressed by any systemic recommendations I may make.

Some Crown counsel regard Mr. Pinkofsky's approach to involve a wholesale attack on virtually every witness, particularly police witnesses, who testify for the Crown, without appropriate distinction. The Report notes that “however well or ill-founded this criticism might be in other cases, there is no doubt that a disquieting number of witnesses for the prosecution in this case gave evidence which could justifiably be regarded as suspect."

Relevance of the Insanity Defence

During the first trial, after calling evidence of Mr. Morin's alibi, Mr. Ruby applied to Mr. Justice Craig for a bifurcated trial in order that the 'defence of insanity' could be raised, should the jury find Mr. Morin guilty. The application was unsuccessful.

Mr. Ruby then adduced opinion evidence on Mr. Morin's mental health from Dr. Graham Turrall, a psychologist who had spent approximately 14 hours with him administering numerous tests, and Dr. Basil Orchard, a psychiatrist who had examined Mr. Morin for approximately five to six hours. The conclusion of both witnesses was that Mr. Morin suffered from simple schizophrenia, a major mental illness characterized by a thinking disorder that affected the way he communicated with others. In Dr. Orchard's opinion, Mr. Morin's illness was "moderately severe" and in an advanced state.

During this psychiatric evidence the experts were questioned on the hypothetical mental state of Mr. Morin *if* he had killed Christine Jessop.

> Assuming that Mr. Morin had killed Christine Jessop, the jury was told that he would have been in an acute psychotic state and unable to appreciate that by stabbing her he was causing her death.
>
> Several parties sought to explore at the Inquiry the factual and systemic issues arising out of the 'insanity defence.' The Commissioner ruled that he would not explore whether the psychiatric and psychological evidence was valid or invalid, and whether this evidence should or should not have been tendered by the defence at the first trial. These issues had limited relevance to his mandate, since the 'insanity' evidence was not heard by the jury that convicted Guy Paul Morin, and the tactical decision to call this evidence during the trial proper has no systemic interest, given the change in the law. (A bifurcated trial is now mandated.) He also had no doubt that the exploration of these issues, undoubtedly intriguing, would be extremely time-consuming. However, the presentation of the alternative 'defence of insanity' at the first trial, and the evidence in its support, affected the investigators' and prosecutors' state of mind and was considered on that basis. The relevance of this evidence does not depend upon its validity. The Commissioner noted that its recitation is undoubtedly painful to Mr. Morin who, it is clear from his counsel's comments at the Inquiry, does not adopt it in any way. The Suprerne Court of Canada held that, even taking the evidence at its highest, it did not make it more likely that

> Guy Paul Morin committed the crime; the critical expert evidence was based upon the *assumption* that he committed the crime.
>
> The Commissioner found that John Scott, Leo McGuigan, Alex Smith and Susan MacLean wholeheartedly believed, throughout their involvement in the Guy Paul Morin proceedings, that Mr. Morin was guilty of the offence with which he was charged . Crown counsel ,at the first trial, believed that Mr. Morin was guilty prior to any knowledge that the alternative insanity defence would be raised. Accordingly, the insanity defence did not change their views, but they saw it as confirmation of what they already knew (or thought they knew). Mr. McGuigan and Mr. Smith, who came to the case after the insanity defence had been raised at the first trial, were affected by it in a similar way. This was not unreasonable - the 'insanity evidence,' carefully scrutinized, may not have made Mr. Morin's guilt more likely, but the fact that such a defence would even be advanced had to impress itself on most anybody.

The prosecutors at the second trial also drew upon other evidence - such as that of Officer Gordon Hobbs - to support their firm view that Guy Paul Morin was guilty. All of this is perfectly understandable.

It is also understandable that this belief would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence at the second trial. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. Their relationship with the police at times blinded them to the very serious reliability problems with their own officers.

The Stay Motion and Issues of Disclosure

Prior to the commencement of the second trial before the jury, the defence moved for a judicial stay on the basis, in part, of misleading disclosure and material non-disclosure. In light of the problems with disclosure to date, the defence also sought access to the complete investigative file (“open box access”). Both motions were denied. The Report only briefly addresses the disclosure issues, given their more limited relevance to the Commissioner's mandate. Very substantial disclosure was effected prior to the commencement of the second trial at which Guy Paul Morin was convicted. The Commissioner concluded that errors in judgment were made by Mr. Scott in falling to disclose certain items (which the Inquiry did examine) to the defence, but that Mr. Scott did not deliberately breach his disclosure obligations. Though the Commissioner did not

agree with everything Mr. Justice Donnelly said in his ruling referable to alleged non disclosure and misleading disclosure, he did agree with him that any failings on Mr. Scott's part were not malevolent. The trial judge's original decision on the motions predated the seminal judgment of the Supreme Court of Canada in *Stinchcombe.* Mr. Scott is fully aware of the Crown's disclosure obligations at present. The obligations at the time were less settled.

The Commissioner also noted that the police failed to adequately disclose information to John Scott. Mr. Justice Donnelly found no misconduct on the part of the police in this regard. Given the prioritization of issues at this Inquiry, and the resulting small role that disclosure issues played, the Commissioner did not explore in any meaningful way the investigators' responsibility for not disclosing items to the Crown or to the defence and, accordingly, did not make findings in that regard.

Recommendations

Recommendations 73 to 119 address systemic issues arising out of the failings identified in the Durham investigation and the prosecution of Guy Paul Morin. These recommendations also address systemic issues in connection with the conduct of appeals and the jurisdiction of appellate courts. The last section of the Report also summarizes much of the evidence heard during Phase VI of the Inquiry (the systemic phase) bearing upon the systemic causes of wrongful convictions here and throughout the world, identified, *inter alia,* in the literature, by other inquiries, by participants in the administration of criminal justice and by those who have themselves been wrongly convicted. The Commissioner found that many of these causes are resonant with those found in the Morin case.

The Commissioner commended the direction taken by the Durham Regional Police Services Board to address some of the failings identified at the Inquiry and, indeed, the Board's approach to the Inquiry itself. He cautioned, however, that many of the failings identified go to the heart of the police culture:

> An investigation can be perfectly structured, but flounder due to tunnel vision or "noble cause corruption" or loss of objectivity or bad judgment. Older techniques and thought processes are, at times, deeply ingrained and difficult to change. Police culture is not easy to modify. The failings which I identified were systemic and were not confined to several officers only. The challenge for Durham will be to enhance policing through an introspective examination of the culture. I am convinced that such an examination has commenced.

CONCLUSION

The Commissioner concluded his Report in these terms:

This Report ends where it started. An innocent person was convicted of a heinous crime he did not commit. Science helped convict him . Science exonerated him.

We will never know if Guy Paul Morin would ever have been exonerated had DNA results not been available. One can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable.

The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future. As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened in Guy Paul Morin's case and by education as to the causes of wrongful convictions.

