

## III

### Jailhouse Informants

#### A. Introduction

As outlined earlier, Phase I of the Inquiry examined the issues which arose out of in-custody statements allegedly made by Guy Paul Morin in the presence of Robert Dean May, and overheard by Mr. X. After Mr. Morin was arrested on April 22, 1985, he was taken to Whitby Jail. While in custody there, he encountered these two inmates. They testified for the prosecution at both trials of Mr. Morin. They are labeled 'jailhouse informants' because they claimed to have overheard a confession made by Mr. Morin while all three were inmates at the jail.

#### B. Evidence Relating to Jailhouse Informants

##### (i) Overview

Both informants gave evidence before the Commission, as did many of the relevant authorities (police, Crown attorneys and jail administrators) who had direct or indirect dealings with them. Some of these witnesses also gave evidence at one or both of Mr. Morin's trials.

The evidence in this Phase of the Inquiry gave rise to a large number of factual issues, as well as some significant systemic ones. Systemic issues will be addressed later on in the Report. The factual issues can be broadly grouped under the four larger issues listed below. It must be recognized, however, that these groupings are not mutually exclusive: the evidence and

issues considered under each heading necessarily overlap and cannot be considered in isolation from one another. They are simply presented here in order to make the task of assessing the voluminous evidence presented before the Commission easier and more comprehensible.

*Credibility.* A basic issue before the Commission was whether the evidence of the informants is worthy of belief. A determination of this issue involves a subjective assessment of the manner in which they testified; it also involves an examination of the details of their evidence, their motives for fabrication, and the possibility of collusion between them. Evidence heard before the Commission which bore upon this issue included an inquiry into the backgrounds of the informants (including their psychiatric and psychological profiles), the circumstances of their incarceration, their association with each other, their conduct around the time of the alleged confession, their conduct after the trials, and the benefits they sought or received for their testimony.

*Set-Up.* An allegation which was made after Mr. Morin's second trial is that the informants' evidence was enlisted by one or more public authorities (and not merely initiated by the informants themselves) in order to bolster the prosecution's case against Mr. Morin. A primary subject of this allegation is Detective Bernard Fitzpatrick. It has been alleged that, either alone or in concert with others, Detective Fitzpatrick made prior arrangements with Mr. May to produce a 'confession' from Mr. Morin and to testify to this 'confession' at Morin's trial. Accordingly, evidence heard before the Commission which bore upon this issue included that pertaining to any prior association between the police and the informants, visits to the informants by the police prior to the confession, indications that evidence of such visits was destroyed, the reasons for the placement of the informants within the jail, and any conduct or words by the police or others suggesting the existence of a 'set-up.'

*Should The Evidence Have Been Used?* Irrespective of any allegation of a set-up by the public authorities (in which case it is obvious that the evidence of the informants should not have been used), the question arose as to whether the prosecution should have used the evidence of the informants in the particular circumstances. In other words, were there indications that their evidence was so unreliable that it should not have been included as part of the Crown's case? Evidence heard before the Commission which bore upon this issue included that pertaining to the circumstances in which the informants came to the authorities, the benefits requested by the informants, the timing

of the decision to offer those benefits, the nature of those benefits, the indications that the informants' evidence was unreliable (such as any propensity to lie), the extent to which the authorities considered and discussed those indications, and the steps taken to ensure the informants' reliability. In assessing this evidence, I am mindful of when it was that indications of unreliability surfaced. For example, the prosecutors at the second trial were not aware until after the trial that May had recanted.

*The Offer Not To Testify.* It was revealed during the course of the second trial that the Crown had given the informants the option not to testify. The defence alleged that this offer was a ploy used to artificially bolster the informants' tainted credibility. This allegation suggests that the offer was insincere and would not have been honoured had it been accepted. And even if the offer was genuine, it was kept secret so that it could be used to unfairly undermine the defence position. Evidence heard before the Commission which bore upon this issue included that pertaining to the reasons for the offer, when and how it was communicated, the responses to it, the disclosure of the offer to the defence, the way in which it came out at trial, and whether the prosecution intended that it to come out at trial.

## **(ii) Credibility**

### **Basic Evidence**

One of the jailhouse informants was Robert Dean May. Commencing on June 27, 1985, Mr. May shared the same cell as Mr. Morin in the protective custody wing of the Whitby Jail. He testified at both trials that on June 29-30, 1985, he and Mr. Morin engaged in conversations about Mr. Morin's case. He further testified that on the night of June 30-July 1, 1985, Mr. Morin became upset and cried out "Oh fuck, why did I do it, oh fuck, man, fuck, I killed her, I killed that little girl." In his testimony before the Commission, Mr. May said that his recollection of the events of that night was near to none; he could not recall the exact words used by Mr. Morin, nor was he sure anymore of what he heard. He 'believed,' however, that Mr. Morin said he killed Christine Jessop:

Q. Well, now, is there any doubt in your mind that Guy Paul Morin said that he killed that little girl?

A. No, I don't believe so.

Q. You don't believe so. I think it's now time to think hard about it, sir. Is that what he said, or might he have said something else?

A. I believe that that was what he said.

The second jailhouse informant was Mr. X. Commencing on June 28, 1984, Mr. X occupied the cell immediately beside the cell shared by Messrs. Morin and May. He testified at both trials that on the night of June 30-July 1, 1985, he overheard the confession purportedly uttered by Mr. Morin. In his evidence before the Commission, Mr. X remained confident of the accuracy of his trial testimony. He stated that on the night of June 30-July 1, he was reading his Bible in bed,

and I overheard some discussions in the cell next to me. And I heard someone weeping, and I kind of paid a little more attention. And the voice got a little louder, and I heard, "Fuck, man, fuck, I killed her, I killed that little girl." And it's my belief that it came from Mr. Morin.

Mr. X only heard the one phrase. He could not say what was said before or what was said afterwards.

## **Backgrounds of the Informants**

### ***Robert Dean May***

Robert May acknowledged having a criminal record dating back to when he was 18 years old. Many of his crimes were crimes of dishonesty, involving forged documents, NSF cheques and thefts. At the time he reported Mr. Morin's alleged confession to the authorities, he had already been convicted of 11 separate offences. The details of his criminal record (both before and after his testimony) are set out below:

Date of Conviction	Offences	Sentence
February 26, 1981	Break & enter & theft Theft over \$200	Suspended sentence + 18 months probation
February, 1983	Breach of probation	Suspended sentence + 2 years probation
April 15, 1985	Utter forged document X2 Failure to appear X2 False pretenses over \$200 X2 False pretenses under \$200 Accommodation fraud	Total sentence of 6 months in jail
August 23, 1985	Assault causing bodily harm	16 months in jail + 2 years probation
August 10, 1994	Possession of stolen property over \$1000	\$1400 fine + 18 months probation
September 21, 1994	Criminal harassment Utter death threat	Total sentence of 5 months in jail + 2 years probation
October 5, 1995	Break & enter & theft	2 years probation, including restitution

The defence at the second trial called three expert witnesses with respect to Mr. May's character. All three testified that Mr. May had a propensity to lie.

Dr. Birgitta Jansen was a staff psychometrist (and later a psychologist) at the Whitby Psychiatric Hospital. Mr. May was held in custody at the hospital for a brief period in 1985 for purposes of a psychiatric assessment (Mr. May ultimately escaped 11 days after he was admitted). Dr. Jansen diagnosed Mr. May as having a "personality disorder, mixed type, with antisocial narcissistic and passive aggressive characteristics." She explained that Mr. May demonstrated an inflated self-esteem, an expansive and uncontrolled imagination, a willingness to use other people to indulge his own desires, an unshaken arrogance, and a deficient social conscience with a disregard for the personal integrity and rights of others. *She considered Mr. May to be a pathological liar.* Someone like him, she said, has "an indifferent conscience, an aloofness to truth and social responsibility that, if brought to

the individual's attention, elicits an attitude of nonchalant innocence .... Though totally self-oriented, these individuals ... are rather skilled in deceiving others with their clever glibness." She continued:

Rather than apply their talents toward the goal of tangible achievements, they will devote their energies to construct intricate lies, to cleverly exploit others, and to slyly contrive ways to extract from others what they unjustly believe is their due. Untroubled by conscience and needing nourishment for their overinflated self-image, they will fabricate stories that enhance their worth and succeed in seducing others into supporting their excesses. Criticism and punishment are likely to prove of no avail since this personality quickly dismisses them as the product of jealous inferiors.

Dr. Glenn Cameron was a physician with the forensic assessment unit of the Penetanguishene Mental Health Centre (later certified as a psychiatrist in 1990). Mr. May was sent to Penetanguishene in early June 1985 for a further psychiatric assessment. Dr. Cameron diagnosed Mr. May as having an anti-social personality disorder. He described May as a con man, a liar, a manipulator. He stated that May was very good at deception: "*It was extremely difficult to ferret out what was the truth and what was untrue.*" He felt that May was always looking for something to trade. He continued:

Mr. May was an individual who lies, who did not tell the truth and who frequently interacted with others in his environment through deception, through misrepresentation, through fraudulent means. He was someone who possessed no remorse, felt no sense of guilt or moral obligation for the things he did ...

As for Mr. May's claim that he heard Mr. Morin confess, Dr. Cameron stated:

I think there are many levels of what's going on when Mr. May talks about his confession from Mr. Morin. One of the psychological explanations would be that he was trying to present himself as someone more famous or omnipotent than he was. On a very practical level, again, I think he was trying to curry favour with the police. This certainly fits into his character as I understand it. And on a completely other level, he's a

man who when I saw him just wasn't capable of telling the truth about important things that were happening in his life in his circumstances.

Dr. Andrew Malcolm was a forensic psychiatrist whom the defence had retained to carry out a mental status assessment of Mr. May (and Mr. X). Both informants refused to be assessed, but Dr. Malcolm arrived at an opinion concerning Mr. May based on May's psychiatric file, his behaviour in court, and other related information. He expressed the view that Mr. May exhibited the same personality disorder while on the witness stand at the second trial as he did in 1985. He had no doubt that May suffered from severe primary psychopathy. He had no resistance to lying:

And so the combination of a natural tendency to lie, plus a natural tendency not to have a conscience allows them to say anything that they want to say that they think would be to their own advantage.

.....

The result of all that is that such people are famously unreliable as informants.

Dr. Malcolm prepared a further opinion of Mr. May in 1994.<sup>1</sup> He affirmed that Mr. May is a "gifted confidence man" with a "tendency to prevaricate" and limited internal restraint. He concluded as follows:

It is my opinion that Mr. May, ... with a fair amount of information unavailable, particularly from his earlier years, is a person with an antisocial personality disorder. In the D.S.M. IV, this is a person in which there is a pervasive disregard for and violation of the rights of others. There is a failure to conform to social norms, deceitfulness, impulsivity, aggressiveness, the reckless disregard for the safety of others, consistent irresponsibility and a lack of remorse. Mr. May shows all of these traits.

I said all of this at the second trial of Guy Paul Morin and everything I have learned about Mr. May since

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<sup>1</sup> The opinion is contained in a letter dated December 18, 1994, and is reproduced in an affidavit sworn for the purposes of Mr. Morin's appeal against conviction.

that time has served to reinforce the strength of this opinion ... *Mr. May is not a trustworthy man, and anyone would be well advised to be very sceptical indeed about any assertion he might make, particularly when to accept his word at face value would result in some advantage to him.* (Emphasis added.)

In his testimony before the Commission, Mr. May acknowledged having had a problem with lying in the past (including 1985). He agreed that he has lied quite freely in situations where he did not think he would be caught, ‘conned’ people into doing things that would help him, and lied to the authorities. Mr. May testified that he no longer lies. It was suggested to him that he had recently apologized to Commission staff for lying to them about not being able to accept service of a summons because he was about to leave on an airplane. Mr. May seemed neither to accept nor deny this suggestion.

Mr. May agreed that he has an ability to manipulate people and events to his own ends, and that in at least one instance (an August 19, 1994 television interview replete with lies) *there was no obvious way of determining when he was lying and when he was telling the truth.* He denied, however, that he has no conscience or that he lies as a means of self-aggrandizement. He pointed out that he has had numerous opportunities to enjoy media attention (and thereby inflate his ego), but has only availed himself of the opportunity once.

Mr. May further denied that he would lie about a murder in order to obtain an advantage for himself. He agreed that he would not be in any position to acknowledge to the Commission that he had lied at Mr. Morin’s trials, given the attendant prospect of perjury charges, but maintained that he had told the truth.

### ***Mr. X***

Mr. X has a lengthy criminal record for sexual offences, particularly offences against young children. His first criminal conviction came when he was still a juvenile, at age 15. At the time he reported Mr. Morin’s alleged confession to the authorities, he had already been convicted of nine separate offences. The details of his criminal record (before and after his testimony) are provided below. In his testimony before the Commission, Mr. X acknowledged committing these offences, but often displayed an inability to



recall any of the details of his illegal acts.

Date of Conviction	Offences	Sentence
1976	Assault X5	-----
June 16, 1977	Contributing to juvenile delinquency	18 months probation, including an order for psychiatric treatment
October 12 , 1977	Indecent assault X2	9 months definite + 3 months indefinite
June 26, 1985	Sexual assault	60 days in jail + 18 months probation
October 24, 1988	Sexual assault	9 months in jail + 2 years probation
1994	Communication for the purpose of prostitution	\$150 fine

Evidence was adduced at the second trial through Dr. Zehanat Khan concerning Mr. X's psychiatric profile. Dr. Khan was a psychiatrist and clinical director of adult mental health at the Oshawa General Hospital. He reviewed Mr. X's psychiatric history and transcripts of X's evidence at the trial. He diagnosed Mr. X as suffering from a personality disorder with predominantly dependent and sociopathic characteristics. *This is a condition which is characterized by exaggeration, lying, disregard for social norms and dependency.* Dr. Khan explained:

The dependent part of the character disorder or the personality disorder refers to the person being passive in relationships, letting the other partner tell them what to do, practically let them run their lives, being very dependent for their emotional needs on others, being very dependent on feeling good because of what others tell them, being highly suggestible, also, to these dominant partners that they might have.

In his testimony before the Commission, Mr. X did not recall much about this diagnosis, but he did remember telling various people at various times that he was losing contact with reality, that he heard voices in his head, and that the voices were so loud that he thought his head was going to

explode. Indeed, he explained his history of sexual misconduct by the fact that he heard the voice of his dead uncle telling him to perform the illegal acts. Mr. X also stated that he had been sexually abused himself.

Dr. Malcolm also reviewed material relating to Mr. X, and came to the following conclusion regarding the interaction of a dependent personality like X and a person like May:

*So the combination of someone who is suggestible and not very strong with someone who is really quite powerful and effective in speaking is quite dangerous because it means that the weak person will be strongly influenced and recruited by the stronger person. This is well known to occur.*

Mr. X agreed that he has told ‘his share’ of lies in his life. He acknowledged that he has lied to the police in the past (including some lies in the very interview with the police where he discloses Guy Paul Morin’s confession), and that it is second nature for him to lie to the police when in trouble. He further acknowledged lying on at least one occasion to the correctional authorities.

Prior to trial, the prosecution had access to the psychiatric records of May and X. At trial, it challenged the evidence given by the defence experts. Cross-examination was directed to a number of issues, including the adequacy of the evidentiary foundation for their opinions, the inconsistencies in their diagnoses, the inferences that could truly be drawn from the available material, and the subjectivity or frailty of their assessments.

## **Circumstances of Incarceration**

### ***Robert May***

On April 15, 1985, Mr. May was sentenced to serve six months in jail for the various offences of which he had been convicted. This was his first jail term. Eleven days after he was incarcerated he attempted to escape by assaulting a jail guard with two bars of soap hidden in a sock. The guard was injured in the attack, and May was later charged with assault causing bodily harm. The escape attempt failed, so Mr. May asked his lawyer to have him remanded to the Whitby Psychiatric Hospital for a 30-day mental assessment.

Mr. May admitted that he made this request because the hospital was a minimum security institution from which he would be able to escape. He availed himself of this opportunity in May 1985, and was unlawfully at large for a period of five days. During this time he stole a vehicle as well as some other items. He was later charged with escape custody and theft over \$1,000. After his recapture, he was sent back to the Whitby Jail. However, he did not stay there for long. In early June he was sent to the Penetanguishene Mental Health Centre for a 60-day psychiatric assessment. Mr. May later admitted that he wanted to go there to attempt a further escape, and while at Penetanguishene he hatched a plan to do so. His plan was discovered in advance, however, and he was returned to the Whitby Jail on June 27, 1985.

In his testimony before the Commission, Mr. May admitted that in June, 1985 he wanted badly to get out of jail and was prepared to do whatever was necessary to do so. He was scared. He said he was being violently mistreated by the jail guards, and would have done anything to stop the assaults. He was trying to get parole, but agreed that his chances were probably zero. He was concerned about his three outstanding criminal charges. He was guilty of the offences. The guard whom he had assaulted during his first escape had been seriously injured: he was hospitalized for three days, and suffered from headaches to an extent that doctors contemplated surgery in order to relieve pressure on his cranial nerve. Mr. May believed that the penitentiary was “staring him in the face.”

Mr. May stated that Mr. Morin was “hot currency” in late June 1985.<sup>2</sup> He further stated that while he knew that being an informant could jeopardize his safety in jail, he was prepared to assume that risk.

### *Mr. X*

Like Mr. May, Mr. X testified that he wanted out of jail “bad.” When he was sentenced on June 26<sup>th</sup>, the presiding judge had recommended him for the Temporary Absence Program (“TAP”), yet he had been denied TAP by the correctional authorities. He was upset about that turn of events. Mr. May confirmed that Mr. X was concerned about getting TAP, but added that Mr.

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<sup>2</sup> From the context, an inmate becomes ‘hot currency’ when it appears likely that the authorities will provide a significant reward in return for incriminating evidence against that inmate.

X seemed to feel that he would get it because his sentence was short and he had a job waiting for him.

Mr. X was a nervous wreck. He feared that by remaining in jail he was going to lose his job, lose the house he was planning to buy, and lose his wife (who was threatening to leave him). Mr. X agreed that all this was a 'huge concern' for him, *and it was the very thing he was thinking about when he purported to overhear Mr. Morin's confession.*

### **Association Between May and X**

Messrs. May and X did not know each other before they were incarcerated together at the Whitby Jail. Both witnesses agreed that they spoke to each other during the final days of June, 1985, but they characterized their relationship somewhat differently.

Mr. X testified that he thought Mr. May was smart "educated wise." He trusted Mr. May and confided in him about his concerns over his wife and the house he hoped to buy. Mr. May offered to lend him money, without Mr. X having asked for it. Mr. May also used to talk to Mr. X to calm him down when he became nervous. Mr. X testified that by July 1, 1985, he knew Mr. May as well as one could know someone in four days. He did not, however, feel protected by him, or rely on him for information as to how to get along in jail.

Mr. May testified that he had no relationship with Mr. X. He was just another inmate. He did not become a friend. May agreed that he offered to lend Mr. X \$5,000, but stated that this was a lie, said only to induce X to stop whining. At Mr. Morin's first trial, Mr. May did not allege that this offer was not genuine. The defence at Mr. Morin's second trial alleged that the offer was a bribe designed to induce X into becoming a corroborating witness.

Mr. May denied that he found in Mr. X a person who could corroborate the story of a confession by Mr. Morin.

## The Night of the Alleged Confession

### *Premonitions of a Confession*

Both May and X advised the police *in separate interviews* on the day after the confession that they had had a feeling in advance that ‘something’ was going to happen. Mr. May was not questioned about this in his appearance before the Commission, but Mr. X was asked to elaborate:

Q. Now, when you say that you had the feeling that something was going to happen, do you mean by that that what you thought that was going to happen was that Mr. Morin was going to give some information out about that murder?

A. I really can’t answer that. I don’t know. I just knew something was wrong and I couldn’t pinpoint it.

Q. Could you describe that feeling just so that we have an idea what you’re talking about?

A. I really didn’t understand what Mr. Morin was talking about and I kind of thought, well, what’s he up to, or what’s he doing, or whatever. And that’s basically how I came to that conclusion.

### *Reactions to the Confession*

In their separate statements to the police on the day following the alleged confession, both Mr. May and Mr. X stated that they had been upset by the confession and had wanted to act out in response to it. Mr. May gave no evidence about this in his testimony before the Commission. Mr. X, however, reiterated that he was very upset and angry at hearing the confession. When asked why he, with his lengthy record for sexual offences against children, would be so upset at hearing such a confession, Mr. X responded that in his mind there is “a big difference between assaulting children and killing children.”

Mr. X’s cell mate, Kenny Doran, was in the cell when Mr. X purported to overhear Mr. Morin confess. He had no reaction to Mr. Morin’s words. Mr. X testified that Mr. Doran was in bed, with his head against the wall, and was not moving. He did not know whether Mr. Doran was awake.

Mr. X did not make any comment to Mr. Doran about what he had overheard, despite the fact that he was upset about it. Mr. X never asked Mr. Doran whether he had overheard the same thing. Mr. X had no explanation for why he failed to do that.

Mr. X testified that he was still upset by the confession the following morning. He had not had much sleep because of it. Nonetheless, Mr. X ate breakfast with Mr. Morin that morning. He also engaged in horseplay with Mr. May, but denied that this was necessarily inconsistent with him being so upset. He asserted that his moods can change “pretty quick.”

Mr. X did not tell any of the guards after he overheard the confession. He explained that he was upset and did not want to talk to anyone at that point. He could not explain why he never told a guard at any time. He told a guard that he had some information for the police. The first person he spoke to about the confession was Mr. May.

The prosecution at Mr. Morin’s second trial tendered the evidence of two jail guards to speak to Mr. X’s demeanour on the morning of July 1<sup>st</sup>. One guard testified that Mr. X approached him, shaking and crying, and asked him to contact Detective Fitzpatrick or Inspector Shephard. The guard added that X had behaved normally until that time. A second guard testified that Mr. X seemed a little nervous when they spoke that morning. The defence argued that Mr. X was upset because he was having marital problems, was in danger of losing his job, and was worried he would not be able to raise the down payment for a house he had contracted to buy.

### **July 1<sup>st</sup> Conversations Between May and X**

Both informants testified that Mr. X approached Mr. May on the morning of July 1<sup>st</sup> and asked whether he had actually heard Mr. Morin confess the night before; May agreed that he had. Mr. X testified that he did not ask the question because he had some doubt about what he had heard, but rather because he was being cautious.

The two informants then discussed what they should do with their information. They agreed they should speak to the police. Mr. X testified that he asked Mr. May who was handling the Jessop homicide investigation and May told him that it was Detective Fitzpatrick and Inspector Shephard. May

suggested X contact Detective Fitzpatrick. Mr. May testified that he had read in the newspapers that Fitzpatrick and Shephard were the lead investigators on the case. The evidence before me disclosed that Detective Fitzpatrick and the informants had dealt with each other in the past. Fitzpatrick had arrested each of them on at least one prior occasion.

In his testimony before the Commission, Mr. May “assumed” that he and Mr. X spoke about the benefits they might be able to get from the police in exchange for their information, but he did not recall the details of what was said. Mr. X might have asked whether May thought he (Mr. X) could make a deal. Mr. May might have told X that he was going to try to barter his information.

In his testimony before the Commission, Mr. X did not recall whether he and Mr. May had talked about making a deal with the police, or the benefits they might obtain, or whether they should say something to the guards. He was confident, however, that he and Mr. May did not sort out how they were going to present themselves to the police.

## **July 1<sup>st</sup> Conversations with the Police**

### *Conversations Between May and the Police*

On the morning of July 1<sup>st</sup>, Mr. May asked to see either Inspector Shephard or Detective Fitzpatrick. He ended up speaking to Detective Doug King and Inspector Shephard. Mr. May acknowledged in his testimony before the Commission that he was hoping to obtain some sort of leniency from the police with respect to his outstanding charges. In his own words, he wanted “some charges dropped or time served.” He stated that he knew he had some information that the police would be interested in, and he tried to barter it for his own good. Inspector Shephard testified that in speaking to Mr. May, it was abundantly clear that May was trying to extract a benefit for his cooperation, and that *May was the kind of person in the kind of situation who would say anything to get out of that situation.*

To the officers’ credit, Mr. May’s conversation with the police was tape-recorded. Reference may be made to the transcript for detailed information as to its content. Some examples of the type of statements made by Mr. May in his negotiations with the police follow. Mr. May made several

statements demonstrating his desire to extract benefits for his evidence:

I would like something before I even sign anything or release any information.

.....

I want to try to get as much out of this as possible.

.....

I can give you whole — you know, anything you want to hear, right from the beginning, as a matter of fact.

.....

I'll give you a statement, a written statement. Anything you want. If you want me to go to court, I'll go to court, that's fine, but you know I'd like to get something out of it.

.....

I would like some type of arrangement made where I would get either time served, a very, very light sentence, or have some of my charges dropped anyway or something. Some reasonable deal worked out I mean, I think it's only fair. I mean, I helped you guys out, I would appreciate the same in return.

.....

[W]ell, I'd like to work something out where I could at least get a reduced sentence or get out of here before I give them any information, I said, before I sign anything, I want to be out of here. You know, get me off and I'll go to court, shit, I'll do what you want.

Mr. May made a number of other statements which invited scepticism. For example:

Q. What are you in for?

A. I was in for 2 counts of uttering a forged document, 2 Fail to Appear, 4 False Pretenses, and



Accommodation Fraud. You know what, I had my (unintelligible) but *it was unintentional*, the uttering a Forged Documents (unintelligible) — you know, I told him I did it *but the false pretenses were totally unintentional* you know, and I told people that the cheques bounce. (sic.)

Q. So what did you get?

A. Six months.

.....

The guards ... set it up with one of the inmates that they had here, he was in here for rape or something and they set it up with them, and he beat the fuck out of me, knocked my teeth out, whatever and Booker had me up here. One of the guards that saw me last night talking to Morin, and he took me up here and said it's too bad they didn't carry you out in a pine box, they should have fucking killed you, you know, they were really giving me a hard time, and anyway, the whole thing.

.....

Q. [W]ould you consider a body pack or your cell wired and have Morin put back in with you?

A. Yeah, I'll do it but you know, sure I'll do it. If you want me to do it I'll do it. But as I said already, I don't know if he's going to go through the same shit again. Once is enough. (Emphasis added.)<sup>3</sup>

Mr. May also offered to provide testimony with respect to a second inmate:

Yeah, and I've got some other — you're going to be really interested in this, you know [name omitted] [who's] a real [con] artist in Oshawa. I have all kinds of goodies on him.

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<sup>3</sup> Mr. May ultimately did agree to wear a body pack. A conversation between him and Mr. Morin was tape-recorded later that day.

*Conversations Between X and the Police*

Mr. X also spoke to King and Shephard on July 1<sup>st</sup>. In his testimony before the Commission, Mr. X acknowledged that he wanted his freedom, and that he tried to use his information about the alleged confession for his “own leverage.” He further acknowledged that his desires to save his marriage and buy a house probably partially motivated his communications with the police. Inspector Shephard testified that Mr. X made many statements which made it abundantly clear just how desperate he was to get out of jail.

Reference may be made to the relevant transcript for the details of Mr. X’s conversation with the police. Some examples of statements made by Mr. X follow:

I’m shaking with disgust and I’m shaking with everything else. I’ve lost my job because I’m in here and they won’t take me back on T.A.P and I’ve got some things going on the outside. I may lose my house and I broke down yesterday in church.

.....

Before I make any statement, any writing, anything I want out of here into the Halfway House.

.....

You get me out of here into a Halfway House I will give you a written statement, signed, I will appear in court, I’d give you anything, I got to get out of here, my nerves are shot.

Mr. X also made some statements which were less than credible. For example:

Q. What are you in here for?

A. Sexual Assault on a female 48 years old. She lived down the hall from me. I’ve done a lot of bad things. There’s ones with kids, sexually assaulting, that is and I wish to straighten out and I asked your partner there to try to get me out of here and into a Halfway House so I can try and get my job back. I’ll give you anything

you want. I got enough information.

.....

Q. Okay, and what was the sexual assault? What happened on that?

A. Well what happened was I was with her in the basement, and what happened was I walked her up to her apartment, she invited me in, okay and I started rubbing her back and she turned around and put her arms around me, we kissed, and my hand went down her pants and up her brassiere. She started pushing against me and of course I have no proof of this, my words against hers and I just said look just fucking plead guilty and get it over with cause it's almost a year and I don't want to live with it no more.

