the jury to note that Morin had not expressed his condolences up to the present date. Apart from the overall inadmissibility of this evidence, it was surely incorrect to invite the jury to infer anything from Morin's failure to express condolences, once he was charged with Christine Jessop's murder. Mr. McGuigan conceded, on reflection, that this is so. (He had not intended to include the time-frame after arrest.)

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

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

E. The Alibi

(i) Overview

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

It was Crown counsel's position at the Inquiry that Mr. Morin's

conviction at the second trial resulted, at least in part, from the failure of the defence to establish a credible alibi. On the other hand, the position of counsel for Mr. Morin at the Inquiry was that the prosecution converted exculpatory evidence and innocent conversations into incriminating evidence as the result of their tunnel vision or their desire to secure a conviction.

The timing and minute detail of the activities of Guy Paul Morin and his family on October 3, 1984, were the subject of considerable analysis and evidence and it is summarized below.

(ii) Mr. Morin's Statements to Investigators

When Guy Paul Morin was first interviewed by Detective Fitzpatrick and Inspector Shephard on February 22, 1985. He initially estimated that he returned home from work on October 3, 1984, at approximately 4:30 p.m.:

> Morin: That particular day I was starting in the morning about 7:00 and finished at I think was, ah, 3:30, then went shopping, got home around 4:30. It only takes me about 45 minutes to get home from where I work.
>
> Fitzpatrick: Okay, so you had, you got home around 4:30.
>
> Morin: All of it. It's easily 4:30, it had to be.
>
> Fitzpatrick: Ya.
>
> Morin: 'Cause, ah, normally I would have seen it ... So if I was there that day I guarantee you I could even tell you the licence plate, everything. 'Cause I'm really suspicious of anyone who stops in front here or anything like that. So that's why I'm really pissed off at myself for not being there. Shopping screwed me up that time. Usually from work I would pick up the odd thing at the mall.

Later, in the untaped portion of the interview, he adjusted his arrival time home to between 4:30 and 5:00 p.m.

Indeed, there were a number of timing errors that he made to the police in this statement relating to the occurrences some five months before.

After telling the investigators that he worked at IIL International for "no more than three months," he later realised, "Oh gosh, when you really think about it, I worked there about a year and a half instead of three months." In this context, he added "I'm really bad with times." While he told the detectives that he had started work that day at 7:00 a.m. (a time he later, in the untaped portion of the interview, changed to between 7:20 to 7:30 a.m.), a check of his workplace time card records revealed that he had not arrived at the plant until 7:56 a.m. Mr. Morin indicated that he thought Christine Jessop disappeared "in the late summer, wasn't it?" Leo McGuigan could not recall his view of this comment at the time, but offered two possible explanations which would have then been open for consideration: either Mr. Morin was not being frank about his recollection of the season, or he had mentally repressed this information. He thought a next-door neighbour would have remembered the date of the kidnaping and the events associated with it.

Mr. Morin said, at his first trial, that during his conversation with the police, he did his best to figure out his timing, months after the event. When asked in cross-examination at the second trial why he told the police he got home at 4:30 p.m. if he went shopping, he said that he "blended the two together without really taking into consideration my one hour of shopping." When asked why he adjusted the time of his arrival home from 4:30 p.m. to between 4:30 and 5:00, he replied that he had estimated that if he got out of work at 3:15, he would have been home at 4:00; with one hour of shopping he would have been home at 5:00. In fact, Mr. Morin's time card documented that he did not leave his place of employment until 3:32. A police timing run confirmed the drive from Mr. Morin's workplace to his residence to be 42 minutes.

Upon his arrest on April 22, 1985 — almost seven months after Christine's disappearance — Mr. Morin had this conversation with the detectives relating to his arrival home:

> Morin: I got home at maybe 5:00 - 5:30 for sure.
>
> Shephard: You told us 4:30, Guy.
>
> Morin: Gosh 4:30 look it takes me an hour easily. I'm sure I'm quite sure, I know I had easily good (sic) groceries (sic.) bags it takes time to shop and my time was immediately out of touch with Christine Jessop's.

> Shephard: You told us you were home at 4:30, you told us that 3 or 4 times.
>
> Morin: You think I was home around 4:30, okay let's say I was, if that's what I told you I mean time usually I would get home around 4:30 but that day I told you I even went shopping. I remember coming in with all the grocery bags. [Frank] Devine was there too, I do remember that for sure but even if I was home at 4:30 I have no idea, I never saw her that day.

During the Inquiry, Crown attorney Susan MacLean acknowledged that while the range of times that Mr. Morin provided and his admitted inability to specifically remember times could indicate that he was doing his best to provide estimates, her perception of his various statements was that he was constructing an alibi.

It was suggested to Mr. McGuigan that had Mr. Morin murdered Christine Jessop, he would have known the time of the abduction; if he intended to avoid admitting any opportunity to abduct her, he would have placed his arrival at home as late as possible. Mr. McGuigan noted that in light of the psychiatric evidence (discussed later in this Report), Mr. Morin might have been in a state of psychosis and may not have remembered the exact time of the abduction.[31]

(iii) The Alibi Notices

Following the arrest of Mr. Morin, Bruce Affleck, Q.C., and Alexander Sosna were retained to represent him.

On June 28, 1985, Mr. Affleck provided 'alibi information' to John Scott relating to Mr. Morin's activities on October 3, 1984:

> On the morning of October 3rd, 1984, Guy had breakfast and drove to work at I.I.L. which is situated between Steeles and Finch near Highway 401. He punched out of work at 3:32 p.m. and proceeded along Highway 401 to Highway 9 and into Newmarket where

[31] Indeed, Dr. Turrall's evidence at the first trial was that one of the symptoms of the illness is distortion of time; in his opinion while Mr. Morin would know whether it was morning or night, he may have more difficulty if asked to be more specific.

> he entered the Upper Canada Mall. He purchased a 649 Lottery ticket as well as a Lottario ticket at a kiosk inside the mall. He proceeded from there to the Dominion store and from there to Loblaws. He left Loblaws at approximately 5:10 p.m. and proceeded along Highway 11 towards Bradford and from there on to Bathurst Street and turned left onto the Queensville Sideroad where he proceeded east to Queensville.
>
> He arrived home at approximately 5:30 p.m. When he arrived home the following persons were present: his fater (sic.) Alphonse Morin, his mother, Ida, his sister Yvette and her husband, Frank Devine.

On July 10, 1985, Mr. Scott wrote to Mr. Affleck asking for the identity of any person who saw Mr. Morin between 3:32 and 5:30 p.m. that day. He also notified Mr. Affleck that police officers would wish to interview the Morin family concerning the alibi.

On August 15, 1985, Mr. Sosna provided Mr. Scott with further alibi information:

> The following is a synopsis of the alibi evidence which will be tendered on behalf of the Defence. Four witnesses will be called to substantiate the whereabouts of our client on October 3, 1984. The following people will give evidence confirming that Guy Paul Morin returned home at approximately 5:30 p.m. These people are as follows:
>
> 1. Al Morin, our client's father.
> 2. Ida Morin, our client's mother.
> 3. Yvette Morin, our client sister.
> 4. Frank Arthur Devine, the brother-in-law of our client.
>
> Yvette Morin would indicate that she arrived at her parents' home at approximately 3:30 p.m. in Queensville. She attended to discuss the health of her young son who was hospitalized. At approximately 4:00 p.m., Frank Devine attended at the Morin home in Queensville. He remained at that residence until approximately 5:30 p.m. At that time, when exiting, he met Guy Paul Morin who was about to enter the home carrying some groceries. A brief discussion ensued

> between the parties and Mr. Devine left the Morin residence. Al Morin would indicate that he was home the entire day and would confirm the attendance of both his daughter, Yvette, and Frank Devine at the approximate times already outlined. He will also indicate that his son, Guy Paul Morin, arrived home at approximately 5:30 p.m. carrying groceries that he purchased. Our client stayed at home for the entire evening, without leaving.
>
> Ida Morin would corroborate the evidence of her husband and confirm the attendance of both Yvette Morin and Frank Devine at her home.
>
> It is my understanding that these witnesses have already been interviewed by the police authorities and, therefore, their addresses are available to you for the purposes of further investigation. Should that not be the case, please contact me and I will supply you with the addresses of the people outlined above.

(iv) The Devines

At Mr. Morin's second trial, his alibi was challenged, *inter alia*, on the ground that members of the Morin family had originally tied their recollections about his time of arrival home to the hospitalization of Andrew Devine, the infant son of Mr. Morin's sister, Yvette, and her husband, Frank Devine.

There is no mention of Andrew Devine in Mr. Morin's statements to the police, or in a conversation Mr. Morin had with Mr. May on July 1, 1985, as to his whereabouts on October 3, 1984. (This conversation is discussed below.) The first time Andrew's hospitalization and the alibi were formally linked is in Bruce Affleck's August 15th letter, set out above. A review of this letter, however, indicates that it is unclear whether Ida and Alphonse Morin actually adopted the statement of Yvette Devine and tied their recollection of Guy Paul's arrival home to the hospitalization of their grandchild — an event, Ms. MacLean thought, would not be easily forgotten by family members. John Scott agreed that the letter contained no indication that Alphonse and Ida Morin linked their recollections to the hospitalization of Andrew Devine.

Frank Devine, Guy Paul Morin's brother-in-law, was of interest to the investigation for two reasons. First, he had supported Mr. Morin's alibi as to his whereabouts the afternoon Christine Jessop disappeared. Second, Paddy

Hester alleged that she had seen Mr. Devine driving with Guy Paul Morin and his father late in the evening on October 3, 1984. (This is discussed in detail elsewhere in the Report.) The investigative practices reflected in the interviews of Mr. Devine are also of interest.

On March 1, 1985 (approximately a week after Guy Paul Morin's first interview with Detective Fitzpatrick and Inspector Shephard), Yvette and Frank Devine were interviewed by these officers regarding their October 3, 1984 activities. The Devines described visiting the Morin household that afternoon. Yvette thought she recalled leaving the residence to visit their son Andrew, who was hospitalized at the time; however, during this interview both were uncertain, due to the elapsed time, as to the times of their arrival and departure and whether Andrew was actually in the hospital on that date. Ms. Devine advised the police that Andrew,

> had just been put in the hospital ... that day or the day before. I'd gone over to let them know how he was doing ... I know we left before 7:00, anyway the two of us were definitely there cause I went back to the hospital that night.

In the course of the interview, she said that her memory of October 3, 1984 (whether it was a Tuesday or a Wednesday) was "pretty bad." After Frank joined the interview, Yvette asked him "Andrew was in the hospital at that time wasn't he?" and Frank replied "I think so. That was a long time ago." Inspector Shephard then asked "Do you remember if Guy had anything with him when he came in?" Frank turned to Yvette and repeated the question, and she responded "I think he had groceries or something."

It is worth noting, at this point, that Andrew was treated by the family physician on October 2nd and October 4th and was admitted to hospital on the 4th.

Yvette and Frank Devine recalled Frank arriving at the residence at times ranging from 3:15 to 4:15 p.m. and departing at times ranging from 5:30 to 7:00 p.m. Ms. Devine recalled leaving the residence after Frank, sometime before 7:00 p.m., possibly at 6:00 p.m.[32] When Mr. Scott received the alibi

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[32] At points during the interview Ms. Devine variously stated that Guy Paul arrived home between 4:30 to 5:00 p.m. with a lot of groceries, that he arrived when Frank

letter, discussed above, he knew that Frank and Yvette Devine had been questioned by Detective Fitzpatrick and Inspector Shephard on March 1, 1985.

Frank Devine was interviewed again on March 14, 1985. Inspector Shephard's notebook entry reflects that his tape recorder malfunctioned during this interview. A supplementary report filed by Detective Fitzpatrick states that Mr. Devine was

> questioned again [as] to what time Guy Paul had arrived home, what time he, Frank, left and where he went. Devine related the same information as he had on the previous occasion when he was interviewed at his residence with wife Yvette.

During this interview, Mr. Devine signed a consent to release his son's hospital records.

On March 15, 1985, the investigators examined these records. As pointed out before, they discovered that Andrew was not admitted to hospital until October 4th. Detective Fitzpatrick described how he felt at the time:

> When you're [in] an investigation like that, and you run across these things ... you start thinking of cover-up, something wrong here. And you start looking into it a little further.

Although he and his partner originally thought that the Devines were mistaken, by the time of the first trial, Shephard and Fitzpatrick had come to the view that they were concocting an alibi for Guy Paul Morin.

On September 19, 1985, Mr. Morin discharged Mr. Affleck as his counsel and retained the services of Clayton Ruby. On December 9, 1985, Detective Fitzpatrick and Inspector Shephard attended Mr. Ruby's office for a meeting with the alibi witnesses, Frank and Yvette Devine and Ida and Alphonse Morin. During this meeting, Mr. Devine maintained the connection between seeing Guy Paul that afternoon and his son's admission to hospital, despite the fact that the records reflected that Andrew was not admitted until the following day. Mr. Devine thought that these records were in error.

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arrived, or that he may have arrived as they were leaving.

Inspector Shephard told the Inquiry that Mr. Morin's counsel suggested that the interview of the three alibi witnesses be a joint interview. Inspector Shephard responded that the interviews must be conducted individually in order to preserve the integrity of the process. Accordingly, the supplementary report of the interview reflects that the witnesses were interviewed separately; Frank Devine's interview commenced at 7:30 p.m., Ida Morin's at 10:02, and Alphonse Morin's at 10:14 p.m.

Detective Fitzpatrick said that of all the alibi witnesses put forward by the defence, he viewed Frank Devine as the weak link. By the time preparation began for Mr. Morin's second trial, Frank and Yvette were experiencing marital difficulties. Fitzpatrick was asked about this during the Commission hearings:

> Q. [Y]ou and [Shephard] thought you might be able to take advantage of the family split up between [Frank] and Yvette, correct?
>
> A. Possibly, yes.
>
> Q. And indeed, what you understood to be something of a custodial or access dispute about their child?
>
> A. I'm not sure, I can't seem to recall everything on it, but I'm sure we were thinking along that line.

Following Mr. Morin's acquittal at his first trial, and in preparation for a re-trial, Mr. Devine was re-interviewed on November 2, 1987, in Inspector Shephard's vehicle. A transcript of the tape-recorded interview contains the following introductory comments:

> Shephard: [A]re you going to talk to Mr. Stone [Devine's family lawyer] or Ruby?
>
> Devine: No, I'm going - I'll talk to Stone, yeah.
>
> Shephard: Because I'm sure, I'm sure that if you talk to Ruby, he's going to say don't talk to the police.
>
> Devine: Um hm.
>
> Shephard: Don't talk to anybody, because he may not use you as a witness himself, and he may not, ... and

> obviously doesn't want anyone else to use you, but the thing is that um if the Crown subpoena's you, you're not gonna have any choice in the matter, ... whether Mr. Ruby says don't talk to the police or not, if he subpoenas you, ... you're going to be there, and that's all there is to it, or they'll issue a warrant for you, and you know, one way or another.

It was in the course of this interview that Inspector Shephard told Frank Devine of his belief that Guy Paul had murdered Christine Jessop:

> Shephard: See Frank all we're trying to do is get to the bottom of this thing. There's no doubt in our minds that Guy Paul committed this horrendous crime. Absolutely no doubt in our mind. There's no doubt in the Crown Attorney's mind, and ah you know, I could go on and on and on, and it's a travesty to think that ... this guy is going to get away with murdering and sexually assaulting this little girl. It's just you know, there's absolutely no doubt in our minds at all.
>
> Devine: Um hm.
>
> Shephard: And if you can shed the least little bit of light on it, you're not only going to do the justice system a favour, you're also doing Guy Paul a favour because he's one sick sick boy. I don't know whether you realize that or not. You weren't at the trial when all the ... psychiatric evidence was brought out about him.
>
> Devine: Um hm.
>
> Shephard: He is one sick little boy. And um the only way he's ever going to get any help is, is through a mental institution. And if they don't get him there before long the same thing's going to happen again and it's going to be somebody else's little girl ... that's going to wind up in the same perdicament (sic.) as Christine Jessop did.
>
> .....
>
> Because it won't end here. I can guarantee you that. And all the people we've dealt with ... we've brought up professionals from the United States and there's

> professionals here in Canada dealing with the psychiatric assessments and reports, and ah they all say the same thing: It'll happen again.'

Later in the interview, Inspector Shephard spoke about Alphonse Morin:

> I understand that ah at one point he [Morin] may have ah wanted to plead guilty and his father wouldn't let him. ... But that's neither here nor there, and his father stood behind him and I give him credit for that.

Detective Fitzpatrick and Inspector Shephard said that they received information from 'a source' that Mr. Morin wanted to plead not guilty by reason of insanity. To their minds, this was indistinguishable from a plea of guilty. They could not, however, recall this 'source.'[33]

Inspector Shephard also conveyed to Mr. Devine his views about Mr. Morin's acquittal at the first trial:

> Devine: You know with ... what I heard in the news and stuff like that, and ah I couldn't believe it. What he was doing [referring to Morin's alleged conversations in jail], I mean unless he must have felt that he done it or something, you know.
>
> Shephard: Well I don't think there's any ... doubt at all. At least not in my mind anyway, Frank.
>
> Devine: Um hm.
>
> Shephard: If there was, ... I wouldn't pursue the matter. If there was the least bit of doubt in my mind that he didn't do it, I'd be, looking at somebody else. But you know, the evidence is there and when you talk to anybody in any legal circles, they'll tell you it's just a goddamn fluke that he wasn't convicted or found not guilty by reason of insanity. And actually, I think everybody was hoping, including Ruby, in fairness to Ruby too, I think he was hoping that ... if it was a case

[33] It would appear this information was provided by Ms. Hester to Detective Fitzpatrick in a February 1987 interview, discussed elsewhere in this Report.

