## C. Findings

On the evidence presented before me, I cannot say one way or the other whether John Scott had any involvement in the offers made to May and X. On the other hand, I am satisfied on the evidence that Leo McGuigan was involved in a direct way in the discussions concerning the offers and in the decision that they be made. Alex Smith and Susan MacLean were also involved in some of the discussions and, to some extent, in making this important decision. However, I find that Mr. McGuigan, the senior counsel conducting the prosecution, was primarily responsible for conceiving the plan to tender the offers to the informants and for implementing it. The other two Crown attorneys deferred to him in the light of his standing and experience.

Numerous reputable witnesses were called on behalf of Mr. McGuigan to attest to the excellent reputation he enjoys in the legal community for honesty and integrity. He has been a role model for Crown attorneys in Ontario. The evidence also discloses that Mr. McGuigan was an experienced prosecutor who had been involved in many serious trials during his long and distinguished career. He was regarded by other Crown attorneys as somewhat of an 'icon'; he had also involved himself for years in the education of other prosecutors. I accept that evidence; it is impressive and it is relevant to my assessment of the credibility of the evidence given by Mr. McGuigan. It is also relevant to support his position that he is a person who is unlikely to engage in misconduct.

Nevertheless — and I say this with a great deal of regret — I must reject Mr. McGuigan's evidence that the offer was made to Mr. X on compassionate or humanitarian grounds. Similarly, I reject his evidence that the offer was extended to Mr. May so that he would not complain that he was being treated worse than Mr. X. I reject Mr. McGuigan's evidence that knowledge of the offers was to be confined to Crown attorneys, the investigators and the informants, and that it was not intended to be revealed to the jury. Mr. McGuigan's evidence that the offers were genuine is neither logical nor credible. In finding that the offers were extended for tactical reasons, I have taken into consideration the totality of the evidence presented to me, including, but not limited to, the extensive evidence summarized in this section of the Report.

According to Mr. McGuigan, the first discussion among the three

Crown attorneys concerning the offers was shortly before Christmas 1991. He believed that he initiated the idea. To use his own phrase, he got 'caught in the Christmas spirit' and suggested that X be given the option not to testify. He testified that the sole motivation for the offer was humanitarian. The three Crown attorneys decided to think it over during the holiday. It was suggested that if they made the offer to X, they also had to make it to May, and Mr. McGuigan agreed. The matter arose again in late January, 1992, and it was decided to proceed with the idea. The offers were not to be revealed to the defence or to the Court.

In his opening address on November 12, 1991, Mr. McGuigan told the jury that both informants would be called as witnesses to Morin's confession. He described the informants and their anticipated evidence, including the words purportedly uttered by Guy Paul Morin. It is clear from the opening that this evidence was treated as important evidence in the prosecution.

At the Inquiry, Mr. McGuigan conceded that, if the informants accepted the offer and were not called as witnesses, it could have resulted in a mistrial. I agree, because the jury would have learned about the existence of the alleged confession from the Crown's opening address and the defence could have — and likely would have — argued that mention of a confession in the opening would taint the jury's deliberations. Mr. McGuigan swore that if he had thought about a mistrial, the offers would not have been made. He said that his opening address was not in his mind when he authorized the offers. However, as the trial transcript discloses, he referred to this very portion of his opening address as late as January 20, 1992. Indeed, he submitted to the trial judge that Mr. Pinkofsky should not be permitted to defer cross-examination of Detective Fitzpatrick on issues relating to the informants until after the informants testified. Had his position prevailed, the jury would have heard more evidence about the jailhouse informants at that early stage in the proceedings. Mr. McGuigan's submission to the trial judge is inconsistent with any expectation that the informants might not be testifying. It is also inconsistent with his testimony before me that the opening address was not in his mind just prior to the Christmas adjournment or in late January, when he said the decision to tender the offers was finalized. It is also inconsistent with his wide trial experience in serious criminal cases.

Mr. McGuigan conceded that on his interpretation of the offers, it was possible that only one of the informants might accept it. That would have caused serious problems for the prosecution, particularly if the one who

accepted the offer was Mr. May, because it was alleged that Mr. Morin had confessed to May and that Mr. X had simply overheard the confession from the next cell. Mr. McGuigan testified that the prosecutors never discussed this possibility and how to deal with it, should it arise. Again, having regard to Mr. McGuigan's experience in criminal trials, it is inconceivable that he would not have foreseen this possibility. The evidence is overwhelming that the offers were not meant by Mr. McGuigan to give the informants a real option not to testify.

Mr. McGuigan agreed that if the informants had accepted the offers, it would have deprived the Crown of significant evidence at the trial. Indeed, this was the only direct evidence of Mr. Morin's guilt. The case was not an overwhelming one. Mr. McGuigan conceded that, from his point of view, this might have resulted in a guilty person being acquitted of the first degree murder of a young child. Mr. McGuigan claimed that he never thought of that. There was a real possibility that the Jessop family would be outraged if they felt that their daughter's killer went free because the prosecutors had tendered such an offer out of compassion and it was accepted. Mr. McGuigan also agreed that the prosecution might be subject to public criticism if a murderer who had purportedly confessed was freed because the prosecutors gave the informants the choice not to testify. Mr. McGuigan said that he never considered any of these consequences. He did not discuss them with his fellow prosecutors. In the light of the serious consequences that might have affected the prosecution if the offers were accepted, I find that the offers were not intended to be unconditional and genuine as Mr. McGuigan claimed they were.

Because Mr. X had been subjected to vilification and abuse as a result of his appearance at the first trial, and also because his psychiatric history would be publicly explored by the defence, Mr. Justice Donnelly, on the application of the prosecution, imposed a ban on the publication of his name or any evidence that would tend to identify him. The Crown submitted that the ban on publication was of vital importance to the administration of justice given that X was "a very important witness on a very serious crime of the murder and sexual assault of a nine-year-old girl." That ban is still in effect. No ban was made in relation to the identification of Mr. May, and there was little evidence that May had suffered greatly as the result of his exposure at the first trial. Apart from those considerations, May and X, in my respectful view, were not persons likely to evoke the degree of compassion put forward by Mr. McGuigan at this Inquiry. Their history of anti-social conduct and their

complete disrespect for the rights of others in the community are reflected in their criminal records. Revealing aspects of their character were known to Mr. McGuigan through the release of their records. They had bargained shamelessly with the police for their information about Mr. Morin. May and X represented the kinds of people who Mr. McGuigan had prosecuted for many years. Neither of them, I suggest, evoked compassion in Mr. McGuigan to the degree that he would make them the offers and incur the risks that I have outlined. Indeed, it is uncontested that neither of these witnesses had even asked the prosecutors to excuse them from testifying.

Mr. McGuigan was asked about the possibility that the informants might be challenged by the defence on the basis that they had been subpoenaed to the second trial and, therefore, had no choice but to testify; if they changed their evidence from that which they gave at the first trial, they could be charged with perjury. Apparently, Mr. McGuigan contemplated that very eventuality. Indeed, I find that Mr. McGuigan regarded this line of attack as inevitable. There was no doubt that the defence was compelled to suggest that the informants continued to be motivated in this way by their own self-interest. If such witnesses declined an offer permitting them not to testify, and the jury learned that, it would seriously undermine such a line of attack and enhance the witnesses' credibility. I reject Mr. McGuigan's evidence that it never occurred to him that declining the offers could enhance the witnesses' credibility until the offers came out in evidence. He contemplated that the offers, if revealed, would counter the thrust of such a cross-examination.

Mr. McGuigan testified that the offer was not to come out in evidence at the trial. He suggested at one point that the witnesses would have been told not to mention the offer. He then swore that he would have told the informants, had they raised the issue with him, that if they were cross-examined along lines that would invite comment on the offer, they should stop and ask for the Court's guidance. In that case, Mr. McGuigan implied, he would have asked the Court to deal with it. He would have suggested to the Court that counsel be advised to stay away from questions of this type because the answer might be unfavourable. This evidence is completely untenable. If the offer was truly genuine and reference to it could be responsive to a line of attack, why would the prosecutors tell the witnesses not to mention it. Indeed, Ms. MacLean's evidence, which is inconsistent with Mr. McGuigan's, is that it was contemplated that the offer might come out in testimony and that the witnesses had the right to say they were there voluntarily. Ms. MacLean so advised Mr. X when he raised the matter with

her in trial preparation. (She correctly noted that telling Mr. X not to mention the offer would be tantamount to telling him to lie.) I accept her evidence that it was contemplated that the offer might come out at trial and that the witnesses had the right to say they were there voluntarily.

I also find Mr. McGuigan's evidence untenable in light of what occurred at the second trial when the existence of the offer was revealed by Mr. May in re-examination. When May swore during his re-examination that he was testifying voluntarily, the defence objected to the admissibility of that evidence. Mr. Smith and Ms. MacLean, in Mr. McGuigan's presence, argued that the evidence was relevant and admissible and Mr. Justice Donnelly ruled in their favour. Having regard to that ruling, it could be expected that similar evidence might be forthcoming from X, who gave evidence immediately following May, and who did, in fact, disclose the offer to the jury during his cross-examination. Mr. McGuigan agreed that the evidence that both informants apparently rejected the offer did enhance their credibility.

I find that the offers were made for tactical reasons with the hope or expectation that their rejection would be revealed to the jury, and in the knowledge that, if revealed, it would enhance the credibility of the informants. It had been suggested to May and X in cross-examination at the first trial that self-interest was the only motivation for their testimony. Mr. McGuigan conceded that he expected that they would be cross-examined in a similar manner at the second trial. I find that it was contemplated by him that the offers, if revealed, would counter the thrust of such a cross-examination.

It is significant that Mr. McGuigan argued in his closing address to the jury that both informants testified voluntarily and that the jury should consider that when assessing their credibility. I find that, contrary to the position that he took at the Inquiry, Mr. McGuigan hoped that the rejection of the offers would be disclosed to the jury and he expected to take advantage of it for the benefit of the prosecution. In my view, that evidence, and its use by Mr. McGuigan in his closing address, may have influenced the jury to convict Mr. Morin.

Alex Smith is an Assistant Crown Attorney who was called to the Bar of Ontario in 1983. He had worked for Mr. McGuigan for three years before practicing in a number of other jurisdictions in this province. Mr. McGuigan was senior to him in both years and experience at the Bar. Witnesses, both orally and by letter, vouched for his excellent reputation for honesty and

integrity among the people who work in the Crown attorney system. For example, James Treleaven testified that Mr. Smith enjoys an excellent reputation for integrity. A number of judges before whom he had appeared share that view.

I accept that evidence and I have outlined earlier how such evidence is relevant. It is important evidence and I have taken it into account in making my findings. Mr. Smith testified that he was present at a meeting of the Crown attorneys involved in the Morin prosecution before Christmas, 1991 and after Mr. McGuigan had delivered his opening address to the jury. At that meeting, Mr. McGuigan came up with the idea of the offer to be made to the informants. He testified that it was born of the hardship that X had suffered as the result of the first trial; it was made for humanitarian and compassionate reasons. Once the offer was made to X it would be difficult not to make it to May. He conceded that the decision to make the offer was an important one.

He swore that he did not consider the possibility of a mistrial if the offers were accepted, nor did he consider the other implications of the making of the offer which I have alluded to in my findings concerning Mr. McGuigan. His position was that the offer was genuine. It was not a trial balloon.

In the light of the strong evidence of Mr. Smith's good character, and having regard to his junior position in relation to Mr. McGuigan, and keeping in mind the factors that the law requires me to consider before I should make a finding that may reflect adversely on his reputation, the evidence does not satisfy me that Mr. Smith was aware that the offers were not genuine and that they were not made on compassionate or humanitarian grounds. Given Mr. McGuigan's stature and seniority, Mr. Smith may have accepted — uncritically — Mr. McGuigan's representation, blinded to the difficulties inherent in that position.

I have greater difficulty, however, with the question of whether or not Mr. Smith intended to adduce from May that he was giving his evidence voluntarily. Mr. Smith testified that that was not his intention. Yet the notes he made in preparation for his examination of this witness (Exhibits 196A and 196B) indicate that, in re-examination, he would ask May "Why are you here?" At first blush, it would seem that this question was designed to elicit an answer which would indicate that May was there voluntarily. If so, Mr. Smith's own notes would contradict his testimony.

Commission counsel questioned Mr. Smith on this point:

> Q. [T]he last question that's reflected there is, "Why are you here?" And I think in fairness, I have to put to you a suggestion, which is, is it possible that that question was intended to elicit the fact that Mr. May was there voluntarily, and that you didn't have to ask the question, because he answered about the voluntary nature of his attendance in response to the previous question?
>
> A. No, that's not the intention at all.
>
> Q. All right.
>
> A. If I can explain?
>
> Q. Sure.
>
> A. First of all, it's not clear to me that that is a question I had determined to ask. It's got a question mark, and I can't claim a recollection as to why the question mark's there, but there's no question marks with respect to the other questions on that page. Secondly, I don't think a responsive answer to that question would be: I'm here voluntarily. My appreciation of an answer that Mr. May would give to that sort of question was that he felt a moral obligation to come, and we had dealt with that issue earlier in the re-examination.

It is debatable what the 'proper' (or likely) answer to the question would have been. But, as Mr. Smith suggests, an answer by Mr. May along the line that "he felt a moral obligation to come" cannot be ruled out. Such an answer, too, would have countered in some measure the suggestion which the defence was bound to make that May and X were there to further their own cause and that they could not, therefore, be believed.

Given that possible interpretation (and there may even be others), I cannot find to the requisite degree of satisfaction that Mr. Smith intended to bring out the offer even though, as I said before, I am satisfied that that was Mr. McGuigan's hope and expectation — a hope and expectation which he may not, however, have shared with his colleagues.

Susan MacLean was called to the Bar of Ontario in 1982. She has been an Assistant Crown Attorney in Durham Region ever since. Letters were filed on her behalf that firmly established her fine professional reputation for fairness and integrity. I accept that evidence. Her first experience in a murder case was when she assisted John Scott to prosecute Mr. Morin at his first trial. Scott made all the tactical decisions at that trial. She was assigned by Mr. Scott to assist him in the prosecution of the second trial. However, when it was decided that Mr. Scott should remove himself from the case because he might be called as a witness, it was felt that senior counsel should conduct the prosecution, and that is when Mr. McGuigan was assigned to the case, to be assisted by Alex Smith. Because she was familiar with the evidence and could, therefore, provide continuity, Ms. MacLean was instructed to assist them.

Mr. McGuigan, who was called to the Bar in 1962, had skillfully conducted the prosecution of many murder cases prior to 1990. I am satisfied that he made the major tactical decisions in the second trial of Mr. Morin, and Ms. MacLean deferred to his greater seniority and experience.

She testified that at the meeting of the prosecutors at which the offer was raised (she said there was only one such meeting and it was in December, 1991), it was discussed that if the offers were rejected, the informants should have the right to say they were testifying voluntarily. The decision to tender the offers was made at that meeting and, according to Ms. MacLean, the Crown attorneys failed to consider the implications of the offer. She was concerned that X might accept the offer, but hoped that moral considerations would impel both informants to do the 'right thing.'

She spoke to X about the offer in mid-January, 1992 and he indicated to her that Fitzpatrick had already spoken to him. She formally put the offer to X on January 13, 1992. When she made the offer, she was not too concerned that he would accept it; Fitzpatrick had told her that X had rejected it . When she was preparing X to give his evidence, she told him that she was not going to lead evidence of the offer from him. However, when he raised the issue of the offer, she instructed him that he could mention the offer if he wanted to; there was no reason to hide it. She felt that telling X not to mention the offer would be tantamount to telling him to lie. She said that the offer was not disclosed to the defence because it did not seem like evidence; it was trial preparation, akin to telling a witness to tell the truth. She now feels that the offer should have been disclosed.

I find that it was unlikely that Susan MacLean knew that the offers were not prompted by compassion or that they were not meant to be genuine. On all the evidence, I am not convinced that Mr. McGuigan confided in her fully as to the real nature and implications of the offers. When he said that he was imbued with the Christmas spirit, she may have accepted the truth of that statement because of her respect for him and his stature.

Detective Fitzpatrick was an experienced officer with the Durham Regional Police. He is now retired and lives in Newfoundland. However, he conscientiously attended the Inquiry and offered his testimony voluntarily. He was one of the two police officers in charge of the investigation of the murder of Christine Jessop. He has a good reputation among his former superior officers as a conscientious and professional police officer.

However, after considering his testimony, as well as that of the other witnesses who testified about the offers, the evidence satisfies me that Detective Fitzpatrick knew that the offers were not made as the result of compassion for X and a consequent need to treat May in the same manner as X.

I find that from the outset it was not intended by Mr. McGuigan that the offers be firm and unconditional. He sent Detective Fitzpatrick to find out the reaction of May and X to the possibility that the Crown might make the offers that they need not testify at the trial. I find that if it appeared likely that the two informants (or either of them) would accept the offers, Mr. McGuigan would have ensured that the offers were not pursued. I find that Fitzpatrick was aware that the offers were not genuine, although he testified that he did not put the offers to the informants as a 'ploy.'

At the Inquiry, Detective Fitzpatrick said that when he contacted May and X he advised them along the lines that the Crown might make them an offer and that they should think about it, so that when they were interviewed by the prosecutors they would have an answer. Apparently, the informants gleaned the real message because both of them purported to reject the offers, although one would have thought that they would receive the news with sighs of relief at the opportunity not to be exposed to intensive cross-examination. When both informants apparently told him that they would reject the offers, Fitzpatrick reported this to the prosecutors.