Q. And what did she say happened?

A. Well she said that I came up, I forced her back on the stairs put my hand in her pants, before that I turned her around, which is completely false, okay, she said I turned her around and started kissing her and then my hand went down her pants and up her top, and she told me no. She didn't say a fucking thing about no. Nothing. Okay, when I was under investigation, they said did she say no, I said no. As far as I know it could have been. But I wasn't in the right frame of mind so.

Q. Had you been drinking?

A. No I hadn't. But then I said yes, she did say no and I didn't stop. Or what was it, he said, did she say stop, I said, yes. He said, "did you stop." I said, "no." That's the way it went.

In yet another parallel to May's 'separate' interview, Mr. X also offered to provide testimony against inmates other than Mr. Morin, and indicated that he had tried to encourage another individual charged with murder (R.M.) to confess:

I can even help you guys in on another case of pornography. It probably means dick because what the guy going to get for having pornography films. (sic)

.....

[R.M.], He's walking around all day, tears seem to be in his eyes, and I try to talk to him and I say, look man, if you've got something to say, let it out and — you know, maybe seek help. You will feel a lot better if you get it off your chest.

Mr. X advised the police that if he did not get something in return for his information, he would stay quiet and try to forget what he had heard:

I know enough okay, that I could put him [Morin] away for at least 25 years. I know that, okay. But, like, if I don't get out of here at least into that Halfway House I'm just going to have to live with it ... It's not going to be easy, but I'm going to have to try and forget that I even heard it.

### **Benefits Given to Mr. May**

There was some dispute over the exact nature and extent of the benefits given to Mr. May, and over why they were given.

#### ***Benefits in Relation to Outstanding Charges***

As noted above, in July, 1985, Mr. May was facing three criminal charges: escape custody, theft over \$200 and assault causing bodily harm. He had a bail hearing on these charges on August 19, 1985. Detective Fitzpatrick was present for that hearing. In cross-examination, Detective Fitzpatrick initially denied that his presence was part of the deal being given to Mr. May, *i.e.* that he was there to put in a good word for May. He insisted that he was there in case the acting Assistant Crown Attorney had any questions, and for “the cause of justice.” Detective Fitzpatrick subsequently accepted that he was there because Mr. May wanted him to be there, and not for the cause of justice.

There is no dispute that because of Mr. May's cooperation, the escape custody and theft charges were withdrawn by the prosecution on August 23, 1985. On the same date, Mr. May entered a plea of guilty to the remaining charge of assault causing bodily harm. He was sentenced to serve 16 months in jail, to be followed by two years of probation.

Mr. May testified that as part of his deal with the authorities he avoided a lengthy sentence for the assault causing bodily harm charge. He agreed that the 16 month sentence was less than he expected to receive, and that he had been told he could get four to five years for attacking a jail guard. Mr. May later qualified his testimony by stating that he expected to receive more than 16 months for the assault because his father had told him he was charged with attempted murder. He also stated that in his conversations with the police on July 1<sup>st</sup>, he had been told that he was 'on his own' with respect to the assault charge.

Detective Fitzpatrick was cross-examined on why he had visited Mr. May at the Whitby Jail on three occasions from mid-July to mid-August, 1985. He did not specifically recall his reasons for visiting Mr. May, but agreed that they probably discussed the deal that Mr. May wanted for his cooperation. Inspector Shephard was also asked about the same visits, and responded that on most occasions Mr. May asked to see the police 'to find out what was going on in regards to the charges.' Neither officer made a record of the subject-matter of the visits.

John Scott, the Crown Attorney for the Region of Durham in 1985, authorized the deal with Mr. May. He testified that Mr. May was not granted any benefit in relation to his assault charge in exchange for his co-operation. But the Crown attorney who represented the Crown at Mr. May's sentencing hearing told the Court that Mr. Scott was trying to give Mr. May a great deal of consideration, and as part of that consideration the Crown was not seeking a penitentiary term or the maximum reformatory sentence for the assault. Mr. Scott pointed out that the Crown and defence did not present a joint submission. He also submitted that the sentencing judge's reasons demonstrate that he considered factors other than Mr. May's co-operation, including May's prospects for rehabilitation and the absence of concerns about specific deterrence.

It was suggested to Mr. Scott that the Crown not only sought a reduced sentence for Mr. May's assault charge, but presented a diluted version of the facts. For instance, the court was not advised (1) that May assaulted the jail guard for the purpose of escaping; (2) of the facts behind the Whitby escape (the charge was just withdrawn); (3) that May had been engaged in a plot to escape from Penetang; and (4) of Penetang's opinion as to May's mental make-up (a personality disorder with narcissistic, aggressive and antisocial traits). Mr. Scott responded that it was not usual for the facts

of a charge being withdrawn to be provided to the Court, that he was not aware of the plot to escape from Penetang, and that he does not think the Crown was aware of the details of Penetang's mental assessment of Mr. May — all they knew was that he had been remanded there for an assessment.

Mr. May felt that he did well by the deal. Detective Fitzpatrick offered the same opinion. Mr. Scott testified that, in reality, Mr. May had not been given very much. The escape custody charge was not a particularly serious charge, was not a question of 'overpowering or opening locks,' and was not an unusual event. Mr. Scott noted that the theft charge involved taking a car for a test drive and not returning it. Mr. Scott suggested that on a regular plea bargain he would have been prepared to drop the theft charge and might or might not have resisted withdrawing the escape charge, depending on the circumstances.

Mr. Scott also felt that the sentence of 16 months was appropriate for the assault offence. He acknowledged that the victim spent three days in hospital as a result, and that an operation to relieve pressure on his cranial nerve was considered. He pointed out that this information was provided by the Crown to the Court.

### *Benefits Relating to Parole*

Mr. May was paroled within a week of testifying at the first trial, on the very first day he was eligible. In examination by Commission counsel, Detective Fitzpatrick accepted the suggestion that the authorities intervened to assist Mr. May in obtaining parole. His notes indicate that on December 11, 1985, Fitzpatrick spoke to Mr. May about parole, but he could not recall the details of the conversation. His notes further indicate that he and Mr. Scott visited Mr. May at the Millbrook jail on December 19, 1985. On that same date they spoke to the prison psychologist, Dr. Douglas Ford, about Mr. May. Detective Fitzpatrick testified as follows:

Q. And why were you and Mr. Scott then interviewing the psychologist at the jail in relation to Mr. May and whether he was to be recommended for release?

A. I believe on that occasion, the first trial was coming up in January, I believe, and we probably went up there for the Crown to do a pre-interview with Mr.

May prior to trial commencing. And I can't recall how we came across the psychologist up there, but obviously, we did speak with him there, and obviously, we talked about him being released early if that was — he was going to recommend an early release on him.

Q. Were you fulfilling the police and the Crown's part of the deal with Mr. May for the cooperation Mr. May had shown?

A. Well, yes, I'm sure that was.

Detective Fitzpatrick added that he did not know whether it was part of Mr. May's deal that he would be released on parole, but said that "maybe he wanted an early release too, so we spoke to the psychiatrist or the psychologist concerning that."

In cross-examination, Detective Fitzpatrick changed his position on this issue. He testified that there was no deal offered to or made with Mr. May regarding early release, and that he had no involvement in May obtaining parole. The meeting with Dr. Ford was accidental, and the sole purpose for going to Millbrook was to conduct a pre-trial interview with Mr. May. He said it was possible that the only interest either the police or the Crown attorneys had in Mr. May's parole status was to keep abreast of his whereabouts.

Mr. Scott stated he did not have any role in the decision to grant Mr. May parole, and he was not aware of any role played by the police. He added that he was not surprised that Mr. May got released when he did "in light of the nature of that offender." When asked why he visited with Dr. Ford at Millbrook, he responded:

I think Detective Fitzpatrick is wrong in that regard. My purpose in talking to the gentleman who was either a psychologist or psychiatrist was to see how Mr. May was doing, to get some idea of how he was in terms of the institution, and get a feel for the individual. Mr. Ford was fairly positive in that regard. As well, we took a subpoena up to Mr. May, I believe, on that date, and served him with a subpoena.

Mr. Scott brought the subpoena because he was concerned that Mr. May

would be paroled before trial.

Inspector Shephard testified that neither he nor (to the best of his knowledge) Detective Fitzpatrick offered Mr. May any deal with respect to parole, or made any efforts to assist Mr. May in obtaining parole. Inspector Shephard was cross-examined on some of his notes which potentially related to Mr. May's parole. The contents of his various notes are reflected in the table below.

Date	Notation
December 3, 1985	"Spoke to Pauline Scott, Ontario Parole Services re: Robert May. Advised Pickering Parole Service would be looking after him. Due to record and occurrence, unlikely parole first time up."
December 10, 1985	"Spoke to Cooler Parole Services re: Robert May."
December 11, 1985	"Spoke to Robert Dean May re: prison, Millbrook, Whitby, parole. Jail guards, et cetera."
December 12, 1985	"Spoke to Kerry Clark, superintendent, Whitby Jail."
December 19, 1985	"Spoke to Douglas Ford, psychologist."
December 19, 1985	"Telephone Greg Whitehouse, family counselling, Peterborough, would recommend parole for May."

Inspector Shephard testified that his contacts with Mr. Clark and Dr. Ford had nothing to do with Mr. May's parole. His explanation for his contacts with parole authorities was that he was attempting to find out when Mr. May was going to be released so he could keep abreast of his whereabouts pending Mr. Morin's trial. He did not know of any other way to obtain the information, and did not intend to communicate to the parole authorities that he was interested in seeing Mr. May obtain parole.

### *The Reason for the Deal with May*

Both informants were cross-examined at both trials on the basis that they had traded their information and testimony for the benefits they received or were promised. Mr. Scott, however, offered a different view as to why benefits were given to Mr. May. He said it was in exchange for Mr. May



agreeing to wear a tape recording device (a 'body pack') during a conversation with Mr. Morin in order to obtain corroborative evidence of the confession. They were not given in exchange for Mr. May's information or testimony.

Mr. Scott stated that the prosecution had no need to exchange benefits for a formal statement or testimony by Mr. May since he had already disclosed his information during his July 1<sup>st</sup> tape-recorded conversations with the police. If necessary, he could be subpoenaed to court and cross-examined on the tape recording of his conversation. Mr. Scott did ultimately agree, however, that Mr. May's formal statement was an important document. He said:

It certainly would be an important document if you did not have the same things on the recording. It remains an important document because it is easier to refresh a person's memory from a written document than it is to play the tapes for individuals for that purpose.

Mr. Scott also conceded that at the time he authorized the deal with Mr. May he had not listened to the July 1<sup>st</sup> tape-recording to see how well it documented the confession.

### ***Subsequent Benefits***

Evidence was adduced before the Commission of contact between Mr. May and the public authorities after the second trial in which Mr. May sought assistance on various matters. Mr. May testified that he hoped he could extract further benefits because of his co-operation in Mr. Morin's case:

Q. And I take it, having regard to what you did for them, and I'm talking about the police and the Crowns, you hoped that the police and the Crowns including Mr. McGuigan would help you out in the future; right?

A. I did.

It is clear from the evidence that Mr. May contacted Detective Fitzpatrick at his home in Newfoundland in late 1993. Mr. May testified that his girlfriend, Kathy Mutch, had read Kirk Makin's book on Mr. Morin's case,

*Redrum the Innocent*.<sup>4</sup> The book refers to the opinions of various psychiatrists as to Mr. May's mental make-up (they called him a liar and a sociopath). Mr. May testified that problems arose in his relationship with Ms. Mutch after she read those opinions, so he asked her if she would feel better if she spoke to someone who was involved in the case. She said she would, and that's why he contacted Detective Fitzpatrick.

Mr. May said he wanted Detective Fitzpatrick to explain the psychiatric aspects of the book to Ms. Mutch. Detective Fitzpatrick testified that Mr. May asked him to advise Ms. Mutch that the psychiatric evidence was 'no big deal,' and that it was just a student who gave the evidence. Detective Fitzpatrick agreed to speak to Ms. Mutch if she called him. She never did.

Both Mr. May and Detective Fitzpatrick were asked why they would be interacting in this way. Mr. May testified:

Q. Why would you feel you had that right or that privilege to phone him?

A. It's difficult to explain. I really don't know myself.

Q. Why did you think he would help you, the trial was over? Why would he help you, you in British Columbia?

A. I really don't know.

Q. Well why would he give you his home telephone number? Trial was over.

A. You would have to ask Mr. Fitzpatrick then.

Detective Fitzpatrick testified:

Q. So why would you, please tell us, agree to help Mr. May after the second trial by explaining to his former girlfriend, Kathy Mutch, that: Well, the psychiatric evidence that's disturbing you isn't so

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<sup>4</sup> *Redrum the Innocent: The Murder of Christine Jessop and the Controversial Conviction of her Next-Door Neighbour*, Guy Paul Morin (Penguin Books, 1992: Toronto).

much, it was just students. Why would you do that?

A. I don't know, sir. He called me, and I agreed to do it.

Q. Why did you give him your home telephone number?

A. No particular reason, sir.

Q. Did you have any obligation to Mr. May?

A. No, sir.

Q. What were you going to tell Kathy Mutch if she phoned?

A. I have no idea, sir.

Detective Fitzpatrick testified that Mr. May also contacted him on two other occasions, although he gave no indication that Mr. May ever requested any benefit during these contacts. On the first occasion, Mr. May telephoned him early in the morning and made a threat against a person in British Columbia. Detective Fitzpatrick responded by telling the local R.C.M.P. in British Columbia. On the second occasion, Mr. May dropped in, uninvited, to the police station where Detective Fitzpatrick was working. They had a brief conversation about May's schooling and family. Mr. May accepted that he contacted Detective Fitzpatrick on these occasions, but could give no evidence as to the content of their conversations.

In the late summer of 1994, Mr. May contacted both Alex Smith and Leo McGuigan. Mr. May had been charged with several new criminal offences in British Columbia (including criminal harassment and uttering a death threat). He contacted Mr. Smith first. Mr. Smith recounted the conversation:

A. Mr. May called me at my office, spoke to me about the circumstances of his arrest.

Basically, the theme of the conversation was that the charges were exaggerated, that he wasn't really stalking anyone, or anything like that. Frankly, I don't recall Mr. May indicating in any concrete terms, why he had called me. I mean, it's obviously clear to me that he was looking for help.

In any event, at the end of the conversation, I suggested to him that he should have his lawyer call Mr. McGuigan — and I may have said, have your lawyer Mr. McGuigan or myself, one or the other, and that was the end of the conversation.

Q. Call Mr. McGuigan or yourself with a view to doing what?

A. Well, first of all, he hadn't sought any help. Secondly, it's not clear to me that either Mr. McGuigan or myself would have been in a position to help him, had we wanted to. I mean, the only reason I say he was calling to seek help is because I'm not naive enough to think that Mr. May called me up because he wanted to have a chat.

I mean, I assume that he was self-motivated when he called. We never talked about the details of what he wanted. I know he subsequently talked to Mr. McGuigan about calling the Crown attorney out there. He didn't have that conversation with me and we never got to the point where he asked me to help him.

Mr. May testified that he contacted Mr. McGuigan several times at his home and office concerning the charges in British Columbia. He was seeking help with the charges, and he asked Mr. McGuigan whether he would call the Crown attorney in British Columbia and put in a good word for him. Mr. McGuigan responded that he would contact the Crown, but could not make any promises. Mr. May felt that Messrs. Smith and McGuigan were both "more than ready" to help him out.

## **Benefits Given to Mr. X**

### ***Benefits Before the First Trial***

Mr. X testified that he tried to obtain benefits (release from custody) in exchange for his information about Mr. Morin, but failed to receive any. He was never released on TAP. He did not get out of jail early. He provided his information to the police when he spoke to them on July 1, 1985, after they promised to speak to Mr. Scott about his demands. He provided a written statement on July 3<sup>rd</sup>, still hoping that the police would help him obtain his release.

Mr. Scott testified that Inspector Shephard telephoned him on July 1<sup>st</sup> to advise him of the information Messrs. May and X had to offer. He stated that all the discussions about a deal focused exclusively on Mr. May. He did not recall any discussions about benefits for Mr. X. He was not even sure that he was informed of Mr. X's demands.

Mr. Scott felt that corroboration of Mr. May's evidence might be of value. He believed that the July 1<sup>st</sup> tape recording of Mr. X's conversation with the police already provided some corroboration, but agreed that he did not know how accurate or specific the tape was about the confession.

Mr. Scott suggested that he did not need to negotiate with Mr. X because he had a tape recording of Mr. X's July 1<sup>st</sup> conversation with the police. On the basis of the transcript, he could have forced Mr. X to testify. Mr. Scott acknowledged that he would normally prefer a co-operative witness, but suggested that with inmate witnesses it is sometimes better to cross-examine them as involuntary witnesses since it takes some of the taint away from them. He agreed, however, that cross-examining your own witness is an unusual procedure. He also agreed that it is valuable to have a written statement from a witness.

Initially, Mr. Scott did not reject the possibility that he had authorized police assistance with Mr. X's efforts to obtain early release. He testified about his conversation with Inspector Shephard on July 1<sup>st</sup>:

Q. So would you agree with me that it's likely that you said: Look, see what you can do with Mr. X. We'd love to get a statement from him; it'll help. See if you can help him with a halfway house, if you can. Is that likely what went on, or ... ?

A. I don't recall that going on, but — you know, I don't want to eliminate it ...

Subsequently in his testimony Mr. Scott repeatedly stated that he had no involvement in Mr. X's efforts to obtain TAP, nor did he instruct any police officer to assist him in that regard. Mr. Scott was aware that Inspector Shephard had made some phone calls to assist Mr. X with TAP, but insisted that Inspector Shephard was not acting under his supervision. This is what he said:

Well, sir, I think if you go back to the transcript relating to Mr. X's sentence, the judge directs that he be put in the temporary absence program, and directs that he be sent to a certain facility. The officer may have made calls to try and put that part of the judge's plan into effect, but it has no involvement with me because the judge has made the decision, and it's clear in the transcript.

Mr. Scott accepted, however, that Inspector Shephard "would not have made the calls if Mr. X were not co-operating by providing information."

Inspector Shephard testified as follows regarding his role in assisting Mr. X with TAP:

Q. And, as well, apart from seeing Mr. May and apart from seeing Mr. X at the Whitby jail, you made various attendances upon Mr. X's employer, upon parole individuals, jail authorities dealing with Mr. X's temporary absence parole. Am I right as to that?

A. Yes, sir.

Q. All right. And that was done with a view to do what? To doing what?

A. A view of having him put on TAP so that he could return to his job at the Ontario Hydro.

Q. Which was one of the things that he was seeking to obtain as a benefit for his cooperation, is that fair?

A. That's correct.

Detective Fitzpatrick testified that there was an attempt to look after Mr. X. His recollection was not clear on the issue, but he believed that the police tried to get Mr. X into a halfway house.

### ***Benefits After the First Trial***

In 1987, Mr. X was charged with sexual assault. He testified that on

the day of his arrest, Detective Fitzpatrick told him that he was ‘on his own.’<sup>5</sup> Mr. X agreed that it was possible he contacted a Crown attorney or a police officer involved in the *Morin* case about his charge. He later stated that both Ms. MacLean and Mr. Scott told him they could not help him. Mr. Scott testified that he was contacted by Mr. Brown, the Crown attorney who was prosecuting the charge. Mr. Brown indicated that he had been asked by counsel for Mr. X to speak to Mr. Scott about Mr. X’s co-operation. Mr. Scott responded that he would not play any part in decisions regarding the trial or penalty for the offence. When Mr. X was sentenced for the offence, the Crown attorney submitted to the Court that Mr. X be given absolutely no credit for his testimony in Mr. Morin’s case.

### *Benefits After the Second Trial*

In 1994 Mr. X was charged with communicating for the purpose of prostitution. Mr. X said he contacted Messrs. Smith, McGuigan and Scott in connection with this charge. He acknowledged that he was probably contacting them to call in favours. As for whether this type of contact was invited, Mr. X had this to say:

Q. [D]id Messrs. Scott, Smith, McGuigan, Fitzpatrick or Shephard ever imply to you, after the second trial, that you could contact them if you ever needed them?

A. I don’t recall.

Q. Is it possible that they may have implied that?

A. They may have, I don’t recall.

Mr. X testified that he was concerned over the fact that the Crown was asking for a jail sentence instead of a fine for his crime. He contacted Mr. Smith and asked him ‘what was going on.’ He contacted Mr. Scott and asked him ‘why they were asking for a jail sentence.’ He was of the impression that Mr. McGuigan got involved through Mr. Smith. Mr. Smith responded that he would look into the matter, and subsequently advised Mr. X that they would bring in another (senior) Crown attorney to deal with the charge. In the end,

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<sup>5</sup> Detective Fitzpatrick testified that he had no involvement with Mr. X’s charge whatsoever.

Mr. X was sentenced to a \$150 fine.

Mr. Smith described his involvement as follows:

Q. Did you speak with Mr. X, post-conviction?

A. I did speak to Mr. X. The timing is less clear. It certainly would have been in 1994 and it would have been earlier in 1994, so I suspect, sort of the spring, early summer, but I'm not clear on the precise time. Mr. X called me again at my office and indicated that he had been charged with communicating for the purpose of prostitution.

The ... his call, as I recall it, was he'd indicated that he had received a screening form that indicated the Crown was asking for a custodial sentence. And he had indicated to me that he was guilty of the charge, that he wanted to plead guilty, but couldn't believe that the Crown was asking for jail because everyone else was getting fines ... My response to him was, people don't go to jail for communicating for the purpose of prostitution. And I can't remember exactly what he asked of me. My recollection is that he asked me not if I could do anything, but he asked me if I could find out whether the Crown was serious about wanting jail. Now, again, I'm not naive enough to think that Mr. X would not have perhaps hoped that that would in some way benefit him.

But in any event, my recollection is that I called the duty Crown, whoever that was, and discussed with them the position on the screening form. My recollection is that they confirmed that the Crown had screened for jail, and I don't specifically remember calling John Scott, but I'm quite certain that I did call John Scott, and passed along the information that Mr. X had told me he wanted to plead guilty to this charge.

But, what surprised me, the Crown was asking for jail and is the Crown serious about asking for jail? I'm sure that I expressed both to the duty Crown and to John Scott, the same incredulity, that people don't go to jail for communicating because that, frankly, was my belief. My recollection as to why Mr. X told me he was calling me was that he said he couldn't afford a



lawyer, and so wanted to plead guilty through a duty counsel.

I don't have any clear recollection of what ultimately happened ... I have some vague recollection that ultimately the position taken by the Crown was that Mr. X should receive a fine. My recollection is that the position taken by the Crown was that he should receive a somewhat higher fine than he got, but that's all very vague.

I frankly, had no first-hand dealing with the matter after calling John Scott, and that's assuming that I did call John Scott.

Mr. Smith testified that he did not know whether or not his intervention assisted Mr. X, but conceded that it might have had an impact.

Mr. Scott testified as follows:

I did receive a phone call from, I think, Mr. Smith, relating to that matter ... [I]t strikes me that it would have been in '94 or '95 ... Mr. Smith called and asked about a screening for him. That indicated the Crown would seek a jail term on a charge of that kind ... And I said I don't know about the screening for him, I'm not going to become involved in it. I'll turn you over to a screening Crown who can address the matter. And I did.

Mr. Scott indicated that he did not speak to the screening Crown himself. He tried to avoid becoming involved in matters concerning either Mr. May or Mr. X since his dealings with them. He believed that Mr. Smith's inquiry was inspired by a desire to gather information rather than an attempt to assist Mr. X, but conceded that the latter was possible. Mr. Scott stated that he never dealt with Mr. X himself.

Mr. McGuigan testified that he had no involvement in any of Mr. X's charges. (Mr. Smith never stated that he spoke to Mr. McGuigan about Mr. X's communicating charge.)

Mr. X stated that it was possible he contacted the Crown or the police about other matters, but he did not know for sure. He did indicate that he

once contacted Sergeant Chapman, the court officer for the second trial, about someone in his union running a CPIC check on him.<sup>6</sup> Chapman confirmed that he spoke to Mr. X about why someone had access to his criminal record. Mr. McGuigan testified that he was asked by Mr. X to do something about someone improperly using the criminal record. Both Mr. X and Inspector Shephard testified that they encountered each other at a public swimming pool one day, but neither suggested that this was anything but accidental. Mr. X also encountered Detective Fitzpatrick at his (Mr. X's) place of work on a few occasions. Mr. X testified that he worked at a place that is routinely used by the average homeowner, and he had no reason to believe that Detective Fitzpatrick came in for the purpose of speaking to him. On one occasion they spoke about Mr. May's recantations. Detective Fitzpatrick confirmed that he had seen Mr. X at his workplace on a few occasions, and that their encounters were entirely unrelated to the Morin prosecution.

### **May's Recantations and Allegations**

After the second trial, Mr. May made a number of out-of-court statements regarding the Morin prosecution. He told a number of people that he lied about hearing Mr. Morin confess, and he made allegations of serious misconduct by some of the individuals involved in the Morin investigation and prosecution. In his testimony before the Commission, Mr. May asserted that these statements were untrue.

Kathy Mutch was Mr. May's girlfriend in the early 1990s. Susan Mutch was her sister-in-law. Daryl Thompson was an old friend of Mr. May. Mr. May testified:

Q. Did you tell Susan Mutch that you had committed perjury at Guy Paul Morin's trial?

A. I did.

Q. About the confession?

A. I believe I did.

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<sup>6</sup> CPIC is the computerized police information database.

Q. Yes. Now did you tell a person by the name of Kathy Mutch that you'd perjured yourself at Guy Paul Morin's trial?

A. I didn't.

.....

Q. And did you tell a fellow by the name of Daryl Thompson that you'd perjured yourself at Guy Paul Morin's trial by stating that he confessed to you?

A. I believe so.

In his evidence before the Commission, Mr. May stated that he lied whenever he said that he had perjured himself.

Mr. May was asked about a phone call that was overheard by Kathy and Susan Mutch:

Q. Now Susan Mutch in an affidavit says she heard you in a phone call in September '93 saying, "People, I understand you're looking for me" — this is out in British Columbia — "and you want me back there." And later, "There's no way I'm going to take the fall for this alone." You said he was not going to let other people back out and blame Bob, because the other person was in on it, too. Did you make such a phone call?

A. I may have, I don't recall.

Q. Yes. Who were you talking to?

A. Nobody.

Q. Talking to yourself?

A. I was.

Q. And Susan Mutch happened to overhear you on the phone talking to yourself?

A. That's correct.

Q. Okay, we have your evidence. Kathy Mutch says

she overheard you say that “He was not going down alone, and that if he took the rap on this, you guys are going with me.” Now did you make that conversation such that Kathy Mutch overheard you?

A. I may have, yes.

Q. Yes. And you told Kathy Mutch that you were talking to the police in Ontario?

A. I don’t recall. I may have, yes.

Mr. May was asked what he meant when he said “I’m not going down alone, and if I take the rap, you guys are coming with me.” He responded that he was in “a bit of a tailspin” when he said those words, and he does not know what was going through his mind. Mr. May was also asked about his evidence that he was talking to himself. He said that he dialed Durham Regional Police, but hung up as soon as someone answered. He was confronted by the fact that Susan Mutch’s phone records show that there were two phone calls to the police, one lasting four minutes and the other lasting two minutes. To the suggestion that this shows he did not hang up once someone answered, but rather spoke to someone on the other end, Mr. May responded that he does not recall speaking to anyone. Mr. May later stated that he may have been trying to contact Detective Fitzpatrick about the Morin trial.

Mr. May was asked about his conversations with Susan Mutch:

Q. Did you tell her that you’d made a deal for your testimony in Guy Paul Morin’s case? Did you tell her that September 23<sup>rd</sup>, 1993?

A. I don’t recall, sir.

Q. Did you tell her that you were angry, and as a result, the police officer had been promoted, and that you’d ... a bad reputation and might go to jail?

A. I might have, I don’t remember.

Q. Did you tell her that you and Bernie Fitzpatrick were friends in a weird kind of way because Fitzpatrick had arrested you so many times and known you such a long time?