> of one or the other, it would be not guilty by reasons of insanity. But when you're dealing with a jury you just, you just never know. There was alot (sic.) of technical evidence there too, that maybe the layman didn't understand and obviously the judge didn't put it to them properly, or the Ontario Court of Appeal would never have said: hey, you're getting a new trial. You know, they'd have said he did the job right, and it was presented to them properly and that's the end of it, he's not guilty. But we've got three judges down there that reviewed it and they said the trial judge didn't put the case to the jury properly, ... so now we're into the new situation.

During this interview, Mr. Devine did not waiver from his recollection that he saw Guy Paul arrive home on October 3, 1984 because that was the day his son went to the hospital. Nor did he alter his position when he was, again, interviewed in 1989.

Despite his remarks, Inspector Shephard maintained that he kept an open mind in the course of the re-investigation of Mr. Morin for the murder of Christine Jessop. He justified his comments to Mr. Devine as an attempt to elicit truthful information about the alibi. He told the Inquiry that he was convinced that Mr. Devine was not merely mistaken about the date of his son's admission to hospital, but that he was, in fact, lying in an attempt to assist Mr. Morin in establishing an alibi. He was unconcerned that his own expressions of Mr. Morin's undeniable guilt might affect the reliability of the witness.

In hindsight, however, Inspector Shephard recognized how interviews conducted in this manner might taint the evidence of potential witnesses. He could not recall whether he expressed similar views about Mr. Morin's guilt and the evidence relating to his mental state to others. But he acknowledged that he may have told witnesses that the case against Guy Paul Morin was very, very strong.

On March 1, 1989, Mr. Devine was interviewed again by Detectives Fitzpatrick and Inspector Shephard. By this time he was separated from his wife. The purpose of the interview was to obtain any information that Mr. Devine had previously held back, but Detective Fitzpatrick denied that the interview reflected an attempt to destroy Mr. Morin's alibi. Again, Mr. Devine did not waiver from his earlier statements.

The tape-recorded interview commenced with the following discussion about Mr. Devine's alleged breach of a condition of his release on a criminal charge relating to an incident with his wife:

> Fitzpatrick: Frank I understand there's a few problems?
>
> Devine: Yeah, yeah.
>
> Fitzpatrick: I understand you were up at the house.
>
> Devine: Which
>
> Fitzpatrick: Yvette's.
>
> Devine: Nope. Nope. I wasn't up there at all.
>
> Fitzpatrick: Yvette still got the kid.
>
> Devine: Not up there oh you mean in her house.
>
> Fitzpatrick: Yeah. You breached the release (inaudible) sit down for a minute, we're not going to jump on you.

Mr. Devine then explained that he had spoken with Yvette and had obtained permission to pick up his son on this occasion. Detective Fitzpatrick replied:

> Fitzpatrick: Well, you're before the courts and you signed this release, notify change of address in writing, 24 hours, no communication with the Yvette Morin, Glen Bogois.
>
> Devine: Yeah that's right.
>
> Fitzpatrick: Except through counsel and not to possess any firearms and to stay away from Lot 6, Con. 4, well that's a breach according to Mills [Officer Mills was the officer investigating the complaint], what you're charged with. Threatening Death by phone.

The potential criminal problems Mr. Devine faced in the course of his matrimonial breakdown were raised by the investigators a number of times during the interview. At one point, towards the end of the interview, Mr.

Devine was told:

> Fitzpatrick: I don't think Mills wants charges but you'd better judge yourself accordingly, because Yvette ... I understand Yvette is a little hostile towards you.

Inspector Shephard's recollection was that Detective Mills had telephoned him to ask if either he or his partner would be seeing Mr. Devine and, if so, if they would speak to him about this matter. Inspector Shephard's understanding was that Detective Mills did not intend to pursue the complaint. He denied that he informed himself about this matter in order to assert an element of authority over Mr. Devine to obtain information from him. While he said that he probably raised the issue with Devine to make it easier to gain access to the residence to speak with him, he denied that he used this information for the purpose of intimidating Mr. Devine.

The interview concluded with the following exchange:

> Shephard: When does this case come up that you're involved in?
>
> Devine: Oh right now it's October 10, 1989.
>
> .....
>
> Fitzpatrick: Well good luck on it, don't worry about the charges, I don't think you're going to be charged at our end, so don't worry about it. ... When we were down here that day, well it was all forgotten. ... You don't need that hassle.
>
> Devine: No, as I say, I'm not out there looking for trouble you know.
>
> Fitzpatrick: Didn't think you were Frank. ... Say, I don't think you are but sort of play it cool, you don't need the hassle from them.
>
> Devine: That's what the Sergeant said at the station, he said what you just said something I have to work out with a lawyer.
>
> Shephard: Yes well, give some thought to what I said to you ... before you know about ... who you discuss

> that situation with because , ah.
>
> Devine: Which situation
>
> Shephard: The times and dates you remember I asked you who sat down [with] and who you discussed the alibi ... with.
>
> Devine: Oh I see.

In the context of this conversation, Detective Fitzpatrick and Inspector Shephard again questioned Mr. Devine as to his recollection of the events of October 3, 1984, particularly as it related to the statement of Paddy Hester who claimed she saw Mr. Devine with Guy Paul and Alphonse Morin in a truck late that evening:

> Fitzpatrick: I want you to think very careful of that.
>
> Devine: That's a long time ago.
>
> Fitzpatrick: I know but this thing certainly is you know not something that you could just put out of your mind, I mean there was a lot involved, we spoke to you a fair amount, I want you to think very careful.
>
> Devine: Hmm-hmm.
>
> Fitzpatrick: About whether you, Guy Paul Morin and his father were out in the truck especially in the nighttime.
>
> Devine: Mmm.
>
> Fitzpatrick: Looking for Christine or whatever you were doing.
>
> Devine: No it was nighttime when I was there, you know, in the Bradford house, I can recall it was the time and year, the fall, I guess late fall.
>
> Fitzpatrick: What would you say if I told you that I can put you in the truck with Guy Paul and his father the night she went missing.
>
> Devine: No, I wouldn't agree with that.

> Fitzpatrick: What if I told you that I've got a witness that says you were
>
> Devine: Well I don't agree with that.

Inspector Shephard thought that Mr. Devine was lying about the events of October 3, 1984, because, in 1985, he had difficulty recollecting his activities that day, yet subsequently he claimed to remember them. Accordingly, Detective Fitzpatrick and Inspector Shephard suggested to Mr. Devine that he had been told what to say at the December 1985 meeting of all the alibi witnesses:

> Shephard: How do they come up with his story about, you know, Guy Paul getting home at this time and Yvette being there and you being there, and how did ... they arrive at that like, did you's all sit down together and talk about that or did you they say to you this is what we want you to say, or...
>
> Devine: No no.
>
> Shephard: How did they arrive at that then
>
> Devine: Well I don't know I just maybe that's the way it was at that time, you know what I mean
>
> Shephard: yeah, but when we first interviewed you over at your house you had no idea about anything like that.
>
> Devine: What do you mean?
>
> Shephard: Well remember we came over and interviewed you and Yvette in ... Bradford at the Landing there whatever they call it. ... You couldn't remember anything about it then when we were talking to you Yvette kept saying well I think this is what happened or I think that's what happened or you said, I don't know, I can't remember. So how all of a sudden when we interviewed you down at Ruby's office you had this story that you arrived there, this happened and that happened and then you knew what time it was and so obviously you must have sat down with somebody and came up with that either Ruby or Mary Bartley.
>
> .....

> Devine: Maybe at the time Yvette and I talked about it, you (sic) because I guess knowing we were going to be interviewed so I guess we had to sort of really think about this thing you know and just remember what happened I guess being at their place.
>
> Shephard: Yeah, but you know like you're not in any trouble for you know telling us what you told us so don't think that but if you wind up testifying and you probably will at this trial, and you get up there and you say you know this is what happened and the Crown attorney asks you how you arrived at that situation, you know and you lie about it, then you're going to be in big problems. You're going to
>
> Devine: Mo (sic.) there's no lies here. No lies. Everything I said was you know ah, to the best of my knowledge.
>
> Shephard: Yeah but how did you arrive at that that's what I want to know, cause when we interviewed you in you (sic.) house that morning you had no idea you kept asking Yvette, and then even when we interviewed you at Ruby's office, you said that you ... left there to go to the hospital and obviously you didn't because Andrew wasn't even in the hospital you know obviously it would appear that you were receiving instructions from somebody, I don't know if it was from the Morins or Ruby or Mary Bartley or who. That's what it appeared to me anyway you know if you were – all we want to know is who and how did you arrive at that, you know, did they sit down and say well this is what we want you to say or is you know what happened.
>
> Devine: No, 'cause you know from I (sic) recall there was nothing like that at all you know, that's what I don't understand what you know, you guys recorded everything we said that day and ... you know I have a copy of it somewhere, I don't know, there's no reason for me to lie you know I mean it's just you know, I've got no reason to lie.

Inspector Shephard admitted at the Inquiry that he didn't apply the same degree of scrutiny to witnesses furthering the prosecution against Mr.

Morin who had come forward with information years after the event and whose claims of earlier disclosure could not be confirmed. He was asked:

> Q. Well, what do you think we can extrapolate from the way you did give a hard, critical look to defence witnesses who fell into the same kinds of categories [late developing evidence]; do you know what I mean? Like, here's Frank Devine being interviewed by you about his alibi, and there's inconsistencies in his alibi, as you saw it.
>
> And you put to him at one point, we've heard, that: Well, you didn't remember this back in your first interview, and now all of a sudden, you remember it with such great clarity, so how could that be? There's just no way that could be. You engaged in that kind of critical analysis, I'm going to suggest to you, when dealing with evidence that tended to support the defence position; isn't that fair?
>
> A: Yes, sir, that's fair.
>
> Q: Do you think that demonstrates, perhaps, a little bit of a differential treatment between evidence that supported Guy Paul Morin's guilt, and evidence which supported his innocence?
>
> A: Yes, sir, probably.
>
> Q: I mean, we've talked about tunnel vision a lot here, and it's been used by some in a sinister way about deliberately going about to bring about the conviction of an innocent person. And you've made quite clear that certainly was never your intention, but can you see how one fixated on a particular accused can deal with evidence differently, depending on whether it conforms to the Crown's theory, or whether it takes away from the Crown's theory? Do you see that now?
>
> A: Yes, sir

He conceded that it was possible that the difference in treatment and evaluation of these witnesses was a result of his firm view that Mr. Morin was guilty:

> Q. And I guess what I want to ask you is kind of looking back with the benefit of some of the things I've asked you about yesterday, do you feel that you subjected those Crown witnesses who testified at the second trial, and who had no recollection that had been disclosed to anyone about events, but later came up with these events five, six years later, to the same kind of scrutiny? Did you do the same thing to yourself at the time? They must be lying because of the way this has come out five, six years later?
>
> A. No, sir, I don't recall doing that.
>
> Q. Do you think that the difference in evaluation may have been a function of how you felt about Guy Paul's guilt or innocence?
>
> A. I hope not.
>
> Q. It's a possibility, though; isn't it?
>
> A. Anything's possible, I guess.

Towards the end of the interview, Inspector Shephard asked Mr. Devine if he had ever been aware of any indication of incest in the Morin family — between Alphonse and his daughters or between Guy Paul and Yvette. Mr. Devine denied this insinuation. During the Inquiry, Inspector Shephard explained the purpose behind this question to Mr. Devine:

> A. Well we had received information from different people ... that there may have been incest in the family, or suspected incest. And again, I was probably using this as a pry to ... push the right buttons.
>
> Q. I mean you weren't really interested in investigating incest, you were interested in seeing whether you could create a wedge between Frank and Morin family so that his evidence would change. Isn't that fair?
>
> A. Well I think also that if there was incest and Frank said yes ... that would be some information ... valuable to the Crown, because this was a sexual murder. It might show the type of person he was, or what type of family he came from, or something like that.

I should interject that I accept that the officers did not originate the allegation of incest, though they used it in their interviewing process. I should immediately note that no one suggested to me that there was, in reality, any incest.

On April 4, 1992, Mr. Devine was interviewed by Crown attorney Alex Smith. Detective Fitzpatrick was present. His unsigned statement prepared as a result of this testimony meeting contains the following new information:

> On the day we went skating, I remember Guy Paul running around the house yelling "REDRUM". I didn't know what he meant by that until after the first trial.

Mr. Devine also put forward new information relating to Guy Paul's demeanour when he arrived home on October 3, 1984:

> [H]e seemed agitated or in a hurry, or something. He was normally a cool-type guy and just appeared to me he wasn't himself that day.

While Mr. Devine maintained that he had seen Guy Paul on October 3rd, he qualified his statement by saying that he was confused about that day because "I feel that I was going to the hospital to visit my son, but there was something to say that my son was not in the hospital that day."

In his statement, Mr. Devine also alluded to discussions with members of the Morin family concerning the alibi:

> I can't recall if it was before or after Guy Paul's arrest ... I remember sitting with Diane, Alphonse and someone else, and we were going over what happened that day. I seem to recall it was in the driveway. I'm sure Guy Paul wasn't there, but I can't remember who else was there.
>
> I also remember being at Mr. Ruby's office, the lawyer at the first trial, and Alphonse pulled me aside and spoke to me before I was to speak to the police. From what I remember, it had to do with the alibi.
>
> I can't remember when it was but I remember on other occasions talking to Mr. & Mrs. Morin and also

> Yvette about it being connected with Andrew ... being in the hospital that is the alibi.

Mr. Devine was not called to testify at either the first or the second trial.

Findings

To begin with, we have here, once again, examples of investigators pressing their personal views about the guilt of an accused on a potential witness. This, as pointed out elsewhere in the Report, carries with it the danger of poisoning the mind of the witness. We then have the unsubstantiated insinuation that incest may have been practiced in the Morin household. And finally we have the heavy hint — made at the very outset of one interview — that Frank Devine was in trouble, leaving the clear impression that he cannot afford any further problems with the law. Inspector Shephard denied that that was the investigators' intention, yet both he and his partner seemed very well informed about the pending proceedings against him, and the questions put to him went quite beyond a casual mention. While 'intimidation' may be too strong a word to use, 'heavy hint' would not — 'Let's have the truth, Frank, and we won't add to your troubles.' This sentence wasn't spoken, but it certainly hung in the air.

The tone and substance of the interviews appear inconsistent with Shephard's position that investigators remained 'open-minded' about the alibi and Guy Paul Morin's guilt or innocence. The suggestion to Shephard that the interviews were designed to 'destroy the alibi' is certainly an inference which can be drawn from their content. At this point, the investigators did not believe the alibi, did not believe Morin to be innocent, and did consider Devine to be the 'weak link' in the alibi, given his difficulties with his wife and with the law. In the investigators' view, Devine, before the break-up of his marriage to Guy Paul Morin, may have considered himself bound by family constraints to support his brother-in-law's alibi. Now, almost four years later, Inspector Shephard and his partner felt that this kind of approach to Devine might extract from him the 'true' version of events.

I cannot say to what extent, if any, the interviewing by Mr. Smith contributed to the problem. Mr. Smith was not questioned about the April 4, 1992 interview at the Inquiry. I can say, though, that at the end of the April 4, 1992 interview (if not sooner), Devine appears to reflect that Morin seemed

agitated or in a hurry on October 3, 1984 and *wasn't himself that day.* Given the interviews which we know about prior to April 1992, and the unlikelihood that Morin was *agitated or other than himself* that day, it would seem that the interviewing process, at some stage, once again, produced unreliable evidence.

Returning to the interviewing techniques used by the investigators with Frank Devine, an additional issue arises. I have no hesitation in criticizing the use of such techniques (communicating Morin's guilt, discussing the evidence, telling the witness that he or she is wrong, etc.) when most witnesses are interviewed. These techniques contaminate witnesses. However, I do not wish to be taken as suggesting that police should never be free under any circumstances to pointedly question potential witnesses whom they believe to be lying to protect an accused, or even the accused himself or herself, so long as such questioning does not violate *Charter* protections or otherwise violate the law. The police have the right, indeed the duty, to effectively investigate crime; this often does not involve a completely tranquil and non-suggestive environment. As my later recommendations suggest, one protection against the use of unfair investigative techniques or techniques which are likely to promote an unreliable account from witnesses is the taping of interviews.

It follows that my concern about the officers' interplay with Frank Devine is not that they critically questioned a witness whom they believed to be lying to protect the accused, but rather, that some of the techniques used were inappropriate. Further, it is my view that the officers never really did investigate the alibi in an open-minded fashion; their approach throughout was to demonstrate that the alibi was false.

(v) Privilege and the Alibi

After the Supreme Court of Canada affirmed the order for a new trial, Guy Paul Morin retained Jack Pinkofsky as his counsel. In September 1989, four years after the alibi notices had been sent, Inspector Shephard and Crown attorney John Scott decided to speak to Bruce Affleck, Mr. Morin's original counsel, to establish whether Ida and Alphonse Morin had based their recollections of the events on October 3, 1984, on their grandson's hospitalization. While Mr. Scott could not recall whose idea it was, he agreed that the objective was to gather information to destroy any alibi advanced at the forthcoming trial. According to Inspector Shephard, it was his idea,

approved by Mr. Scott. Shephard said that he approached Mr. Affleck (as opposed to Mr. Ruby who had represented Mr. Morin at the first trial) because he knew Mr. Affleck through many dealings with him over 27 years.

This meeting took place on September 19, 1989, and they were joined by Mr. Affleck's partner, Alexander Sosna. Inspector Shephard's notes for that interview reflect the following discussion:

> I asked about Mr. Morin's alibi and if Alphonse and Ida were present when it was adopted. And Mr. Sosna said it was a round-table discussion on more than one occasion. Couldn't recall exactly what was said, or who was present. Will check file to jog memory and call me. And then Mr. Affleck said he recalls Ida and Alphonse being present during discussions about Yvette's son being in the hospital. In fact, when they found out the hospital records showed he wasn't admitted until October 4th, Alphonse said the hospital records were wrong. Mr. Affleck said he will check the file and call me back.