My conclusions should not be taken as a cynical or pessimistic view of the administration of criminal justice in Ontario. On the contrary, many aspects of Ontario's system of justice compare favourably to other jurisdictions. Most of its participants, police, forensic experts, Crown and
defence counsel and the judiciary perform their roles with quiet distinction. These participants are justifiably proud of their roles in the administration of justice, and the roles performed by their colleagues. It is understandable, then, that a Report which focuses on systemic inadequacies may be viewed by some of them with dismay, if not frustration.

As several Crown counsel told me during the Inquiry, prosecuting someone who turns out to be innocent is a Crown attorney's “worst nightmare." I accept that I also accept that no Crown counsel involved in this case, and no police officer involved in this case, ever intended to convict an innocent person. Although I have sometimes described the human failings that led to the conviction of Guy Paul Morin in very critical language , many of

the failings which I have identified represent serious errors in judgment, often resulting from lack of objectivity, rather than outright malevolence.

The challenge for all participants in the administration of justice in Ontario will be to draw upon this experience and learn from it.

A particular challenge presents itself to the Government of Ontario. Some of the recommendations presented in this Report rely, for their efficacy, on the availability of resources. Indeed, some of the experienced counsel, Crown and defence, who testified at this Inquiry were concerned that the failure to allocate adequate resources will not only prevent the implementation of important changes, but result in more miscarriages of justice. As Mr. Wintory noted, the ability of the adversarial system to prevent rniscarriages of justice relies on the existence of fully competent, fully resourced adversaries. In his context, miscarriages of justice include both the conviction of the innocent and the failure to apprehend and successfully prosecute the guilty. Adequate resourcing can only benefit the public of Ontario in the long term.

I am grateful to have had this opportunity to make recommendations for the improvement of the administration of criminal justice in Ontario. If this Report results in one less innocent person being charged, or prosecuted or convicted, it will have been worth the effort.

RECOMMENDATIONS

The Report contains 119 recommendations. Most are accompanied by commentary, which often summaries the systemic evidence and the significant caselaw bearing upon each recommendation, and which explains or refines the recommendations. The commentary is not reproduced below.

Recommendation 1: Policy for Funding Inquiries

A clear and comprehensive policy should be established by the Government of Ontario for the funding of public inquiries, consistent with the concerns expressed herein.

Recommendation 2: Admissibility of Hair Comparison Evidence

Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

Recommendation 3: **Admissibility of Fibre Comparison Evidence**

Evidence of forensic fibre comparisons may or may not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of the accused's guilt. However, the limitations upon the inferences to be reliably drawn from forensic fibre comparisons need be better appreciated by judges, police, Crown and defence counsel. This requires better education of all parties, improved communication of forensic evidence and its limitations in and out of court, in written reports and orally.

Recommendation 4: Admissibility of Preliminary Tests as Evidence of Guilt

Evidence of a preliminary test, such as an 'indication of blood,' does not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

Recommendation 5: Trial Judge's Instructions on Science

Where hair and fibre comparison evidence or other scientific evidence is tendered as evidence of guilt, the trial judge would be well advised to instruct the jury not to be overwhelmed by any aura of scientific authority or infallibility associated with the evidence and to clearly articulate for the jury the limitations upon the findings made by the experts. In the context of scientific evidence, it is of particular importance that the trial judge ensure that counsel, when addressing the jury, do not misuse the evidence, but present it to the Court with no more and no less than its legitimate force and effect .

Recommendation 6: Forensic Opinions to be Acted Upon Only When in Writing

(a) No police officer or Crown counsel should take action affecting an accused or a potential accused based upon representations made by a forensic scientist which are not recorded in writing, unless it is impracticable to await a written record. Where a written record is not obtained prior to such action, it should be obtained as soon thereafter as is practicable.

(b) The Crown Policy Manual and the Durham Regional Police Service operations manual should be amended to reflect this approach. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

(c) Where a written record is only obtained after such action, and it reveals that the authorities acted upon a misapprehension of the available forensic evidence, police and prosecutors should be mindful of their obligation to take corrective action, depending upon the original action taken. Corrective action would, for example, include the immediate disclosure of the written record to the defence and, if requested, to the Court, where the forensic evidence has been misrepresented (even inadvertently) in Court. It would also include the re-assessment of any actions done in reliance upon misapprehended evidence.

Recommendation 7: **Written Policy for Forensic Reports**

The Centre of Forensic Sciences should establish a written policy on the form and content of reports issued by its analysts. The Centre should draw upon the work done by forensic agencies elsewhere and the input of other stakeholders in the administration of criminal justice who will be receiving and acting upon these reports. In addition to other essential components, these reports must contain the conclusions drawn from the forensic testing and *the limitations to be placed upon those conclusions.*

Recommendation 8: The Use of Appropriate Forensic Language

The Centre of Forensic Sciences should endeavour to establish a policy for the use of certain uniform language which is not potentially misleading and which enhances understanding. This policy should draw upon the work done by forensic agencies or working groups elsewhere and the input of other stakeholders in the administration of criminal justice. This policy should be made public.

Recommendation 9: **Specific Language to be Avoided by Forensic Scientists**

More specifically, certain language is demonstrably misleading in the context of certain forensic disciplines. The terms 'match' and 'consistent with' used in the context of forensic hair and fibre comparisons are examples of potentially misleading language. CIS employees should be instructed to avoid demonstrably misleading language.

Recommendation 10: Specific Language to be Adopted

Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item 'may or may not' have originated from a particular person or object. This language is preferable to a statement that an item 'could have' originated from that person or object, not only because the limitations are clearer, but also because the same conclusion is expressed in more neutral terms.

Recommendation 11: The Scientific Method

The 'scientific method' means that scientists are to work to vigorously challenge or disprove a hypothesis, rather than to prove one. Forensic scientists at the Centre should be instructed to adopt this approach, particularly in connection with a hypothesis that a suspect or accused is forensically linked to the crime.

Recommendation 12: Policy Respecting Correction of Misinterpreted Forensic Evidence

A forensic scientist may leave the witness stand concerned that his or her evidence is being misinterpreted or that a misperception has been left about the conclusions which can be drawn or the limitations upon those conclusions. An obligation should be placed on the expert to ensure that these concerns are communicated as soon as possible to Crown or defence counsel. Where communicated to Crown counsel, an immediate disclosure obligation is triggered. The Crown Policy Manual and the Centre's policies should be amended to reflect these obligations. The Centre's employees should be trained to adhere to this policy.

Recommendation 13: Policy Respecting Documentation of Contacts with Third Parties

(a) The Centre of Forensic Sciences should establish a written policy requiring its analysts and technicians to record the substance of their contacts with police, prosecutors, defence counsel and non-Centre experts. This policy should regulate the form, content, preservation and storage of such records. Where such records are referable to the work done on a criminal case, they must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

(b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

Recommendation 14: Policy Respecting Documentation of Work Performed

(a) The Centre of Forensic Sciences should establish written policies regulating the content of records kept by analysts and technicians of the work done at the Centre. In the least, these policies must ensure that the records identify the precise work done, when it was done, by whom it was done and the identity of any others who assisted, or were present as observers when the work was performed. The policy should also regulate the retention period and location of these records. All records referable to the work done on a criminal case must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

Recommendation 15: Documentation of Contamination

(a) Where in-house contamination is discovered or suspected by the Centre of Forensic Sciences, the contamination should be fully investigated in a timely manner. The contamination and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the contamination may relate. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements.

