

V

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

A. Introduction

In Chapters II, III, and IV I discussed forensic evidence, jailhouse informants and the investigation by the York Regional Police force. Though I was mindful of the totality of the evidence in making any findings, each of the chapters permitted some discrete treatment. These chapters corresponded in content to Phases I (Jailhouse Informants), II (Forensic Evidence) and III (the Investigation by the York Regional Police force) of the Inquiry, although, as I earlier noted, for the purposes of the Report I chose to commence with the forensic evidence.

At the Inquiry, Phase IV addressed the investigation by the Durham Regional Police Service. Phase V addressed Trial Issues. Not surprisingly, there was much overlap between the two phases, given the fact that the Durham investigation resulted in Guy Paul Morin's arrest and prosecution. Put another way, the investigation extended through Guy Paul Morin's arrest until his conviction at the second trial. It is, therefore, advantageous to address both the investigation and the prosecution of Guy Paul Morin in this chapter. Of course, to the extent to which investigative or trial issues relating to jailhouse informants or forensic evidence have been dealt with, those subject matters will not be revisited here.

B. Body Site Evidence

(i) Discovery of the Remains of Christine Jessop

On December 31, 1984, Frederick Patterson and his two young daughters were out for a walk along a tractor path south of the Fourth Concession of Brock Township, just west of Durham Regional Road 2, when they made a grisly discovery. The temperature that afternoon was about 35 degrees Fahrenheit, there was very little wind, the ground surface was dry, and the sky was overcast. The Fourth Concession, also known as Brock Concession Road 4, runs east and west. A rutted tractor path leading into the field from the Fourth Concession, curved in a way which precluded anyone who was walking along the path from seeing what was on the other side of the bend. The area to the west of the tractor path, as one walked south from the Fourth Concession and leading up to a clearing in which a trailer was permanently parked, was grassy, lightly wooded, and interspersed with cedar trees and growth. As the Pattersons walked along the tractor path they spotted what initially appeared to them to be garbage approximately 25 feet from the west edge of the tractor path. The trailer, which had been put there by the owners of the property, was approximately 60 to 70 feet from the site of this 'garbage.' The Pattersons, who were neighbours, went to the trailer to see if anyone was there. It was unoccupied and it appeared someone had broken into it.

Mr. Patterson and his daughters then walked along a trail in the grass towards the site of the 'garbage.' The grass adjacent to the beaten down pathway was approximately 1½ feet tall. As they came closer to the site, Mr. Patterson realized that they had come upon the remains of a child. Although he had walked along this property a number of times between October 3, 1984 and December 31, 1984, this was the first time he had noticed the remains. The police were called.

Sergeant William Scott and Constable Rick Keeler arrived at the nearby Patterson residence between 1:15 and 1:20 that afternoon. They were met by Mr. Patterson, who accompanied the officers to the location of the body.

The remains were identified as those of Christine Jessop. Her body was on its back and decomposed. Her legs were spread apart in an unnatural

position and her knees were spread outward. Animals appeared to have eaten at the legs. Her head was pointed north and her feet south. A sweater was pulled over her head. A few bones were scattered between her head and what remained of her legs, giving the appearance that her head and waist were not connected.

The victim was wearing a beige turtleneck sweater, a blue pullover sweater, a blouse on which some buttons were missing and two pairs of socks. Her panties were found at her right foot. Blue corduroy pants with a belt and a pair of Nike running shoes were found just south of her feet. These clothes were subsequently identified as belonging to Christine. Her school recorder, with her name still taped on it, was found next to her body. The hand-knitted blue sweater with the zippered front and no collar, which she was last reported wearing, was not found on the body; nor was it ever located.

(ii) The Initial Search of the Body Site

At approximately 1:30 that afternoon, Officer Keeler parked his cruiser at the point where the tractor path met the Fourth Concession; he remained at this entrance to ensure that no unauthorized persons came upon the scene. Meanwhile, Sergeant Scott called the Criminal Investigation Bureau of the Durham Regional Police Service and asked them to attend the site. Shortly before 2:00 p.m., Detective Bernie Fitzpatrick arrived at the scene, accompanied by Detective Peter Moore.

The identification officer, Sergeant Michael Michalowsky, arrived at 2:10 p.m. in the identification van. Mounted on the identification van was an extendable telescopic light. There were four quartz halogen lights built into the underside of the van which could be activated to cast a light out while the van's motor was running. This light, however, was not adequate for a detailed search of the area as darkness approached, but only assisted in illuminating the general area in the vicinity of the van. Constable David Robinet, the second identification officer at the scene, arrived at 4:32 p.m. At approximately 4:57 p.m., Officer Keeler went off duty and was replaced by Constable Sam Fox.

On December 31, 1984, Inspector Robert Brown was in charge of the Durham Regional Police Service Crimes Against Persons Squad. Inspector Brown reported to Superintendent Doug Bullock, who was the administrative officer in charge of the Criminal Investigation Branch as well as the Intelligence Branch of the force. Inspector Brown would ultimately be in

charge of this investigation from the time Christine Jessop's remains were found until April 22, 1985, when Guy Paul Morin was arrested. He wore two hats during this period: he was the administrator of the unit and also acted as case manager. As Inspector Brown said at the Inquiry, the key to homicide investigation is supervision and direction. He agreed during the Inquiry that being involved with the administration of other ongoing investigations and other duties in addition to the investigation into the Jessop death may have resulted in him being "spread a little too thin."

The Crimes Against Persons Squad at that time was comprised of six detectives who often worked in two teams of three: Detectives Fitzpatrick, Doug King and John Shephard were on one team, Detectives Reg Webster, Peter Holley and Joe Loughlin on the other. Both squads reported directly to Inspector Brown. These squads were composed of experienced and seasoned officers in the detective office who had investigated a wide variety of crimes. Inspector Brown testified that in 1984 the number of homicides per year in Durham did not warrant a fully mandated homicide squad.

Inspector Brown was the first officer of a higher rank to arrive at the crime scene. He asked Sergeant George Scott to organize a ground search of the immediate area. Sergeant Scott left the scene between 3:00 and 3:15 p.m. to arrange for additional personnel to assist in the search. He returned between 4:15 and 4:30 p.m. The Brock Fire Department was asked to bring electric lighting and generators to the area. This lighting arrived at approximately 3:45 that afternoon. The coroner arrived at approximately 4:00 p.m. More officers began to arrive in the latter part of the afternoon to assist with the search of the ground for potential evidence.

It was New Year's Eve; a severe storm was predicted for that evening. Detective Fitzpatrick testified that he suggested to Inspector Brown that a tarpaulin be used to cover the area of the remains until the next day. This was not done. No tarp or tent was erected to protect the site from the impending storm. Inspector Brown determined that, considering the vegetation, tenting the area would be difficult without cutting down saplings and, perhaps, contaminating the scene further. He testified that he had discussions with the identification officers, who assured him that officers could clear the body site, before leaving, of any and all evidence that was retrievable. In fact, at the end of the day, the search was not yet complete.

Considering the inclement weather, the decision not to protect the site

was imprudent, and there was insufficient time to preserve all possible evidence before the area was fully covered by snow and ice. It is to Detective Fitzpatrick's credit that he made the suggestion to take the necessary steps to preserve the site so that the search could be continued the following day and, I am sure, it must be a matter of regret for Inspector Brown — indeed, he said so — not to have followed Fitzpatrick's advice. I understand that making arrangements of this kind is not always easy, and getting a tent on New Year's Eve might have been difficult, if not impossible. But even a tarpaulin would have gone a long way to protect the ground. Unfortunately, this was not done.

The small clearing surrounding the remains of Christine Jessop was cordoned off. This roped-off area was located approximately 45 feet west of the identification van, which was parked east of the pathway and slightly to the north. Searches for evidence both inside and outside of this roped-off area were conducted until early evening. To the west of this area, the woods became more dense and forest-like. Officers Fitzpatrick and Michalowsky attempted to clear the area between the tractor path and the body of any potential evidence by conducting a ground search on their hands and knees. During this search, they found two pearl buttons to the west edge of the laneway which were subsequently identified as coming from the blouse of Christine Jessop. These were photographed and placed in a plastic bag by Michalowsky.

(iii) The Removal of the Remains

At approximately 4:30 that afternoon, Durham officers placed the remains of Christine Jessop on a four-by-eight foot painted piece of plywood which had come from the Durham police laboratory for use for this purpose. Sergeant Michalowsky used a shovel to loosen the ground around the remains. Officers attempted to slide the board under the body and balled clothing surrounding it in order to interfere with the remains as little as possible and gather some of the soil surrounding the remains. The head portion of the body was placed on the board, separate from the torso. The officers found it necessary to lift up various parts of the body while physically attempting to 'shimmy' the board underneath the remains. In the process, the skeletal remains were not placed in precisely the same position as they were when they were lying on the ground. While every effort was made to be as careful and precise as possible, Sergeant Michalowsky testified during the first trial that some rib bones had been beyond the width of the board and had to

be picked up and placed on the edge of the board by hand.

No measures were taken to prevent officers' hair and fibres from their clothing from falling on the remains during this process. Inspector Brown could not recall whether or not the officers were wearing scarves or gloves, though he did state that rubber gloves would have been an excellent idea. The body was not covered.

The plywood board, on which the body and surrounding earth had been placed, was moved into a van originally sent to transport the remains. Unfortunately, six inches of the board extended outside of the rear of the van, making it impossible to close the doors. A second vehicle, which could accommodate the full length of the board, was then called to the scene. In the meantime, members of the media began to arrive. An officer took white sheets and put them over the exterior portion of the van to block anyone's view of the remains. The second vehicle, a traditional funeral hearse, containing the remains of Christine Jessop, left the scene at 6:33 p.m. for the Coroner's Building in Toronto.

(iv) Search Instructions for Officers

While this took place, officers continued to arrive from points as far as Oshawa, Whitby, Ajax, Port Perry and Pickering. They arrived from 4:15 onward, and some came as late as 5:22 p.m. There was urgency to the search because darkness descended early at that time of the year and heavy snow was expected.

An officer was stationed at the edge of the tractor path, near the roadway, to control access and to keep track of who was going to and coming from the body site. As officers arrived for the search, they were generally briefed on their duties by this officer. Some of them testified that they were instructed to ensure that no loose clothing or anything that could be dropped or fall out of their pockets was taken into the search area in order to preclude contaminating the scene. Others did not remember receiving any instructions. From that point, officers were told to see a sergeant near the body site who gave them further details and assigned them to search specific areas.

Inspector Brown testified that no grid search was done, either at the immediate body site or in the adjoining area. Efficient grid searches are conducted with pegs and twine dividing up the area into square yards (or

similar units of measurement). Everything found within a square is catalogued and recorded numerically. This was not done on December 31, 1984; Durham did not do grid searching at that time. In hindsight, Inspector Brown agreed that it should have been done, and while I understand that most police departments now employ this method in searches of this kind, this should be standard procedure. That way, no area is likely to be left unsearched, and items found can be located on a grid map, thereby avoiding uncertainty or faulty measurements or recollections.

Instead of a grid search, officers lined up shoulder to shoulder and were instructed to crawl in as straight a line as possible. But it was difficult to maintain that pattern because of the terrain in the area, and often the nature of the vegetation required greater or lesser separation. Officers were also told that should they find anything which might be of value to the investigation, they were to notify the nearest identification officer at once. Nothing was to be touched, and Sergeant Michalowsky, the identification officer in charge, would document the find, photograph it, and take control of the item by bagging and tagging it.

Searchers were instructed not to enter the roped-off area around the body. The search was broken into segments surrounding the remains. While artificial lights were brought in to illuminate the general area, officers still had difficulty seeing the ground as they proceeded on their hands and knees through the long grass. Some officers used flashlights. The searching continued until approximately 6:00 p.m. when the area was in darkness.

Several items of potential evidence were apparently found on December 31, 1984. These included a cigarette butt, a milk carton, a service station credit card receipt, a broken plastic cup, and a piece of carpeting. Sergeant Michalowsky testified that while he photographed items found at the scene, he did not keep a record of photographs that were taken. Details about some of these items and issues surrounding them will be discussed later in this section.

The identification officers, Sergeant Michalowsky and Officer Robinet, left the scene at 6:37 that evening, apparently because of problems they were having with their lighting equipment. This equipment was in a state of ill-repair and was not functioning properly. Officer Robinet testified that when they left the scene, they had *not* done a thorough search of the inner perimeter of the roped-off area where Christine Jessop's body had been found. They

intended to return the following day to continue the search. Other officers testified they were not satisfied with the thoroughness of the search of areas *outside* the roped-off area.

On New Year's Eve and in the early hours of January 1, 1985, the storm that had been predicted for the region hit with full force. Rain, sleet, ice and approximately six to eight inches of snow blanketed the crime scene.

On January 1, 1985, several officers met at the police station in Sunderland, a short distance from where the remains were found, to proceed to search the body site, as previously scheduled for that day. Unfortunately, since the snowstorm had covered the crime scene with ice and snow, the search was canceled and the officers returned to their respective divisions.

(iv) Sergeant Michalowsky

Background

Sergeant Michael Michalowsky was the chief identification officer at the Durham Region Service and reported to Inspector Brown. He joined the ranks of the Oshawa Police Force on March 1, 1957. He completed his identification course at the Ontario Police College in Aylmer in 1972 and became an identification technician with the Durham Regional Police Service. He took a number of different courses and seminars on various subject matters concerning identification, investigating sudden deaths, homicides and photography. In 1972 he was employed as a full-time identification technician with the Durham Police and served in that capacity until September 19, 1983, when he assumed the responsibilities of officer-in-charge of the Identification Branch of the Service. It was in this capacity that Sergeant Michalowsky was called to the scene when the remains of Christine Jessop were found. Sergeant Michalowsky remained with the Identification Branch until after the first trial in the *Morin* case in 1986. He then transferred to the Youth Bureau of Durham. He left the police force sometime in 1990 because of health concerns.

In March 1990, during the preparatory stages for Guy Paul Morin's second trial, Crown attorney Susan MacLean learned that Sergeant Michalowsky had two notebooks for the Jessop investigation, containing a number of divergent entries for the same events. The second notebook was

apparently made after Sergeant Michalowsky testified at Mr. Morin's preliminary inquiry.

Following an investigation by the Ontario Provincial Police, Sergeant Michalowsky was charged with perjury and related offences in connection with his evidence at the first trial relating to his notebook and to his evidence that a cigarette butt tendered as an exhibit at the first trial was the one found at the body site. These charges were judicially stayed in 1991 for reasons relating to Sergeant Michalowsky's health. These facts will be discussed in greater detail later.

Identification Duties

The Identification Branch was a separate unit of the Durham Regional Police Service. As of December 1984 the five officers who were members of the unit reported to their supervisor, Sergeant Michalowsky.

An identification officer attends a crime scene to handle and package exhibits, take measurements, create scaled diagrams to mark the location of items found, take photographs, and ensure the continuity of all such evidence collected. Continuity involves the control and maintenance of an item that is seized. It requires establishing the chain of who handled the item, from its discovery to its ultimate presentation in Court. Sergeant Michalowsky was the officer primarily responsible for ensuring the continuity of exhibits in this investigation. Establishing continuity depended on proper record-keeping.

In the course of investigations, the submission of exhibits to the Centre of Forensic Sciences was not exclusively the province of the identification department. Any police officer could submit what he or she thought to be appropriate for CFS analysis; just because an exhibit was seized at a crime scene did not necessarily mean it was submitted to the CFS.

At Mr. Morin's second trial the defence raised issues concerning the recording, the handling, the continuity, the preservation, and the submission for testing of evidence in relation to various items found at the body site. This is more fully discussed later in this section.

Durham Laboratory Conditions

Aside from those exhibits seized at the body site that were taken

directly to the coroner's office or to the Centre of Forensic Sciences, Durham Region stored exhibits in their forensic identification unit. Officers testified that these facilities were unsuitable for a police force of this size.

In 1985 the Durham identification office and laboratory were located at the southwest section of the police building in Oshawa. A darkroom was set up beside the office, where photographs were developed. Much of the laboratory's work involved fingerprint examination. Clothing collected at the scene that was damp was air-dried in the room. In fact, this laboratory was essentially one large open room measuring approximately 20 by 22 feet with a 16-foot ceiling. One entered the laboratory by an east door which was generally kept locked. On the south side of the room was a wall with a large counter where fingerprint examinations were performed. A grid and fan cleared fumes and fingerprint powder from the room. To the west of the grid and fan area was the counter top used for packaging exhibits. Directly above that counter was an area where each identification officer stored exhibits, accessible by a ladder. Identification officers stacked their exhibits on this open metal shelving above the counter which was approximately four feet wide and extended the full 22-foot length of the lab. It was not secure in the sense that there were no doors on the storage area itself.

At that time, any Durham officer could sign out a particular exhibit if he or she so chose. If an officer required an exhibit, he or she would attend at the laboratory with an identification officer who would open it by key. There was no sign-in/sign-out requirement to log and keep track of these visits. Whether in practice the key was utilized only by the identification officer is uncertain, but the protocol was that the identification officer retained this key. There were no written directives regarding this process at the time.

Numerous cases of all kinds were worked on in this laboratory, often simultaneously. Different examinations, some involving chemicals, occurred in this same room. More than one identification officer would sometimes be working at the same time in the laboratory. Work might well be going on while potential exhibits were hanging to dry. Some days were more problematic than others and on all days the identification officers did their best to avoid contamination, but it was a difficult situation in which to work — a situation ripe with the possibility for contamination.

Officers testified that the facilities were inadequate. There was a general lack of space, making it difficult to maintain exhibits in one area.

Officer Robinet testified that an area on the floor was designated where things were placed: “They were waiting to be examined because we were lacking such space, and at times it became very overcrowded.”

These overcrowded conditions were recognized in 1984. Concern was raised relating to the difficulty of ensuring the integrity of exhibits or absence of contamination in relation to physical exhibits as too many functions were taking place in the same room. Inspector Brown conceded that contamination could occur given the circumstances.

Lab coats were available for individuals to wear while in this area; some did and some did not. There were no regulations requiring officers to wear them.

Perhaps even then, but certainly now, more than 13 years later, these arrangements seem primitive and they were. But I am pleased to note that the Durham authorities took cognizance of this fact and the Identification Branch is now housed in appropriate quarters, with modern equipment and better security.

Sergeant Michalowsky testified at the stay motion that he and Officer Robinet were the only identification officers working at Durham the weekend of December 31, 1984, because of the holiday season. This fact becomes important in considering the evidence of Constables Jean-Paul Nadeau and Jeffrey Hewett in relation to their conversation with an identification officer on that New Year’s Eve, and this will be discussed further in this chapter.