On September 21, 1989, Inspector Shephard received a call from Mr. Sosna advising him that the Law Society of Upper Canada had said that, without Mr. Morin's consent, any discussion about the alibi could not go behind the 1985 letters.

The position of counsel for Mr. Morin on appeal, as well as before the Inquiry, was that Guy Paul Morin's solicitor-client privilege was violated by his previous lawyers, as any information obtained concerning his defence fell well within the 'work product privilege.' In its factum on appeal, the defence further asserted that the violation went to the heart of Mr. Morin's defence — the integrity and reliability of his alibi.

Mr. Scott maintained that the information concerning the alibi was not privileged. Ms. MacLean, too, expressed the opinion that once the alibi notice had been sent, privilege had been waived with respect to the alibi at large. Further, there was no solicitor-client privilege between either Alphonse or Ida Morin and their son's lawyer. Mr. Scott could not recall addressing his mind to notifying Guy Paul Morin about the interview with his former counsel.

It was conceded, in written submissions at the Inquiry by counsel for Mr. Morin, that Inspector Shephard should not be criticized for his actions

since he consulted beforehand with Mr. Scott. And insofar as Mr. Scott was concerned, Mr. Morin's counsel conceded that it was difficult to be too critical of him because both Mr. Affleck and Mr. Sosna were experienced counsel.

Findings

First, no blame should attach to either Inspector Shephard or Mr. Scott on this issue. As a non-lawyer, Inspector Shephard could not be expected to know about the intricacies of the law of privilege; and as for Mr. Scott (who could be expected to know about solicitor-client privilege), I accept that, rightly or wrongly, he regarded the information concerning the alibi not to be privileged. In any event, it would not be unreasonable to take the approach: "Ask them, and if they can't tell you because of privilege they will say so." Second, Mr. Affleck has since passed away. Mr. Sosna is not a party to this Inquiry. I find it unnecessary to decide whether or not Messrs. Affleck and Sosna breached their client's privilege. But I do suggest that, in future, it would be preferable if the Law Society's views were obtained in advance of any conversations with an investigator. More to the point, any assertion of privilege is for the client to make or to waive. Accordingly, the best approach, where counsel perceives any potential privilege to arise, is to ascertain the position of the client through his or her present counsel.

(vi) The May - Morin Conversation

On July 1, 1985, following his preliminary hearing, Mr. Morin engaged in a surreptitiously tape-recorded conversation with cell mate Robert May in which he discussed his activities on October 3, 1984. The transcript of the conversation includes the following excerpts relating to Mr. Morin's alibi:

> May: OK. How long were [you] in [Dominion]?
>
> Morin: Well it takes easily 15 minutes, easily.
>
> May: OK, so ... say 15 minutes so that puts us at 4:25 right?
>
> Morin: Yep
>
> May: OK, so 4:25 ok, and then you went to Loblaws and you were there how long?

Morin: Well, I, it's - um, minimum, minimum ah again another 20, fifteen minutes, twenty minutes.

May: OK, so we'll say 10 to 5 right ok, so we got

Morin: This is really cutting it short

May: OK, OK, 4:50

Morin: And again we'll say another ...

May: Mr. Grocer

Morin: 20 minutes for Mr. Grocer

May: Where is Mr. Grocer, did you have to drive there?

Morin: Oh yeah, you have to drive one to the other

May: OK, so OK, alright

Morin: They're all close to each other but I drive --

May: OK

Morin: Instead of me walking (inaudible)

May: All right OK, so 4:50 and then you got to Mr. Grocer

Morin: It would take um maybe another 3 minutes to get to Grocers, but ah we'll say another 20 minutes at Mr. Grocers.

May: OK so 20 minutes, so that puts us at ah ten after 5. So we got 5:10 now and from, from there you came home right?

Morin: OK.

May: You came home from there?

Morin: Yeah, hold on. Um see, I'm not sure if I picked up gas.

May: OK.

Morin: I would think I picked up gas.

Morin: OK, so you picked up gas.

Morin: The car — the car, inside the car I guarantee it I have right from 1977 when the car was brand new...

May: Yeah.

Morin: Every day.

May: All the receipts.

Morin: Yeah.

May: How've you got them?

Morin: My dad's got to book it up but then I, I, I have lots of pieces of paper showing the gas mileage. Now it might be in there that I picked up gas that particular day.

May: Yeah.

Morin: Uh, but I, I believe I left Loblaws at twenty after five.

May: Twenty after five, OK.

Morin: Oh not exactly, it's been quarter after five, quarter after five.

May: OK, so 5:15.

Morin: Yeah.

Guard: (inaudible)

May: So, so far (dinner time) so far you're fucking covered, so far your ass is covered, like you should have said this right off the bat and your, your ass would have been covered.

Morin: Yeah.

May: You went from there.

> Morin: That's right, but this will be a surprise to them, ok?
>
> May: Yeah, but OK, so you went from here, you went from the Mr. Grocer and shit and you went home, right.

In a later portion of the tape, the conversation continued:

> May: OK, so 5:30 ok so you from 5:30 from Mr. Grocer to your house you said was fifteen minutes right.
>
> Morin: That's right
>
> May: From the mall to your house ok, so we got quarter to six so ok, so right oh, so we're looking at quarter to six.
>
> Morin: I got home, I even noticed that immediately. [Mrs. Morin's car was parked backwards.]

The transcript of the July 1, 1985 tape-recorded conversation also contains the following excerpt:

> May: Loblaws you left Loblaws at 5:15, I thought you said you left Loblaws at 4:50, Mr. Grocer at 5:15.
>
> Morin: No, for sure Loblaws, I know for sure.
>
> May: Ok, so you left Loblaws at 5:15 big fucking deal — fuck off asshole.
>
> Morin: Mr. Grocer would be (pause)
>
> May: Ok.
>
> Morin: Give her 10 - 15 minutes from there, so it would be 5:30 .
>
> May: OK, so 5:30 at Mr. Grocers, right on. So from Mr. Grocers home, you know gas station you went for gas.
>
> Morin: na, na

> May: You didn't go get gas?
>
> Morin: No it would be right after ah Dominion, I would get gas, but I can't recall if I did, that's my problem.
>
> May: Ok, well you would have a receipt in your car anyway.
>
> Morin: That's right.
>
> .....
>
> May: OK, so 5:30 ok so you from 5:30 from Mr. Grocer to your house you said was fifteen minutes right.
>
> Morin: That's right
>
> May: From the mall to your house ok, so we got quarter to six so ok, so right on, so we're looking at quarter to six.
>
> Morin: I got home, I even noticed that immediately. [Mrs. Morin's car was parked backwards.]

During the conversation, Mr. Morin enlisted Mr. May's assistance to obtain verification of his alibi upon May's release from jail. Morin asked May to get a picture of him from his parents to enable Mr. May to take it to the various shops where he had gone after work to see if any clerks could recall seeing him on October 3, 1984.

It is interesting to note that Detective Fitzpatrick and Inspector Shephard did this very thing three weeks later. They attended the grocery stores in which Mr. Morin indicated he had shopped, with a photograph of Morin.

On June 7, 1985 Detective Shephard received a telephone call from Jan Stem, a band member. She advised that Alphonse Morin had told her that he was positive that Guy had arrived home from work at 5:30 (within two minutes one way or the other) and that he recalled Guy coming in with grocery bags in his arms. According to Shephard's notebook entry:

> She asked if these times were not accurate, and I advised her that either they were mistaken or lying, and I asked her if she was certain about the 5:30 time that Guy arrived home. She said yes, Al Morin was positive that it was 5:30, two minutes one way or the other. She also advised that Ida Morin was present during this conversation.

Inspector Shephard acknowledged that he may have tainted Ms. Stem's evidence concerning her conversation with Alphonse Morin wherein he took a position on the time which was consistent with the alibi defence ultimately tendered at trial.

It was the position of counsel for Mr. Morin that the investigators sought to destroy Mr. Morin's alibi when interviewing alibi witnesses. Both Detective Fitzpatrick and Inspector Shephard denied this allegation and insisted they attempted to *confirm* the alibi. In July, 1985 the investigators attended at the shops named in Mr. Morin's alibi letter (and at a Mr. Grocer's store, not mentioned in the notice but discussed with Mr. May on July 1, 1985). Shephard described the investigation of items which may have been on sale at supermarkets. Fitzpatrick obtained the payroll schedules of the Loblaw's store to determine who was working on October 3, 1984. Inquiries were made to determine if anyone could confirm that Mr. Morin had made a purchase at any of the grocery stores at the relevant time. No one could — which is hardly surprising.

(vii) "How Do We Destroy the Alibi?"

On December 12, 1990, a meeting took place involving Crown counsel Leo McGuigan, Alex Smith, Brian Gover and Susan MacLean. Ms. MacLean's notebook contains the following notation: "How do we destroy the alibi?" When asked about this statement, Ms. MacLean cautioned against attributing more to the word "destroy" than was intended in the conversation. She said the comment was directed towards challenging the alibi with a view to establishing it was false. In this regard, the issue was how to marshal all available relevant information.

Her notes and a list of things to do dated March 4, 1991, make reference to a series of steps to be taken, including legal research on tendering alibi notices as prior consistent statements, reviewing the evidence of May, which was said to suggest the alibi was being developed, checking the hospital

records for error, reviewing the evidence of the Morin family for purposes of cross-examination and reviewing the statements of Frank and Yvette Devine. The March 1991 notes also refer to arranging a meeting with Mr. Devine, if possible.

Mr. McGuigan recalled advising the group that he thought the alibi evidence was very important. It was his belief that Mr. Morin was acquitted after his first trial on the basis that the jury accepted the alibi evidence in conjunction with the psychiatric evidence (explaining Mr. Morin's 'strange' utterances). The psychiatric evidence is discussed in more detail below.

(viii) Trial Evidence

Guy Paul Morin testified at his trials that after punching his time card at 3:32 p.m. he drove to the Upper Canada Mall in Newmarket, parked at the second level near the Dominion store, and went downstairs to the kiosk where he bought an 'Early Bird' lottery ticket from a clerk named Sue.[34] He then took the escalator up to the Dominion store and did some grocery shopping before returning to his car. He may have purchased gasoline, as he usually did once or twice a week. He then would have gone diagonally across the intersection to Loblaws and purchased some bulk food items. From there he proceeded up the street to Mr. Grocers. He could not recall whether he went

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[34] Susan Scott testified on behalf of the defence at both the first and second trial. It was the position of the defence that she provided important circumstantial evidence of the truth of the alibi of Guy Paul Morin for Wednesday, October 3.

Ms. Scott's evidence at trial was that Guy Paul Morin purchased a ticket from her once a week between 3:45 and 4:30 p.m. She only worked afternoons on Wednesdays and Fridays. She did not work every Wednesday. The Early Bird ticket had to be purchased between Sunday and Wednesday. In cross-examination Ms. Scott could not recall telling the police in the summer of 1985 that Mr. Morin bought tickets mostly on Fridays and sometimes on Thursdays. She had since reviewed her work records as to the days she worked and testified this information was erroneous. She confirmed she worked the afternoon of October 3, 1984 but could not say whether Mr. Morin purchased a ticket that day.

Ms. MacLean testified that at the time of the second trial Crown counsel did not consider it necessary to disprove Ms. Scott's evidence in order to prove that Mr. Morin could have been home in time to abduct Christine Jessop.

inside the store, but said that he would have reviewed the bulletins in the window for specials.

He testified that he *would have* arrived home between 5:00 and 5:30, just as Frank Devine, his brother-in-law, was leaving. He brought at least two grocery bags into the house and put them on the kitchen table near the microwave oven. His parents and his sister, Yvette, were inside. He *would have taken* his customary nap for half an hour, had supper at about 7:00 and then went outside to assist his father with work on the house.

In his closing address to the jury, Leo McGuigan commented on the fact that much of Mr. Morin's memory simply relied on extrapolation from his regular routine, as evidenced by his expressions during his testimony of "I would have" done this, "I would have" said that, or "I would have" been there.

During the first trial, John Scott's personal belief was that the alibi was fabricated. His style of advocacy, however, was to permit witnesses the opportunity to admit error, as opposed to confronting them directly with accusations of lying. Accordingly, his position in Court was that Mr. Morin's parents were *mistaken* in the evidence they provided about his activities on October 3, 1984.

The Crown's position at the second trial, however, was that the alibi was fabricated by Guy Paul Morin and his parents and, as such, was indicative of consciousness of guilt. At the request of the Crown, the trial judge directed the jury that several items of evidence relating to alibi were capable of proving concoction and might be indicative of consciousness of guilt. Some of the items upon which the Crown attorneys relied are set out below:

1. Details surrounding the alibi were too specific; for instance, alibi witnesses were able to say with certainty how many shopping bags Mr. Morin carried when he arrived home, where he placed them in the kitchen and, to a certain extent, what the contents included;

2. The defence tendered about 20 grocery receipts covering the period of August to November 1984. These receipts were relevant to the alibi because Mr. Morin calculated his arrival time home on the basis of the time he left

work on October 3rd and the various places he shopped before arriving home. Mr. Morin testified that, according to his habit, he did the family shopping once a week on the way home from IIL. He further testified that when he did the shopping, he would go to three stores and, as a result, could not have arrived home in time to abduct Christine Jessop on October 3rd. Some of these receipts had been located pending Mr. Morin's first trial by Alphonse and Ida Morin. Guy Paul Morin located more of these receipts prior to the second trial. He indicated that he kept these receipts in a paper bag in his bedroom. While he had done his best to find receipts for that time period, the collection was incomplete.

The Crown introduced a chart analysing the *time-stamped* receipts put forward by the defence. In his later submissions, Mr. McGuigan relied on this evidence to show weaknesses in the Morins' claim that he did the family shopping once a week, on Wednesday, and would go to three stores; these receipts demonstrated no such pattern of shopping. Moreover, no receipts were found for October 3, 1984.

In his submissions to the Commission, Mr. McGuigan said:

> We will never really know if there were additional grocery receipts ... is it just an unfortunate coincidence that all the grocery receipts Mr. Morin introduced put the lie to his alibi without one supporting him?

During the Inquiry, Ms. MacLean testified that an analysis of receipts by Crown counsel established that he could have gone shopping and still been home by 4:30. She said:

> When a claim is made and you prove that claim to be incorrect, that's a factor in terms of credibility.

Thus, the alibi evidence was left to the jury as evidence capable of establishing concoction. Mr. Justice Donnelly told the jury in this regard:

> The accused spoke of his habit of bargain shopping at three stores over an hour or more. The grocery receipts filed call into issue the time required to shop, whether he shopped regularly at more than one store, and whether he shopped for the entire family. The amounts of the purchases and the evidence of his father may be taken to indicate he did not do the principal family shopping. The times on the grocery receipts plus 10 or 15 minutes to get to his home may be taken to indicate on occasion he could shop after work and still be home by 4:30 contrary to the evidence of the accused and of his mother.

In their final submissions to this Commission, Messrs. McGuigan and Smith say this about the grocery receipt chart prepared by the Crown:

> This chart was a piece of demonstrative evidence that dealt a telling blow to Mr. Morin's alibi. It is respectfully urged that the formulation and introduction of this chart into evidence was one of many examples of the high calibre advocacy of the prosecution team in this case and brought home to the jury in strong fashion the weaknesses of Mr. Morin's alibi and contributed to its undoing.

I agree that the chart was a piece of demonstrative evidence that represented good advocacy by the Crown. I am not prepared, however, to call it a "telling blow," although it may well have contributed to the alibi's undoing.

3. The fact that Mr. Morin was not consistent in his estimates of his arrival time was also left to the jury as evidence capable of proving fabrication. As stated by the trial judge:

> The accused has given different versions of the critical time of his arrival home from work on October 3rd, 1984. In the tape-recorded portion of the February 22nd, 1985 statement, he said after shopping he arrived at 4:30. And the later portion of that statement, according to Inspector Shephard's note, he said 4:30 to 5:00. In the alibi notices that time is stated to be approximately 5:30. In his testimony at this trial, the

> accused said after shopping he arrived home at 5:00 to 5:30. On the basis of those contradictions, you may find one or more times to be fabricated.

The position of defence counsel was that the inconsistency in Mr. Morin's timing estimates were honest mistakes, more consistent with innocence than with 'contradictions' indicative of guilt.

It was the position of the Crown that Mr. Morin extended his time of arrival at home in accordance with the Jessops' change in time of their arrival home.[35] In explaining the position that Mr. Morin was changing his times because he was lying and not because he could not precisely remember them, Ms. MacLean referred to the assessment of this evidence by her and her colleagues in light of all available information, not in isolation.

. Mr. McGuigan acknowledged that the jury may also have inferred that Mr. Morin changed the time of his arrival home when speaking with Mr. May in July 1985 in response to Janet Jessop's evidence at the preliminary inquiry. The jury did not know that Mr. Morin's evidence at both trials (*i.e.* that he arrived home between 5:00 and 5:30) was not inconsistent with what he had said at the time of his arrest.

However, in his view, the admission of the April 22, 1985 statement would not have helped Mr. Morin:

> Q. [I]f I was on the jury and I heard the following: I got home at 4:30, shopping made me late. Next, 4:30 to 5:00, next 5:30 to 6:00 to 6:30.[36] Now, it ends up

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[35] But, as suggested by counsel for the Morins during the Inquiry, when Guy Paul told the police at the time of his arrest that he arrived home between 5:00 and 5:30, he was unaware that Janet Jessop's time of arrival had been extended by her to 4:30 to 4:35 p.m. The only time given in media reports, including the "Citizen's Alert" documentary which had aired April 14, 1985, was the Jessops' 4:10 time.

[36] Mr. McGuigan agreed that times discussed in the unrecorded portion of the May/Morin conversation were dependent upon Mr. May's truthfulness. (Counsel submitted

> with Mr. May, as I recall, the last time being that of 6:30. If that does not demonstrate a change in arrival at home, then my logic's no good.

Mr. McGuigan conceded that the jury may have also assumed that the first time Mr. Morin referred to the fact that he purchased a lottery ticket on October 3, 1984, was when he told Mr. May about it during their July 1, 1985 conversation. In fact, Mr. Morin told the police on April 22, 1985 that he had done so.