Mr. McGuigan was asked why, if he knew from Fitzpatrick that May

had already rejected the offer, he put the offer to May again. He responded that he did so in order to avoid any misunderstanding, and because he felt the informants might put more faith in an offer given to them by the Crown attorneys personally. In all the circumstances, I reject that evidence. It is illogical and not credible. It is evidence that supports the conclusion that the offers were not meant to be firm and unconditional.

Detective Fitzpatrick testified that when he had made the offers to May and X at the police station in Ajax he took signed statements from them confirming that they were declining the offers. It is curious that Detective Fitzpatrick, who purportedly was told only to advise the informants about an offer that might come from the prosecutors, spoke to May and X about the offers by telephone, brought them into the Ajax station to discuss the offers again, got an answer to offers which had not yet been made, and recorded in writing the informants' rejection of the offers. He said these statements were signed by the informants.

Detective Fitzpatrick testified that the signed statements were then taken to London and placed in a police file. Sergeant Chapman acknowledged that such a file was kept in the police office in that city and that he was in charge of it. However, he has never seen those statements. The statements were apparently not found and were not produced at the Inquiry. When I consider all the evidence, I am unable to make a finding as to whether Detective Fitzpatrick took written statements from May and X at the time he discussed the offers with them.

The issue arose at the Inquiry whether Detective Fitzpatrick told Janet and Ken Jessop that the offers were not genuine. I am not able to make a finding that he did, after considering Fitzpatrick's evidence and the evidence of Ken, Janet and Robert Jessop.

Inspector Shephard testified that he believed that the offer was made to enhance the informants' credibility. He was not even told about the offers until after they were made. The day after Inspector Shephard so testified, he resiled from his earlier position, indicating that it was unfair to those involved for him to speculate. He had spoken to Detective Fitzpatrick about the issue in the interval. I place no reliance upon this evidence. Mr. May also testified that he believes that the offer was made to him to enhance his credibility, though he did not know that at the time. I consistently place no reliance upon anything that he has said which is otherwise unsupported in the evidence.

I have found that the Crown attorneys who prosecuted at both trials and the police officers who were involved in those prosecutions believed that May and X were telling the truth about the alleged confession made by Mr. Morin. Mr. McGuigan testified at the Inquiry that he still believes that both informants were telling the truth and that Mr. Morin perjured himself when he denied that he made the confession.

Perhaps it was Mr. McGuigan's firm belief in the guilt of Mr. Morin and the horror of the crime that was committed on Christine Jessop that caused him to overstep the limits which, I feel, should bind prosecutors in the prosecution of their cases, when he involved himself in the offers made to May and X and used their rejection to bolster the prosecution's case.

## D. Systemic Evidence and Recommendations

### (i) Overview

I have found that Mr. May and Mr. X were wholly unreliable. Their evidence was motivated by self-interest. They were predisposed, by character and psychological make-up, to lie. Mr. May was diagnosed as a pathological liar and, on his own admission, he was a particularly facile liar. Since these witnesses were motivated by self-interest and unconstrained by morality, they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed to May was easy to make and virtually impossible to disprove. These facts, taken together, were a ready recipe for disaster.

The systemic evidence presented during Phase VI of the Inquiry emanating from Canada, Great Britain, Australia and the United States demonstrated to me that these dangers were not unique to the in-custody informers presented in the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informers.

A number of systemic witnesses gave evidence relating to in-custody informers. I intend to summarize some of that evidence now. Other portions of that evidence are referred to in the context of my specific recommendations.

## (ii) The Los Angeles Experience

In October 1988, Leslie White, a repeat jailhouse informant in Los Angeles, demonstrated for the Los Angeles County Sheriff's Department how he would impersonate public officials by telephone from inside the jail to secure information about a fellow inmate. This information would then be used to fabricate the fellow inmate's confession. Directives were issued by the Sheriff's Department and the District Attorney's Office designed to prevent unauthorized telephone access to information. Yet, notwithstanding these directives, in January, 1989, Mr. White conducted a similar demonstration in a hotel room for a television crew from the CBS program, *60 Minutes*. White was given the name of a defendant whose recent arrest for murder had been locally reported. Posing as a Deputy Sheriff, Deputy District Attorney, and a Los Angeles Police Department detective, White was able to obtain the cause of death, date of shooting, the age and race of the victim, and the existence of multiple gunshot wounds to the victim's thighs. He then demonstrated his ability to arrange for himself and the defendant to be transported together to court so that he could demonstrate that he and his target had spent some time together.

Leslie White's revelations (together with allegations of widespread misuse of jailhouse informants) caused the Los Angeles County Grand Jury to conduct an investigation into the involvement and use of jailhouse informants in the county's criminal justice system.

Douglas Dalton, a witness before me, was Special Counsel to that grand jury.

Mr. Dalton was admitted to the California State Bar in 1956. He has served as an Adjunct Professor of Law at Pepperdine University School of Law, a member of the Committee on California Jury Instructions (Criminal), the Special Committee on Revision of the Federal Criminal Code, and as author and editor of *West California Criminal Law*, West Publishing Company 1995. He is an elected fellow of the American College of Trial Lawyers. I found him to be an impressive witness.

One hundred and twenty witnesses testified before the grand jury. One hundred and forty-seven exhibits were filed. Hundreds of additional interviews were conducted by Mr. Dalton's investigators and staff. The investigation

extended to jailors, prison officials, guards, probation officers, defence attorneys, the District Attorney's Office, the Attorney General's Office, the Los Angeles Police Department, the Los Angeles County Sheriff's Department, jailhouse informants themselves[36] and private citizens. The grand jury was empowered to subpoena individuals and secure documentation. This grand jury investigation appears to represent the most comprehensive inquiry into this topic ever conducted.

The 153-page report of the grand jury (*Report of the 1989-90 Los Angeles County Grand Jury Investigation of the Involvement of Jailhouse Informants in the Criminal Justice System in Los Angeles County*, June 16, 1990) was drafted by Mr. Dalton and his staff, based upon input from the grand jury during its deliberations. The report was then accepted and confirmed by the jurors.

The Grand Jury Report contains many insightful findings and recommendations. I have cited some below. In doing so, I am mindful of the important distinctions between the Canadian and American justice systems and of the particular circumstances that produced this most extreme situation in Los Angeles.[37] Having said that, I share much of the perspective offered by Australian Commissioner Ian Temby, Q.C., in his *Report on Investigation Into the Use of Informers (Volume 1)*, made pursuant to the *Independent Commission Against Corruption Act 1988*, where he states at page 37:

> I visited California during the course of 1991, both in relation to this investigation and for other purposes. The procedures followed were then outlined to me by Harry Sondheim, a senior lawyer in the District Attorney's Office. I was very impressed by the work that had been done. I found it dispiriting, as I believe he did, that the authorities in other parts of the United States had not been to Los Angeles to see what could be learnt from their unfortunate experience. It seems

[36] Six jailhouse informants testified; another 19 were interviewed.

[37] Mr. Frank Sundstedt, a senior prosecutor in the Los Angeles District Attorney's Office during the relevant time frame, noted that "many of the things that occurred in my office occurred as a direct result of the office being so large, and not knowing in many respects what the left hand was doing in relation to the right hand." Richard Wintory, the Chief Deputy Attorney General of Oklahoma, made a similar observation at the Inquiry.

> that in most other jurisdictions the problem is being ignored.
>
> That is simply unrealistic. What happened in Los Angeles could happen in other parts of the United States, and could happen in Australia. There is no reason to believe that the extreme situation that developed there has happened here, but in the absence of appropriate preventative steps it probably would.
>
> .....
>
> What happened in Los Angeles is important for New South Wales. Much can be learned from the Grand Jury Report. Indeed similar problems are likely to arise wherever informants are relied upon to give evidence for the prosecution in an adversarial system and there are not adequate controls in place.

The Los Angeles Grand Jury was assisted in its work by the L.A. County District Attorneys' Jailhouse Informant Litigation Team. Frank Sundstedt, another witness at this Inquiry, was a lead prosecutor for this team. He dealt with the various post-conviction discovery issues and writs of *habeas corpus* that resulted from the public allegations and the team's own work in cataloguing the use that had been made of jailhouse informant witnesses over the preceding 10 years.

Mr. Sundstedt has been a prosecutor for some 25 years. He is a Fellow of the American College of Trial Lawyers. He is now Head Deputy for the Los Angeles County District Attorneys' Office in Pomona, California. In the entire county, there are over 1,000 prosecutors. About 70,000 felonies are prosecuted every year. Prior to his position in Pomona, he held various posts, including Assistant District Attorney (essentially the third in command within the Los Angeles office).

Mr. Sundstedt's objectivity was raised as an issue before me.[38] Mr.

[38] I was asked by counsel for the Morins to exclude Mr. Sundstedt's testimony, due to his extensive involvement in determining when capital punishment will be sought against individual defendants. I refused this request, and said I would judge his credibility by the usual standards, including his demeanor while testifying. His involvement in the death penalty issue was part of his duties as the holder of his office.

Sundstedt has never used a jailhouse informant himself as a prosecutor. Though the grand jury was extremely critical of the L.A. District Attorney's Office, Mr. Dalton noted that the criticism was not directed to Mr. Sundstedt personally. Indeed, his litigation team cooperated fully with the grand jury. I found both Mr. Dalton and Mr. Sundstedt's evidence to be extremely candid and helpful to me.

The L.A. grand jury examined the use of jailhouse informants from January, 1979 to the beginning of 1990. During roughly the same time period (the 10 years prior to October, 1988), Mr. Sundstedt's team identified 153 cases where jailhouse informants had testified for the prosecution, although I must note that members of the defence bar estimated that at least 250 cases were so affected.

The purpose of the grand jury investigation was not to judge individual cases, but to conduct an overall inquiry into how and why the system went wrong and to recommend policies and procedures that would prevent or curtail the emergence of such practices in the future.

'Jailhouse informant' was defined by the grand jury as a person other than a co-defendant, percipient witness, accomplice or co-conspirator, whose testimony is based upon statements made by the defendant where both the defendant and the informant are held within a correctional institution. This definition is similar to that used by me in this Report.

Prior to the publication of the grand jury's report, informers had been sequestered in the Los Angeles County Jail and wore a red wrist band identifying them as 'K-9s,' the designation for informers. As many as 80 to 90 informers were housed together at one time. This caused some to work in teams, each supplying some part of information against a defendant, and trading off information. As the report reflects, "there was a great deal of intercourse among them in providing information that they felt would be beneficial to them." The informants welcomed a high profile defendant amongst them so that they would be given an opportunity to say that they were with him when he confessed:

> In highly publicized cases, informants declared that "if we get this case, we'll all go home" — according to one informant. That informant explained how informants will work as follows: One informant

> acquires some information on the case. He may then relay that information to another informant who disseminates it to other informants. Each informant will then try the story out on police, changing a word here and there for slight variation. When an inmate previously unknown to other informants arrives in the informants' area in the jail, the informants will discuss "booking" him (i.e. providing fabricated evidence about him to the authorities) all day.

In summary, not only were jailhouse informants drawn to highly publicized cases, they were 'mutually reinforcing.' 'Mutually reinforcing' informants in a 'high profile' case could certainly describe Mr. May and Mr. X.

All jailhouse informants are either charged with, or have been convicted of, a crime. The grand jury report reflects that these crimes include the most serious and often heinous offences. One jailhouse informant had been determined to be a mentally disordered sex offender. Mr. Dalton reflected that this certainly raised concerns with the grand jury "that a person who had been so classified would be used as a prosecution witness." A number of the informants were sociopaths. One had been described by a psychiatrist as a 'pathological liar.' He had falsely confessed to a crime that he himself had not committed. According to the informant, the prosecution had used his testimony in five or six subsequent cases. Mr. Dalton noted that the grand jury was concerned that a diagnosed pathological liar would be used in presenting the government's case; however, he pointed out that the prosecutors did not necessarily know that he had been so characterized when he testified.[39] Of course, Guy Paul Morin's prosecutors at the second trial knew that Mr. X was a mentally disordered sex offender and that Mr. May had been diagnosed as a sociopath and pathological liar.

The grand jury found that the informant system did not appear to provide any disincentive to re-offending. There was a high rate of recidivism amongst the jailhouse informants. One informant was convicted of two counts of arson in 1975, of attempted rape in 1979, of rape in 1981 or 1982. He was re-arrested in 1985 and thereafter convicted of multiple serious offences. Recidivists were used as informants in multiple cases. Of course, Mr. May re-

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[39] Indeed, this psychiatric report was discovered by Mr. Sundstedt.

offended after the second trial and sought assistance from the prosecutors. Similarly, Mr. X re-offended between the first and second trials and after the second trial, and sought assistance for these offences (not always with success).

Mr. Dalton saw a broad range of benefits, real or perceived, that motivated informants. These benefits would run from special privileges — better food, excusing prison violations — to early release from incarceration. There could be a benefit to a family member or friend, the payment of money, extra food, letters to the Bureau of Prisons on their behalf, or special consideration on sentencing. The reward did not have to be great. As Mr. Dalton noted:

> One prison official told me that in his view some of them would lie for an extra banana at a meal. The incentives and the rewards did not have to be great in all cases.

Put succinctly, the grand jury was not confident that even a relatively small benefit provided some assurance of trustworthiness on the part of these informants.

The grand jury found that the courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such testimony. One appellate court had reflected that "whatever consideration a jailhouse informant may expect for testifying, the direct compelling motive to lie is absent."[40] Mr. Dalton noted that this was not borne out by the evidence before the grand jury. Jailhouse informants have a very strong incentive and motive to lie. Indeed, Mr. Dalton recalled no cases in which jailhouse informants sought no benefits for their co-operation.

Despite their benefit-oriented motivation, the informants did not always present themselves that way. The report states:

> Jailhouse informants want some benefit in return for providing testimony. The more sophisticated may attribute their willingness to testify for law enforcement to other motives, such as their repugnance

[40] *People* v. *Alcala*, 36 Cal. 3d 604 at 624 (Cal.1984).

> towards the particular crime charged, a family member having been a victim of a similar occurrence, the lack of remorse shown by the defendant or other explanation to account for their assistance to law enforcement.
>
> Nevertheless, in the vast majority of cases, it is a benefit, real or perceived, for the informant or some third party that motivates the cooperation.

Both Mr. May and Mr. X claimed that they were motivated to testify by their repugnance towards the crime with which Mr. Morin was charged. As noted earlier, I do not accept this testimony. Their presentation is reminiscent of the Los Angeles experience. Their attitude demonstrates that an informant's motive to lie may not be obvious — indeed, it may often be less conspicuous than that of a defendant.

The grand jury noted instances where prosecutors submitted to the jury that there would be no benefits and, almost immediately after the case concluded, benefits were extended. Two examples follow:

> Case No. 1:
>
> A 17-year-old boy was charged with murder and attempted murder. An informant testified that he had obtained a confession on an in-custody bus trip. He testified to the confession and the he was shocked at the defendant’s lack of remorse. He further testified that he had asked for nothing and that the District Attorney would not even discuss favorable treatment with him.
>
> Within a day of this testimony he provided the Deputy District Attorney with a sample form for a letter he wished written to the Department of Corrections requesting an early release. The jury was never apprised of this request but was advised that benefits are not awarded for testimony.
>
> Following the conviction, a letter was written to the Department of Corrections requesting an immediate release.
>
> .....

> Case No. 5:
>
> Prior to his testimony regarding an alleged jail house confession, the informant insisted that he did not want anything in return for his testimony, that he just did not like rapists because his sister had been raped. Following his testimony, he requested that the Department of Corrections be advised of his role when he became a candidate for an early release program. A letter was written by the Deputy District Attorney requesting "favorable consideration" to his request for an early release.

The grand jury report also reflects the extent and persistence of the informants' motivation:

> Each informant who participated in the investigation after the appointment of Special Counsel in December 1989, was told at the onset that Special Counsel had no authority to secure special favours or treatment in exchange for the informant's cooperation. Following their testimony a number of the informants phoned the office of Special Counsel, requesting further contacts. These requests were not pursued by Special Counsel staff.

In other words, despite being clearly told that the grand jury would confer no benefits upon them, some of the informants who appeared before the grand jury tested the waters and contacted Mr. Dalton's staff in the hope that they would get some sort of special consideration for providing testimony.

Informants would also time their requests for benefits to maximize their usefulness to the prosecution. The grand jury report states as follows:

> From the [various cases that are cited], one could conclude that the more clever informant, realizing that his successful performance will be enhanced if it appears that he is not to benefit therefrom, will testify that he has not been promised anything and will then wait until after his testimony to make his request for favours, oftentimes successfully.
>
> Another area of unspecified benefits may occur

> when an informant is seeking to build up a reserve of credit to be used as future needs may require.

Prosecutors also sometimes deferred the determination of specific benefits until the informants had completed their testimony.

For example, where informants face the imposition of sentence, American prosecutors frequently ask the Court to defer their sentencing until after their testimony is given. The prosecutors contend that this approach provides informants with an incentive to testify truthfully, since the extent of their cooperation and truthfulness will be considered by the prosecution and by the judge in imposing the sentence.[41] The grand jury recognized the difficulties inherent in this approach. Jurors are denied information to assist them in assessing credibility; in fact, they may be unable to properly evaluate what influence the benefits or expected benefits may have on the testimony. Equally problematic, deferral of sentencing (and the precise benefit to be conferred) may provide informants with an incentive to give the most 'helpful' (as opposed to the most truthful) testimony, to enhance their position.