A. I may have.

Q. Did you tell Susan Mutch and laughed with her about it, how you'd fooled the jury into thinking you changed your lifestyle when you were regularly dealing drugs?

A. I don't believe so.

.....

Q. Can you say that you didn't?

A. No, I can't.

Mr. May believed he did tell Kathy Mutch that he was paid \$25,000 for his evidence at Mr. Morin's trial.

Mr. May was questioned about two conversations he allegedly had with Mr. Thompson. The first was in June, 1994:

Q. He asked you if you'd lied at the trial, and he's dealing with Morin's trial. And you said, "Yes, I made a deal with the devil and now have to live with it," and that an innocent man was in jail. You told Daryl Thompson that?

A. I believe so.

Q. Yes. Thank you. On July the 7<sup>th</sup>, 1994, did you phone Daryl Thompson from your parents' home and say to Daryl that everything you said at Guy Paul Morin's trial was a lie, that you'd perjured yourself to avoid a lengthy sentence for assaulting a jail guard?

A. I may have. I don't recall.

Mr. May was also asked about a similar conversation with Susan Mutch:

Q. Okay. And as to Susan Mutch on July the 5<sup>th</sup>, 1994, did you tell her that you cut a deal with the devil, and the devil's come calling, and that what we're dealing with here is coercions, false witnesses, fabricated evidence and destroyed evidence?

A. I might have.

Mr. May later denied that he had made a deal with the devil.

Mr. May had a conversation with his father in July, 1994:

Q. And did you say to him during a conversation in the back yard that you'd perjured yourself at the Morin trial when you said that Morin had confessed, and that if you were found out, you could go to jail for ten years?

A. I may have. I don't recall the conversation.

.....

Q. Is your father a truthful man?

A. He is, yes.

Q. Did you tell your father on that occasion that you'd made a deal to be a witness because you were being assaulted by guards at the Whitby Jail?

A. I may have.

.....

Q. Did you tell your father you'd been keeping a secret for ten years and couldn't keep it any longer?

A. I may have.

On July 7, 1994, Mr. May had a conversation with his mother:

Q. Did you tell her — your mother — that you lied at Guy Paul Morin's trial by claiming that Guy Paul Morin confessed to you the murder of Christine Jessop?

A. I may have.

Q. You may have said that to her; all right. And did you tell her that you made up this confession because you were being assaulted by guards at the jail?

A. I may have.

Q. Did you tell her that you'd had a broomstick inserted in your behind, and you would have done anything to stop the assaults?

A. I believe so.

Q. Did you tell her — your mother — that the assaults had stopped once you told the police that Morin had confessed?

A. I believe I did.

Q. Did you tell her that Bernie Fitzpatrick had visited you at the jail and told you to dance around with Morin, and not come out directly and ask him if he killed the Jessop girl?

A. I might have, yes.

Q. You might have told her that. Did you tell her that you'd been threatened personally by Detective Fitzpatrick on numerous occasions?

A. I believe so.

Q. And that the threats had also been directed at your wife and children, and the May family as a whole?

A. I believe so.

Mr. May's mother suggested that he write down his allegations in a letter in case something happened to him. He did so in a letter dated July 7, 1994:

In June of 1985, I was approached by Det. Bernie Fitzpatrick of the Durham Regional Police force. This occurred one day before my talk with police about Guy Paul Morin confessing to me at Whitby County Jail. The discussion I had with Fitzpatrick consisted of a deal the police wanted to give me in exchange for testifying against Morin. The deal was that I would wear a wire and dance around Morin's alibi. But never to directly ask him about the murder. I was to find somebody who would corroborate my testimony and

they to (sic) would be looked after. I was told that in exchange for my help, police would give me short time and would parole me immediately after I testified. I have specific information that could lead to the arrest of the top level officers involved in the case for fabricating evidence, perjury, destruction of evidence, coercion, and threatening. To my knowledge, Guy Paul Morin is an innocent man. In the event of my death or disappearance I would like the following to be released to the public.

The page missing from the jail log was removed to hide the fact that I was approached by police one day before I was to confess. Det. Michael Michalowsky was threatened because he had knowledge that could blow the case. This is why he kept two notebooks. I know this because Bernie Fitzpatrick let it slip while drinking with me at his condominium in London Ont. during the second trial. Ever since the first trial, I have been threatened to keep my mouth shut by telling me that my family was in danger. I am now worried that my ex-girlfriend may be in danger because Bernie Fitzpatrick feels she may know too much. He has implied that she could have an "accident". I am concerned for the safety of my family and friends. This should be enough information to start an investigation. I will in the future if need be, provide dates and specific information concerning the conspiracy to convict Morin.

Dated and signed in Whitby, Ont. on July 7/94 at 10:12 am.

This is a list of names of the officials involved in the conspiracy to convict Morin:

Bernie Fitzpatrick, Alex Smith, Robert Chapman, Leo McGuigan, John Shephard.

Send this to:

Mark (sic) Makin - Globe and Mail  
Eric Manning - The Fifth Estate  
Peter Cheney - The Toronto Star

Dated this day July 7/1994 in Whitby, Ont. 10:25 a.m.



### *May's Explanations*

As stated above, Mr. May denied that his recantations were true. He offered two explanations for why he made them. First of all, Mr. May said that he did so in order to scare Kathy Mutch, his former girlfriend, into contacting him. Mr. May explained this as follows:

Q. So why would you tell Judy Mutch that you perjured yourself at the Morin trial if, as you tell us today it wasn't true?

A. I was trying to convey a message to Kathy through people that she knew to try and scare her so that I could make contact with her. She refused to have contact with me at that time.

Q. I don't quite understand that. Maybe you can help us. You told Judy Mutch that you'd perjured yourself when you swore at the trial that Guy Paul Morin had confessed because you hoped that would scare Kathy, her sister, in some way? I don't quite understand; maybe you can help us.

A. It was part and parcel of the story that I was telling everybody, that she was in danger because Bernie thought she knew too much, and so on and so forth, and I figured if she was scared enough, she might try to contact me or talk to me so that — you know, she would remove, or could remove herself from the situation.

In his letter to his mother, Mr. May wrote that he was worried that his “ex-girlfriend may be in danger because Bernie Fitzpatrick feels she may know too much. He has implied she could have an accident.”

Mr. May admitted that this explanation was convoluted and did not make much sense. In particular, he could offer no explanation for why he privately told his family doctor, a person with no connection with Kathy Mutch, that he had perjured himself. He also acknowledged that his telephone conversation with no one, overheard by Susan Mutch, occurred nine months before his relationship with Kathy Mutch ended.

Mr. May's second explanation for making false statements was that he

had been abusing drugs and alcohol at the time he made them; he had been on a sedative called Xanax when he lied to his parents. His mother swore an affidavit in which she stated that her son appeared to be sober when he made his statements to her. Mr. May explained that his parents had never noticed him being under the influence of intoxicants, even though he had been in their home many times after having taken drugs. When confronted with an affidavit from his doctor who also regarded him to be sober, Mr. May responded that he used eye drops to take the redness out of his eyes.

### *May's Recantations of his Recantations*

Mr. May had denied the truth of his recanting statements in advance of his testimony before the Commission. On August 17, 1994, an article appeared in the Toronto *Globe and Mail* reporting on Mr. May's claims that he had perjured himself at Mr. Morin's trials. Mr. May had attempted, by threats and violence, to dissuade the Mutchs and Mr. Thompson from disclosing his recantations, but was unsuccessful in doing so. Mr. May testified before the Commission that he feared he would be charged with perjury as a result of this publicity, so he gave a television interview in which he claimed that the Mutchs and Mr. Thompson were lying about his recantations. He alleged that Judy Mutch was mad because he had hurt her sister, and Thompson was mad because May had called him a homosexual. He also contacted Mr. McGuigan and assured him that he did not lie at Mr. Morin's second trial. He advised others, including Metro Toronto police officers, of the same thing. Mr. May subsequently acknowledged, during the course of Mr. Morin's appeal proceedings as well as before the Commission, that he had actually made the statements which Thompson and the Mutchs attributed to him.<sup>7</sup>

Guy Paul Morin testified at both trials and at this Inquiry that he was not responsible for the killing of Christine Jessop and that he did not confess to Robert Dean May. I accept these statements completely.

## **Findings**

My mandate does not permit me to determine whether Mr. May and

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<sup>7</sup> Mr. May explained to the Commission that he was forced into acknowledging this when his letter to his mother appeared in the public forum.

Mr. X perjured themselves at Mr. Morin's trials. I do find, however, that on the evidence before me, Robert Dean May and Mr. X are totally unreliable witnesses. Further, they did not report the purported confession to the authorities because of their moral outrage at the crime committed by Mr. Morin. I do not accept that explanation; their motives were self-serving. I find their evidence unreliable for many reasons. Some follow:

Mr. May has a criminal record for crimes of dishonesty. He admitted that he had a problem with lying in the past and that he had lied to the police and correctional authorities. He wanted badly to be released from jail in June, 1985 and would do whatever was necessary to accomplish this. During his negotiations with the police for the information he said he had about Morin's confession, he told them (on tape) that he would give them anything they wanted in exchange for the authorities' assistance with his outstanding charges.

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. Subsequently, May publicly alleged that those people were lying when they came forward with his recantations. Later, May retracted his allegations against those people and agreed he had fabricated them. Then he attempted to recant his recantations and took the position that his evidence at the trial about the purported confession was indeed true. I find that May spun a web of confusion and deceit around the issue of the confession. He is too unreliable a person to be believed as a witness on the issues to which he has testified before me.

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 sociopathic tendencies. At the second trial of Mr. Morin an expert testified that this is characterized by exaggeration, lying, suggestibility and disregard for social norms. Another expert said Mr. X would have been strongly influenced and recruited by a stronger person like Mr. May. Mr. X agreed that he has lied to the police and correctional authorities in the past. He told this Inquiry that at times he apparently lost contact with reality; he has 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, X was desperate to get out of the Whitby Jail and into the Temporary Absence Program. He told the police he would give them anything they wanted if they got him into a halfway house. However, if he did not get something in exchange for his information, he would stay quiet and try to forget what he had heard about Morin's purported confession. After the first trial he was convicted of another sexual assault. He, too, is an untrustworthy person whose testimony cannot be accepted on any of the issues that arise before me.

Other aspects of the evidence which further undermine the reliability of these witnesses are reflected throughout the balance of this chapter. These aspects parallel those found in other miscarriages of justice involving jailhouse informants.

An issue canvassed by some counsel during the course of the Inquiry was the response of the various authorities upon learning of Mr. May's recantations (and statements subsequent thereto). Mr. Morin was appealing his conviction at the time, and eventually sought to introduce fresh evidence on the appeal concerning Mr. May's recantations. As such, it was argued, any evidence pertaining to the recantations may have had an impact on the appeal.

Detective Fitzpatrick testified that in the summer of 1994 he learned of Mr. May's recantations as well as a threat on his son's life by Mr. May. He did not report either matter to the Crown attorneys with carriage of the appeal. He felt that he was retired and had no obligation to pass on this information. He also noted that there were two Metro Toronto police officers assigned to deal with the disclosure issues pending appeal.

Mr. Smith was contacted by Mr. May shortly after the recantations became public. Mr. May advised him that his friends were lying. Mr. Smith subsequently learned that Mr. May was lying. Mr. Smith testified that he did not think to notify the Crown attorneys with carriage of the appeal about this information. He agreed that, in retrospect, he should have been more careful and disclosed the information.

Inspector Shephard testified that after he learned of Mr. May's recantations he telephoned the Deputy Chief of Police and suggested that someone investigate the issue. Inspector Shephard felt that he had a duty to pass on the information, as it was relevant to the issue of whether Mr. May

was a reformed individual (as he had professed to be at the second trial).

Detective Fitzpatrick's failure to notify police officials of the two events, and Mr. Smith's failure to contact the Crown attorneys with carriage of the appeal, demonstrate a serious flaw in the system. It may well be that Detective Fitzpatrick, by then retired, felt that matters were well in hand and that he wanted no further involvement in the case. Still, as a former police officer, he should have realized the possible importance of these events and passed them on, although I acknowledge that he was under no obligation to do so.

Insofar as Mr. Smith is concerned, he agreed that this was an error of judgment, and I accept that this was not a malicious omission. His inaction does, however, indicate that guidelines are necessary to ensure proper cooperation between trial Crowns and those in charge of the appeal. My recommendations address this issue.

### **(iii) Set-Up**

In his testimony before the Commission, Mr. May not only denied the truth of any of his recantations, he also denied any knowledge of any wrongdoing on the part of the investigators and prosecutors in Mr. Morin's case. As reflected above, after the second trial Mr. May made a series of incriminatory statements regarding the conduct of the authorities, and particularly the conduct of Detective Fitzpatrick. He alleged that there had been a conspiracy to convict Mr. Morin. More particularly, he alleged, *inter alia*, that he had been visited by Detective Fitzpatrick on the day prior to overhearing Mr. Morin confess, that Detective Fitzpatrick had encouraged him to fabricate a confession by Mr. Morin and find another inmate to corroborate the story, and that Detective Fitzpatrick had engaged in a cover-up of his improper activities, involving the destruction of evidence and intimidation of potential witnesses.

Detective Fitzpatrick was questioned about Mr. May's allegations, and categorically stated that they were false. Mr. McGuigan denied that there was any conspiracy to convict Mr. Morin, as had been alleged by Mr. May in his recantations.<sup>8</sup> The Commission heard further evidence to determine whether

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<sup>8</sup> The allegation was contained in May's letter to his mother of July 7, 1994.

there was any truth to the allegations, particularly the suggestion that the informants' evidence was the product of a set-up. Ultimately, counsel for the Morins conceded that the evidence was insufficient to permit me to find any set-up. I agree. However, given the public attention directed to this issue (and the systemic recommendations which also arise from this issue), it is necessary to review the relevant evidence.

### **Prior Association between Fitzpatrick and May**

Mr. May testified that Detective Fitzpatrick had been the arresting officer on all of his criminal charges prior to 1985, except for the assault on the prison guard. He acknowledged that he may have once told Susan Mutch that he and Fitzpatrick were friends "in a weird kind of way" because Fitzpatrick had arrested him so many times. He further acknowledged that he may have told Mr. Thompson that Detective Fitzpatrick was a friend who would always look after him. In his testimony before the Commission, Mr. May denied that he had any special relationship with Detective Fitzpatrick that would lead him to believe that Fitzpatrick would look after him if he had a problem. When asked how he had looked upon Detective Fitzpatrick in 1985, Mr. May responded that he did not have "much use for him."

Detective Fitzpatrick testified that he was not Mr. May's friend, and that they had no relationship at all. He stated that his only contact with May prior to July 9, 1985, was when he arrested him on his 1981 break and enter and theft charges.

### **Prior Association between Fitzpatrick and X**

Mr. X testified that he had been arrested and/or investigated by Detective Fitzpatrick on at least two or three prior occasions. He agreed that he knew Fitzpatrick quite well, but added that this was only through dealings with him on criminal charges.

Detective Fitzpatrick testified that his only prior association with X was when he arrested him for sexual assault in 1984; he was the officer-in-charge of that prosecution. He had no other contact with X, nor did he know of his reputation amongst the Durham police officers.

### **Fitzpatrick's Alleged Visit to May on June 29-30, 1985**

As reflected above, Mr. May at one point told his mother that he had been visited by Detective Fitzpatrick in the days immediately prior to July 1, 1985 (the date on which he allegedly overheard Mr. Morin confess) and that the record reflecting that visit had been destroyed by Fitzpatrick. No professional visitors' records for the Whitby Jail for June 29 and 30, 1985, could be found by the time of this Commission. An issue canvassed during the hearings was whether those records were destroyed or removed so as to conceal a visit to Mr. May on one of those days. The evidence pertaining to this issue will be addressed below.

The only available record was the Corridor 1 Log Book. This is a book which records inmate movements in Corridor 1 of the jail. Mr. May was being held in a cell in Corridor 1 on June 29 and 30, 1985.

The Log Book indicated that Mr. May did receive a visitor from 7:14 to 7:59 p.m. on June 30<sup>th</sup>; the Log Book also indicated, however, that the visit was held in the area reserved for non-professionals (the 'visitors room'). Police officers would normally visit inmates in the 'lawyers room.' The records did not reflect visits by anyone to the lawyers' room in Corridor 1 on June 29<sup>th</sup> or 30<sup>th</sup>.

The jail records reflected that Mr. Morin also received a visitor in the visitors' room on June 30<sup>th</sup>. Mr. Morin was brought out to see this visitor at 8:00 p.m., one minute after Mr. May was returned to his cell. A witness from the jail testified that there was no privacy in the visitors' room, and it was therefore possible that the visitors to Messrs. May and Morin would have seen each other in that room.

Mr. May denied that he was visited by Detective Fitzpatrick on either June 29 or 30, 1985. He did not recall who it was that visited him on the 30<sup>th</sup>, but he was sure that it was not a police officer. He could not offer an explanation for what would prompt him to come up with the story that Fitzpatrick had visited him before the confession.

Detective Fitzpatrick denied that he visited Mr. May on June 30<sup>th</sup> (or June 29<sup>th</sup>). He said that he was on leave from work from June 28 to July 9, 1985. During that period of time, he visited some of his relatives in Boston.

He could not be certain of the exact date of his departure for the United States. He initially thought it was on the morning of June 29<sup>th</sup>, but later stated that it could have been on June 30<sup>th</sup> or July 1<sup>st</sup>. He agreed that, due to the passage of time, he could not prove where he was on June 30<sup>th</sup>. He was first asked to account for his whereabouts in December 1994, some nine years after the fact. His notes simply reflect that he was on leave. Detective Fitzpatrick gave Detective Jacob Poranganel, a Metro Toronto police officer investigating Mr. May's allegation, access to his Visa, telephone and gasoline purchase records for the time in question.<sup>9</sup> Detective Poranganel testified that Fitzpatrick was co-operative in providing those records, and that he found nothing which indicated that Detective Fitzpatrick had visited Mr. May on June 30<sup>th</sup>.

Mr. X testified that no one discussed with him the possibility of getting a confession from Mr. Morin in advance of June 30, 1985. He did not recall receiving any visits from either Detective Fitzpatrick or Inspector Shephard before July 1<sup>st</sup>. Inspector Shephard likewise stated that he did not attend the Whitby Jail on either June 29<sup>th</sup> or 30<sup>th</sup>.

## **Evidence of Missing Jail Records**

### ***Mr. Mangano's Attendance at the Jail***

Basil Mangano was a private investigator retained by Mr. Morin's defence counsel at the first and second trials. He testified that in late 1989 or early 1990, he contacted the Whitby Jail to determine what records existed of professional visitors to inmates. He was told by the head of the Records Department, Mary Humphries, that the relevant records had been destroyed.<sup>10</sup> On October 4, 1991, Mr. Mangano and a law student from Mr. Pinkofsky's office, Susan Mulligan, attended at the Whitby Jail with a subpoena for the professional visitors sign-in book records from May 1, 1985 to September 20, 1985. They spoke to Superintendent Orville Kerlew. Mr. Kerlew retrieved an envelope containing professional visitors records, and showed Mr. Mangano

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<sup>9</sup> He also testified before the Commission that he would have no objection to anyone searching the U.S. immigration archives for a record of his entry into the United States.

<sup>10</sup> Ms. Humphries confirmed that in 1989 she thought the jail no longer had the records and that she so advised Elisabeth Widner, a member of the Morin defence team.



and Ms. Mulligan the requested records. Mr. Mangano testified that he believed they were originals because the writing was in ink and the pages were yellow.<sup>11</sup> He further testified that he was surprised to see the records, because he had previously been advised that they had been destroyed.

The records for the various dates were stapled together. In Mr. Kerlew's presence, Mr. Mangano and Ms. Mulligan flipped through the pages, looking for records from June 30 or July 1, 1985. Mr. Mangano saw records for June 28<sup>th</sup> and July 1<sup>st</sup>, but none for the dates in between. He also noted that there was a small bit of paper caught underneath the staple where the June 30<sup>th</sup> record would have been located. Mr. Mangano testified that this piece of paper was yellow in colour, and appeared to be part of a page that was ripped out of the remaining stack of records.

Mr. Mangano was cross-examined on the fact that he made no contemporaneous note of his discovery. He explained that it was Ms. Mulligan's job to report back to Mr. Morin's defence counsel, and that he was more interested in obtaining information which would prove the theory that the 'confession' was a police set-up rather than raise further questions about it. Mr. Mangano was also questioned about why he did not mention his discovery to Mr. Kerlew. He explained that he did not know whether or not Mr. Kerlew was on the side of the police, and he worried that alerting Mr. Kerlew to the missing page might cause the remaining evidence (the small bit of paper) to disappear. Mr. Mangano ultimately left the original records with Mr. Kerlew (after obtaining a copy for himself), and requested that Mr. Kerlew personally maintain control over them.<sup>12</sup> He testified that he felt safe leaving the documents because Mr. Kerlew had not been advised of their significance.

Both Detective Fitzpatrick and Inspector Shephard denied removing any original records from the Whitby Jail. Mr. May likewise denied that he had any knowledge of such an occurrence. When asked how he could have thought to include such an allegation in statements to his mother and Susan Mutch, Mr. May suggested that he once overheard a conversation between two Crown attorneys about a missing page from the Whitby Jail records. This

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<sup>11</sup> Other witnesses confirmed that original records of professional visits are yellow.

<sup>12</sup> Mr. Kerlew did not recall ever receiving such a request.

conversation occurred either before or during Mr. Morin's second trial, in the Crown Attorney's office in London. Mr. May could not explain how he related that conversation to the time period immediately before July 1, 1985, or to the actions of Detective Fitzpatrick.

All the witnesses agreed that original jail records would not be given to a police officer unless he or she had a warrant to seize them.

### *Losing and Finding the Original Records*

As indicated above, Mr. Mangano said he was advised in 1989/1990 that the Whitby Jail no longer had the professional visitors records for 1985, yet he was shown them by the superintendent of the jail in October, 1991. The Commission heard evidence in order to shed some light on the continuity of the jail records.

Exhibit 11 in the Commission proceedings is an envelope containing some professional visitors records from the Whitby Jail. Joan Blake, the secretary to the superintendent, testified that she was given that envelope in 1989 by former Deputy Superintendent Louie Mignon. The words "Guy Paul Morin" were written on the front. Mr. Mignon told Ms. Blake "to guard the envelope with her life."

Ms. Blake kept the envelope in her filing cabinet until she spoke to Ms. Humphries sometime in 1990 or 1991 (but no later than May 1991). Ms. Humphries mentioned that two Durham police detectives were coming to look at files pertaining to Mr. Morin, and that there was not much to show them because the file had been transferred elsewhere. Ms. Blake responded that she had the Exhibit 11 envelope, and provided it to Ms. Humphries at that time.

Ms. Blake testified that she assumed that Ms. Humphries retained possession of the envelope. In the fall of 1994, however, Ms. Humphries came to her looking for the file. A search was undertaken and Ms. Blake finally located it in a filing cabinet she used for overflow of records. This was in October 1994.

Ms. Blake testified that she never examined the contents of the envelope, although she did see some yellow professional visitors sheets sticking out of the end. It was about one inch thick when she received it from Mr. Mignon. She had not removed anything before she gave it to Ms.

Humphries. When she located the envelope in October 1994, however, there was much less inside: it was “pretty much” empty.

### *How the Records Might Have Been Lost*

Ms. Humphries confirmed that she took possession of the envelope in April, 1991, and that the envelope contained some professional visitors sheets and a hard cover Log Book. She testified that she later met with Detective Fitzpatrick and Inspector Shephard and showed them the envelope.<sup>13</sup> The two officers reviewed the contents of the envelope in her presence, but she was not watching them at all times. She agreed that she probably would have noticed if the officers had removed any of the documents, but stated that she could not guarantee that they did not. When the officers left, Ms. Humphries retained the envelope. It appeared to be as thick as before. She did not recall the officers asking to take some originals with them, but could not swear that they did not. She assumed they probably took copies. She stored the envelope in a filing cabinet in the records department (but not in the same filing cabinet in which they were found in October, 1994).

Neither Detective Fitzpatrick nor Inspector Shephard had any memory or note of visiting the Whitby Jail to look at records on or about April 1, 1991. Detective Fitzpatrick ultimately conceded that he may have visited the jail and viewed records with Ms. Humphries if she had a note of his visit, but he did not believe he ever had access to original records. Inspector Shephard could not state for certain that he was not at the jail on April 1<sup>st</sup>.

The next time the professional visitors records showed up was in October, 1991. Superintendent Kerlew confirmed that he met with Ms. Mulligan (and probably Mr. Mangano) at that time. Mr. Kerlew said he showed Ms. Mulligan professional visitors records, although he did not recall ever seeing the Exhibit 11 envelope before. Mr. Kerlew thought he had obtained the visitors records from either Ms. Blake or Ms. Humphries. Ms. Humphries could not be sure, but believed that she had, at some point, given Mr. Kerlew the records. Ms. Blake was off work from May to November, 1991.

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<sup>13</sup> Ms. Humphries thought that the meeting occurred on or about April 1, 1991, but she could not be sure.

Mr. Kerlew testified that the records he showed to Ms. Mulligan were about one inch thick. He flipped through them to ensure that they were professional visitors records. He did not think that there was a page missing, but could not dispute that the records could have contained a corner of a torn page as described by Mr. Mangano. After the meeting with Ms. Mulligan, Mr. Kerlew placed the records in his out-basket. Documents in that basket would normally be dealt with by his secretary, who at that point in time was a Ms. McIntyre.

Ms. Blake testified that the most likely explanation for the change in content was that someone had deliberately taken documents out of the envelope. She conceded it was possible that records had slipped out accidentally. She further agreed that only jail staff would have had access to the room where the envelope was found in October, 1994.

Both Detective Fitzpatrick and Inspector Shephard remembered visiting the Whitby Jail in July, 1985 and obtaining copies of records of who visited Mr. Morin on June 30, 1985. Detective Fitzpatrick also recalled later obtaining a handwritten list of professional visitors for Mr. Morin from April 26 to October 17, 1985. Ms. Laura Mair, an employee of the Whitby Jail, testified that she prepared that list sometime in late 1985 from the original professional visitors records. The list does not reflect any visits on June 30<sup>th</sup>, leading to the inference that the June 30 records — if they ever existed — were already missing.

### *The State of the Remaining Records*

Exhibit 16 in the Commission proceedings is a copy of the records obtained by Mr. Mangano during his visit to the Whitby Jail of October 4, 1991. The last entry on the professional visitors sheet for June 1985 is for June 28<sup>th</sup>. This entry is found at the very bottom of the page. Ms. Mair testified that each month the jail started a new professional visitors sheet. On the last day of the preceding month the sheet for that month would be placed in the jail's files, whether or not the sheet was full. Ms. Mair therefore agreed that either, by coincidence, the last entry for June 1985 was on June 28<sup>th</sup> on the very last line of the visitors sheet, or there is a page missing from the records which reflected further entries for the month.

### **Sign-in Procedures at the Whitby Jail**

The Commission heard evidence concerning the sign-in procedures at the Whitby Jail. This evidence bore upon the likelihood that any record would have existed of a visit to Mr. May by Detective Fitzpatrick on June 30, 1985. Obviously, if no record existed in the first place, there would have been no need for the police to destroy one to cover their tracks.

The various witnesses from the Whitby Jail testified that all visitors were supposed to sign in when visiting the jail, but that this policy was not always followed. Particular reference was made to the back door entrance to the jail. This was the entrance through which prisoners were taken. Police officers also had access through it. Ms. Mair testified that, although professional visitors were supposed to sign in at the back door, they may not always have been required to do so if the attending guard was otherwise occupied. Superintendent Kerlew (who was not in charge of the Whitby Jail until 1988) considered this to be a serious breach of the regulations, given that only the Superintendent or Deputy Superintendent of the jail had the authority to waive the requirement to sign in.

Detective Fitzpatrick and Inspector Shephard confirmed that they did not always sign in at the back door entrance to the Whitby Jail, and both referred to the situation where the attending guard would be too busy to present them with the register. Detective Fitzpatrick testified that he rarely signed in when he visited the jail, and that he normally entered through the back. Inspector Shephard testified that he did not sign in probably half the times he visited the Whitby Jail. He also stated that he often met the informants in the Sergeant's office, and that one could access this office without going through the area where the sign-in book was kept. In the course of his investigation into Mr. May's allegations, Detective Poranganel learned that some police officers very seldom signed in at the jail.