4. Guy Paul Morin testified at the second trial that in the late evening of October 3, 1984 two police officers, one with a dog, came to his door asking if he had seen Christine Jessop that day. He told them he hadn't seen her as he had been in Toronto working. He was asked when he got home and told them he arrived home between 5:00 to 5:30 p.m. after shopping. Constable David Robertson (as discussed elsewhere in this Report) had provided evidence during the trial that after his dog Ryder was put in the police car, he and Constable James McHardy went to the Morin property and knocked on the door to ensure their dogs were inside the house. During his testimony, Constable Robertson was not examined about speaking with Mr. Morin. Crown counsel Susan MacLean specifically asked that a direction to be given to the jury on the failure of the defence to cross-examine Robertson about his conversation at the Morin residence and, Mr. Justice Donnelly charged the jury as follows:

> Robertson was not cross-examined about...the accused providing information he had shopped after work and the time of his arrival home.
>
> As a result, Robertson had no opportunity to deny the accused said, a) He was shopping; b) He had arrived home at 5:00 to 5:30 p.m., if you regarded that as untrue.

---

the latest time referred to in the tape was 5:45 p.m., by taking Mr. Morin through his activities and adding the time as they went along).

.....

> In assessing the weight to be given to the accused's evidence that he told officers that night he was shopping and got home at 5:30, you should bear in mind that Officer Robertson and Ken Jessop were not questioned by the defence on those points.

This evidence was also included in that aspect of the charge setting out evidence from which concoction could be inferred, as follows:

> In the accused's evidence he told the officers with the dog on the night of October 3rd he went shopping after work and arrived home at 5:30. This was challenged by the Crown as a self-serving fabrication by the accused.

It was the position of Mr. Morin, through his counsel at the Inquiry, that given the defence position that Robertson's evidence was a 'tissue of lies,' it made no sense for the defence to cross-examine him on these points especially in light of the fact that the Morins did not identify the officer with the dog with whom they had a conversation.

5. Mr. Morin's evidence at the second trial was that he could not remember whether he went inside Mr. Grocers but he drove there and did check the bulletins on the window, reviewing the prices. He testified that in his discussion with Mr. May, he added in 20 minutes for this stop as this was approximately how long it would have taken had he shopped there.

In his closing Mr. McGuigan asked the jury:

> [T]o give close consideration to the conversation between the accused and Mr. May when the accused recruits him to check out his alibi. He states at one time he spent 20 minutes at Mr. Grocers. That, I submit, in the light of the evidence that we have heard, in itself confirms that the accused was constructing a false alibi, trying to work out or cook up an alibi together with May. During the discussions with May

> they have the accused returning home at approximately six p.m. I submit that the conduct of trying to work out the details is part of the evidence from which you can conclude that the alibi was being fabricated.

The trial judge instructed the jury that in considering whether the alibi was concocted, they should consider this:

> In discussing the alibi with Mr. May, the accused spoke of allowing twenty minutes for his time spent at Mr. Grocers. His trial evidence was he didn't shop at Mr. Grocers on October 3, 1984. He may have stopped there to check the daily specials.

6. Mr. Morin's request of Mr. May to obtain a photograph of him to show to employees at the stores to see if anyone remembered him. This request was put forward by the Crown at the second trial as evidence of Mr. Morin's consciousness of guilt. Ms. MacLean testified that the nature of the discussion between Mr. Morin and Mr. May suggested an attempt by Mr. Morin to 'shore-up' his alibi and make it stronger.

Mr. McGuigan told the jury:

> It is clear on the tape that the accused was endeavouring to enlist Robert May's assistance in refining a false alibi, making it stone rock hard, as Mr. May said. Why else would the accused ask Mr. May to investigate his alibi? Do you ask a fellow inmate to find support for your truthful alibi or do you leave that task to your defence counsel and their investigators.

The Crown Attorney left this item to the jury as evidence capable of establishing fabrication.

The trial judge said:

> The accused's suggestion that May get a photograph from Morin's parents to enable May to check on the alibi which would be consistent with attempting to verify a legitimate alibi claim, although it was about eight months after the event.

7. The trial judge also referred to the following evidence as capable of establishing concoction:

> Subsequent to this claimed announcement [to York police] on October 3rd of his 5:30 arrival, the accused told May on tape that he informed the Durham officers he got home at 4:30. He claimed to May to have made an oversight in that 4:30 time, because he didn't allow time for shopping, and to May, he revised his arrival time to 6:00 p.m. However, during the February 22nd interview when he told Durham officers Shephard and Fitzpatrick 4:30, he twice referred to the fact he had been shopping.

Mr. May testified that on June 30, 1984 [an untaped conversation] Mr. Morin first said he arrived home at 4:30 and later in the conversation changed it to "six or six-thirty. I'm not quite sure on the time." According to May's evidence, when he inquired as to the discrepancy between 4:30 and "six or whatever it was",Mr. Morin seemed to have misunderstood whether May was asking him the time he told the Durham police or what he told York. Morin explained to May that he told Durham he was home at 4:30 because he forgot he had shopped. He told York he was home at 6:00 p.m. approximately.

8. In his review of evidence, the trial judge also itemized the following as evidence capable of establishing fabrication:

> The tape recording of the accused and May discussing the alibi, and May's evidence at trial as to their discussions of his perceived deficiencies in the alibi.

The trial judge also instructed the jury to consider, in determining whether the alibi was fabricated, the evidence of Alphonse Morin, Ida Morin, and Guy Paul Morin, all of whom denied any concoction or fabrication of the alibi.

The trial judge reviewed the above evidence, said by the Crown to be indicative of a concocted alibi, and told the jury they could consider:

- whether there is any evidence of fabrication in

witnesses whose testimony tends to show that the accused gave a false account of his whereabouts;

- whether the accused has given different versions as to his whereabouts, one of which may be concocted;
- the intelligence of the accused;
- the relative significance of the events disclosed in the alibi;
- the objective likelihood of honest mistake about those events;
- the emotional conditions of the accused when he gave the alibi information; and
- the consistency or otherwise of the account by the various witnesses.

(ix) Crown Closing

In Leo McGuigan's closing address to the jury he said this about the Devine aspect of the alibi:

> Now it's the Crown's position and submission that this is a fabricated alibi. In essence, it's a very simple alibi to keep straight. One, the accused got off work approximately 3:30 p.m., he went shopping, came home with two bags of groceries, got home around 5:30, parents present, sister Yvette and husband Frank Devine were present. And I submit to you that the son-in-law and sister were inserted into the line-up because some people might feel that the mother and father might go out of their way to fabricate an alibi to assist their son. I submit it was important to involve Frank Devine, who although related by marriage, was not a blood relative.
>
> It is submitted that the family got together at some time and certainly prior to the alibi notice being sent out by the accused's counsel to the Crown and

concocted this alibi. The central point was to be that that was the day, October the 3rd, '84, that baby Andrew went in the hospital. This accomplished two things: gave a reason for Frank Devine and Yvette to be at the house that day to talk about Andrew going into the hospital, and two, a reason to remember the day.

Subsequently, and I submit that after August 14, '85, a serious -- because that's when the last alibi notice was sent out on August 14th (sic) -- a serious problem developed. The police ascertained through all the hospital records that Andrew was admitted to the hospital not on October 3rd, but October 4th, '84. Now this was a serious problem and how to you get around it? Well, the first thing is to disassociate yourself from Andrew. Andrew? Andrew who? He wasn't' there October 3rd, '84, never asked about him. He might have been left in the car in the driveway. Let's forget about Andrew. Let's talk about the reporters on October 4th, '84, the Sun reporters. That's our new Andrew. At least it was, in my submission, for Mr. and Mrs. Morin.

.....

Their denial that they sat down with the lawyers and discussed this alibi. What kind of lawyer would send out a letter that I read to you without sitting down and discussing it with the people that are involved?

.....

Andrew Devine. [Ida Morin] had previously babysat him. Doesn't recall him being present at the residence on October the 3rd. Doesn't recall any questions from [Mr. Affleck and Mr. Sosna] about whether Andrew was in hospital. Remembers the day Christine went missing because of reporters the next morning, not because of Andrew going in the hospital.

Acknowledges meeting at [Mr. Affleck and Mr. Sosna]. And as I indicated to you, Mr. Affleck and Mr. Sosna were the lawyers who were defending the accused. They prepared the documents at that time as part of his defence and I submit that common sense would indicate that they would not send out such a

> document without checking it out with the people that were involved.
>
> .....
>
> [Alphonse Morin] [s]ays about his meeting with Affleck and Sosna and the alibi, he says it may have happened, had a lot of visits but he can't recall specific visit with Ida, Yvette and Frank Devine. Doesn't say it didn't happen, just can't remember.

(x) Crown Attorney's Opinion Regarding Alibi

It was Mr. Gover's opinion that the failure of Mr. Morin's alibi was "a principal reason for the conviction." He made reference to the dissenting judgment of Cory J.A. (as he then was) of the Ontario Court of Appeal, who expressed the view that Mr. Morin was acquitted at his first trial because the jury either believed his alibi or the alibi created reasonable doubt. Mr. Gover said that the jury at the second trial clearly did not believe Mr. Morin or his parents on the alibi issue.

In her evidence before the Inquiry, Ms. MacLean said that she now believes that Mr. Morin and his parents were honestly mistaken about aspects of the alibi, but that, at the time of the second trial, the family's certainty was problematic:

> In hindsight, I've thought about ... the whole alibi issue, and clearly the Morin family, all of them, were trying to reconstruct what had happened several months before. I thought to myself, I couldn't tell you what I did six months ago. I suppose there were - the event of Christine disappearing was a ... -- a significant event in the community that you may be able to recall certain events of that day.... But to try and remember that somebody brought in a bag of groceries[37], or something like that, I would think would be difficult.
>
> .....

[37] Ms. MacLean recalled that alibi witnesses when first called upon were able to say with certainty how many shopping bags he arrived home with and where he placed them.

> I suppose if Mr. Morin or his family had said, look, it's so long ago, we really just can't remember exactly what happened, but that wasn't the approach taken. It was that we do know what happened. This is when he was home. This is what he was doing. And some of the things we were able to demonstrate weren't correct, so, unfortunately, that -- ... in its result, I think, cast doubt on their credibility on those issues.

Leo McGuigan, too, during the Inquiry, commented that the specificity of the number (and even content) of grocery bags was problematic. He told the Inquiry that he maintained his belief that Mr. Morin and his parents perjured themselves in their evidence as to Mr. Morin's whereabouts on October 3, 1984. In his final submissions to the Commission, he attributed Mr. Morin's actions, in this regard, to the panic of an innocent man.

In his evidence at the inquiry, Mr. Smith accepted that Mr. Morin may have come home at 5:30 p.m. on the day in question but he still does not accept all aspects of the alibi. He no longer, however, attributes what, in his view, were serious problems with the alibi to the fact that Mr. Morin and his parents were lying. Mr. Smith's impression at the time of the second trial was that Mr. Morin knew the time he arrived home and changed it. He also viewed Mr. Morin's discussions with Mr. May on June 30, 1985 as an attempt to enlist Mr. May's assistance in framing a false alibi.

(xi) Finding

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

Mr. Morin's proven innocence casts a different light upon many of the problems which the Crown attorneys identified with the alibi defence. This is not surprising. However, I see no impropriety in the approach taken by the prosecutors to the alibi at trial. I have no doubt that they believed that the alibi

was false. This necessarily followed from their view, also genuinely held, that Guy Paul Morin was guilty. There were weaknesses that could be exploited in the alibi. The prosecutors were highly skilled in doing so. Of course, their approach meant that they gave sinister interpretations to conduct which is equally capable of an innocent explanation. However, in this instance, I do not say that their approach was unreasonably coloured by tunnel vision. (Though, as I note below, Mr. McGuigan does have a certain tunnel vision now about the truth or falsity of the alibi.) The inferences which they asked the jury to draw were supported by the evidence (and indeed, in some instances, by uncontested evidence of prior statements made by Mr. Morin). They were entitled, as well, to rely upon the 'improvements' in the recollections of the defence witnesses to try to undermine the alibi. Ms. MacLean's notes about 'destroying the alibi' are inflammatory now, given Mr. Morin's proven innocence. I accept her explanation, however, that the term meant no more and no less than that the prosecutors felt the alibi was false and that they would marshal their full legal resources to demonstrate that.

The debate as to alibi heated up at the Inquiry because counsel for the Morins perceived that Mr. McGuigan, in articulating the problematic aspects of the alibi and other parts of the defence case, appeared to be re-arguing the case today, as if Mr. Morin was still on trial. Accordingly, the debate degenerated somewhat.

I have no doubt that Guy Paul Morin and his parents did not fabricate their evidence. I can also understand why Mr. McGuigan's approach to the issue at this Inquiry was so vigorously challenged. Mr. McGuigan's present opinion that the Morins lied (and were not just mistaken) about the alibi, knowing what he knows today, does demonstrate substantial tunnel vision. Of course, innocent persons can lie, out of panic, about an alibi. However, a continued resistance (even now) to the notion that Guy Paul Morin and his parents might have been mistaken, is a justifiable cause for concern. Be that as it may, the prosecutors committed no impropriety in approaching the issue of alibi in the way they did at trial.

I wish to draw a distinction between the position of the Crown and that of the investigators in this regard. The prosecutors inherited a case where the accused stood charged with murder. The investigators were responsible, in the first instance, for determining who committed that crime. The investigators demonstrated real tunnel vision in their approach to the alibi. Their investigation, even before Guy Paul Morin was arrested, was intended

to disprove the alibi, rather than consider it in an open-minded way. I made this point earlier, in the context of their interviews with Frank Devine.

F. Conduct of the Defence and Crown

(i) Introduction

I have already explored the conduct of the Crown in the context of specific issues or testimony. This part of the Report examines more general issues of conduct relating to the defence and the Crown.

(ii) The Traditional Role of the Parties

The Crown

The Supreme Court of Canada has articulated the 'dual role' of Crown counsel. Recently, as I have noted earlier, I was provided with amendments or additions to the Crown Policy Manual which are responsive, in part, to the issues raised at this Inquiry. The new preamble to the manual says this:

> Crown counsel play a pivotal role in the criminal justice system. Only Crown counsel empowered to fully and independently exercise their discretion can bring about a fair trial of those accused of an offence and the protection of the many interests of the public. This book of Crown policies contains dozens of guidelines and directives drafted to assist Crown counsel in the exercise of their discretion.[38] It will also serve to make the exercise of discretion more transparent and understandable to the public.
>
> There are also many discretionary decisions made

[38] A partial list of the decisions which falls within Crown counsels' discretion would include: charge screening, plea resolution, providing disclosure, taking over a private prosecution, stay proceedings, electing a mode of procedure, determining what evidence to call at a preliminary inquiry, determining which witnesses and the order in which they will be called at trial, taking a position with respect to sentence and determining whether to launch a Crown appeal.

daily by Crown counsel that are not specifically described or captured by these policies. In general, Crown counsel should exercise their discretion in keeping with the spirit of the other policies in this Manual. This means that Crown counsel must always remember that an accused is innocent until his or her guilt is proven beyond a reasonable doubt in the courtroom. We are to seek the truth above all else in our decisions and prosecutions. We are to be fair and judicious in our decision-making. The adversarial system in which we operate requires our participation as strong advocates but it also is seriously flawed if the "adversaries" are not evenly matched. We have, therefore, a special duty to ensure that the defendant and his counsel are able to fully and fairly place their evidence and arguments before the court.

The Courts have described the role of Crown counsel on many occasions. [footnote herein omitted] The following two observations from the Supreme Court of Canada provide a particularly helpful summary of our complex function within the criminal justice system:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.[39]

.....

[39] *Boucher* v. *The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263.

> [W]hile it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence, [cites omitted] it is well recognized that the *adversarial process* is an important part of our judicial system and an accepted tool in our search for truth: see, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 295, 67 C.C.C. (3d) 289 *per* L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within the adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: [cites omitted]. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. (*R. V. Cook*)[40] (Emphasis original.)
>
> .....
>
> In order to fulfil our responsibility as guardian of the public interest, we must be prepared to act as strong advocates. As quasi-judicial officers, however, our actions as advocates must be grounded in scrupulous fairness. This balancing between what has been called the quasi-judicial role of Crown counsel and our position as fearless adversaries in the criminal justice system is at the very heart of the proper functioning of our courts. It is one of the linchpins that creates or destroys public confidence in the justice system.

The Defence

It is trite to say that defence counsel do not assume the 'dual role' of Crown counsel. Their duty is to act as fearless, independent advocates on behalf of the accused. Subject only to their ethical and legal obligations, their duty is to their client, and to their client alone.

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[40] *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.) at 489.

(iii) Conduct of the Defence

In his submissions at the conclusion of the evidentiary stage of the Inquiry, Mr. Levy, on behalf of Mr. McGuigan and Mr. Smith, repeated his earlier requests that I consider the conduct of the defence at the second trial. He submitted that Jack Pinkofsky's manner of cross-examining witnesses, including the length of such examinations and his sometimes abusive attitude towards them, as well as his constant criticism of the prosecutors, alienated the jury towards Mr. Morin's defence. He suggested that the conduct of the defence should be seriously considered as an important factor in the wrongful conviction of Guy Paul Morin. As I reflected in Chapter I, he complained that while the Inquiry subjected the conduct of the prosecutors to intense scrutiny, there was very little scrutiny of the defence. In my view, the evidence demonstrates that this was not so.