Mr. Dalton described the dilemma in another way:

> [T]he theory of [putting sentencing over until after the informant's testimony] for the prosecutor was: Well, we can't rely on him delivering, and so we're going to have to use his testimony first to see how this works out before we confer any benefit. And of course, the counterpart to that is: Well, if you don't trust him, why should a jury trust him? So we viewed that as a serious problem.[42]

In the Morin prosecution, the prosecutors relied, in part, upon their instructions to Mr. May and Mr. X to only tell the truth. The grand jury spoke to the efficacy of that practice, however well-intentioned:

> When the cooperating informant is told that it will be

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[41] Indeed, Richard Wintory emphasized that this was the appropriate way to proceed for prosecutors.

[42] The California Supreme Court also recognized these potential problems: *People v. Phillips*, 41 Cal. 3d 29, 47 (1985); *People v. Morris*, 46 Cal. 3d 1 (1988).

> reported in his favour if he gives "truthful" testimony, it is only reasonable that "truthful" to the informant means consistent with the prosecution's theory of the case. Otherwise, of course, there is no point in calling the informant as a witness. Such an incentive to provide testimony may have a significant influence on the integrity of the fact-finding process.

Mr. Dalton reflected that an instruction to the informant to only tell the truth was ineffective or meaningless to the more serious offenders. This may be no different than deferring sentencing to ensure that the informant tells 'the truth.' The truth, to an unscrupulous witness, may only be that which is consistent with the prosecution's theory of the case.

Mr. Dalton noted that "the concept of truth really had no meaning to some of these people, certainly for a large part sociopaths, and they would by their own admission lie one way, then recant their testimony, tell something different, and so the moral concept of right and wrong and truth and false, and so forth, really had no serious meaning to them at all." Mr. May's numerous recantations similarly demonstrated his indifference to the truth.

The grand jury found an appalling number of instances of perjury and false statements attributed to jailhouse informants. Indeed, my summary of the report's contents fails to adequately convey the extent to which "the inmates were running the asylum," to quote Mr. Sundstedt.

Informants told the grand jury that they had repeatedly perjured themselves and provided false information to law enforcement agencies.

One informant claimed that he had testified for the prosecution in Los Angeles County 10 times and provided information to law enforcement agencies over 100 times and this despite documentary evidence that he had previously failed a polygraph test, then made allegations of subornation of perjury by law enforcement officials, and then changed these allegations prior to another scheduled polygraph examination. The report notes:

> The Department of Corrections also notified the Attorney General's office that this informant was "a real flake." This individual's career as an informant was just beginning to blossom.

Los Angeles defence attorneys provided examples of informant impropriety. One informant was rebuked by the prosecutor when he offered himself as a prosecution witness. He then offered to testify for the defence. Another testified for the prosecution at the preliminary hearing. When the prosecutor refused to agree to his release from custody, he wrote to the prosecutor indicating that "the more he thought about it, the more he believed his conversation with the defendant never took place."

The report describes the practices employed by jailhouse informants to secure evidence. Leslie White's approach represented the most flagrant method. Informants reported that they would gather information from newspaper articles which they would save. Sometimes they would have a friend or relative attend court to enable them to provide authentic-sounding information. Informants would exchange information about specific cases with other inmates. Informants would read the materials which the defendant retained in his or her cell, to prepare for trial. Indeed, California defence attorneys expressed reluctance to provide these materials to their clients in custody for this reason. This would, in turn, heighten the clients' mistrust of their own attorneys.[43]

The report also reflects that informants procured information on a crime from the defendant himself and then distorted that information to fabricate a confession. In one case, the defendant described a crime he witnessed. The informant used that description to claim that the defendant confessed. In another case, an informant enticed the defendant into writing the allegations down, which he then allegedly modified so it would be treated as a confession.

The report sums up as follows:

> [I]nformants profess, and indeed have demonstrated, the astonishing ability to discover information about

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[43] In a joint panel of senior defence counsel and prosecutors presented by the Ontario Crown Attorneys' Association and the Criminal Lawyers' Association, similar concerns were expressed by Bruce Durno and Lee Baig, senior defence counsel in Ontario. Mr. Baig noted that, in his Northern Ontario jurisdiction, a protocol has developed, permitting an accused in custody to have the Crown brief locked in a briefcase only accessible to the accused while he or she reviewed the brief in jail. Steve Sherriff, a senior Crown counsel, thought this to be a very desirable practice.

> crime in order to concoct a confession by another inmate. Their incarceration does not prevent them from accessing information on other defendant's cases. Indeed, their familiarity with the criminal justice system permits them to fully exploit information held by its various components.

There was so much proven access by informants to information, that corroboration of an informant (for the purposes of the L.A. District Attorney's policy manual) must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement officials or to the perpetrator.

The grand jury considered the extent to which the authorities were responsible for this epidemic of false claims by jailhouse informants. Two main findings were made:

> **Finding No. 1**
>
> **The Los Angeles County Sheriff's Department failed to establish adequate procedures to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions would be made.**

The Los Angeles County Sheriff's Department is responsible for maintaining order in the Los Angeles County jail system. It is also responsible for the transportation of inmates throughout Los Angeles County to various court appearances. Liaison officers from the Sheriff's Office recommend inmate classifications, which affect placement of inmates within the institution.

As a general rule, inmates charged in notorious cases are classified as K-10s. This designation is reserved for inmates who are to be kept away from all other inmates, including other K-10s, 'as much as practical.' Informants, as it said before, are classified as K-9s.

The grand jury found that the classification of some inmates as informants occurred under questionable circumstances. In one case, a defendant in a highly publicized murder case was arrested and housed in the jail's general population. A few months later he was released. Five years later, he was rearrested on the same charges. A police detective requested that he be classified as an informant, allegedly because years earlier he had testified

in a receiving stolen property case and had given information about auto thefts. One jail liaison deputy approved the request. A second liaison officer questioned the classification, believing that "placing the defendant in with informants would be like throwing a 'lamb into the lion's den' because the informants would say he had confessed to them." The officer reluctantly went along when a recent magazine article reported that the defendant had been granted immunity for testimony six years earlier. There was no evidence that the defendant felt he was in danger. He was transferred to one floor of the institution. An informant on another floor (the 14th) contacted a jail deputy, suggesting that the informant was in danger and should be transferred to his floor. The deputy recognized that something was wrong, so he reclassified the defendant and removed him from the informant floors. The police detective received a telephone call from the informant on the 14th floor, inquiring as to the whereabouts of the defendant. He requested that the defendant be placed in his cell. The detective denied that his original request for the defendant's classification as an informant had been motivated by a desire to place him near the 14th floor informant.

In another case, a detective and a deputy district attorney discussed the idea of placing a defendant charged with murder in the 'informant tank' in the hope that one or more of the informants would 'come up with information' to strengthen the prosecution's case. The prosecutor thought this was a good idea and secured the approval of her supervisor. In his testimony before the grand jury, the detective admitted that he falsely advised jail personnel in writing that the inmate was an informant because he wanted the inmate placed with informants. Within 24 hours, one informant contacted the detective with 'information.' Three informants came forward within several days. Their evidence was ultimately excluded by the Court due to constitutional violations. The case was then dismissed for lack of evidence.

The corollary also took place. Notorious informants (ordinarily K-9s) were often reclassified as K-10s and housed with other K-10s. The grand jury heard evidence which indicated that the Sheriff's Department deputies intentionally reclassified such inmates for the purpose of gathering information.

Some informants were so notorious that defendants, who would find themselves even momentarily in a holding cell with them, were reported to say "Get me out of here, get me away from him," knowing that even slight exposure would make the defendant vulnerable to a falsely claimed

confession. A defendant who had always denied any criminal involvement would purportedly confess in 20 minutes to a total stranger in a holding tank. An inmate was powerless to prevent a notorious informant from sharing a bus or a holding cell. On the other hand, the informants perceived that, when a notorious defendant was placed with them, the system was tacitly encouraging them to tell the authorities something that would help convict that defendant.

Interestingly, the grand jury report reflects that informant 'perception' of how the system works may be as important as reality:

> Whether or not true, many informants believe that law enforcement officials have directly or indirectly solicited them to actively conduct themselves to secure incriminating statements from other defendants. Some informants claim that various law enforcement officials supply informants with information about crimes, in order that they (the informants) may fabricate a defendant's confession.
>
> In exchange for providing evidence for the prosecution, the informants expect significant benefits from the government. Based on this expectation, informants supply information favourable to the prosecution, often irrespective of its truth.
>
> Informants' claims concerning the pervasiveness of perjury and falsifications reflects a belief, at least among some informants, that this is how informants ply their trade. The belief that this is how the informant game is played can only encourage other informants to follow suit.
>
> **Finding No. 2**
>
> **The Los Angeles County District Attorneys' Office failed to fulfill (sic.) the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony.**

The informants made disturbing allegations about how they were pressured by law enforcement officials to become informants and to fabricate confessions. They reported widespread abuses by sheriff liaison officers. They

also alleged that law enforcement officials, including deputy district attorneys, supplied them with arrest reports, case files, photographs of victims or verbally provided information necessary to falsify a defendant's confession. They also alleged less blatant efforts to feed them information:

> Sometimes law enforcement are less blatant when feeding informants facts about a case. An example of an indirect method of furnishing information arises after an informant denies hearing incriminating evidence. The official then responds, "Don't you remember about...", supplying critical facts about the particular case. The informant can then piece together enough details of the crime to fabricate a confession.

Mr. Dalton testified that the evidence adduced before the grand jury was that the authorities, either police or prosecutors, did provide information to the informants directly and indirectly. However, the grand jury made no findings of fact in reliance only upon the informants who testified before them. Either they lied to the grand jury about prosecutorial practices (which confirms they are perjurers) or, if they were telling the truth (about prosecutorial practices), it was very bad news.

The grand jury did find instances where the relationship between the deputy district attorney and the informant was just too close — there were a lot of improper accommodations made by deputy district attorneys on behalf of informants.

Some informants were able to achieve an elevated status because of their activities; others were permitted an unusual degree of contact with prosecutors. I note two such examples cited by the grand jury:

> Example No. 1:
>
> One top administrator in the District Attorney's Office recalled for the Grand Jury an incident in 1986. The administrator received a call "out of the blue" from a jail house informant claiming to be unable to reach a certain Deputy District Attorney. The informant stated that he was seeking a favor from that Deputy District Attorney, and asked the administrator to help him instead. The informant identified himself as " a snitch over here in the county jail" with "the assertiveness that one might do when presenting

> credentials that you were a member of the F.B.I."

> Example No. 3:
>
> Testimonial and documentary evidence also revealed that another high-level management official with the District Attorney's Office complied with an informant's request for letters written to the Board of Prison Terms. An informant drafted a letter to the Board of Prison Terms for signature by a high-level management official setting forth the informant's alleged cooperation in nine cases in Los Angeles County. The informant sent the draft of the letter to a Deputy District Attorney. This deputy revised the letter eliminating reference to one case, and forwarded the revised copy of the letter on to the management official. The management official testified that he believed another official verified the contents of the letter. Included in the list of cases in which the informant cooperated was a case in which the judge declined to rely on the informant's testimony, questioning his credibility.

As well, the report reflects the absence of any real assessment of the informants' credibility:

> Very little effort was expended by the District Attorney's Office to investigate the background and motivation of most jailhouse informants in order to assess their credibility prior to presenting them in court as witnesses. Numerous accounts were given by Deputy District Attorneys that the only investigation of this nature consisted of asking other Deputy District Attorneys how the informant performed in other cases.

The evidence disclosed that no research was done on these individuals, no information kept, no index indicating how many times they had testified before, or offered information before, or what kinds of benefits they had asked for or received. Instances were noted where informants were found by judges not to be credible witnesses. Although these opinions were expressed from the bench, no record of them generally was maintained, nor was the information generally disseminated throughout the District Attorney's office. Similarly, multiple informants would come forward in a notorious case. Only some, if

any, were used. No record was kept of those rejected and the reasons for that rejection.

*The grand jury felt that the prosecutors failed in their ethical responsibility to see that the evidence had some sort of authenticity, rather than just determining whether the informant would be effective in persuading a jury.*

The grand jury also found a lack of proper controls and supervision concerning benefits, that is, individual prosecutors could do pretty much what they wanted to do. As well, there was inadequate disclosure of the benefits or expected benefits.

Representations made on behalf of an informant were often overly generous in describing what the informant had done, his great value and the danger to himself.

The report also commented on the failure to prosecute informants shown to have lied:

> The willingness to fabricate information and evidence has undoubtedly been encouraged by the lack of prosecutions for such conduct. The investigation failed to identify a single case of prosecution of an informant for perjury or for providing false information, despite the fact that numerous cases of this nature were discovered during this inquiry.
>
> Cases have been described where an informant has testified to two sets of diametrically opposite facts in the same trial and also wherein testimony is given which is completely contrary to earlier taped statements. Cases have been identified where judges, after hearing testimony of informants, have stated their disbelief.
>
> Still other cases establish informants have testified in one fashion and then later said they lied or testified under oath in other proceedings that they had lied.

Mr. Dalton did note that two informants (one of whom was Leslie White) were prosecuted for perjury after the grand jury investigation.

Before the use of jailhouse informants became a matter of public controversy, some prosecutors within the District Attorney's Office were bothered by the practices, reported them to their superiors, raised complaints and protests, and put forward suggestions such as the central index. Indeed, Mr. Sundstedt was one of those who expressed such concerns. Nothing was done about the problem. Yet there was significant evidence of individual prosecutors who used jailhouse informants despite specific warnings brought to their attention about the demonstrated unreliability of those informants.

Frank Sundstedt, testifying at the Inquiry, almost entirely adopted the findings of the grand jury. As pointed out before, its report describes a time when the "inmates were running the asylum." He explained that this occurred, in part, because the L.A. District Attorney's Office, perhaps the world's largest, failed to adequately supervise what was transpiring. Many deputy district attorneys were naive. Though he did not believe that the prosecutors deliberately processed perjured witnesses, the prosecutorial conduct, at times, amounted to malfeasance and was, in his view, in many respects outrageous.

Defence attorneys also raised another issue with the grand jury — the systemic problems in investigating an alleged jailhouse confession. If the claim only came to the attention of the defence some time after the confession was made, it was difficult to determine not only who was sharing the cell at the relevant time, but which other inmates might have been around to say it did not happen.

The grand jury made these recommendations:

**The District Attorney's Office**

1. The District Attorney's Office should maintain a central file which contains all relevant information regarding the informant. As a minimum, the file should include information regarding the number of times the informant has testified or offered information in the past and all benefits which have been obtained.

2. A complete record should be maintained describing all favorable actions taken on behalf of an informant, including copies of all relevant letters written. This information should be contained in a central index.

3. No consideration should be provided to an informant beyond that set forth in the written statement required by Penal Code Section 1127a, except as may be authorized by leave of court.[44]

4. The District Attorney should give increased consideration to the prosecution of charges of perjury and other crimes related to the conduct of jailhouse informants.

5. The District Attorney should conduct regular training of its professional staff regarding the specific ethical responsibilities of prosecutors.

**The Sheriff's Department**

1. The Sheriff's Department should more clearly define the criteria which determines K-9 or informant classification for jail personnel.

2. A law enforcement officer requesting an inmate to be classified as an informant should be required to provide information as to the reasons for the requested classification. The reasons stated and the identity of the requesting officer should be recorded.

3. When an informant advises jail personnel of a claim to have heard an incriminating statement by a fellow inmate, the jail deputy should record the location of the involved persons at the time of the alleged occurrence.

4. The Sheriff's Department should place greater adherence to its policy to keep inmates who are classified as K-9s away from inmates who are classified as K-10s.

5. Due consideration should be given to determine if there is a practical means by which an inmate's legal papers can remain

[44] Prosecutors are now required by legislation to file a written statement with the trial court setting out the benefits conferred.

exclusively within his control.

Mr. Dalton's examination in chief by Commission counsel concluded as follows:

> Q. Mr. Dalton, finally, and I say finally because I'm aware that some of the other counsel here are going to be putting specific potential recommendations to you for your comment, so I won't do that at this stage. But if there's a message or a conclusion of particular importance that you'd like to convey arising out of your involvement in these grand jury proceedings, what would the conclusions or message be?
>
> A. Well, firstly, I'd say that whenever the prosecution decides to use criminals as witnesses, they introduce some very, very serious problems into the justice system. The greatest, of course, is that it can result in the conviction of the innocent. The other lessons learned from it, I believe, and these again limited to Los Angeles and what we saw, but that these informants typically are very manipulative, they're very skillful, they're very devious.
>
> The moral constraints of right and wrong and truth and falsity really have no importance to them at all, and in fact, with these kinds of informants, and the ones that we heard from, and the investigation undercovered (sic) on our part that there is indeed — I would say, really, you'd start with having heard all this, that there's a presumption of — that the testimony is really not worthy of belief. Knowing all the facts that we know, having to do with the informants that we dealt with, and the evidence related to them, that they are just, in my opinion, not worthy of belief, and certainly shouldn't be the basis upon which any serious decision is made.

In response to the public allegations arising out of the misuse of jailhouse informants in Los Angeles, the District Attorney's Office issued a number of special directives. These were introduced into evidence by the Ontario Crown Attorneys' Association through Mr. Sundstedt.

Special Directive 88-11, dated November 1, 1988, directed the

compilation of cases in which jailhouse informants had testified and all cases in which Leslie White had testified, regardless of the subject matter. Shortly thereafter, Special Directive 88-12, dated November 4, 1988, reflected the office's interim policy as a result of the disclosures. This policy required that approval be obtained from a Bureau Director before any jailhouse informant could be called as a prosecution witness. The following was also stated:

> No deputy has ever supposed that [jailhouse] testimony springs from the prisoner's sense of good citizenship or moral duty. On the contrary, the prosecutor is by virtue of training and experience altogether conscious of the self-interest of the informant and actively mindful of the source — his background and his character. Further, since we are unalterably committed to obtaining the truth and seeking justice, the informant's information is viewed through the prism of our ethical mandate. That view remains; it should not be changed — and, indeed, it has only been reinforced and justified by recently reported events.