Ms. Mair testified that professional visitors always entered the jail through the back door on weekends. June 30<sup>th</sup> was a Sunday. Detective Fitzpatrick agreed that if he visited Mr. May on June 30<sup>th</sup>, had not signed in and had not made an entry in his notebook about it, there would be no record of the visit.

### **Placement of the Informants in the Jail**

On the night of June 30, 1985, Mr. Morin was housed in the protective custody wing of the Whitby Jail. Individuals charged with violent crimes against children are often despised by other inmates, and thus at risk of being physically harmed by them. Questions were raised before the Commission as to why Mr. May was also housed in protective custody. It was suggested that he might have been deliberately placed there in order to have contact with Mr. Morin and thus be in a position to either induce a confession or convincingly fabricate a story of such a confession.

Mr. May gave confusing evidence on this issue. He first suggested that he was placed in protective custody because he had assaulted a jail guard and was considered a hero for it by the general population inmates. But he later stated that he did not know why he was placed in protective custody and agreed that he was a general population inmate who might be dangerous to Mr. Morin. Later still, he accepted the suggestion he might have been put into protective custody because he had got into fights with other inmates.

Superintendent Kerlew testified that an inmate would not be placed in protective custody because he had assaulted a guard (which made him a hero amongst the other inmates) or because he alleged he had been assaulted by other inmates at the instance of the guards (in retaliation). He further testified that an inmate who was an escape risk would generally be placed in segregation rather than protective custody.<sup>14</sup> He did indicate, however, that an inmate with a psychiatric background would normally be placed in protective custody or a special needs facility.

Mr. Kerlew was not responsible for the decision to place Mr. May in protective custody and did not want to comment directly on the merits of the decision to do so. However, he did state that he may very well have decided otherwise had the decision been his.

Mr. Kerlew testified that the Superintendent of the jail is responsible for the placement of inmates within the jail. At the same time, the police sometimes provide information (such as whether the inmate is suicidal) that

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<sup>14</sup> Mr. May, of course, had just escaped from custody in May 1985. He had also planned another escape after he had been recaptured.

is taken into account when a decision is made as to where an inmate should be placed. Inspector Shephard testified that he had no involvement in the decision to place Mr. May in protective custody. Mr. Scott stated that no one consulted him about placing informant inmates near Mr. Morin. Detective Fitzpatrick was not asked about this issue.

## **Findings**

On the basis of this evidence, I am unable to find that Detective Fitzpatrick attended at the Whitby Jail prior to the alleged confession made to May (and allegedly overheard by X), or that he encouraged either of them to fabricate a confession. Nor can I find that Fitzpatrick engaged in a cover-up of his activities by destroying evidence or intimidating witnesses.

The prime source of these allegations was Mr. May, during the period when he was recanting his trial testimony. Mr. May's claim (which he no longer maintains) is no more reliable than was his trial testimony.

Indeed, accepting Detective Fitzpatrick's evidence, there is a certain irony here. Detective Fitzpatrick faces an allegation initiated by May, an unsavoury witness, respecting a crime Fitzpatrick did not commit, in circumstances where his true 'alibi' cannot be adequately documented, given the passage of time.

It is clear that better observance of the rules concerning visitors' sign-in procedures would have been of great help to the Commission. I can understand how the system slipped into laxity. Yet the rules are there for a purpose, and procedures clearly must be improved.

Various institutional records which would have assisted the Commission were lost. It remains unclear when, where and how they were lost. As well, there appears to be no consistent policy in place regulating access to institutional records (who can see them, when a warrant or other court process need be produced to the institution, when copies can be provided), or their maintenance and retention. My recommendations address these issues.

#### **(iv) Should the Evidence have been Used?**

This section of the Report asks whether the informants' testimony should ever have been tendered against Guy Paul Morin at trial. I outlined much of the evidence bearing upon this issue when I earlier considered the reliability of Mr. May and Mr. X. This section focuses on the indicia of unreliability available to the police and prosecutors, when such indicia became available, and the response by the authorities. As well, factors which were said to enhance the informants' reliability are considered here.

#### **Indicia of Unreliability and the Police**

As the investigating officers in the case, Inspector Shephard and Detective Fitzpatrick were both questioned about potential indications that the information was unreliable, and asked whether they considered and followed up those indications in their dealings with the informants.

As indicated above, Detective Fitzpatrick had been the arresting officer on Mr. May's 1981 charges of theft and break and enter, and on Mr. X's 1984 charge of sexual assault. In June, 1985, he knew that Mr. May was still active in criminal conduct and that Mr. X had a criminal record for sexual assaults on children. *He thought May was a 'con man.' He did not think that X was trustworthy.*

Detective Fitzpatrick acknowledged that he was aware of the attempts by the informants to trade their information for personal benefit. He did not think such bargaining reduced their credibility, however, *because that was normal conduct for informants.* He was questioned about numerous statements made by Messrs. May and X on July 1, 1985, and generally responded that the statements did not cause him to doubt the reliability of the informants. He did not think that the absence of details in the confession was a badge of unreliability. He was not concerned by the fact that the confession contained several uses of the word 'fuck,' even though Mr. Morin rarely used the word and Mr. May regularly did.<sup>15</sup> He was not troubled by the fact that

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<sup>15</sup> Although Detective Fitzpatrick did not recall Mr. Morin ever swearing (in his presence), Mr. McGuigan asserted that it was not uncommon for Mr. Morin to swear, and referred to several examples of the July 1, 1985 tape-recorded conversation between Mr. May and Mr. Morin in support.



Mr. May suggested that he might not be able to get Mr. Morin to repeat the confession. He was not concerned by the fact both May and X incorrectly stated that they knew Fitzpatrick well. He agreed that he thought Mr. X was lying when he denied his culpability for the 1984 sexual assault, but could not say whether that had an impact on his assessment of X's reliability regarding the confession.

Inspector Shephard testified that he had concerns about the reliability of the informants right from the start. He insisted, however, that he took into consideration a number of factors which bore upon their credibility and reliability. He considered the fact that Messrs. May and X were people who would potentially say anything to get out of jail. He considered the fact that May and X wanted benefits in exchange for their information. He considered the fact that May and X had spoken to each other before they first approached the police (although he acknowledged that he should have given this factor more consideration). He considered the fact that May failed to confront Mr. Morin with the confession during their taped conversation of July 1<sup>st</sup>, despite being urged to do so; he felt that, instead, May was trying to recreate the atmosphere which had led to the confession the night before. He may also have considered the fact that X was denying culpability for his 1984 sexual assault charge, even though X had pleaded guilty to the offence (although, again, he acknowledged that he should have given this factor more consideration).

Inspector Shephard accepted that there were a number of other factors which he probably should have considered. As reflected above, when they spoke to the police on July 1, 1985, both Messrs. May and X offered to provide evidence against other inmates in addition to Mr. Morin. Inspector Shephard testified:

Q. [D]id it occur to you at the time that both Mr. X and Mr. May were so anxious to strike a deal that they were offering up not only Mr. Morin, but other individuals?

A. Yes, sir.

Q. All right. Did that factor in your assessment of their reliability?

A. No, sir, it didn't.

Q. Okay. Do you think in hindsight, it ought to have?

A. Probably.

Inspector Shephard further testified:

Q. Okay. Now, we've heard evidence that Mr. X and Mr. May had a psychiatric history, each had a psychiatric history in various institutions. And you're aware of that now, I take it?

A. Yes, I was aware of it back in '85.

Q. How had you become aware of that back in 1985?

A. Well, May had escaped from the Whitby Psychiatric Hospital and he'd been to Penetang, so I would assume that he'd had some kind of psychiatric assessment or treatment, or whatever.

Q. All right. And Mr. X?

A. I can't recall whether I knew about Mr. X at that time, or not.

Q. I guess what I want to ask you is, did you or to your knowledge, officer Fitzpatrick, take any steps assuming that you knew that there was a psychiatric background, to determine the particulars of that psychiatric background?

A. I didn't. No, and I don't believe Fitzpatrick did either.

Q. Do you think with the benefit of hindsight that that's something that ought to have been done with a view to assessing their reliability?

A. Yes, sir.

Inspector Shephard later added that he might have needed a judge's order to examine the informants' psychiatric records.

In his statement to the police on July 1, 1985, Mr. May complained of being brutalized by the jail guards.

Q. Now here, he was making an allegation that a number of guards had shoved a broomstick up his rear end and assaulted him in that way. Did you ever look into that?

A. No, sir, I didn't.

Q. If that was just fiction by a jailhouse informant, and it carries some sympathy with you, and explain away the fact that he had assaulted a prison guard, I take it that would be pretty important to assessing whether he could be relied upon. Don't you agree?

A. I think if my memory serves me correctly, this happened after he assaulted the guard.

Q. Right. I mean, he's saying I assaulted a guard, so they did all these horrible things to me in the jail, and I have to get out, and so on and so forth; right?

A. Yes.

Q. Well, I guess what I'm asking is, you indicate to him, "Well, we can get you out of here, and then we can go over all that stuff and talk to John Scott about it", was that ever pursued at all?

A. Not to my knowledge.

Q. Did you find it credible?

A. Didn't find it unbelievable.

Q. All right. Well, did you know, one way or the other?

A. No, sir, I didn't.

Q. I mean, did you determine whether indeed he'd even made a complaint as he had alleged that guards had brutalized him at the Whitby Jail?

A. No, sir.

Q. Do you think that perhaps that might have been one valuable way to assess whether this was a reliable witness?

A. Yes, sir.

Q. Okay. So do you think with the benefit of hindsight, it's something that ought to have been done?

A. Yes, sir.

Mr. May advised Inspector Shephard during his July 1, 1985, interview that Detective Fitzpatrick's partner (not Shephard) had "smacked him out."

Q. Did you find that credible?

A. I didn't really find it credible, but it didn't surprise me.

Q. What do you mean?

A. Things like that happen.

Q. But first of all, did you speak to Bernie Fitzpatrick or his partner, or anybody else at Durham about this allegation that Mr. May had made that he'd been "smacked out" by an officer?

A. No, I didn't.

Q. I mean, sure, these things do happen, but I take it, in your experience, many times, false accusations have been made against officers by accused as to physical brutality; am I right?

A. Yes, sir.

Q. So, I guess what I'm asking is that when you heard this coming across the sound waves, did you find it credible, his allegation that Bernie Fitzpatrick's partner had smacked him around?

A. It wouldn't surprise me to hear that.

Q. I'm really asking something a little different. Did you find it credible, did you believe him when he said it?

A. Actually, I don't know whether I did or not, to be honest with you.

Q. I mean, if you're assessing the truthfulness or the reliability of a witness who's describing a confession in the same statement, do you think it would have been valuable in benefit of hindsight to determine whether that was even possible, that the events that he described took place?

A. Yes, sir.

Q. Okay. I mean, if that's just an out-and-out lie, that a police officer smacked him around at a police station in connection with another offence, then I take it that would very significantly affect an assessment of his reliability. I mean, here, he would be falsely implicating another person with having committed a criminal offence; right?

A. Yes, sir.

Q. Okay. I mean, I guess I'm going to ask you a searching question here, and that is, do you think because it was a confession that related to a case that was difficult in proving against Guy Paul Morin, that maybe you didn't scrutinize it with the same care and attention that you should have scrutinized it with? Do you think that's a fair suggestion?

A. Well, if I'm using hindsight now, I certainly do, but at the point in time, I don't know whether I even gave that any consideration or not.

Inspector Shephard accepted that he failed to consider a number of additional factors, but did not comment on whether or not he felt that he should have. He was asked about the informants' criminal records:

Q. All right. Well, we've heard some evidence that the circumstances surrounding some of these prior criminal convictions may reflect in a very significant way upon these two witnesses. Mr. X purports to be hearing voices when certain offences are committed. Mr. May appears to engage in a pattern of deceptive manipulative behaviour and lying. Is that something that stands out in your mind as having come to your

attention back in 1985, 1986?

A. No, sir.

He was asked about a comment Mr. X made in his July 1, 1985 meeting with the police:

Q. And [he] says:

Okay — like, I know Fitzpatrick quite well, and I know some of his tricks in getting confessions and everything else, okay? And I've gained some of his fancy footwork because hey, if you can put a murderer away for twenty-five years, that's one less I have to worry about getting killed by.

Did you accept that Mr. X knew Officer Fitzpatrick quite well, knew some of his tricks in getting confessions, and had gained some of his fancy footwork [as he indicated during the interview]?

A. No, sir, I didn't put much faith in that.

Q. And that wasn't very credible, was it?

A. No, sir.

Q. All right. Did you consider that in assessing his credibility back in 1985?

A. No, sir, I didn't.

Q. Why not?

A. I guess I just never thought of it.

Inspector Shephard was asked about another comment made by Mr. X in the July 1 meeting:

Q. That fact that [X] followed the confession by immediately stating, "Is that of any value?" I gather what you've just indicated is that expression would have caused you some concern about his reliability, the fact that he's gauging how valuable it is as he's

uttering the very words, right?

A. I don't recall taking that into consideration, sir.

Mr. Morin was interviewed by the police after his arrest. In an attempt to extract incriminatory statements from him, the police told Mr. Morin that they had certain pieces of evidence against him which they did not actually have. For example, they told him that his fingerprints were found on Christine Jessop's recorder. Inspector Shephard testified that, to his knowledge, no police officer had advised Mr. May of this investigatory technique with a view to having May extract a confession from Morin:

Q. I mean, it also looks, or I'll ask you, it appears [from May's interview] to look like Mr. May is putting evidence which doesn't exist to Mr. Morin to see what his reaction is going to be to that evidence. So you see for example at page 29, he says: "I was just testing him out, I wasn't sure, I was just testing him out." I said, "apparently your blood type matches the blood type that they found at the scene." And he said, "no, in court they said they couldn't tell."

So it appears that not only is Mr. May describing information acquired from a newspaper that may not have been available in the newspaper, he's putting to him evidence to get Mr. Morin's reaction which evidence was not available to the prosecution. Am I right?

A. Yes, sir.

This appears not to have been considered by Inspector Shephard.

Inspector Shephard also did not consider why Mr. May had succeeded in getting a confession from Mr. Morin, when the police, with all their expertise, had not. In fairness, Inspector Shephard testified that Mr. Morin probably viewed him as a person in authority who would likely advise others of the confession, whereas it appeared as though Messrs. Morin and May were confidants in the jail.

### **Steps Taken to Ensure Reliability**

Both officers testified that they took positive steps to test the

reliability of the informants. First and foremost, they arranged for them to be tested with a polygraph. (Both informants consented to the test and passed it.) Detective Fitzpatrick interviewed the employees at the Whitby Jail to determine what they saw or heard, and where the informants were housed. They ascertained whether it was physically possible for X to have overheard the confession from a neighbouring cell. Detective Fitzpatrick said they checked the informants' criminal records, and Inspector Shephard testified that they probably investigated the circumstances surrounding those prior convictions. Fitzpatrick also stated that he inquired of other police officers and informants whether May or X had acted as informants in the past. They had not.

Detective Fitzpatrick agreed that it was a routine part of police work to weigh and assess information coming from informants. He stated, however, that he was never concerned that either informant was fabricating the story of the confession. He believed them both, and was comforted by the fact that X corroborated May.

Inspector Shephard testified that, short of an obvious problem with the reliability of the information, it was not his job to scrutinize the credibility of informants. He believed that function rested with Crown and defence counsel, and ultimately the triers of fact. Furthermore, it was the Crown's job to decide which witnesses to call. He acknowledged, however, that he was supposed to do more than simply 'dump' evidence on the Crown. It was part of his role to investigate the problematic aspects of an informant's evidence.

Inspector Shephard acknowledged that, in hindsight, he may not have scrutinized the confession evidence with as much care and attention as he should have. He did not feel that he failed in his duty as an investigating officer. But he knew of no rule that prohibited bargaining with informants. He would not reject a confession just because it came from a known liar. Informants are a necessary aspect of the prosecutorial system, and the courts have fashioned ways of dealing with their evidence.

### **Making the Deal**

On July 1, 1985, the informants came forward with their information about the alleged confession by Mr. Morin. On that same day, Mr. May and



possibly Mr. X<sup>16</sup> were promised benefits in exchange for their co-operation. A question was raised as to whether the benefits were promised, and the confession evidence accepted, before the Crown was given sufficient information about the informants' reliability. If so, this might be said to reflect a carelessness on the part of the prosecution and a commitment to the informants before their evidence was properly considered. A related issue was whether the police fully advised the prosecutors of the indications that the informants might be unreliable, on either July 1<sup>st</sup> or in the years that followed.

Mr. Scott was the Crown attorney who authorized the benefits for the informant(s) on July 1<sup>st</sup>. He received a telephone call from Inspector Shephard around mid-day. He was advised in general of the information Messrs. May and X had to offer, the reasons why they were in custody, the nature of May's criminal record, and the fact that May wanted charges dropped in exchange for his co-operation. He may also have been advised that there were some credibility problems with the informants. Inspector Shephard told him of the circumstances of the charges Mr. May was facing, and Mr. Scott authorized the withdrawal of two of them. As indicated above, Mr. Scott testified that he did not authorize any benefits for Mr. X.

Mr. Scott testified to a number of things he was not advised of on July 1<sup>st</sup>. He was not advised that the informants were bargaining hard. He was not advised that both informants told the police they had known before the confession that 'something was going to happen,' and that they were horrified by the confession, and did not want to hear it. He was not advised how long the informants had been in jail together. He was not advised that both informants claimed to know Detective Fitzpatrick. He was not advised that Mr. May was unsure whether he could get Mr. Morin to repeat the confession. He was not advised that Mr. X was desperate to get out of jail, had lied about his sexual assault conviction, and had been trying to extract statements from another inmate.

Mr. Scott defended his decision to act on July 1<sup>st</sup>. As indicated above, he testified that he agreed to withdraw two charges only in exchange for Mr. May agreeing to wear a body pack. He was of the view that such decisions have to be made instantly lest the opportunity be lost. He felt that he had

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<sup>16</sup> As earlier noted, there is conflicting evidence over whether X was promised a benefit on July 1<sup>st</sup>.

enough information regarding Mr. May, the nature of the charges being withdrawn and the potential benefits to the prosecution. He added that it is not unusual for charges to be withdrawn as part of plea bargain.

Both Detective Fitzpatrick and Inspector Shephard agreed that it was their responsibility to advise the prosecutors of at least any obvious problems with the credibility or reliability of the informants. Neither could specifically recall ever doing so in this case. Detective Fitzpatrick could not recall advising the prosecutors of his concern that Mr. May was a 'con man.' Inspector Shephard did not recall ever sitting down with the Crown attorneys to discuss the problems revealed in his July 1, 1985, conversations with the informants. Inspector Shephard did assume, however, that the information obtained from the investigation, including the details behind the informants' criminal records, would have been given to the Crown. He further believed that he may have discussed with the prosecutors the fact that Mr. X was desperate to get out of jail and would have said anything to do so.

### **Indicia of Unreliability at the Second Trial**

At Mr. Morin's second trial, Mr. Smith led and was primarily responsible for preparing the testimony of Mr. May. Ms. MacLean led and was primarily responsible for preparing the testimony of Mr. X.

Mr. Smith was aware of a number of factors which might be thought to undermine Mr. May's credibility. He knew about May's criminal record. He believed that May had an anti-social personality.<sup>17</sup> He felt that May had a proclivity for not telling the truth, and believed that May was a liar.<sup>18</sup> He knew that May had bargained for benefits on July 1, 1985. He knew that May had something to gain by telling a lie about the confession. He agreed that Mr. May tends to look out for his own interests as best as he can. He recognized that the alleged confession contained no details which would have been known only to the perpetrator and the police. He knew that after May was asked to wear a body pack, he stated that he might not be able to get Mr. Morin to repeat the confession. He agreed that May failed to confront Mr.

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<sup>17</sup> May and X's personnel records had been released to the defence and to the Crown by Donnelly J., upon application by the defence, prior to the commencement of the jury trial.

<sup>18</sup> He would not go so far as to say that May was a pathological liar.

Morin with the confession during their tape recorded conversation on July 1<sup>st</sup>, despite being encouraged to do so.<sup>19</sup> He accepted that it was bizarre that in this conversation, hours after he had purportedly confessed to Mr. May, Mr. Morin was busy explaining his alibi to May. He assumed that he would have had concerns over some of the things that May had said in his testimony at the first trial:

Q. When you read the evidence of Mr. May and Mr. X, I'm going to suggest that there were certain warning bells about certain things that they said at that first trial. Mr. May testified at that first trial that he'd just be joking, for example, about when he'd suggested to officer King, that he wanted to get out of jail. He had indicated that he pleaded guilty to the false pretenses charge, which he didn't intentionally commit. That he had uttered a forged document while not trying to be convincing, it was sort of a half-hearted effort. He had one of his failing to appear was his girlfriends fault. She wanted him not to appear in court. He had no thoughts about getting any kind of advantage until the lawyer spoke to him. And then, he was confronted with an earlier conversation with Mr. X, about advantages that were reflected in the King/May tapes. Didn't remember striking the guard. Said that was all as a result of a nervous breakdown. Said that he had offered a personal loan to Mr. X, because he felt empathy for him, or sympathy for him, without any reflection that it wasn't a genuine offer.

When you reviewed these matters — and they're just examples that have come out at you in the evidence, did you have concerns as to whether or not Mr. May had been forthright in his evidence at the first trial?

A. I can't say that I have a specific recollection of having those concerns and frankly, I haven't read that transcript since the last trial. But, I mean, as you read those things, I can't imagine that I would not have had concerns as to whether or not he was being truthful on those issues.

He also vaguely recalled having concerns over the fact that in his July

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<sup>19</sup> Mr. Smith believed that Mr. May had an explanation for this.

1<sup>st</sup> conversations with the police, May had twice referred to Mr. Morin speaking about Christine Jessop's blue skirt, when in fact the real killer would have known that Christine was wearing blue slacks

Mr. Smith did not accept X's evidence at the first trial that he had come forward with his information simply as a good citizen and in order to aid the administration of justice; Mr. Smith was aware of X's attempts to make a deal for his information (although he noted that X did eventually give up his information without getting a deal).

Ms. MacLean was asked about some of the factors which bore upon the credibility and reliability of the informants. She was aware that both had demanded benefits for their co-operation when they first approached the police. She became familiar with X's criminal record and psychiatric history. She knew that May had done a number of dishonest things in his life and, generally, had a problem telling the truth. She was concerned by the past of both May and X, but less concerned about X since his record for sexual offences did not necessarily mean he had a propensity to be dishonest.

Mr. McGuigan testified that one must be very reluctant to immediately accept the evidence of informants. They can turn on you very quickly. Jailhouse informants, furthermore, are the most dangerous type of informer. Great care must be exercised by a prosecutor before calling one as a witness. Criminals are likely to say anything in order to get out of jail, including a false accusation.

Mr. McGuigan was admittedly aware of several indications that the informants might be lying, but generally felt that the facts were open to more than one interpretation. He knew that Mr. May had a record for crimes of dishonesty, and felt that a jury would have a great deal of difficulty accepting Mr. X's evidence. He did not trust either of them. He did not feel, however, that they were incapable of telling the truth about a particular incident. Mr. McGuigan was aware of Mr. May's psychiatric history, but stated that he never believed that May was a psychopath. He added, however, that he would not have acted differently even if he had; *psychopaths can still tell the truth sometimes*. He had also been advised (at some point) that 60 to 70 percent of prisoners suffer from some sort of antisocial personality disorder, so May's psychiatric profile did not surprise him. Mr. McGuigan acknowledged that it might appear odd that Mr. Morin was telling Mr. May about his alibi the day after he supposedly confessed, but offered the alternative interpretation that

Mr. Morin was enlisting May's assistance in perfecting a false alibi. Mr. McGuigan agreed that Mr. May never asked Mr. Morin in their taped conversation whether he had killed Christine Jessop, but pointed out that May did ask whether Mr. Morin had 'fucked' her.<sup>20</sup> Mr. McGuigan did acknowledge that the informants' evidence was unusual in that there was no aspect of the confession that would have been known only to the perpetrator and the police.

### **Justifications for Calling the Informants**

Mr. Smith testified that he accepted the core of the informants' evidence. He gave a number of reasons why. First, there were two informants, and they supported each other's evidence. Mr. Smith agreed that the informants had had an opportunity to collude with each other, but maintained that logically it was more convincing that two people were saying the same thing than just one. Second, the informants' evidence was supported by the fact that an undercover officer, Sergeant Gordon Hobbs, alleged that Mr. Morin had also confessed to him. Mr. Smith added that, like the informants, Sergeant Hobbs also stated that Mr. Morin said a number of odd things which might be indicative of guilt. Third, both informants voluntarily took and passed a polygraph examination. Mr. Smith stated that although he was not a "big supporter" of the polygraph, he was nevertheless impressed that the informants were prepared to do something which might cause them difficulty if they were not telling the truth. Fourth, Mr. X was reported to have been tearful and very upset on the morning of July 1, 1985 (though Mr. Smith was also aware that the informants had engaged in horseplay with each other that same morning). Fifth, Mr. May appeared to have straightened himself out by 1992. And finally, Mr. May had agreed to have a tape recorded conversation with Mr. Morin.

Mr. Smith stated that he was also supported in his belief in the informants by the other evidence which he felt was probative of Mr. Morin's guilt. He pointed, for example, to the hair and fibre evidence purportedly linking Mr. Morin to Christine Jessop, the problems with Mr. Morin's alibi, the large number of seemingly odd utterances made by Mr. Morin with respect to Christine's disappearance, and the fact that Mr. Morin had entered

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<sup>20</sup> Mr. McGuigan felt that this was an indirect way of asking if Mr. Morin committed the murder.

an alternative plea of not guilty by reason of insanity at the first trial. Mr. Smith agreed that while such evidence was of some value in assessing the reliability of the informants, the primary focus had to be on factors relating to the confession evidence itself.

Mr. Smith testified that the prosecution must often rely on witnesses of unsavoury character, and that the Crown should not generally be assessing the credibility of witnesses. He added that he would not reject an informant simply because he or she had a lot of inherent credibility problems. He did agree, however, that it was part of his role as a Crown attorney to ensure, as best as he could, that the informants gave truthful evidence at the trial. He testified that he clearly told Mr. May to give truthful evidence with respect to every issue. At the same time, he accepted that he was required to do more than this, and that this admonition probably did not provide any additional assurance of trustworthiness for a person like Mr. May.

Ms. MacLean testified that she believed the informants were being truthful, and that she would not have called them to testify if she had not. She was asked why it was that she held this belief, and she responded as follows:

A. Well, there were a number of [factors]. First of all, we already had information that he had confessed to Mr. Hobbs ... By the time of the second trial we also had the evidence of Mrs. Jessop and the Rabsons. There was about four people that said the night of the funeral, Mr. Morin had been heard crying out, "Help me, help me, oh God help me."<sup>21</sup> So that seemed to be somewhat in line with the way that Mr. May was describing the nature of the confession.

So we sort of had two similar situations. The timing at which Mr. Morin was alleged to confess to Mr. May was immediately following the preliminary inquiry, when he had been committed to stand trial, and he had had a visit from his family the afternoon or late evening of the night he was alleged to confess, which I believe was June 30<sup>th</sup>, July 1<sup>st</sup>. And the information that we had was that Mr. Morin was very depressed.

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<sup>21</sup> These alleged statements by Mr. Morin became known as the 'funeral night screams.'

His family had told him it didn't look good for him, based on the evidence that had been called at the inquiry. I think he'd been told that two witnesses he was hoping to count on for his alibi weren't going to come forth. In the back of my mind, I have something about he had missed some family birthday, or some family gathering, and all of those things seemed to lead to a situation where one would expect he'd be quite depressed, and break down.

There was also the evidence of the jail guards, Mr. Carson and Mr. Bryans, who testified that they had observed the next morning ... Mr. X's demeanor that he was shaken and pale, and appeared to be emotionally upset about something that had happened. And, frankly, I didn't think Mr. X was that good an actor to sort of put on that, if he'd made that up. So that was consistent.