After leaving the crime scene on December 31, 1984, Michalowsky and Robinet returned to the Durham laboratory with plastic bags containing the corduroy slacks, panties, the recorder and its bag, and the running shoes found in the vicinity of Christine Jessop’s body. Sergeant Michalowsky testified at the first trial and the stay motion that upon returning to the laboratory, he removed these items from their plastic bags, hung up the clothing to dry, and ensured that brown wrapping paper was placed underneath to preserve any fibres that fell from it. At the first trial, he said nothing in his testimony about receiving any assistance in these tasks from Officer Robinet. At the stay motion he testified that Sergeant Robinet *may* have assisted in carrying the items into the laboratory, but could not recall whether he assisted in hanging them up. These items were dry by January 4, 1985, at which point they were photographed, wrapped in the paper over

which they hung, tagged, placed in paper bags and forwarded to the CFS for analysis.

Necklace Hair

Sergeant Michalowsky attended the autopsy in Toronto on January 2, 1985. At this time, a chain was removed from around the victim's neck area by the pathologist. Michalowsky testified that the chain was embedded in flesh. The necklace hair, discussed at some length in Chapter II, was one of the hairs also embedded in the chain and flesh. Michalowsky donned a pair of rubber gloves, started at one end of the rolled flesh around the chain with a scalpel blade and separated the flesh from the hair. He placed the hairs in a sealed paper envelope and tendered it to the CFS for analysis. When asked during the first trial why he had removed the embedded hair instead of providing the entire chain to the Centre, he testified that he felt capable of taking it off and knew that the necklace was required by the investigative team so it could be identified by the Jessops.

I pause to reflect on the fact that Sergeant Michalowsky appeared to have no difficulty in separating the necklace from the decomposed flesh which surrounded it — surely an unpleasant, if not gruesome task. Of course, identification officers regularly attend autopsies and they, as much as the pathologist and staff, acquire some measure of immunity from sights and smells which others might find very upsetting. It was argued by counsel for Mr. Morin, with some justification, that it was difficult to reconcile Michalowsky's choice to perform this task with his later assertions, in the context of Mr. Morin's second trial proceedings, that his trauma over seeing Christine Jessop's remains made him unable to think about the case.

On January 2, 1985, Dr. John Hillsdon-Smith, the chief pathologist who conducted the post-mortem on Christine Jessop, turned over all of the victim's clothing to Sergeant Michalowsky. Michalowsky brought a blue and white pullover, a turtleneck, a blouse and two pairs of socks to the Durham laboratory. These items were also hung to dry. Again, brown kraft paper was placed on the floor under the clothing to catch and preserve any debris. When everything was dry, Sergeant Michalowsky photographed and examined the clothing, wrapped it in the kraft paper and delivered it to the Centre of Forensic Sciences.

(v) Return to the Body Site

On January 3, 1985, Sergeant Michalowsky and another officer returned to the area of the body site with propane tanks and torches. They used this equipment to melt the snow in the roped-off area. There is no notation that any evidence was found on that date.

The following day, Sergeant Michalowsky and another officer again returned to the body site to complete the task of melting the snow and ice in the immediate area in an attempt to find additional evidence. Two bones were found which apparently were never submitted to the CFS. An issue concerning the continuity and preservation of these bones was, again, part of the challenge by the defence to the integrity of all of the evidence with which Sergeant Michalowsky had been involved.

Sometime after this discovery, Inspector Brown had a conversation with Sergeant Michalowsky about these additional bones. It was decided that Sergeant Michalowsky would re-attend the crime scene as soon as practicable in the spring when the weather had changed and the ground had cleared to do a thorough search. This would, however, be some three months after the body was discovered. Inspector Brown agreed during the Inquiry that the efficacy of an investigation where officers were sent back to the site three months after the discovery to look for evidence was indicative of “not a very efficient homicide investigation.”

(vi) The Importance of the Smoking Paraphernalia

It was uncontested that Guy Paul Morin was not a smoker. Accordingly, evidence that the perpetrator was a smoker would support his innocence.

During the first and, to a greater extent, the second trials, the defence focused on the evidence found at the scene which, arguably, supported the inference that the perpetrator had left behind smoking paraphernalia: a cigarette butt or butts, a lighter and possibly a cigarette package. The prosecution, in turn, took the position that these findings were irrelevant to the identity of the killer and, indeed, could be explained, in large measure, by searchers leaving items at the scene.

At least one cigarette butt, and possibly a second, was found at the body site on December 31, 1984. At the first trial, Michalowsky testified that two photographs of a cigarette butt introduced through him were of the same butt taken at different times. That evidence was later discredited; the Crown conceded at the second trial that the photographs were not taken in the sequence described by Michalowsky and that one of the photographs did not depict the same cigarette butt, but another object. (The Crown also conceded that the cigarette butt actually introduced into evidence at the first trial was not the butt found at the scene.) There was also evidence from Constable Patrick Holtorf, dealt with below, that suggested that the object depicted in the other photograph was only birch bark which he found at the scene, and not another cigarette butt. Serious issues were raised as to the accuracy of that account.

As well, Sergeant Kenneth Hudson was alleged to have told the OPP investigating Michalowsky in 1990, that he (Hudson) found a cigarette package at the scene. He later did not adopt that position, but suggested that he may have seen a milk carton instead. Michalowsky, in a second notebook, attributed the finding of a milk carton to yet another officer who, however, denied that he found anything at the scene.

Detective Sergeant Holley (now Inspector) found a cigarette lighter at the scene several days after the initial search at the site. He bagged this lighter and said that he turned it over to Michalowsky. Officer Hewett later claimed that he had dropped it at the scene on December 31, 1984, and so advised an identification officer shortly after his return to the station. There was evidence that Hewett had booked off duty before the identification officers returned to the police station from the body site. There was also evidence that the lighter may have been found in a different location than that in which Hewett was searching. Those differences, however, narrowed as the proceedings progressed. Various aspects of the evidence changed somewhat through time. Michalowsky also denied that he received any lighter from Holley. The lighter was never produced.

I note at this point that the smoking paraphernalia found at the scene may have had absolutely nothing to do with the identity of the perpetrator. Its significance, in this Report, has more to do with how the authorities dealt with any perceived problems in the case against Guy Paul Morin, once the smoking issue had been raised. This bears upon the quality of the investigation and also upon the quality of the testimony which was elicited

from the officers who were confronted with this issue at trial.

(vii) Smoking and the February 22, 1985 Interview

Inspector Shephard and Detective Fitzpatrick interviewed Guy Paul Morin for the first time on February 22, 1985. Detective Fitzpatrick asked Morin whether or not he smoked. He replied that he did not. Detective Fitzpatrick then asked “Do you mind if I do?” Detective Fitzpatrick testified that he had no intention of trying to find out if Mr. Morin smoked; he was simply being polite. Inspector Shephard testified that he did not know on February 22nd that a cigarette butt had been found at the scene. Both Inspector Shephard and Detective Fitzpatrick claimed they had no real interest in whether or not Mr. Morin smoked. By contrast, Inspector Shephard’s notes of the February 22nd interview included the phrase “doesn’t smoke” in quotation marks. On the stay motion, Inspector Shephard was asked why he put this in quotations:

Q. Is there any explanation you can give us for that answer, “Doesn’t smoke,” being in quotes other than the fact that you were aware on February 22nd, 1985 that there were cigarettes found close to the body and you were concerned that the killer of that body was a smoker?

A. No, sir. The only reason I can say that was in quotations is because I don’t smoke, I have never smoked in my life, I detest smoking, and I may very well have just jotted it down in quotations.

The questioner’s point was well taken. However, I am inclined to believe that the investigators were not alive to the importance of the presence of the cigarette butt(s) at the body site on February 22, 1985, which, of course, is in itself a failing. Later in this Report I find that Guy Paul Morin was already regarded as a suspect by the officers on February 22, 1985. Even if the presence of the cigarette butt at the scene was not known to an investigator, it might be of potential use down the road to know whether a suspect did or did not smoke. Accordingly, Detective Fitzpatrick probably did ask the question out of politeness and Inspector Shephard probably noted the answer without a great deal of forethought, because it might possibly have later significance.

(viii) The Lighter

Introduction

The evidence bearing upon the lighter and its origin is complicated. Accordingly, it is useful to outline it in some detail.¹ Counsel for Mr. Morin alleged that the evidence demonstrates that officers improperly altered and ‘developed’ their evidence relating to the lighter, with the assistance of others, to meet issues raised by the defence. It is the position of the Durham Regional Police Association, shared by certain other parties at the Inquiry, that the evidence discloses no impropriety.

Finding a Lighter at the Scene

In January 1985, Detective Sergeant Holley was asked to search the body site with a metal detector, to look for a knife or any other weapon used by the perpetrator. Holley and another officer searched the area on January 3rd and January 4th. Holley’s notebook for this two-day search only reflects “Sunderland detail.” Sergeant Michalowsky was in attendance at the scene on both days, melting snow and ice.

Holley testified at the Inquiry that he began his search immediately north of where the body had been located at the edge of the treed area. The ground was covered with four to five inches of snow. He described the top layer as encrusted, enabling him to walk on the surface of the snow without going through to the ground. He and the other detective conducted their search in a crude grid-like formation. They laid yellow ropes on the ground from the pathway back to the bush area to the west. The lighter which Holley later found was not located on his first ‘pass down,’ but rather on his second or third pass down. Since the yellow ropes were approximately six feet apart, Holley estimated that he was 15 to 18 feet from the edge of the clearing.

Officer Holley had first found some keys behind the trailer. A short time later, the metal detector led him to the lighter, under the hard crust of the snow, northeast of where the body was found. Holley broke through this crust

¹ Counsel for Guy Paul Morin filed a chart, Exhibit 191C, entitled “The Development of the Evidence Concerning the Lighter.” This represented the final version of the chart, reflecting input from counsel for the Durham Regional Police Association.

with his pocket knife and began brushing snow away until he came across a disposable Bic-type lighter.

Holley picked up the lighter by its ends and examined it. He marked the spot where he had found it with a stick, put the lighter in a paper bag and brought it to Sergeant Michalowsky. He agreed in his testimony at the Inquiry that while it would have been more prudent to have left the lighter where it was for the identification officer to photograph it, he had not been given any instructions by Sergeant Michalowsky in this regard.

Unfortunately, his notes contained nothing about the lighter or its location. A supplementary report which Holley said he prepared about the search was lost prior to the second trial.

Holley's first will-say (the authorship of which was in issue, as noted below) prepared before the first trial, contained this passage:

We were shown an area where the remains of Christine Jessop had been located. Both Det. Griffin and myself were equipped with metal detectors. We conducted a search of the area. At this time there was approximately four to five inches of snow and ice on the surface of the ground ...

During the course of the search *we located a cigarette lighter, disposable type, approximately 20 feet north of where the remains of Christine Jessop were found.*" (Emphasis added.)

There was no reference to the condition of the lighter, or what he did with it.

Officer Holley testified at the Inquiry that he did not prepare this will-say and had no idea who did. I pause to note that while a will-say can be written by someone other than the prospective witness, this fact should be noted on the will-say, together with the name of the officer who prepared it. Officer Holley was not the only witness who disclaimed a will-say attributed to him. My later recommendations address this issue.

No one testified about the lighter at the first trial, nor was it raised as an issue, but it became a live issue during the stay motion prior to the second

trial.

Location of the Lighter and Hewett's Search

Constable Jeffrey Hewett was a fourth class constable on December 31, 1984. As such, he was in his probationary period of basic recruit training, assigned to his mentor, Constable (now Sergeant) Paul Nadeau. It was the position of the Crown at trial that Hewett dropped a lighter at the scene, which explained why Holley found one.

At approximately 3:30 on the afternoon of December 31, 1984, Hewett and Nadeau were directed to change out of their uniforms and into work clothes to be part of the search team at the body site. Hewett put on a pair of blue overalls and his large winter uniform parka. At 4:50 he arrived at the scene with Officer Nadeau. They left at 6:10 and booked off shift at 6:55 p.m. (This time acquires some significance.) Neither Nadeau nor Hewett took notes of their search other than to detail their arrival and departure from the scene. There is no reference to a lighter in the supplementary report prepared by Officer Hewett on January 1, 1985. Officer Nadeau made no mention in his notes, his supplementary report or his will-say for the first trial of any discussion with Hewett relating to a lighter.

Officers Holley, Hewett and Nadeau testified at the stay motion, second trial and at this Inquiry, in part about the origin of the lighter found at the scene.

At the stay motion, Hewett told the Court that by the time he and Nadeau attended the scene, the search was already in progress. They walked south on the tractor path and joined a line of officers who were an arm's length apart and began crawling on their hands and knees in a ground search. The location where Hewett and Nadeau searched was relevant because the suggestion was that Hewett's lighter fell out of the breast pocket of his overalls at the body site.

Hewett and Nadeau originally both testified that they searched in roughly the same place, west of the body site. That place, however, was not where Officer Holley indicated that he had found the lighter, according to the diagram provided to him during his initial testimony at the stay motion and according to the contents of 'his' first will-say.

Between the stay motion and the second trial, Detective Hewett's evidence differed somewhat in his description of the area in which he searched. He explained that he had some problems specifically recalling and describing the area when he first testified at the motion. He maintained that he was confused about directions, that he had only been to the site once, and that he had been affected by the scene. He testified that all of these factors contributed to his inability to remember every detail about the location of the search when he was questioned at the stay motion, and he was confused by the questions asked of him by defence counsel during the trial.

Officer Nadeau's evidence also changed after the stay motion. Both Nadeau and Hewett's evidence relating to where they had searched became more closely aligned to the area in which Holley found the lighter. At the second trial, both claimed that they had started at the tractor path, north of the body site, going south-west in an arc. Hewett testified that the prior testimony relating to directions was simply human error on the parts of both himself and Nadeau. Both said at the second trial that they were confused by the diagram of the area provided to them during testimony. Despite vigorous cross-examination by counsel for Mr. Morin at the Inquiry, both officers maintained there was no conspiracy or suggestive briefing by Crown counsel, but rather that the diagram they had utilized was confusing.

Holley's recollection of the lighter's location moved from "20 feet north of where the remains were found" (assuming that his first will-say had anything to do with him) to 25 to 30 feet north and slightly to the east of the body site (at the stay motion) to approximately 30 feet north and slightly east of the body site (in a second will-say requested by the Crown), and this was his evidence at the second trial and at this Inquiry. Holley attributed this variation, in part, to the fact that he did not write his first will-say.

Losing the Lighter: Hewett and Nadeau

Officer Hewett spent approximately 45 minutes searching. Officer Nadeau assisted in moving Christine Jessop's body into the hearse. Neither found anything at the scene. They left at 6:10 p.m. and drove back to the station.

Both Hewett and Nadeau were emphatic that Hewett did not smoke at the body site. Hewett commonly smoked in the car while they were out on patrol. Nadeau said it was possible that Hewett smoked a cigarette in the

vehicle but was unable to recollect. Hewett claimed that he had not smoked on the way to the body site, at the body site, or on the way back. He testified that before he left for the body site his lighter had been in the right breast pocket of his overalls. When he returned to 17 Division after the search, he noted that his lighter was missing.

Officer Hewett prepared no will-say for the first trial. On April 20, 1990, in his will-say statement prepared at the request of Sergeant Chapman, he described losing his lighter out of the right breast pocket of his overalls during the search while he was crawling. He made no mention of learning that somebody had found his lighter. His will-say indicates that he assisted in the search of the area directly west of where the body was located.

On May 15, 1990, when Hewett was interviewed by the OPP in connection with Michalowsky, he stated that he had noticed that his lighter was missing when he returned to the station and had reported the loss to someone in the identification branch, but did not recall who it was. When asked at the stay motion if he reported it to someone, he answered: "I don't recall the name. A police person. ... And that's the extent of it." He claimed that he filed no report mentioning his lost lighter because he did not know that he had lost it at the scene. At the second trial, Officer Hewett remembered that he told Officer Nadeau when he discovered that his lighter was missing. When asked what further action he took, he said that he mentioned it "to another officer."

During this Inquiry, Officer Hewett provided further information. He testified that he appreciated at that time that the loss of his lighter, its description and the area in which he may have searched, might be an important piece of information. He felt that if he had lost a personal item at a crime scene, he should notify someone of the potential contamination. (He added that he never got his lighter back.)

At one point, Officer Hewett testified in the trial proceedings that he did not know that a lighter was subsequently found at the crime scene by Officer Holley. This was contrary to the information he provided earlier to the OPP in May 1990, when he said that someone had told him that Peter Holley had found his lighter. He was unable to explain this discrepancy.

As I earlier noted, Officer Nadeau's original notes for December 31, 1984, his will-say for the first trial and his supplementary report dated January

1, 1985, do not refer to any information about the lighter or any conversation relating to it.

On July 5, 1990, Nadeau testified at the stay motion. At that time he was cross-examined by Mr. Pinkofsky:

Q. All right, sir. Was there any other topics you heard around concerning items people normally associate with cigarette smoking, such as books of matches, or cigarette packs, or lighters, or anything like that?

A. Well, I heard about Officer Hewett losing his lighter and I can't recall, he *must have* told me sometime afterwards when he discovered the loss, *but I can't recall him saying that. It's possible that he did; most likely that he did.*

Q. You have no memory of him ever saying that to you?

A. I don't have a recollection of it, but in the back of my mind, I *almost have a feeling* that he did or he must have.

Q. Why do you have that feeling, sir?

A. Well I was his training officer and I'm sure that he would have shared that information with me enquiring as to what he should do concerning the loss of that. (Emphasis added.)

On re-examination by the Crown, the following exchange took place:

Q. Constable Nadeau, if Constable Hewett had, as you say you feel in the back of your mind, reported that to you, that he lost his lighter, you would have told him to report that to the Identification Branch personnel?

A. Yes. I believe that is very *possibly* the way it occurred because I would have known and I did know at the time that that would have been the procedure, at least to notify someone to make everyone aware that this item had been lost at the scene. (Emphasis added.)

Following that evidence, Officer Nadeau prepared a second will-say. This document includes the following information:

I cleared the body site at approximately 18:00 hours that evening. And after having returned to 17 Division in Oshawa, my trainee at that time, *Constable Jeff Hewett, informed me that he'd lost his cigarette lighter at the search scene. I instructed him to notify the identification branch of this fact immediately.* (Emphasis added.)

It is interesting to note the evolution of Officer Nadeau's memory in this regard. There is no information in this will-say that he attended at the identification branch with Hewett, nor is there any information relating to a conversation Hewett had with the identification officer. By the time he testified at the second trial, however, he stated:

I recall Constable Hewett, who was my trainee, disclosed something to me. As a result of that disclosure, [that he had lost his lighter at the scene] I gave him some information and *together we walked to the identification office* which was in the same building where Constable Hewett had a conversation with someone else. (Emphasis added.)