Special Directive 88-14, dated November 17, 1988, added the following instructions:

> No one should underestimate what is at stake. Justice depends not only on the substance of a criminal case, but upon the process by which the case is proved. The capacity for criminals to systematically obtain information from throughout the system of justice strikes at public confidence in the system and poses the serious risk of an injustice being done. We must eliminate from the People's case the risk of perjured testimony by a jail house informant. That threat is most acute when the indication of the informant's reliability is solely that "he relates facts which are known to law enforcement, but could not otherwise be known by him". That factor of reliability has been shown not to be dependable in all cases.
>
> For that reason, this office will no longer call a witness a jailhouse informant to testify to a defendant's oral statement, admission or confession without concrete evidence of the truthfulness of the informant (for example, a recording in the defendant's own voice, a document in the defendant's own handwriting, etc.). Even then, prior approval by the appropriate Bureau

> Director must be obtained.

Special Directive 90-02 (revised), dated February 28, 1990, provided as follows,

> On January 1, 1990, sections 1127a, 1191.25 and 4000.1 dealing with in-custody informants were added to the Penal Code. These new sections should be reviewed and kept in mind whenever you are dealing with an in-custody informant.
>
> The new law essentially attaches certain conditions to the calling of a witness who is an "in-custody informant". Namely, whenever an in-custody informant, who is not a co-defendant, accomplice, co-conspirator, or percipient witness, testifies in a criminal trial to statements which the defendant made to him while both were in custody.:
>
> 1. The defendant is entitled to a cautionary instruction concerning the informant's credibility. (Penal Code section 1127a(b).)
>
> 2. Contemporaneous with the calling of that witness, the prosecution shall file with the court a statement of any consideration promised to or received by the informant witness. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to the rules of evidence. (Penal Code section 1127a(c).)
>
> 3. Prior to the informant testifying, the prosecution must make a good faith effort to notify the victim of any crime committed by the informant witness of any consideration given on the victim's case in exchange for the witness's testimony. This victim, however, has no right to intervene in the case in which the informant is testifying. (Penal Code section 1191.5)

Special Directive 93-04, dated May 4, 1993, then provided this:

> Since 1988, when Special Directive 88-14 was issued, this office has strictly controlled the use of jailhouse

> informants as witnesses. This administration intends to continue the practice of rigidly controlling the use of jailhouse informants.
>
> Legal Policies Manual Section V.L. dealing with the use of jailhouse informants has been reviewed and has been revised to remove any perceived requirement that corroborative evidence in the defendant's voice or handwriting must be available in every case in which a jailhouse informant is used. Instead, strong corroborative evidence is required before an informant may be used. This corroborating evidence must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement. The revised version of Legal Policies manual Section V.L. is attached and should replace existing page V.L.

The revised version of the policy manual reads:

> **L. Jailhouse Informants**
>
> A "jailhouse informant" is someone in custody who receives a communication from another in-custody person about a crime committed by the person.
>
> No "jailhouse informant" shall be called to testify to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the truthfulness of the informant.
>
> A Deputy wishing to use a "jailhouse informant" as a witness must obtain the prior approval of the Jailhouse Informant Committee. The Committee is comprised of the Chief Assistant District Attorney, the Assistant District Attorneys, and the Bureau Directors. Written requests to use a "jailhouse informant" must be submitted to the office of the Chief Assistant District Attorney through the appropriate Head Deputy and Bureau Director. The request must include: a brief description of the crime; the name and criminal history of the informant; the evidence being offered by the "jailhouse informant"; a description of the corroborating evidence; and an analysis of the strengths and weaknesses of the case if the "jailhouse informant" is not used. In addition, if any benefit has

> been promised to the informant by any member of law enforcement or by any employee of the District Attorney's Office for information offered on the pending case, that fact must be included in the memorandum. Furthermore, the trial deputy must contact the Habeas Corpus Litigation Team and inquire whether the informant has offered to be a witness in the past or has testified in any prior case. The result of this inquiry must also be included in the memorandum.
>
> If the Committee approves the use of a "jailhouse informant", the trial deputy must comply with the requirements of Penal Code Sections 1127a, 1191.25 and 4001.1.
>
> If the informant testifies, the trial deputy must notify the Habeas Corpus Litigation Team.[45]

Mr. Sundstedt advised the Commission that the Jailhouse Informant Committee is staffed by the Chief Deputy, the various Assistant District Attorneys and Criminal Directors. It often questions the trial deputy who proposes to call the evidence. The Head Deputy and the Bureau Director have to approve the request first. Jailhouse informant evidence has been approved about 14 times from 1994 to 1997. No requests were made in 1993. Sometimes approval was given, but with the advice that the evidence ought not to be called since the case was otherwise sufficient.

There is now a central index. It is contained in the appellate department of the district attorney's office. It is frequently reviewed and examined by defence attorneys, who have free access to it.

The thrust of Mr. Sundstedt's testimony was that the Los Angeles District Attorney's Office has adopted, through its policies and practices, a 'guarded gate keeper' approach to jailhouse informants. Prosecutors are encouraged not to rely upon such informants. Their use is highly regulated within the District Attorney's Office. The policies appear to reinforce the need

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[45] Mr. Sundstedt indicated that the *habeas corpus* litigation team replaced the jailhouse informant litigation team after the completion of the grand jury investigation. It is staffed by appellate assistant deputy district attorneys.

to objectively assess both their reliability and their true utility in a criminal prosecution. As I understand it, this involves a changed culture where the primary goal is not to find ways to make these witnesses appear more presentable.

Many of the recommendations which I make were specifically addressed by Mr. Sundstedt. Indeed, he reflected that he had learned certain things from this Inquiry, which he intended to address with his office. I will make further reference to his testimony in the context of specific recommendations.

I have dealt with the Los Angeles County Grand Jury Report in great detail. I did so because it appears to be the most thorough study of jailhouse informants available and there is much which we can learn from the Los Angeles experience. I do not suggest that the situation which now exists in Ontario approaches either the scope or the gravity of what occurred in Los Angeles County. But what happened there can happen here too. We have no reason to suspect that criminals in Canada are less cunning or less sophisticated than criminals in California, so we must learn from the Los Angeles experience and benefit from their deliberations.

## (iii) Crown Policy Guidelines

I have already referred to the new Crown policies introduced during this Inquiry. One relates to in-custody informers. (See *Crown policy — In-Custody Informers, dated November 13, 1997, Appendix L*) As I earlier reflected, I was advised that this and all other Crown policies will be reviewed in light of my final recommendations.

I found this Crown policy extremely helpful in facilitating discussion at this Inquiry. One of my counsel, Mr. Sandler, filed a document containing possible changes to the Crown policy arising out of the evidence here. (See *Exhibit 298, Appendix M*). He raised these with the Ministry of the Attorney General panelists during the systemic phases. I am suggesting significant changes to this policy. Nonetheless, I wish to acknowledge that the present policy represents a laudable first step in addressing these difficult policy issues. Peter Griffiths, one of the architects of the present policy, was an impressive witness. He considered with openness the suggested revisions put to him, adopted a number of them and reflected his concerns about others. I

have considered his and other evidence carefully in crafting the recommendations which follow.

## (iv) Survey of Ontario Crown Attorneys

A survey conducted of 255 Ontario Crown attorneys was filed at the Inquiry. Thirty-three percent (84) of the Crown attorneys surveyed have prosecuted cases (totaling 133) involving a jailhouse informant. These Crown attorneys tended to represent the more seasoned prosecutors. Over 60 percent of these cases involved murder or related offences. Twenty percent of the cases involved offences inside the jail. (This and other responses led me to conclude that the respondents included as 'jailhouse informants' persons who would not qualify as 'in-custody informers' as defined later in this Report: for example, the witness to an offence allegedly committed in jail.) The respondents stated that the vast majority of informants were not promised a present or future benefit. In most of those cases, the Crown attorneys had no knowledge of the informant later receiving a benefit. In 38 cases, Crown counsel elected not to call such a witness, 42 percent of the time due to lack of credibility. The vast majority of the Crown attorneys were unaware of any case where an informant had given testimony, later shown to be perjurious. Further responses on this topic are noted under specific recommendations below.

Sarah Welch[46] drew upon the Crown survey in her remarks. She reflected that she would not want to see more supervision infused into the jailhouse informant decision-making process. Crown counsel must be independent to exercise prosecutorial discretion.[47] The decision whether to tender a jailhouse informant is but one of the very important discretionary decisions made by an individual Crown attorney. Further, the Crown survey suggests that Ontario prosecutors are alive to the dangers of such evidence and rarely utilize it. She did note that "that's not to say there isn't room always for more training, and ... the Morin Inquiry ... [has] been a useful

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[46] As noted in Chapter II, Ms. Welch is President of the Ontario Crown Attorneys' Association and a seasoned prosecutor.

[47] In crafting my recommendations throughout this Report, I was mindful of the importance of preserving prosecutorial discretion, and of not unnecessarily binding Crown discretion in the conduct of a case: see *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* at 40-41.

exercise in highlighting the potential dangers here."

## (v) Martin Weinberg

Martin Weinberg was tendered as a witness by the Criminal Lawyers' Association. He is a distinguished defence attorney, a partner in a Boston law firm, who received his Bachelor of Laws degree from Harvard Law School in 1971. He has practiced criminal law for approximately 25 years, pleading cases before various United States District Courts, Courts of Appeal and before the United States Supreme Court. He is a director of the National Association of Criminal Defence Lawyers, the pre-eminent organization of criminal defence counsel in the United States. He has extensively lectured attorneys on confronting jailhouse informants and lectured judges and policy makers on the correlation between minimum mandatory sentencing and the motivation to commit perjury.

Most recently, Mr. Weinberg appeared as counsel in two Florida federal trials — in one, 27 or 28 prosecution witnesses were called, almost all of whom were jailhouse witnesses who had bargained for and expected substantial benefits for testifying. All accused were acquitted. In the second, about 12 jailhouse witnesses formed part of the prosecution's case. The accused were acquitted on one of the most serious charges; the jury was undecided on the balance of charges. In that case, one of the witnesses was captured on tape telling a cousin, in effect: This is my golden opportunity, let's not screw it up. I can be home in a year. The cousin testified, initially denying that she knew that the inmate hoped for any sentence reduction.

U.S. federal laws provide for minimum mandatory sentences in certain cases, particularly for drug offences. This, taken together with abolition of parole and requirements that a prisoner serve 85 percent of his or her sentence, means that many federal defendants face lengthy jail sentences. Rule 35 of the Federal Rules of Criminal Procedure provides that the Court, on motion of the government, may, within one year after imposition of sentence, reduce the sentence to reflect the defendant's substantial assistance in the investigation or prosecution of another person. Absent that motion (known as a 5K motion), courts are almost powerless to change a sentence. Written plea agreements specifically refer to this prosecutorial discretion. Prosecution witnesses, facing many years in jail, testify, knowing that the prosecutors' evaluation of their testimony will affect whether such a motion is filed. Mr.

Weinberg concluded on this point:

> So this combination of heavy sentences, no parole, 85 per cent time, and only one ticket to freedom which essentially was within the complete control of the prosecutor, creates an historic imbalance in our justice system. Before 1987, this imbalance didn't exist. I consider it to promote unreliable testimony, not through the fault of our fine jurists who are required to implement this system; they have no discretion under minimum mandatory sentencing. They doubt they do have some discretion under guidelines, but not a tremendous amount.
>
> It's not the fault largely of United States prosecutors. Most of them are resourceful, they're hard working, they believe in their tasks. But they have no crystal ball, they have no CAT scans, they have no x-rays into what motivates these very desperate defendant/ informants who are there doing twenty and thirty years in jail and faced with a cruel choice, which is: Do they sit silently with their freedom expiring, with their families often thousands of miles away since many of them are arrested here but come from other countries? Or do they actively seek the benefits of this 5K system?
>
> And it's simply a system that, in answer to your original question, I don't think should be duplicated in any respect, by the Canadian justice system.

I am mindful of the distinction to be drawn between the Canadian experience and that of Mr. Weinberg, given the system described above. I agree with Mr. Weinberg that it is a system not worthy of emulation in Canada. It provides an almost irresistible incentive to implicate a fellow inmate.

Nevertheless, Mr. Weinberg was a valuable witness, whose objectivity was commended by counsel for prosecutors and defence counsel alike. His evidence dovetailed in most respects with Mr. Sundstedt. His recommendations were as follows:

1. Informants need a meaningful disincentive to perjury. Courts should be encouraged upon their perception of untruthful testimony to initiate investigation by an independent

prosecutor, required to report back as to the results of that investigation. Further, even if an informant's false claim is ultimately not acted upon at trial, it ought to be addressed in a serious way. In the United States, it is a felony to make false statements to a federal law enforcement agent. (Of course, public mischief is one of a number of Canadian crimes which can address non-testimonial false information.)

2. The commission of further offences by the informant ought to bring a serious systemic reaction — serious consideration should be given to a blanket rule that any informant who commits a crime while an informant, or who gives any false testimony, should have his capacity to continue to get benefits extinguished by the prosecutor.

3. Benefits should be determined before testimony, made express to the informant, disclosed to the defence and finite — that is, they should not be enhanced after testimony, absent exigent circumstances (reviewable by a judicial officer). The prosecutor must be free to revoke these benefits if the witness is untruthful.

4. The prosecutor has the duty not to enhance the credibility of an informant through his or her own credibility (otherwise known as 'vouching'). Vouching occurs when a prosecutor communicates to a jury through questioning or in summation that he or she has some extra-judicial source of knowledge as to whether the informant is truthful or not, or when a prosecutor communicates to a jury that he or she is monitoring or supervising the informant's testimony, and benefits are only conferred upon his or her evaluation that the witness is truthful. There should be strong judicial sanctions against vouching. Any vouching should be accompanied by the strongest possible instruction by the court to a jury that it is improper and unethical for a prosecutor to vouch, implicitly or explicitly, for the credibility or trustworthiness of his or her witness. This is particularly important as jury questionnaires have demonstrated that prosecutors are perceived as more trustworthy than defence counsel.

5. Before and after receipt of the jailhouse testimony, the court should effectively focus the jury on the fact that this category of evidence has historically generated on occasion unreliable results and that they have a duty as triers of fact, on their oath as jurors, to bring special scrutiny, special care and caution to the testimony they are about to receive.

6. Pre-trial disclosure should be made of the identity of informants, the promises, the entire universe of criminal background known to the prosecutor, including knowledge of crimes committed or suspected to have been committed by the informant which are still potentially prosecutable (since these crimes relate to their testimonial motivation) or criminal conduct known to the prosecution which can be used to impeach.

7. A registry would be a meaningful vehicle for defence counsel to receive information regarding prior instances where an informant testified or provided information.

8. A court should be empowered to exclude unreliable jailhouse informant evidence, where on the preponderance of evidence, the testimony is untruthful. This is a more meaningful protection than a corroboration requirement, since informants are motivated to recruit untruthful corroboration.

9. The authorities should not be permitted to place informants in a position (*i.e.* in the accused's prison cell) where they can receive confessions.

## (vi) Richard Wintory

Richard Wintory was tendered by the Ontario Crown Attorneys' Association as a witness on systemic issues. He provided an articulate and colourful perspective that was quite different from Mr. Sundstedt's. (Indeed, I commend the O.C.C.A. for providing me with a diversity of prosecutorial views, all well-considered and expressed.)

Mr. Wintory has been a prosecutor since 1984, serving in various

capacities, including Chief Deputy Attorney General for Oklahoma. He is most recently the Senior Assistant District Attorney in Oklahoma City, performing both policy and trial functions and reporting directly to the District Attorney. He has extensively lectured on a variety of criminal law issues, particularly for the National College of District Attorneys. He has trained prosecutors and law enforcement officers on the use of informants in criminal investigations and prosecutions. He noted that this topic includes "how to work informants instead of having them work you, which has been legitimately identified ... by this Commission as an issue worth concern."

Mr. Wintory was a forceful advocate of the adversarial system as the best means to ascertain the truth or falsity of jailhouse informant testimony. His recurrent theme was that false, inaccurate or misleading evidence does not cause miscarriages of justice — such evidence often exists. Rather, miscarriages of justice result from the failure of the adversarial system — whether due to inadequate representation, incomplete disclosure by prosecutors, inadequate resources for either side or the failure of the court to do its job. Highly skilled adversaries, with adequate resources and appropriate disclosure, best ensure that 'right' prevails. It follows that, in his view, the preconditions set in Los Angeles, and, indeed, even the present Ministry of the Attorney General policy guidelines in Ontario, are misdirected. In his view, the Los Angeles approach has chilled the use of jailhouse informants, even when there are factors of reliability that indicate that the evidence is true and important. The Ministry guidelines go in the wrong direction; they do not serve the interest of letting right prevail as tested by the adversarial system. Reliability *voir dires* are inappropriate. Credibility is for the jury.

Having said that, Mr. Wintory was strongly of the view that prosecutors must carefully assess, in determining whether to tender the evidence, the reliability of a jailhouse informant, the existence of confirmatory evidence, the extent to which certain inducements make the informant incredible, and the desirability of conferring benefits upon jailhouse informants, even if regarded to be truthful. He also indicated that the prevailing view among American prosecutors is that evidence should not be tendered by a prosecutor unless he or she subjectively believes it to be true.