Another factor, which of course could never be put before the jury, was they'd both passed the polygraph, and beyond that, I guess there was the factor that, from what I'd heard about inmate code of honour, is that the inmates would view someone who had raped and murdered a child as sort of the lowest on the totem pole, and then they would be more likely to want to "rat out" somebody like that.

So it seemed consistent with that. I guess by the time of the second trial, the fact that both Mr. May and Mr. X were prepared to continue to testify despite knowing what they would go through.<sup>22</sup> Mr. X in particular — I dealt with him more — seemed, as I said earlier rather emotional around the issue of the confession, which made him seem very sincere, like he was — I don't know if you say tearful or shaken — when he was asked about the confession, that it was something that he would never forget.

And he seemed very sympathetic to the Jessops, and to the plight of having their daughter killed. I don't know if there are other factors as well, but those are sort of

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<sup>22</sup> This is a reference to the fact that before the informants testified at the second trial they were both given the option to choose not to testify. This aspect is discussed in great detail later in this chapter.

the main ones that strike me.

Ms. MacLean later expanded on her reasons:

Q. [I]n your mind, what was there about Sergeant Hobbs' evidence that, looking at that evidence fairly, led you to put more weight on the believability of Mr. X having heard the confession, and Mr. May having heard the confession as well.

A. Well ... I guess if you have inmates coming forward in isolation from any other evidence, you know, you have to question their motivations and other issues like that. And, so I think that the inmate evidence we were looking at, not in isolation, but in the context of all the other evidence, and one of the pieces of evidence, for example, was, as I mentioned, the crying the night of the funeral that Mrs. Jessop said she heard.

And it seemed in a similar vein, like an emotional breakdown, with some acknowledgment of responsibility. And then the evidence of Officer Hobbs was sort of similar in that he told us that he had received a confession from Mr. Morin, and so, the fact that he was to have broken down in a jail setting, and confessed — I don't know that it was broken down with Sergeant Hobbs, but there were discussions which would appear to implicate himself.

And that was in a jail setting. Then, later on, right after the preliminary inquiry when Mr. Morin's family told him things didn't look so good, it seemed consistent that he would have been in an emotional frame of mind to break down and make some admission of guilt.

Ms. MacLean testified that she felt it was for the jury to decide whether the informants were being truthful. The Crown attorneys did not try to hide the informants' "warts"; they simply asked the jury to believe the informants in spite of their pasts.

Mr. McGuigan testified that he also believed that the informants were telling the truth. He offered a number of reasons for his opinion. The informants consented to and passed polygraph tests, while Mr. Morin refused



to take one. Mr. Morin told Mr. May on July 1, 1985, that they were doing “hot talking” the night before, and “I’ve got the hole dug deeper.” Late on July 1, Mr. Morin confronted Mr. May about a rumour circulating in the jail that he had confessed, but did not assert that the rumour was false. Both the confession and the ‘funeral night screams’ were purportedly made at a time when Mr. Morin could have felt abandoned by his family: the confession occurred after Mr. Morin’s father told him that his case did not look good, and the funeral night screams occurred when Mr. Morin’s parents were out of town.<sup>23</sup> Mr. McGuigan believed that Mr. Morin had previously confessed to Sergeant Hobbs. Mr. McGuigan was also comforted by the fact that the Crown at the first trial had seen fit to call the informants as witnesses.

Like Mr. Smith, Mr. McGuigan stated that the other evidence seemingly pointing to Mr. Morin’s guilt reinforced his belief in the informants’ credibility. Thus, for example, he referred to the facts that Mr. Morin had advanced an insanity defence at the first trial, had changed his alibi times seemingly in response to the evidence against him,<sup>24</sup> and had supposedly told someone that Christine had been killed on the day she had been abducted, information which might have been known only to the killer.

Mr. McGuigan agreed that the Crown must test the evidence of informants and use whatever is available to confirm their reliability. At the same time, he felt that he had no choice but to call the informants at the trial when he believed them to be telling the truth. He could not usurp the function of the jury.

Mr. Scott was also asked why he called the informants at the first trial. Although that trial ended in an acquittal, and thus was not directly involved in Mr. Morin’s wrongful conviction, Mr. Scott’s evidence on this issue is potentially relevant to the reasonableness of the decision made by the

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<sup>23</sup> Mr. McGuigan noted that the psychiatric evidence pertaining to Mr. Morin showed that his parents had a lot of control over him, and thus their absence may have a greater impact on him than on someone else.

<sup>24</sup> Mr. Morin advanced an alibi defence at both trials, adducing evidence that he did not arrive home from work on October 3, 1984, until after the time when Christine Jessop was abducted. In his various statements to the police, Mr. Morin gave times ranging from around 4:30 p.m. to as late as 6:00 p.m, with 5:00 and 5:30 being mentioned as possibilities.

prosecutors at the second trial, especially in light of the fact that Mr. McGuigan was comforted by the fact that the informants had been called as witnesses at the first trial.

Mr. Scott gave the following reasons why he found the informants to be credible:

A. When you looked at the tapes relating to the interviews with X and May, and look at the information we had from Staff Sergeant Hobbs, it's a real consistence in what is indicated there. As well, the information from Staff Sergeant Hobbs that Mr. Morin would store the good thoughts at the front of his head, and the bad thoughts at the back of the head — I may have that backwards, but in any event, they would be kept in that fashion.

And you think happy thoughts to prevent the bad thoughts from coming out of your mind, was very consistent with the pattern that I saw on June 30<sup>th</sup>, July 1<sup>st</sup>, in that Mr. Morin's family, as I understand it, attended. It was right after the preliminary inquiry. He was upset, arguably depressed, and having Mr. May say a number of those things to you, I'm sure it wouldn't improve your feelings.

So that the whole scenario fit in that sense, it was consistent with what Hobbs had described by way of personality. The fact that May was able to recount a great deal of material that he indicated that Mr. Morin told him about from the preliminary inquiry, and appeared to recount it very accurately, right down to, as Mr. Lockyer points out yesterday, an error that was made in the evidence of the preliminary inquiry, gave me some basis to believe in their reliability.

The fact that in the transcript, Mr. May indicates — I'll do it essentially — he says, "I'll do it anyway," at page 37 of the matter, after a long discussion about possible requests from him.

The fact that X is not someone that I ever saw as being capable of being organized to carry a story of this kind, when one looks at his criminal history, it's inevitably one of minimization of crimes. And in dealing with police officers, as well, followed by any kind of

questioning, and he agrees. He's not someone, that in any of the material I saw, really carried these stories for a long time, and I appreciate he minimized what he did.

On the sexual assault that led to him being incarcerated with May, that's just not a terribly unusual thing to do when you're in jail. The dealings with these two individuals were, as I viewed it, over on July 1<sup>st</sup>. I appreciate I've had read to me the transcripts of August of 1990 — '85, but even on that basis, that's over with May in August of '85. There's nothing further that he's going to get. It's my view, it's over with May on July 1<sup>st</sup> of '85.

X gets nothing, winds up doing his time, coming out to testify — I don't see the benefits occurring to these individuals. The evidence of the jail guards, as to their emotional state at the time that these things occurred. The polygraph, the fact they both not separate — or, not together, but separately passed, and I know that there's been a lot of evidence about polygraphs, and there's lots of potential flaws with them as well.

The — I'm sure there are other matters that I'm just not thinking of at the moment. One or two other things, actually: May didn't ever grab what, as I saw, the easy lines. If you go through those transcripts, there's one place where May has said to — the officer says — something about the recorder bag, well, did he pick it up and handle it?

I mean, the easy lying struck me at that stage, and then as to say: Yes, because he was aware from his discussions with Morin that there was a partial print on it, that was not inconsistent at that stage, with Morin's print. But instead of saying that, he says no, he says he just looked at it. Now this relates to when there apparently — but there are places where easy lines are rejected by May.

I don't see the opportunity or the time available to get X set up to carry this story. Dealing with the next day on July 1, there is a passage, which I've made reference to earlier, albeit inaccurately, that I think can go back to the events of June 30<sup>th</sup> or July 1, and be seen

as certainly consistent with what May and X say.<sup>25</sup>

And another feature that I didn't see until after the psychiatric evidence was called, and it's my recollection that one of the comments, his — or is stated by either X or May, is that: "Like, I killed that little girl. Why did I kill that little girl?" There's an inquiry, which I never quite could make sense of it until the psychiatric evidence was called. And then that inquiry makes a lot more sense.

And really, the psychiatric evidence, when I viewed that part of the statement — and I'm not sure, but I may have utilized that in my closing, it made sense to me of the why, or the questioning nature of what was going on there in Mr. Morin's alleged discussion with May. Those are the matters that I can recall at this time.

Mr. Scott also testified to a few things that he had done in order to test the reliability of the informants. He had arranged for Mr. May to wear a body pack and have a tape-recorded conversation with Mr. Morin. He may have suggested that the informants be tested by a polygraph examination.<sup>26</sup> He asked to speak to the prison psychiatrist at the Whitby Jail about Mr. May.

### **Tunnel Vision**

Several of the witnesses before the Commission were questioned in Phase I about their current views on the reliability of the informants and the innocence of Mr. Morin. This evidence is relevant to the issue of whether the prosecutors and investigators acted with 'tunnel vision, *i.e.* a 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. If tunnel vision existed, it may cast light on how the informants' reliability was assessed, or whether there was any

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<sup>25</sup> This refers to a statement made by Mr. Morin on July 1 which Mr. Scott had suggested might have been an adoption by Mr. Morin of statements he had made the night before. Mr. Scott had quoted the statement as "I cried my heart out about it, last night or yesterday, got the hole dug deeper."

<sup>26</sup> Mr. Scott allowed for the possibility that one of the police officers may have suggested this.

real assessment of their reliability, at the time.

Detective Fitzpatrick would not say, even now, that Mr. May's word was not to be trusted, even despite May's later accusations made against Fitzpatrick. He denied, however, that he suffered from tunnel vision. He acknowledged that the purported confession to Mr. May played a role in clearing other suspects, but insisted that he would have followed up any new leads pointing to other suspects, and in fact did continue to investigate another suspect after May and X came forward. He also testified that the police rejected evidence from other informants who offered information against Mr. Morin.

Inspector Shephard acknowledged that he failed to consider some factors which might have indicated a lack of credibility. He denied, however, that his failure to do so was the result of tunnel vision.

Ms. MacLean testified that she still believed Mr. May was truthful about hearing Mr. Morin confess (although she did not know enough about May's recantations and current situation to know how it impacts on his credibility). She was comforted by Mr. X's corroboration and what she knew of Mr. X as a person. She stated that she would have trouble calling May to testify to the confession again, but this was because of his recantations and their effect on his believability as a witness. Ms. MacLean testified that she did not now believe Mr. Morin was guilty, but she had difficulty reconciling his innocence with all the other evidence in the case which, in her opinion, pointed to Mr. Morin as the killer.

Mr. Smith stated that he was still inclined to believe that the informants may be telling the truth, although he was less confident of Mr. May's evidence, and was bothered by the fact that May got into more trouble after the second trial.<sup>27</sup> He did not think that Mr. Morin's innocence necessarily led to the conclusion that the informants were lying. Mr. Smith could not say with certainty whether he would call the informants to testify to the confession for a third time (if there had been a third trial). It would be far more problematic than it was at the time of the second trial, but he could not rule out the possibility. He was concerned about the changes that had

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<sup>27</sup> As indicated above, one of the reasons why Mr. Smith believed the informants at the time of the second trial was because Mr. May appeared to have reformed himself.

occurred with Mr. May, and the fact that both informants seemed less clear about their evidence when testifying before the Commission.

*Mr. McGuigan firmly stated that he still believes that Messrs. May and X were telling the truth. Mr. McGuigan added that he also believes Mr. Morin perjured himself when he testified at his trials that he did not confess. Mr. McGuigan acknowledged that after the second trial Mr. May had recanted, told a number of lies about the confession, and had implicated Mr. McGuigan in a conspiracy to obstruct justice. These events did not shake his belief in Mr. May's truthfulness. Mr. McGuigan ultimately conceded, however, that Mr. Morin's proven innocence and the evidence heard before the Commission were factors relevant to a present-day assessment of the reliability and credibility of the informants.*

Mr. McGuigan did not believe that informants had ever given him false information in the past, and *it never occurred to him that the informants in the Morin case might have been testifying at the second trial for reasons other than altruism (e.g. in order to obtain future benefits)*. He indicated that, if there was a third trial, he might call the informants to testify again, but probably would not do so because of Mr. May's recantations and other actions. Mr. McGuigan denied that his actions were driven by tunnel vision. He followed up leads on other suspects at the request of the defence, even though this involved great time and expense.<sup>28</sup> He also accepted the DNA evidence proving Mr. Morin to be innocent.

Mr. McGuigan was questioned about Mr. G, another jailhouse informant. In the late 1980s Mr. G came forward with a story of another confession by Mr. Morin. He claimed that Mr. Morin confessed to him during a time when they shared a jail cell. The police investigated the claim and rejected it, primarily because G had recanted his story and the police were advised he had never shared a cell with Mr. Morin. In July 1990, Mr. McGuigan requested that a new investigation be conducted into G's story. The police did so, and determined that G had in fact shared a cell with Mr. Morin. Detective Fitzpatrick testified that he still advised the Crown that G

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<sup>28</sup> Four women reported that they had witnessed Christine Jessop's murder, claiming that she was the victim of a satanic cult. The women stated that bodies were buried at various locations in Ontario, and Mr. McGuigan investigated their allegations at the request of Mr. Morin's defence counsel, Jack Pinkofsky. Nothing came of the investigation.

should not be called as a witness against Mr. Morin. Fitzpatrick and Shephard found Mr. G to be unreliable. Ms. MacLean had notes dated December 12, 1990, of a discussion amongst the prosecutors (including Brian Gover) regarding Mr. G. These notes, modified slightly in this Report to disguise Mr. G's true identity, read: "Speak to Leo McGuigan's main man, 'truthful' ... (per Leo) [McGuigan], or 'big fucking [risk]' (per Alex)." Mr. McGuigan had called Mr. G as a witness in a previous murder case. Mr. Smith testified that the prosecutors decided not to call G because, after the police cross-examined him, they felt he was unreliable and there was no confirmation of his evidence.

It was suggested that Mr. McGuigan's actions in this regard reflected a tunnel vision on his part: he was so determined to convict Mr. Morin that he would consider using informant evidence which the police had already deemed unreliable. Mr. McGuigan denied this suggestion. He stated that when he ordered the new investigation he did not know that G had recanted. In his testimony before the Commission, however, Mr. McGuigan still maintained that one could probably believe Mr. G. He pointed out that the police eventually determined that G and Morin had shared a jail cell on three occasions, G subsequently returned to the position that Morin had confessed, and G claimed that he only recanted because the police treated him poorly when they first interviewed him (suggesting he was a liar). Mr. McGuigan added that he had never pondered the issue of G's credibility in great detail because he felt that the critical form of questioning adopted by the police in G's first interview made his evidence useless at a trial.

### **Polygraph Tests**

Both May and X consented to and passed polygraph examinations. As reflected above, this was the principal means by which the credibility of the informants was tested, and one of the reasons why the investigating and prosecuting authorities believed the informants' evidence. Detective Myno Van Dyke was the person who administered the examinations to May and X. He was called as a witness before the Commission to explain how a polygraph examination is conducted, how May and X were tested, and how useful a polygraph is as a tool to test the credibility of a witness. His evidence was relevant to both the reasonableness of the authorities' beliefs and actions in the Morin case, and to the larger systemic issue of the extent to which polygraph examinations should be relied upon as a means of testing the veracity of questionable evidence.

### *The Mechanics and Merits of Polygraphs*

A polygraph is a machine which measures various bodily reactions of a person (perspiration flow, breathing and respiratory rates, and pulse and heart rates) to questions posed by the examiner. The underlying assumption is that a person will react physiologically in a more significant way when lying than when telling the truth.

In 1985, the questioning technique used was the Control Question Technique. This is a technique which compares answers to 'relevant' questions and 'control' questions. A relevant question is one which asks for information relevant to the case. A control question is one which asks for similar information, but is not quite directed at the critical issue. Thus, for example, a relevant question for the jailhouse informants might be: On July 1, 1985, did you lie to the police about Guy Paul Morin? A control question might be: Can you now remember ever lying to a person in authority? Three relevant and three control questions are asked during the examination (along with a number of neutral, irrelevant questions designed to give the examinee a rest), and they are each repeated three times in different orders. The objective is to get the witness to lie in response to, or at least be concerned by, the control questions. His physiological reactions to those questions are then compared to his physiological reactions to the relevant questions. It is assumed that the latter reactions will be greater if his answers to the relevant questions are lies (and smaller if his answers are true).

An assumption lying behind a polygraph examination is that the examiner can formulate and present the control questions in such a manner that the examinee will either answer the questions untruthfully or at least be uncertain and concerned about his answers. Detective Van Dyke acknowledged that this is one of the problems with the reliability of the test. The questions must be finely tuned, something which poses a significant challenge for the examiner. The examiner tells the examinee to be truthful in his answers, yet at the same time tries to get him to hold back on his admissions to the control questions. He does this by 'building up' the examinee so that he will not want to admit anything bad about himself, while continually narrowing the control questions so as to increase the likelihood that the examinee will be forced to lie in order to hide an unfavourable truth. Detective Van Dyke offered the example of a control question which asked: Can you now remember ever lying to stay out of trouble? If the examinee answers yes, the examiner narrows the question by asking: Apart from the



times that you've described to me, have you ever lied to stay out of trouble? The objective is to get the examinee to answer no to the control question. Detective Van Dyke testified:

Q. So the theory, as I understand it, is that somebody like Mr. May has qualified the number of times he's lied to persons in authority, so you've rephrased the control question, that: Apart from the times that you've described, have you ever lied to a person in authority, and answer no. And the theory is that he may be truthfully answering that question — right? — but that nonetheless, you assume that he's going to be more concerned when he truthfully answers that question [because there may be other things that he has not thought about] than he would be concerned about truthfully answering the relevant question. Is that the assumption that this is all based on?

A. That's correct, and then that control is compared to the three relevants, so that they're — that's why there's not just one control question, as well. That's why there's three.

Polygraphs have been criticized on the basis that they assume that a person's physiological reaction to a very threatening relevant question (*e.g.* did you kill Christine Jessop?) answered truthfully will necessarily be smaller than his reaction to a moderately threatening control question. Detective Van Dyke acknowledged that this will not always be the case. For example, a person may be so concerned about how the authorities perceive him that his physiological reactions to the relevant questions, even if answered truthfully, may be greater than to the control questions. He felt, however, that if the control questions are tailored accordingly, it is still more likely that a truthful person will react less to the relevant question when telling the truth. He stated that it takes a lot of practice to be able to tailor questions in this way.

In 1985, the examiner was responsible for measuring the results of a polygraph examination. Today, the results are tabulated by computer. Detective Van Dyke agreed, however, that there remains a subjective element to the examination. The examiner sets the questions asked, and in certain circumstances he will rely on his assessment of the examinee's body language, demeanour and gestures in addition to the examinee's numerical score. He further stated that these non-verbal clues may indicate that someone is being

truthful even when the tests results indicate that they are lying. He felt that the opposite was rarely true.

Detective Van Dyke agreed that some examinees may be able to fool a polygraph examination. Persons suffering from personality disorders may be able to beat the test if they feel no guilt about lying, especially if the examiner relies in part upon demeanour in making his ultimate assessment of truthfulness. The test can be distorted by someone who is knowledgeable about mechanics of and principles behind the test, such that the responses could be tailored to achieve a desired result. The test can also be beaten if the examinee does not care about the results, since the examinee must fear the consequences in order to get an accurate result. To counteract this possibility, Detective Van Dyke explained that the examiner advises the examinee that lying to the police may have serious repercussions, in the form of a criminal charge for public mischief. Finally, the test can be fooled if the examinee cares more about his answers to the control questions (perhaps because they may reveal prior criminal activity on his part) than his answers to the relevant questions. Detective Van Dyke explained that this is why the control questions are closely related to the relevant questions, and do not deal with unrelated activity.

Detective Van Dyke acknowledged that examiner bias can influence polygraph test results. Such bias can arise from either the examiner's personal desire to assist his colleagues, who hope for a particular result, or pressure from those colleagues to arrive at a predetermined result. Detective Van Dyke stated that it was not unusual for an investigator to tell him that the police were sure they had the right person. He felt, however, that a good examiner can maintain an objectivity which allows him to overcome such bias, particularly if he makes clear to the investigating officers that the test is not foolproof. He agreed that this may be difficult for a young and inexperienced examiner. He also could not speak to the issue of unconscious bias. Detective Van Dyke was confident that his examinations of Messrs. May and X were not influenced by bias, despite the fact that he knew the examinations were important and that a failed result might cause difficulty in an extremely serious case.

Detective Van Dyke was of the view that a polygraph examination, though not perfect, is still a useful investigative tool. It has withstood the test of time, and is one of the very few ways in which an investigator can try to determine whether a witness is truthful; there simply are not enough police

personnel available to investigate everything every person has to say. Polygraph examinations of suspects can also result in the discovery of valuable evidence: Detective Van Dyke estimated that he obtained confessions from about 60 percent of the suspects he found deceptive. However, he also felt that polygraph examinations should not be used as a replacement for a full and complete investigation of potential suspects, and that they should not be used for anything other than investigative purposes. He endorsed the idea that Crown attorneys should be educated on the pros and cons of polygraph examinations in order to be able to properly assess the value of a test result. He felt most Crown attorneys are already very knowledgeable about the test. The use that was made of polygraph examination in the Morin investigation generally is revisited in a later Chapter.

### *Recording and Disclosing the Polygraph Examination*

An issue which arose during the course of the Inquiry was the extent to which polygraph examinations are (and were) properly recorded and disclosed to the defence. Detective Van Dyke gave relevant evidence in this regard.

A polygraph examiner must be given some information in advance about the investigation to formulate relevant questions. The content of the information provided may assist others in understanding the context of the examination and assessing the possibility that bias may have influenced the results. Detective Van Dyke testified that any documentation he was provided would have been retained in the file, but that no written record would be made of any verbal communications from the investigators. He recalled some of the information he was given with respect to the examinations of Messrs. May and X. He was advised that Mr. May was a 'con artist,' and that both witnesses were jailhouse informants who might be inventing their story to get a reduction in their sentences. He was given a copy of Mr. May's criminal record. He was advised by Detective Fitzpatrick and Inspector Shephard that Mr. Morin had been arrested, that they believed him to be guilty, and that he had allegedly made inculpatory statements to an undercover officer, Sergeant Gordon Hobbs. He did not recall either investigator advising him that they believed the informants, or what the consequences would be if either informant failed the polygraph test. He stated that he would want to know before he administered a test whether the examinee has some skill in deceiving others, since this might render visual clues worthless, and also whether the examinee had only been partly truthful in his statement to the police, since this

may narrow the questions deemed relevant for the test.

A number of documents were (and are) generated in polygraph examinations. Each examinee signs a consent form, the results of the test are recorded on a score sheet, a chart is (now) generated by the polygraph machine, a supplementary report is prepared for the investigator, and a record is made of any interrogation conducted by the examiner. In Mr. Morin's case, none of the documents relating to the examinations of Messrs. May and X were provided to the Crown for disclosure to the defence. The documents were destroyed pursuant to a police regulation which required destruction after one year if no charges were laid in relation to the polygraph examination and the documents were of no evidentiary value. Detective Van Dyke made the decision to destroy the documents based on his view that they contained nothing of relevance: they were not admissible in court, and were basically a repetition of what the informants had previously told the investigators.

He added that polygraph documents were only kept for one year primarily because they were bulky, there was insufficient storage space, and retrieval of the items was difficult. Since all polygraph results are now computerized, these problems no longer exist and all documents are now kept by the police, unless they have no apparent relevance to anything.

Detective Van Dyke did not recall much about the responses given by May and X during their tests. He simply remembered that they both produced good truthful results. In 1985, very few of the examinations of male witnesses were tape-recorded, but today every test is tape-recorded and the tapes are retained by the police. Detective Van Dyke agreed that such a record can be helpful in documenting what the witness said during the examination, and in assessing the quality of the examination conducted.

## **Findings**

This section of the Report answers the question: Should the prosecutors have called the evidence of these informants?

In a later section of this chapter, I summarize the systemic evidence which I heard on jailhouse informants. It has led me to conclude that jailhouse informant evidence is intrinsically, though not invariably, unreliable and that many of us have failed in the past to appreciate the full extent of this

unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, their reliability.

Inspector Shephard was candid — commendably so — in acknowledging that a number of things that the informants said and did should have been more carefully scrutinized and investigated. Detective Fitzpatrick obviously had little or no concern about their reliability and less insight than Inspector Shephard has now.

Some of the things that the informants said (for example, pertaining to their own criminal activities and their motivations) were patently unreliable. Evidence that Mr. May gave at the first trial was, at times, demonstrably untrustworthy. In my view, the prosecutors at the second trial did not *objectively* assess the reliability or credibility of these informants. Their focus was, instead, on their presentability. Accordingly, when confronted prior to the second trial, with the informants' diagnosed propensity to lie prior to the second trial, emphasis was placed upon denigrating (or minimizing) that evidence, rather than introspectively questioning whether their reliability should be revisited. Mr. McGuigan testified that he did not trust either of them, but did not think they were incapable of telling the truth. Mr. McGuigan, when confronted with the informants' psychiatric and psychological profiles at this Inquiry, stated that he never believed that May was a psychopath; however, since psychopaths are still capable of telling the truth, this would not have affected him anyway. He noted that such a diagnosis would not surprise him in any event, since 60 to 70 percent of prisoners suffer from antisocial personality disorders.

With respect, Mr. McGuigan missed the point. Two sociopaths, motivated to obtain benefits, who allege a 'bare-bones' confession containing no detail known only to the perpetrator, absent any real confirmation of what they said, should ring far more alarm bells than were rung here. Mr. Smith admitted that May swore to some problematic things at the first trial — but his core evidence could still have been true. I agree that such evidence *could* still be true. I also acknowledge that sociopaths *can* tell the truth. These observations, however, do not support the informants' reliability or provide any level of comfort.

I find that Mr. McGuigan did not really endeavour to evaluate the informants' reliability; this was also true for other pieces of suspect evidence later addressed in this Report. He reflected here the dangers of jailhouse

informants and the great caution to be exercised in dealing with them. However, his dealings with May and X, some of the other suspect witnesses, and his inclination to try to resurrect the somewhat discredited Mr. G, demonstrate that he evaluated potentially incriminating evidence almost exclusively on the basis of whether it tactically advanced the case; any such evidence would be called by Mr. McGuigan unless he felt that it would tactically backfire, not because it was unreliable in fact. That is one reason why the second trial saw the introduction of a number of items of dubious value. (Potentially exculpatory evidence was not so easily favoured.)

However, having said that, I believe that the prosecutors did regard May and X as truthful on the critical issue. The polygraph results figured prominently in that belief — and understandably so. One of the lessons at this Inquiry, coming from the polygraphist himself, was that undue reliance should not be placed on those results. No doubt coloured by their views on Guy Paul Morin's guilt, the informants looked better to the prosecutors than they were, evidence which undermined them was more easily discarded, and largely inconsequential evidence became confirmatory. This is unfortunate but understandable. Equally important, the prosecutors were correct in their view that no existing law or ethical standards prevented them from calling even suspect evidence, so long as they did not *know* that the evidence was perjured. Many a prosecutor has said, supported by authority: "Let the jury decide. It's not my decision."

The current Ministry policy manual articulates the criteria which should be considered by prosecutors in evaluating informant reliability. I have suggested some changes to those criteria which are reflective of the evidence heard at this Inquiry. I have also addressed the extent to which prosecutors should assess reliability, and how their role relates to the role of the triers of fact and the defence. My findings help explain these and other recommendations which later follow.

Had the present policy manual been in effect during Guy Paul Morin's trials (together with my recommended changes), a decision should have been made that the informants were not to be tendered as witnesses. This represents a change in policy, which cannot be visited upon the prosecutors at the first or second trials. *Put succinctly, I find no misconduct in the prosecutorial decision to call these informants.*

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 interrogation. 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. McGuigan still accepts Mr. May’s evidence, in the face 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.