During the Inquiry, Nadeau provided very detailed testimony. He said that Hewett approached him after they returned from the station. He said that Hewett appeared very, very nervous while they were standing in the hallway. He was pacing, his face was getting very red and he looked down at the ground. He appeared to Nadeau to be very, very upset about something and disclosed to him that he thought he had lost his lighter at the crime scene. This conversation took place in a hallway near the staff sergeant's office. Nadeau further testified that he now recalled that Hewett was very concerned and expressed the hope that he would not lose his job over this. Nadeau responded by telling Hewett that he would accompany him to the identification office so that it could be documented in case someone found a lighter. He added that he recognized this was a very serious issue, important enough to have documentation surrounding it and to make Identification aware of it. Nevertheless, neither Detective Hewett nor Officer Nadeau prepared any contemporaneous notes or reports documenting the loss of the lighter or this subsequent conversation. Nor was either officer able to testify to which identification officer they provided this information.

According to Michalowsky's evidence at the stay motion, he and Robinet were the only identification officers on duty; if Nadeau and Hewett had spoken with someone at the lab, it must have been one of these two officers. Neither of them had any recollection of such a conversation. In fact, Officers Robinet and Michalowsky were not back at the lab until 7:20 that New Year's Eve. Detective Hewett booked off shift at 6:55 p.m.

Susan MacLean's notes of April 10, 1990 reflect that Hewett told her that he had told "Mike" (Michalowsky) about losing his lighter. During the Inquiry, Hewett agreed that, considering the timing, he could not have told Sergeant Michalowsky about this. Ms. MacLean could not recall whether Hewett specifically told her that he had spoken to Michalowsky or she had assumed it was Michalowsky. Hewett had no recollection in this regard.

When Officer Nadeau was asked by Commission counsel what had transpired to improve his memory, he claimed that the subject matter began to

trigger certain memories in my mind, and the more I thought about it, the more something about a cigarette lighter became clearer to me.

.....

I endeavoured very, very deeply to recall it at the time, but that I could not recall the specifics of it, and I went through a series of scenarios; had it been brought to my attention, it might have been. I would have used this procedure. Well, that is exactly the procedure that I did use, so there were certain memories that were coming back to me, but nothing that I could turn around to the court and clearly remember because it was not a clear memory.

Officer Nadeau was emphatic that the 'triggering effect' of his memory was not induced or assisted by group meetings with other officers and Crown attorneys. His evidence before the Commission was that it came about on his own.

Officer Hewett's memory also evolved. For example, when he provided testimony at first instance, he was unable to recall the colour of the lighter. During a later proceeding he described it as yellow.

The Condition and Disposition of the Lighter: Holley

As earlier noted, Officer Holley's notes did not refer to the lighter found. 'His' first will-say describes the lighter only as a "disposable type lighter." There was no reference to the condition of the lighter. Ms. MacLean's notes of April 10, 1990 reflect that Holley told her he found the lighter under the snow and turned it over to Michalowsky, who told him that it belonged to an officer who had been at the scene. In an April 24, 1990 supplementary report, he added that the lighter did not appear to have been there long and that it was under the snow, on top of the frozen ground. At the stay motion, he testified that the lighter appeared to have been dropped recently. He then provided an additional will-say which described the lighter as a "Bic-type disposable lighter." At the second trial, he swore that the lighter was "fairly new, with no rust on it, it could have come out of the store." At the Inquiry, he said it was "brand new" and appeared to be "just out of the store." Officer Holley put considerable emphasis on the fact that the lighter must have been dropped fairly recently as "it was not quite stuck into the ground." This was one of his foremost considerations in coming to the conclusion that the lighter was newly disposed of at the site. (Interestingly, it appears clear from the photographs that Christine Jessop's button, also found at the scene, was sitting loosely on top of the ground.)

During the Inquiry, Officer Holley testified that he did not believe, even at the time he found the lighter and before giving it to Sergeant Michalowsky, that it belonged to the killer:

I felt at the time it was too good to be true because the lighter - it was just too new. I just - I didn't think it would be. But for whatever reason, that's what I thought at the time, it's just too good to be true.

Sergeant Michalowsky, when questioned by the OPP, stated that he knew nothing about a cigarette lighter. He did not recall Officer Holley giving anything to him on January 3 or 4, 1985. He had no notes reflecting such a discovery, nor did he recollect any conversation with officers stating that they had lost a lighter. Officer Holley, when he testified at the Inquiry, said that he would not place a great deal of faith in the word of Sergeant Michalowsky.

An Alleged Conversation between Hewett and Holley

Officer Hewett testified at the Inquiry that, in April 1990, while using the photocopier at the station, Holley came up to him and asked if he had ever gotten his lighter back. When Hewett told him that he had not, Holley smirked. Officer Hewett testified that he found it curious that Holley was discussing this matter some five years after the event, but he never pursued it.

This is in conflict with the evidence of Officer Holley. He emphatically denied, both at the stay motion on July 4, 1990, when asked about this conversation (some three months after it allegedly took place) and at the Inquiry, that he had ever spoken with Hewett about this matter.

Hewett, Holley and Nadeau Meet with Crown Attorneys

On Friday, October 26, 1990, a meeting was held at 18 Division in one of the classrooms commonly used by recruits in training. Those attending included Officers Nadeau, Fitzpatrick, Shephard, Cameron, Hudson, Holtorf, Hewett, Wooten, Hammond, Harmer, Kapuscinski, Bradley, Myers, Brown, Naccaratto, Pursey and Crown attorneys MacGuigan, Smith, and MacLean. There were discussions regarding the crime scene and photographs were examined. A map of the body site area was also reviewed at the time.

The event was described by Officer Nadeau as a group meeting where everyone discussed his recollection in one sitting. Nadeau said that his memory of this meeting was vague; however, he heard the evidence of other officers, listened to them discuss matters and saw them demonstrate the location of evidence on maps. He maintained, however, that none of this affected his memory or recollection.

Police notebooks record a meeting in London on December 8, 1991 from 7:00 p.m. to 9:00 p.m., attended by Ms. MacLean, Mr. Smith, Mr. McGuigan, Detective Fitzpatrick, Sergeant Chapman, Sergeant Brown, and Officers Hewett, Nadeau and Holtorf. This was a preparatory meeting prior to their December 9 to 11, 1991 testimony. While Ms. MacLean did not believe that the witnesses were interviewed jointly at this time, they may have been shown the diagram/map as a group and told that they would be asked to point out where they searched and, if they found evidence, where they found it. They were then interviewed separately.

Mr. Smith stated that there had been a lot of confusion about the locations of the officers' searches which may have been resolved at that meeting. He said that the Crown attorneys were careful to avoid the problem that arose at the stay motion where the officers were "all over the map" in their search. They made a point of having the officers orient themselves to the diagram and to point out where they had searched. Mr. Smith said they made it clear to the officers that it was important to be specific on this issue because they were trying to demonstrate that the search was systematic. Mr. Smith was unable to say if Nadeau and Hewett were putting themselves where Holley said he found a lighter; he believed, however, that it would be negligent for counsel to call a witness and put a map to them without first allowing them an opportunity to orient themselves to that map.

During the Inquiry, Officer Nadeau conceded that

[p]eople can be influenced very easily by what they hear from other people; that's how gossip gets started. You know — one thing leads to another, which leads to another and I think if you're one on one with an individual witness, and you are talking to one witness as opposed to a group of witnesses, say this room, for instance, then you are getting a more honest — well, perhaps not more honest, but a clearer picture of what they recall.

And they're not about to adopt somebody else's memory and begin to nurture that as being their own which human nature sometimes do. We sometimes hear things that other people have said, and believe that we actually did see it that way, and you see it in even the most minor of investigations at the scene of an accident where one person may give you an account of how the accident happened.

The other individual says: Oh yeah; it would have happened that way, and they're just going along with the flow of things, and collecting little pieces that they later give, and it didn't come from them, it came from somebody else.

He agreed that such meetings could conceivably taint the officers' recollections. Nevertheless, when asked whether it was possible that it could have assisted his own evolving recollection, he maintained that all

recollections were his own.

Findings

Nadeau, Holley and Hewett were vigorously cross-examined by counsel for Guy Paul Morin at this Inquiry. He prefaced his cross-examination of Officer Hewett as follows:

Mr. Hewett I want to start off by explaining to you the direction in which my cross-examination of you is going to go so that it's clear to you, and for that matter everybody else, but particularly it's clear to you. And essentially, my questioning of you sir is going to fall into three parts. The first part is going to suggest to you that you were recruited as a result of Holley having referred to finding a lighter at the scene in his original willsay.

You were recruited to be the person who dropped the lighter so that that accounts for the lighter that he found, as opposed to having belonged to perhaps the killer of Christine Jessop. And that you were also recruited to deal with the problem presented by Michalowsky who was unable to produce the lighter by the time the second trial and indeed, when he gave his evidence, denied knowledge of it ever having existed. He denied he was ever given it by Holley in the first place.

.....

The second area I'm going to question you about sir and suggest to you is that in order to buttress your position that it was your lighter found at the scene, it became necessary to come up with someone else who would support you by saying that you had indeed dropped your lighter at the scene and told someone right back in 1985. And also, you helped provide evidence to try and explain why this lighter would have disappeared. That's the second area, understand that, sir?

.....

The third area, sir, is that in order for the lighter that

Holley found at the scene to be yours you had to have searched the area where Holley said he'd found the lighter, otherwise you could hardly have been the one who dropped it where he said he'd found it; you understand?

.....

And I'm going to suggest to you sir, that you and Nadeau got into a horrible mess at the beginning because you both identified an area which was not where Holley said he'd found it, and so you had to do a quick adjustment by the time of the second trial and change your evidence so that you now had you and Nadeau searching an area where Holley had said, back in 1985 he'd found the lighter, do you follow?

On the totality of the evidence, I am unable to find that a conspiracy existed to recruit witnesses to give false evidence on the lighter. Having said that, I must add that the quality of the evidence before the Inquiry bearing upon the lighter, its location, condition, and disposition is quite unsatisfactory.

In my view, this lighter probably had nothing to do with the identity of the perpetrator. Indeed, Hewett may have been responsible for it. We do not know. Why do we not know? — because no one documented anything in connection with the lighter in a contemporaneous note or supplementary report. If an item was worth picking up and retaining, I would have thought it self-evident that it was worth recording. The absence of any contemporaneous record of the lighter's location, condition or ownership *before* Guy Paul Morin was arrested or became a suspect invites concern that details that are later supplied are tailored to refute the position of the defence.

I am fully cognizant of the fact that memories are not frozen in time. Additional details can be recollected some time after the events, particularly where the details may not have been regarded as terribly important initially, but acquired significance due to very precise, exacting questions put by a defence counsel who is not daunted by complexity or detail. Put succinctly, I have made generous allowance for this human phenomenon in evaluating the evidence at this Inquiry.

The 'lighter' evidence is but one manifestation of an all too common event during the Morin proceedings. As the defence explores perceived

weaknesses in the Crown's case, officers are able to recollect, sometimes with amazing precision, the detail that rebuts the defence and fortifies the Crown's position. (Though witnesses may recall additional detail over time, it is more common that recollections are dulled through the passage of time.) That is why contemporaneous notes and transcripts of prior proceedings assist recollection and enable witnesses to, at least, preserve memories which they once had.

On the 'lighter' evidence in particular, I have no doubt that each of the witnesses was affected, to varying degrees, by the positions taken by others: As a result, I cannot place reliance upon the accuracy of their recollections before me, even acknowledging, as I say, that their evidence may have involved a relatively insignificant matter in the scheme of things. I do not find, however, that their evidence was knowingly false.

(ix) The Cigarette Butt(s)

Background

On December 10, 1985, prior to the commencement of the first trial, a meeting was held between John Scott, Mary Bartley for the defence, Sergeant Michalowsky and Officer Robinet at the identification office in Durham for the purpose of disclosing photographs. While Sergeant Michalowsky was displaying photographs, he came to one depicting a partially smoked cigarette. Michalowsky made a joking comment to Ms. Bartley, "See, we even find our own officers' cigarette butts." This is curious as, at this time, there had apparently not yet been a Durham officer who claimed to have deposited a cigarette butt at the body site; neither Officer Robinet nor Sergeant Michalowsky had spoken with Officer Cameron about a cigarette butt he had left at the site. Shortly thereafter, Mr. Ruby's office requested more information on the cigarette butt that had been found at the scene.

On December 27, 1985, there was a meeting between John Scott, Susan MacLean and Durham police officers at 18 Division. During this meeting, Mr. Scott reportedly was upset about a missing cigarette butt and instructed Michalowsky, in no uncertain terms, to locate it. Officer Robinet was unable to recall whether he had any discussion with Sergeant Michalowsky or had been made aware of the fact that the cigarette butt could not be located prior to this meeting. Scott asked the assembly of officers

whether the cigarette butt belonged to any of them. No one claimed it. Michalowsky later represented that he had found the butt under the flap of an exhibit box. (This meeting is elaborated upon below.)

During Mr. Morin's first trial, Sergeant Michalowsky testified that a member of the search team, whose name he did not record, found a cigarette butt in the vicinity of the body. Michalowsky produced it in evidence and described it as a recently dropped butt. He conceded during cross-examination that he was not in a position to state how long the butt had been in the vicinity of the body site.

Sergeant Michalowsky further testified that he had not turned the butt over to the Centre of Forensic Sciences on January 11, 1985, contrary to his evidence at the preliminary inquiry. He explained that, following the preliminary inquiry, he had checked his forms and submissions and realized that he had erred. Thus, despite the fact that a saliva test could have been done on the cigarette butt, it had not been sent for this analysis.

I earlier noted that two photographs of a 'cigarette butt' were introduced during the first trial. As discussed, at the first trial, Sergeant Michalowsky testified that these were photographs of the same object taken at the same place. One photograph showed what appeared to be a cigarette butt in long grass. He testified that the second photograph depicted the same cigarette butt after the grass had been pulled back.

Michalowsky subsequently testified at the stay motion that one of the photographs was not a cigarette butt but was, instead, "a piece of [birch] bark that looked like a cigarette butt." He said that he had been advised by the Ontario Provincial Police in his May 29, 1990 interview that one of the photographs allegedly depicted a piece of birch bark. Before this interview Michalowsky had assumed it was a cigarette butt and had testified accordingly at the first trial. Officer Holtorf testified on the stay motion that he had found this birch bark during the body site search of December 31, 1984. The details of Officer Holtorf's revelation relating to the 'birch bark' are discussed below.

(x) Birch Bark v. Cigarette Butt

Holtorf and the Birch Bark

At the stay motion and at the second trial, much testimony surfaced surrounding the discovery of the cigarette butt (or butts) during the search on December 31, 1984. As stated earlier, during the first trial two photographs were tendered by Michalowsky purportedly representing one cigarette butt. The investigation following the first trial disclosed that these pictures depicted different items photographed at different times. In addition, it was determined that the cigarette butt tendered could not have belonged to Officer Cameron. (This will be more fully discussed later in this chapter.)

Officer Holtorf was called at the stay motion in 1990. He provided evidence that one of the photographs that had been tendered during Morin's first trial, purportedly of a cigarette butt, was not a cigarette butt at all, but rather a piece of birch bark that he had found during his search of the body site.

Officer Holtorf testified that he arrived at the scene in order to assist with the search at 4:20 p.m. Dusk was beginning to set in. He noted that officers were searching in various locations. He began searching approximately five to six metres north of the roped-off area and proceeded in a westbound direction. He testified that, during the search, he found two items: a credit card receipt and a piece of birch bark that he initially believed was a cigarette.

The credit card receipt (subsequently determined to be irrelevant to the crime) was found one to two metres off the tractor path, five to six metres north of the roped-off area.

Shortly after Holtorf found this receipt, he noticed a cylindrical object approximately one-half inch long, one-quarter of an inch in diameter. It was deep down in the grass, approximately two to three metres further in from where he found the credit card receipt. It appeared to be a cigarette butt. Sergeant Michalowsky came over, bent down and looked at the object. He asked Officer Holtorf to point to it while he took one photograph of the object in the tall grass. After taking the picture, he picked it up with a set of tweezers. Holtorf testified that upon doing so, Sergeant Michalowsky

observed that this was merely a hollow tube of white material that appeared to be rolled-up birch bark. Sergeant Michalowsky seemed ‘a little bit upset’; he held out the piece of birch bark to the constable, gave him a ‘nasty little glare’ and walked off. Officer Holtorf believed that Sergeant Michalowsky discarded it along the roadway.

Officer Holtorf did not reflect this finding of birch bark in his notes, nor in his supplementary report, nor in the first will-say he prepared because he did not think it had any importance.

When Sergeant Michalowsky testified, he had no recollection of photographing a piece of birch bark, nor did he recall picking one up with tweezers. He said that he did not even have a pair of tweezers with him. On the stay motion, he said that he did not pick up a piece of birch bark and toss it away, and that he believed he had photographed a cigarette butt.

Analysis of The Object Depicted in the Photograph

The photograph of what Holtorf since claimed to be ‘birch bark’ was entered at the first trial as one of two photographs of a cigarette. The photographs are dissimilar in that the first is a picture of a person pointing to an object in long grass (which Michalowsky represented as the first in sequence) and the second is a picture of an object with no grass surrounding it (which Michalowsky represented as taken after the long grass depicted in the first picture had been pulled away.)

As the OPP became involved in the investigation into Sergeant Michalowsky, the original colour contact sheets, from which the photographs were made, were analyzed. These contacts showed that Sergeant Michalowsky’s second picture of the ‘cigarette butt,’ with no long grass surrounding it, was taken *before* the picture of the person pointing to a ‘cigarette butt’ in long grass. Michalowsky’s explanation was, therefore, impossible.

What then was to be inferred from two photographs of a ‘cigarette butt’ taken in two different locations? Were two butts found? There were two expert examinations of the photograph with the finger (Holtorf’s) pointing to it to determine whether or not it was, indeed, a photograph of a cigarette or of birch bark or neither.

The first examination was performed on August 22, 1990 by William Bruce, an expert in remote sensing, analysis, enhancement and interpretation of photographs. He testified at the stay motion:

Based on the same interpretation criteria as were applied to the photograph with No. 4 in it [that is the photograph of an actual cigarette butt], it is evident that the feature in the other photograph [the photograph in question as to whether it was birch bark or a cigarette] *is a man-made feature* by the same criteria.... I am looking at the very sharp-edged feature, the bright white colouring of the feature, the size and shape of the feature as being consistent with certainly an interpretation as a man-made object. That interpretation is consistent with the object being something of the size and shape of a cigarette butt or a piece of chalk, or a white pencil, something of that dimension.

.....

Compared with the size of the hand and the finger [which in this case we learned was the finger of Constable Holtorf] and compared with the grass leaves surrounding it, we can come to what I'm confident is quite an accurate assessment of the relative size of the object.... I would expect to see the birch bark in an irregular form.