## (vi) Steven Sheriff

Steven Sheriff has been a prosecutor for some 26 years, with the

federal Department of Justice, as senior disciplinary counsel for the Law Society of Upper Canada and now as an Assistant Crown Attorney in Brampton. He has lectured extensively on a number of subjects, including jailhouse informants, to law enforcement agencies, which consult him on a regular basis regarding serious and complex investigations across Canada. During the joint panel of prosecutors and defence counsel presented by their respective associations, Mr. Sherriff provided a helpful analysis of the issue, and it is worth quoting at length:

> Mr. Commissioner, all of us experienced in criminal law — we have lots of it in this room this morning — on both sides of the fence, we all know that there is no category or species of witness that has any monopoly on the truth or on fiction, for that matter, and that perjurers can be found across the entire spectrum. Perjury has its genesis in human nature. Every human being's capable of telling the truth, but it would be an impossibility to categorize a group of people and say that: We're not going to have them in criminal cases because they're incapable of telling the truth.
>
> That would be a serious mistake, banning these types of witnesses. There is no historical precedent for that, although it's been debated in the cases. For example, paid informants, the question of whether or not they can be called has been litigated in the Ontario Court of Appeal. No category or species of witness that I'm aware of is precluded from entering a criminal case, and it would be very wrong to do so. To ban them outright, I suggest, harms society, and could lead in inappropriate cases, to wrongful acquittals. Now wrongful convictions are anathema to all of us, and wrongful acquittals in serious cases are very harmful as well.
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> There are many homicide cases, for example, that a wrongful acquittal would not necessarily impact society in the future, but when we're talking about serial predators and other types of very dangerous offenders, a wrongful acquittal means that innocent future victims can be maimed or killed, and it's therefore wrongful acquittals are a serious concern to society, as well. I mean, none of us in this room want wrongful convictions, and society, and those of us in this room, we don't really want to see wrongful

acquittals, either.

And therefore, in my suggestion to you, and I guess I've had a little more experience than most in this field, because I consult with the police across the country on these issues frequently, we have to try and tailor-make a recipe to get the truth. It wouldn't be right to ban them, because jailhouse informants come in all different shapes and varieties. You might have somebody who's only serving intermittent sentences, a husband who has assaulted his wife. He isn't a career criminal. He's already been sentenced, he's got nothing to gain.

So to just have that outright ban that they can't even hit the witness box, I would suggest would not make any sense. People talk in prisons. They've got lots of time on their hands, obviously. They have a commonality of interest when they go in there. They're after all facing criminal charges, and truth can emerge from those quarters. On occasions, jailhouse informants can assist the defence. More frequently, probably in practice, they're called by the Crown, but to say that we're going to have a moratorium on them is to have a moratorium on truth, which is unfortunate.

Now I would like to amplify some of the guidelines that we already have in this province, and when I say that I've encountered truthful jailhouse informants, you have every right to ask me: Well, how do you know that? And in my way of thinking, it is vital to focus on the integrity of the information that they're providing, very vital to have a flow chart, if you will, on that, because obviously, if it can be shown that they're relating information known only to the perpetrator, or they give you information leading to the discovery of real evidence, then we start to have a strong reason to have confidence in the integrity of the information.

So I focus on the sources of potential contamination, and there are lots of them. And it's my thesis to you that training and cautious use of jailhouse informants, coupled with police protocols, will have a real effect on integrity assurance, and that's what we're after. We're after the truth. And therefore, to properly consider using jailhouse informants, you need, first of all, a full

media search. And that is, the print media, radio, and television, anything that's ever come into the media, because obviously, we're looking at contamination here.

And they should be approached from the base point, could there be contamination. For example, in homicide cases, it's common these days, as you know, that there'll be Crime stoppers re-enactments, and obviously, if there's been a Crime stoppers re-enactment, and the informant has been exposed to it, then we have real contamination. You've got to be careful about this, because the informant could have acquired the knowledge through visitors at the jail. The information could have been in contact with other inmates who've seen these things, and this could have happened before or after the informant has entered custody.

So it is very important for justice that there be a full and comprehensive media scrutiny. Second thing that is important to me, and I would trust to all of us, would be to be very careful about the continuity of the Crown brief. Clearly, if the Crown brief has been into the institution, then one has to be very worried indeed that the jailhouse informant has acquired knowledge from borrowing the Crown brief or viewing it that way. And prudent defence counsel and Crown attorneys — of course, the Crown won't have any real control of this — but prudent defence counsel will ensure that they do not give the Crown brief to the custodial client, or indeed, perhaps, to the non-custodial client, if others are in custody, so that we don't have that kind of contamination.

And indeed, we probably need more safeguards in that regard, because a Crown brief in an institution is a very dangerous document. It is important in assessing the integrity of the information as to how detailed it is. If the jailhouse informant simply states that the inmate told them he did it, it is obviously much more risky than information that he did it with a nine-millimetre Smith and Wesson nickel plate. So it is not just the information, it is its detail, and whether there's a contaminating source that is very, very vital indeed.

Now the next item I have on my own checklist is the

integrity of the informant. Let's face it, by definition, that's damaged, or they wouldn't generally be in jail in the first place, so that isn't the test. The test is basically, one, a continuity test. Has the informant been in custody with other accomplices who could have knowledge of the crime? Has the informant been exposed to friends of the accomplices? This could be a very complex elimination process involving an analysis as to what ranges the various participants have been on, and whether there was an opportunity to speak with contaminated sources.

And that's not an easy investigation in itself, to look at continuity. It's also very important to look at the informant's past history, and a central registry that the Crown panelists, and no doubt, the defence panelists would all be in favour of a central registry. It would have to be protected identity-wise, because there can be reprisals, very violent ones, indeed, but a central registry that we, the Crown, could readily access, knowledge of any testimonial information given before, and that would be, of course, mandatory disclosure to the defence would be a good thing, because in the ones that I've found that were contaminated in the past, and obviously, I'm not infallible on this, but when I've detected contamination, it's come from, in part, at least, analysis of past history.

And the more you know about the informant's past performance, the better. A criminal record is not necessarily as important, although obviously, there are certain types of records that would cause one grave concern. But it's much more important to analyze the past history, and as I keep on coming back to the risk of contamination. It is important to analyze the benefits sought. Our survey shows that benefits are not given very often, but certainly they're often sought. And it's natural to expect that benefits will be sought; there no doubt are altruistic persons who may come forward, particularly in shocking crimes.

But it is not something that should alarm us, that people would want something in return, although one has to be scrupulous if there are any benefits given — first of all, benefits sought should be carefully recorded. Benefits given should be scrupulously

documented, and obviously, I'm talking about full disclosure of all of these subjects. The benefits given, as a matter of policy, I suggest it would be wrong to give promises of future assistance for future crimes — that clearly would be against public policy — and the benefits, future and present, should be carefully documented.

There is one vexing dilemma, Mr. Commissioner, and that is this: That if a prior jailhouse informant is subsequently re-incarcerated, there still is a problem of safety, should they be freshly jailed and new charges, and although, as I say, in my view, it would be wrong to promise future benefits, we have the dilemma of what do we do with their safety in the future? I would think our situation is vastly different from some of those in Los Angeles, which I've read the study there, because there is a serious disincentive to become a jailhouse informant in Canadian institutions because there is a real risk of a violent reprisal in some of these cases.

So that I don't get the impression that this is done lightly, and I'm scandalized by the thought in Los Angeles that it could be done for some flimsy reward. It hasn't been my experience in Canada. The benefits sought have been significant. Obviously, there should be thorough recording of the informant's approach to the authorities wherever possible, and a very clear record of all the discussions. That may not be possible at its inception, because it can take many, many different routes, from a phone call on down. But obviously, it's desirable to have a careful tracking mechanism.

Now these are just a few of my thoughts; I don't want to go on at great length. The point I want to make is that I do believe that this can be taught, that cautious discrimination can be practiced. I certainly plan on making a point of teaching the subject more thoroughly. This Commission has heightened my awareness, and no doubt it has for all of my colleagues. I believe that policing standards and protocols can be developed and should be developed, but that they should not be mandatory, because these are fluid and flexible, and unique situations.

> And to say that because paragraph 4 on a protocol wasn't followed, that the informant shouldn't be called, is to pigeonhole what is really a very complex subject, so I would not be in favour of that. But on balance, my suggestion to you is that the ends of justice can be well served if prosecutors and defence are very, very cautious about this type of evidence. And I can tell you, any prosecutor worth his or her salt is already aware of the dangers.
>
> The question is, education and training as to how to sift it out, how to sift the tainted from the real. And I do humbly suggest to you that throwing the baby out with the bath water is not the solution. The solution comes in rational and cautious approach to this type of evidence.

## (vii) Sergeant Thomas Hart

Sergeant Hart has been a member of the Durham Regional Police Service since 1979. He has worked both in the Criminal Investigations Branch and in the Intelligence Branch, the latter since 1993. He prepared the informant registry policy (which postdates Durham's involvement with the two informants in the Guy Paul Morin case). It is contained in the D.R.P.S.'s Regulations and Procedures Manual. This policy is largely designed to protect the investigator or handler of an informant. (See *Informant Registry Policy*, *Appendix N*)

When an investigator recruits an informant, that investigator (or 'handler') does a background check on the informant and advises the officer in charge of the intelligence branch, who maintains a master index system or registry of all of Durham's informants. (This index or registry of confidential informants should not be confused with the suggested central registry of jailhouse informant witnesses elsewhere discussed.) A further background check is done by that officer, utilizing the Automated Criminal Intelligence Information System (ACIIS) and the Ontario Criminal Intelligence Information System (OCIIS). With the assistance of the handler, the officer in charge of the intelligence branch is to assess the credibility, value, motive for participation and acceptability of the informant. The handler is not to offer benefits or make promises to the informant; these are to be determined by the intelligence officer. This officer, however, cannot negotiate benefits sought in relation to the informant's criminal charges or sentencing; that must be

referred to the Crown attorney. The assessment of the informant's reliability is recorded in the registry. The policy sets out the documentation required to reflect contact with the informant.

Sergeant Hart testified that this policy does not specifically address jailhouse informants. In his view, it is desirable, as a result of the evidence given at this Inquiry, that amendments should be made to the policy to specifically address the unique problems of unreliability which jailhouse informants present, over and above those related to the general informant population.

Sergeant Hart would not oppose a central jailhouse informant registry in Ontario. He thought it important that benefits be established 'at the beginning' and that future consideration should not be left open. Finally, he agreed that it would be a good idea to audiotape and, where possible, videotape police contacts with the jailhouse informant.

## (viii) Ontario Case Law

I was provided with several Ontario appellate decisions which are relevant to the systemic issues presented here. Two of these judgments are of particular relevance.

### ***R.* v. *Frumusa***[48]

The Ontario Court of Appeal considered Frumusa's appeal against conviction on two counts of first degree murder. The Court concluded that fresh evidence relating to the credibility of a crucial Crown witness, referred to as "C," had sufficient weight and probative value that a new trial was required. The facts, as outlined by the Court, are instructive.

In 1988, Richard and Annie Wilson were killed in their home, the result of blows to their heads. The killings had the appearance of an execution. There was no evidence of forced entry, robbery or vandalism. Frumusa lived with Brenda Smith, Annie Wilson's daughter. The Wilsons had a failing marriage of convenience. There was evidence that Annie Wilson knew that her husband had taken steps to exclude her from his will and that she and

[48] (1996), 112 C.C.C. (3d) 211 (Ont. C.A.).

Frumusa, who had been sexually involved, had discussed killing Mr. Wilson. Brenda Smith testified that the talk was nothing and that Frumusa had already admitted this sexual relationship to Brenda.

The prosecution alleged that Frumusa's anger towards the Wilsons motivated the crime. The Court of Appeal found the evidence of motive to kill the two Wilsons was weak at best.

Though Frumusa provided clothing and bodily substance samples to the police, no forensic evidence was found linking him to the murders.

The Court concluded that the Crown's case consisted of evidence of circumstances and an alleged confession by Frumusa to C. The latter (as was the case for Guy Paul Morin) was the only direct evidence against Frumusa.

C and Frumusa were drug traffickers, each with a serious criminal record. At the material time, Frumusa owed C drug-related monies. C claimed at trial that the night before the murders Frumusa had taken him to a house and promised to get him the money from that house. (Other witnesses cast doubt on whether such a meeting ever occurred.) C claimed that Frumusa contacted him from jail after his arrest. C quoted from the conversation:

> When I got on the phone, I asked, "What the hell's goin' on?" And I was really upset and he was saying "Take it easy", I said "What about my money", you know and he was sayin' "Take it easy, you'll get it", and I said "Did you do it?" He goes "Yeah, but I got it beat". So I said, "What's goin' on, then, what are you calling me for?" He was havin' a little bit of problems in Thorold.

Shortly after Frumusa was charged with murder, C was charged with unrelated criminal offences. C told the police about the confession only after they agreed to C's bail and to his charges being dropped.

After Frumusa's convictions, the defence sought to introduce, on appeal, certain evidence discovered after the convictions: (1) the witnesses Cameron and Thorne and (2) the evidence which C gave as a Crown witness in two unrelated cases while Frumusa's appeal was pending.

Cameron had a lengthy criminal record. He knew Frumusa as a heavy

drug user and seller for a man named Vaccaro, who told him that Annie Wilson and Brenda Smith owed a lot of money for their drugs. Cameron also knew C as a tough guy for hire, a violent bully, drug dealer and heavy drug user. A few days before the murder, Cameron was present at a meeting with C and other drug dealers, one of whom was angry because Frumusa had not paid him. It was agreed that "they both (presumably meaning Frumusa and his girlfriend) pay the ultimate price." Cameron, then an R.C.M.P. informant, reported what he had witnessed — he thought it was a plan for C to kill Frumusa and his girlfriend. The night of the murders, he saw C leave with other named individuals. They returned early the following morning and told Vaccaro it was done. C's clothing and body showed blood stains. Vaccaro said "See what happens when people fuck with us" and "You don't have to worry about Annie any more." Several days later, C told Cameron and another man that "When I hit the old bastard, the blood just flew."

Sherry Thorne was a prostitute who lived with C for a short time. He was selling drugs. He was a dangerous man. He told her he was paid to assault others and she witnessed a beating. He also told her he would provide information to the police when it suited him to do so. She said he lied continuously and could not be trusted. Some time later, he admitted to her that he had lied to the police about Frumusa because he wanted to negotiate a deal to avoid going to jail.

While Frumusa's appeal was pending, C was a Crown witness in two unrelated cases. In *R. v. Walker*,[49] he falsely testified to a conversation with the accused, calculated to convict him of first degree murder. In *R. v. Buric et al.*,[50] he testified for the Crown that he had participated in a scheme to fabricate evidence at the accused's request. In both cases he had provided Crown evidence when in personal jeopardy and after receiving assurances or in the hope of favourable treatment.

In the *Walker* case, C alleged that Walker had not only admitted the killing to him, but that Walker told C that he planned it. C's testimony at trial revealed that he had given the police four statements radically different and

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[49] (1994), 90 C.C.C. (3d) 144 (Ont. C.A.); "C" is referred to as "Able" in this judgment

[50] (1996), 106 C.C.C. (3d) 97 (Ont. C.A.).

untrue, one implicating an innocent stranger and two calculated to convict Walker of first degree murder. C admitted that he hoped to avoid a murder charge by giving the police the statements. C's testimony at the Walker trial revealed that he had been under psychiatric care for many years and had been convicted of several more crimes since he testified about Frumusa. Sherry Thorne testified for the defence in the Walker case and was not cross-examined. At the conclusion of the Walker trial, Crown counsel told the jury that his own witness C was a liar and they should not convict on his evidence. Walker was convicted only of manslaughter.

A year later, C testified at the *Buric* trial that, while in jail, he met Buric who sought his assistance to have one Steve McLean give false evidence implicating others. C admitted that he gave this information to the police in return for witness protection and relocation. He admitted that, when he agreed to cooperate in the Frumusa case, he expected to be charged himself with the Wilson murders. He was also cross-examined regarding his false testimony in the Walker case.

The Crown contended on the Frumusa appeal that Cameron and Thorne's evidence should not be admitted as fresh evidence on appeal because it could have been discovered by due diligence. The Court rejected that argument. As well, the Court was unpersuaded that a formidable circumstantial case against Frumusa existed. Both Cameron and Thorne were reasonably capable of belief.

The Court of Appeal further concluded that C's evidence at the *Walker* and *Buric* trials indicates

> a scheme on C.'s part to provide information and testimony, without regard for truth, to deflect suspicion from himself, or obtain preferential treatment in return. His evidence in the trial of Buric regarding his testimony at the appellant's trial demonstrates this pattern. It is to the effect that he was suspected of the Wilson murders, and expected to be charged, and so he agreed to co-operate and told the police that the man they had charged had confessed to him.

The Court also noted that the direction to the jury by the trial judge in *Buric* and the position of Crown counsel in *Walker* were compelling. Both of them virtually rejected C's testimony as unbelievable because of his lack of

credibility. In his closing address to the jury at the *Walker* case, the Crown attorney impugned the testimony of his own witness, C, as follows:

> Frank C.'s evidence, ladies and gentleman is the only evidence of planning and deliberation...His evidence provides you with the only basis upon which to find John Walker guilty of first degree murder, the only basis. And he is a liar. And ladies and gentlemen, on the part of C.'s evidence that shows planning and deliberation I cannot ask you in good conscience to act, and I ask you, ladies and gentlemen-it is your choice, it is your duty, it is your responsibility, it is your job, but I ask you to find John Walker not guilty of first degree murder. C. is a liar and a criminal..Do not rely on his evidence to find this man guilty of first degree murder.