## **(v) The Offer Not to Testify**

### **Overview**

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. It was submitted by the Morins that the offer was actually a ploy to artificially bolster the tainted credibility of the informants in response to the allegation that they were only testifying out of self-interest. After all, if they could say that they had the choice not to testify without suffering any repercussions for that decision, could they not also say that they were only testifying out of a sense of civic duty and not for any personal gain? This section of the Report addresses this issue.

It is important to note at the outset that there are several possible variations to the allegation that the offer was a ploy. At the most serious level, it could be alleged that the informants and the authorities agreed together to create evidence to bolster the credibility of the informants. The informants

knew that the offer was not genuine, and rejected it as part of an artificial exercise so that they could later claim they rejected it out of a sense of moral imperative. A second variation of this allegation could suggest that the informants were not necessarily a part of the ploy. The prosecution simply inquired what their responses to an offer would be, and then only formally presented the offers once they felt comfortable that they would be rejected. This variation would allege that the Crown attorneys were surreptitiously trying to create evidence in their favour and not that they ‘agreed’ with the informants to create evidence. A third variation could allege that, although the Crown may not have had an oblique motive for creating evidence, once it existed (*i.e.* once the informants rejected the genuine offer), they hid the information from the defence in order to set a trap: let the defence blindly attack the credibility of the informants on the basis that they were only acting out of self-interest, and the offer would then be mentioned and thereby eviscerate the attack.

### **The Decision to Make the Offer**

All the relevant witnesses were asked about the circumstances surrounding the decision to make the offer to the informants: when it was made, who was present, and whose idea it was. As a general rule, Ms. MacLean had a somewhat different recollection than the others.

Mr. McGuigan testified that the idea of making the offer to the informants first arose in mid-December 1991 during the course of the second trial and shortly before the Christmas recess. All three Crown attorneys, their law student (Allison Shanks), and Detectives Chapman and/or Fitzpatrick were present. The informants’ names came up during a conversation about the progress of the trial and the witnesses who were next to testify. After learning of the hardship that Mr. X had endured as a result of testifying at the first trial, Mr. McGuigan suggested that they give X the option not to testify if he did not want to. Mr. McGuigan presented to the others that he was motivated by humanitarian reasons; he may have expressed this by saying that he was “moved by the Christmas spirit.” Everyone seemed to agree with the idea, and McGuigan proposed that they think about this over the holidays; no final decision was made at that time. The issue next arose in late January when Detective Fitzpatrick mentioned that he was going to bring the informants to London so that they could be prepared for testifying. The decision was then made to extend the offer to both informants.



Mr. Smith's recollection corresponded in several respects with Mr. McGuigan's, but was not as specific. Mr. Smith testified that the offer was first discussed after the Crown's opening to the jury and before the Christmas break of 1991. (The Crown opened to the jury on November 13, 1991.) He had no clear memory of who was present, but thought that the three Crown attorneys, Sergeant Chapman, Detective Fitzpatrick and Inspector Shephard might have been. He was confident that Mr. Scott was not present. He believed that the offer was discussed on more than one occasion, but could not recall a meeting when the actual decision was made. He was fairly confident that it was Mr. McGuigan who came up with the idea. Like Mr. McGuigan, Mr. Smith said that the idea was borne out of a discussion concerning the hardship which Mr. X had suffered as a result of testifying at the first trial.

Detective Fitzpatrick testified that he was present during a discussion about the idea of extending the offer to the informants. The three Crown attorneys, a police cadet and possibly Detective Chapman were also present. The discussion occurred in Mr. McGuigan's temporary apartment in London at some point in the second trial. This was the only discussion concerning the offer of which Detective Fitzpatrick was a part. The idea came up during the course of a casual conversation about the problems that both informants had gone through after the first trial. Detective Fitzpatrick could not recall who came up with the idea of the offer, but he did not think it was himself. After one or two hours of discussion, a consensus was reached and the decision to extend the offer was made.

Ms. MacLean agreed with her colleagues that the idea of the offer first came up in December, 1991. She differed, however, on who was present and whose idea it was. She stated that John Scott was present during the discussion and that he was the one who first came up with the idea of making the offer. Ms. MacLean recalled that Mr. Scott was in London visiting with the prosecution team: the three Crown attorneys, Ms. Shanks, Detective Fitzpatrick and maybe Detective Chapman. It was a social gathering. At some point, the conversation turned to how unnecessarily harsh the cross-examinations had been of some of the Crown witnesses and how the informants would likely be subjected to a very vigorous attack on their credibility. During this discussion Mr. Scott raised the idea of the offer; Ms. MacLean did not recall exactly what he said. She testified that there was only one meeting about the offer. No real objection was raised to the idea and the decision was made. At the end of the meeting, someone asked Detective

Fitzpatrick to tell the informants.

Mr. Scott testified that he occasionally went to London to visit with the members of the Morin prosecution team, and that during those visits people would often discuss the progress of the trial. He also remembered having dinner at Mr. McGuigan's apartment. He had no recollection, however, of ever participating in a discussion about the offer. He could not foreclose the possibility that he may have been present during such a discussion, but he did not recall ever suggesting that the informants should be able to refuse to testify. Mr. Scott stated that he was not involved in the strategic decision-making for the second trial. At the same time, he was aware of Mr. X's troubles and the purportedly abusive cross-examinations by the defence, and he could conceive of coming up with the idea of the offer, especially in light of Mr. X's cross-examination at the first trial and his 'pathetic background.'

Although several witnesses thought that Detective Chapman might have been present at the discussions about the offer, Detective Chapman himself had no memory of being there. He testified that his absence would not have been surprising. At meetings with the Crown attorneys, he would normally just obtain instructions about what he was required to do and then leave. Inspector Shephard also testified that he was not present during any of the discussions. Mr. Smith, the only person who thought he might have been present, accepted in cross-examination that he was not. Mr. McGuigan stated that he never discussed the offer with Inspector Shephard.

### **How the Offer was Used**

McGuigan testified that after the offer came out in evidence at the second trial, it became one of the most important pieces of evidence used to support the informants' credibility. Mr. Smith stated that the offer created quite significant evidence in favour of the informants' testimony. Ms. MacLean accepted that the informants' right to say that they were testifying voluntarily was a right that could only benefit the prosecution.

The offer was used by the prosecution in its closing address to bolster the credibility of the informants. Mr. McGuigan told the jury:

I'm going to review the evidence of Messrs. May and X, but first, general observation.

We heard in evidence that both Mr. May and Mr. X appeared at this trial on their own volition. They were both given the opportunity to decline to testify, to walk away from it all, no charges, no hassles, no recriminations. Both did not accept that offer and came forward at this trial, testified and placed themselves knowingly in a position where their whole life would be examined under the microscope of cross-examination.

.....

You should consider that Mr. May has a criminal record and his admissions that in the past he has lied and deceived a number of people but I would also ask you to consider that Mr. May testified at this trial as (sic.) a volunteer. It is clear that he had no hope of any advantage or gain as a result of his testimony before you, and that he was under no compulsion to come forward and face the lengthy, searching, and at times, embarrassing cross-examination.

.....

I might just say in passing, both Mr. May and Mr. X, you cannot believe, having heard their testimony, that they are any great lovers of the police. They are not, in my submission, coming forward here to help the police. You heard their evidence about exactly how much they trust the police and their past dealings with the police, and so this is not - and Mr. X, in indicating about the offer was made, that he didn't have to come to this court and testify, said: "I believed it because it came from the Crown." I take it from that that had it come solely from the police he would have had some difficulty in accepting that. In any event, they're not police lovers. I think that's very clear from the evidence.

.....

You saw Mr. X testify. It was obviously not easy for him to come here and discuss the details of his past offences and his involvement with his uncle.

He was given an opportunity to avoid all of that and yet he chose here, he chose to come here voluntarily

and to testify before the 12 of you, and I submit there is simply no reason for him to come before you and lie about hearing the accused's confession in those circumstances.

.....

Finally you have the offer that was made to Mr. X and May, the opportunity they were given to decline to testify in this case. Counsel ask you to believe that Robert May couldn't resist the gratification that he would get by testifying. I ask you, did Robert May look like he was having fun when he was up in that witness box? You watched him as every intimate embarrassing detail of his background was dissected over a period of six days. Do you really believe Mr. May subjected himself for his own gratification?

What of Mr. X? There's absolutely no evidence that he would get any gratification by subjecting himself to a searching cross-examination about his sexual difficulties, sexual offences, or the abuse he received from his co-workers. And I submit to you that all that Mr. X got out of this was grief.

The offer was also referred to by the trial judge as a piece of evidence which reflected on the informants' credibility:

Mr. May testified that he was aware he was in for "a bit of a bashing" in cross-examination, and was prepared for that. In connection with this trial, he presently is in no way under police power and expects and has received no advantage from Crown or police. He stated he was not pressured by the police in connection with his testimony. Although he was given the opportunity to not testify, he response was, "I said, forget it". Regarding the offer made to May, that he could withdraw from testifying, Dr. Malcolm would have expected Mr. May couldn't resist an offer that would put him on centre stage. Dr. Malcolm didn't regard that offer to withdraw as a test of truthfulness, In his view, May would say exactly what he said earlier. This evidence that May voluntarily chose to testify also bears on the issue of whether May's evidence is forthcoming in return for a benefit received by him.

.....

Because of the hardship he endured following his testimony at the first trial, Mr. [X] was given the opportunity not to testify at this trial, without fear of charges or harassment by police and Crown attorneys. However, he chose to testify. This evidence that [X] voluntarily chose to testify bears on the issue of whether [X's] evidence is forthcoming in return for a benefit received by him.

### **The Reasons for the Offer**

All three Crown attorneys were asked why the offer had been made. All three responded that it had been made for humanitarian and compassionate reasons only: it 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. As examples, Mr. McGuigan listed the facts that Mr. X had received death threats, had a bucket of bolts poured over his head and had cigarette butts thrown into his coat. There were also numerous signs posted at his workplace mocking, harassing and insulting him. Mr. X ultimately had a nervous breakdown. Mr. McGuigan stated that he was astounded by the abuse, and felt that there was a very good chance of it re-occurring after X testified at the second trial. He was also concerned by the fact that Mr. X now had two young children, and that they might also suffer abuse.

Mr. McGuigan said he was mindful of the obligation on Crown attorneys to be kind and gentle to witnesses, adding that throughout his career he had always been concerned that witnesses were the 'lost people' in the judicial system. Finally, Mr. McGuigan was also concerned about the manner in which Mr. Morin's counsel, Jack Pinkofsky, had cross-examined prosecution witnesses to that point in the trial. He felt that Mr. Pinkofsky had ridiculed and harassed the witnesses, and had subjected some people who had only assisted in the search for Christine to some very intense cross-examination. He acknowledged that he had expected Mr. Pinkofsky to be aggressive and relentless, but said that during the trial Mr. Pinkofsky had gone to the extreme. Mr. McGuigan could see that Mr. X was in for a rather

difficult cross-examination.<sup>29</sup>

Mr. Smith referred to similar reasons for the decision to make the offer. He said:

A. Certainly it was clear specifically with respect to Mr. X, that Mr. X had gone through a significant hardship as a result of his testimony at the first trial. It was clear that he would undergo very significant and vigorous cross-examination at the second trial.

I think that was probably heightened by the cross-examination of other witnesses who we felt were relatively neutral, and so it was — you know, the primary issue was the hardship that he had gone through, but as well, it was clear that he would not have a fun time when he testified.

Q. All right, he wouldn't have a fun time when he testified, and how did that generate itself into a discussion that he would be given an offer that he need not testify?

A. Well, as I recall it, the focus was on — well, clearly the testimonial aspect was part of it, the focus was on the hardship that he had suffered, and the conclusion was reached that he ought to be part of the decision as to whether he is placed in the risk of further such hardship or not.

Mr. Smith later added that he felt that Mr. Pinkofsky's cross-examinations were sometimes sarcastic and highly personal, and that he (Smith) was offended by the suggestion that some of the civilian witnesses, who appeared to be simply coming to Court to tell the truth, were shading their evidence in favour of the prosecution. He stated that the decision to make the offer arose as the Crown attorneys saw how the trial was unfolding and the witnesses were being cross-examined. He further testified that, apart from the offer, the Crown never gave any serious consideration to not calling the informants as witnesses.

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<sup>29</sup> When cross-examined on this latter reason for the offer, Mr. McGuigan later stated that it was not his most significant concern.

Ms. MacLean's explanation for why the offer had been given was similar to those of her colleagues, but made greater reference to the interests of Mr. May. She said:

Q. And who was the one who suggested that this offer be made to Mr. May and Mr. X in the presence of the other Crowns?

.....

A. It was Mr. Scott's idea, as I recall, to answer your question directly.

Q. It was Mr. Scott's idea that this offer be made?

A. Yes. I mean, he and Mr. McGuigan were the two that were discussing the issue primarily, but I thought it was Mr. Scott who first suggested it. And what had happened was that at that stage in the trial, we had observed Mr. Pinkofsky's dealings with other witnesses and — I don't mean to sound critical, but he was fairly harsh with some civilian witnesses that took us by surprise that he'd be that harsh with them, and, we were — I think, Mr. Carruthers is one example I recall, he sort of mocked him about failing English, or something like that. And I don't know if Miss Hester had testified yet, but he was pretty rough on her, and Officer Robertson, who was the dog officer who had the search — or tracking dog, I guess you'd call it, was also dealt with fairly aggressively.

And we're observing that by the time Mr. May and Mr. X testified, that they would be in for a very rough go of it, if that's the way that those witnesses would be treated, they'd be dealt with harshly. And it was recognized they had to be vigorously questioned and that would have been expected. But the concern was, because at that stage there had been access to what — in my experience, was unprecedented, unprecedentedly broad material regarding personal matters with these two men, the psychiatric records, I think, were the most troublesome to us.

At this stage, the *O'Connor* decision obviously had never been decided and it was very early in the development of the law that there would be access

made to third party records and I think it troubled us to a large extent, that just because these men were witnesses, their entire histories, including very personal, private psychiatric matters, would be exposed to the world, because this was obviously covered — this trial was covered on national — in the national media.

Q. Why did it trouble you?

A. Well, I think as a Crown, we always we feel we have applicable responsibilities towards people and I think in a compassionate sense, the fact that someone's a witness, it exposes their entire history, including — well, under the Mental Health Act, there's a presumption that your medical, psychiatric records will not become public, will not be in the public domain, and, as well, nowadays, with the *O'Connor* applications, the judges normally got the material, and edit what's irrelevant...And, Justice Donnelly chose to deal with it differently. He — I think, expressed that he didn't feel comfortable with determining relevance, so he left it to us as counsel, to review all the material, so we weren't allowed to photocopy anything, but we were allowed to make notes and the defence were ... of everything in those materials. And so, I think it struck us as a very difficult situation for these men to have all of that exposed.

Q. Well, your concern was that these particular two men would — that their privacy would be invaded by reason of this? Was that it?

A. Furthermore, well, that was with respect to Mr. May.

Q. Yes.

A. But furthermore, with respect to Mr. X, at that point we'd already had the motion on the ban on publication.

Q. Yes.

A. Where there was a significant amount of evidence called, and, actually, later in the trial, photographs were produced demonstrating that Mr. X at his



workplace, had been threatened, harassed, assaulted, almost set on fire, and his actual safety was compromised, just by the virtue of him being a witness, and the publicity that had followed, and certainly by the time of the second trial, Mr. May did not have the protection of a publication ban.

Ms. MacLean also thought that the impact of Mr. X having to relive in cross-examination the abuse he endured from his uncle could be devastating.

Detective Fitzpatrick testified that the idea of the offer came up during a conversation about the problems the informants had been enduring since the first trial. People felt sorry for the informants and therefore they decided to make the offer.

Detective Chapman testified that, as far as he knew, the offer was made because the informants had been suffering problems. He never heard that the offer was not genuine, or that it was made to enhance the informants' credibility.

### *The Anticipated Cross-Examination of the Informants*

The three Crown attorneys were asked whether they anticipated that the defence would cross-examine the informants on their motivations for testifying. This evidence bore upon the Crown's motive to take action to counteract such an attack on the informants' credibility.

Mr. McGuigan stated that he knew that the defence position was going to be that the informants had fabricated their evidence out of self-interest and were now stuck with their story. He acknowledged that their credibility was going to be a difficult issue. He expected the defence to muster an aggressive and relentless attack. Mr. Smith stated that it was inevitable that the defence was going to attack the informants' motivations. Ms. MacLean said it was an obvious line of attack for the defence to allege that Mr. May had only come forward out of self-interest.

### *The Offer Enhancing the Informants' Credibility*

All three Crown attorneys testified that they eventually came to realize

that the offer could enhance the credibility of the informants.<sup>30</sup> All three stated, however, that they did not come to this realization until after the offer had been made.

It was suggested to Mr. McGuigan that May and X seemed to have fully appreciated the significance of their decision to reject the offer as enhancing their credibility and it was strange that the Crowns did not seem to appreciate it that way. Mr. McGuigan agreed that it was only common sense that the informants' rejection of the offer would enhance their credibility. He could not explain why it was then such a surprise to him when the informants mentioned the offer in court in response to challenges to their motivations for testifying. He pointed out that he was not involved in preparing the informants to testify.

Mr. Smith ultimately testified that he was not aware of the significance of the offer until after Mr. Pinkofsky pointed it out. He had initially testified, however, that he became aware of its significance when he did his own assessment of Mr. May's credibility. He said:

The fact that Mr. May came, notwithstanding the offers I indicated earlier, caused me comfort. So, was I aware of its significance? Of course I was aware of its significance because it's something that I found helpful in my personal consideration of May's credibility. The point was that I never intended that that would be something that would be evidence at the trial.

Ms. MacLean insisted that she had not realized how the offer could boost the informants' credibility until the defence raised the issue at trial. Much of her evidence appeared inconsistent with that position, however. She stated that during the December, 1991, conversation about making the offer to the informants, it was suggested that the informants, should they reject the offer, had the right to say that they were testifying voluntarily. This is part of her testimony:

Q. Okay. Well was there much debate at this meeting when Mr. Scott introduced this idea? Were those who

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<sup>30</sup> Mr. McGuigan later qualified this with respect to Mr. X, stating that he did not think the jury would have put a lot of weight on his evidence irrespective of his voluntary status, given his record for sexually abusing children and hallucinating.

said, well let's, I'm just speculating, did someone say: Well look, we can't give these fellows this option, if they walk out of this trial we've lost our direct evidence. Did anyone say that at the meeting?

A. No. Somebody did say: What if they accept the offer?

Q. Yes.

A. But not in the sense of going further than that, that's our only direct evidence walking out, it didn't go that far. And, as I mentioned before, I don't want it to sound like Mr. Scott was the only one talking, as I recall, Mr. Scott and Mr. McGuigan were the two discussing the issue. But, when that issue was raised, I don't know if that was Mr. McGuigan or Officer Fitzpatrick who raised that, I think Mr. Scott at that point said, well, if they're forced to be here and they go through all of this, at the end, the defence could say, well, you're only here because you're forced to be here.

And undermine their evidence in that respect, I think there was a discussion as Mr. Ruby had done at the first trial, to suggest that you're only here because you're forced to be here and you're only repeating the confession because you're worried about perjury. And, so, the response was that these men, if they're going to be put through all of the things I've just discussed, have to have the right to be able to say, well, I'm here because I chose to be here. I don't think it would be fair to them not to be able to say that.

Ms. MacLean emphasized that the offer was not made in order to give the informants the right to say they were testifying voluntarily. The discussion about this 'right' occurred at the end of the conversation about the offer, essentially as an afterthought. It did not lead to a discussion about how the offer would enhance the informants' credibility. That issue was never raised.

Ms. MacLean was later cross-examined on the implications of her evidence:

Q. Now, I believe your evidence with regard to the offer, and this is at least as early as December 4<sup>th</sup>, was that it was important to the Crowns that Mr. May and

Mr. X could say, I had the right to choose to be here, and that means to testify. Is that ...?

A. That was sort of an element that was discussed at the end, yes, that's right.

Q. Okay. Would you agree with me that their being able to say so really goes to the issue of motivation?

A. Yes.

Q. And, so motivation was considered as an issue as early at least since December 4<sup>th</sup> of '91?

A. Yes, it was — that issue was raised, that's right.

Q. And did it not occur to you then, that this whole issue of motivation would then have a bearing on their credibility and certainly would be an issue at the trial?

A. Later on it did. As I said, as the time of the meeting it was — the issues that we were focusing on were the compassionate or humanitarian, however people choose to describe the issues.

And that it was in the context of them having — if they're going to have to basically endure that type of inquiry, that they have to have the right to be able to say that they're there voluntarily. And that was that in that context. The issue about the effect of it enhancing their credibility didn't, I guess, gel, or whatever, until the questioning by Mr. Pinkofsky.

.....

Q. I suppose what I'm asking you is that, doesn't any issue of motivation really go to credibility?

A. Yes.

Q. So, wouldn't you agree with me that if the issue of motivation was thought of as early as December 4<sup>th</sup>, so was the issue of their credibility in terms of their motivation.

A. Yes, because clearly the issue of their seeking benefits on July 1<sup>st</sup> was well known to us and their —

that issue, in terms of their credibility, was a very live one. That when they came forward with the information, they both sought benefits for themselves, and that was very clearly known to us.

Ms. MacLean also gave the following evidence:

Q. Remember saying that yesterday? “We wanted them to be able to say, ‘We chose to be here.’”

A. We wanted them to have the right to say that, yes.

Q. Right. And you were saying that in the context of the December discussion?

A. Yes.

Q. All right.

A. That’s fair.

Q. So that’s pretty clear, isn’t it? As of December 4<sup>th</sup>, “We” — the Crowns — “wanted them to be able to say, ‘We chose to be here’”, is really another way of saying that we wanted them to be able to respond to the Ruby-type questioning from the first trial?

A. That’s fair, yes.

Q. ...That, incidentally, is an acknowledgment by you, is it not, that it was anticipated long before Mr. May’s re-examination that these offers, and the rejection of these offers, could come out in evidence?

A. Yes.

Mr. McGuigan was confronted with Ms. MacLean’s evidence. He denied that there was any such discussion about the informants’ right to say they were testifying voluntarily.

### ***An Offer Made to Both Informants***

Messrs. McGuigan and Smith were asked why the offer had been made to Mr. May as well as Mr. X, since the concerns seemed to centre

around Mr. X. Mr. McGuigan responded:

Q. Well, you indicated some of the motivations that prompted the offer to Mr. X; why make the offer to Mr. May?

A. Well, if you made the offer to Mr. X, and he accepted it, and you didn't make the offer to Mr. May — I mean, you've had the benefit of seeing Mr. May. He's not an individual that would sit still and listen to — and feel that he was treated more shabbily than Mr. X was. You would be hearing about that, and secondly, in many ways, they're in the same boat, and it seemed to me that given the fact that this would have caused Mr. May, in my opinion, to be serious — it would seriously have affected his evidence had he not been given the same option.

Q. Seriously affected it in what way?

A. Well, I think he would have said: I don't care, I'm just going to go up there and I'll answer it whatever way I feel. If it's a tough question, I'll agree, if it isn't, I won't, because these guys don't care about me. One of the things about inmates that I've learned is that, as I've said previously, they're very, very touchy about all kinds of matters, and if you treat inmates with respect, they respond accordingly, and he would look upon this as lack of respect for him, and his evidence would be, in my opinion, would have been affected.

Mr. Smith could not recall the specifics of the conversation about why an offer had to be made to Mr. May. He thought that it was primarily because it would be difficult to only make the offer to Mr. X. But he also noted that while Mr. May had not suffered grief to the same extent as Mr. X, he had still suffered, and would still be subjected to a very searching and embarrassing cross-examination by the defence.

Ms. MacLean's explanation for the offer made reference to Mr. May, but she did acknowledge that the concerns with respect to him were less than with respect to Mr. X. She also agreed that when the Crown applied for an order banning the publication of Mr. May's identity, it did not adduce any evidence of hardship suffered by Mr. May as a result of testifying at the first trial. She stated, however, that Mr. May had suffered some personal

embarrassment and difficulty with family and friends. He had also had a broom handle inserted up his rectum by jail guards.<sup>31</sup> Ms. MacLean maintained that Mr. May might suffer as a result of highly intrusive and embarrassing questions based on his psychiatric records. Finally, she agreed with her colleagues that fairness dictated that the offer be given to both informants.

Detective Fitzpatrick did not recall why the offer was made to Mr. May. He simply assumed that if it was going to be made to one informant, it had to be made to the other. Detective Chapman testified that the offer was made to May because he had suffered family problems as a result of testifying at the first trial, and also because he was going to be cross-examined on his psychiatric record. Detective Chapman did not know where he learned that information.

### *The Publication Ban*

The three Crown attorneys were examined on why they felt the need to make the offer to Mr. X after they had already obtained a publication ban with respect to his identity. The prosecution had applied for the ban in order to enable Mr. X to testify. During her submissions on the application, Ms. MacLean advised the Court why the informants were very important witnesses, and why the ban was necessary for the due administration of justice.

All three Crown attorneys responded that they did not feel that the publication ban would completely protect X from suffering further difficulties as a result of his testimony. They pointed to the fact he had testified at the first trial without such a ban, and thus a significant number of people would still know that he was the unnamed informant testifying against Mr. Morin. Mr. McGuigan, for example, testified:

Q. I mean, the Crown has taken measures which have been accepted by Justice Donnelly to better protect this witness so that the public doesn't have his name or any information leading to his identity, so the Crown's taking affirmative steps to further protect this witness to ensure that he can give evidence.

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<sup>31</sup> This unsubstantiated claim by Mr. May allegedly occurred prior to May's involvement in the Morin investigation.

A. Yes.

Q. So do you not see some contradiction between taking those measures and then deciding to make him an offer that he doesn't have to testify at all?

A. Well, I think, first of all, had Mr. May also received the same protection as Mr. X, I think it would have had more significance. The difficulty was that the two of these were connected at the first trial, and when you have the paper reporting Mr. May says so and so, all the people who knew him, all the people at Hydro who he worked with, his ex-neighbors and friends and so on, would all know who X was. And although it was a help and an assistance, in my opinion, it was not the total answer. This information would still be — come into the possession of a number of people knowledge and he was still open for further difficulties.

Q. He changed his employment and he changed his residence, did you consider those aspects in deciding whether it was necessary to put such an offer to Mr. X?

A. Well, I think that actually that's one of the items that we did discuss, I can remember that particular discussion and the idea that this was not the answer to his problems. That this information would somehow get out to people and he'd be placed in the same — and the additional thing I remember in this discussion was that he now had children, two young girls, and the effect that this would have if that got into the school where they were on the lives of those two young girls. That was another aspect that I — that you brought — that came back to me as a result of your question.

Mr. McGuigan later added that people sitting in the courtroom would be able to identify Mr. X.

### *Inspector Shephard*

As indicated above, Inspector Shephard was not present during the initial discussions about the idea of making the offer. He first learned about it in a telephone conversation with Detective Fitzpatrick after it had been first extended to the informants and rejected by them. In that conversation, he did not ask for, nor did Detective Fitzpatrick volunteer, an explanation why the



offer had been made.<sup>32</sup> However, in examination by Commission counsel, Inspector Shephard stated that, with the benefit of hindsight, he had come to the conclusion that in all probability the offer was given to the informants to boost their credibility. He said that no one had ever told him that. He agreed that it would have been beneficial to have had a means of shoring up their credibility.

The following day, Inspector Shephard retreated from his opinion. While agreeing that he was trying to be candid and truthful in offering his view, he felt that he had been unfair. He was criticizing three very competent Crown attorneys without any grounds for so doing. He had jumped to conclusions, he said, and did not know what was in the minds of the prosecutors. He had not considered the suggestion that the offer was made for compassionate reasons. He agreed that he had spoken to Detective Fitzpatrick between the time he offered his initial opinion and when he retracted it, and that Fitzpatrick had maintained that the offer was given for compassionate reasons. He said that that conversation had ‘somewhat’ factored into his change of view. Inspector Shephard also agreed that when he offered his initial opinion he had already known of Detective Fitzpatrick’s point of view. Finally, Inspector Shephard agreed that he had not been taken by surprise when he was first asked why the offer had been made.

### *Fitzpatrick’s Meeting with Ken and Janet Jessop*

Ken and Janet Jessop both gave evidence at the Inquiry that they were once told by Detective Fitzpatrick that the offer was being made to the informants in order to bolster their credibility. This evidence was disputed by many of the other parties before the Commission.