(b) The Centre of Forensic Sciences should also reflect, in its written policies, the protocols to be followed by its employees to prevent the contamination of original evidence.

(c) The Centre of Forensic Sciences should ensure that its employees are regularly trained to comply with the policies reflected in this recommendation.

Recommendation 16: Documentation of Lost Evidence

Where original evidence in the possession of the Centre of Forensic Sciences is lost, the loss should be fully investigated in a timely manner.

The loss and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the original evidence relates. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements. In this context, original evidence extends to work notes, communication logs or other material which is subject to disclosure.

Recommendation 17: Reciprocal Disclosure

Reciprocal disclosure of expert evidence should be established. The defence should be obliged to disclose to the Crown in a timely manner the names of any expert witnesses it intends to call as witnesses, along with an outline of the witnesses' evidence.

Recommendation 18: Joint Education on Forensic Issues

The Centre of Forensic Sciences, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Ministry of the Attorney General should establish some joint educational programming on forensic issues to enhance understanding of the forensic issues and better communication, liaison and understanding between the parties. The Government of Ontario should provide funding assistance to enable this programming.

Recommendation 19: Creation of an Advisory Board to the Centre of Forensic Sciences

An advisory board to the Centre of Forensic Sciences should be established consisting of Crown and defence counsel, police, judiciary, scientists and laypersons. It should be created by statute.

Recommendation 20: Quality Assurance Unit

(a) The recent establishment of a quality assurance unit by the Centre is to be commended. The unit's staffing and mandate should be reflected in written policies. Dedicated funds should be allocated to the quality assurance unit, adequate to implement this recommendation. The unit's budget should be insulated from erosion for operational use elsewhere.

(b) The unit should consist of at least seven full time members. The Centre should be encouraged to hire at least half of the unit's members from outside the Centre. At least one member of the unit should have training in biology.

(c) The unit should include a training officer, responsible for internal and external training.

(d) The unit should include a standards officer, responsible for writing, or overseeing the writing of policies.

<u>Recommendation 21</u>: Protocols Respecting Complaints to the Centre of Forensic Sciences

(a) In consultation with the advisory board, the Centre should establish, through written protocols, a mechanism to respond to, investigate and act upon complaints or concerns expressed by the judiciary, Crown and defence counsel, or police officers. The protocols should identify the person(s) to whom a complaint or concern should be directed, how it should be investigated and by whom, to whom the results should be reported and what actions are available to the Centre at the conclusion of the process.

(1)) Trial and appellate judges should be encouraged by the Centre, through correspondence directed to the Chief Justice of Ontario, the Chief Justice of the Ontario Court of Justice (General Division), and the Chief Judge of the Ontario Court of Justice Provincial Division) to draw to the Director's attention, in writing, any concerns about testimony given by the Centre's scientists. Judges should be encouraged by the Centre to identify judgments, rulings or comments made by the Court in instructing the jury which are relevant in this regard. Transcripts should generally be obtained by the Centre of the relevant judicial comments, together with the witness' testimony.

(c) The Crown Policy Manual should be amended to provide that Crown counsel should draw to the Centre's attention such concerns, together with such

particulars that will enable the matter to be investigated by the Centre. This policy should be encouraged through correspondence directed to the Ontario Crown Attorneys' Association.

(d) The private bar should be encouraged by the Centre, through correspondence directed to relevant organizations, including the Criminal Lawyers' Association and the Canadian Bar Association Ontario, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

(e) Police officers should be encouraged by the Centre, through correspondence directed to relevant police forces, or through the Ministry of the Solicitor General, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

Recommendation 22: Post-Trial Conferencing

The Centre of Forensic Sciences should establish a case conferencing process to assist in evaluating performance.

Recommendation 23: Audits of the Centre of Forensic Sciences

(a) The Centre of Forensic Sciences should, in consultation with its advisory board, engage an independent forensic scientist (or scientists) no later than October 1,1998, to specifically evaluate the extent to which the failings identified by this Inquiry have been addressed and rectified by the Centre. The scientist's (or scientists') final report should be made public.

Recommendation 24: Monitoring of Courtroom Testimony

The Centre of Forensic Sciences should more regularly monitor the courtroom testimony given by its employees. Monitoring should, where practicable, be done through personal attendance by peers or supervisors. Monitoring should exceed the minimum accreditation requirements. All scientists, regardless of seniority, should be monitored. Any concerns should be promptly taken up with the testifying scientist.

The monitoring scientist should be instructed that any observed overstatement or misstatement of evidence triggers an immediate obligation to advise the appropriate trial counsel.

Recommendation *25*: Training of Centre of Forensic Sciences Employees

The Centre of Forensic Sciences' training program should be broadened to include, in addition to mentoring components, formalized, ongoing programs to educate staff on a full range of issues: scientific methodology, continuity, note keeping, scientific developments, testimonial matters, independence and impartiality, report writing, the use of language, the scope and 'imitations upon findings, and ethics. This can only come with the appropriate allocation of funding dedicated to training.

Recommendation 26: Proficiency Testing

The Centre of Forensic Sciences should increase proficiency testing of its scientists. Efforts should be made to increase the use of blind and external proficiency testing for analysts. Proficiency testing should evaluate not only technical skills, but interpretive skills.

Recommendation 27: Defence Access to Forensic Work in Confidence

(a) The Centre of Forensic Sciences, in consultation with other stakeholders in the administration of criminal justice, should establish a protocol to facilitate the ability of the defence to obtain forensic work in confidence.

(b) The Centre should facilitate the preparation of a registry of duly qualified, recognized, independent forensic experts. This registry should be accessible to all members of the legal profession.

Recommendation 28: The Role of the Scientific Advisor

A 'scientific advisor,' contemplated by the Campbell mode, serves an important role and addresses concerns identified at this Inquiry. The use of a 'scientific advisor' should, therefore, be encouraged. There should be no prohibition upon the designation as scientific advisor of a forensic scientist who is directly involved

in the forensic examinations associated with the case. This is impracticable. However, mindful of the concerns identified at this Inquiry, the CFS should be encouraged, where practicable, to designate a scientific advisor who is not also the scientist whose own work is likely to be contentious at trial.

Recommendation 29: Post-Conviction Retention of Original Evidence

The Ministries of the Attorney General and Solicitor General, in consultation with the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for the post-conviction retention of original evidence in criminal cases.

Recommendation 30: Protocols for DNA Testing

The Ministries of the Attorney General and the Solicitor General, in consultation with the forensic institutions in Ontario, the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for DNA testing of original evidence.

Recommendation 31: Revisions to Crown Policy Manual Respecting Testing

The Ministries of the Attorney General and Solicitor General should amend the Crown Policy Manual on physical scientific evidence to reflect that forensic material should be retained for replicate testing whenever practicable. Where forensic testing at the instance of the authorities is likely to consume or destroy the original evidence and thereby not permit replicate testing, the defence should be invited, where practicable, to observe the testing. Where defence representation is impracticable (or where no defendant is as yet identified), a full and complete record must be maintained of the testing process, to allow for as complete a review as possible.