In the *Buric* case, the trial judge warned the jury as follows:

> I would say to you that he is an unsavoury character in the extreme, and I repeat the other parts in my warning that you can accept his evidence if you wish, but you should in my view look for confirming evidence. In my view, your search will be fruitless in that regard as to the important part of the evidence. I ask you to keep in mind this man's apparent and admitted past in being a liar, a perjurer, and obstructor of justice, a police informer and a bully. I would suggest to you that he has absolutely no conscience and absolutely no regard for the solemnity of an oath.

### ***R.* v. *Simmons***[51]

In this case, the Ontario Court of Appeal allowed the accused's appeal against conviction.

McGuinty was a jailhouse informant who had offered to testify in return for favours from the Crown *on three prior occasions*. Although the witness claimed that in this instance he had not sought, nor been offered, a reward, the Court of Appeal concluded that "the jury should have been

[51] [1998] O.J. No. 152 (Ont. C.A.).

warned that they should treat this assertion with extreme caution":

> This was an unsavoury witness. He had a criminal record, including crimes of dishonesty. His circumstances at the relevant time were that he had been released on two different bails and directed by those bail conditions not to drink alcohol, not to drive and to obey a curfew. The witness violated all three conditions and was arrested and detained at the Barrie Jail where he first met the appellant. He was again released prior to trial on a third bail in a exchange for giving information to O.P.P. officers regarding a drug deal. It was necessary for the Crown to issue a material witness warrant to compel his attendance at trial. A clear and sharp warning as to the risk of accepting the evidence of such a manifestly unreliable witness was necessary.

The Court of Appeal also noted that "the evidence of the witness was very prejudicial to the appellant in a case which relied almost exclusively on circumstantial evidence." A new trial was ordered.

## (ix) Panel of the Wrongfully Convicted

As I elsewhere noted, during Phase VI of the Inquiry, AIDWYC organized a panel of persons who had been wrongfully convicted of serious crimes. Their evidence is elaborated upon in a later chapter.

For the purposes of this chapter, it is important to note that jailhouse informants were called as witnesses in the cases against several of the wrongfully convicted persons on the panel.[52]

In particular, on this issue, Mr. Carter articulated a very strong position on the need for reform:

> [J]ailhouse informants are not a rare breed. They do it in order to buy themselves some time ... in my judgment, testimony of that kind from a jailhouse informant ought never, ever, ever be allowed in a court

[52] There were seven panelists: Rubin Carter, Rolando Cruz, David Milgaard, Joyce Milgaard, Joyce Ann Brown, Patrick Maguire, and Rick Norris.

room.

## (x) Miscellaneous Materials

In framing my recommendations, I also drew upon the literature collected by my staff (and made available to all parties) which addresses the use of jailhouse informants throughout the world. As pointed out before, an excellent discussion paper was prepared by Chris Sherrin for the use of all parties at this Inquiry.[53] I also heard from several systemic witnesses as to the role that jailhouse informants have played in miscarriages of justice in various jurisdictions. Their evidence, which relates to the multiple causes of wrongful convictions, is summarized in a later chapter. As well, I have relied on the written and oral submissions made during the final phase of this Inquiry.

## (xi) Definition

**For purposes of the recommendations which follow, an in-custody informer is someone who:**

**(a) allegedly receives one or more statements from an accused**
**(b) while both are in custody, and**
**(c) where the statements relate to offences that occurred outside of the custodial institution.**

**The accused need not be in custody for, or charged with, the offences to which the statements relate.**

**Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).**

This definition is similar to that contained in the present Crown Policy Manual. It is also similar to that contained in California legislative provisions and in the Los Angeles District Attorney's policy manual.

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[53] Christopher Sherrin, "Jailhouse Informants, Part I: Problems with their Use", and "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform" (1997), 40 Crim. L.Q. 106, 157.

## (xii) Recommendations

**Recommendation 36: Ministry guidelines for limited use of informers.**

In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove.

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

AIDWYC suggests that the evidence of in-custody informers be absolutely prohibited. The Morins suggest that the evidence should be prohibited unless the alleged confessions are recorded on tape, handwritten by the accused, supported by a witness who is not an in-custody informer, or unless the statements contain reference to previously unknown facts, subsequently substantiated by the authorities. The Criminal Lawyers' Association concedes that a ban of in-custody informer evidence is not a viable alternative. The C.L.A. submits that the state's recognized interest in convicting those guilty of serious criminal offences cannot simply be ignored. It is impossible to draw meaningful legal distinctions between informants and other unsavoury witnesses. As the C.L.A. notes:

> Although attractive arguments can be made for exclusion of jailhouse informant evidence in particular circumstances, to say that no matter what the factual specifics, such evidence ought to be excluded, is not tenable.

The Criminal Lawyers' Association suggests that such testimony should be inadmissible in law unless corroborated; as well, prosecutors should be required to follow strict policies in their dealings with in-custody informers.

Each suggestion was motivated by the recognition that this evidence

is inherently unreliable (though not necessarily so in every case), that such evidence has contributed to a number of miscarriages of justice and that jurors may be unable to fully evaluate the extent of its unreliability. These concerns are completely warranted on the record before me.

I know of no jurisdiction in the world where this category of witness has been banned. Indeed, a total or partial prohibition runs against the grain of Canadian jurisprudence and is unlikely to acquire legislative or judicial acceptance. To paraphrase Dickson J. (as he then was) in *R. v. Vetrovec*,[54] the construction of a universal rule singling out in-custody informers as automatically unreliable would reduce the law of evidence to blind and empty formalism. Similarly, we have moved away from mandatory corroboration of individual pieces of evidence as a function of admissibility.[55] I prefer that corroboration be addressed in the context of the exercise of prosecutorial discretion, through the imposition of stringent guidelines which preserve such discretion but place limitations upon it for this special category of witness.

The policy guidelines produced by the Ministry of the Attorney General do not nearly go far enough to address the problems that jailhouse informants present. The specific recommendations which follow address the inadequacies of the present policy.

**<u>Recommendation 37</u>: Crown policy clearly articulating informer dangers.**

**The current Crown policy does not adequately articulate the dangers associated with the reception of in-custody informer evidence. Further, the statement that such witnesses "may seek, and in rare cases, will receive, some benefit for their participation in the Crown's case" does not conform to the extensive evidence before me. The Crown policy should reflect that such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers wish to**

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[54] [1982] 1 S.C.R. 811.

[55] Mr. Weinberg suggested that a corroboration requirement is a less meaningful protection than the court's ability on a *voir dire* to exclude unreliable jailhouse informant evidence since informants are motivated to recruit untruthful corroboration. I urge consideration of a *voir dire* for informant evidence below in recommendation 59: Reliability *voir dires* for informer evidence.

**benefit for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one.**

Mr. Weinberg testified that he has never experienced a 'good citizen' informant. He regarded the statement in the present Crown policy as completely antithetical to his understanding and experience of what currently motivates almost all informants, which is their hope and expectation of receiving a benefit, and the reality that they do receive benefits. It troubled him that a statement to the contrary would form part of the policy's preamble.

Mr. Sundstedt similarly disagreed with the policy statement that benefits are rarely received. In his view, there may be rare occasions when a witness incarcerated on a minor offence did not want anything. Otherwise, informants do not cooperate because they have an interest in effective law enforcement or from any sense of moral duty. Richard Wintory reflected that most informants cooperate, not because it is the right thing to do, but because it is the right thing for them. In Ontario (as reflected in the Crown survey), it may be true that benefits are less often offered up by prosecutors. Even if true, it is dangerous to assume that in-custody informers here are any less motivated to act in their own self-interest than in other jurisdictions.

**<u>Recommendation 38</u>: Limitations upon Crown discretion in the public interest.**

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

I accept without hesitation Mr. Sundstedt's testimony (confirmed in the Los Angeles District Attorney's policies) that it can never be in the public interest to initiate or continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

**<u>Recommendation 39</u>: Confirmation of in-custody informer evidence defined.**

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

The present policy was correctly crafted to reflect that confirmation must relate to the reliability and accuracy of the purported confession itself, rather than simply be confirmation of the accused's guilt generally. My recommendation is intended to enhance that policy by ensuring that the confirmation truly supports, in a significant way, the reliability and accuracy of the informer's testimony. Mr. Sundstedt noted that one in-custody informer cannot amount to strong corroborative evidence of another informer, for purposes of the Los Angeles policy guidelines. I agree with that approach.

The Los Angeles District Attorney's policy was modified to remove any perceived requirement that confirmation must consist of evidence in the defendant's voice or handwriting. I agree that the presence or absence of such evidence is relevant, but should not be mandated in every case.

**<u>Recommendation 40</u>: Approval of supervising Crown counsel for informer use.**

**The current Crown policy provides that, if the Crown's case is based exclusively, or principally, on evidence of an in-custody informer, the prosecutor must bring the case to the attention of their supervising**

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

In Los Angeles, approval for the use of a jailhouse informant must be obtained not only from the prosecutor's supervisor, but from the Jailhouse Informant Committee. Paul Culver, a senior prosecutor responsible for Canada's largest trial prosecutors' office (Toronto/York Central Region), noted that mid-trial issues sometimes make it impracticable for Committee approvals. As well, Ontario's geographical extremities, unlike Los Angeles, may make Committee approval less feasible. In my view, a Committee of senior prosecutors could provide important direction not only on the potential use of an informer at trial, but also on the proposed benefits, if any, to be conferred. Some of the Directors of Crown Operations may have limited or no exposure to jailhouse informants. I would hope that the Ministry would favourably consider the formation of such a Committee, with appropriate recognition of the logistical issues properly raised by the witnesses. One solution to these issues is to recognize that Committee approval need not be sought in exigent circumstances.

**<u>Recommendation 41</u>: Matters to be considered in assessing informer reliability.**

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

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

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

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

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

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

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

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

8. Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to

the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;

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

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

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

12. The manner in which the report of the statement was taken by the police (*e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or videotape, in accordance with the guidelines set down in *R. v. K.G.B.*[56] However, in considering items 10 to 12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence;

13. Any other known evidence that may attest to or diminish the

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[56] (1993), 79 C.C.C.(3d) 257 (S.C.C.).

credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

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

The matters to be considered by prosecutors which are presently listed in the Crown policy are, with respect, somewhat inadequate. They heavily emphasize the accurate and contemporaneous recording, under oath and on videotape of an informant's claim. It is indeed extremely important that such a record of an informant's claim be taken. However, as Mr. Sundstedt noted, the policy incorrectly assumes that the reliability of an informer's claim will be enhanced by its accurate recording under oath by the authorities. The above elements which I suggest be considered by prosecutors, place appropriate emphasis on those matters which truly enhance or detract from the reliability of an informer's claims. They draw upon the evidence of Mr. Dalton, Mr. Sundstedt, Mr. Weinberg, Mr. Wintory, Mr. Sheriff and others. All of these matters were put to Mr. Griffiths by Commission counsel (See *Exhibit 298, Appendix M*). Mr. Griffiths largely adopted these recommended changes, with some refinements. Most of Mr. Griffiths' refinements have been incorporated into the above language.

Item 5 may also include any psychiatric or psychological profile, if known to the authorities. Access to psychiatric or psychological material raises special problems, which are addressed below in recommendation 50: Access to confidential informer records.

The Los Angeles District Attorney's policy provides that the corroboration must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement. Of course, this arises out of the proven, widespread abilities of informants there to access such details. This may be an appropriate limitation in Los Angeles. The tenor of Mr. Sheriff's evidence, with which I agree, is that the disclosure of information which, reasonably viewed, is only known to the authorities (and, of course, the perpetrator) may constitute important confirmation. I have adopted this approach, together with a cautionary note that prosecutors should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be inaccessible to them. Prosecutors are also instructed to assess what information is reasonably accessible to the informant through sources such as the media.

AIDWYC suggests that Crown counsel should be required to "make active inquiries" respecting the reliability of an in-custody informer. The current Crown Policy Manual reflects that Crown counsel "should ensure that the background of the informer has been appropriately investigated. Part of this police investigation should include a review of any available registry of informers." In my view, a delineation has to be made between the police — whose duty it is to investigate — and Crown counsel, who should not be investigators. In my view, the recommendations which I have made, together with the current Crown policy, contemplate that Crown counsel should ensure that the police have performed the active investigation required of them into the reliability of an in-custody informer. Crown counsel are then obligated to review the fruits of that investigation in assessing reliability.

Martin Weinberg testified that prosecutors (albeit well-intentioned) are sometimes not motivated to scrutinize the character and background of their informant:

> I think that's the problem, is the extent to which they receive testimony that corroborates their -- confirms their predispositions towards believing a person to be guilty, and that they don't scrutinise or require the scrutiny of that information with the same vigour or tenacity that they would information that pre-existed their development of the case against a particular defendant.

In my view, the present policy, together with my recommended changes, adequately addresses this issue.

Mr. Griffiths raised the justifiable concern that some of the matters listed above will not be known to prosecutors. In my view, it is important that police investigators become conversant with these matters and incorporate them, where possible, into their interviews with in-custody informers.

**<u>Recommendation 42</u>: Limited role of Crown counsel conferring benefits.**

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

**<u>Recommendation 43</u>: Agreements with informers reduced to writing.**

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

The recommendation that such agreements be memorialized in writing was supported by Mr. Griffiths and Ms. Dana Venner, another senior Crown counsel whose evidence I relied upon. Ms. Venner, who has responsibilities under the witness protection program, confirmed that this recommendation is similar to the approach taken with witnesses under that program. Mr. Weinberg advised that, in the United States, a plea agreement involving benefits is signed by the prosecutor, the informant and his or her counsel, and ratified under oath by a judge who determines whether the informant understands the limitations and scope of benefits incorporated into the plea agreement. In *R. v. Dikah and Naoufal*,[57] Doherty J.A. noted at 335:

> I see great merit in committing a compensation agreement with an agent to writing so that there can be no doubt at trial as to the terms of the agent's employment. The impact of those terms on the agent's reliability as a witness can then be fully considered by the trier of fact.

**<u>Recommendation 44</u>: Restrictions upon benefits promised or conferred**.

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

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[57] (1994), 89 C.C.C. (3d) 321 (Ont. C.A.); aff'd (1994), 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*).

**criminality. Indeed, such criminality may disentitle the in-custody informer to any benefits previously agreed to but not yet conferred.**

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

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

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

Contrary to the practice commonly adopted in the United States, the evidence overwhelmingly supports the view that benefits ought to be fixed prior to an informant's testimony, so that they can be fully disclosed to the defence and to the triers of fact who must assess the informant's credibility. New benefits, not previously agreed upon, should generally not be conferred, unless reasonably related to the original agreement — for example, new security issues arising out of the prior involvement of the informant that need be addressed.

Difficult issues arise where the informant requests new benefits either before or after his or her cooperation is completed. Not uncommonly, the informant's requests relate to criminal charges which the informant now faces or may face.

Mr. Weinberg suggested that a request for additional benefits during the trial must be disclosed and should motivate a prosecutor to reconsider the use of that informant at trial. If the informant commits new offences after agreement has been reached but before he or she testifies, the bare minimum response ought to be the invalidation of any benefits and the prohibition against ever again utilizing or relying on that informant for cooperation that is related to future benefits. If recidivism does not permanently disable the informants from again receiving benefits, they are motivated to re-inform in other cases to start the process again. Benefits should never be conferred upon an informant in relation to offences committed after his or her testimony has been completed.

Mr. Sundstedt testified that additional benefits after the agreement has been reached should be prohibited as a matter of policy, absent exigent circumstances. Such a policy should prohibit or at least direct a re-evaluation of the continuing conferral of benefits upon an informant who re-offends. In the least, such a policy should dictate that no benefits relating to those further offences should be conferred. He emphasized that policies should always be subject to exigent circumstances or subject to direction from a supervising prosecutor. He recognized that the administration of justice would benefit if prosecutors were not allowed to make agreements with informants after their testimony is completed, again subject to exigent circumstances. He suggested that a judicial officer should be the arbiter of such benefits. Mr. Sundstedt hoped that the future use of a re-offender as an informant would be extinguished.

Though Mr. Wintory preferred that prosecutors not be required to specify in advance the benefits to be conferred (a view with which I disagree), he agreed that there must be a consequence to the commission of further crimes by an informant.

Mr. Sheriff indicated that it is wrong to give promises of future assistance for future crimes committed by the informant.

My recommendations draw upon the evidence of these witnesses and the recommendations made by the Los Angeles grand jury. I have not suggested inflexible rules, but rather general policies which can be relieved against in exceptional circumstances.

Ms. Venner and Mr. Griffiths agreed with the tenor of these

recommendations. Indeed, they are again similar to those practices in place for witnesses under the witness protection program.

**Recommendation 45: Conditional benefits.**

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

There appears to be a strong judicial support for the view that benefits offered to a witness which are conditional upon the conviction of the accused should be prohibited by policy: see *R. v. Xenos.*[58] In *R. v. Dikah and Naoufal,*[59] an agent entered into an agreement with the R.C.M.P. to assist them in the investigation into the suspected criminal activities of certain persons. He also agreed to testify in related criminal proceedings. The R.C.M.P. was to provide him with a cash payment as a fee for his services, not to exceed $10,000, at the conclusion of his involvement, based upon factors such as the length and complexity of the investigation, the degree of risk he was exposed to and the time involved. He acknowledged that he could not anticipate full payment of the fees unless the R.C.M.P. was able, through his assistance, to successfully investigate some or all of the suspects. The trial judge stayed the proceedings, finding the agreement offensive:

> I cannot think that payment to an informant contingent on successfully charging the suspect would ever be a proper law enforcement technique. It invites corruption. It prejudices the informant from the beginning by inviting him to put a spin on his evidence, to blur, shade and fabricate it so that charges can be laid and he can pocket more money ... There is no doubt that when the police pay for information as a "necessary evil" of drug investigations, that information is inherently suspect. However, when they pay more for information leading to the result they want and there is no other independent evidence, the reliability of the agent's evidence and his credibility becomes even more suspect.