Ken and Janet Jessop testified that in August or September, 1991, Detective Fitzpatrick visited them at Ms. Jessop’s home in . The visit was one of Detective Fitzpatrick’s regular visits to Ms. Jessop to keep her informed of events concerning Mr. Morin’s trial. Ken Jessop had only recently moved back in with his mother after having separated from his wife.

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<sup>32</sup> Inspector Shephard could not explain why he had not asked Detective Fitzpatrick (or anyone else) for an explanation, even though he agreed that that would have been a natural question to ask.

Ken Jessop testified that during the course of the visit, Detective Fitzpatrick mentioned that they were probably going to hear about the informants being given the choice not to testify if they did not want to. He assured the Jessops, however, that the offer was just being made to enhance the informants' credibility. He gave no other reason for the offer. He told the Jessops not to worry about it.

Janet Jessop testified that Detective Fitzpatrick told her and her son about the offer during this visit. He also told them that they might find out about it in the newspapers, but not to worry about it because it was just for show and to enhance their credibility. Detective Fitzpatrick said that the offer would make the informants 'look good.' Ms. Jessop did not recall Detective Fitzpatrick saying anything about the offer being made because the authorities felt sorry for the informants.

Detective Fitzpatrick denied ever having forewarned the Jessops that the offer was going to be made, or having told them that they were not to worry about it because it was only being made for show and to enhance the informants' credibility. In fact, Detective Fitzpatrick did not recall ever speaking to the Jessops about the offer. If he ever did speak to them about the offer, it would have been after the informants had testified.

The Jessops first told someone (their legal counsel) about this discussion with Detective Fitzpatrick shortly before they testified before the Commission. Both stated that they told their counsel after learning that Mr. Smith had testified before the Commission that the offer was made for humanitarian reasons. Ken Jessop learned about Mr. Smith's testimony through the media, whereas Ms. Jessop learned about it from her counsel.

The Jessops were cross-examined on why they waited to tell someone until over five years after the event. Ken Jessop denied that he had heard about the debate over the genuineness of the offer before Mr. Smith testified. He said he was not present for the informants' testimony at the second trial, and did not receive newspapers reporting on the trial in the hospital where he was in early 1992. He may have seen news reports of the opening comments by Commission counsel with respect to the purported reasons for the offer, but he only glanced over them. He had read 'bits and pieces' of Kirk Makin's book on the Morin prosecutions, but did not recall whether he read something about the offer being a ploy. Ken Jessop further testified that he learned after he was released from the hospital that the offer had become public during the

trial, but stated that he never thought about the discussion with Detective Fitzpatrick because events had unfolded as he had been told they would: the offer was made and it was declined. He never spoke to anyone about the discussion because there was nothing to talk about: "It was made plain and clear to us what it was, and there was no real discussion about it at all." He added that he would have been very upset and angry had he first learned about the offer through the media, and he would have raised the issue with the police or Crown. As it was, however, he was neither upset nor angry because he had been assured that it was just for show and to enhance the informants' credibility.

Janet Jessop similarly testified that she had never heard before Mr. Smith's testimony that the offer had been made for compassionate reasons. She said that she did not recall reading about the offer in the newspapers during the second trial, and she was not in Court when the informants gave evidence. She did not recall if she was advised of the position the defence was taking with respect to the offer. She never read Mr. Makin's book. She acknowledged that she had been kept informed by her counsel of 'things going on' at the Commission, but stated that nothing ever twigged her memory about her meeting with Detective Fitzpatrick.

The Jessops were also cross-examined on their ability to recall events from 1991. Both had admittedly been going through difficulties at the time. Ken Jessop separated from his wife in the summer of 1991, partly because he had resumed drinking after being sober for almost two years. About a week before Detective Fitzpatrick visited, he ceased drinking and started going to Alcoholics Anonymous meetings. He testified that he was not drinking at the time of Detective Fitzpatrick's visit. He resumed drinking in December, 1991 and tried to commit suicide in January, 1992. He was subsequently imprisoned and then sent to stay at a psychiatric hospital for three months. This is where he was living during much of the second trial.

Ms. Jessop had her own problems during the second trial. Her marriage had broken up, she had financial problems, and her son was facing criminal charges, was drinking too much and had attempted suicide. Ms. Jessop agreed that her concentration was short at the time and her mind was occupied by matters other than the trial itself. She insisted, however, that she had a very good recollection of the meeting with Detective Fitzpatrick. She acknowledged that she often needed to refer to her written statement about the meeting (prepared over five years after the event) to answer questions

about it, but stated that once she did, her memory returned. She had at one point in her interview with Commission counsel apparently indicated that the offer had been given for humanitarian reasons. She later corrected herself. She told the Inquiry that she was more comfortable recalling events in her home than on the witness stand.

Ms. Jessop stated that her memory had not been assisted by her son. Both Jessops testified that they recalled the meeting with Detective Fitzpatrick independently of each other, and advised their counsel of it before speaking to each other.

Ken Jessop acknowledged that after he learned that Mr. Morin was innocent, he felt as though he had been lied to for 10 years. He was upset at the people involved in the case, including the police and the lawyers. Ms. Jessop stated that she had become very close friends with Detective Fitzpatrick as a result of the case.

As indicated above, Detective Fitzpatrick and all three of the second trial prosecutors testified that the idea of the offer was first raised in December, 1991. This is several months after the Jessops testified that Detective Fitzpatrick told them about it. Mr. Scott testified that it was possible he could have thought of making the offer to the informants, and shared this thought with the police before December, 1991. However, he had no recollection of doing so.

### ***Robert Jessop***

Christine Jessop's father, Robert Jessop, testified that he first heard about the offer through the media around the time that the informants testified at the second trial. He wanted to know why the offer had been made, so he contacted either the Crown or police to find out. He was told that the offer was made in response to the damage to the credibility of the informants which was anticipated by defence cross-examination. He was never told that the offer was made to enhance the informants' credibility, but drew his own conclusion in that regard:

I believe it's my own thought as to why an offer like that would be made in the first place, based upon...the fact that it was known that the defence attorneys were going to be very strenuous in their cross-examination

of the two witnesses, and therefore, one that's testifying wants to be credible. And I would assume that — my thought was: Well, this must be why they've done it.

Mr. Jessop could not specifically say who advised him of the reason for the offer, but he was certain that he was never told that the offer was made for compassionate or humanitarian reasons. He would have been angry if he had been told that, and he never had that visceral reaction of anger.

Mr. Jessop met with Commission counsel on March 20, 1997, in preparation for testifying before the Commission. He was cross-examined about this meeting by counsel for Messrs. McGuigan and Smith:

Q. Well, did you not first say to Mr. Cooper, you didn't recall any specifics about the offer, and that no one told you why the offer had been made?

A. I might have said that on that particular day.

Q. And in response to that, Mr. Cooper then referred you to Mr. Danson's letter, and you responded by saying you got that information from the media. Do you recall that happened, you saying that?

A. Perhaps I did.

Q. And then Mr. Cooper saying, Mr. Danson's letter said you were told about this. Do you recall Mr. Cooper then saying words to that effect?

A. He may well have. If you've got it written down there, I suppose he said it.

.....

Q. Okay. So it would be fair to say — my original question was, to be fair, that you might be, given the passage of time — I know you're trying your best, that you may well be confused about what you were told regarding the purpose of the offer?

A. I think that would maybe be fair to say.

Detective Fitzpatrick was asked whether he ever had a conversation

in which he told Mr. Jessop that the offer was made in anticipation of attacks on the informants' credibility in cross-examination. He did not recall such a conversation, but said it was possible that he discussed the issue of credibility with Mr. Jessop.

### *The Informants*

Mr. X testified that when he was given the offer not to testify, he felt that it was a genuine offer. He still believes that today. He did not know why he had been given the offer. No one told him why.

Mr. May testified that although he did not think that the offer was a ploy at the time he was given it, he now believes that it was. Mr. May had actually told his mother in July, 1994, that he thought the offer was a ploy, but he testified that he was lying to her at the time. It is only in hindsight that he now believes that he was correct. As usual, no reliance can be placed upon Mr. May's testimony, on any side of any issue.

### *The Crown's Response*

Both Mr. McGuigan and Mr. Smith testified that if they had wanted to use the offer to enhance the informants' credibility, they would have disclosed it to the defence with a view to either heading off cross-examination about the informants' motives, or enabling the issue to be raised in re-examination. Mr. McGuigan suggested that this would have been much more clever than hiding the offer since (in his opinion) the defence would have inevitably attacked the motivations of the informants. Mr. Smith suggested that it would have been inept to keep the offer a secret because one does not leave tactical considerations to chance.

Ms. MacLean agreed with the suggestion that it would have been foolhardy to have concocted a scheme wherein one would have to enlist the cooperation of two unstable persons like the informants. Mr. Scott was also asked about this, and said that it would be unwise to use informants in a scheme because they might turn on you.

### **Considering the Implications of the Offer**

The three Crown attorneys who prosecuted the second trial were

asked about a number of possible implications of giving the informants the choice whether to testify:

1. The Crown might lose the informants' evidence — the only direct evidence they had against Mr. Morin, whom they regarded to be a sadistic killer — and, as a consequence, also 'lose' the trial;
2. The proceedings might end in a mistrial — wasting the time and effort which had been put into the trial and pre-trial motions — because the Crown might not be calling witnesses who had been referred to in some detail in the prosecution's opening address to the jury;
3. The Crown would effectively delegate an important trial decision — whether to adduce the informants' evidence — to two witnesses of disreputable character who had bargained for their evidence;
4. The interests of the Jessops in convicting the murderer of their nine year-old daughter might be sacrificed to the interests of a con man and a sexual assailant;
5. Only Mr. May might have accepted the offer, leaving the prosecution with nothing but the evidence of the person who simply *overheard* the confession;
6. The public may have reacted adversely if Mr. Morin had been acquitted because the prosecution felt sorry for the informants;
7. The administration of justice may have been adversely affected by the unusual offer.

The Crown attorneys generally responded by stating that they failed to consider almost all of these implications, concentrating only on their humanitarian concerns for the informants. The evidence bearing upon these admissions is outlined below. This evidence bears upon the issue of whether Crown counsel failed to properly consider the implications of their decisions. It is also relevant to the credibility of their stated reasons for making the offer and the *bona fides* of the offer itself. The Morins argued that it stretches

credulity to believe that three competent Crown attorneys, assisted by several experienced police officers, acted without any appreciation of the potentially serious consequences of their actions.

*Losing the Informants' Evidence and the Trial*

The most obvious potential impact of the offer was that it would be accepted and the prosecution would lose the informants' evidence. This, in turn, might have led to Mr. Morin's acquittal. The witnesses were asked about this possibility.

Mr. McGuigan stated that when the offer was being considered, no one ever discussed the fact that it might deprive the Crown of significant evidence — in fact, its only direct evidence — and let the murderer of a young child go free. He could not explain why not:

Q. Okay. Now, leaving aside the mistrial, we've heard that this was either significant or important evidence relied upon in your opening, and the only direct evidence in a less than overwhelming case. We've also heard that the officers and Sue MacLean had been working on the case against Guy Paul Morin since 1985. Was there any discussion at all that such an offer, if accepted, would deprive the Crown of the only direct evidence it had in the case?

A. No.

Q. Was there any discussion that such an offer, if accepted, would deprive the Crown of significant evidence that it relied upon in the case?

A. No.

Q. Well, was there any discussion that such an offer, if accepted, could cause a guilty man to go free?

A. No.

Q. Would you not expect that those would be topics discussed amongst Crown counsel in making a decision of this nature?

A. No. One might expect that, but it didn't happen.



It just didn't — those items were not discussed. Why they weren't discussed, I don't know, but they weren't.

.....

Q. Okay. Well, leaving aside the absence of any discussion that such an offer would deprive the Crown of important or significant evidence it had in the case, was there any discussion that such an offer, if accepted, might allow not just any guilty person to go free, but a person who you believed at that time to be mentally ill, a child abductor, a sexual sadist and a violent killer?

I mean, I want to put it at its starkest terms possible. Is there any discussion about the fact that such an offer, while potentially humanitarian to the witnesses, could cause this sick, child abductor and murderer, as you regarded him back then, to be walking free in the community?

A. No.

Q. Would you expect — well, let me ask you this. If you believed that the offer might be accepted, wouldn't it concern you that it might cause such a killer to go free?

A. Well, if I'm working from the basis that the jury's not going to accept the evidence in any event, in my opinion, then I haven't lost much, from my perspective.

Q. Well, what I heard you say was that that was true for Mr. X, but not necessarily true for Mr. May. This is an offer that's being communicated or contemplated in relation to Mr. May as well.

A. Yes.

Q. So you might lose something very significant. So I guess what I'm asking you is: If you believe that the offer might be accepted, and let's just put in Mr. May here, wouldn't it concern you that it might contribute to causing a killer to go free?

A. Well, that was something that was not discussed and was not considered by me. Now, you can very

justifiably argue that it's something that should have been considered, but I'm just telling you that that was not considered.

Mr. Smith stated that the Crown attorneys did not consider any of the implications of the offer, including the possibility of losing a very serious case:

Q. Well, was there any discussion amongst the Crown counsel or the investigating officers that this was a first degree murder case involving a nine-year-old child with sexual overtones; in other words, a most serious offence imaginable, and that the Crown was voluntarily exposing itself to an acquittal or a potential acquittal by foregoing evidence of a confession? I mean, did anybody ever talk about the implications of that?

A. No one talked about the implication, at all, and we — you know, obviously, we knew we were prosecuting a very serious case indeed, and we went about our task, I thought, in a very professional manner, and tried to do what we thought was right. If you tell me that potentially that could have been a very grave mistake, you're right. It could have been a very grave mistake. But frankly, sir, we did not think about it or discuss it at the time.

Ms. MacLean stated that someone asked “What if they accept the offer,” but this did not translate into a discussion about losing the only direct evidence against Mr. Morin. They did not consider the possibility of an acquittal. They did not assess what evidence was left in the absence of the informants. No one suggested that they could lose a first degree murder trial.

Detective Fitzpatrick agreed, at one point, that no one ever discussed the possibility of losing important evidence, and even the whole case, because of the offer. However, he said that he had been personally concerned about this. He thought that the informants' evidence was the prosecution's most important piece of evidence, although he felt the prosecution still had enough evidence to convict without it. He also testified that he may, in fact, have voiced some concerns over the impact of the offer. He could not recall how the Crown attorneys reacted when he did so. None of them remembered Detective Fitzpatrick, or any other police officer, raising any concerns about the offer. In hindsight, Detective Fitzpatrick felt that he should have voiced

his concerns more strongly.

Inspector Shephard felt that the offer could have had a serious impact on the prosecution since the informants' evidence could have been lost. When Detective Fitzpatrick told him about the offer (after the informants had already rejected it) he was concerned that the informants might change their minds before they testified and accept the offer. He agreed that he had never raised his concerns with the three prosecutors, and could not explain why he had not.

Mr. McGuigan agreed that the case against Mr. Morin was not an overwhelming one. He stated that a prosecutor needs to have ample other evidence before he or she can decide not to call the evidence of a jailhouse informant, and acknowledged that the Morin prosecution was not one of those cases. He stated that since jurors often do not trust informants, the Crown only calls them when they are needed. He insisted, however, that he had not felt that the risk in making the offer was that substantial. He pointed out that calling unreliable informant witnesses can tarnish the entire Crown's case. He had also thought it unlikely that the jury would believe the informants in any event, especially Mr. X who had a history of sexually abusing young children, hearing voices and seeing people with no legs. He acknowledged that he had thought it more likely (though not certain) that Mr. May would be believed, but stated that he had simply failed to consider the impact of losing May's evidence. He further acknowledged that Ms. MacLean had thought that Mr. X would be of assistance to the prosecution. He testified that her opinion was not discussed when the decision to give the offer was made.

Mr. Smith expressed similar sentiments in his evidence. He testified that it was hard to assess the effect of the informants' evidence on the prosecution's case as a whole because, although it was important evidence in a difficult case, it was also problematic evidence. The jurors might think that the informants acted out of self-interest. The informants had unfavourable criminal records. The psychiatric evidence suggested that Mr. May was a pathological liar and Mr. X heard voices. Mr. Smith had not considered the informants' evidence to be the most important evidence for the prosecution. At the same time, Mr. Smith testified that the decision to make the offer was a very important decision. He also felt that it was not appropriate for the prosecution to hold back evidence simply because it might not be necessary to secure a conviction. Necessity is not the standard to be applied, and a

prosecutor never knows when he or she has enough evidence for a conviction.

Ms. MacLean acknowledged that losing the informants' evidence would have had an impact on the prosecution, but felt that there had been a lot of other indirect evidence pointing to Mr. Morin's guilt. She had also felt that the informants' evidence was vulnerable. At the same time, however, she had been more optimistic that Mr. X's evidence would be accepted. She had been concerned that he might accept the offer, but hoped that moral considerations would impel both informants to do the 'right thing.'

### *The Possibility of a Mistrial*

When Mr. McGuigan gave the prosecution's opening address to the jury, he referred in some detail to the informants' evidence. If the informants had accepted the offer, the jury would never have heard their evidence. All three Crown attorneys accepted that this might have caused a mistrial.<sup>33</sup>

The evidence was uncontradicted that the possibility of a mistrial was never considered by the prosecution before the offers were made. Mr. McGuigan, for example, testified:

Q. You had already told the jury in November of 1991, that they would hear this evidence of a confession by the accused. And I take it you'd agree that if this offer was a legitimate one and if accepted by the witnesses, could generate a mistrial of a case that had commenced some months before.

A. That was potential.

Q. Well, did you ever consider that this offer that was going to be made, or was being discussed, could generate a mistrial of the case?

A. First time that I considered it was when we were arguing in court and Mr. Pinkofsky indicated this was mentioned in the opening, and therefore would be grounds for a mistrial. That's the first time the light

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<sup>33</sup> Mr. McGuigan qualified this by suggesting that the defence may have been pleased by the turn of events, since the jury would not hear from witnesses that the prosecution had referred to. I have some difficulty with that suggestion.

went on.

Q. All right. Was a concern — your answer probably answers this one as well, but was a concern raised by any of the Crowns or police officers in your presence that making such an offer to these witnesses could generate a mistrial of this lengthy case?

A. No.

Mr. McGuigan stated that he certainly would not have wanted a mistrial, given how much time and effort had already been put into the prosecution, and that if he had considered the possibility, he would not have extended the offer to the informants.

Mr. Smith testified:

Q. Well let's look at the ramifications, from all angles, that you never apparently considered. Now, apparently the others never considered because if they had, they would likely have communicated it to you. All right? First of all, let's look at it from the point of view of, let's suppose that both of them had accepted the offer and said: Mr. McGuigan, it's a belated Christmas present now and we'll accept it. All right? You follow?

A. And so they both would have said we're not going to testify.

Q. You got it.

A. Right.

Q. All right. Well, at this point in the proceedings, sir, and bear in mind you haven't considered the ramifications of this, you haven't and as far as you know, none of the others have. First of all, this is taking place in the context of a case where there has already been a very lengthy stay application brought by the defence that has consumed more than seven months of court time. Correct?

A. Yes.

Q. That has been followed, sir, by a series of pre-trial motions that have consumed between four and five months of court time.

A. Fair enough.

.....

Q. Okay. So you add all that up, you're into 16 months of court time has already been used up on this case.

A. Okay.

Q. Of the second trial. The resources, sir, that had been put into this case — just from that perspective at this point in time, are enormous. Agreed?

A. Sure.

.....

Q. Yes. And then of course, you have to now factor in, as well, the fact that this case has been going on at this point, for seven years. The prosecution of Mr. Morin's been going on for seven years through court after court. Okay? In previous trial, Court of Appeal, Supreme Court of Canada, Supreme Court of Canada, Supreme Court of Canada, three times Supreme Court of Canada. And now we're back with all this 16 months of trial. And of course, you had all been quite troubled, had you not, sir, I mean, it's natural is it not that you were all troubled? That maybe the defence would win the stay application.

A. Troubled by it?

Q. Yes, of course. Weren't you? Or were you always a 100 per cent confident that you'd win it?

A. I guess it depends what you mean by "troubled by" it. I mean, we went on with our trial preparation ---

Q. (Inaudible)

A. And we would have heard whether they was a stay or not at the appropriate point. When you say troubled

by it —

Q. You were worried you could lose, is what I mean by that.

A. Oh sure. We certainly realized that there was some risk of a stay, sure.

Q. That's all I mean by "troubled by".

A. Yes.

Q. And the implication, sir, given that background, is that first of all, if the two of them had accepted the offer — and we're assuming for the moment it's a genuine offer, which of course you say it is, that it would hardly have been unexpected if the defence had brought an immediate application for a mistrial, given the opening address of Mr. McGuigan.

A. Well, I think that's fair. I lost count of how many applications there were for mistrials.

.....

Q. And of course, sir, I would suggest that a further application — and we've always tended to focus on a mistrial application, a further application that could well have been brought by the defence in this circumstances, would be a further application for a stay of proceedings. Because the Crown has effectively aborted a second trial 16 months into the trial, and we're now eight years after the event.

A. Well, I think I can fairly say that if there had been a mistrial, it would be astounded me. If there was a mistrial that was occasioned by the conduct of the Crown, it would have astounded me if Mr. Pinkofsky had not brought a stay application.

Q. And equally, sir, would I be right in saying that it would have given you cause for considerable concern that on this occasion he might actually be successful?

A. Well, frankly, I didn't turn my mind to that —

Q. I know you didn't. I'm talking about the actual

ramifications, not what you thought about because you said you didn't think about this. I'm just looking at the actual ramifications. At the end of it, I'm going to put to you that it's inconceivable that you didn't consider these things, but, we haven't got to that. I just want to look at what the actual ramifications were, now we're looking it.

A. I don't know if I can concede that a stay would have been inevitable.

Q. I didn't say that. The question was: You would have had cause to be extremely concerned that a stay might indeed be granted if such an application were brought in these circumstances?

A. Fair enough. I mean, I was concerned about every stay application Mr. Pinkofsky brought and there were a number of them.

Q. All right, but this one —

A. I didn't mean that I thought they necessarily had merit.

Q. No, but this one you might have thought had a great deal more merit than your opinion of some of the others?

A. I'd certainly concede that there would be an arguable position, sure.

Q. So, in other words, blindly, on your evidence, unknowingly, you have — and I say you, generically ... have taken a decision that could very likely lead to a mistrial and equally, possibly, lead to a stay of proceedings on account of Crown ... Would you have done that unknowingly?

A. When you say very likely, again I don't want to quibble, but could have, sure.

Q. Yes. All right. But unknowingly. You've walked into this.

A. Without applying my mind to that issue, yes.



Mr. McGuigan was cross-examined on how he could not have considered the possibility of a mistrial. He agreed that the offer was first considered within two and a half to four weeks of the opening, but stated that he usually forgets all about his opening once a trial gets underway. Mr. Scott felt somewhat differently:

Q. Don't you think, sir, that your mind would have strayed back to the opening address?

A. I would like to hope so ...

Q. You don't think, sir, that any seasoned prosecutor — and really any unseasoned prosecutor would realize immediately that there's a significant problem there?

A. I would like to hope so.

Mr. McGuigan was referred to submissions he made at the trial on January 20, 1992, in response to a defence application to defer cross-examination of Detective Fitzpatrick and Inspector Shephard about the informants until after the informants had testified. Mr. McGuigan argued that the topic was not new and had been raised in the prosecution's opening address. Mr. McGuigan denied that his submissions indicated that his opening address remained in his mind in responding to issues at trial. He explained that (according to his recollection) a firm decision on whether to make the offer had not yet been made, and his submissions concerned an issue entirely unrelated to the offer.

### ***Improper Delegation of the Decision***

It was suggested to the Crown attorneys that by making the offer they had in effect delegated — improperly — an important trial decision to the informants, *i.e.* whether to adduce their evidence. All three agreed that this issue had not been considered, but generally felt that the suggestion was invalid. They did not feel that they had delegated a trial decision. Mr. McGuigan stated that the decision to extend the offer was made by the Crown, not the informants. Ms. MacLean testified that the offer was a product of the Crown's decision on how to best conduct the prosecution. Mr. Smith pointed out that the prosecution is always at the mercy of witnesses concerning what evidence they choose to give.

*The Jessops*

All three Crown attorneys agreed that they neither consulted with the Jessops nor considered the Jessops' interests before deciding to make the offer. Ms. MacLean, for example, testified:

Q. So as of December 4<sup>th</sup> of 1991, madam, of course, you and others, but you in particular, had devoted a very substantial part of your career to the prosecution of Guy Paul Morin; correct?

A. Not by choice, but that's what happened, yes.

Q. And you accompanied — you both had been and were still being accompanied by Crowns and police officers who were both highly skillful?

A. Yes.

Q. Highly motivated?

A. Yes.

.....

Q. And you've got some police equally highly motivated, Fitzpatrick, Shephard, Chapman?

A. To do the right, thing, yes.

Q. Well, highly motivated in the prosecution of Mr. Morin, is what I mean by that. You all believed that Mr. Morin had killed Christine Jessop?

A. Yes.

Q. So you were highly motivated to try and satisfy a jury that Mr. Morin had killed Christine Jessop?

A. Yes.

.....

Q. This group of people, madam, you would say and have us believe, as a result of one social occasion, discussion with what would seem to be very little

debate, agree unanimously, without dissent, to place the sensitivities of a con man on the one side, and a pedophile on the other side, before the sensitivities of the Jessops; correct?

A. The issue of the Jessops didn't come up.

Q. So they place the sensitivities of these two individuals before the sensitivities of the Jessops, without thinking about it, without realizing what they were doing?

A. We didn't talk —

Q. When I say they, I mean you?

A. We didn't talk about the consequences to the case, we didn't talk about mistrial, we didn't talk about the Jessops or the public's reaction. We were talking about what was fair to these men as witnesses.

None of the Crown attorneys offered an explanation for why they failed to consider the Jessops' interests, but they did defend the decision not to tell the Jessops about the offer. Mr. McGuigan testified that he did not tell the Jessops because it was a matter of Crown discretion, the Jessops were just interested generally in how the trial was progressing, the Jessops may have caused problems by going to the media, Ms. Jessop might have accidentally averted to the offer in her testimony, and the informants' rejection of the offer may have influenced Ms. Jessop's testimony by strengthening her beliefs in Morin's guilt. Ms. MacLean agreed that the Crown had to be very cautious about discussing trial matters with the Jessops when they were witnesses in the trial and there had been an order from the trial judge excluding all witnesses from the courtroom.

### *Miscellaneous*

Several other potential implications of the offer were raised in the questioning of the Crown attorneys. They are grouped together here.

They did not consider what the public's reaction might have been if the informants had accepted the offer and Mr. Morin had been acquitted. Messrs. McGuigan and Smith pointed out, however, that they would have been held equally accountable if they had decided not to call the informants because of

reliability concerns.

They did not consider the long term effects on the administration of justice by choosing not to call witnesses because of the cross-examination they faced. It was suggested that the offer might prevent similar informants from coming forward in the future. Ms. MacLean testified that she did not think the Crown attorneys were tainting the administration of justice. On the contrary, they were giving it integrity by treating witnesses with decency.

Mr. McGuigan was asked whether he ever considered the possibility that only Mr. May would accept the offer. He responded that he had not (nor had any of the Crown attorneys). He agreed that this would have posed a serious problem, in that Mr. May was the person who supposedly had the actual conversation with Mr. Morin. Mr. X had only overheard the alleged confession.<sup>34</sup>

### *The Crown's Responsibilities*

All three Crown attorneys acknowledged to a greater or lesser extent that they should have given more thought to the potential ramifications of their decision to make the offer.

Mr. McGuigan stated that it was a mistake not to consider the possibility that the offer could result in a mistrial. He also stated that he should have considered the impact of losing Mr. May's evidence. If he could do it over again, he would have disclosed the offer to the defence, and used it in re-examination if circumstances permitted. His only explanation for why the Crown attorneys failed to consider so many implications of the offer was that they acted stupidly.