Recommendation 32: DNA Data Bank

A national DNA data bank, as contemplated by Bill C-3, now before Parliament, is a commendable idea, proven in other jurisdictions, and it should be adopted in Canada.

Recommendation 33: Backlog at the Centre of Forensic Sciences

The Centre of Forensic Sciences should eliminate its backlog through increased use of overtime and an increased complement of scientists and technicians to enable it to provide timely forensic services. This can only come with the appropriate allocation of government funding specifically earmarked for this purpose.

Recommendation 34: Forensic Research and Development

The Centre of Forensic Sciences should dedicate resources to research and development. The Province of Ontario should provide adequate funding to implement this recommendation.

Recommendation 35: Resource Requirements

The specific recommendations referable to the Centre of Forensic Sciences involve, by necessary implication, the infusion of additional financial resources into the Centre. It is imperative that such an infusion occur, to ensure that the Centre can serve a pre-eminent role as a provider of critical forensic services, that it can do so in an impartial, accurate and timely manner, and that future miscarriages of justice can thereby be avoided. In this context, miscarriages of justice include both the arrest and prosecution of the innocent, and the delayed or failed apprehension of the guilty.

Recommendation 36: Ministry Guidelines for Limited Use of Informers

In the face of serious concerns about the inherent unreliability of in-custody informers, the decision whether to tender their evidence should be regulated by Ministry guidelines. The Ministry of the Attorney General should substantially revise its existing guidelines, in accordance with the specific recommendations below, to significantly limit the use of in-custody informers to further a criminal prosecution.

Recommendation 37: Crown Policy Dearly Articulating Informer Dangers

The current Crown policy does not adequately articulate the dangers associated

with the reception of in-custody informer evidence. Further, the statement that such witnesses "may seek, and in rare cases, will receive, some benefit for their participation in the Crown's case" does not conform to the extensive evidence before me. The Crown policy should reflect that such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers wish to benefit for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one.

Recommendation 38: Limitations upon Crown discretion in the public Interest

The current Crown policy provides that the use of an in-custody informer as a witness should only be considered in cases in which there is a compelling public interest in the presentation of their evidence. This would include the prosecution of serious offences. Further, it is unlikely to be in the public interest to initiate or continue a prosecution based only on the unconfirmed evidence of an in-custody informer. The policy should, instead, reflect that (a) the seriousness of the offence, while relevant, will not, standing alone, demonstrate a compelling public interest in the presentation of their evidence. Indeed, in some circumstances, the seriousness of the offence may militate against the use of their evidence; (b) it will never be in the public interest to initiate or continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

Recommendation 39: Confirmation of In-Custody Informer Evidence Defined

The current Crown policy notes that confirmation, in the context of an in-custody informer, is not the same as corroboration. Confirmation is defined as evidence or information available to the Crown which contradicts a suggestion that the inculpatory aspects of the proposed evidence of the informer was fabricated. This definition does not entirely meet the concerns that prompt the need for confirmation. Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer,*

which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another.

Recommendation 40: Approval of Supervising Crown Counsel for Informer Use

The current Crown policy provides that, if the Crown's case is based exclusively, or principally, on evidence of an in-custody informer, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The policy should, instead, reflect that, if the prosecutor determines that the prosecution case *may rely, in part*, on in-custody informer evidence, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The Ministry of the Attorney General should also consider the feasibility of establishing an In-Custody Informer Committee (composed of senior prosecutors from across the province) to approve the use of in-custody informers and to advise prosecutors on issues relating to such informers, such as means to assess their reliability or unreliability, and the appropriateness of contemplated benefits for such informers.

Recommendation 41: Matters to be Considered in Assessing Informer Reliability

The current Crown policy lists matters which Crown counsel may take into account in assessing the reliability of an in-custody informer. Those matters do not adequately address the assessment of reliability and place undue reliance upon matters which do little to enhance the reliability of an informer's claim. The Crown policy should be amended to reflect that the prosecutor, the supervisor or any Committee constituted should consider the following elements:

1. The extent to which the statement is confirmed in the sense earlier defined;

2. The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;

3. The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;

4. The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused. This consideration need involve an assessment of the information reasonably accessible to the in-custody informer, through media reports, availability of the accused's Crown brief in jail, etc. Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be inaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement;

5. The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;

6. Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;

7. Whether the informer has, in the past, given reliable information to the authorities;

8. Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;

9. Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;

10. Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;

11. The circumstances under which the informer's report of the alleged statement was taken *(e.g.* report made immediately after the statement was made, report made to more than one officer, etc.);

12. The manner in which the report of the statetment was taken by the police *(e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or videotape, in accordance with the guidelines set down in *R. v. K.G.B.*[1] However, in considering items 10 to 12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence;

13. Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

[1](1993), 79 C.C.C.(3d) 257 (S.C.C.).

14. Any relevant information contained in any available registry of informers.

Recommendation 42: Limited Role of Crown Counsel Conferring Benefits

Crown counsel involved in negotiating potential benefits to be conferred on an in-custody informer should generally not be counsel ultimately expected to tender the evidence of the informer. This recommendation supports the current Crown policy in Ontario.

Recommendation 43: Agreements with Informers Reduced to Writing

The Ministry of the Attorney General should amend its Crown Policy Manual to impose a positive obligation upon prosecutors to ensure that any agreements made with in-custody informers relating to benefits or consideration for co-operation should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and his or her counsel (if represented). An oral agreement, fully reproduced on videotape, may substitute for such written agreement. As well, in accordance with present Crown policy, any such agreements respecting benefits or consideration for co-operation should be approved by a Director of Crown Operations.

Recommendation 44: Restrictions Upon Benefits Promised or Conferred

(a) An agreement with an in-custody informer should provide that the informer should expect no benefits to be conferred which have not been previously agreed to and, specifically, that the informer should expect no additional benefits in relation to future or, as of yet, undiscovered criminality. Indeed, such criminality may disentitle the in-custody informer to any benefits previously agreed to but not yet conferred.

(b) Where the in-custody informer subsequently seeks additional benefits nonetheless particularly in connection with additional criminal charges which he or she faces or may face) prior to the completion of any testimony he or she may give, Crown counsel (and, where practicable, any supervisor or Committee constituted) should re-assess the use of the in-custody informer as a witness in accordance with the criteria set out in the Crown Policy Manual.

(c) Where additional benefits (that is, benefits not previously agreed to or necessarily incidental to a prior agreement) are sought by the in-custody informer subsequent to his or her completed testimony particularly in connection with additional criminal charges which he or she faces or may face), they should not be conferred by Crown counsel. Indeed, Crown counsel should advise the Court addressing any additional criminal charges that the informer was made aware that he or she could not expect additional benefits in relation to future or, as of yet, undiscovered criminality when the earlier agreement was reached, and that the informer is not entitled to any credit from the court for past co-operation.