.....

It is unlikely that the bark would come off in as consistent and as uniform a piece as one would expect say in a natural object or the object we see in this photograph. It is unlikely as well that the natural birch bark would take a cylindrical form that would be particularly precise in terms of the edges being parallel to one another. (Emphasis added.)

As digital computer enhancement was not effective, Mr. Bruce relied on visual interpretation of the imagery under high magnification involving an analysis of tone, texture, pattern shape and association. The end of the object was somewhat obscured by leaf overlay. In his opinion, there was a possibility, albeit a low possibility, that the object was not man-made. Mr. Bruce concluded that the object was more likely a cigarette butt, but it could

be a piece of birch bark. He was able to determine, however, that the vegetation in the two photographs demonstrated that the photographs were taken at different locations.

An F.B.I. expert examined the same photograph and rendered a report dated May 6, 1991. He concluded that the identity of the object depicted could not be determined.

In the midst of the second trial, the Crown made the following admission relating to the two photographs:

The cigarette butt introduced at the first trial as being the cigarette butt found at the body site on December 31st, 1984 is not the cigarette butt that was found and photographed at the body site on December 31st, 1984, Photograph 39 at this trial.

The second fact that the Crown is prepared to admit is that Photographic Exhibit 39 [object in short grass] in the first trial, was photographed before Photograph 36 [object in long grass]. This has been established by an analysis of the negative role.

The third point that the Crown is prepared to admit as a fact is that the cigarette butt pictured as 39 is lost or missing.

Holtorf's Handwritten Statement

In approximately March 1990, Officer Holtorf attended a meeting at which he was asked to provide information relating to his search activities in anticipation of the pending stay motion and upcoming trial. He testified that he was unable to find his old notebooks, and had to prepare a document without the assistance of his notes while the meeting was in progress. His notebooks were kept in the basement of his home. At the time, he said, officers were not required to turn notebooks into the station and they were able to retain them themselves. He also said that "[i]t was up to us to destroy them when they were no longer required, as long as the time was past the retention date." That policy was subsequently changed by the Durham Regional Police Service.

The document that Officer Holtorf prepared at the meeting was

extremely detailed and not written in will-say form, but rather in the format of a notebook entry. At the time of making these notes, he was alive to the issue that there was a problem with the conduct of Michalowsky. Holtorf's information was very detailed in terms of time and location considering he did not have use of his notes. He recounted in these 'notes' for the first time in writing the fact that he located what appeared to be a cigarette butt, which subsequently turned out to be a piece of birch bark. He made no mention in these notes of the credit card receipt which he stated he found. He stated that he found this piece of birch bark at 4:58 p.m. Officer Holtorf conceded that this was remarkable specificity considering he had no notes documenting this find and the search had occurred some five years earlier:

Q. It was a pretty good guess some five years later, though.

A. Well, I think that seems to be too much of a coincidence to hit it that close. I don't know where it came from.

Again, coincidentally, 4:58 p.m. matches the exact time that Holtorf actually did locate the credit card receipt.

He testified that he had spoken with Officer Fox approximately a day earlier when he had been notified that there was a meeting and he was unable to find his notebooks. Despite the fact that he had already prepared a will-say in this matter in 1985, and the fact that he was not told prior to the meeting that another will-say was required, he explained that he gained Officer Fox's assistance for specific details relating to some of the times. But, as noted during the Inquiry, Officer Fox was the officer stationed at the roadway and would have had no way of providing him this 4:58 time. When this proposition was put to him by Commission counsel, he conceded that there would have been no way he could have ascertained from this officer what time he actually found an exhibit.

Officer Holtorf then testified that he had no real knowledge of timing but that he simply "approximated" the times which they did not come from anyone else.

In March 1990, when he wrote these 'new notes,' Holtorf had heard some talk that there was a problem with a cigarette butt. He testified that by this time he knew that Michalowsky had lost an exhibit or lost a cigarette butt,

but did not know specifics. Yet, on April 12, 1990, when he was interviewed by the OPP in the Michalowsky investigation, he claimed this was the first time he realized there was an issue about the birch bark. He was shown two photographs, one of which he was able to identify as his finger pointing to the birch bark due to a scar that he had on his knuckle area. Approximately one year later, on March 4, 1991, the information that Holtorf provided was incorporated into a will-say statement.

Findings

Two photographs were tendered as evidence by the prosecution at the first trial. They were represented by Sergeant Michalowsky to be photographs of the same cigarette butt found at the scene. This was incorrect. The Crown was unaware that this was untrue and acted in good faith in tendering these photographs.

After the first trial it became clear that Sergeant Michalowsky's explanation could not be true. The photographs were not taken in the sequence described by him; nor were they taken in the same location. This raises an interesting issue — what was depicted in the photograph with a finger pointing to it?

The finger was apparently Holtorf's; however, this did not resolve the issue. At the second trial, Holtorf swore that the object was a piece of 'birch bark.'

This explanation raised its own problems. Nothing about finding 'birch bark' is recorded in Holtorf's notes, supplementary reports or in his first will-say. Frankly, this would not be surprising, since the finding of birch bark would be an insignificant event. More problematic is why birch bark would be photographed, with Holtorf pointing to it, had it only been birch bark and had Michalowsky discarded it with disdain. Holtorf says that it was only identified as birch bark after the photograph was taken. This would mean that Michalowsky fully preserved the moment on film before ascertaining whether there was anything of significance found. The circumstances under which Holtorf came to document his find raise additional questions, the most obvious being his explanation as to how he came to identify the time of the finding with such precision. The forensic evidence does not assist me in the resolution of this issue. Michalowsky's earlier evidence cannot be relied upon in any way.

The state of the evidence does not permit me to accept or reject Officer Holtorf's evidence. Having said that, the quality of the evidence before the Inquiry is quite unsatisfactory.

Like the 'lighter' evidence, earlier addressed, this object found at the body site probably had nothing to do with the identity of the perpetrator. Again, we do not know; we do not know because no one documented anything in connection with an object which was located and photographed. The absence of any contemporaneous record about this object *before* Guy Paul Morin was arrested or became a suspect and *before* the identity of the object became an issue, invites concern that details that are later supplied about the object are tailored to refute the position of the defence.

It would, of course, be interesting to know just what was in the photograph. However, since two experts were unable to resolve the issue, it is clear that the Commission cannot do so either, and the matter must, therefore, remain unresolved.

(xi) Milk Carton

Constable Joseph Kapuscinski was an officer with the Durham Regional Police Service for 25 years when he attended the body site of Christine Jessop in December 1994 to help in the search. He was instructed by Sergeant Scott to go to a certain location west of the pathway and search the ground. When he arrived at 5:22, it was already getting dark. With the assistance of his own flashlight and the floodlights in the area, he searched an area south-east of the roped-off area on his hands and knees. He did not find anything.

His next involvement in the Jessop investigation was on March 15, 1990, when he learned that he was to attend a meeting with the Crown attorneys. He asked Sergeant Michalowsky where the meeting was taking place. As Kapuscinski stated on June 22, 1991 during the pre-trial motions, Sergeant Michalowsky

[a]t first he just informed me that he had my name down in his notebook and that it was highlighted. ... And I just looked at him and didn't know what he was referring to and he indicated that I had found something at the scene. ... He indicated a milk carton.

Officer Kapuscinski told the Inquiry that he was shocked and surprised as he had no recall of finding anything at the scene. He went back to his desk, rechecked his notebook to reassure himself, and told Sergeant Michalowsky that he had not found anything. Sergeant Michalowsky responded that he should not worry about it and that “it would work its way out.”

Kapuscinski attended the meeting later that day. He spoke with Ms. MacLean and told her what had transpired before in his conversation with Sergeant Michalowsky. She told him that she would look into it.

Michalowsky’s evidence before the jury was that he believed one of the items seized on December 31st was a milk carton, but he could not recollect who had found it. He indicated that he had in his notes that it had been found by Kapuscinski, but he recalled no conversation with Officer Kapuscinski, contrary to the latter’s assertion.

When Michalowsky was asked about this during the stay motion, his explanation as to why Kapuscinski’s name appeared next to the milk carton entry was that he had tried, where he could, to put the name of the officer who had either found or pointed out the exhibit to him. He testified that it was Kapuscinski who had either found or pointed out the carton to him. As stated above, Kapuscinski emphatically disagreed with that proposition.

Findings

I unequivocally accept Officer Kapuscinski’s evidence. He found no milk carton. Michalowsky’s second notebook was not an accurate account of events in this regard.

(xii) Hudson and the Cigarette Package

Sergeant Kenneth Hudson was called by the defence at the stay motion. He arrived on the scene sometime after 4:00 p.m. He had been part of the hands and knees search at the body site.

Sergeant Hudson testified that during the search, Sergeant Michalowsky was called over either by himself or another officer searching nearby. He testified that he saw “some kind of an object ... off to one side” from where he was searching. At the time, he thought it was a faded package

or carton. He testified that it was hard to see exactly what the package was because it was in tall grass and it was getting dark.

In May 1990, Sergeant Hudson was interviewed by the OPP in relation to their investigation into Sergeant Michalowsky. His discussion with the OPP officers was reduced to writing, and a review of the notes indicates that this was done while he was speaking. This is what the notes say, in part:

- Found a cigarette package, faded.
- Someone else found a pop can.
- Others found bits & pieces that Michalowsky put in bags.
- Attended pre-trial meeting with Sue MacLean for the upcoming trial. That was the only meeting he attended.
- Cigarette package was given to Michalowsky and put in a plastic bag.

Prior to his meeting with the OPP he had never indicated in any notes, supplementary reports or will-say statements, that he found anything at the body site, let alone a cigarette package. He further agreed that if he had found a cigarette package at the scene, it was important information relative to the discovery and prosecution of the murderer of Christine Jessop. He stated that he had not ever told a Crown attorney or any investigators prior to May 1990 that he had found a cigarette package

because [he] wasn't aware of it ... Through the discussions with the OPP, I think *we* arrived at a scenario that the thing I saw resembled what looked like a cigarette package, and I sort of concluded in my mind that might have been what it was. So that's the statement I took down. (Emphasis added.)

Sergeant Hudson told the Inquiry that when interviewing a potential witness it is important to obtain the witness' actual recollection and to guard against hearsay or speculation. He stated that if a witness was speculating or hypothesizing about something, it would be desirable to so indicate to the interviewing officer. He conceded during the Inquiry, however, that he did not present his evidence to the OPP or recall the events with the same degree of accuracy and care that he would desire from a civilian witness that he might

interview. He claimed that he was led into speculative areas by the OPP. According to Sergeant Hudson, he made assumptions and speculated about a lot of things because he was not clear on a lot of points and the OPP officers “seemed to want some clarity.”

On June 13, 1990, Sergeant Hudson was again called in to provide a further statement to the OPP. In the interim, one of the OPP officers discovered that Sergeant Hudson’s supplementary report of the search documented that he had found nothing at the scene. Sergeant Hudson stated that this caused him no embarrassment or concern. During this interview a new statement was made, which Sergeant Hudson signed. In the notes by the OPP of their June 13, 1990 interview with Hudson, he was recorded to have said this:

- Cannot recall anything about the cigarette package or pop can, not now sure whether he found the cigarette package or pop can or if others searching close to him found those and he saw this happening.

-Cannot definitely say now that it was a cigarette package, it might have been the milk carton.

- He has no notes of attending a meeting at 18 Division on December 27/85.

Hudson testified during the Inquiry that the OPP led him to believe that he was to speculate during both interviews. He therefore went forward during this interview into an area of speculation about a milk carton. Sergeant Hudson testified at the second trial about his evidence relating to the cigarette package “It was so long ago, I just – I think I was trying to be too helpful and I was too imaginative, possibly.” During the Inquiry he was asked:

Q. [Currie] But, sir, as an experienced professional officer with years on the force at that point with a history of interviewing witnesses, with a history of taking witness statements, did you think that speculation was truly as helpful to them [OPP] as recounting what you remembered and what you didn’t?

A. [Hudson] But they seemed to be encouraging me to do that, for whatever their reason was. I didn’t know what their purpose was and I wasn’t going to question their purpose. I was told to cooperate with them and

help them as best I could.

Q. So it was their fault?

A. I don't know, I'm not saying it was anybody's fault, I was just following their line of questioning and their demeanor. I wasn't trying to be indifferent, I was trying to be probably too cooperative, maybe or — I don't know.

Q. By too cooperative, you mean putting forward what you claimed to Ms. MacLean was your imaginings?

A. Well I left it up to them. They knew what they were looking for, and I assumed, I don't know. They were asking me things and I was telling them, and they draw their own conclusions, I would assume, with their experience, the same as I would if I thought it was speculation or it was nothing to do with what I was asking, I'd probably use a different ... or I'd mention it.

.....

Q. We just read your portion of the evidence where Mr. Pinkofsky clearly asked you 'Did you tell them you were speculating?' and you said, 'No, I did not.' Do you remember reading that?

A. Yes I do.

Q. Okay. Are you changing that evidence now?

A. No. I assumed if they thought I was speculating that they'd tell me.

It was not until Hudson provided testimony at the second trial that he mentioned that he was some distance (10 to 15 feet) away from the package.

When he was cross-examined on April 29, 1992 at the second trial by Mr. Pinkofsky, he stated that he believed that the answers he provided to the OPP officers in May 1990 were the best, most honest recollection of what he had found. He further stated that he adopted what was written by the OPP officers as an accurate rendering of what he had said.

When questioned at the Inquiry, he said that the OPP had been inaccurate in taking down what he had said in May 1990. He further stated that the report of the faded cigarette package was “what was concluded after talking with them.” He was emphatic at the Inquiry that he did not actually tell the OPP officers that he had found a cigarette package.

With reference to the statement in the OPP report that reads “[c]igarette package was given to Michalowsky and put in a plastic bag,” Sergeant Hudson indicated to the Commission that he did not give it to Michalowsky, nor did he put it in a bag: “I made an assumption he [Michalowsky] was in the area and he put it in the bag, that’s all.”

Hudson also testified at the Inquiry that he called Sergeant Michalowsky over two or three times during the search. On all occasions, he said, he was merely attempting to relay messages to him because someone else could not attract his attention.

During his evidence before the Inquiry, Sergeant Hudson testified:

Q. As you stand today, what’s your present belief of whether you found a cigarette package or a milk carton?

A. I didn’t find either one.

Findings

At best, on Sergeant Hudson’s own evidence, he was too imaginative and speculative in articulating what he found at the scene. At worst, his evidence excites the same kind of concerns reflected by me in connection with other aspects of the body site evidence discussed elsewhere in this chapter. I am unable to determine what, if anything, Hudson found. I do not accept or reject Hudson’s evidence. The quality of the evidence before this Inquiry bearing upon this issue is unsatisfactory.

Officer Cameron’s Attendance at Body Site

On December 31, 1984, Officer Cameron was on regular patrol duties when he received instructions to attend at the Fourth Concession of Brock Township to assist in the search. He arrived at the scene at 4:58 p.m. (That

time becomes important.) Officer Cameron recalled receiving no particular instructions when entering the site from the officer stationed at the roadway. He smoked a cigarette as he walked southward along the pathway. He could not recall precisely when he lit up, but was under the impression that the actual body site or crime scene was a considerable distance along the pathway from the Fourth Concession.

At first, as he proceeded southward on the tractor path, he was unable to see any activity. But 20 yards down the path, at the point where it curved, he was surprised to see ahead of him, on the east side of the path, the Durham identification van and a number of officers milling around it. He immediately extinguished his cigarette on the heel of his boot and threw the butt on the west side of the path. He did so, he told the Inquiry, first because he was in uniform, and smoking while in uniform was not permitted, second because he realized he had entered an area where he should not have been smoking regardless of his dress, and third he noted a senior officer ahead — three good reasons for disposing of his cigarette. He estimated that the area around the bend where he had butted his cigarette would have been 60 to 70 yards north of the roped-off area in which Christine Jessop's body had been found. At no time did he see, or subsequently learn, of anyone searching in the area in which he threw his cigarette butt. In addition, Sergeant Michalowsky's second notebook (discussed below) suggests that the cigarette butt was found 20 to 30 feet north of the roped-off area.

Officer Cameron assisted in the ground search. He was assigned by Sergeant Scott to participate in a search of an open area or meadow to the west side of the pathway for approximately 20 minutes until 5:20. He found nothing during his search. He was then called to assist in moving the remains of the body into the hearse. At 6:33 he escorted the hearse to the Coroner's Building in Toronto. Cameron's notebook of that day and his subsequent supplementary report do not reflect the fact that he butted his cigarette on the way into the search area. He stated that, at the time, it did not have relevance as it was not a significant event and, in any case, he should not have been smoking in those circumstances. *I accept his evidence in this regard.*

He had no further involvement in this case until December 27, 1985.

The December 27, 1985 Meeting

This meeting was held in an in-service classroom at 18 Division in

Whitby. Present were Mr. Scott, Ms. MacLean, Officers Fitzpatrick, Shephard, Cameron, Nadeau, Nechay, Bunce, Thompson, Wilson, Patton, Heaver, Keeler, Robinet, Tucker, Mills, Hudson, Scott, Michalowsky, Fox, and Inspector Brown. The meeting called by Mr. Scott for the purpose of reviewing the role of each officer at the scene, lasted approximately two hours. Each officer listened to the other officers tell the Crown attorneys how each participated at the crime site. Each officer shared with everyone what he had to say on the various issues. Officer Robinet said that it is not a normal occurrence that police officers, prior to testifying at a trial, get together in a group and proceed to hear the evidence of all the other police officers involved in the case. He told the Inquiry that he had never before attended any meeting like it. Ms. MacLean told the Inquiry that this was the only meeting she could recall with Durham Regional officers where evidence was discussed in a group setting.

Officer Cameron believed that his presence was required at this meeting to provide evidence relating to continuity, as he had escorted the remains to Toronto. He recollected that Mr. Scott, the Crown attorney, addressed individuals in the room and asked them, while sitting together in this room, to outline their involvement at the scene or elsewhere. Officer Cameron testified that he believed the meeting specifically related to evidence obtained at the crime scene. In the context of this conversation, Mr. Scott looked at Sergeant Michalowsky and asked him “Did you find the cigarette butt yet?” Sergeant Michalowsky answered that he had not. Mr. Scott then responded “Well, find the fucking thing,” or something to the effect that he wanted “to know whose fucking cigarette butt it is.” Mr. Scott’s demeanour was described as ‘exasperated’ by one of the officers who was in attendance. Scott then directed his attention away from Michalowsky and said to the group in the room, “Nobody here threw away a cigarette butt up there, did they?” This was the first time Officer Cameron had heard anything about a cigarette butt.