During the submissions of Mr. Levy and Mr. Lockyer, reference was made to the fact that Mr. Pinkofsky was not called as a witness at the Inquiry. The record makes it clear that Commission counsel inquired of counsel for the parties at the Inquiry whether they were requesting that Mr. Pinkofsky be called as a witness at the Inquiry. If such a request were made, Commission counsel would consider it. Apparently no party requested he be him called. As Mr. Levy stated in his submissions in reply:

> Mr. Lockyer says he offered me the opportunity to examine Mr. Pinkofsky and I turned him down and that makes it, you know, it's my fault. Now why would I want to cross-examine Mr. Pinkofsky, Mr. Commissioner? Am I going to say to Mr. Pinkofsky, Mr. Pinkofsky, we've heard all sorts of witnesses here say you treated them abusively.
>
> What do you have to say to that Mr. Pinkofsky?' I know what Mr. Pinkofsky's answer is going to be ... I heard from the best evidence, the witnesses who were on the other end of Mr. Pinkofsky's cross-examination.

Although a great deal of evidence was called as to the conduct of Mr. Pinkofsky at the second trial, Mr. Pinkofsky did not apply for standing at the Inquiry, nor did he request that he be called as a witness. I did not consider it necessary to hear from him. What he said and did at the trial was fully revealed in the transcripts of evidence which were part of the Inquiry record

(which my mandate permits me to consider) and in the evidence of witnesses who attended at the Inquiry.

In suggesting that the conduct of the defence be considered by me as a factor contributing to the wrongful conviction of Mr. Morin, Mr. Levy cited the testimony of a number of witnesses heard at the Inquiry. Thus, he referred to the evidence of Constable McGowan, who testified that when he was being cross-examined by Mr. Pinkofsky, he looked over at the jury and observed them slouching in their seats, hands on their faces, and gazing around the room. He said they appeared "as though they didn't want to be there." They didn't seem focused. At one point during a break, he went into the washroom and was met by a male member of the jury. The juror, according to McGowan, gave a big sigh of relief, indicating he was glad it was all over. The juror said that McGowan did "okay," and added that "Mr. Pinkofsky is really being an asshole."

Mr. Levy cited the evidence of Mr. Morin to the effect that the jury members eventually developed a distaste for Mr. Pinkofsky and, indirectly, for Mr. Morin. Mr. Morin agreed that he saw the trial judge's distaste for Mr. Pinkofsky. Mr. Scott, who had dealt with Mr. Pinkofsky previously, advised Susan MacLean how to deal with him in the light of his lengthy and contemptuous treatment of witnesses. He suggested that Ms. MacLean maintain her focus; it would be difficult. He told her Pinkofsky's cross-examinations could seem abusive.

Mr. Levy also pointed to the evidence of Brian Gover, who was counsel for the Crown at the pre-trial motions. He testified that Mr. Pinkofsky tended to take a sarcastic tone with witnesses which appeared to "batter" them. Mr. Gover agreed that Pinkofsky's approach might court the displeasure of the jury and that his demeanour and tactics might sorely test the trial judge's patience. Mr. Pinkofsky's nickname among the Crown attorneys was "The Prince of Darkness."

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

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

- Detective Fitzpatrick said that a number of witnesses

were upset at their treatment in the courtroom by Mr. Pinkofsky;

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

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

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

- Mr. Gover found Mr. Pinkofsky's manner of dealing with witnesses aggressive:

> I would say that Mr. Pinkofsky tended to take full advantage of the latitude that I'd extended to him in the questioning of witnesses, in confronting them with what they had written in the absence of exhaustion of their memories, and that he, in addition, especially with police officers, and some of the civilian witnesses, tended to take a sarcastic tone, and one which tended to batter the witnesses, in a sense.

In the light of this evidence Mr. Levy submitted that Mr. Pinkofsky's conduct of the case was detrimental to the defence, and it should not be ignored as a factor contributing to Mr. Morin's conviction.

Mr. Levy also pointed to tactical errors made by the defence team: they erred in leading the evidence of Ken Jessop as to his sexual relations with Christine because the jurors must have seen this as an insensitive tactic; they erred in calling the evidence of Sergeant Michalowsky, who came across as a pathetic and sick person. He also implied that Mr. Pinkofsky was not well advised to tender grocery receipts through Mr. Morin in support of his alibi; he said that those receipts damaged the alibi defence.

As I said in Chapter II, while discussing Ms. Nyznyk's evidence at the second trial, it may be that her lengthy cross- examination by counsel for Mr. Morin led the jury to believe that the hair and fibre comparisons demonstrated even more than Nyznyk claimed they did.

Mr. Gover gave evidence that, in effect, the defence alleged a conspiracy on the part of the police and the Crown to convict an innocent person; that can be a dangerous tactic. If it fails, the jury may turn against the false accuser. Mr. McGuigan alleged that there was a general attack on the integrity of the Crown pervading the trial through various cross-examinations during the Crown's case. However, Mr. Smith agreed that after hearing the evidence at the Inquiry, there was very little in front of the jury at the second trial on the issue of the integrity of the Crown. He said that during the private meetings with the defence team and during the stay and pre-trial motions, there was a great deal that apparently was said on behalf of the defence that led him to believe that the integrity of the prosecutors was very much in issue. He conceded that, perhaps, he did not divorce statements made before the jury from those made in its absence when he considered that issue.

On the other side of the ledger, there was evidence from Ms. MacLean that the prosecutors knew that Mr. Pinkofsky fought hard for his clients and would argue the admissibility of much of the evidence. They were aware that they might have to be very vigorous to ensure that the evidence was fairly and properly put before the jury. She implied that Pinkofsky was a strong opponent.

Mr. McGuigan testified that he had been involved in previous cases with Pinkofsky. He stated that Pinkofsky was a formidable opponent. No one works harder for his client. He works diligently. Accordingly, the prosecutors would be required to work very hard also. The idea was to 'outwork' him. He expected Mr. Pinkofsky's cross-examinations to be relentless and aggressive. He knows what the issues are, although the manner in which he gets to those issues is sometimes annoying. Mr. McGuigan further testified that Mr. Pinkofsky makes great use of the previous testimony of a witness that he is cross-examining. Accordingly, one has to take the time and make the effort to have the witnesses fully aware of what is contained in their previous testimony. Most Crown attorneys do not have the same degree of respect for Mr. Pinkofsky that Mr. McGuigan does. Pinkofsky left no stone unturned in the Morin trial.

Mr. McGuigan agreed that "any experienced prosecutor knows that he must prepare far more thoroughly for Mr. Pinkofsky than for any other opponent." He has great respect for Mr. Pinkofsky and he gets great results. Although he is not liked by some of McGuigan's fellow Crown attorneys, he respects him and enjoys having a trial with him: "You know its going to be tough, but he brings out the best in you, in my opinion."

After Guy Paul Morin's exoneration on January 23, 1995, Mr. McGuigan stated at a press conference that "the accused at his second trial was represented by an extremely competent, dedicated and experienced counsel — Mr. Jack Pinkofsky." He adopted that statement in his testimony at the Inquiry. He took no joy in criticizing Pinkofsky, but did so because the issue as to the conduct of the defence was raised at the Inquiry. He reflected his view that certain tactical decisions by Mr. Pinkofsky, including the approach to Crown witnesses, may not have been the best in the circumstances and may have contributed to the jury's verdict. He said that he did not share the less charitable view of Mr. Pinkofsky held by some other prosecutors.

Mr. Gover recalled Mr. McGuigan's view of Mr. Pinkofsky, as stated to him:

> Mr. McGuigan made it plain that Mr. Pinkofsky was a very formidable adversary, who was dogged in his defence of his clients, and I recall a turn of phrase that Mr. McGuigan used; he said, "Jack has all the tools," meaning that Jack had all of the forensic ability to fully defend Mr. Morin.

Mr. Gover further testified at the Inquiry:

> I have a lot of respect for Jack Pinkofsky. I felt Jack did his utmost to put on the record every allegation of professional misconduct, and he did his level best to make them out ... occasionally Mr. Pinkofsky would lose his focus, and what perhaps were some of his better arguments were lost in the shuffle ... He marshalled [the facts] well, but became indiscriminate in the manner in which he used them.

Mr. Gover also said that, "from an early juncture in the motion, Mr. Pinkofsky alluded to the prospect of a commission of inquiry when the case

was over." Undoubtedly, Mr. Pinkofsky's judgment in this respect was accurate. Mr. Gover sensed during his involvement in the trial that Mr. Pinkofsky was not merely posturing regarding Morin's innocence; he had a genuine belief in his innocence. Mr. Morin told the Inquiry that Pinkofsky had that belief. As subsequent events have disclosed, Mr. Pinkofsky's intuition was accurate in this respect also.

Mr. Morin told the Inquiry that he felt that Mr. Pinkofsky and his other counsel at the second trial were professional, loyal, industrious and indefatigable. He said his lawyers were "phenomenal." He found Mr. Pinkofsky to be personable, like a 'father' to him. He was a dogged lawyer who brought all his skills to his defence. He appeared to have no serious complaints about the manner in which he was defended despite the fact that he was outraged that he was found guilty of a murder that he did not commit. He was grateful for the efforts of his lawyers. He did not feel that Mr. Pinkofsky or his other counsel were in any way responsible for his conviction.

I find it noteworthy that among the many grounds of appeal set out in Mr. Morin's Notice of Appeal, none suggested that he was incompetently or inadequately represented at trial. Mr. Levy alleged that Mr. Lockyer and JoAnne McLean would not be expected to level criticism at this Inquiry of the conduct of the defence at the second trial. He pointed out that Mr. Lockyer is Mr. Pinkofsky's partner and that Ms. MacLean was part of the defence team at that trial. Undoubtedly, he could advance the same argument as to why Morin's Notice of Appeal raised no complaint as to the conduct of the defence at his trial. However, I find it more compelling that Mr. Morin chose to retain Mr. Lockyer and Ms. MacLean as his counsel on appeal (and at this Inquiry) despite their prior relationships to Mr. Pinkofsky and to the trial. It is, perhaps, trite to observe that Mr. Morin probably had a wide choice of counsel to represent his interests at both proceedings. His choice reflects his satisfaction with his trial representation.

Findings

Having regard to all the evidence, to the submissions which have been made to me, and the considerations which I have outlined, I have concluded that some tactical decisions taken by the defence at Mr. Morin's second trial were not the best, and it may be argued that they adversely affected the jury. However, some of the forensic skills demonstrated at that trial were exceptional. Unlike the situation in a number of the notorious cases of

wrongful convictions cited by some of the systemic witnesses, I do not see this as a case of defence incompetence, neglect or misconduct. Any criticisms of Mr. Pinkofsky are idiosyncratic to his style and approach and are not reflective of systemic issues or to be addressed by any systemic recommendations I may make.

The conduct of the defence was also relevant in two other ways. First, it was alleged that the cross-examinations conducted by Mr. Pinkofsky of various witnesses in the first months of the trial explain, in part, why Mr. McGuigan was moved to make 'the offer' to the jailhouse informants. I rejected that explanation in Chapter III, for the reasons earlier provided. Second, Mr. Pinkofsky's approach to trials is relevant to the approach taken in response by Crown counsel during the currency of the second trial. For example, the defence approach to the second trial is relevant to certain actions or attitudes of the prosecutors. This relevance is discussed in the context of specific issues.

(iii) Relevance of the Insanity Defence

During the first trial, after calling evidence of Mr. Morin's alibi, Mr. Ruby applied to Mr. Justice Craig for a bifurcated trial in order that the 'defence of insanity' could be raised, should the jury find Mr. Morin guilty. The application was unsuccessful.[41]

Mr. Ruby then adduced opinion evidence on Mr. Morin's mental health from Dr. Graham Turrall, a psychologist who had spent approximately 14 hours with him administering numerous tests, and Dr. Basil Orchard, a psychiatrist who had examined Mr. Morin for approximately 5 to 6 hours. The conclusion of both witnesses was that Mr. Morin suffered from simple schizophrenia, a major mental illness characterized by a thinking disorder that affected the way he communicated with others. In Dr. Orchard's opinion, Mr. Morin's illness was "moderately severe" and in an advanced state.

Dr. Turrall testified that Mr. Morin felt alienated, misunderstood, and that he was socially very introverted; he could be secretive and a day-dreamer, having unrealistic attitudes about himself and others, with abnormal, bizarre,

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[41] The approach advocated by Mr. Ruby has since become the law: *R. v. Swain* (1991), 63 C.C.C.(3d) 481 (S.C.C.).

and illogical thinking. Dr. Turrall described the disease as one which could affect

> [h]is interpersonal relations and his ability to deal with reality testing. Reality testing being defined as the ability to distinguish what is real from what is not real.

Dealing specifically with Mr. Morin's speech, Dr. Turrall testified that he was very awkward and lacked spontaneity. He was said to have presented the psychologist with illogical ideas, talking to him about "little girls growing up to be corrupt women" and the 'split brains of monks'. Dr. Turrall had observed Mr. Morin's cross-examination by John Scott. In his opinion, while Mr. Morin could deal with narrowly focused questions, when questions were not so structured, he could not keep his mind on track. His propensity for tangential thinking and inappropriate affect, such as smiling when Christine Jessop was discussed, was a characteristic symptom of schizophrenia.

During this psychiatric evidence the experts were questioned on the hypothetical mental state of Mr. Morin *if* he had killed Christine Jessop. Assuming that Mr. Morin had killed Christine Jessop, the jury was told that he would have been in an acute psychotic state and unable to appreciate that by stabbing her he was causing her death.

Dr. Turrall testified:

> [A]ssuming Mr. Morin [committed the murder] it would be my opinion that he would be in a primitive form of thinking disorder characterized as primary process thinking in which something, some stress, some acute confusional state had transpired where he perceived rejection.
>
> .....
>
> He could, in fact, take Christine's life thinking in a reality that is out of this world that, in fact, when he was taking her life or stabbing her that, in fact, he might be giving her life, preserving her innocence in some strange illogical bizarre form of thought.
>
> .....
>
> I would like to stress that in Mr. Morin's mind the act

> of stabbing may have represented to him a magic wand with which he was touching her and giving her life.
>
> .....
>
> For Mr. Morin, at that particular point [driving a car] he may have been thinking and feeling that he was on a magic carpet.

According to Dr. Turrall, statistics indicate that one percent of the population has been diagnosed and hospitalized with a major mental illness, schizophrenia being the primary one, at some point in their lives.

Both Drs. Turrall and Orchard expressed the opinion that through defence mechanisms Mr. Morin would be able to block the incident out of his mind.

During cross-examination by Mr. Scott Dr. Orchard was asked whether Mr. Morin had the capacity to rape and repeatedly stab a nine year-old girl:

> Q. I take it by the very fact that you are capable of expressing an opinion on what condition this man would be in, in the event that he sexually assaulted — raped and stabbed many times Christine Jessop, that you must be of the opinion that he has the psychological make-up to commit such an offence.
>
> A. No, I am of the opinion that, in fact, the illness — and if he did that — did disturb his psychological make-up so that he could do such an act.
>
> His Lordship: Excuse me. I didn't get that. Your answer was "No..." what, Doctor?
>
> The Witness: No. The illness very likely did — could have or very likely did disturb his psychological make-up to the point that he could commit such an offence. I didn't feel that he had necessarily the psychological make-up to molest children.
>
> .....
>
> Q. Coming back to where we started about capacity and your responses to certain hypotheticals, I am

suggesting to you the man sitting there, on what you have told us in this Court, is a man that has mental problems, who is capable of raping and of stabbing multiply an individual. Isn't that correct?

A. He is capable of forcing intercourse and stabbing multiply a person if he did that, yes, he is capable of it.

Q. With a 40 pound girl, a nine year old.

A. Yes.

Q. Now, you talked of schizophrenia. I suggest to you that the broad range of schizophrenics would not be so capable, would they?

A. Well, the majority of people with schizophrenia don't get into violent behaviour, but some of them do. So the majority of cases of schizophrenia would not be involved in this kind of behaviour. The point is I don't know whether he was involved in the behaviour or not, but I do know about the illness.

Q. You know that this illness is such that it would permit him to do that to that nine year old, don't you?

A. Yes.

Q. And I am suggesting to you that the number who could do that to a nine year-old is minuscule.

A. That is true.

Q. That this man is something special, isn't he?

A. Yes. It is not a usual kind of thing, not a common kind of thing, so yes, in that way it is unusual.

Q. It could only be an offence committed by a member of an abnormal group. Isn't that correct?

A. Well, almost, at any rate. I never say 'only' or 'never' or 'always' because that's when I'm wrong, but I would say in the vast, vast majority of cases, such an offence would likely be committed by somebody who had some sort of pretty strong abnormality; a serious abnormality.

Q. Are not the psychiatric disorders that you are describing that this man has, similar to what you would expect to find in terms of the scene that has unfolded before you on Exhibit 8, an isolated area, sexual assault of a nine year-old left with her clothes askew, stabbed many times?

A. Yes, certainly. I don't know – first of all, sexual assault of a nine year old, if it was attempting to force intercourse, would be pretty unusual because that is not a thing that a nine year old is usually attractive for. They usually are not developed to the point that they are usual sexual objects. Stabbed many times is often a sign that there is something strange going on. If somebody wants to kill somebody they can usually do it without doing it many times. They can usually manage not to sort of continue on in the activity.

Q. This is a sign of disorganization, isn't it?

A. Yes it is.

Q. Multiple stab wounds on the chest and back are clearly an indication of a very disorganized crime aren't they?

A. Yes.

.....

A. I don't know that I am surprised that he denied it. I just say that when someone is able to take me through their memory and their mental processes about a certain time, then I can draw a conclusion from that. When a person does not have that available, then I can't draw conclusions from what he tells me about the incident or about the particular time. I have to draw conclusions from my diagnosis. That is what the difficulty is, you see. I don't know; I have nothing in my interviews with him that I could say, "Ah, yes, he did this", but I did have an illness. Whether he did it or not, that is up to somebody else to decide, that is not for me because I have nothing that can add to that one way or the other, except that there is this illness.

Q. I agree with you, you can't, but I suggest you can add two features which you have added, that this man

> would be totally capable of denying the crime, repressing the truth, standing where you are standing, and say "I didn't do it." Isn't that correct?
>
> A. Yes.
>
> Q. And the second thing you can add is that in your opinion that man is the type of man who could commit this crime.
>
> A. Yes. That is possible with this illness, that happens with this illness.
>
> Q. That is very helpful, isn't it sir, in terms of assessing a situation?
>
> A. Whoever hears it will have to decide whether that is helpful.
>
> Q. Then you went a third step and indicated – I think you've indicated that there would be a very small, small area of the population that could be capable of such a crime, didn't you?
>
> A. It's not a common thing.