(d) The commission of additional crimes should generally disqualify the witness from future use by the prosecution as a jailhouse informant in other cases.

Recommendation 45: Conditional Benefits

Any agreement respecting benefits should not be conditional upon a conviction. The Ministry of the Attorney General should establish a policy respecting other conditional or contingent benefits.

Recommendation 46: Policy on Kinds of Benefits Conferred

The Ministry of the Attorney General should establish a policy which sets limitations on the kinds of benefits that may be conferred on jailhouse in-custody informers or appropriate preconditions to their conferral.

Recommendation 47: Disclosure Respecting In-Custody Informers

The current Crown policy reflects that the dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Without limiting the extent of that onus, the policy lists disclosure items that should be reviewed to ensure full and fair disclosure. The disclosure policy is generally commendable. Some fine-tuning of the items listed is required to give effect to the onus to make complete disclosure. The items should read, in the least:

1. The criminal record of the in-custody informer including, where accessible to the police or Crown, the synopses relating to any convictions.

2. Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's statement, should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.)

3. Any offers or promises made by police, corrections authorities, Crown counsel, or a witness protection program to the informer or person associated with the informer in consideration for the information in the present case.

4. Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities, including but not limited to those kinds of benefits already listed in the Crown Policy Manual.

5. As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed and/or be recorded on videotape. Such arrangements should be approved by a Director of Crown Operations or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier, in accordance with *Stinchcombe*).

6. Copies of the notes of all police officers, corrections authorities or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in-custody informer. There may be additional notes of officers or corrections authorities which may also be relevant to the in-custody informer's testimony at trial.

7. The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.

8. If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.

Recommendation 48: Post-Conviction Disclosure by Crown Counsel

The Ministry of the Attorney General should remind Crown counsel of the positive and continuing obligation upon prosecutors to disclose potentially exculpatory material to the defence post-conviction, whether or not an appeal is pending. Such material should also be provided to the Crown Law Office.

Recommendation 49: Post-Conviction Continuing Disclosure by Police

The Durham Regional Police Service should amend its operational manual to impose a positive and continuing obligation upon its officers to disclose potentially exculpatory material to the Durham Crown Attorney's Office, or directly to the Crown Law Office, post-conviction, whether or not an appeal is pending. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 50: Access to Confidential Informer Records

A Joint Committee on Disclosure Issues should consider potential policy changes to effect broader access by police, prosecutors and defence counsel to confidential records potentially relevant to the reliability of an in-custody informer.

Recommendation 51: Prosecution of Informer for False Statements

Where an in-custody informer has lied either to the authorities or to the Court, Crown counsel should support the prosecution of that informer,

where there is a reasonable prospect of conviction, to the appropriate extent of the law, even if his or her false claims were not to be tendered in a criminal

proceeding. The prosecution of informers who attempt (even unsuccessfully) to falsely implicate an accused is, of course, intended, amongst other things, to deter like-minded members of the prison population. This policy should be reflected in the Crown Policy Manual.

Recommendation 52*:* Extension of Crown Policy to Analogous Persons

The current Crown policy defines "in-custody informer' to address one type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should, therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.

Recommendation 53: Revisions to Police Protocols Respecting Informers

The Durham Regional Police Service should revise Operations Directive 04-17 to specifically address in-custody informers as a special class of informers. This directive should reinforce the inherent risks associated with such informers, the need for special precautions in dealing with them and establish special protocols for such dealings. These protocols should also address the method by which an informant's reliability should be investigated. The Ministry of the Solicitor General should facilitate the creation of a similar directive for all Ontario police forces.

Recommendation 54: Creation of Informer Registry

The Ministry of the Attorney General should establish an in-custody informer registry, designed to make available to prosecutors, defence counsel and police, information concerning the prior testimonial involvement of in-custody informers, any benefits requested, benefits agreed to or conferred, and any prior assessment of reliability made by police, prosecutors or the Court of an informer.

Recommendation 55: Crown Contribution to Informer Registry

The Ministry of the Attorney General should amend the Crown Policy Manual to impose a positive obligation upon prosecutors to provide relevant information to the registry and to ensure disclosure to the defence of relevant information contained in the registry.

Recommendation 56: Police Contribution to Informer Registry

The Durham Regional Police Service should amend its operational manual to impose a positive obligation upon its officers to provide relevant information to the registry. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 57: Creation of National In-Custody Informer Registry

The Government of Ontario should use its good offices to promote a national in-custody informer registry.

Recommendation 58: Police Videotaping of Informers

The Durham Regional Police Service should amend its operational manual to provide that all contacts between police officers and in-custody informers must, absent exceptional circumstances, be videotaped or, where that is not feasible, audiotape. This policy should also provide that officers receive statements from such informers under oath, where reasonably practicable. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

Recommendation 59: Reliability *Voir Dires* for Informer Evidence

Consideration should be given to a legislative amendment, providing that the evidence of an in-custody informer as to the accused's statement(s) is presumptively inadmissible at the instance of the prosecution unless the trial judge is satisfied that the evidence is reliable, having regard to all the circumstances.

Recommendation 60: Crown Education Respecting Informers

The Ministry of the Attorney General should commit financial and human resources to ensure that prosecutors are fully educated and trained as to in-custody informers. Such educational programming should fully familiarize all Crown attorneys with the Crown policies respecting in-custody informers and appropriate methods of dealing with, and assessing the reliability of, such informers.

Recommendation 61: Police Education Respecting Informers

Adequate financial and human resources should be committed to ensure that Durham Regional police officers are fully educated and trained as to in-custody informers. The Ministry of the Solicitor General should liaise with other Ontario police services to ensure that similar education is provided to police forces which are likely to deal with in-custody informers. Such educational programming should fully familiarize all investigators with the police protocols respecting in-custody informers and appropriate methods of dealing with, and investigating the reliability of, such informers.

Recommendation 62: Protocols Respecting Correctional Records

The Ministry of the Solicitor General and Correctional Services should establish protocols (which may be incorporated in whole or in part in legislative amendments) governing access to and retention of correctional records, potentially relevant to criminal cases.

Recommendation 63: Access by Police Officers to Correctional Facilities

The Ministry of the Solicitor General and Correctional Services should ensure that a record is invariably kept of police (and other) attendance's at any provincial correctional institute. The sensitivity of a particular attendance may affect what, if any, access is given to such a record, but that should not obviate the necessity for its invariable existence.

Recommendation 64: Placement of Inmates

An accused and another inmate should not be placed together to facilitate the collection of evidence against the accused, where that placement otherwise violates institutional placement policies. In other words, the police should not encourage correctional authorities to permit an inappropriate placement to facilitate the collection of evidence. Where a placement is requested, the request should be recorded, together with the reasons stated and the identity of the requesting party.

Recommendation 65: Placement of Witnesses

Where inmates have already been identified as witnesses in a criminal case, they should be placed, wherever possible, so as to reduce the potential of inter-witness contamination. This generally means that prosecution jailhouse witnesses in the same case should not be placed together, where such separation is reasonably practicable.