Officer Cameron testified that he said nothing at the meeting about throwing away a cigarette butt that day. During this meeting, he said, he did not even recall that he had actually thrown away a cigarette butt.

Officer Robinet, on the other hand, later testified that, at this meeting, Officer Cameron responded to John Scott’s outburst by stating “I think it’s mine.” Cameron was emphatic that he did not make this statement. None of the other police officers who were in attendance at this meeting recalled him

making such a statement. Ms. MacLean's contemporaneous notes for that meeting date report "don't know who threw cigarette butt down."

Findings

I will express my views as to the dangers of collective meetings to discuss substantive matters later in this section. However, I would like to think, in the absence of evidence to the contrary — which I find wanting — that it was the genuine desire of Mr. Scott and Ms. MacLean to learn as much as possible about the case and that it was not their intention to encourage prospective witnesses to change their stories.

Conversations between Cameron and Fitzpatrick

Approximately one week after the December 27th meeting, Officer Cameron received a telephone call from Detective Fitzpatrick. He told Officer Cameron that he was conducting a canvass of officers who had been at the scene to inquire whether or not they may have been smoking at or near the body side and whether or not they may have thrown away any cigarette butts. Officer Cameron was known to be a smoker. Fitzpatrick may or may not have specifically asked Cameron whether he had thrown a butt away. During this telephone call, Officer Cameron recalled and advised Detective Fitzpatrick that he had thrown away a cigarette along the tractor path. While Fitzpatrick testified that the butt was found approximately three or four feet to the side of the tractor path, he did not describe its distance from the Fourth Concession or the roped-off area. Officer Cameron was unsure of Fitzpatrick's precise words, but he recalled the conversation as one in which Fitzpatrick asked the questions and he answered them. He was unable to obtain any further information as to where this cigarette butt was found. Detective Fitzpatrick told Cameron that a fresh cigarette butt had been found and he asked Officer Cameron what brand of cigarettes he smoked. Cameron replied that he smoked Craven Menthol.

While Officer Cameron did not have a precise recollection of the conversation, he testified that he attempted to explain to Detective Fitzpatrick where he had thrown away his cigarette butt. He told Fitzpatrick that he threw away his butt just south of where Officer Fox was standing near the mouth of the tractor path. He stated that it was north of the actual crime scene. At no time did Detective Fitzpatrick specify precisely where the butt had been found or tell Cameron that the cigarette butt that was found was a long distance

away from where Fox was stationed. Fitzpatrick stated that Cameron would likely be asked about it at trial and would have to explain his actions to the Court. Officer Cameron's impression from the phone call was that it was implicit in the questions and in Fitzpatrick's reactions to his answers that they were talking about the same cigarette butt. Detective Fitzpatrick testified that he was under the impression that the cigarette butt "was found in the vicinity of the remains."

I find that Detective Fitzpatrick did not have a clear idea of exactly where the cigarette butt was found. It may well be that, in his opinion, this was of no importance since the butt appeared to be fresh. On the other hand, once it was picked up and tagged as a potential exhibit, it was incumbent on all concerned — and this included Fitzpatrick since he had been charged with making inquiries — to find out, insofar as that was possible, the precise location of the butt. This was an error in judgment caused by his view of the butt's unimportance. I do not find that he knew, after speaking to Cameron, that the butt found at the scene could not be Cameron's.

On January 12, 1986, the night before Cameron was to testify at the first trial, he went to Detective's Fitzpatrick's hotel room in London so that they could go together to a preparatory meeting for Cameron's evidence with the Crown attorneys. In Fitzpatrick's hotel room, Cameron was anxious to learn more about the cigarette butt and the location of its discovery in order to satisfy himself that it was, indeed, his butt. Cameron testified about this meeting:

Q. And were you able at that time to find out more information about cigarette butt?

A. No, I did not find out any more information about the cigarette butt, but I think, as a result of the conversation, it was reinforced for me further that Detective Fitzpatrick believed that the cigarette butt that had been found was my cigarette butt. That was what I believed. I felt that he — you know, I think that it's important to understand that in communicating between police constables and detectives who were investigating homicides that the constables typically don't put the questions to the detectives.

We answer the questions, and if you are perhaps guilty of some misconduct, in other words, if you've, as in

this instance, you've thrown a cigarette away where you shouldn't have, or something along these lines, and you attempt to deny your responsibility for that, it's not something that I would have done. I was prepared to accept responsibility for something I had done, but I wasn't convinced I had done it, I suppose is the best way to describe it, at least I wasn't convinced, because I didn't have enough information to completely convince me that the butt he was talking about was mine.

So I went to the meeting, I did not want to give the appearance of trying to deny responsibility for it, and I'm sure that influenced me when I had my conversation with him.

Fitzpatrick and Cameron then attended the meeting with the Crown attorneys, Mr. Scott and Ms. MacLean. Present at this meeting, in addition to Cameron and Fitzpatrick, were Officers Chapman, Michalowsky, and Shephard. Officer Cameron discussed his evidence with them and included the general physical location where he had thrown away the butt. He was not informed when or where the butt was found. Officer Cameron's information was that the butt which was found was obviously fresh, and could not have been left at the scene by a killer three months prior to its discovery. Detective Fitzpatrick told Officer Cameron that, in his opinion, the butt was a 'red herring' and that it was irrelevant to the prosecution of Guy Paul Morin. Cameron testified that he came to understand that the defence might potentially use the unaccounted for cigarette butt to mislead a jury into believing that the real killer had left it.

Testimony at the First Trial

The next day, on January 13, 1986, Officer Cameron testified at the first trial. He recounted the events of the search. He was asked no questions in relation to the precise location where he had actually butted his cigarette,² but testified during questioning by Mr. Scott that he smoked Craven Menthol cigarettes. In cross-examination by Mr. Ruby, Officer Cameron agreed that he really did not know whether or not the cigarette butt that was found was

² He testified in chief that after he passed Constable Fox he walked down the lane and realized that he was approaching an area where he should not be smoking. He butted the cigarette and threw it to the side of the path.

his.

Detectives Shephard and Fitzpatrick testified during the Inquiry that they were aware prior to the first trial that the cigarette butt found at the scene had been lost, but was subsequently found by Sergeant Michalowsky. They recalled being told that Sergeant Michalowsky had found the butt under a flap of a cardboard exhibit box.

On January 10, 1986, during the first trial, Sergeant Michalowsky produced a cigarette butt encased in a plastic envelope. On the tag, under “description of property,” was the notation “cigarette butt — 20 to 30 feet north of roped-off area west of laneway may have been dropped by Constable T. Cameron.” Sergeant Michalowsky testified that the butt was found 20 feet north of the “deceased” and 8 feet west of the west edge of the laneway. When Sergeant Michalowsky, who testified immediately prior to Officer Cameron, was asked during the first trial who had found the cigarette butt, he replied: “This is a note I did not make, sir. I don’t know the officer’s name who found that cigarette butt.”

At Mr. Morin’s first trial, Inspector Shephard, at the request of Clayton Ruby, purchased a package of Craven Menthol cigarettes. The cigarette butt tendered at trial and a Craven Menthol cigarette were compared. It was determined that the butt tendered as evidence was *not* a Craven Menthol cigarette.

Cameron and Michalowsky’s Drive Home

Officer Cameron drove back to Durham with Sergeant Michalowsky after his testimony. Cameron described Sergeant Michalowsky’s demeanour as friendly and happy to talk with him. Sergeant Michalowsky did not have any difficulty, in Cameron’s observation, about speaking of events connected to the trial. During this ride, Cameron and Michalowsky had a conversation about the cigarette butt. Again, Michalowsky did not offer any information to Cameron about the location of the butt. It appeared to Cameron that Michalowsky was attempting to provide him with a little fatherly advice or assistance with respect to his evidence. During their conversation, Officer Cameron asked Sergeant Michalowsky when the butt was found. From Michalowsky’s response, Cameron came to believe that it was found *prior* to his arrival at the scene: he concluded that it was not possible that the butt was his. Cameron testified about this conversation:

He asked me if — firstly, he said, actually, something along the lines of: We all made mistakes and don't worry about it, and this kind of thing. And then he asked me if I minded if he used my humiliation, is the word he chose, when he was training police recruits in the area of crime scene protection.

In other words, not only did I get to feel embarrassed in Court, I now got to be a bad example for police recruits, which I wasn't keen on, and so I asked him not to do that.

.....

And if there had been any doubt in my mind before about pursuing this issue of the cigarette butt, that cemented it for me there. At that point in time, I think, needed to know was this or was this not my cigarette butt, and that's when I discussed with him the time that it was found.

During his second trial testimony, Michalowsky claimed he had no memory of this conversation with Officer Cameron.

Following his ride home with Sergeant Michalowsky, Officer Cameron said he contacted Ms. MacLean and Detective Fitzpatrick to tell them that he no longer believed that the cigarette butt was his. While he could not be specific as to when he contacted these individuals, he testified that it was within a week or two of his conversation with Sergeant Michalowsky on January 13, 1985. (The trial ended on February 7th.) Officer Cameron told the Inquiry that, to the best of his recollection, the telephone conversation between himself and Ms. MacLean took place when Ms. MacLean was in Durham, as opposed to being in London. While he had previously testified that he did not believe that the first trial was yet over in London when he telephoned her, he was unable to state definitively at the Inquiry when he had contacted the Crown and the police officer, but maintained it was shortly after the ride. He told them that he had learned through his conversation with Sergeant Michalowsky that the cigarette butt had been found prior to his arrival. He recalled Ms. MacLean telling him not to worry about it since he had not definitively testified that it had been his cigarette butt in the first place and that, in fact, it had been “pretty well established” that it was not his butt. In essence, Officer Cameron said that Ms. MacLean stated “that it just wasn't important.” As will be more fully explored below, Ms. MacLean denied that

Officer Cameron communicated with her at this time.

Officer Cameron added that he spoke with Detective Fitzpatrick at about the same time as he spoke with Ms. MacLean. Detective Fitzpatrick confirmed that Cameron had telephoned him expressing concerns about his evidence at the first trial when it was suggested that he was responsible for the cigarette butt found at the scene; however, Fitzpatrick denied receiving this call before the end of the first trial:

I don't recall him mentioning to me during the first trial while the trial was on. I can't give you a specific date, and I'm sure if he had, that I probably would have brought it to the Crown's attention, and if he mentioned it to the Crowns, I'm sure that they would have done something about it. I remember Cameron mentioning something to me about it, the date I can't give you, but I seem to recall it was probably after the trial.

Officer Cameron did not hear anything more about this issue after he had spoken with either of these individuals until March 1990.

March 9, 1990, Meeting of MacLean and Cameron

On March 9, 1990, Officer Cameron was interviewed by Ms. MacLean to prepare for Mr. Morin's upcoming second trial. Officer Cameron said that he reiterated, during this meeting, that it was not his cigarette butt. He also reminded her at this time that he had already told her this in 1986:

I'm sure I said to Sue: Well, look — you know *as I told you before* I didn't arrive there until 4:58.

And that was, *you know, we talked about that*, I'm sure. I don't specifically recall all the details of the conversation, but that's what it related to. (Emphasis added.)

Officer Cameron further testified that Ms. MacLean told him during this conversation that she did not recall him ever bringing this to her attention earlier.

Ms. MacLean maintained that the first time that she heard that a

cigarette butt had not been discarded by Cameron was during their interview of March 9, 1990. She disagreed that Cameron had told her this near the end of the first trial or during 1986.

On September 24, 1990, during the stay motion, Ms. MacLean testified about her meeting with Cameron:

Q. When you realized that what Sergeant Cameron was telling you didn't fit with what was in Sergeant Michalowsky's note book?

A. I was very concerned [b]ecause it appeared as though in the conversation on the way back from the trial, the first trial, Sergeant Cameron was saying things — excuse me — Sergeant Michalowsky was saying things to Constable Cameron that didn't make sense at the time. *And this was the first I had heard about it, was in March of this year.*

.....

Q. Do you recall any question coming up as to where these photographs were taken, where the butt was found in relation to the body?

A. No, I don't recall that being discussed, the location of the butt, *because the first time that I really heard about it was from Sergeant Cameron on March 9th this year [1990], about the location issue. We all assumed it was his cigarette. (Emphasis added.)*

Ms. MacLean testified at the stay motion about her conversation with Officer Cameron on March 9th, 1990:

Q. Did you ask Sergeant Cameron if he had spoken to any other police officers about this problem, whether before or after the meeting or since the trial, whether he had spoken to anyone about his conversation with Sergeant Michalowsky after the trial in which he realized it may not have been his cigarette butt that was found at the scene.

A. Yes, because I was concerned about why it hadn't been brought to our attention while the trial was still in progress. So I asked him if he'd told anyone and *he*

said he thought he had but he didn't remember who. It wasn't me, but I don't know —. (Emphasis added.)

On January 25, 1991, during the preliminary inquiry into Sergeant Michalowsky's charges, Ms. MacLean gave this evidence:

Q. Do you ever recollect Sergeant Cameron ever coming to you immediately after the first trial in January 1986?

.....

A. No. He told me — when he told me about his concerns about the conversation with Michalowsky in the car?

Q. Yes, that's coming back from the trial.

A. On - on - right, on the March 9th meeting, I asked him right away: Did you tell anyone about it?

Q. Yes.

A. Because obviously the trial was still ongoing.

Q. Yes.

A. And if he knew it wasn't his cigarette butt, or thought it wasn't, why, you know...

Q. Right.

A. [w]hat we were doing at that first trial, basically?

Q. That's my point.

A. Right, and he said he had told *somebody* at the time.

Q. Who did he say he told?

A. *I don't know. I don't — I mean, it would have been either a Crown or Staff Sergeant Fitzpatrick or Inspector Shephard.*

Q. But he told you in March of 1990 that at some

point immediately after his testimony in London in 1986 that he told someone with respect to the prosecution.

A. *Yes. I don't remember being told. The first I heard about it was when he told me in March.*

Q. I'm not suggesting it was ...

A. *No, well, I mean I don't know if he'll say he told me, but if I don't recall ever being told that information before March 9th, 'cause I think I would have acted on it as I did in March of 1990.*

Q. And yet he told you in March of 1990 that immediately after his testimony on the day, the very day he testified he had some misgivings about his testimony at that time.

A. On the ride back which is the — I guess the day he testified.

Q. Right.

A. Or the day after. I'm not sure when they drove back, and I don't know when he said he told somebody about it but it was at the time of the trial. Like, I don't know if he — he didn't say 'I told them' you know, [t]he next day I phoned somebody or whether it was a few weeks later, or what. I don't know.

Q. But you - your impression was, it was while the trial was ongoing in London?

A. That was my impression, yes. (Emphasis added.)

It was not suggested to Ms. MacLean during her testimony at Michalowsky's preliminary inquiry that Officer Cameron specifically said he had contacted her. As she was an excluded witness (and provided testimony before Cameron), MacLean claimed that she was unaware that Cameron testified at Michalowsky's preliminary inquiry that he telephoned her in 1986 about his conversation with Michalowsky.

Ms. MacLean's position is that she only became aware that Cameron claimed during his cross-examination at Mr. Morin's second trial that it was

she whom he contacted. She said that she did not review this area with him during her preparation of Cameron for his trial evidence. She told the Inquiry that she was quite surprised by his evidence because she thought his position had always been that he did not know whom he contacted.

As will be discussed more fully below, Ms. MacLean was the Crown attorney who called Officer Cameron's evidence during Mr. Morin's second trial. Counsel for Guy Paul Morin alleged that Ms. MacLean's interventions at the second trial during Cameron's cross-examination by Mr. Pinkofsky made it clear that she had already read Cameron's earlier evidence from Michalowsky's preliminary inquiry. Accordingly, it was his position that Ms. MacLean was, therefore, familiar with the contradiction between her recollection and his.

In the midst of Cameron's cross-examination by Mr. Pinkofsky, his evidence at Michalowsky's preliminary inquiry relating to the cigarette butt was put to him:

Q. And you contacted either one of them, either Detective Fitzpatrick or Ms. MacLean, very close to the date that you testified, very soon after you testified?

A. I talked to both of them at different times, and I can't recall just how soon it was to the date I testified. It was not long after.

Q. So is that a fair way to put it, that you can't ... you can say that it was very close to the date that you testified, and very soon after you testified?

A. I believe that it was soon after. If those are my words, I'm hedging a bit now on them, but I expect it was very soon after. I'm not certain just exactly when it was today.

Q. All right, sir. And as far as you could remember, you contacted Detective Fitzpatrick and Ms. MacLean while the trial was pending, is that correct? While that original trial was still going on?

A. I can't recall whether that was the case or not.

Q. At page 133, line 25, sir, [of his testimony at Michalowsky's preliminary hearing] again, under

cross-examination by Sergeant Michalowsky's lawyer,

—

A. What was the reference?

Q. Page 133, line 25. Just to put it in context I'll start off with the question at line 20:

Q. And the very next time that you heard anything about the cigarette butt in relation to this case is when?

A. (pause) ... This was after the trial or after I had given evidence at the trial.

Q. Yes, sir.

A. And the question was?

Q. You indicated you spoke to Detective Fitzpatrick and Susan MacLean ...

A. Yes.

Q. While the trial was pending.

A. Yes.

Were you asked those questions and did you give those answers?

A. Yes, I accept that I did.

Q. At the time, on February 8th, 1991, was that a true and correct memory of how soon after you testified on January 13th, 1986 you spoke to Detective Fitzpatrick and Sue MacLean?

Ms. MacLean: Your Honour, if I might, perhaps I can pass this to you. It's at page 131, line 27 at the bottom, there's a question and answer which I submit is part of this witness's evidence at the trial.

Mr. Pinkofsky: I'll agree to read that, Ms. MacLean, in fairness to you.

Ms. MacLean: All right, thank you.

The Court: Thank you.

Mr. Pinkofsky: Have you got, officer, have you got the questions and answers at page 133 in your mind?

A. Yes, sir, I do.

Q. Previously, Mr. O'Brien had asked you the following questions, sir. Perhaps I'll put it into context by line 20:

Q. And, no doubt, you would want to report that immediately to both Sue MacLean and Detective Fitzpatrick because of that misconception?

A. Yes.

Q. And indeed your evidence is today that you did?

A. Yes. That is correct, Sir.

Q. To both of them?

A. Yes.

Q. And to the best of your recollection, it is while the Morin trial is still pending, before a resolution had been affected?

A. I can't say that, Sir, only that it was very close to the date that I testified, very soon after.

Were you asked those questions and did you give those answers on February 8th, 1991?

A. Yes, I believe I did.

Q. Were those answers true and correct at the time you gave them?

A. Yes.

Q. Are they true and correct today?

A. Yes, they are true.

Q. Are the questions and answers that you gave at page 133, that were read to you previously where you say you indicated you spoke to Detective Fitzpatrick and Sue MacLean, you were asked “while the trial was pending”, and you answer: “Yes”, were they true and correct at the time you gave them?