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[58] (1991), 70 C.C.C. (3d) 362 (Que. C.A.).

[59] (1994), 89 C.C.C. (3d) 321 (Ont.C.A.); aff'd 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*).

On appeal, the Court of Appeal distinguished the arrangement in *Xenos*. Doherty J.A. found nothing offensive in considering the success of the operation when determining the amount to be paid to the agent. He concluded:

> Agent 21's compensation was in no way related to any testimony he might give at trial. He was paid in full long before he testified. In *Xenos*, the witness was to be paid a certain amount of money if he testified in a certain manner. This arrangement may well be a "direct invitation to perjury and the fabrication of evidence"... in that the promise of payment may induce the witness to testify in a certain manner regardless of the truth of that testimony. Nothing in the agreement with Agent 21 made his compensation dependent on the content of his evidence, or the result of the trial.

The Court also concluded that, in any event, a stay was inappropriate and the effect of the agreement upon the agent's credibility could be fully explored at trial.

With respect, I express no views on the correctness of this decision or the propriety of the specific agreement. I have highlighted the issue, however, since it must be addressed in the context of a review of Ministry policy respecting conditional or contingent benefits. Without reflecting one way or the other upon the correctness of *Dikah*, I am compelled to say that the evidence I have heard about benefit-driven informants raises a concern in my mind that the justice system has, at times, underestimated the dangers associated with benefit-driven testimony.

**<u>Recommendation 46</u>: Policy on kinds of benefits conferred.**

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

As I said before, I do not favour an absolute ban on jailhouse informant evidence. I note that several witnesses indicated that such a ban would preclude the testimony of an informant, in custody on a minor offence, who seeks no benefits and has no self-interest in fabricating a confession. This

position raises an interesting issue: rather than a ban on such witnesses, should there be a ban upon the conferral of any benefits on jailhouse informants whatsoever, other than protective measures that ensure the safety of the informant?[60]

The Los Angeles grand jury did not suggest that some favourable treatment should never be given in return for valuable assistance in appropriate cases. Indeed, the grand jury said that the prosecution must have the discretion to determine what consideration is appropriate. It was noted that the first breakthrough in the notorious Manson Family case was attributed to a jailhouse informant. On the other hand, the grand jury specifically noted that it also did not suggest that favourable treatment was an advisable course:

> One expert summarized his philosophy as 'I don't reward anybody for anything." Based on his experience, he opined that offering rewards for information to convicts merely encourages them to fabricate information. He stated "Ninety-five percent of the stuff [information] you get is bogus."

It may be that a number of the Ontario prosecutors who participated in the Crown survey share that view in light of their responses to benefit-related questions. Cases such as the informant who advised the prosecutor, once desired benefits were not forthcoming, that "the more he thought about it, the more he believed his conversation with the defendant never took place," certainly demonstrate the corrupting effect of a benefit system.

One prominent American defence attorney, Barry Tarlow, has noted that the ABA Model Code of Professional Responsibility provides:[61]

> A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.

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[60] I am not addressing whether benefits should be conferred on non-testimonial informers or jailhouse witnesses whose testimony relates to criminal activities which they allegedly witnessed or activities involving both the accused and themselves.

[61] Barry Tarlow, "The Moral Conundrum of Representing the Rat" (August, 1995) The Champion, 15.

ABA Model Code Ethical Consideration 7-28 states:

> Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness.

Tarlow argues:

> Federal and state laws criminalize giving inducements to witnesses in exchange for partial testimony. Prosecutors believe they have secured for themselves a *de facto* exemption to these ordinary rules that prevent purchasing testimony. However, a defence lawyer [considering whether to permit his/her client to become a rewarded prosecution witness] should be able to refuse to help prosecutors exploit this special exemption that prosecutors claim to the ethical constraints that apply to attorneys generally.

Mr. Wintory was asked by Commission counsel whether benefits should ever be given to jailhouse informants:

> A. You start from the premise that if you want to solve crime, that people who know about the crime are not people who are going to cooperate because it's the right thing to do. They will cooperate because they decide it's the right thing to do for them.
>
> Q. All right. Could I ask you a question: Why, why not just slap them with a subpoena, and bring them to court?
>
> A. Well, of course, if you'd had any time in prosecution, or as any lawyer, I'm sure you know that that's a terrific system for somebody who will tell the truth because they believe it's the right thing to do.
>
> Q. These people don't believe it's the right thing to do to tell the truth?
>
> A. Absolutely.

> Q. Okay.
>
> A. Any more than a defendant does.
>
> Q. I'm interested as a matter of — sort of philosophically. I mean, suppose you had an eye witness who was not in the jail, who came up and said: You know, I saw the robbery, but I don't want to tell you about it unless you give me $1,000.00. Not a very nice person. Would you pay that $1,000.00 to the person outside the jail in order to be able to get her evidence?
>
> A. That's exactly how most crime-stoppers and reward programs work.
>
> Q. They do that?
>
> A. Absolutely. And obviously, that payment dramatically reduces the credibility that they have. It's a shameful thing, if it has to be done, it's a shameful thing that they have to have that as a precondition, but if that testimony is reliable, should I go to the family of a raped little girl, a murdered little girl, and say: I'm sorry, I've got an eyeball witness, but because I think it's morally reprehensible that this person won't do the right thing, I'm going to ignore that truth. I don't think that lets right prevail.

With respect, I do not draw any comfort from any practice that would encourage payments even to eyewitnesses for their testimony.

Finally, it can be argued that a policy that rewards jailhouse informants in some circumstances, known to the inmate population, encourages the manipulation of the system and inhibits the solicitor-client relationship for inmate accused. A no-benefit policy, known to the inmate population, might cause some truthful inmates to remain silent, but would improve the odds that those coming forward are indeed truthful. I have no doubt that, had Mr. May and Mr. X known that no benefits could be forthcoming for cooperation, we would never have heard from either of them.

Nevertheless, and with some reluctance, I am not prepared to recommend that the conferral of benefits on jailhouse informants should be

banned.[62] Again, such a ban would run against the grain of existing Canadian jurisprudence. Situations do exist where such benefits result in testimony which has subsequently been fully verified and is, therefore, reliable. Informants may expect benefits to be conferred, even in the face of a purported ban. Informants may contemplate that they will use their co-operation (for example, in submissions to a sentencing judge), even in the absence of any agreement with Crown counsel. In these circumstances, juries considering the testimony of jailhouse informants may be misled by the existence of a ban into thinking that the informants are motivated by altruism only.

However, the potential corrupting effect of benefits is very significant. It should form part of any educational programming for prosecutors relating to such informers. As well, the Ministry of the Attorney General should consider what limitations should be placed upon the kinds of benefits which may appropriately be conferred. Peter Griffiths acknowledged that consideration has not yet been given to any limits upon benefits conferred. The Crown Policy Manual addresses the need to obtain approval for benefits and the procedures associated with that approval process. There is no guidance as to what kinds of benefits are properly conferred. California legislation limits monetary benefits which can be conferred upon jailhouse informants. In my view, parameters need be set for such benefits here as well.

**<u>Recommendation 47</u>: Disclosure respecting in-custody informers.**

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

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

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[62] See for example, *Palmer & Palmer* v. *The Queen* (1979), 50 C.C.C. (2d) 193 (S.C.C.).

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

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

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

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

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

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

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

Many of these items are already contained, in substantially the same form, in the present Crown manual. I have suggested some changes broadening disclosure to accommodate the evidence before me. For example, I recommend that disclosure extend not only to benefits conferred, but also to benefits sought by the informer, whether or not conferred. A similar change was reflected in Recommendation 41.

As noted elsewhere, disclosure of psychiatric or psychological materials relating to the informant raises special issues, addressed in Recommendation 50, below.

**Recommendation 48: Post-conviction disclosure by Crown counsel.**

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

The current Crown Policy on disclosure reflects the principles articulated in this recommendation. In light of the evidence heard during this Inquiry, the Ministry should take steps to reinforce the significance of these principles in the minds of all Crown counsel.

**Recommendation 49: Post-conviction continuing disclosure by police**

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

**<u>Recommendation 50</u>: Access to confidential informer records.**

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

In a later chapter, I recommend that a Joint Committee on Disclosure be created to address a number of important disclosure issues which continue to affect the administration of criminal justice in Ontario.

Most everyone agrees that police, prosecutors and defence counsel should be fully informed, to the extent possible, about the antecedents, background and psychiatric and psychological profile of an in-custody informer to assist in the assessment of his or her reliability. Much of this information can be accessed without legal impediment — for example, the informant's criminal record and outstanding charges.

Important and difficult issues arise when the understandable interest in full access collides with privacy interests and specific restrictions on access mandated by the Supreme Court of Canada's decision in *O'Connor*[63] and section 278.2 of the *Criminal Code*. In my view, protocols can address a number of access issues without running afoul of the law. For example, to what extent should police and prosecutors seek the consent of an in-custody informer to access otherwise restricted records and to what extent should such consent be a precondition to any agreement between the prosecution and an in-custody informer? Similarly, to what extent should an in-custody informer be asked to submit to a psychiatric assessment at the instance of the prosecution or defence and what should follow if he or she refuses to be assessed? I have not heard sufficient evidence to set the appropriate protocols myself or to recommend specific legislative changes to the present statutory and common law regime, and this is, therefore, an appropriate matter for consideration by the Joint Committee on Disclosure Issues.

**<u>Recommendation 51:</u> Prosecution of informer for false statements.**

**Where an in-custody informer has lied either to the authorities or to the**

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[63] *R. v. O'Connor*, [1995] 4 S.C.R. 411; 103 C.C.C.(3d) 1.

**Court, Crown counsel should support the prosecution of that informer, where there is a reasonable prospect of conviction, to the appropriate extent of the law, even if his or her false claims were not to be tendered in a criminal proceeding. The prosecution of informers who attempt (even unsuccessfully) to falsely implicate an accused is, of course, intended, amongst other things, to deter like-minded members of the prison population. This policy should be reflected in the Crown Policy Manual.**

Martin Weinberg reflected that there is no widespread fear by informants that they will be prosecuted if they fabricate evidence. It is that perception that, in some respects, fuels their willingness to be informants. Unless they fear that their sentences will be increased for lying, there is little counterweight to their motive to get out of jail. Weinberg indicated that as part of our system to try to improve their reliability, these informants must understand at a meaningful level that there are serious perils to perjury, not just that they will not get any benefits. I agree.

I appreciate that the legal requirement for corroboration may prevent the prosecution of some informants for perjury. (It is ironic that, in law, an accused can be convicted based on the uncorroborated evidence of a jailhouse informant, but such an informant cannot be convicted of perjury in the absence of corroboration.)

The Los Angeles grand jury also appreciated the difficulties in such prosecutions, but felt that clear cases nonetheless went unprosecuted. It is important that every consideration be given to these prosecutions, consistent with the burden of proof, or to alternative charges (such as public mischief or the giving of contradictory sworn evidence) where circumstances warrant.

**<u>Recommendation 52</u>: Extension of Crown policy to analogous persons.**

**The current Crown policy defines "in-custody informer" to address one type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should,**

**therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.**

**Recommendation 53: Revisions to police protocols respecting informers.**

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

A number of parties, including the Durham Regional Police Service, supported such a recommendation. Various police forces have protocols governing confidential informants. There is a need to specifically address in-custody informers as a special class. Such protocols should stress the inherent risks associated with such informers (tracking the language used in Recommendation 37). Equally important, they should outline the appropriate investigative techniques to be used in interviewing an informer, how the interviews should be recorded, how benefits should be addressed and by whom, what questions should be directed to informers to assist in the assessment of reliability and ways in which informer reliability can be further investigated (tracking the language used in Recommendation 41).

As part of the investigation, police and custodial personnel should cooperate to ensure that the location of potentially relevant persons at the time of the alleged statement by the accused is recorded in the most timely way possible.

**Recommendation 54: Creation of informer registry.**

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

**police, prosecutors or the Court of an informer.**

There was general consensus that such a registry would be welcome in Ontario. Indeed, I note that 66 percent of Crown counsel surveyed favoured such a registry; 75 percent felt that it would assist in determining whether they wished to call a jailhouse informant. The *Frumusa* and *Simmons* cases, cited above, underline the need for a central registry.

The registry should be maintained by the Ministry of the Attorney General. Protocols as to its contents, defence access (and any limitations upon access due to confidentiality issues), and means of disclosure, should be established in co-operation with law enforcement personnel and the defence bar. The Los Angeles registry may provide useful guidance.

In my view, such a registry should also contain information pertaining to criminal charges against a jailhouse informant, past or present. Where an informant seeks benefits after his testimony is completed, this should also be recorded in the registry, together with any benefits conferred or received.

My recommendation as to the information to be contained in the registry is not intended to be exhaustive.

**Recommendation 55: Crown contribution to informer registry.**

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

**Recommendation 56: Police contribution to informer registry**

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

**Recommendation 57: Creation of national in-custody informer registry.**

**The Government of Ontario should use its good offices to promote a**

**national in-custody informer registry.**

The Morins suggest a national registry. Their rationale is that in-custody informers know no jurisdictional boundaries. A national registry ensures that an in-custody informer cannot present himself in different jurisdictions without full disclosure of their prior roles to police, Crown and defence counsel. I agree. Indeed, Mr. May's criminal activity in Ontario, Manitoba and British Columbia (though not as an in-custody informer in the other jurisdictions) highlights the issue. Further, there is every reason to believe that jurisdictions other than Ontario would, in the very least, benefit from registries in their own jurisdictions.

**Recommendation 58: Police videotaping of informers.**

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

In a later chapter, I discuss in some detail the desirability of videotaped interviews of the accused and certain important or contentious witnesses generally. There is no doubt that the videotaping of jailhouse informants is of critical importance, not only in the assessment of their credibility but also for the protection of the interviewer.

**Recommendation 59: Reliability *voir dires* for informer evidence.**

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

Jailhouse informant testimony should not be legally banned. Nor should corroboration be legally required. Prosecutorial discretion should be retained in relation to the tendering of such evidence, though significantly regulated. The existence or absence of confirmatory evidence should heavily

factor in the exercise of that discretion. This approach is consistent with the jurisprudence and, indeed, the direction already reflected in Ontario Crown policy. I have earlier expressed these views.

The issue which I must then consider is whether a legislative amendment is desirable so that the reliability of such evidence should be assessed by the trial judge, on a *voir dire*, as a condition of its admissibility.

The testimony of the systemic witnesses varied on this issue. Mr. Wintory opposed such an approach. Mr. Sundstedt did not. Mr. Weinberg recommended it. Several prosecutors declined to comment on it. The parties to the Inquiry held divergent views.

David Butt[64] stated the position against such *voir dires* in a most articulate fashion. The theme of his evidence was reinforced in the written submissions of the Ontario Crown Attorneys' Association.

Mr. Butt submitted that the decision of the Supreme Court of Canada in *R. v. Buric*[65] was the appropriate one, namely that *voir dires* into unreliability ought not to be encouraged. He said:

> [W]hat we need to focus on is the preservation of the adversarial mechanisms that will ensure full exploration of the reliability of any witness in front of a jury.

Mr. Butt saw juries as democracy in action. He felt that pre-vetting based upon reliability undermines the democratic aspect of the jury system and the confidence shown in juries, which has not been shown to be misplaced.

The Ontario Crown Attorneys' Association said this:

> The idea that trial judges should exclude the evidence of an in-custody informant where that evidence is found to be inherently unreliable misses the mark.

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[64] As noted in Chapter II, Mr. Butt is a senior appellate counsel with the Crown Law Office.

[65] *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont. C.A.), aff'd (1997), 114 C.C.C. (3d) 95 (S.C.C.).

> There is nothing unfair about a trial in which *prima facie* unreliable evidence is led. Recently, the Supreme Court of Canada in *R. v. Buric*, adopted the majority judgment of Labrosse J.A. in the Ontario Court of Appeal, who stated
>
> > The admission of evidence which *may* be unreliable does not *per se* render a trial unfair. It is for the jury to assess the quality of the evidence.
> >
> > .....
> >
> > It has been said many times that modern juries are not unsophisticated with proper assistance from counsel and from the trial judge, they deal with most difficult issues. In my view, the trial judge underestimated the ability of the jury when he concluded, in effect, that the case was too difficult for them to decide. He was quite able to pick his way through the evidence on the *voir dire*; he cautioned himself on the danger of accepting the witness's evidence, and he reached his conclusion. I see no valid reason why the jury could not deal with this case in the same way he did. It is also in the best interest of society to have its most serious criminal charge resolved by a jury.[66]

Other judgments may be cited where courts have stressed the capability of jurors and the system's dependence upon jurors to assess the reliability of evidence and the credibility of witnesses, without being pre-empted by the trial judge.[67]

The Criminal Lawyers' Association takes a diametrically opposed position:

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[66] *R.* v. *Buric* (1996), 106 C.C.C. (3d) 97 at 111 and 113 (Ont. C.A.), aff'd (1997), 114 C.C.C. (3d) 95 (S.C.C.)

[67] See, for example, *R. v. Dikah and Naoufal,* (1994), 89 C.C.C. (3d) 321 (Ont.C.A.); aff'd 94 C.C.C. (3d) 96 (S.C.C.)(sub. nom. *Naoufal v. The Queen*)*; R. v. C.C.F.* (1998), 120 C.C.C. (3d) 225 (S.C.C.); *R.* v. *Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.).