Recommendation 66: Storage and Security of Defence Papers

The Ministry of the Solicitor General and Correctional Services should establish protocols to ensure that the accused's legal papers can remain exclusively within his or her control in the correctional institution.

Recommendation 67: Timing and Content of Informer Jury Caution

Where the evidence of an in-custody informer is tendered by the prosecution and its reliability is in issue, trial judges should consider cautioning the jury in terms stronger than those often contained in a *Vetrovec* warning, and to do so immediately before or after the evidence is tendered by the prosecution, as well as during the charge to the jury.

Recommendation 68: Crown Videotaping of Informers

The Ministry of the Attorney General should amend its Crown Policy Manual to encourage all contacts between prosecutors and in-custody informers to be videotaped or, where that is not feasible, audiotaped.

Recommendation 69: Informer as State Agent

Where an in-custody informer actively elicits a purported statement from an accused in contemplation that he or she will then offer himself or herself up as a witness in return for benefits, he or she should be treated as a state agent.

Recommendation 70: Missing Persons Investigations

(a) Officers conducting a missing persons investigation must remain. mindfu1 of the possibility that such an investigation may escalate into a major crime investigation. This means, in the very least, that an accurate and complete record be kept of statements taken from relevant persons. This may also mean, under some circumstances, that potential evidence be immediately preserved from removal or contamination. It is inappropriate to direct, as a rule, when a missing persons investigation should be treated as a major crime investigation. This decision need remain within the discretion of the investigating or supervising officer.

(b) Police officers should be trained on how to respond to a missing persons investigation, where the possibility exists that such an investigation may escalate into a major crime investigation. Such training should draw upon the lessons learned at the Inquiry.

(c) The York Regional Police force's operating procedures have been amended to respond to the concerns raised by the Christine Jessop investigation. The Ministry of the Solicitor General should facilitate the creation of similar operating procedures for all Ontario police forces.

Recommendation 71: Conduct of Searches

(a) Searches conducted during a missing persons investigation should be supervised, where feasible, by a trained search co-ordinator.

(b) Searches should generally be conducted in accordance with standardized search procedures, taking into consideration the particular circumstances of each case.

Recommendation 72: Skills, Training and Resources

(a) Rank and file officers need be educated and trained on a continuing basis on a wide range of investigative skills. Their educators need themselves be fully trained in these skills and in their communication to others. Financial resources need be available, secure from erosion for operational purposes, to ensure that training for all Ontario police forces is state-of-the-art.

(b) Attention should be given by the Government of Ontario, on a priority basis, to the specific concerns identified by the York Regional Police Association and the audit of the York Regional Police force. The Government of Ontario should publicly announce the measures being taken to address the concerns raised.

Recommendation 73: Education Respecting Wrongful Convictions

(a) The Ministry of the Attorney General, in consultation with the Ontario Crown Attorneys' Association, should develop an educational program for prosecutors which specifically addresses the known or suspected causes of wrongful convictions and how prosecutors may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry. Adequate financial resources should be committed to ensure the program's success and its availability for all Ontario prosecutors.

(b) An educational program should be developed for police officers which specifically addresses the known or suspected causes of wrongful convictions and how police officers may contribute to their prevention. The Ministry of the Solicitor General should take a leading role in promoting this programming. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all police investigators, both new and established.

(c) The Criminal Lawyers' Association should develop an educational program for criminal defence counsel which specifically addresses the known or suspected causes of wrongful convictions and how defence counsel may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry

(d) The Centre of Forensic Sciences should develop an educational program for its staff, including all scientists and technicians, which specifically addresses the role of science in miscarriages of justice, past and potential. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all Centre staff; both new and established**.**

(e) Ontario law schools and the Law Society of Upper Canada, Bar Admission Course, should consider, as a component of education relating to criminal law or procedure, programming which specifically addresses the known or suspected causes of wrongful convictions and how they may be prevented.

(f) The judiciary should consider whether an educational program should be developed which specifically addresses the known or suspected causes of wrongful convictions and how the judiciary may contribute to their prevention.

Recommendation 74: Education Respecting Tunnel Vision

One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.

Recommendation 75: - Crown Discretion Respecting Potentially Unreliable Evidence

The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole

or in part, due to its inherent unreliability. The Ministry should take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

Recommendation 76A: Overuse and Misuse of Consciousness of Guilt and Demeanour Evidence

a) Purported evidence of 'consciousness of guilt' can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel and police should also be educated as to the dangers associated with this kind of evidence. This recommendation should not be read to suggest that such evidence should be prohibited.

b) Purported evidence of the accused's 'demeanour' as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence. In particular, where such evidence of strange demeanour is brought forward after the accused is publicly identified, Crown counsel, the police and the judiciary should be alive to the danger that this 'soft evidence' may be coloured by the existing allegations against the accused. The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way.

Recommendation 76B: Use of term 'Consciousness of Guilt'

In accordance with the *Peavoy* decision, the term 'consciousness of guilt' should be avoided.

Recommendation 77: Admissibility of Exculpatory Statement Upon Arrest

The Government of Canada should consider a legislative amendment permitting the introduction of an exculpatory statement made by the accused upon arrest, at the instance of the defence, where the accused testifies at trial.

Recommendation 78: Admissibility of Canine Scent Discrimination

Trial judges should exercise great caution in permitting evidence of canine 'indications' to be tendered as affirmative evidence to prove guilt.

Recommendation 79: Evidence of Other Suspects

It may be appropriate to revisit the rule regarding the admissibility of evidence of other suspects having committed the crime, in light of the concerns raised at this Inquiry.

Recommendation 80: Jury Research

The *Criminal Code* should be amended to permit research into the jury's deliberative process, with a view to improving the administration of justice.

Recommendation 81: Outline of Facts and Personal Opinions by the Trial Judge

The Government of Canada, upon the recommendation of the Canada Law Commission, should consider whether the common law should be altered, through legislative amendment, to limit the ability of a trial judge to express his or her opinions on issues of credibility to the jury and further alter the obligation imposed upon a trial judge to outline the most significant parts of the evidence for the jury.

Recommendation 82: Cautioning the Jury that Evidence May be Coloured by Criminal Charges or Other External Influences

Trial judges should be alert to the concern that honest witnesses' perceptions of events may be coloured by the existence of criminal charges against the accused,

the notoriety of the crime which he or she faces, or the fact that the authorities, whom they respect, admire, and deal with, are supportive of the prosecution. Where this concern arises on the evidence, trial judges should instruct the jury to be mindful of potential colouration in assessing the evidence of these witnesses and that miscarriages of justice have been occasioned in the past due to honest, but faulty, accounts of witnesses whose perceptions were coloured by criminal charges or other external influences.

Recommendation 83: Treatment of the Person Charged in Court

a) Absent the existence of a proven security risk, persons charged with a criminal offence should be entitled, at their option, to be seated with their counsel, rather than in the prisoner's dock.

b) Crown counsel and the Court should be encouraged to refer to the persons charged by name, rather than as 'the accused.'