A. I believed them to be. I don’t believe it now.

Q. You believed it on February 8th, 1991. You don’t believe it now?

A. I suggest I was confused at that point. It was very late in the testimony. And I see the question and answer, and I realize I’ve answered that way. But I don’t believe it to be correct today. I must have on that day or I wouldn’t have given that answer.

Q. Yes.

A. Or misunderstood the question, or was confused, or something.

Q. Can you give me your best estimate, sir, in terms of days, how many days after you found out from, as a result of your conversation with Sergeant Michalowsky on the car ride home on January 13th, 1986, that it was impossible for that cigarette butt to have been yours, within how many days did you contact either Detective Fitzpatrick or Ms. MacLean?

A. I can’t recall, sir.

Q. Can you give me an estimate, please, sir?

A. I can’t even estimate it.

Q. You can’t even estimate it?

A. Not with respect to number of days or, I don’t want to be guessing and get it wrong.

Q. Yes. Tell me, sir, you must be aware today that Mr. Morin’s trial commenced on January 7th, 1986, that on February 7th, 1986 the jury returned its verdict

of not guilty, ending the trial. Are you aware of that today?

A. I accept that it's true. I'm aware of it now, I suppose.

Q. You mean, you didn't ... it didn't sort of catch you eye, all the media coverage that this trial originally —

Ms. MacLean: Well, Your Honour, the question was relating to the date, I mean —

The Court: Well, Mr. Pinkofsky, we have been through this before, and I think, by my count, that's the fifth time that's happened. Now I haven't mentioned it before.

Mr. Pinkofsky: With this witness, sir?

The Court: No, at this trial.

Mr. Pinkofsky: You're saying you had no awareness that that was approximately the time that Mr. Morin's trial ended?

A. I said I would agree with you on the date, sir, but I don't specifically recall the date.

Q. Did anyone, after you reported to Detective Fitzpatrick or Ms. MacLean, did anyone tell you that it would be necessary for you that you should return to court and testify again at that original trial to clear up the misconception about the cigarette butt?

A. It had, by that time, been cleared up by others. I was not asked to return, no.

Q. Sorry. What made you think it had been cleared up by others?

A. I was told this. I read an article in the Toronto Star the day following my testimony about something of an experiment that was done in the court room; and my concern about it waned somewhat when it seemed to have been established that it was likely not my cigarette butt. So this idea that it was impossible and that I should be contacting someone right away became

less important because it appeared to have been established that it was likely not mine.

Q. So you followed the newspaper accounts to that extent?

A. I read it that day, yes.

Q. Yes. If you had reported it to Detective Fitzpatrick, let's say, while this trial was still going on, your conversation with Sergeant Michalowsky and your realization that the cigarette butt you testified about couldn't be yours, would you have considered it proper or improper for you not to have returned to court to testify to clear up the matter?

Ms. MacLean: Your Honour, excuse me, I am objecting on the basis of that being a purely speculative question.

The Court: Well it isn't this witness's responsibility in any event. You are not obliged to answer that question, officer. (Emphasis added.)

During Ms. MacLean's evidence before this Commission, she was questioned as to whether she had reviewed Cameron's evidence from the preliminary hearing:

Q. First of all, you suggested in answering Mr. Cooper's questioning that maybe you had not read Cameron's evidence that he gave at the preliminary hearing into Michalowsky's charges; remember that?

A. Yes, I've read it now. I don't remember reading it before he testified.

Q. I'm going to suggest to you, madam, it was available to you to read at the time. The Crown had a copy of the transcript.

A. I don't know if we did. That's what I'm saying. I know that Mr. Pinkofsky did use it in cross-examination. I don't know if we had a copy or not.

Q. I'm going to suggest to you further that at one point, you suggested that perhaps it wouldn't have

been — or you seemed to suggest it may not have been proper for you to read it because you'd been a witness at the same proceeding. Of course, by this time, Michalowsky's proceeding was over.

A. No, I realise that. I said up until November, the stay was entered in November of '91. I think Officer Cameron testified in December.

Q. Well he testified twice, in December and February.

A. Yeah, but what I'm saying is, up to the first point when he testified, I know I would not have read any evidence from the Michalowsky prelim before the stay was entered because of my status there as a witness. And there was an order excluding witnesses.

Ms. MacLean's answers from Michalowsky's preliminary inquiry (wherein she claimed that he did not contact her) were read to Officer Cameron at the Inquiry. In relation to Ms. MacLean's position, he said:

Her answer is not factually correct.

.....

She's forgotten that I called her [in 1986], and she's forgotten that I reminded her about it in March of 1990.

.....

She's forgotten or she's not telling all she knows.

Officer Cameron's position was that Ms. MacLean was told about his concerns shortly after his conversation with Sergeant Michalowsky in January 1986. Cameron testified that MacLean was further aware in March 1990 that he believed that he had telephoned her and Detective Fitzpatrick after learning this fact. This is Cameron's evidence at the Commission:

[I]t has always been my contention and my knowledge and belief that I spoke to Sue MacLean, ... after I testified at the first trial. I understood that she was aware of this, that I believe that to be so. ... What you've just read to me that I didn't know who I had spoken to, that's not accurate, she's mistaken about

that. I knew who I had spoken to.

During the Inquiry, the question of whether Cameron had told Ms. MacLean about his conversation with Michalowsky and that she had simply forgotten about this was discussed with her by Mr. Morin's counsel:

Q. Suffice to say, if he had told you on March 9th that it was you whom he told, which is what he's always maintained, not only that he said to you, but he said under oath on every occasion, as well. You could hardly have forgotten that; could you?

A. No, because I would have said to him: Well, it wasn't me. You didn't call me.

Q. So this is truly a direct conflict in evidence between you and he?

A. Yes. As I said, in my view, it seems to be an honest difference of recollection.

Q. Well, you've already conceded that you could not possibly have forgotten that he said to you, if he did say that. (sic) So it can't be an honest failure of memory on your part; correct?

A. No.

Q. Right.

A. But I'm saying I don't think that Officer Cameron's a liar so —

Q. There has to be an honest failure of memory on his part; that's the only way you can explain it.

A. That's my perception of it, yes.

Findings

To summarize, Constable Cameron attended at the body site on October 3, 1984 at 4:58 p.m. He butted out a cigarette while on duty. I find that it was not the butt found and bagged at the body site. That butt was located before Cameron arrived at the scene. It was of a different brand and was found in a different location than the butt Cameron had left behind.

Cameron testified on January 13, 1986. The position of the Crown was that the cigarette butt found at the scene could be explained by Cameron's actions. The Crown took this position in good faith.

Constable Cameron rode home with Michalowsky later that day. I accept that Cameron concluded, from what Michalowsky said to him, that the cigarette butt found at the scene was not his.

Constable Cameron's recollection is that he contacted both Ms. MacLean and Officer Fitzpatrick to advise them that he no longer believed that the butt was his. His recollection is that he did so within one or two weeks of this conversation with Michalowsky. If so, this would have been during the first trial. Ms. MacLean would have been obliged to disclose this to the defence. Her response, as Cameron recalls it, was that this was not important as it was pretty well established that the butt was not his.

Officer Fitzpatrick did receive the call from Cameron, but believes it came after the trial had concluded. MacLean does not remember any such call; she would have taken action on it, she said, had the call been received during the trial.

Cameron does recall that he called Ms. MacLean in Durham. This might favour an interpretation that the call, if it took place, followed the trial, though Ms. MacLean was at home in Durham at times during the trial. As well, at the second trial, Cameron conceded that he could not remember whether the phone calls with Fitzpatrick and MacLean occurred prior to or after the first trial.

Cameron and MacLean each testified at the Inquiry that they respected the integrity of the other.

The evidence became more complex.

Cameron and MacLean met on March 9, 1990. Cameron recollected that he reminded Ms. MacLean that he had earlier spoken to her about this issue. According to him, Ms. MacLean said she had no recollection of it. Ms. MacLean's recollection of the March 9, 1990 meeting is very different. At the 1990 stay motion, she testified that Cameron indicated that he could not remember to whom he had previously given this information.

Cameron and MacLean later testified at Michalowsky's preliminary inquiry. Ms. MacLean testified to the same effect as noted above and added: "I don't know if he'll say he told me." Ms. MacLean denied that she knew that this allegation was forthcoming from Cameron, who was yet to testify at the preliminary inquiry.

The different recollections of Ms. MacLean and Constable Cameron became an issue at the second trial, when Ms. MacLean's ability to examine Cameron as a witness was challenged. That issue is addressed below. I should, however, say at once that I am satisfied that Cameron brought this matter to Officer Fitzpatrick's attention sometime in 1986, after his conversation with Michalowsky. I am unable to resolve the credibility issue between Constable Cameron and Susan MacLean.

March 14, 1990 Meeting of Susan MacLean and Officer Robinet

In March 1990, Michalowsky met with Sergeant George Scott who was in charge of the searches outside the roped-off area at the scene. Michalowsky stated that he was concerned that some people were saying that he had "messed up the examination of the scene." Michalowsky then told the officer that his doctor did not want him to testify.³ On March 13, 1990, one of Michalowsky's doctors provided a letter documenting his hypertensive heart disease, concluding that, in his opinion, Sergeant Michalowsky should not participate in the trial due to his constant problem with fluctuating blood pressure.

Ms. MacLean testified that she learned from Detective Fitzpatrick on the morning of March 14, 1990 that Sergeant Michalowsky had shown him a doctor's letter. That letter, addressed to the Crown which stated, in part:

It is my opinion that Mr. Michalowsky should not participate in such a trial. Should he do so, it is my

³ In July 1986 Sergeant Michalowsky underwent cardiac surgery. He returned to work in October 1986 and continued in the Identification Bureau for several months. In January 1987 he was transferred to the Youth Bureau. It was not until August 30, 1989, that Michalowsky became re-involved in the Morin case when he met with Inspector Brown, the officer-in-charge of the Durham Regional Police Service Criminal Investigation Branch. At this time he spent many hours reviewing evidence and studying transcripts to be ready for the trial.

opinion that he would expose himself to a potentially dangerous situation physically.

On the afternoon of March 14, 1990, Officer Robinet met with Ms. MacLean at a meeting set up for the purpose of preparing for his anticipated evidence at trial. Robinet brought the Jessop file, a box of material left behind by Sergeant Michalowsky, who was away on sick leave. In this box were photocopies of three pages of notes written by Sergeant Michalowsky. The discovery of these notebook pages during this meeting led to the realization that Michalowsky had a duplicate notebook; this initiated the commencement of a criminal investigation, resulting in charges against him.

According to Ms. MacLean's evidence at both Mr. Morin's stay motion and at the Inquiry, she told Officer Robinet at this meeting that the Crown may not be able to call Sergeant Michalowsky due to health concerns. She inquired of Robinet as to whether he could fill in any of the gaps in the event Michalowsky was not available to testify. Officer Robinet told her that he had arrived at the scene on December 31, 1984, too late to be of much assistance, as all the exhibits had been seized and bagged and the body had already been removed.

Ms. MacLean testified that she asked Officer Robinet about his knowledge of the cigarette butt which was an issue in the proceedings. Robinet indicated that he had no knowledge about this. The discussion of the cigarette butt led MacLean to recall a meeting she had with Michalowsky in August 1989, during which Ms. MacLean had received a copy of Michalowsky's notebook. She asked Officer Robinet for a copy of his own notebook. While Robinet was looking through the box for his notebook, he came across the three pages out of Sergeant Michalowsky's notebook. He handed these pages to Ms. MacLean and said, "Well, here, why don't you compare this to what you've got." According to Ms. MacLean's evidence at the Morin stay application (and at the Inquiry) at some point Robinet told her that Sergeant Michalowsky may have another notebook. In his evidence at the Inquiry, Constable Robinet could not recall saying this, but he did not dispute it. When Ms. MacLean looked at the three pages, she realized that they differed substantially from the pages of what she believed was Sergeant Michalowsky's only notebook on the issue. These pages (subsequently determined to originate from Sergeant Michalowsky's second notebook) clearly referred to Officer Cameron stating at the scene on December 31, 1984 that the cigarette butt belonged to him. (Cameron had told MacLean that until

the December 27, 1985 meeting, he did not know the cigarette butt was an issue.) Officer Robinet testified that Ms. MacLean appeared extremely upset and he, himself, was somewhat shocked and bewildered.

Aspects of the discussions between Ms. MacLean and Officer Robinet on March 14, 1990 became an issue at both Mr. Morin's second trial and at the Inquiry. In particular, Officer Robinet denied, in cross-examination at the second trial, that in the course of that meeting:

- Ms. MacLean told him that the purpose of the meeting was to determine whether he could fill in some of the gaps to "avoid" having to call Sergeant Michalowsky.
- Ms. MacLean told him that the Crown may not be able to call Sergeant Michalowsky due to health concerns.
- He told Ms. MacLean that he had arrived at the scene on December 31, 1984, too late to be of much assistance as all the exhibits had been seized and bagged and the body had already been removed.
- Ms. MacLean inquired as to what he knew about the cigarette butt and Officer Robinet said he did not know anything about it.

During the Inquiry, Officer Robinet said that although he had no specific recollection of his discussion with Ms. MacLean, he did not dispute that the above matters may have been discussed.⁴ He could not explain what had changed since his denials at the second trial.

During cross-examination at the Inquiry, Officer Robinet further testified as follows:

Q. [Fuerst] Am I correct that Ms. MacLean told you that Officer Michalowsky was apparently experiencing some serious health problems?

⁴ Although he did not understand the Crown to be attempting to "avoid" calling Michalowsky.

A. [Robinet] Yes, I believe that happened.

Q. Am I correct that she advised you that she advised you that she wanted to canvass information with you to determine whether you would be able to give any of the same evidence as Officer Michalowsky, in case he was too ill to testify?

A. Yes, I believe that's so.

Q. Am I correct that during the course of your meeting, the topic of the cigarette butt at the scene came up?

A. It probably did, yes.

.....

Q. You recall talking to Ms. MacLean about the cigarette butt?

.....

A. I can't remember talking to Ms. MacLean, but I can't say for certain that the cigarette butt came up, it probably did.

Q. You don't have any reason to disagree if she's made a notation that that's what was discussed; do you?

A. No, I don't.

.....

Q. And do you recall Ms. MacLean indicating to you that there was something in Officer Michalowsky's notebook about the cigarette butt that was causing her concern at that point?

A. I'm sorry, I don't recall that, but I'm not disputing it.

Q. So again, if that's her position, you don't have any reason to disagree, do you?

A. No.

Robinet's Prior Knowledge of Duplicate Notebooks

On April 3, 1990, Officer Robinet advised the Ontario Provincial Police that he was aware Michalowsky had prepared two notebooks in connection with the case. He subsequently testified at the stay motion that he observed Sergeant Michalowsky sitting at his desk copying a notebook into another notebook during a period after the preliminary hearing and shortly before the first trial — late 1985 or early 1986. This is in conflict with Michalowsky's subsequent evidence at the stay motion that he had prepared his new notebook at his residence at the kitchen table.

Officer Robinet said that he was not aware that the two notebooks were markedly different from one another — though they covered the same periods of time. He testified that he did not find the existence of two notebooks strange or untoward as Michalowsky told him at the time Robinet observed him writing the second notebook, that he wanted to have everything in one notebook to be organized for the trial. Michalowsky made a comment to him that he had been flipping back and forth from date to date during the preliminary hearing and could not find things quickly. It was Robinet's understanding that Michalowsky was transcribing everything verbatim from his initial notebook into the second notebook. It was also his assumption that Sergeant Michalowsky's original notes would also be presented at trial.

Officer Robinet testified that he did not realize until his meeting with Ms. MacLean that the photostatic copies of Michalowsky's notes did not conform with the copies Ms. MacLean had in her file. Despite his knowledge of the existence of a second notebook, Officer Robinet did not, at that time, tell Ms. MacLean that he had previously seen Sergeant Michalowsky rewriting his notes. In his evidence at the stay motion and at the Inquiry, Officer Robinet explained that it just did not enter his mind. It was not until his interview by the OPP that Officer Robinet said, for the first time, that he was aware Sergeant Michalowsky had two notebooks. (At that time he indicated that Sergeant Michalowsky rewrote his notes from his day-to-day notebook for organizational purposes.) Officer Robinet also told police on April 3, 1990 that he thought Officer Cameron had claimed ownership of the cigarette butt at a meeting in late December 1985, and that at some point he heard that the butt could not be found.

Shortly after the discovery of the three notebook pages, Ms. MacLean terminated the interview with Officer Robinet. According to Ms. MacLean,

she cautioned Officer Robinet not to discuss this matter with anyone. She did so, she testified, because she did not want interference in a potential investigation. She then went to speak with Mr. Scott, who surmised that there could be a legitimate reason an officer could have a second set of notes. They could be rough notes used and then another notebook was better organized for trial. He suggested that Ms. MacLean not confront Sergeant Michalowsky directly with the notes during her pre-arranged meeting with him the following day, but to ask him whether he had any other rough notes or rough notebooks.

On April 12, 1990, Officer Robinet attended at Sergeant Michalowsky's home. He did so upon being instructed by Inspector Shephard to set up a meeting with Michalowsky to determine whether there were other photographs which had not been disclosed to the defence. At this time, Officer Robinet told Sergeant Michalowsky of his production to Ms. MacLean of the three pages from his notebook. At the stay motion, Officer Robinet testified that Sergeant Michalowsky told him he had been interviewed by the OPP about having two notebooks and that he had written the second notebook to be more organized. Robinet's evidence at the Inquiry was that he did not believe he discussed with Michalowsky the fact that the entries in the two notebooks were different.

March 15, 1990 Meeting of Susan MacLean and Officer Cameron

On March 15, 1990, Ms. MacLean conducted another interview with Officer Cameron. At this time she showed him the three pages from Michalowsky's notebook that were supposedly made on December 31, 1984 which contained the following notation:

Cigarette butt located in area approx 20 - 30 feet north of the roped-off [sic] area - west of edge of laneway.

Was advised by an officer in near proximity that it had been "butted" by him — it was his — it had been photographed and bagged — may have been lost. Tom Cameron who said it was his - not sure then claimed it was his.

All told to put their refuse in a Litter-Bag hanging off left side mirror of Ident Van.

Officer Cameron vehemently denied any such conversation with Sergeant Michalowsky at the body site. *I accept his evidence in this regard.*

Ms. MacLean and the ‘Conflict’

Upon reporting to Mr. Scott after her meeting with Michalowsky on March 15, 1990, Mr. Scott instructed Ms. MacLean to contact Inspector Edward Wilson, Sergeant Michalowsky’s direct supervisor. She and Mr. Scott met with Superintendent Alex McMurray and Inspector Wilson on March 16, 1990. As it was apparent that there would be an investigation into Michalowsky’s two notebooks, Mr. Scott asked Ms. MacLean to prepare notes on this matter for the Crown’s Regional Director.