Following Mr. Morin's acquittal at his first trial, the Supreme Court of Canada, in considering the psychiatric evidence and the trial judge's charge to the jury, concluded that the trial judge did not err in ruling that the psychiatric evidence was not admissible as proof that Guy Paul Morin did, in fact, kill Christine Jessop. Sopinka J. stated:

> The evidence of Dr. Orchard referred to above amounts to no more than this. The appellant is a simple schizophrenic. A small percentage of simple schizophrenics have the tendency or capability of committing the crime in question in the abnormal fashion in which it was committed. There is no evidence that the appellant has these tendencies or capability unless one assumes, as Dr. Orchard was asked to do, that the appellant committed the crime. Accordingly, the learned trial judge was right when he ruled that the evidence was not admissible as proof that the appellant did, in fact, kill Christine Jessop.

> There was, therefore, no error at trial in this respect.[42]

No psychiatric evidence was tendered by the defence at the second trial. The exclusive defence advanced on behalf of Guy Paul Morin was that he did not commit the crime. Indeed, he did not.

On Mr. Morin's application for bail pending his re-trial, Dr. Orchard, who had continued to see Mr. Morin professionally, since his acquittal, prepared an affidavit reflecting upon Mr. Morin's state of health. In his affidavit of November 11, 1992 he stated:

> At Mr. Morin's first trial, I was also asked to express an opinion on the issue of insanity under section 16 of the Criminal Code. This issue was addressed solely on the basis of a hypothetical question that included as its necessary premise an *assumption* that Mr. Morin did in fact kill Christine Jessop. Indeed, at that time and ever since, Mr. Morin has consistently asserted his innocence to me and has always denied any involvement in the disappearance and death of Christine Jessop. Based solely on the hypothetical question, I expressed the opinion that if Mr. Morin had committed the offence, he would very likely have been in a psychotic state in which he would not appreciate the nature and quality of his act. Further, I testified that Mr. Morin's belief that he did not commit the crime, *if* in fact he had committed it, would have to be the result of massive repression which precluded him from having access to any recollection of these events.
>
> *In my assessment of Mr. Morin, there was no evidence of the existence of such a psychotic break or such massive repression.*
>
> .....
>
> Prior to Guy Paul Morin returning to custody in June of 1987 when the Ontario Court of Appeal overturned his acquittal, I had occasion to see Mr. Morin a couple of times at his request for general supportive therapy. After his detention and his release on bail in June, 1987, I saw Mr. Morin regularly. I initially saw him

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[42] *Morin* v. *The Queen* (1988), 44 CCC (3d) 193 (SCC) at 218.

> once a week and then in the later stages, once every two weeks.
>
> This continued from 1987 until June, 1990 when Mr. Morin's second trial commenced.
>
> .....
>
> During the period of time that I have seen Mr. Morin, I have formed the opinion that Mr. Morin does not require medication. *He does not present any psychiatric risk to himself or to others* so that I have not, at any time, prescribed medication for him.
>
> Throughout the years 1987 through to 1990, my opinion has remained unchanged: that Mr. Morin suffers from simple schizophrenia but this illness is not at present so severe as to interfere with his thoughts, emotions, activities or his life in general.
>
> During the years that I have had contact with Mr. Morin, there have been occasions, largely as a result of further appeals or the anticipation of the commencement of his trial, when he has faced substantial stress. *Despite this stress, I have not observed any decompensation by him nor have I observed any psychotic behaviour. If a psychotic break had occurred and Mr. Morin had massively repressed the behaviour associated with this episode, it is my opinion that I would most likely have observed evidence of this during our sessions. It is further my opinion that if in fact Mr. Morin had ever suffered a psychotic break in the past, there would be an increased likelihood of observing decompensation again. This I have not seen. Although this does not alter the initial diagnosis, it does speak to the improbability that Mr. Morin ever experienced such an event in the first place.* (Emphasis added.)

Several parties sought to explore the factual and systemic issues arising out of the 'insanity defence,' at this Inquiry. In Chapter I, I outlined my relevant rulings on this point and it is unnecessary to repeat my reasoning in any detail here. Simply put, I decided that I would not explore whether the psychiatric and psychological evidence was valid or invalid, and whether this evidence should or should not have been tendered by the defence at the first trial. These issues had limited relevance to my mandate, since the 'insanity'

evidence was not heard by the jury that convicted Guy Paul Morin, and the tactical decision to call this evidence during the trial proper has no systemic interest, given the change in the law. I also had no doubt that the exploration of these issues, undoubtedly intriguing, would be extremely time-consuming. However, counsel for police and prosecutors made clear that the presentation of the alternative 'defence of insanity' at the first trial, and the evidence in its support, affected their state of mind and must be considered by me on that basis. I agreed. Accordingly, I have summarized the above evidence because it is relevant to the investigators' and prosecutors' state of mind. The relevance of this evidence does not depend upon its validity. Its recitation is undoubtedly painful to Mr. Morin who, it is clear from his counsel's comments at the Inquiry, does not adopt it in any way. The Supreme Court of Canada held that, even taking the evidence at its highest, it did not make it more likely that Guy Paul Morin committed the crime; the critical expert evidence was based upon the *assumption* that he committed the crime.

(iv) The Outlook of the Crowns, and the Effect of the Insanity Defence

Mr. Gover told this Inquiry that he "saw strong indications of tunnel vision from time to time" on the part of both the investigators and the prosecution. In his view, the tunnel vision of the prosecutors should be viewed in the context that

> they were prosecuting a case where the defence had included what I have described as the implicit admission that Mr. Morin had committed the act.

When asked for his opinion as to what had led to the wrongful conviction of Mr. Morin, Mr. Gover cited various things, elsewhere noted, including this:

> I think, as well, that what went wrong includes the defence ... by Mr. Morin at his first trial. A defence which included the implicit acknowledgment that he had committed the deed, resulting in the death of Christine Jessop. And that, I think, constituted substantial confirmation of the view that the investigators and prosecutors were pursuing the right man.

Brian Gover's view was that the psychiatric evidence led by the

defence at the first trial went beyond merely explaining Mr. Morin's unusual conduct and some of the unusual things said by him to Sergeant Hobbs and Mr. May in the jail cell, and to others:

> By leading evidence of insanity, Mr. Ruby, in my view was conveying the message that he didn't believe the alibi. So, you know, he went well beyond leading some psychiatric evidence to explain away the conduct of Mr. Morin.

Apparently the jury did not feel similarly since they acquitted Mr. Morin after hearing the evidence. As Mr. Gover commented in part:

> A. I think that history has borne out the fact that the psychiatric evidence led at the first trial was ... not worthy of belief.
>
> Q. A crock; is that the vernacular?
>
> A. Yes.
>
> Q. Yes. So what you're saying, so I understand that, your view is that the evidence given by the psychiatrists, both Crown and defence at the first trial, was just nonsense?
>
> A. That's the view that I've come to take, and in part, it's based on the way Mr. Morin has conducted himself while at large awaiting trial, while on trial, and since his trial, and since being acquitted by the Court of Appeal.

In this context, I reiterate my earlier comments. Drs. Turrall and Orchard are not parties before this Inquiry. Mr. Gover's evidence is not relied upon by me for the accuracy of his assessment, but rather to reflect the state of mind of the prosecutors who were aware of it.

Mr. Gover told the Inquiry of his belief that Ms. MacLean was "utterly convinced that Mr. Morin was the perpetrator of this horrific offence."

Ms. MacLean said that her belief in Mr. Morin's guilt was influenced, in part, by the psychological and psychiatric evidence at Mr. Morin's first trial wherein:

- Mr. Morin had told Dr. Turrall that, like a monk, he was able to compartmentalize his bad thoughts and only access them when necessary. In Ms. MacLean's opinion, this evidence corroborated Sergeant Hobbs' evidence of discussions he had with Mr. Morin, and lent more credibility to his claim that he had received a confession from him;

- Mr. Morin told the psychologist that little girls grew up to be corrupt. This served to confirm in Ms. MacLean's mind the statement that he had made to Inspector Shephard in the unrecorded portion of the February 22, 1985 interview;

- Mr. Morin's masturbation habits were discussed which led prosecutors to believe that, in addition to having schizophrenia, he may be sexually dysfunctional;

- It was Dr. Turrall's opinion that Mr. Morin was an angry member of a pathological family, the members of which were secretive and defensive in nature;

- Dr. Orchard had testified that Mr. Morin was capable of committing the crime and then suppressing it.

Ms. MacLean said that, until the insanity defence was called, there was nothing to suggest to the prosecutors that Mr. Morin, who appeared to be a quiet, private person and an accomplished musician, had the psychiatric make-up to commit the crime.

In addition to the evidence of Mr. Morin's psychological make-up, Ms. MacLean also relied on her strong belief in the hair and fibre evidence, proven mistakes in aspects of the alibi that Mr. Morin put forward in the second trial, the alleged confession made to May, Sergeant Hobbs' evidence that Mr. Morin had confessed to him, together with the Hobbs/Morin taped conversations. During the Inquiry, Ms. MacLean was obviously anguished over her role in Mr. Morin's conviction and provided Mr. Morin with a heartfelt apology for any part she played in his conviction.

In Mr. McGuigan's view, the insanity defence at the first trial indicated

that Mr. Morin had admitted to Mr. Ruby that he had committed the offence or, alternatively, that Mr. Ruby was convinced of his guilt or felt he would be found guilty. In addition to the psychiatric evidence, Mr. McGuigan said that the other factors convinced him of Mr. Morin's guilt, including:

- Mr. Morin's refusal to take a polygraph upon his arrest;

- Sergeant Hobbs' evidence that in response to his question "What do you do for your frustrations?", Morin replied, "I redrum the innocent" ('murder' - spelled backwards);

- Morin's comment to Sergeant Hobbs that no one was aware of the real relationship he and Christine Jessop had;

- Sergeant Hobbs' evidence that, in response to his question to Mr. Morin "How was your's [murder] done?", Mr. Morin made stabbing motions towards the chest;

- Mr. Morin's failure to search for Christine, his failure to offer condolences to the family or attend her funeral;

- Mr. Morin's comment to Mandy Patterson that she was murdered the night she was taken, showing exclusive knowledge of the killer.

During the Inquiry, Mr. McGuigan expressed his current belief that Mr. Morin is innocent. On January 23, 1995, at a press conference, he made the following public statement, which he adopted in his evidence before the Commission:

> My name is Leo McGuigan. I was the lead Crown counsel on the second trial in which Guy Paul Morin was convicted by a jury of first-degree murder. It would be inhuman for me not to acknowledge the hardship to Guy Paul Morin, his parents and family, that this prosecution has caused.

> It has extracted a huge toll on Mr. Morin's family, and I join in expressing my regret to them. I would be extremely remiss if I did not acknowledge the anguish that these developments have caused the victims. The Jessop family has been forced to endure the brutal murder of their nine year-old daughter, Christine, in two lengthy trials. Now at a time when I'm sure they were attempting to get on with their lives, all that pain has been revived. I feel great sorrow for them.

The position set out in the submissions of counsel for the Morins is that, despite Mr. McGuigan's apology, his confrontational position at the Inquiry rendered his apology "a hollow one." In support of this proposition, the submission cites the following incidents:

- Placing the responsibility for Mr. Morin's wrongful conviction squarely on Mr. Pinkofsky's conduct of the defence;

- Blaming Guy Paul himself on the grounds that he committed perjury by denying that he confessed to May and Mr. X and in presenting a false alibi at both trials;

- Blaming Alphonse (and perhaps Ida) Morin for committing perjury by supporting Guy Paul's false alibi;

- Amassing lists during his evidence indicating that Morin made numerous incriminating remarks in his conversations with Shephard and Fitzpatrick on April 22nd;

During the Inquiry, Mr. McGuigan was asked whether his critical assessment of evidence may have been skewed, albeit unconsciously, by a strong belief in Mr. Morin's guilt. He acknowledged this possibility and the inherent difficulty in evaluating the effect of one's belief in guilt:

> Q. I want to ask you whether you think, with the benefit of hindsight, that perhaps your critical assessment of this kind of evidence, for example, and we'll deal with some of the other people down the

> road. Paddy Hester and others might have been skewed, unconsciously, by your strong view in Guy Paul Morin's guilt. Do you think that could have happened?
>
> A. Well, you know, I suppose everything's possible. I would hope that that's not true. I tried to look at this as what would I do if I was the defence counsel and I think that helps you to keep somewhat of an open mind. But, you know, I don't know how everyone's mind works and I probably don't even know how mine works.
>
> But I would hope that that's not the situation, but I guess there is human nature and what effect that has on someone is, subconsciously, is hard to evaluate. But I would really hope that's not the situation.

Mr. Gover told the Inquiry:

> Q [S]peaking of my own approach to the case, going into it, I was convinced that this was the right man who was occupying the prisoner's dock.
>
> A. Yes.
>
> Q. Because of the psychiatric evidence which included the admission from either Doctor Orchard or Doctor Turrall in cross-examination that Mr. Morin was one, a member of a minuscule percentage of the population capable of committing this horrendous offence.
>
> .....
>
> *In my involvement in the motion, I came to doubt whether we had the right man.* (Emphasis added.)

Later in his evidence, he said:

> I had misgivings about the case, and I believe I've explained the view that I took of the case revolving as it did around the psychiatric evidence led at the first trial. And by the end of the case — in my involvement in the case, rather, I came to the view that Mr. Morin

> had perpetrated the deed, but that he had done so in a condition such that he would have a defence under Section 16 of the Criminal Code.

March 22, 1991 Tactical Meeting: Approach to Pinkofsky

After the order directing a re-trial was affirmed by the Supreme Court of Canada, the Crown was notified that Mr. Pinkofsky and Ms. Widner would represent Mr. Morin at his second trial.

Ms. MacLean and Mr. McGuigan testified that between February 1991 (the date the application for a stay of proceedings was dismissed) and April 1991 (the commencement of the pre-trial motions on the admissibility of evidence) a meeting of senior Crown attorneys was arranged by Mr. McGuigan to discuss how certain issues should be approached.

The Agenda for the March 22, 1991 meeting

Ms. MacLean said that Mr. McGuigan asked her to prepare an agenda for the meeting for advance distribution to senior Crown attorneys asked to attend. Mr. McGuigan's recollection was that there was no agenda for the meeting.[43]

Ms. MacLean testified that the agenda was discussed amongst Mr. McGuigan, Mr. Smith and Ms. MacLean, but she could not recall to what extent. Ms. MacLean's notes outlining her agenda read, in part:

> 1. Tactical advice regarding Pinkofsky's approach of attempting to confuse the jury and blame others, specifically:
> a) other "suspects";
> b) sightings of Christine Jessop;
> c) sightings of suspicious vehicles.[44]

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[43] He did, however, recall that he prepared a chart of the issues or problems in the trial and the legal principles which would emerge. He took these notes to the March 22, 1991 meeting but they were not used and were subsequently discarded.

[44] Although she could not recall specific discussions, Ms. MacLean related a concern on the part of those formulating the agenda that these matters and the issue of other suspects might be raised by the defence in a manner which may confuse the jury. The Crown perspective was that these issues should be raised only where rulings permitted and

2. How do we deal with Pinkofsky's general approach to a trial.
a) leading inadmissible evidence;
b) failing to obey rulings of the trial judge;
c) failing to follow procedural rules such as the [Canada Evidence Act], s. 9(2) applications. [cross examination of one's own witness]
d) misstating evidence, especially during cross-examination.

Ms. MacLean told the Inquiry that while the stay proceedings had provided her with some insight as to Mr. Pinkofsky's style of defence, the views expressed in the agenda would have emanated from other Crown attorneys who had opposed Mr. Pinkofsky in a trial setting. Both Mr. McGuigan and Mr. Scott had trial experience with Mr. Pinkofsky. Scott had shared with her his views as to Mr. Pinkofsky's general approach to trials and she may have contributed to the formulation of the agenda on the basis of those discussions.

Mr. McGuigan described the March 22, 1991 meeting as a discussion of how to proceed with various issues he and his co-counsel believed would arise in the case. Mr. McGuigan's recollection was that the meeting took place at the Whitby Police Station, although it may have been at the Oshawa station.

Who was Present

Ms. MacLean and Mr. McGuigan who attended the 6 ½ hour meeting recalled the presence of several other Crown attorneys, including Mr. Smith, Mr. Scott, Chris Meinhart, Larry Owen, and David Thompson. Neither Mr. McGuigan nor Ms. MacLean were sure whether Paul Culver was present.

Some of the lawyers present had substantial legal precedent files which were identified for future reference. Mr. McGuigan could not specifically recall a discussion as to Mr. Pinkofsky's particular style of defence, but said that it may well have been discussed by Mr. Scott or by him or by some of the others who had dealt with him previously.

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presented in a manner which could be properly responded to.

Was it a "War"?

Ms. MacLean's notes taken during the meeting included the following reference in connection with other suspects:

> Fight him every inch of the way - object to relevance, make him call witnesses, don't let him file occurrence reports.

Ms. MacLean could not recall who made this comment but stated that it was not she. She explained the underlying concern that the rules of evidence would not be complied with if the issue of other suspects was raised.

Ms. MacLean was asked if the note reflected that this trial was gearing up to be a 'war.' In reply, she referred to a perception on the part of Crown counsel which emerged in about April 1990[45] that the defence would involve a personal attack on the integrity of all four Crown counsel (including Mr. Scott) and the two lead investigators in the case. As to whether the note reflected an appropriate style of prosecution, Ms. MacLean indicated that Crown counsel knew that Mr. Pinkofsky fought hard for his clients and would argue the admissibility of much of the evidence. She explained that it may be necessary to 'fight' to ensure that evidence was dealt with fairly and that only proper evidence was placed before the jury.