Mr. Smith said that the decision to make the offer was a very important one, and that the Crown attorneys did not discuss the possible ramifications of the different possible responses. He accepted that they exposed themselves to the possibility of a mistrial, and that he had not applied

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<sup>34</sup> If only Mr. X testified to the confession, the jury might be left wondering why the actual participant in the conversation did not testify and confirm what X said he had overheard. The jury might speculate that Mr. May did not hear any confession, and therefore more easily conclude Mr. X was lying (especially in the face of Mr. Morin's denial).

his mind to that issue.

Ms. MacLean stated that the prosecutors had been obliged to think through the possible implications of the offer, but failed to do so. She said that the whole issue was not discussed as thoroughly as it should have been. She could not explain why they failed to consider the possibility of a mistrial.

### **Fitzpatrick Communicating the Offer to the Informants**

Detective Fitzpatrick was the first to tell the informants about the offer. He did so at the request of the prosecutors. An issue before the Commission was whether Detective Fitzpatrick was meant to act as a kind of advance scout: advising the informants that they *might* be given the offer in order to learn what their responses would be before the Crown attorneys decided whether to make the offer official at a later date. All three Crown attorneys denied that this was their intention.

#### ***Fitzpatrick's Instructions***

Detective Fitzpatrick testified that he did not tell the informants about the offer as part of a ploy. No one suggested that he find out how the informants would respond to an offer and then report back to the Crown with what he learned. At the same time, however, he testified that he was instructed by the Crown attorneys as follows:

Q. All right, so you were sort to convey to May and Mr. X that the Crown may make this offer to you, and you fellows should think about it so when you come down to be interviewed by the Crown, you'll have some sort of an answer?

A. Yes.

Mr. McGuigan disagreed with Detective Fitzpatrick. He testified that he instructed Fitzpatrick in the following terms:

I instructed Fitzpatrick that: If they're going to accept this offer, then there's no sense in bringing them down. So what I want you to do is twofold, is to make this offer to them, and tell them that the Crowns will be making the offer to them when they arrive in the

event that they don't accept it right away.

Mr. McGuigan stated that Detective Fitzpatrick was not instructed to tell the informants that the Crown *might* make the offer. Although the issue may not have been discussed in terms that distinguished between a firm and a conditional offer, Detective Fitzpatrick knew that it was a firm offer.

Mr. Smith and Ms. MacLean generally supported Mr. McGuigan's version of the events. Both said that Detective Fitzpatrick was not instructed to put the offer as a conditional offer. On the contrary, he was to advise the informants that the Crown would be making the offer, and that the informants should think about their response before they met with the Crown attorneys to discuss it. Mr. Smith added that it would have been foolish to have Detective Fitzpatrick float the offer as a trial balloon: the informants were not the type of people you could make an offer to and then retract it if you did not like their response.

### ***How Fitzpatrick Conveyed the Offer***

Detective Fitzpatrick could not recall the exact words that he used to convey the information about the offer to the informants. He agreed, however, that he used words along the lines of: This is something the Crowns might do. How would you respond?

Mr. May testified that Detective Fitzpatrick indicated it was possible that the Crown would make the offer, and he was wondering how May would react. Mr. May later conceded that he could not definitely state what words had been used by Detective Fitzpatrick.

Mr. X did not recall how Detective Fitzpatrick phrased the information about the offer. He agreed, however, that he had previously stated: "I believe Bernie Fitzpatrick mentioned to me that he thinks the Crown is going to give me the chance to back out."

### ***A Final Decision?***

A premise behind the allegation that Detective Fitzpatrick was to act as an advance scout is that Crown counsel had not yet decided whether to make the offer to the informants; their final decision would depend on how they thought the informants might respond. Detective Fitzpatrick testified that

he was not sure whether the Crown attorneys had finally decided whether the offer should be made when they asked him to speak to the informants.

All three counsel testified that when Detective Fitzpatrick was asked to tell the informants about the offer, a final decision had been made to make the offer. There was a conflict in their testimony, however, as to when that was. As reflected above, Messrs. McGuigan and Smith thought that the offer was discussed on more than one occasion. Mr. McGuigan stated that the final decision to make the offer, and to have Detective Fitzpatrick convey it, was not made until late January, 1992. Mr. Smith testified that Fitzpatrick was asked in February, 1992 to transmit the offer. Ms. MacLean and Detective Fitzpatrick, however, testified that there was only one meeting about the offer, in December, 1991, and that Fitzpatrick was asked at that meeting to tell the informants. The significance of this difference was minimal in terms of Detective Fitzpatrick's testimony, as he testified that he did not speak to the informants until early February, 1992. Ms. MacLean, however, suggested that Detective Fitzpatrick had to be wrong about that date since she spoke to Mr. X about the offer in mid-January and X indicated that Fitzpatrick had already spoken to him. Mr. McGuigan agreed that if Detective Fitzpatrick had conveyed the offer to the informants before late January, the most he could have told them was that the Crown might be making the offer. He did not recall asking Detective Fitzpatrick in December, 1991 or early January, 1992 to raise the offer with the informants.

### *Why Fitzpatrick Was Asked to Convey the Offer*

The three Crown attorneys were asked why Detective Fitzpatrick was asked to tell the informants about the offers. It was suggested to Mr. McGuigan that it would have been more logical for Crown counsel to advise the informants, if they really wanted the offers to be rejected, since the informants did not particularly like the police.

Mr. McGuigan stated that he was not sure that he knew the informants disliked police when he asked Detective Fitzpatrick to convey the offer, although he agreed that most inmates do. He said that Detective Fitzpatrick was asked simply because it was practical: Fitzpatrick would be contacting the informants to arrange for them to come to London (in preparation for their testimony) and if the informants had accepted the offer they would not have been brought down. Detective Fitzpatrick was chosen over Detective Chapman because he knew the informants better. Mr. McGuigan denied that

Detective Fitzpatrick was chosen because he would present the offer in such a way that the informants knew they had no choice but to reject it.

Mr. Smith and Ms. MacLean stated that the Crown attorneys wanted the offer communicated in advance so the informants could give it serious thought. According to Mr. Smith, Detective Fitzpatrick was chosen simply because the police were assisting the Crown in arranging the affairs of witnesses.

Detective Fitzpatrick testified that he was asked to tell the informants about the offer so that they would have a chance to think about it before Crown counsel discussed the issue with them. He could not recall why he, rather than someone else, was chosen to act as the messenger.

### **The Crown Attorneys Communicating the Offer to the Informants**

Mr. Smith formally made the offer to Mr. May in mid-February, 1992. Detective Chapman was present. Neither could recall exactly what was said to Mr. May, but Mr. Smith was confident that they discussed the fact that Mr. May would be facing a searching cross-examination if he testified at the trial. Detective Chapman did not think they made the offer to Mr. May only after making him feel good about his proposed testimony, thereby minimizing the chances he would accept. Mr. Smith testified that Mr. May responded by saying that his family was not keen on him testifying, but that he could not look at himself in the mirror if he did not.

The evidence varied somewhat over when the Crown formally made the offer to Mr. X. Mr. X thought that it was in February, 1992, when all the prosecutors were present. Messrs. Smith and McGuigan had a similar recollection. Ms. MacLean accepted that such a meeting occurred, but said that she had already made the offer to Mr. X on January 13, 1992. She was able to pinpoint the date by looking at her hotel bills, and because she knew Detective Fitzpatrick had been testifying in court and she had been alone with the Crown's law student. Ms. MacLean did not know why the offer was extended to Mr. X for a third time in February, but thought it might have been because Mr. McGuigan, as lead prosecutor, wanted to reaffirm X's feelings. She also testified, however, that Mr. X's response in January was clear. Mr. McGuigan could not assist on this issue because he said he was not aware that Ms. MacLean had ever discussed the offer with Mr. X in January.



Ms. MacLean stated that when she discussed the offer with Mr. X in January, the issue came up only briefly and rather informally. She explained to X that the offer was being given because he had suffered as a result of testifying at the first trial, and because he was facing a difficult experience in testifying at the second trial. Mr. Smith said a similar conversation occurred at the February meeting with X.

Ms. MacLean was asked why she had waited until January 13<sup>th</sup> to discuss the offer with Mr. X, when she had met with him for two hours the day before, which time would have been wasted had Mr. X accepted the offer. She suggested that it might have been because the Crown attorneys had planned to raise the issue as a group with Mr. X later on, but X then brought it up himself at the meeting of January 13<sup>th</sup>.

The Crown attorneys were asked why they bothered to reiterate the offer after the informants had already rejected it when speaking to Detective Fitzpatrick. Mr. Smith explained that they had promised to personally discuss the offer with the informants, and had wanted the informants to take some time to think about it. Mr. McGuigan stated that he and his colleagues thought the informants might put more faith in an offer coming from them (as opposed to the police). He also testified that they wanted to ensure there was no misunderstanding about the offer, and to give the informants a chance to change their minds. He added that if the offer had not been sincere, they would not have repeated it. (The opposite side of the coin was also raised in evidence — if a genuine offer was already declined, why repeat it to witnesses whose evidence you wish to tender?)

## **The Informants' Responses to the Offer**

### ***Why the Offer Was Rejected***

Mr. X could not really say why he rejected the offer. He insisted, however, that he was not participating in a game that the authorities were playing. He agreed that he was concerned about how testifying would affect his safety. He also knew that the defence had access to his psychiatric records, and that he was going to face an embarrassing cross-examination at the trial. He said:

Q. Okay. Isn't it true that you really didn't want to testify?

A. I really can't answer that. I've been at two trials, and whether or not I wanted to testify, I went through with what I set out to do and that was to tell the truth.

Mr. May testified that he did not want to testify at the second trial, and that he knew he was going to be 'dragged through the mud' if he did. He insisted, however, that he took the offer seriously. When asked for a reason why he rejected it, he said:

Q. [I]f you really didn't want to testify at the time, why did you tell Bernie Fitzpatrick to "stuff it" if you really had an option? ...

A. I was under subpoena to testify and I don't think it's up to Mr. Fitzpatrick to tell me whether I can or cannot testify at a trial, it's entirely up to the court.

Q. Up to the court. Well, why did you then, as you've told us, really want to testify and be put through all this hardship, and I can understand that, sir. Why did you tell Alec Smith in London when he put the offer to you before your testimony, why did you say to him, "No, I want to go through with it"?

A. Because I knew that what was said to me was true and I wanted to testify in court to that fact. As much as I disliked the fact that I was going to be dragged through the mud, which I was well aware was going to happen. I mean, I have an obligation to testify.

Q. I don't quite understand your position. You told us five minutes ago that really didn't —

A. On one hand I don't want, I didn't want to testify, but on the other hand I felt that I had to testify.

Q. You felt that you had to testify, and you were under subpoena?

A. I was also under subpoena, yes.

### ***The Crown's Knowledge of the Informants' Response***

The Crown attorneys made the offer to the informants in early 1992. Evidence was adduced as to whether they knew in advance what the

informants' responses would be. This evidence bore upon the issue of whether the Crown had used Detective Fitzpatrick as an advance scout so that they could make the offer secure in the knowledge that it would be rejected.

All the Crown attorneys testified that originally they were not sure how the informants would respond to the offer. All of them also testified that before they personally extended the offer to the informants they had learned that the informants had already rejected it when speaking to Detective Fitzpatrick. Mr. Smith added that Detective Fitzpatrick had told them that at least one of the informants had rejected the offer in fairly emphatic terms. Ms. MacLean agreed that, in light of that information, when she put the offer to Mr. X she had not been too concerned that he was going to accept it.

### **How and Whether the Offer Would Come Out at Trial**

As indicated above, the offer came into evidence at the second trial when Mr. May mentioned it in response to the last question asked of him in re-examination by Mr. Smith. The question and answer were as follows:

Q. You were questioned, sir, about, extensively about your motivation back in 1985 or 1986 and were asked a lot of questions about the sort of deal you made, first of all, to be body packed and what not. In any event, can I ask you, sir, presently, do you expect to be given or do you hope to gain any advantage at all from either the Crown or the police as a result of coming to court and testifying in this trial before this jury?

A. Absolutely not. As a matter of fact, it's been indicated to me or was indicated to me from the Crown and the police and they gave me every opportunity to back out of this without fear of harassment or having any type of charges laid against me. I told them to forget it.

Q. Thank you sir, those are my questions.

After the issue was raised, Mr. Pinkofsky applied for and received the right to re-cross-examine Mr. May. He later applied to the judge for a mistrial, or an instruction to the jury that they were to disregard May's evidence on the issue. Mr. Smith successfully resisted these applications, arguing that the evidence was admissible in response to the defence allegation (in cross-

examination) that the informants were under the power of the police. Mr. Pinkofsky also applied for disclosure of all discussions with the informants concerning the offer. Mr. Smith responded that there was no record of the discussions, but advised the trial judge that the offer had been made for compassionate reasons. The Crown also had Detective Fitzpatrick prepare a will-say of his involvement.

All three Crown attorneys testified that they did not intend to lead the offer as evidence in the second trial. Mr. Smith said that he did not expect Mr. May to mention the offer in response to his question. He felt that the answer was unresponsive to the question. He had asked whether Mr. May hoped to gain something by testifying, and only expected Mr. May to respond by stating that he did not. Mr. McGuigan agreed that Mr. May's answer was unresponsive. Ms. MacLean testified that she interpreted Mr. Smith's question as: "Do you expect future favours if you get into trouble again?"

Mr. Smith agreed that he fully intended to re-examine Mr. May on the issue of what benefit, if any, May had received at the second trial, since that issue was a substantial element of the cross-examination. He had also planned to leave that issue to the end of his re-examination. He acknowledged that, in hindsight, it was not surprising that Mr. May mentioned the offer at the end of his re-examination.

Mr. Smith was asked about a note he made for the purposes of Mr. May's re-examination. The note reads:

- has no outstanding charges
- has not been charged with a criminal offence since pled guilty to assault in 1985.
- knew that embarrassing details of past would be disclosed and would be cross-examined re background.
- question re motivation in 1985 and 1986
- have you been given or do you expect to be given any advantage by the Crown or police as a result of your attendance to testify before this jury.
- Why are you here?

Mr. Smith agreed that the note reflected his thoughts on how to address issues in re-examination. He further agreed that the second last sentence was very similar to the last question he actually asked in re-examination. He denied, however, that the last sentence (“Why are you here?”) reflected an intention on his part to raise the fact that Mr. May was testifying voluntarily — the need for which was obviated by May’s response to the second last question. He was not sure that he had ever intended to ask the question, since, unlike the other questions in the note, it was followed by a question mark.<sup>35</sup> He suggested that, in any event, the last question would have elicited a response about feeling a moral obligation to testify, not about testifying voluntarily. He also would not have wanted to open up a new issue for further cross-examination by the defence, since he felt that Mr. May’s evidence had gone quite well.

### *Preparation of the Informants*

Mr. Smith was responsible for preparing Mr. May to testify. He told the Inquiry that he did not discuss with May the option of raising his voluntary status in response to questions at trial. He did not discuss or suggest the answer that May gave in re-examination. He did not even prepare Mr. May for re-examination; in fact, he has never prepared a witness for re-examination. Mr. Smith did acknowledge, however, that he discussed the general issue of Mr. May’s lack of motivation to lie:

Q. You don’t think you took him through in preparing him for his evidence, why he would be saying now, rather you would take him through in preparation for his questioning the fact that he didn’t have motivation to lie now, whereas he did have motivations back in 1985?

A. That general issue would have been dealt with, sure.

Q. Well, that’s what the question really was in re-examination, it went to that, didn’t it?

A. I think that’s fair.

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<sup>35</sup> Mr. Smith could not actually recall why the question mark was there.

Q. And I guess you'd tell us that in preparing him for that type of question, he never said to you, well, of course, you've made me this offer and I've turned it down, so it's obvious that I haven't got a motivation to lie. He said it in answering a question, I'm wondering if he said it while you were preparing him for this type of question before he gave his evidence.

A. Well, first of all, Mr. Lockyer, I don't have a clear recollection of everything I asked of Mr. May and everything he said to me, but I can say quite certainly that, in fact, it was not said.

Detective Chapman was present during Mr. May's preparation. He testified that he did not recall Mr. Smith ever telling Mr. May to 'slip in' something about the offer. He added that he would recall that, had it occurred.

Mr. May testified that no Crown attorney or police officer suggested that he mention the offer in Court. No one suggested anything except that he tell the truth. The offer just came out in response to questioning by Mr. Smith.

Ms. MacLean was responsible for preparing Mr. X to testify. She testified that the Crown attorneys had discussed the general issue of the informants' right to state in response to questions in cross-examination that they were testifying voluntarily. Regarding her conversations with Mr. X about the issue, she said this:

A. I don't recall clearly what was said about that. I think that Mr. X may have raised the issue, and all I can recall is something about: "I am not going to lead it from you and if some issue comes up about it, just tell the truth"...That's as much as I recall, I don't recall any further discussion about it. I know I didn't say: wait for this question, give this answer, nothing like that happened.

Ms. MacLean added that she told Mr. X to only mention the issue if asked about it.

Mr. X testified that he was advised that he could mention the offer if he wanted to. He was told to tell the truth if asked about it, and that there was no reason to hide the offer. He may have been the one to raise the issue with

the Crown but no Crown attorney ever told him what to say. He was never told that the offer was his 'ace in the hole' in terms of his credibility.

Mr. McGuigan had no direct involvement in the preparation of Messrs. May and X, so he could not testify as to what they were told in advance of their testimony. He did not know that Ms. MacLean had told Mr. X that he was entitled to refer to the offer if the defence raised his motivation to lie. On the contrary, he assumed that the informants were told not to mention the offer. The Crown attorneys talked in December, 1991 about the fact that the offer was not to come up in Court, and Mr. McGuigan believes that he would have instructed Mr. Smith and Ms. MacLean to advise the informants of that. Both Mr. Smith and Ms. MacLean testified that no such discussions ever occurred.

### *Discussion Among Crown Counsel*

As reflected above, Ms. MacLean testified that the Crown attorneys discussed the informants' right to say they were testifying voluntarily. She also acknowledged that it was anticipated the offer might come up if the defence raised the issue of the informants' motivations for testifying. Mr. McGuigan testified that there was no discussion about the informants' right to say they were testifying voluntarily. Mr. Smith stated that no Crown attorney in his presence discussed the potential use of the informants' voluntary status in response to questions in cross-examination.

Mr. McGuigan testified that he never discussed Mr. May's re-examination with Mr. Smith. He never told Mr. Smith (or Ms. MacLean) not to raise the offer in re-examination, but it was understood among the Crown attorneys that the offer was to remain a secret. He also could not see how the offer would come out in re-examination if it did not come out in cross-examination on the issue.

Ms. MacLean testified that she did not think the Crown attorneys discussed that it would be relevant to elicit Mr. May's voluntary status in re-examination. She could not be certain about this, however, because she could not clearly recall their conversations.

### *Mr. X Mentioning the Offer*

Mr. X testified after Mr. May at the second trial. He also mentioned the offer. He did so, however, in response to a question in cross-examination.

The day before Mr. X mentioned the offer, and in the middle of his examination-in-chief, the Crown sought and was granted permission from the trial judge to speak to Mr. X in private. It was suggested that the Crown did this so that Ms. MacLean could remind Mr. X to mention the offer in cross-examination. Ms. MacLean denied this. She testified that she simply told Mr. X to remain calm, think about his answers and tell the truth. She said that she could not have spoken to Mr. X about the fact that Mr. May had raised the offer in re-examination because there was an order from the trial judge excluding witnesses from the courtroom. Detective Chapman was present during Ms. MacLean's conversation with Mr. X. He made notes of the conversation. His notes did not refer to the offer being discussed.

### *The Crown Attorneys' Responses*

Mr. Smith responded in two ways to the suggestion that the Crown set a trap for the defence. First of all, he stated that if he had intended to lead the evidence of the offer, he would not have left it to chance. He would have disclosed the offer to the defence so that he would be fully entitled to address it in re-examination (if the defence still decided to pursue in cross-examination the issue of the informants' motivations for testifying). Second, Mr. Smith stated that the allegation that the Crown set a trap rests on the faulty assumption that re-examination would necessarily be the witness' last word at the trial. In reality, the defence was often permitted to re-open its cross-examination after the Crown's re-examination, and was permitted to do so after Mr. May's re-examination.

Mr. McGuigan also argued that the allegation of a trap did not make sense. If Mr. May had been schooled to bring up the evidence of the offer, he would have done so in cross-examination, rather than through an unresponsive answer in re-examination. Mr. May's conduct, therefore, supported the position that the offer was to remain a secret. When asked how he expected the informants to respond to the suggestion that they were only testifying because they had to, Mr. McGuigan responded as follows:

Q. [I]f you saw that Mr. X or Mr. May were being cross-examined in a way that raised the offer directly, like: The only reason you're here is because you're



forced to be here under a subpoena, you're compelled to come here and give evidence?

A. Well, the situation is that when this offer was made, we were well aware that they would be cross-examined in that fashion, and as I have indicated to you, if tactics had been the issue, it would have been done differently. It would have been disclosed, and then it would have been utilized in re-examination.

Q. But if you were aware that the cross-examination was coming, that Mr. Pinkofsky inevitably was going to ask something along the lines that Mr. Ruby had asked, namely: You're only here because you have to be here. You have to maintain the story, and you have to be here. How did you expect Mr. X and Mr. May to respond to that question?

A. Well, they were not — as far as I was concerned, they were not to refer to the fact that they had been given this option, and had turned it down. It's — had we been again thinking in a logical fashion, I would have done it the opposite way in which we would have made disclosure and utilized it in re-examination. If I had this to do over again, first of all, I wouldn't mention in the opening that we were calling these people.

If the situation arose where an offer like that was to be made, and not necessarily out of humanitarian reasons, but maybe because you have some doubt about the credibility of the witnesses, you place that offer to them, you disclose it, and then you can use it in re-examination. And that's the manner that, if this had been a long-standing plan of ours, then that's how we would have done it, and it's perfectly proper, perfectly legitimate, in my respectful submission.

.....

Q. But I guess that still leaves us with Mr. X or Mr. May's question. I mean, what would you tell them about that, that they have to lie and say: I'm compelled to be here?

A. What I would have told them is, if that situation arises, you stop and ask for some guidance, and then

we can deal with it at that time. And my suggestion to the trial judge is that he should be instructed that the counsel should stay away from those types of questions because the answer will be something that is not particularly favourable, and I guess you disclose it to the court at that time, what it is, if that arises. But the situation I have is that if you're asked about it, I don't know how defence counsel who's not aware of it is going to ask about an offer that he doesn't know about.

He later testified:

Q. You said that you felt that if you thought they were about to say something like that, then you would stand up and interrupt the proceedings, ask for the jury to go out, and advise the defence of the problem that they were getting into, so that it wouldn't happen. Don't you remember saying that?

A. I don't remember saying that, but there's some — that's along the lines of what I think that I would do.

Q. All right, but that wouldn't work too well, would it, sir, because the cat would have been out of the bag, as indeed it was out of the bag with Mr. Smith's re-examination?

A. The idea was to, if that were to happen, the idea would be to get it before it is out of the bag.

Q. But how do you catch it before it gets out of the bag. There's any number of questions that could elicit the answer —

A. I thought it was caught fairly well —

Q. [D]idn't have to be here if I didn't want to?

A. I thought it was caught fairly well on Mr. X.

Q. Well, that's because the cat was already out of the bag, sir, through Mr. May. So that's hardly surprising. It wasn't caught very well with respect to Mr. May, was it?

A. The point I'm trying to make, Mr. Lockyer, is that

when Mr. X appeared that he was going to refer to this offer, he was cut off, and he did not have the opportunity to continue with what he was saying at that time. And that's what I'm anticipating might happen in another situation. It's not inevitable that the — well, maybe the paw would be out of the bag, but not the whole cat.

Q. Well, he was cut off by, if you recall, by Mr. Pinkofsky over Susan MacLean's objection; right?

A. That's correct.

Q. Yes. So it didn't quite work out the way you had visualized it, that the Crown's cutting him off. It was rather the defence cut him off over the objections of the Crown; right?

A. Well — I mean, the ability to cut him off can be employed equally by the Crowns as well as the defence. The fact the defence did it means the Crowns could have done it.

As indicated earlier, in preparing Mr. X to testify, Ms. MacLean did not discourage him from raising the offer at trial if the issue came up. *Ms. MacLean testified that telling Mr. X not to mention the offer would be tantamount to telling him to lie.*

## **Disclosure of the Offer**

### ***Initial Disclosure***

The Crown attorneys did not disclose any information about the offer to the defence until after Mr. May mentioned it at trial. An issue before the Commission was why they did not, and whether this was circumstantial evidence that the prosecution had set a trap for the defence. The trial judge ruled at trial that the Crown had not been obliged to disclose the offer.

Mr. McGuigan testified that the defence had not been entitled to disclosure because the Crown had never intended to use the offer at trial. It was a matter that was meant to remain between the informants, the Crown and the police. He stated that he had never intended to disclose the offer, and only did so after it came out at trial because he felt that once it had become

evidence it should be disclosed.

Mr. Smith testified in a manner similar to Mr. McGuigan, stating that the offer was never disclosed because the Crown had not intended to lead it as evidence at trial. He acknowledged that after the offer became evidence he still resisted disclosure of its details.

Ms. MacLean acknowledged that it was anticipated long before Mr. May's re-examination that the offers could come out in evidence. This is because it was discussed that the informants had the right to mention that they were testifying voluntarily.

Ms. MacLean testified that the offer was not disclosed because it did not seem like evidence, but rather as a part of trial preparation, akin to advising a witness to tell the truth. She stated that she now feels that the offer should have been disclosed because it had the effect of enhancing the informants' credibility and because it was used by the Crown in the closing address. She added, however, that her change of view might be a result of the changes since the second trial in the law governing disclosure.

### *Incomplete Disclosure*

After Mr. May mentioned the offer in re-examination, Ms. MacLean advised the defence that a similar offer had been made to Mr. X. The Crown also had Detective Fitzpatrick prepare a will-say about his involvement in the offer. Signed statements given by the informants about the offers, however, were never disclosed. An issue before the Commission was why they were not (and whether they ever existed).

As indicated above, Detective Fitzpatrick was asked to convey the news of the offer to the informants. He testified that he telephoned the informants in early February, 1992 and discussed the offer with them. The informants both rejected it. Detective Fitzpatrick then arranged to meet the informants at the Ajax police station the next day to discuss the matter further. At that time, he took signed handwritten statements from both informants documenting both the offer and their rejection of it. Mr. May confirmed that he met Fitzpatrick at the police precinct to discuss the offer. Mr. X gave no evidence in this regard.

The Crown attorneys testified that they did not know the statements

existed. Detective Fitzpatrick said that he told the prosecutors that he had met with the informants and taken statements from them. He did not think he ever showed the statements to the Crown attorneys. He did not refer to the statements (or his meeting at the police station with the informants) in his will-say. He did not recall reminding Crown counsel of the statements when he was asked to prepare the will-say. When asked why he prepared a will-say when he knew the statements existed, he responded that he prepared the will-say because he was asked to do so. Mr. McGuigan testified that he instructed Detective Fitzpatrick to prepare a will-say of his discussions with the informants and what he did in relation to the offer. Ms. MacLean testified that she would have expected Fitzpatrick to have produced the statements to the Crown once the offer became a disclosure issue.

Detective Fitzpatrick acknowledged that there was no reference to the statements in either his notes or a supplementary report, even though it would have been normal to include a reference in such a report. He testified that when he returned to London with the statements, he placed them in a file so that the police record-keeper would put the information into the computer system and store the statements in the appropriate file. Detective Chapman was responsible for the police files at the second trial. He testified that he could not locate the statements in the file indices, even though they should have been listed under the name of every person mentioned in each statement. He never saw the statements from the informants, but he did not see every report, and three different police cadets were responsible for filing during the trial. Detective Chapman said that he could have erred in creating the indices and could have lost some reports. He also acknowledged that he had never gone through the indices and compared them with the documents that were actually present in the files. Nor, to his knowledge, had anyone else. Detective Chapman did not look for the statements until several years after the trial. By that time, the files had been transferred to three different locations.

Detective Chapman was also asked why he did not remind the Crown attorneys to mention that he had been present when the offer was discussed with Mr. May, or volunteer to prepare a statement regarding the offer. He responded that he did not think he was involved, he thought the defence would assume he had been present, and Crown counsel knew he had been there.