Ms. MacLean prepared handwritten and typewritten notes, both dated March 16, 1990, together with a will-say prepared by her on March 28, 1990, in connection with the OPP investigation.

Ms. MacLean’s handwritten notes (Exhibit 161) reflect that on March 9, 1990, Cameron advised her of the conversation that he had with Michalowsky returning from London during the first trial:

The first [Cameron] knew that a cigarette butt was important was when he was at a pre-trial meeting [December 27, 1985] at 18 Division (before the first trial) and John Scott asked if anyone had been smoking. He [Cameron] was very embarrassed, but after the meeting went up to John Scott and told him about his, (Tom’s) cigarette.

.....

It has always been my recollection that until Tom came forward *at the meeting* just before the trial in 1986, no one knew whose butt was found at the scene. (Emphasis added.)

These notes are in conflict with Ms. MacLean’s earlier contemporaneous notes of the December 27, 1985 meeting and the recollection of Cameron (and some others) that he did not come forward that day.

The position of counsel for Mr. Morin was that the changes in the later

versions of these documents evidenced an aborted attempt on the part of Ms. MacLean to account for the cigarette butt by supporting the theory that Cameron had taken responsibility for it as early as December 27, 1985. Ms. MacLean's evidence on this issue is somewhat confusing. She said that when writing these notes on March 16, 1990, she was not only attempting to remember what Cameron had told her, but was also trying to record as much as she could recall about the events of the prior week and the issues then raised. She explained that portions of her notes reflected her own memory as well as what she had been told by others. She stated that she did not have access to her notes prepared in 1985 when she prepared this note. She said that her memory was faulty on this point and conceded that her March 1990 notes were in error.

As discussed above, in 1992 Ms. MacLean led Officer Cameron through his evidence at the second Morin trial.

At the outset of Officer Cameron's evidence, Mr. Pinkofsky made the following statement to the Court:

[T]he next witness [is going to be] Officer Cameron; and that Ms. MacLean is not only going to be present but is going to be conducting his examination. And I want to put that on the record that an area of cross-examination will directly involve questioning of this officer with respect to conversations that he had, or that he proposes to have had with Ms. MacLean concerning the question of the cigarette butt issue.

[The Court]: Thank you. Ms. MacLean are you aware of this problem?

[Ms. MacLean]: No, this is the first time I've heard about this before we reconvened. In fact, I spoke with Mr. MacGuigan and Mr. Smith about my leading Officer Cameron's evidence and it was agreed that I should do so.

[The Court]: Well that's been considered by the Crown?

[Ms. MacLean]: Yes.

[The Court]: Are you prepared to do it?

[Ms. MacLean]: Yes, I am.

Ms. MacLean told the Inquiry that she thought the defence's objection related to her general preparation with Constable Cameron on March 9, 1990. *She claimed that she was unaware, at the outset of Cameron's evidence, that he would take the position that he telephoned her following his conversation with Michalowsky.* She said that at no time had she known or had it been suggested to her that she had a conflict of interest in relation to being advised of, and not taking the appropriate steps about, Cameron's alleged disclosure to her in 1986.

Mr. McGuigan's recollection was that the defence counsel's objection to Ms. MacLean leading Constable Cameron's evidence related to the fact that she had generally prepared Cameron to testify. Mr. McGuigan's position was that there was nothing distinguishing that situation from any other witness prepared by a member of the prosecution. He testified at the Inquiry that he did not know if he was cognizant exactly of what Mr. Pinkofsky was complaining about at that time. Mr. McGuigan, too, noted there had never been any suggestion by the defence that Ms. MacLean would be a potential witness.

Officer Cameron told the Inquiry that it had not occurred to him, before he provided this evidence, that there was anything inappropriate or odd about this. At some point he felt it was unusual that Ms. MacLean was the Crown attorney calling his evidence considering her involvement in the issues. As discussed earlier, during his cross-examination he stated that he had telephoned Ms. MacLean in 1986 after his conversation with Michalowsky. During the Inquiry he agreed with counsel for Mr. Morin that, in retrospect, it was completely inappropriate for Ms. MacLean to call his evidence as it could potentially have an impact upon an evaluation of her conduct.

At the conclusion of Cameron's testimony on December 12, 1991, Ms. MacLean conducted a brief re-examination, but did not touch upon Cameron's evidence relating to the conversation he allegedly had with Ms. MacLean. In her evidence before this Commission, Ms. MacLean could not specifically recall the discussions with her co-counsel as to whether she should or should not conduct the re-examination.

Cameron was recalled two months after his December evidence, at the request of the defence, to address certain issues relating to Detective

Fitzpatrick's evidence. At this time, Ms. MacLean asked Officer Cameron, in re-examination:

Q. Sir, can you tell us today whether or not those conversations [relating to information obtained on his ride home with Michalowsky] with myself or Staff Sergeant Fitzpatrick occurred before or after the first trial ended?

A. I cannot remember ma'am.

Ms. MacLean testified that she spoke to Mr. McGuigan and Mr. Smith about her conflict:

The decision was made by us that I would not — we wouldn't contradict him. We wouldn't challenge him on that point of the phone call, because then we would be making me a witness. But his evidence had been that he wasn't sure if it was before or after the first trial, so in re-examination, I limited it to: 'Well, are you sure whether it was before or after?' and he said: 'I don't know.' That's the gist of it. But I remember talking with Alex and Leo at the time and saying: "Well, what do I do?". I mean here I am leading him, he's saying something I disagree with, and we just chose, we would have to — I guess the expression is, wear it, and not challenge him on that.⁵

Ms. MacLean admitted during the Inquiry that she should not have conducted this re-examination:

I guess the only thing I can think is that in terms of the jury, they wouldn't understand why suddenly another lawyer was taking over that witness when I had handled him. But it was a very difficult situation.

She also said this:

I mean now, looking at it, I shouldn't have, being alive to that issue, I shouldn't have done it. I guess the only thing I can think is that in terms of the jury, they

⁵ McGuigan was emphatic that this issue was never discussed.

wouldn't understand why suddenly another lawyer was taking over that witness when I had handled him [originally]. But it was a very difficult situation.

Findings

I previously reflected on the difference in recollection between Constable Cameron and Susan MacLean. The issue became a significant one at the second trial. Ms. MacLean tendered Cameron as a witness. However, Cameron was bound to be cross-examined by the defence on his discussion with Michalowsky, his resulting telephone calls with Fitzpatrick and MacLean, and his conversation with MacLean on March 9, 1990. Since Cameron and MacLean's recollections were materially different, it was a conflict of interest for MacLean to examine Cameron herself. Indeed, the difficulty was manifest when Cameron was asked by MacLean in re-examination whether the conversations relating to the ride home with Michalowsky were made with MacLean or Fitzpatrick prior to or after the second trial.

Had Cameron given the same answer that he gave here (namely that he thought the calls took place shortly after the ride home, within a week or two), it would have reflected on his own questioner, Ms. MacLean.

Counsel for the Morins raise serious questions about Ms. MacLean's evidence on this issue. Cameron did testify in February 1991, at Michalowsky's preliminary inquiry, that he reported his conversation with Michalowsky to MacLean and Fitzpatrick prior to the completion of the first trial. During his cross-examination at the second trial, he no longer was prepared to swear that the calls took place prior to the end of the first trial. He said that he had been confused when he testified at Michalowsky's preliminary inquiry. He no longer believed it to be correct, or he "misunderstood the question or was confused or something." At the Inquiry, he testified that he did not believe that it was more than a week or two after the ride home that he spoke to MacLean, and he denied that MacLean had made it clear to him that his answers at the Michalowsky preliminary inquiry had implicated her. However, he conceded that he

could very well have been affected by things I'd heard and didn't want to testify with the same degree of certainty if I wasn't certain in 1992.

It is MacLean's position that she did not appreciate there was a

problem, even though it appears to have come to Cameron's attention. She claims that the contradiction did not come out when she prepared Cameron to testify on the cigarette butt issue. She was not alive to the contradiction, although she appeared to have had the preliminary inquiry transcript when Cameron testified at the second trial and intervened to ensure that appropriate passages were read to Cameron in cross-examination. (She indicated that she had not read the transcript in advance, in part because she had not originally been designated as the Crown to examine Cameron.) Finally, she was not alive to the contradiction although Mr. Pinkofsky objected to her presence at the beginning of Cameron's evidence, as Cameron would be questioned about conversations "he had, or he professes to have had with Ms. MacLean concerning the question of the cigarette butt issue." (She indicated that she thought he was referring to unproblematic discussions in 1990, which should not have disqualified her.)

The evidence is not clear, cogent and convincing that Susan MacLean knew that Cameron would contradict her when he testified. Once the contradiction was revealed, Ms. MacLean should not have re-examined Cameron. I accept her evidence that she was advised that she could do so after consultation with Mr. McGuigan and Mr. Smith. It was no answer that Cameron would not be challenged on the conversation having taken place, but only questioned on its timing. Cameron was obviously reluctant to hurt Ms. MacLean's position in any way; the fact that she was the questioner could reasonably be expected to colour — not necessarily consciously — his testimony. Ms. MacLean conceded that she should not have conducted that re-examination.

(xiii) Michalowsky's Conduct and the Morin Prosecution

Michalowsky's Attendance at the Stay Motion

Michalowsky was called as a witness by the defence at the stay proceedings. As was summarized in Mr. Morin's Statement of Fact and Law to the Ontario Court of Appeal, by agreement of counsel and with the concurrence of Michalowsky's physician, Dr. Rowsell, his evidence was heard in the barristers' lounge at the London court house. Counsel and the trial judge wore business suits. Everyone sat on sofas and armchairs. Michalowsky provided evidence on the stay motion from June 25 to 29, 1990.

Mr. Gover, the Crown attorney at the stay motion, expressed his scepticism to the Inquiry as to whether Michalowsky was too sick to testify:

I don't think that as long as I was involved in the case that the view [among the Crowns] changed from the view that I held and Mr. Smith held initially, and that was that Sergeant Michalowsky was faking it.

Mr. Gover said that Michalowsky's demeanour at the stay motion in the presence of the judge differed from his demeanour when the judge was not present:

I did have a concern that he — that although he appeared to be, for example, breaking down into tears whenever Mr. Pinkofsky started touching on an area where Mr. — pardon me, Sergeant Michalowsky could be seen to have some culpability and that he laughed and smiled in the absence of the judge, that nonetheless, there may be something in his medical history that a real concern about his ability to testify.

The Investigation by the Ontario Provincial Police

Sergeant Michalowsky had, indeed, prepared two notebooks pertaining to the Jessop investigation. His original notebook (notebook No.1) stopped at the conclusion of the preliminary inquiry in June 1985. Michalowsky's notebook No.2 purported to extend to the entire investigation, including the events of December 31, 1984.

In April 1990, the OPP reviewed the two notebooks of Sergeant Michalowsky and prepared a report noting the differences in them. Notebook No. 2 contained considerably more detail than notebook No. 1. In addition to being more comprehensive, the detail itself varied from that included in the first notebook. The report of the OPP noted, *inter alia*, the following discrepancies between the two notebooks:

- Notebook No. 2 includes a time of arrival and more descriptive wording as to the location of the body site;
- Notebook No. 2 includes a more detailed description of weather conditions;

- Notebook No. 2 lists officers not mentioned in notebook No. 1;
- Notebook No. 2 has more detailed, specific and differing measurements than notebook No. 1; notebook No. 1 indicates that the body was 372 feet south of the south edge of the Fourth Concession, whereas notebook No. 2 measured 272 feet;
- Notebook No. 2 identifies the time certain exhibits were found and includes a more precise description of certain exhibits;
- Notebook No. 2 contains a drawing of the crime scene including measurements that differed from notebook No. 1;
- Notebook No. 2 details the officers searching and describes the location in which the cigarette butt and empty milk carton found by Kapuscinski were found. Notebook No. 1 has no mention of the cigarette butt;
- Notebook No. 2 reports that Tom Cameron stated that the cigarette butt was his and had been butted by him. There was no mention of any such detail in notebook No. 1;
- Notebook No. 2 contains much more descriptive information of fingerprint tests done on some of the evidence received including the recorder, milk carton, broken glass. The analysis of fingerprints described in Michalowsky's notes had not yet been done on that date;
- Notebook No. 2 contained more descriptions on the examination of the clothing and eliminated the entry from notebook No. 1 that all buttons from the victim's clothing had been accounted for;

On April 4, 1990, Sergeant Michalowsky was interviewed by the OPP officers. At this time, he discussed the cigarette butt and stated:

Prior to the preliminary trial, it was thought by myself that the cigarette butt would not be an issue due to the fact that an officer by the name of Tom CAMERON, who was a member of the search party at the crime scene had admitted that the cigarette butt that had been located and photographed and retained might well have been his. He admitted to smoking during the search I recall at the time during that event, that all officers in the search were reminded of the seriousness and the importance of the search and were asked to discard any personal refuse in a bag that I had provided for them at the Ident van. Having transcribed in the book #2 after the preliminary trial and realizing the cigarette butt was an issue the information regarding the cigarette butt was entered into book 2. It was never entered into book 1, because I felt it wasn't a piece of evidence pertinent to the investigation having been told that it may have been dropped by one of our own men. The photograph relating to that cigarette was never withheld from the Court it accompanied all photographs taken at the crime scene and when questioned made reference to explain to the best of my ability. (Emphasis added.)⁶

Following the OPP investigation, Sergeant Michalowsky was charged in the late summer of 1990 (after his evidence at the stay motion) with:

- One count of perjury in stating under oath, in response to Mr. Justice Craig's question, that his notes (used to refresh his memory) were made contemporaneously, an offence contrary to section 132 of the *Criminal Code*;
- One count of wilfully attempting to obstruct, pervert or defeat the course of justice by preparing and testifying from a second notebook at the first trial, an offence contrary to section 139 of the *Criminal Code*;

⁶ Statement of Michael Michalowsky, dated April 4, 1990, to Det. Sgt. Mike Sharland and Sgt. Ralph Paul.

- One count of wilfully attempting to obstruct, pervert or defeat the course of justice by tendering a cigarette butt at the first trial of Guy Paul Morin which he falsely claimed had been seized in the vicinity of the body of Christine Jessop, an offence contrary to section 139 of the *Criminal Code*.

Michalowsky at the Second Trial

On October 16, 1990 (after Michalowsky's testimony on the stay motion), Ms. MacLean took notes of a tactical meeting attended by herself, Mr. MacGuigan and Mr. Smith, along with Sergeant Chapman and a police cadet. These notes contain a list of things to be done and they include the following comment: " Michalowsky — interview him with lawyer. — *how to make a lemon into lemonade.*" (Emphasis added.)

Ms. MacLean testified that Mr. MacGuigan had used this expression in relation to Sergeant Michalowsky. She related the concern at the time about the effect Michalowsky's absence could have on the issue of continuity. (Her notes from an agenda for a later meeting on March 22, 1991 asked: "How do we minimize the damage caused by Sergeant Michalowsky's situation?")

Mr. MacGuigan, when asked during this Inquiry if there was a discussion about minimizing the damage caused by Michalowsky, said "I don't think it happened." He disagreed that the lemon-into-lemonade remark was his; he suspected it was a "personal observation by Ms. MacLean." Mr. Smith did not remember the comment.

Ms. MacLean told the Inquiry that while what Michalowsky did was wrong, the cigarette butt depicted in the photograph was still regarded by Crown counsel as a fresh one. Her own view was that Michalowsky had rewritten his notebook not with a view to seeing Mr. Morin convicted, but in order to look organized. Over the years of dealing with him he had impressed her as somewhat of a perfectionist who did not want to ever concede that he may not know the answer; in the course of rewriting his notebook he altered information. She further speculated that he discarded the cigarette butt at the

time because he did not think it was relevant, producing one later when inquiries were made.

Mr. McGuigan disagreed that the Crown attorneys were of the view from the outset that Michalowsky presented a serious problem for the case. He said, however, that there was strong disagreement among them as to whether Sergeant Michalowsky should be called. Mr. Smith was of the view that he should be called so that the jury could see he was not the monster Mr. Pinkofsky made him out to be; Mr. McGuigan thought that this was not an appropriate reason to call him. Given Ms. MacLean's status as a witness in the proceedings against Michalowsky, she did not involve herself in any significant way with the decision as to whether or not he would be called as a witness.

The Crown attorneys ultimately determined that they would not call Michalowsky as a witness. He was, therefore, subpoenaed by defence. As was the case at the stay motion, an application was made on May 14, 1992 by Michalowsky's personal counsel to quash this subpoena on the basis that his physical and emotional health did not permit him to testify. Several doctors who had examined Sergeant Michalowsky tendered evidence.

Mr. Justice Donnelly ruled that Michalowsky should testify, but that special conditions would, again, apply to his evidence (similar to those imposed during his testimony on the stay motion):

- Michalowsky's doctor was to sit beside him throughout his evidence, monitor his condition and advise as to the taking of recesses;
- No one, including the trial judge, would robe;
- No one could stand up during Sergeant Michalowsky's evidence, including the questioning counsel;
- Sergeant Michalowsky was to have his back to the audience and a screen was to be placed between him and the spectators;
- All counsel and the judge had to sit on the same level

as Sergeant Michalowsky;

- Sergeant Michalowsky's evidence was to be videotaped.

On June 2, 1992, Sergeant Michalowsky testified at the second Morin trial in accordance with the trial judge's ruling. Mr. Morin watched as Mr. Justice Donnelly, in the jury's absence, walked over to Michalowsky and shook his hand, stating:

Sergeant Michalowsky, it's nice to see you again
And I want you to understand, we want to make this as comfortable as we can for you. If you are in any stress or difficulty, I want you to let me know. All right? You can sit here by the Doctor. He's in charge. Okay?

As was noted in the Appellant's Factum: "*In the presence of the jury, the registrar then warmly shook Michalowsky's hand prior to swearing him in.*"

The trial judge introduced Michalowsky to the jury in the following words:

Members of the jury, our garb and orientation has changed since yesterday. The reason for that is Sergeant Michalowsky is about to testify. We are acting on medical advice that in some way we can make this less discomfiting and we are attempting to do that. Sergeant Michalowsky, if you are having difficulty I expect you to give us some indication and, for your information, this is Dr. Rowsell, who is seated beside Michalowsky, his internist and physician.

Mr. Michalowsky's evidence was extremely hard to follow as he claimed to have forgotten most of the events he was asked about. He testified: "I have been trying to obliterate this situation from my mind." At another point in his testimony he said: "I'm not sure of all of it. I'm not sure of anything. I'm really not sure why I'm even here."