The alternative of excluding informer evidence from the trial record is an attractive one. Unfortunately, it must be conceded that the judicial response has not been enthusiastic. The case of *Buric* is perhaps the leading one in the area. There, Justice Labrosse reversed the decision of a trial judge holding that a Crown witness could not testify because his evidence was "manifestly unreliable". Justice Labrosse's reasons were affirmed upon appeal. It is not clear, however, just how far *Buric* goes. Both the majority and minority in the Court of Appeal held that the trial judge had misinterpreted the dissenting judgment in the Supreme Court's judgment in *Mezzo* and had mistakenly thought that the Supreme Court had endorsed exclusion of unreliable evidence. Justice Laskin in dissent in the Court of Appeal held that "manifest unreliability" went only to weight, not to admissibility.

The resolution of the *Buric* case was to no small extent coloured by the fact that without the witness in issue, the Crown could not prosecute the case. The exclusion of the witness would have the same practical effect as a stay of proceedings. Nonetheless, it will be next to impossible to get around the holding in *Buric* that even egregiously unreliable evidence is admissible.

One avenue is still available is that outlined by Justice Laskin in his *Buric* dissent. Where police conduct has undermined the trial process to the extent that the jury is unlikely to be able to fairly assess the credibility and reliability of a suspect witness, the trial judge is entitled to exclude the witness's evidence. The concept is called the "principle of protection" by Paccioco and applicable when even the evidence left to the trier of fact is not fairly assessable. The majority and Supreme Court of Canada decisions in *Buric*, although implicitly disagreeing with Justice Laskin on the fact of whether the evidence was possible to fairly evaluate, do not appear to disagree with the "principle of protection" espoused in his judgment. In fact, Justice Labrosse opined that if it was apparent during the witnesses' testimony that the trial was unfair, the "appropriate relief" — i.e. a stay or an exclusion of the evidence — would still be open to the trial judge.

This "principle of protection" approach seems

> particularly apposite to the case of jailhouse informants. Particularly if police directives or Crown Policy Guidelines are not adhered to, it may not be possible to exhume the informant's antecedents, motivations and dealings with the police and Crown. In such case, if it is not possible to put the full picture of the informant before the jury, his evidence ought not to be tendered at all.
>
> The C.L.A. would support a legislative initiative giving trial judges the power, in the right circumstances, to exclude unreliable evidence. Despite our system being premised on the intelligence and good judgment of the jury, it is well accepted that there are types of evidence which, although relevant, are potentially so misleading and unreliable that the jury ought not to be permitted to rely upon them. (Footnotes omitted.)

I appreciate that our jurisprudence has generally favoured an approach that leaves the assessment of reliability to jurors and generally does not favour the assessment of reliability as a pre-condition to admissibility. However, I respectfully disagree with Mr. Butt that pre-vetting of jailhouse informant testimony based upon reliability 'undermines democracy' or the confidence shown in juries.

A *voir dire* which addresses reliability as a precondition to admissibility is far from a novel proposition. For example, it is now clear that the admissibility of hearsay evidence on a principled basis may involve an inquiry into the reliability of the proposed evidence (as well as considerations of necessity). In *R. v. Tat et al.*,[68] Doherty J.A. said this, in the context of hearsay evidence:

> The reliability inquiry turns from a recognition of the dangers inherent in hearsay evidence to a search for indicia of reliability which provide a sufficient safeguard of the trustworthiness of the statement to overcome the concerns arising out of those dangers. Lamer C.J.C. and Iacobucci J., for the majority on this issue, put it this way in *R. v. Hawkins, supra,* at pp. 1083-84 S.C.R., pp. 157-58 C.C.C.:

[68] (1997), 35 O.R. (3d) 641 (Ont. C.A.).

> The requirement of reliability will be satisfied where the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness. In particular, the circumstances must counteract the traditional evidentiary dangers associated with hearsay...
>
> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient *indicia* of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. *More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers.*

Similarly, the Supreme Court of Canada in *Mohan*,[69] and the Ontario Court of Appeal in *Terceira*,[70] both cited earlier in this Report, provide another analogy to the proposal here. These cases made clear that, where expert evidence which advances a novel scientific theory or technique is tendered for admission, the trial judge must assess, on a *voir dire*, the reliability of that expert evidence as a condition of its admissibility. Finlayson J.A. in *Terceira* emphasized that the trial judge determines *sufficient* reliability, not *ultimate* reliability.

It is my strongly held belief that the dangers associated with jailhouse informant evidence, together with its great potential to mislead, should make such evidence presumptively inadmissible. A trial judge should determine whether the evidence, together with the surrounding circumstances, meets a threshold of reliability *sufficient* to justify its reception as evidence. If admissible, the jury would determine the *ultimate* reliability of the evidence.

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[69] (1994), 89 C.C.C. (3d) 402 (S.C.C.).

[70] [1998] O.J. No. 428 (Ont. C.A.).

The appropriate burden of proof applicable on such a *voir dire* is equally debatable. Mr. Weinberg suggested that admissibility should be determined on a preponderance of evidence. Such a burden, which is synonymous with proof on a balance of probabilities is, of course, the burden which most frequently regulates the admissibility of evidence. However, we are concerned here with statements allegedly emanating from the accused, most frequently highly inculpatory. In Canada, the prosecution need establish the voluntariness of an accused's statements made to a person in authority beyond a reasonable doubt.[71] In *Terceira,* Finlayson J.A. held that the reliability issue respecting novel scientific theory or technique relates strictly to a question of the admissibility of evidence where proof on a balance of probabilities is an acceptable standard. However, he goes on to say:

> This is not an inculpatory statement made by an accused to a person in authority ... nor is it the establishment by the Crown of "facts which trigger a presumption with respect to a vital issue relating to guilt or innocence." (citations omitted)

He later returns to this topic:

> The appellant relies upon the accepted onus on the Crown in determining the admissibility of confessions. The onus is described by Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at 359 as follows:
>
> > The present law in Canada and the U.K. is that the prosecution must prove voluntariness beyond a reasonable doubt. This view is based on the reasoning that since a confession is potentially determinative of the issue of guilt or innocence, the criminal standard of proof should be maintained.
>
> The appellant also relies on *R.* v. *Egger,*[72] a

[71] I am aware that the Supreme Court of Canada is now being invited to consider whether the voluntariness *voir dire* should be extended to all statements emanating from the accused, whether or not made to a person in authority: *Michael Colin Hodgson* v. *The Queen,* Court File No. 25561, Supreme Court of Canada.

[72] (1993), 21 C.R. (4th) 186 (S.C.C.).

> breathalyser case, where the Supreme Court of Canada held that the standard of proof for the service on the accused of a Certificate of Analysis and a Certificate of Qualified Technician within the times proscribed by the Criminal Code was to the criminal standard of beyond a reasonable doubt before the Crown could rely upon the presumption in the certificate as to the blood-alcohol content of the accused's blood. However, this does not engage a question of the admissibility of evidence. As Sopinka J. stated at p. 202:
>
> > The issue here is very different from a question of admissibility of evidence. The effect of satisfying the burden of proving preliminary facts to the admissibility of evidence is only that the evidence is admitted: it determines neither the weight of the evidence nor the guilt of the accused. This occurs in the next step in the process during which the Crown must establish its legal burden. When admission of the evidence may itself have a conclusive effect with respect to guilt, the criminal standard is applied. This accounts for the application of this standard with respect to the admission of confessions (see *Ward* v. *R.*, [1979] 2 S.C.R. 30 at p. 40, per Spence J., for the Court, and *R.* v. *Rothman*, [1981] 1 S.C.R. 640, at pp. 670, 674-675, per Martland J., for the majority, and at p. 696, per Lamer J. (as he then was), concurring).

In my view, the jurisprudence supports, by analogy, the imposition of the burden of proof beyond a reasonable doubt to a *voir dire* into the admissibility of jailhouse informant evidence.

**<u>Recommendation 60</u>: Crown education respecting informers.**

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

The Ontario Crown Attorneys' Association submitted that:

> Crown counsel should be educated on the particular dangers associated with the use of in-custody informants.
>
> Crown counsel should receive instruction on the most effective means of evaluating the reliability of such evidence, including:
>
> - the need to consider whether the in-custody informer has previously claimed to have received statements while in custody;
>
> - the need to investigate any potential sources of media contamination from which an in-custody informant may have received information;
>
> - the need to investigate an in-custody informant's opportunity to receive a statement from the accused;
>
> - the need to investigate an in-custody informant's prior history, including his or her criminal record;
>
> - the nature of any present or future benefit which is requested;
>
> - the presence or absence of any evidence that would corroborate the particulars of a statement attributed to an accused by an informer.

I agree.

**<u>Recommendation 61</u>: Police education respecting informers.**

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

**reliability of, such informers.**

Jailhouse informants have shown ingenuity in accessing information to enhance their testimony. Mr. Weinberg noted that informants can obtain information through "an ill-motivated questioner [or] just the inadvertent exchange of information which to an intelligent informant would give him some predicate for expanding his potential testimony." Educational programming should ensure that investigators are mindful of this concern and conduct themselves accordingly.

**Recommendation 62: Protocols respecting correctional records.**

Provincial correctional facilities control various kinds of records which may become relevant to a criminal case. Different categories of records raise varying degrees of privacy or security issues. There appears to be no uniform and coherent policy respecting access to, or rights of inspection of, these records by police officers or defence representatives, the physical location of these records or the duration of their retention.

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

**Recommendation 63: Access by police officers to correctional facilities.**

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

**Recommendation 64: Placement of inmates.**

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

**together with the reasons stated and the identity of the requesting party.**

In Los Angeles, informants were placed with notorious accused and notorious accused placed with informants to facilitate the gathering of evidence. The grand jury was justifiably concerned about the classification of inmates in this way.

In the *Morin* case, Mr. May and Mr. Morin were placed together. Serious issues were raised at this Inquiry as to why they were initially placed together, given their circumstances. No satisfactory explanation was given by anyone for this placement. Nevertheless, the evidence did not permit me to find that the placement was done to facilitate the gathering of evidence.

Officers may have legitimate reasons for requesting a certain placement for an individual; indeed, they may be obligated to do so, where information in their possession bears upon the security of an inmate. Where a placement is requested, the request should be recorded, together with the reasons stated and the identity of the requesting party. This accords with the practice suggested by the Los Angeles grand jury.

**Recommendation 65: Placement of witnesses.**

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

This recommendation is intended to address 'mutually reinforcing' witnesses, another concern justifiably raised in Los Angeles.

**Recommendation 66: Storage and security of defence papers.**

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

This recommendation is similar to that suggested by the Ontario Crown Attorneys' Association and parallels a recommendation made by the Los Angeles grand jury. It addresses the misuse of disclosure briefs revealed

by the evidence before the Los Angeles grand jury and the concerns expressed there and here by defence counsel (and by Mr. Sheriff) as to the inhibiting effect upon the solicitor-client relationship created by unsecure defence materials within the institution.

The Ministry may be assisted by the protocol described by Mr. Baig in his testimony before me.

**Recommendation 67: Timing and content of informer jury caution.**

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

In *Vetrovec v. The Queen*,[73] the Supreme Court of Canada reflected that there is no automatic rule dictating when a trial judge must caution a jury about a potentially unreliable witness. A discretionary caution is frequently known as a *Vetrovec* warning.

The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury. In my view, the present law has developed to the point that a cautionary instruction is virtually mandated in cases where the in-custody informer's testimony is contested: see *R. v. Simmons*;[74] *R. v. Bevan.*[75] The content and timing of the caution is within the trial judge's discretion. Indeed, the Crown survey indicated that in 34 percent of the 41 cases where a warning was given, it was given both when the evidence was called and in the charge to the jury.

At Mr. Morin's second trial, the prosecution resisted a *Vetrovec* warning referable to Mr. May and Mr. X in the charge to the jury. Mr. Smith

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[73] [1982] 1 S.C.R. 811 (S.C.C.).

[74] [1998] O.J. No. 152 (Ont.C.A.).

[75] (1993), 82 C.C.C.(3d) 310 (S.C.C.). In California, such an instruction is statutorily mandated: Penal Code section 1127a(b).

conceded that such a warning was warranted and that it would have been preferable had he not taken that position. In my view, if ever a warning was required, this was the case.

The trial judge did caution the jury. The caution may have survived appellate scrutiny. It is unnecessary for me to decide that. I am of the firm view, however, that a caution referable to contested jailhouse informant testimony must be given in the strongest terms. Like the traditional instruction for eyewitness identification, it should reflect that historically such evidence has produced miscarriages of justice. Such a caution can draw upon the dangers identified at this Inquiry and reflected in the language used in Recommendation 37 above.

I adopt Mr. Weinberg's evidence in this regard:

> Telling the jury that this category of evidence has in the past resulted in unreliable verdicts is the best way of communicating to a jury that you need to be cautious. "It really drives home the fact that that category of evidence has put someone, or threatened to put someone in jail, who in fact was innocent, which is the ultimate horror of our criminal justice system."

Mr. Weinberg also believed that jury instructions given at the end of the case are extensive, and cautions as to jailhouse informants get lost. Where, as is the case for this category of witness, there is a history of unreliability or potential unreliability, the instructions should be given at the time just prior to the testimony, orally and in writing. The instructions can be repeated at the end of the case.

Frank Sundstedt agreed that the caution would be more meaningful if given immediately before or after the witness testifies.

I agree that trial judges should be encouraged to exercise their discretion through a caution given at the time the witness testifies. With respect, I do not agree with Mr. Wintory that such cautions amount to a "running commentary of really good and really bad evidence" and are inconsistent with the trial judge's role.

**Recommendation 68: Crown videotaping of informers.**

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

In a later chapter, I reject the suggestion that all Crown attorneys' interviews with prospective witnesses be taped. It is impractical and unfairly inhibits trial preparation by Crown counsel. I should note that several of the Morin prosecutors supported such taping; however, I saw their support as a reaction to allegations made about how their untaped interviews with Morin witnesses were conducted, rather than a policy driven, well-thought out response.

Having said that, I am of the view that prosecutors should be encouraged (not mandated) to arrange for taping of interviews with witnesses who pose particular reliability concerns. Such taping not only enhances the ultimate fact-finding process through disclosure, but protects prosecutors from baseless allegations.

**Recommendation 69: Informer as state agent.**

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

In California, a jailhouse informant acting as a state agent cannot actively elicit a statement from a detained accused. This conforms to Canadian law under section 7 of the *Charter*. So, where the police recruit an informant in their investigation against another inmate, the informant is deemed to be a state agent.

In many of the reported Los Angeles cases, the informants questioned their fellow inmates, with the expectation that they would then go to the authorities with a claimed confession (whether true or false) and barter for some benefits. In that case, the informant may not be a state agent. Mr. Sundstedt and Mr. Dalton could see no policy reason why such a person who actively elicits a statement, should not be treated as an *anticipatory* state

agent.[76] In other words, where an inmate actively elicits, with the expectation that he or she will offer himself up as an informant, it is arguable that the fruits of his or her efforts should be treated no differently than the treatment given to a conventional state agent. Of course, the countervailing argument is that the *Charter* is directed to government action; this informant's conduct does not attract *Charter* scrutiny.

The Criminal Lawyers' Association suggests the following analysis:

> A presumption that a jailhouse informant is a state actor is not judicially available in Canada nor is such a presumption in accord with our traditions.[77] However, all is not lost in regulating the informant who has not previously been in contact with the police. Insufficient attention has been paid to the following passage from the majority judgment in *Broyles*:[78]
>
> > *I would add that there may be circumstances in which the authorities encourage informers to elicit statements without there being a pre-existing relationship between the authorities and individual informers.* For example, the authorities may provide an incentive for the elicitation of incriminating statements by making it known that they will pay for such information or that they will charge the informer with a less serious offence. The question in such cases will be the same: would the exchange between the informer and the accused have taken place but for the inducements of the authorities? (Emphasis added.)

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[76] This terminology was used instead of characterizing such a person as a state agent since the informant may do many things that, in law, should not be attributable to the authorities before they had any involvement, for instance, where the informant offers drugs to the accused as an inducement.

[77] *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.); *R. v. Broyles* (1991), 68 C.C.C.(3d) 308 (S.C.C.); see Clifford Zimmerman, "Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform" (1994) 22 Hastings Constitutional L.Q. 81 at 138-140.

[78] (1991), 68 C.C.C.(3d) 308 (S.C.C.).

> Where the police or other authorities create an environment or a culture in which it becomes known that rewards will be provided to inmates who come forward with information incriminating other inmates, the inmate is properly classified as a police agent for the purpose of *Charter* analysis. The elicitation restriction originated in *Hebert* will be applicable. Certainly, this would seem to fit the situation which obtained in Los Angeles, where there was a pervasive culture which bred jailhouse informants. Counsel, propelled with broad disclosure concerning the recruitment of informants in the jurisdiction, should be encouraged to develop this line of authority.

I find that this approach has much to commend it. I also agree with Mr. Sundstedt and Mr. Dalton that there are sound policy reasons to treat witnesses who elicit, with the expectation that they will thereby become informants, as state agents. Such an approach is less likely to promote an environment such as that which existed in Los Angeles. However, we should be under no illusion. It does not follow that such informants will respect these limits (or admit that they exceeded them). As the grand jury report noted:

> No informant testified that he was cautioned not to directly or deliberately elicit information from the targeted defendant. Assuming that law enforcement officials did admonish an informant not to directly elicit evidence from another inmate, informants are unlikely to heed the instruction. The widespread belief held by informants that law enforcement officials solicit fabricated testimony would tend to negate the effect of any such admonishment. Furthermore, the favourable treatment informants expect for obtaining information is an overwhelming incentive to disregard such an instruction. The willingness of many informants to perjure themselves, and otherwise lie, will prevent these informants from acknowledging their roles in eliciting information from a defendant.

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**CHAPTER 3: JAILHOUSE INFORMANTS**