Ms. MacLean said that her primary duty was owed to the community to present evidence fairly and to prosecute vigorously. She testified that a vigorous defence and a vigorous prosecution does not lead to injustice; the fact of Mr. Morin's innocence does not mean the conduct of counsel contributed to his wrongful conviction. She added:

> [I]f you believe that a defence lawyer will be attacking your integrity ... it's a very difficult issue as to how to appropriately respond. ... Most of the lawyers I deal with do not use the style that Mr. Pinkofsky had, which is to suggest a broad-based conspiracy amongst all members of the administration of justice. ...[T]he local Bar in Durham doesn't have that style, and other

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[45] Commencing with a complaint to the Regional Director by the defence against John Scott.

> counsel from Toronto who come out don't have that style. ... [I]n my view, it's a very unfortunate style of defence, because it ... does pit the Crown and the defence against one another more than I think is necessary.

The following reference to Donald Marshall's case is contained within the notes of the March 22, 1991 meeting:

> Re Donald Marshall. a) May be raised during objections or closing argument. b) How do we object? Relevance?
> 1. talk about reasonable doubt.
> 2. Talk about duty of jury, look at the evidence and decide on that basis.
> 3. Does this mean no jury can ever convict in light of Marshall?
> 4. Marshall was an important inquiry to protect all of our rights. Should we let Morin ride on Marshall's coattails, "me too, me too". Isn't his own defence good enough? This approach is calculated to mislead you into conjuring in your minds a fanciful doubt, not a real doubt. Are we going to let Marshall be used to let a rapist murderer of nine-year-old girls off?

In explaining these notes, Ms. MacLean reflected the concern that the defence may improperly attempt to inject the results of the Marshall case into the Morin proceedings, thereby creating a risk that the jury would be fearful of performing its sworn duty — the performance of which may involve convicting Mr. Morin.

While Mr. McGuigan recalled the Donald Marshall case being discussed, he had some doubt that there was a discussion as to whether Morin should be allowed to 'ride on Marshall's coattails.' However, he had no definite recollection one way or another.

How to deal with the defence raising other suspects

MacLean's evidence was that while there was nothing wrong with the defence raising the issue of other suspects, Crown counsel wished to ensure that, if raised, it was in accordance with the rules of evidence. She stated that the following notes of the March 22nd meeting reflect this concern:

> Suspects
> 1. how does defence introduce this evidence? Through cross-examination.
> - can he cross-examine the police on these points. What is the relevance?
> - sightings of Christine Jessop
> - will argue police targeted Morin and ignored other suspects - he'll say look at all these investigative avenues that were not explored.

MacLean testified that possible responses to the issue of other suspects being raised by the defence, included the question of whether evidence could be called to show that the police had cleared suspects by the use of polygraphs. These issues were discussed during the meeting:

> - can call the "suspects" to say they didn't do it.
>
> - call evidence to clear those suspects.
>
> .....
>
> - the polygraph is a widespread, accepted method of eliminating a suspect.
>
> - officers should be instructed to say: "and I took one other step...."
> - then object, get the jury out, and argue the admissibility of the reference to the polygraph.

Ms. MacLean explained that the above note refers to instructions to officers not to mention the polygraph in relation to other suspects. The concern was that inadvertence, in this regard, may lead to a mistrial. Rather, officers were told to use a phrase like "And I took another step" as a cue to litigate the issue before the trial judge. Mr. McGuigan could not recall this discussion. The notes also contain the following reference:

> b) object as to relevance - make defence specifically articulate grounds - if bias - what are specific allegations re: bias.
> c) put defence to strict proof

Ms. MacLean addressed the necessity of knowing the grounds on which the issue of other suspects would be raised. While this area was open to the defence on the basis of an argument that the police were biased in the

investigation of Mr. Morin, the issue of bias was not, in fact, raised by the defence. The trial judge ruled the evidence inadmissible in that there was an insufficient connection with other suspects.

The note also reflects a concern with potential hearsay.

> PROCEDURE
> 1. Re other suspects
> a) Object as being hearsay evidence.

Another reference in Ms. MacLean's notes related to cross-examination of an officer on information received by that officer. Ms. MacLean explained that in the course of the motion on admissibility, an undertaking would be sought that the suggestion be supported by subsequently calling the evidence:

> d) make defence undertake to call evidence in support of his allegations, the best evidence rule.
>
> .....
>
> If defence can ask officers about hearsay evidence,
> 1. prepare officers to articulate why suspects eliminated.
> 2. Have officers prepared to indicate why Morin was a better suspect (comparison)
> - Evaluation of evidence against Morin compared to other suspects.

"Don't let Jack cuddle up"

Ms. MacLean's notes of the March 22nd meeting also contain the following entry under the heading "General Approach to Trial":

> Don't let Jack cuddle up to you and chat to you during the trial

Ms. MacLean stated that the meaning of this suggestion, made by one of the other counsel present, was that witnesses should be advised that although Mr. Pinkofsky may engage in a friendly conversation in the hallway, nothing was off the record and that what was said to Mr. Pinkofsky may be put to them in the witness stand.

Findings

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

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

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

Brian Gover was intimately familiar with much of the Crown's case. He was a prosecutor. He was an effective advocate. He understood perfectly the adversarial system. But he was able to view the Crown's evidence with some objectivity. He recognized the serious, perhaps fatal, problems with the credibility and reliability of some of the evidence to be led by the Crown. I believe that, had he prosecuted Mr. Morin, he would not have called some of the evidence presented by the Crown at the second trial — not because he was legally disentitled from so doing, but rather in the exercise of sound prosecutorial discretion. I accept that John Scott did not call evidence at the

first trial in the exercise of prosecutorial discretion — Leslie Chipman was one example.

These findings mirror those which I earlier made in the context of the prosecutors' assessment of Constable Robertson's evidence.

(v) The Incident Concerning Michael Brian Joll

Michael Brian Joll was a member of the Peel Regional Police force from 1977 to 1990. He testified that in 1985 he joined the Youth Bureau of that force, where he served for two years. In 1990 he left the force to join an organization known as "Pointts," a paralegal firm that defends people in traffic courts.

He gave evidence before the Inquiry that in or about the summer of 1986 he attended a lecture for members of the Peel force given by the Peel Regional Crown attorneys in the basement conference room at 12 Division at 4600 Dixie Road in Mississauga. There were 30 or 40 persons there, including both uniformed and plainclothes officers. Four or five Crown attorneys presented lectures; they were introduced by Leo McGuigan.

Mr. Joll's police notebook was produced at the Inquiry by counsel for Mr. McGuigan; it was marked as Exhibit 300 and it reflected that he had attended a session with Crown attorneys and police at 12 Division on April 24, 1986 at 7:00 p.m. The notes indicate that Mr. McGuigan was there on that occasion and there were brief notes as to what was discussed at this educational session.

Mr. Joll testified that Mr. McGuigan talked about the role of the Crown attorney in a criminal prosecution. He began his talk by outlining the traditional British definition, that is, a fair and unbiased presentation of the facts to the jury and without a vested interest in the outcome. The only interest was to ensure that justice was done. Mr. Joll said he found nothing unusual in that definition and that he believed that to be the Crown attorneys' role.

Then, according to Mr. Joll, Mr. McGuigan said "hogwash" or "bullshit" and proceeded to say it was the Crown attorneys' job to win by any means at their disposal; that the police had spent a lot of time and energy in getting their pinch, their arrest, and the job of the Crown attorney was not to

fumble or drop the ball — it was to ensure that the individual charged was properly prosecuted and a conviction registered. The end justifies the means; it does not matter how you got the conviction. Defence counsel were described by Mr. McGuigan as "sleazebags" or "scumbags"or "slimeballs"; there was no real difference between the lawyer and his client as far as he was concerned. Mr. Joll said Mr. McGuigan described the accused in similar terms. Those comments, according to Joll, were received favourably by the police who were present; however, Mr. McGuigan's comments were not reflected in Joll's notebook.

Mr. Joll testified that he was upset and disappointed and saddened by Mr. McGuigan's remarks; he felt he had sullied the whole profession.

Subsequently, in February 1995, after the DNA results that cleared Mr. Morin were published, Mr. Joll met a lawyer he knew at the provincial court house in Brampton. Mr. Joll told him that he had been disappointed with the conviction of Guy Paul Morin at the second trial, but he was not wholly surprised knowing that McGuigan was the chief Crown attorney on the case. He spoke about McGuigan's lecture and the lawyer asked if he would provide a written statement about this for Mr. Pinkofsky, counsel for Mr. Morin. Mr. Joll ultimately drafted a written statement that eventually was faxed to Mr. Pinkofsky on February 27, 1995, together with a covering letter. These documents were forwarded to Commission counsel on September 18, 1997.

In cross-examination by Mr. Lockyer, Mr. Joll testified that if he were still a member of the Peel Regional force, he would not have provided a statement because he would not have had the courage to come forward. According to him, the police always close ranks and defend themselves.

Mr. Joll was vigorously cross-examined by counsel for Mr. McGuigan as to his credibility and about his motives for testifying at the Inquiry.

Mr. McGuigan testified before me that he was involved in lectures given by the Crown attorneys in Peel Region to the police in that area. He conceded that it was quite possible that he gave a lecture to the police at 12 Division in 1986 or 1987 in the evening between 6:00 and 7:00. He was accompanied by other Crown attorneys, but he did not recall who they were. He does not recall the topic of his lecture. He did not know Mr. Joll. He would agree with Mr. Joll's evidence that he would introduce everyone who was there; it seemed reasonable to him that he would do so. He testified that,

if he spoke about the role of the Crown attorneys (although he was surprised that it was alleged that he did so) it would be sensible that he would convey the message that they would do their best to help the police with their tasks. He denied that he presented the attitude that Mr. Joll said he did at that meeting. Mr. McGuigan testified that what Mr. Joll said about his lecture is totally opposite to what he believes. He did not make the statements attributed to him by Joll, nor did he use some of the language that Joll said he did, although, not surprisingly, he does use the word "bullshit" on occasion.

Mr. Levy called 22 witnesses on behalf of Mr. McGuigan in relation to the 'Joll' lecture. Some were Crown attorneys and others were police officers. Almost all of them had attended educational sessions for police which had been addressed by McGuigan. All swore that Mr. McGuigan had never described the role of the Crown attorney in the manner told by Mr. Joll. Many of them testified that, on the contrary, whenever Mr. McGuigan outlined the role of the Crown attorney he described it as a dual role: on the one hand, the Crown was a vigorous advocate for the prosecution; at the same time he or she was a minister of justice with a duty to the court and a further duty to be fair to the defendant. Many testified to Mr. McGuigan's excellent reputation in the police and justice communities for honesty and integrity.

For example, Paul Michael Taylor, the present Crown Attorney in Peel Region, who had worked under Mr. McGuigan for 21 years, testified that he had attended educational road shows on a number of occasions and had heard Mr. McGuigan speak at them. He was aware of the words attributed to McGuigan by Joll and swore that if McGuigan had spoken about the role of the Crown in that manner he would have had difficulty continuing to work for him. Mr. McGuigan always spoke of the Crown's special role as a minister of justice. He disagreed that McGuigan was known as a Crown attorney who was pugnacious and unbending.

Leonard Favreau gave evidence on behalf of Mr. McGuigan. He is a detective sergeant with the Peel Regional force and has been a police officer since 1982. He had worked with Mr. Joll in the Youth Bureau. Mr. Favreau had his own notebook for April 24, 1986, and it noted that he had attended the lecture at 12 Division, but there was no record of what had been discussed. He conceded that McGuigan introduced the other Crown attorneys, but he had no recollection as to what else he had spoken about. He had no recollection of Mr. McGuigan saying what Joll said he did at the lecture, but it would have shocked him if McGuigan had used the words

attributed to him. He and Joll were friendly and they socialized. In addition, Joll and he confided in each other and Joll never talked to him about the incident as he would have expected if it had occurred. It should be noted that Mr. Joll admitted in cross-examination that he socialized with Favreau and, although he did not specifically recall doing so, he might have discussed the McGuigan lecture with him.

Favreau knew Joll to be an honest, reliable person who had shown no hostility towards Mr. McGuigan; however, he was shocked by Joll's testimony because, in his view, the incident involving McGuigan never happened. He would have remembered if McGuigan had said anything improper.

Carolyn Harrison is a teacher at Conestoga College. Prior to that she had been a member of the Peel Regional force from 1990 to 1998. She had attended sessions at 12 Division given by Crown attorneys, but she no longer had her notebook in which they might have been reflected. She recalled that Mr. McGuigan spoke at such a lecture when she was in the Youth Bureau. Joll was in the same Bureau at the time. She never heard McGuigan speak the words attributed to him by Joll. She would have been shocked if he had said those things because she had a lot of respect for him. Joll never spoke to her about the matter although they had worked and socialized together. She agreed in cross-examination that Joll was at her wedding and that he was an honest person whom she trusted when they worked together.

Another witness called on behalf of Mr. McGuigan in relation to Joll's evidence was Mark Saltmarsh, who has been an Assistant Crown Attorney in Brampton since 1985 and who worked under McGuigan. He believed that he attended an educational session at 12 Division in 1986. He had no specific recollection of dates, but he recalled that Mr. McGuigan was present. He had never heard McGuigan speak the words attributed to him by Joll. He had heard McGuigan speak about the role of the Crown attorney; he said they were to act as ministers of justice and conduct themselves with integrity.

Claude Gelbard has been with the Peel Regional force for 20 years. He served on the Youth Bureau with Joll until April 27,1986, when he left the Bureau. He testified that a couple of days before he left the Bureau he attended a training session at 12 Division. To the best of his memory he never heard Mr. McGuigan express the comments attributed to him by Joll. If Mr. McGuigan had spoken those words he would have remembered and he would

have lodged a complaint.

Brian O'Marra was with the Peel Crown office from 1982 to March 1993, when he became the Crown Attorney for Halton Region. He testified that he attended educational programmes where McGuigan had spoken to the police. McGuigan's comments, as repeated by Joll, are quite the opposite of what McGuigan conveyed both inside and outside of the Crown's office. McGuigan always spoke of the Crown's special role as a minister of justice. He swore that Mr. McGuigan's reputation for honesty and integrity was impeccable.

Findings

The evidence of the witnesses set out above is a fair sampling of the nature of the testimony given by the 22 witnesses called on behalf of McGuigan in relation to the allegations made by Joll. The sentiments which Mr. Joll has attributed to him about the role of the Crown in a criminal prosecution would run contrary to the role that the Crown should assume, as earlier articulated in this chapter.

If the words attributed to Mr. McGuigan had actually been expressed by him, they would have been relevant to prove a propensity on his part to seek convictions at any cost of the defendants in the cases he prosecuted and, therefore, relevant to his conduct in the prosecution of Mr. Morin.

Mr. Joll's evidence was attacked on the basis that it was ill-motivated and deliberately false. The cross-examination did not address the possibility that Mr. Joll misconstrued a forceful (but appropriate) articulation of the Crown's role as advocate. Mr. Joll appeared to me to be an honest witness. I do not find that his testimony at this Inquiry was ill-motivated or deliberately false. On the other hand, the police and Crown attorneys who gave evidence on behalf of Mr. McGuigan on this issue, including Mr. McGuigan himself, also were credible. It is clear that Mr. McGuigan properly described the role of Crown counsel on other occasions. On the totality of the evidence, I do not find that Mr. McGuigan described the role of Crown counsel in an inappropriate way.[46]

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[46] The character evidence tendered on behalf of Mr. McGuigan, Mr. Smith, Ms. MacLean, Inspector Shephard and others was impressive and was considered by me, in the

(vi) The Stay Motion

Overview

The 'stay motion,' brought on behalf of Mr. Morin for an order terminating the criminal proceedings against him, commenced on May 28, 1990. The main issues included the alleged misleading disclosure and material non-disclosure by Crown counsel of the first trial, as well as police conduct.

Mr. Gover, Crown counsel on the motion, told the Inquiry that the Crown's strategy on the stay motion was to

> give the defence every opportunity to make out what it was alleging, and then, at the end of the motion, to point out that, for example, there had been few limits placed on the examination of witnesses, that we didn't insist on relevance being shown prior to evidence being led and that we didn't in any way thwart the inquiry that the defence was embarking upon.

Brian Gover called as witnesses Mr. Scott, Ms. MacLean, Inspector Shephard, Detective Fitzpatrick, Detective Nechay and Detective Bunce. Wide latitude was extended in the examination of other witnesses, recognizing that they were adverse in interest to Mr. Pinkofsky's client.

It was originally anticipated that this motion would take two to three weeks; instead, it lasted eight months. Mr. Gover described the frustration that mounted during the stay motion over the amount of time it was taking.

Disclosure Issues

The current jurisprudence relating to disclosure is summarized by Doherty J.A. in *R.* v. *Girimonte*.[47] He stated, *inter alia*:

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way described in Chapter I of this Report. Accordingly, though some of this evidence was introduced in the context of Mr. Joll's allegations, the character evidence had general application.

[47] (1997), 121 C.C.C. (3d) 33 (Ont.C.A.).