Recommendation 84: Exercise of Prosecutorial Discretion respecting Fresh Evidence on Appeal

The Ministry of the Attorney General should amend the Crown policy manual to support the exercise of prosecutorial discretion by appellate Crown counsel to consent to the reception of fresh evidence on appeal when the fresh evidence raises a significant concern on such counsel’s part as to the innocence of the Appellant.

Recommendation 85: Crown Discretion Where Significant Concerns as to the Appellant's Innocence

The Ministry of the Attorney General should amend the Crown policy manual to support the exercise of prosecutorial discretion by appellate Crown counsel to consent to an appeal against conviction where a review of the original evidence raises a significant concern on such counsel’s part as to the innocence of the Appellant.

Recommendation 86: Fresh Evidence Powers of the Court of Appeal

a) In the context of recanted evidence, the requirements that evidence must

reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness' original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.

(b) Consideration should be given to further change the 'due diligence' requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.

Recommendation 87: Powers of a Court of Appeal to Entertain 'Lurking Doubt'

Consideration should be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt.

Recommendation 88: Crown Appeal Against Acquittal

The Government of Canada, upon the recommendation of the Canada Law Reform Commission, should study the advisability of amending the *Criminal Code* to provide that a Crown appeal against (a jury) acquittal is only to be allowed where the court concludes, to a reasonable degree of certainty, that the verdict would likely have been different, had the error of law not been committed.

Recommendation 89: Police Culture and Management Style

Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.

Recommendation 90: Case Management System

a) The standardized case management system recommended in the Campbell Report should be implemented as soon as possible.

b) Adequate resources should be made available to train sufficient senior police investigators to ensure that the case management system is used in all major crime investigations across Ontario.

c) There should be periodic review and updating of the case management system, incorporating best practices from around the world.

d) Audits should be conducted by 'peer review' teams to ensure that the case management system is being applied properly and consistently.

Recommendation 91: Minimum Standards for Police

a) The Ministry of the Solicitor General should consider setting minimum provincial standards respecting the initial and on-going training of police officers on a full range of subjects, relevant to the issues identified at this Inquiry.

b) The Ministry of the Solicitor General should consider setting minimum provincial standards for the conduct of criminal investigations, relevant to the issues identified at this Inquiry.

c) The content of policing manuals which guide Ontario police officers in the performance of their duties, such as the Canadian Police College Manual, should be revisited to reflect the lessons learned at this Inquiry.

Recommendation 92: Structure of Police Investigation

Investigating officers should not attain an elevated standing in an investigation through acquiring or pursuing the 'best' suspect or lead. This promotes competition between investigative teams for the best lead, results in tunnel vision and isolates teams of officers from each other.

Recommendation 93: Body Site Searches

When conducting searches at a body site, police investigators should be mindful of the lessons learned at this. Inquiry. Such lessons include the desirability of:

a) a grid search;
b) preservation of the scene against inclement weather;
c) adequate lighting;
d) coordinated search parties, with documented search areas;
e) a search plan and search coordinator;
f) full documentation of items found and retained, together with precise location and continuity;
g) adequate videotaping and photographing of scene;
h) adequate indexing of exhibits and photographs;
i) adequate facilities and methods for transportation of the remains;
j) decontamination suits in some instances;
k) resources to avoid cross-contamination of different sites. This may require that different officers collect evidence at different sites, where a forensic connection between the sites may be investigated.

Recommendation 94: Investigation of an Alibi

Where the defence discloses the existence of an alibi in a serious case, police should be encouraged to have the alibi investigated by officers other than those most directly involved in investigating the accused. Often, the investigation of an alibi need not draw extensively upon the knowledge of the investigating officers themselves. This recommendation permits a more objective, less predisposed approach to the potential alibi.

Recommendation 95: Accountability for Unsatisfactory Police Testimony

If police give testimony found to be false or which Crown counsel reasonably considers to be unreliable, Crown counsel should report these matters to the Chief of Police for investigation. The Ministries of the Attorney General and Solicitor General must implement measures to ensure that these situations are reported to the Chief of Police for investigation, that such investigation occurs, and that the results of the investigation are communicated to Crown counsel or to the Court.

<u>Recommendation 96</u>: Police Videotaping of Suspects

(a) The Durham Regional Police Service should amend its operational manual to provide that all interviews conducted with suspects within a police station be videotaped or audiotaped, absent truly exigent circumstances. Any practice of interviewing a suspect off-camera before a formal videotaped interview undermines this policy. Similarly, a practice of encouraging suspects to speak off the record or off-camera during an interview undermines this policy. Videotaping or audiotaping ultimately narrows trial issues, shortens trials, protects both the interviewer and interviewee from unfounded allegations and encourages compliance with the law; such a policy also enables the parties and the triers of fact to evaluate the extent to which the interviewing process enhanced or undermined the reliability of the statement.

(b) The Durham Regional Police Service should investigate the feasibility of adopting the practice of the Australian Federal Police of carrying tape recorders on duty for use when interviewing in other locations or indeed, for use when executing search warrants or in analogous situations.

(c) Where oral statements, which are not videotaped or audiotaped, are allegedly made by a suspect outside of the police station, the alleged statements should then be re-read to the suspect at the police station on videotape and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded and sign it, if it is regarded as accurate.[2]

(d) Where the policy is not complied with, the police should reflect in writing why the policy was not complied with.

(e) The Ministry of the Solicitor General should work to implement this policy (in the very least) for all major Ontario police forces.

[2] Of course, the recommended practive must also conform to the Charter s. 10 (b) and other legal documents.

Recommendation 97: Exercise of Trial Judge's Discretion

A trial judge may wish to consider on an admissibility *voir dire* any failure to comply with any policy established pursuant to Recommendation 96 and may wish to instruct a jury (or himself or herself as the case may be) as to the inference which may be drawn from the failure of the police to comply with such a policy. In doing so, the trial judge (and, where applicable, the jury) should be entitled to consider the explanation, if any, for the failure to comply with the policy.

Recommendation 98: Police Videotaping of Designated Witnesses

The Durham Regional Police Service should implement a similar policy for interviews conducted of significant witnesses in serious cases where it is reasonably foreseeable that their testimony may be challenged at trial. This policy extends, but is not limited to, unsavoury, highly suggestible or impressionable witnesses whose anticipated evidence may be shaped, advertently or inadvertently, by the interview process. The Ministry of the Solicitor General should assist in implementing this policy (in the very least) for all major Ontario police forces.

Recommendation 99: Crown Videotaping of Interviews

Crown counsel should not be mandated to videotape or audiotape their interviews with witnesses. However, the Ministry of the Attorney General should study, in consultation with the Ontario Crown Attorneys' Association or representative Crown counsel, the feasibility of limited videotaping or audiotaping of selected interviews, where the tenor of the anticipated interview or the nature of the person being interviewed would make such a contemporaneous record desirable to protect Crown counsel or would be in the interests of the administration of justice.

Recommendation 100: Creation of Policies for Police Note Taking and Note Keeping

Police note taking and note keeping practices are often outdated for modern day policing. Officers may record notes in various notebooks, on loose leaf paper, on occurrence reports or supplementary occurrence reports or on a variety of other forms.