Sergeant Michalowsky testified that he kept two notebooks, one for general occurrences, the second for a particular homicide. His reasoning for preparing another notebook was that he realized when providing testimony at

Morin's preliminary hearing, that his homicide notebook was not as concise and organized as it should have been. As a result, he decided to get his notebook in chronological order in a way in which he could find items readily.

Michalowsky also testified that shortly before August 15, 1990, his wife threw out a box containing all of his daily notebooks. He stated that she threw out the box so it would not remind him of his job; she did not realize the importance of these books. *Assuming that this explanation was true, it is difficult to justify Michalowsky's retention and control (at his home) of these notebooks, months after he was no longer on active duty. My later recommendations address this issue.*

The testimony of Sergeant Michalowsky was marked by a number of comments by the judge *in the presence of the jury*:

- When asked about his training with respect to identification work, the witness said that it took place at the Ontario Police College in Aylmer. The judge commented: "Sergeant Michalowsky, you are doing very well and we appreciate it, thank you."
- Michalowsky told defence counsel that he could not recall the number of homicides he worked on with Fitzpatrick and Shephard. Defence counsel then stated:

[Ms. Widner]: I would like to provide you - I don't think you have transcripts of some of your previous evidence, sir, so I want to give you and just ask you to keep these by you until I refer them to you, or you them.

[The Court]: Sergeant Michalowsky?

A. Sir?

[The Court] No, no, sit down, sit down. I was just going to tell you that up in Goderich, where I come from, we say the tougher the job the better you feel when it's finished. I want you to keep that in mind if this becomes difficult for you.

A. Thank you, your honour.

- When Michalowsky was asked if he knew an officer by the name of Holtorf, he replied:

A. I've heard of the name, madam. I don't know if I know him personally or not.

[Ms. Widner]: Would it be appropriate to take a break, Your Honour? Do you need a break sir?

A. No ma'am.

[The Court]: Thank you Ms. Widner. Doctor? Doctor, do you regard it as appropriate to continue?

[Dr. Rowsell]: Yes.

[The Court]: Sergeant Michalowsky, you have shown great strength of purpose and recuperative powers in being able to come back from your emotional moments and we realize that's difficult for you, and certainly if you have a feeling that you would like more than a momentary break we want you to let us know, but I have the impression that given a short break you are able to reorganize yourself and get going again.

A. Yes, sir.

[The Court]: If I made a mistake in that assessment, I want you to try and help me out, please.

A. Thank you.

In the absence of the jury, Mr. Justice Donnelly expressed the following sentiments to Michalowsky during his evidence:

- When Officer Michalowsky first entered the witness stand, His Honour said:

[The Court]: Sergeant Michalowsky, it's nice to see you again.

[Michalowsky]: Thank you, my Lord.

[The Court]: And I want you to understand, we want to make this as comfortable as we can for you. If you are in stress or difficulty, I want you to let me know. All right? You can sit here by the Doctor. He's in charge. Okay?

- Following a day's evidence, Sergeant Michalowsky left the courtroom. In discussing Michalowsky's condition with his doctor (he had reported that he experienced chest pain) in the absence of the jury, Mr. Morin watched as the following exchange took place:

[Dr. Rowsell]: He had a little [chest tightness] this morning, but that subsided fairly quickly. We were giving him a little valium, just half a tablet, from time to time and that seems to settle them [sic] him down a bit, but it's the emotional impact that's the real risk.

[The Court]: Well, you can tell him this, that from my assessment of him he's conducting himself with dignity and courage and it's a matter he should be proud of himself and we'll go on from there.

Findings

With great respect, I am compelled to say that the trial judge's actions, while well-intentioned, were unfortunate. The conditions put on the defence made it extremely difficult to examine the witness effectively, and this all the more so since the defence was obliged to call Sergeant Michalowsky. The advantages of cross-examination were, therefore, lost and what even under normal circumstances would have been a delicate and difficult task was greatly aggravated by the special arrangements made to accommodate the witness.

As I said before, I do not question the fact that Sergeant Michalowsky was ill, and I can understand why Mr. Justice Donnelly felt obliged to take special precautions (regardless of whether the ones he took were or were not necessary). Indeed, as discussed below, I determined during the Inquiry, that, in light of the medical evidence, I would not direct that a summons be delivered to Mr. Michalowsky. But, as the trial judge quite correctly concluded, this was a murder trial and the defence considered Michalowsky's evidence essential; it would not have been right, barring very grave facts, to

deprive the defence of this witness.

While it was the judge's desire to make the witness feel as much at ease as possible, such an accommodation must have limits, for otherwise the jury may get the wrong impression. I do not think that comments by the judge such as "you are doing very well and we appreciate it" or "you've shown great strength of purpose and recuperative powers" were helpful. To the jury, this may have seemed like a judicial stamp of approval of Michalowsky's testimony; it may also have conveyed the impression that, for some unfathomable reason, the defence forced this poor man to testify, unmindful of the potential consequences. Either way, the results were unfortunate. If the trial judge insisted on proceeding in this way, I would have expected that, in the absence of Michalowsky, he would have advised the jury, in the strongest possible terms, that these accommodations, including his personal interventions, should not be taken as an endorsement of Michalowsky's testimony or honesty or even the genuineness of his purported inability to answer questions.

There is another aspect to this. Even though the jury was absent at times, Mr. Morin was not. He therefore saw the judge's action — shaking hands with the witness — and heard all of the judge's comments. This, after all, was the person charged with crimes arising out of Mr. Morin's own case. I do not for a moment believe that it ever crossed the judge's mind that these incidents may have given rise to fear by Mr. Morin that he was partial to the witness, but appearances are important, and certainly what happened in the courtroom cannot have inspired Mr. Morin with confidence.

Inquiry Ruling on Mr. Michalowsky's Appearance as a Witness Before This Commission

As I indicated, in the normal course of events, Commission counsel would have called Michael Michalowsky to testify in Phase IV of the Inquiry. However, it was submitted at the time by Mr. Michalowsky's counsel that his client was too ill to be called.

Sergeant Michalowsky's medical records (and prior medical assessments) were made available by his counsel, but I considered his potential testimony to be of sufficient importance to have an independent expert examine him and provide the Commission with an assessment of his capability to appear as a witness. I therefore appointed Dr. Allan Gordon

Adelman, an Associate Professor of Medicine at the University of Toronto and a former Director of the Cardiovascular Clinical Research Laboratory at Mount Sinai Hospital, to examine Sergeant Michalowsky and report his findings to the Commission.

This examination was done on July 28, 1997, and a detailed report was provided to me a few weeks later. The key findings were that “Mr. Michalowsky suffers from angina due to myocardial ischemia” and that neither

his treating cardiologist [n]or myself can be certain whether or not Mr. Michalowsky would suffer an acute myocardial ischemia event while testifying. There is evidence that is likely because he is a very anxious man who is quite depressed and who has myocardial ischemia with very little provocation.

On October 28, 1997, I delivered reasons stating, in essence, that, in light of the medical evidence, “I will exercise my discretion and not issue a subpoena compelling Mr. Michalowsky to appear and testify.” In my reasons I said:

[I]n my view this is not a risk we can impose. I realize that Brian Gover, a former Crown attorney who testified at these hearings, was of the view that Mr. Michalowsky was “faking” when he testified with what appeared to be great difficulty at the trial. And Ms. McLean [Mr. Morin’s counsel before this Commission] relied upon this evidence, together with the chronology of events, including the timing of Mr. Michalowsky’s assertions of illness, in her submissions that he should be compelled to testify.

However, the fact remains that there is incontrovertible evidence that Mr. Michalowsky has coronary artery disease, and while Doctor Adelman suggests that coronary and left ventricular angiography, followed by angioplasty, may well “improve his functional capability and allow him to testify before the Inquiry”, this is not something that I can order.

In fact, in fairness to Mr. Michalowsky I add at this point that we were informed that he has made arrangements to have the first part of this procedure carried out at St. Michael’s Hospital in Toronto, and

the likely date is towards the end of November.

Only then can his physicians decide whether or not to proceed to the second part, the angioplasty, but I must note here that this procedure was attempted once before, but failed to succeed.

These reasons are set out in full in Appendix O, and I will not go into greater detail at this point.

Findings

Sergeant Michalowsky's evidence at the first trial was that a member of the search team, whose name he did not record, found a cigarette butt in the vicinity of the body. He produced it in evidence and described it as a recently dropped butt. Two photographs were introduced of a 'cigarette butt' at the first trial. Michalowsky testified that these were photographs of the same object taken at a different time. The second photograph was said to depict the same cigarette butt after the grass had been pulled back. During the first trial, Michalowsky was permitted to refresh his memory through use of a notebook. His testimony left the impression that the notebook entries were made contemporaneously.

I find that the cigarette butt introduced into evidence by Michalowsky was not the butt found at the body site. I find that the photographs did not depict the same object and were not taken in the sequence described by Michalowsky. I find that the notebook used by Michalowsky to refresh his memory during the first trial was not made contemporaneously with the events described therein or shortly thereafter. Further, some of the events described in that notebook did not take place. The conversation with Cameron, as described in that notebook, did not take place. The finding of a milk carton by Kapuscinski, described in that notebook, did not take place.

The cigarette butt may have had absolutely nothing to do with the identity of the perpetrator. Its treatment reflects on the quality of the investigation.

No reliance can be placed on any contested evidence given by Michalowsky at the stay motion or at either trial. I do not rely on his prior evidence to make any findings of fact where his evidence conflicts with the

testimony given at this Inquiry.

(xiv) Continuity and the Evidence of Officer Robinet

Officer Robinet attended at the body site at 4:32 p.m. on December 31, 1984. He testified that the area was roped off when he arrived, and that Christine's remains had already been placed on a wooden board, located directly south of the identification van. This is in conflict with a reference in Sergeant Michalowsky's second notebook which states that Officer Robinet assisted Michalowsky in roping off the area.

Officer Robinet has no recollection of taking any photographs that day. This, again, is in contrast to a reference in Michalowsky's notebook which reflected that both he and Robinet took photographs of the area.

Officer Robinet did not recall being at the scene when a cigarette butt or butts were found. This is in sharp contrast to Sergeant Michalowsky's testimony at the second trial where he stated that Officer Robinet got very upset when he learned that Sergeant Cameron had thrown a butt on the ground at the body site. Nor did Robinet agree with Michalowsky that, following this incident, he placed a plastic bag on the identification van and told all officers to put their garbage in the bag. He did, however, recall that there was a garbage bag hanging from the identification van mirror when he got there. Robinet stated that he could not recall anyone smoking in the environment surrounding the remains.

Officer Robinet testified that Tom Cameron was at the scene when he arrived at 4:32. In fact, Officer Cameron did not arrive until 4:58 that afternoon.

Officer Robinet did not testify during the first trial of Mr. Morin as Sergeant Michalowsky covered all identification issues in his evidence. But at the second trial Robinet was tendered as a witness to establish continuity of the Crown's exhibits.

Officer Robinet's evidence at the stay motion in June 1990 was that, apart from assisting Sergeant Michalowsky in carrying the exhibits into the station, he had no recollection of the way in which he helped Sergeant Michalowsky and no recollection of any specific exhibits that were there or what was hung up to dry.

This is in contrast to his evidence at the second trial on January 21, 1992, where he testified that he assisted Sergeant Michalowsky in taking specific items out of the identification van and into the identification laboratory. He helped Michalowsky in tearing off and placing brown kraft paper under the area in which Christine Jessop's clothing was hung to dry. He recalled a pair of blue corduroy pants and two off-white running shoes with blue trim. He also provided testimony in relation to Christine Jessop's recorder and bag. But his rough notes, notebook and supplementary reports do not reflect the specifics provided in his evidence.

Proof of the continuity of Christine Jessop's pants, running shoes, recorder and recorder bag were of critical importance to the prosecution's case, since fibres found on these items were purportedly linked, as we have seen, to the Morin Honda. Robinet's evidence, enhanced as it was at the second trial, assisted in establishing continuity.

At the Inquiry, Officer Robinet, when questioned about the considerable improvement in his recollection, testified that it was brought about by his review of photographs which had been taken, by a perusal of certain transcripts of the evidence, and by his pre-trial preparation with Mr. Smith, one of the Crown attorneys. Constable Robinet's notes record 20 hours of pre-trial preparation with Mr. Smith, spread over several days. He added that he had not seen some of the photographs before, so when he testified a few days later they were fresh in his mind.

On November 22, 1992 Constable Robinet attended the courtroom with Mr. Smith, Sergeant Smith and the registrar to view the clothing exhibits. Mr. Smith did not specifically recall this exercise, but testified that his practice is to give witnesses an opportunity to view exhibits before being called to testify.

Despite the time spent with Robinet, Mr. Smith denied suggestions put to him that he had 'spoon-fed' the evidence to the witness. He also denied that Robinet's testimony was required in order to minimize the damage caused by Sergeant Michalowsky. All the Crown needed, he said, was to show that the exhibits tested were, in fact, the items which had been taken to the station.

Findings

Memories are not frozen in time and additional details can be recalled

sometime after events have occurred. As I have reflected earlier, details may acquire heightened significance due to the issues raised by defence counsel. I have made generous allowance for this phenomenon. Having said that, Officer Robinet demonstrated considerable, if not remarkable, improvement in his recollection respecting his involvement in the items collected at the body site. Indeed, if Robinet's memory of these events had been as thin at the second trial as it had been when he gave evidence in June 1990, the Crown may have had some difficulty in establishing the necessary continuity. (I am not prepared to say that Robinet's improved memory was absolutely necessary to prove continuity.) Yet again, the absence of contemporaneous records supporting Constable Robinet's improved memories invites concern that details are being later supplied to buttress the Crown's position. I do not find that Constable Robinet's evidence was knowingly false. I specifically find that Alex Smith did not deliberately counsel perjured evidence or deliberately 'feed' Constable Robinet with details, not known to Robinet, so that Robinet would adopt them as his own. I am aware of the very substantial amount of time that Smith spent with Robinet in preparation for his evidence. Smith's failing may have been that he did not take adequate care to ensure that his interviewing did not contaminate Robinet's testimony. I understand that it is appropriate to review documentation with a witness in preparation for trial. Counsel should be alert to the dangers in doing so, where the witness' own contemporaneous records and his or her prior testimony compel a cautious approach in the interviewing process. Despite the absence of any finding of deliberateness, I am left with the concern that Robinet's ultimate testimony no longer reflected an accurate recollection of his involvement in the events of October 3, 1984.

(xv) Conclusion

In this case, it is truly remarkable the extent to which the memories of a number of Crown witnesses improved as the proceedings progressed.⁷ Some of this, as I have said, was expected and was responsive to the more detailed demands placed upon them in the later proceedings. I find that some of this was a product of an interviewing process (such as collective meetings or overly informative questioning of witnesses) that was not designed to create unreliable evidence, but which nonetheless had that very effect. I find that a

⁷ The extent to which the memories of defence witnesses also improved is discussed later in this Report under Alibi.

number of witnesses adopted and incorporated into their evidence things they were told by others — often, done subconsciously; sometimes, I regret to say, done deliberately.

Throughout my analysis of the body site evidence, I have assessed the Crown's responsibility for evidence which may be unreliable. My conclusion throughout is the same. I do not find that any Crown counsel counselled perjury or deliberately contaminated the evidence of witnesses. However, I do find that prosecutors failed to take appropriate measures to preserve the integrity of the interviewing process. I accept that, in the context of the 'lighter' evidence (and some other aspects of the body site evidence), the Crown attorneys did not regard this evidence as anything more than a 'red herring,' which undoubtedly affected the way in which they related to the officers on these issues. As well, they were affected by the fact that these were police officers. Collective meetings with police officers about substantive matters are as problematic as the assembly of civilian witnesses to discuss their collective evidence — and Crown counsel did not seem to fully appreciate this at the time.

Some time was spent in the course of the Inquiry examining the usefulness — indeed, the propriety — of collective meetings of this nature generally. Certainly, a great deal of time can be saved by having everyone in the room at one time in the hope that a complete (and accurate) picture will emerge. On the other hand, the dangers inherent in this procedure are clear: memories are jogged, lacunae are filled in and, in the end, recollections may be adjusted to fit in with the general pattern. I do not suggest that this is necessarily done in bad faith, but that does not alter the fact that independent recollection may be sacrificed on the altar of collective recall, and important details (and differences) may be lost in the process.

This poses a dilemma. On the one hand, a Crown attorney, preparing for trial, will want all the facts. And he or she will want them in one coherent story from beginning to end. So why not get all the participants in one room and proceed in chronological order? On the other hand, when it comes to preparing a witness for trial, counsel should not be suggestive, and it is clearly undesirable to try and dovetail the evidence of a number of witnesses to make a perfect whole. And what does one do with conflicting recollections from one's anticipated witnesses? Counsel may understandably wish, in fairness to the witness and with a view to ascertaining the true facts, to advise witnesses of conflicting evidence to invite comment and reflection. On the other hand,

the dangers are obvious. The line is a thin one. Great caution must be exercised by counsel.

Recognizing this ‘thin line,’ certain guidelines seem appropriate:

- Counsel should generally not discuss evidence with witnesses collectively.
- A witness’ memory should be exhausted, through questioning and through, for example, the use of the witness’ own statements or notes, before any reference is made (if at all) to conflicting evidence.
- The witness’ recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.
- □ Questioning of the witness should be non-suggestive.
- Counsel *may* then choose to alert the witness to conflicting evidence and invite comment.
- In doing so, counsel should be mindful of the dangers associated with this practice.
- It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness’ own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.
- Under no circumstances should counsel tell the witness that he or she is wrong.
- Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

- Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.
- Facts which are obviously uncontested or incontestable may be approached in another way. This accords with common sense.

These guidelines enhance the reliability of the interviewing process and ensure that not only the ultimate evidence of the witness is disclosed, but also the basis for the changed recollection. This is an approach that is presently employed by many counsel, without any formalized process, as a matter of practice. I am certain that Crown counsel, not infrequently, advise the defence that a witness is now saying one thing, but originally told the Crown something else and that the change came about in a certain way.

In conclusion, I again note that a number of the items found at the crime scene may not have been connected in any way to the identity of the killer. But that is not the point: they were gathered at the scene, they were bagged and tagged. Surely, both the Crown and the defence were entitled to be told with certainty exactly where these items were found, who found them, and at what time. No such certainty was ever established, and I can understand John Scott's exasperation when told that a potential exhibit was lost. I can equally understand Jack Pinkofsky's frustration (and scepticism) at getting different answers from different people about the same thing.

The body site evidence was therefore disturbing for two reasons. First, it reflected upon the quality of the search at the scene. Second, and more importantly here, it reflected upon the quality of the testimony given by officers in the case generally. My later recommendations address both issues.

C. The General Investigation

(i) Jurisdiction

Traditional protocol in Ontario dictates that in situations where an