The Ministry of the Solicitor General should take immediate steps to implement a province wide policy for police note taking and note keeping. Financial and other resources must be provided to ensure that officers are trained to comply with such policies. Minimum components of such a policy are articulated below:

a) There should be a comprehensive and consistent retention policy for notes and reports. One feature of such a policy should be that, where original notes are transcribed into a notebook or other document, the original notes must be retained to enable their examination by the parties at trial and their availability for ongoing proceedings.

b) A policy should establish practices to enable counsel and the police themselves to easily determine what notes and reports do exist. These practices might involve, for example, direction that one primary notebook must bear a reference to any notes or reports recorded elsewhere - for instance, October 4, 1998: supplementary report prepared respecting interview conducted with A. Smith on that date.

c) The pages of all notebooks, whether standard issue or not, should be numbered.

d) Policies should be clarified, and enforced, respecting the location of notebooks.

e) The use of the standard issue “3" by "5" notebook should be revisited by all police forces. It may be ill suited to present day policing.

f) The computerization of police notes must be the ultimate goal towards which police forces should strive.

g) Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities.

h) Supervision of police note taking is often poor; enforcement of police regulations as to note taking is equally poor. Ontario police services must change their policies to ensure real supervision of note taking practices, including spot auditing of notebooks.

Recommendation 101: Police Protocols for Interviewing to Enhance Reliability

The Ministry of the Solicitor General should establish province-wide written protocols for the interviewing of suspects and witnesses by police officers. These protocols should be designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

Recommendation 102: Training Respecting Interviewing Protocols

All Ontario investigators should be fully trained as to the techniques which enhance the reliability of witness statements and as to the techniques which detract from their reliability. This training should draw upon the lessons learned at this Inquiry. Financial and other resources must be provided to ensure that such training takes place.

Recommendation 103: Prevention of Contamination of Witnesses Through Information Conveyed

Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.

Recommendation 104: Prevention of Contamination of Witnesses Through Commentary on Case or Accused

Police officers should be specifically instructed on the dangers of communicating their assessment of the strength of the case against a suspect or accused, their opinion of the accused's character, or analogous comments to a witness, which may colour that witness' account of events.

Recommendation 105: Interviewing Youthful Witnesses

Police officers should be specifically instructed how to interview youthful witnesses. Such instructions should include, in the least, that such witnesses should be interviewed, where possible, in the presence of an adult disinterested in the evidence.

Recommendation 106: Crown Education Respecting Interviewing Practices

The Ministry of the Attorney General should establish educational programming to better train Crown counsel about interviewing techniques on their part which enhance, rather than detract, from reliability. The Ministry may also reflect some of the desirable and undesirable practices in its Crown policy manual.

Recommendation 107: Conduct of Crown Interviews

a) Counsel should generally not discuss evidence with witnesses collectively.

b) A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.

c) The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.

d) Questioning of the witness should be non-suggestive.

e) Counsel *may* then choose to alert the witness to conflicting evidence and invite comment.

f) In doing so, counsel should be mindful of the dangers associated with this practice.

g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

h) Under no circumstances should counsel tell the witness that he or she is wrong.

i) Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

j) Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

k) Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.

Recommendation 108: Treatment of 'Late-Breaking Evidence'

Police officers should be instructed how to address and evaluate 'late breaking evidence,' that is, evidence which could reasonably be expected to have been brought forward earlier, if true. These instructions would include an exploration of the information available to the witness, the reason or motivation for the untimely disclosure, etc. These instructions would also include the need to attempt to independently confirm such evidence and, in appropriate circumstances, to view such evidence with caution.

Recommendation 109: Review of Completed Investigations

There should be an institutionalized requirement for review of all major crime investigations once completed.

Recommendation 110: Limitations Upon Criminal Profiling

Police officers should be trained as to the appropriate use of; and limitations upon, criminal profiling. Undue reliance upon profiling can misdirect an investigation. Profiling once a suspect is identified can be misleading and dangerous, as the investigators' summary of relevant facts may be coloured by their suspicions. A profile may generate ideas for further investigation and, to that extent, it can be an investigative tool. But it is no substitute for a full and complete investigation, untainted by preconceptions or stereotypical thinking.

Recommendation 111: The Public Dissemination of a Purported Profile

In a notorious case, the public dissemination of a purported profile, which has been re-shaped to fit an identified suspect or accused (and which makes that person readily identifiable in the community), with the view of inducing that suspect to incriminate himself or herself by words or conduct, is an improper use of criminal profiling. Though police are permitted, in law, to use some forms of trickery, this technique stigmatizes the suspect in the community and may render a fair trial in that community an impossibility.

Recommendation 112: The Recording of Facts Provided to a Profiler

Where profiling is used as an investigative tool, the summary of relevant facts should be provided to the profiler in writing, or discussions of these facts by the investigators with the profiler accurately recorded. This ensures that the foundation for the profile can later be evaluated by these or other investigators or other parties.

Recommendation 113: Polygraph Tests

a) Police officers should be trained as to the appropriate use of, and limitations upon, polygraph results. Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for a full and complete investigation. Officers should be cautious about making decisions about the direction of a case exclusively based upon polygraph results.

b) The documentation respecting polygraph interviews, including any information provided to the examiner by the investigators or by the person examined, should be preserved until after the completion of any relevant court proceedings or on-going investigations.

Recommendation 114: Creation of a Committee on Outstanding Disclosure Issues

It is time for a Committee of stakeholders in the administration of criminal justice, Crown counsel, defence counsel, the judiciary, and the police, similarly constituted as the Martin Committee, to revisit outstanding issues of disclosure,

with a view to greater efficiency and uniformity of practice, and with a view to resolving outstanding disclosure issues identified at this Inquiry.

Recommendation 115: Crown Education on the Limits of Advocacy

Educational programming for Crown counsel should contain, as an essential component, clear guidance as to the limits of Crown advocacy, consistent with the role of Crown counsel. These issues may also be the subject of specific guidelines in the Crown policy manual or a Code of Conduct.

Recommendation 116: Adequacy of Funding for Defence Counsel and Prosecutors

a) The Government of Ontario bears the heavy responsibility of ensuring that the Ontario Legal Aid Plan and the Criminal Law Division of the Ministry of the Attorney General are adequately resourced to prevent miscarriages of justice.

b) The adequate education and training of Ontario prosecutors requires dedicated financial and other resources to ensure that all prosecutors are relieved from courtroom duties to attend educational programs and that such programs are comprehensive.

Recommendation 117: Creation of a Criminal Case Review Board

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

Recommendation 118: Committee to Oversee Implementation of Recommendations

The Government of Ontario should constitute a committee to oversee the implementation of recommendations contained in this Report which are accepted. Such a committee should issue periodic reports, which are publicly accessible.

<u>Recommendation 119</u>: Communication of Recommendations to Other Governments

The Government of Ontario, through its good offices, should facilitate the communication of these recommendations to the federal, provincial and territorial governments for their consideration.