> Full disclosure is fundamental to the right to make full answer and defence. The Crown has both a legal and ethical obligation to make that disclosure. While the Crown's obligation to make full disclosure is quite properly stressed, defence counsel also has an obligation to act "responsibly" in the course of the disclosure process: *R. v. Stinchcombe, supra,* at p.12.
>
> .....
>
> The Crown's disclosure obligation is firmly established. The Crown must disclose to the defence all information whether inculpatory or exculpatory under its control, unless the information is clearly irrelevant or subject to some privilege which justifies the refusal to provide that information to the defence. Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence. Full answer and defence encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence: *R. v. Stinchcombe, supra,* at pp. 10-14; *R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.) at 203-4 (S.C.C.; *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 at 233-234 (S.C.C.).
>
> The accused's right to disclosure is a principle of fundamental justice and a component of the constitutional right to make full answer and defence. Full and timely disclosure by the Crown enhances both the fairness and reliability of the trial process. The Crown's failure to meet its disclosure obligations results in a breach of an accessed's rights under s.7 of the *Charter* and entitles the accessed to an "appropriate and just" remedy under s. 24(1) of the *Charter: R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.) at 301-306.
>
> The Crown's obligation to disclose is triggered by a request for disclosure from counsel for the accused. Initial disclosure must occur sufficiently before the accused is called upon to elect or plead so as to permit the accused to make an informed decision as to the mode of the trial and appropriate plea. In a perfect

> world, initial disclosure would also be complete disclosure. However, as is recognized in *Stinchcombe, supra*, at p.14, the Crown will often be unable to make complete disclosure at the initial stage of the disclosure process. There will also be rare cases in which the Crown can properly delay disclosure until an investigation is completed. If full disclosure cannot be made when initial disclosure is provided, the Crown's obligation to disclose is an ongoing one and requires that disclosure be made as it becomes available and be completed as soon as is reasonably possible. In any event, an accused will not be compelled to elect or plead if the accused has not received sufficient disclosure to allow the accused to make an informed decision.
>
> The disclosure process requires that the Crown make the initial determination of what material is properly subject to disclosure to the defence. In making that determination, the Crown must exercise the utmost good faith and be guided by the spirit and the letter of *Stinchcombe*. The Crown's determination is subject to judicial review.

At the time of the stay motion, the rules governing disclosure were relatively uncertain. I am mindful of the fact that the exercise of prosecutorial discretion relating to disclosure prior to the second trial occurred without the benefit of the seminal judgment of the Supreme Court of Canada in *R. v. Stinchcombe.*[48]

Mr. Gover described how, at the outset of the stay motion, his approach to disclosure differed from that of Ms. MacLean. According to Mr. Gover, Ms. MacLean was initially concerned that the disclosure decisions made by him could be seen to undermine the original disclosure decisions made in 1985. The two prosecutors clashed on this issue from time to time. It was his view that, at least for the first few months of the motion, Ms. MacLean "identified closely with the police officers who were being accused of various types of misconduct." He noted that she had worked on the case for most of her career up to that point, virtually exclusively, with that police force. Mr. Gover told the Inquiry:

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[48] (1991), 68 C.C.C. (3d) 1 (S.C.C.).

> I was critical of Susan at the beginning of the motion. And I think that if I were to put in a nutshell her attitude, for example, toward disclosure, at the beginning of the motion it was: 'how is that relevant, why should we disclose it?' to, by the end of the motion, 'why shouldn't we disclose it, it may be relevant.'

Mr. Gover said that both Mr. Scott and Mr. McGuigan "took a fairly hands off position" in relation to disclosure decisions made by Mr. Gover.

However, he recounted a schism between his position and that of the police and of Ms. MacLean which came to a head around July, 1990. He said:

> Sergeant Shephard did not trust me and said from time to time that he felt the police should have their own lawyer present in the court room on the abuse of process motion.

Mr. Gover also recalled concerns expressed by both Shephard and MacLean over the practical aspects of the motion in terms of bringing police officers down to London who would then have to wait for days to testify.

Inspector Shephard was asked whether he recalled heated conversations with Mr. Gover about the manner in which the disclosure motion was being conducted. He responded "certainly not [about] the way he was conducting the disclosure motion" but he did recall a heated discussion with Mr. Gover about officers who were not under subpoena being called to London -- only to wait for days to testify, at considerable cost to and hardship to the department. Inspector Shephard's recollection was that if officers cooperated and reviewed their notes with the defence, they were called that day or the next. Otherwise, they were kept waiting for up to a week or longer. At one point there were seventeen officers in London.

Mr. Gover expressed his view that the Durham Regional officers, particularly Detective Fitzpatrick and Inspector Shephard, did not understand the scope of the abuse of process motion and "essentially treated me on a need-to-know basis." This was "overcome when the point was made that clearly I had to know everything there was to know about some of these other suspects in order to ensure that the Crown was properly represented". In his

view, the motives of the police in failing to disclose certain documents were due to the fact that "they didn't appreciate their duties in relation to disclosure. Mr. Gover said:

> They hadn't acquainted themselves with the work of other teams within their own force, and other investigators who had been working with the York Regional Police Force. ... Shephard and Fitzpatrick had not taken proper steps to acquaint themselves with other suspects.

Mr. Gover confirmed that at the time of the stay application he was aware that disclosure had not been made, relating to:

- other suspects;
- the Janet and Ken Jessop will-says and prior statements relating to timing;
- the laundromat test;
- suspicious sightings and suspicious cars;
- the Horwoods;
- the OPP report regarding the 'partial fingerprint' that Michalowsky testified about at the first trial;
- additional bones found by the Jessops;
- some favours done for the jailhouse informants;
- the problems associated with Michalowsky;
- the loss of evidence through the failure to investigate, such as the Bell Telephone records concerning Janet Jessop's visit to their offices; and,
- the Pamela Watson interview concerning Ms. Jessop's visit to Household Finance.

In light of these omissions, Mr. Gover said that he "regarded it as by no means certain that the motion would not succeed." I will discuss a few of the above matters only.

Jessop Will-Says

John Scott was provided with a 3-page legal-size document entitled "Evidence of Kenneth Jessop," prepared by Detective Fitzpatrick prior to the first trial, which became part of his Crown brief. The document contained very detailed evidence relating to the timing of Ken and Janet Jessop's whereabouts on October 3, 1984. This document was not provided to defence counsel; instead, John Scott revised the will-say of Ken Jessop's anticipated evidence and provided the defence with a one-page edited version. In the revision, he deleted the following portions of the evidence of Ken Jessop:

- "Mom bought me a wristwatch." Mr. Scott cannot recall why he removed this, but believes it was because Ken Jessop said that he looked at his watch as he arrived home and it was 4:10, while Janet Jessop said that she looked at the clock, and it said 4:20.

- "I was only "in the dentist's" minutes. All he did was a check-up." Mr. Scott said that he removed this because it was clearly an error when one considered Dr. Taylor and Ms. Lowson's evidence.

- "When we came in the house, I remember Mom looking at the clock and saying it was 4:20." Mr. Scott stated that he removed the 4:20 notation in particular because it was his information that Ms. Jessop told the officers that, when she looked at the clock she stated that it was 4:10. Mr. Scott said that he removed the position about looking at the clock because it was seen as being "part of what I viewed as an error sentence. It was not accurate."

- "She [Janet Jessop] said she had time to have a coffee and think about what she was going to say to the lawyer, Mr. A. Kuracas when she called him at 4:45." Mr. Scott had difficulty recalling why he deleted this

reference.

- "We mainly searched the fields. I stayed out until midnight. Then I came in and went to bed. The police were at our house all night. One of the officers came up and woke me up around 2:00 a.m. and did the same thing you're doing now." Mr. Scott did not believe that this was relevant evidence.

When asked about the deleted references to timing during the Inquiry, Mr. Scott said that the material was removed because "it was unreliable." In his view, Ken Jessop's statements in this regard were not accurate. He had met Ken Jessop once or twice and had spoken to him about issues in order to determine whether to call him to give evidence at the first trial. He decided not to call him and was concerned that the times put forward by Ken Jessop were in conflict with one another. Mr. Scott does not believe that he reviewed other notes or statements documenting the Jessop timing before vetting the will-say, but maintained that he was aware of them from the information of the investigating officers.

In retrospect, Mr. Scott told the Inquiry that it would have been better to have allowed the defence to view this evidence to enable them to come to their own opinion as to the reliability of Ken Jessop. He agreed with counsel's suggestion that he probably should have indicated, at least in brackets, times mentioned by Ken Jessop. He stated that in the post-*Stinchcombe* environment all material would have been disclosed; however, at the time of making these decisions, he believed that Ken Jessop was simply in error and therefore vetted the will-say accordingly.

In the context of this issue, Mr. Scott was also questioned on the propriety of calling a witness at trial whose credibility was suspect. He said:

> I think as a Crown you've got to make some conclusion, this is credible evidence because I think that's probably in *Boucher* or one of those older cases. But, it just gets so confusing when you start making these decisions yourself because – let's assume for a moment that there's a case I'm prosecuting and I make this decision, if this isn't, in my view credible evidence, I don't lead it.

> Later on it turns out it's completely credible evidence and the individual harms someone else in the interim as a result of me not leading this evidence, they're acquitted. And then we've got an Inquiry into that as to what I'm doing in not leading evidence that's available to me, but I've made some decision that I don't feel it is credible which somebody else questions later.

Mr. Scott knew that Janet Jessop was going to be a witness. He was provided by the investigators with a legal-size document providing a detailed summary of Mrs. Jessop's activities on the day that her daughter disappeared. It included the following statement:

> I picked Ken up, it was about 4:20 p.m. and we came straight home. We got home at 4:35 p.m. The dog was inside.

She also, however, commented in the last paragraph of this document:

> I had originally said I got home around 4:00 p.m., but after talking to the investigating officer, I realised I had made a mistake and the earliest time I could have gotten home was 4:35 p.m. I may have even — I may have been even later, approximately 4:45 p.m.

This will-say was not provided to the defence by Mr. Scott. Instead, Mr. Scott advised defence counsel that Ms. Jessop's evidence was as set out in the preliminary inquiry.

In Ms. Jessop's preliminary inquiry evidence, however, she testified as follows relating to the time that she returned home:

> Q. What time did you arrive home from the dentist?
>
> A. That I can't remember.
>
> Q. Well, was it before 5 o'clock?
>
> A. Definitely.
>
> Q. Was it before 4:30?
>
> A. Well I honestly don't know. I know by the time I

> looked around for Christine and I had to make a call, I made a cup of coffee, looked around for her, I called, made my call roughly quarter of five.
>
> .....
>
> Q. In the area of your home - you don't give what time you arrived. Can you at least give us an estimate? Just give us a ballpark figure?
>
> A. Well, I really don't know. I know what time I made my phone call.
>
> Q. And that was quarter of five?
>
> A. Around there.
>
> Q. You'd have been home how long at that point?
>
> A. It wouldn't be any more than ten or fifteen minutes.
>
> Q. All right.
>
> A. At the most.
>
> Q. So you arrived perhaps 4:30, 4:35?
>
> A. Um hmm.
>
> Q. Is that correct?
>
> A. Could be, yes.

Mr. Scott told the Inquiry that he did not provide Ms. Jessop's will-say to the defence because:

> A. I just had no confidence in the times as given in those documents, nor any time but the time she told the police, which was, 'got home at 4:10.' And I know there are specific times there [in the documents] but I think if you go through them you'll see they don't work.
>
> Q. Do you think, however, considering that timing was an issue, then it would have been of value to .... to

> defence counsel to see that the statements don't work. They could have utilized them because timing was of crucial importance.
>
> A. I don't, respectfully, think that Mrs. Jessop's timing was crucial at all in the proceedings. I think the time that she announced she got home was important, but you're right, I'm doing things from a perspective.[49]

Findings

As Mr. Scott admitted, it would have been better had he not vetted the will-says in the way he did. Certainly, the defence was entitled to know that different times were given on different occasions by Ken and Janet Jessop, and they could then have dealt with it in whatever manner they saw fit. That, however, is not only today's wisdom, but also today's law. In 1985, the Crown was obligated, as it is now, to disclose exculpatory evidence. However, I understand Mr. Scott's interpretation of his obligation at the time and, whereas it constituted an error in judgment, I accept his explanation and find no deliberate attempt to circumvent his obligations. I should say that, in so finding, I am mindful of the fact that Mr. Scott did not press Ms. Jessop to confirm the 4:30 to 4:35 arrival time (when he led her evidence at the second trial) and elicited from her that she had earlier told the police 4:10 p.m. I appreciate that Mr. Ruby's approach to the timing issue might have been different had he been aware of the full extent of the Jessops' prior statements, but Mr. Scott's approach at the first trial is relevant to the absence of any *mala fides.*

The Laundromat Test

During the first trial, Janet Jessop testified that she used the Dutch River Laundromat in Holland Landing. Guy Paul Morin testified that he, too, regularly used this laundromat. Defence counsel suggested that a transfer of fibres may have occurred through use of the same laundromat.

A textile expert, Herbert Pratt, called by the Crown, was cross-examined by Mr. Ruby on the possibility that fibre transference may have

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[49] Mr. Scott's counsel fairly commented following this question that the timing in the first trial was not the issue that it was in the second trial or became at this Commission.

occurred by the use by the two households of the same laundromat. Mr. Pratt said environmental contamination of this sort was possible, but it was contingent on a number of assumptions. He did not enthusiastically endorse this possibility because he believed that the item from which the pink animal fibre originated would have been dry-cleaned. Another expert, Barry Gaudette, a fibre examiner with the RCMP, was also called by Mr. Scott during the first trial. He conceded in cross-examination that if both the Jessop and Morin families laundered at a common laundry, it could be a possible source of environmental contamination.

At Mr. Scott's behest, a test was conducted by Constable Harry Shephard of the Durham Regional Police Identification Bureau during the first trial. Mr. Scott told the Inquiry that he believed the proposition of fibre transference was nonsense as no one would wash something with animal fibre in a laundromat. The result of the test performed by Constable Shephard was indeed an "obvious" transfer of fibres from angora items washed in one load of laundry to items washed in a second load of laundry. Mr. Scott did not disclose the results of the laundromat test to defence counsel:

> I thought it was completely irrelevant, completely of my making that the evidence had been well-covered by the experts in terms of the possibilities. I thought the chances of these people doing laundry back-to-back were nil, and that's the issue that I went to the jury on, is that — not that there couldn't be this transfer from this laundromat item that everybody said you wouldn't wash anyway, but that the chances or the likelihood of this happening were just not there.

During Mr. Scott's closing address to the jury, he was less than clear in his statement to the jury relating to the laundromat issue:

> We will go back, because I told you I was going to go back to the hairs and fibres, the mute witnesses. I indicated to you initially when we started this case, there wasn't a lot of possibility, a lot of laundromats, and so on.[50]

[50] Note that Mr. Scott had not earlier referred to the laundromat in this closing statement.

Mr. Justice Donnelly held that the laundromat test was pre-trial preparation and not discoverable.

Findings

In my view, the laudromat test was discoverable and ought to have been disclosed to the defence. Again, I see this as an error in judgment, rather than a deliberate circumvention of Mr. Scott's obligation to disclose.

Fingerprint Evidence

A partial fingerprint was apparently found on Christine Jessop's recorder. On December 30, 1985, Detective Fitzpatrick and Inspector Shephard delivered the recorder and the lifted partial fingerprint to Constable Brian Dalrymple of the Ontario Provincial Police for further examination. Mr. Scott drove to the OPP headquarters with them on that day. On January 3, 1986, Sergeant Chapman picked up the recorder, the print and Constable Dalrymple's report, dated the same day, and gave them to Detective Fitzpatrick. The report advised that the impression on the recorder was "unsuitable for comparison." Detective Fitzpatrick was "sure" that he told Mr. Scott of the report.

Sergeant Michalowsky testified during the first trial that Mr. Morin could not be excluded from having touched the recorder as the lifted print had whorl patterns similar to those found on Mr. Morin's fingers. It was made clear, however, that 27 to 30 percent of all prints have a whorl pattern. Mr. Scott did not recall receiving the report back from Officer Dalrymple, nor can he remember if he saw the report during the trial process. He did not quarrel with Detective Fitzpatrick's evidence that he advised Mr. Scott of it. The latter did not disclose this report or the fact that the OPP were considering the matter prior to Mr. Ruby's cross-examination of Sergeant Michalowsky. Mr. Scott agreed that he probably should have done so. It was John Scott's position during the Inquiry that the OPP report came to the same conclusion as Michalowsky — that there were insufficient points of similarity. Mr. Scott said that, assuming he had this information, he did not see it as inconsistent with Michalowsky's position.

During the trial, Mr. Scott made submissions to Mr. Justice Craig that Sergeant Michalowsky's fingerprint findings from the recorder were

admissible, and he filed the recorder as an exhibit. On January 13, 1986, Mr. Justice Craig ruled that the evidence was admissible, but of limited probative value. On that date, Sergeant Michalowsky's examination in-chief, including his evidence about his fingerprint findings, was completed.

At the Inquiry, counsel for Mr. Morin put this to Mr. Scott:

> Q. And I suggest to you, Mr. Scott, that you didn't follow up on it [OPP analysis], and you didn't disclose its existence, because you saw it as damaging your position in terms of trying to get Michalowsky's evidence in.
>
> A. I disagree.

At the Inquiry, Sergeant Robinet was asked about the propriety of providing evidence that a fingerprint "could not be excluded" as coming from a particular individual:

> Q: Have you ever heard of such evidence sir, in a fingerprint context, Have you ever given evidence of that nature, that a fingerprint cannot be excluded as having come from someone, as opposed to a fingerprint either did or did not come from someone?
>
> .....
>
> Can't be excluded, that's the question. Have you ever testified ---
>
> A. No, I'm sorry, I never use that terminology.
>
> Q. Right. So you've never stood up and said, sir, this partial print that can't be identified, has a particular pattern in it, one of the fingers of a suspect has that pattern as well, therefore, maybe it's his print, but I can't say whether it is or it isn't. You've never given evidence like that?
>
> A. No.
>
> Q. Did you know that Michalowsky was giving evidence of that nature, sir, at the first trial? That he was trying to actually present that as a proposition?

> A. I believe there was a whorl pattern on the recorder, and I believe Mr. Morin had a whorl pattern on one of his digits. It couldn't be identified to him, whether he gave evidence of that nature, I don't know.
>
> Q. But he did. Would you have agreed to give evidence of that nature, sir?
>
> A. No.
>
> Q. ... As a fingerprint examiner, are you a member of an organization, sir?
>
> A. Yes, sir.
>
> Q. What is it?
>
> A. ...Identification of Fingerprint Examination.
>
> Q. Okay. Is that a society, an association?
>
> A. Yes, also Michigan Ontario Identification Association.
>
> Q. Do you think either of those organizations, sir, would approve of one of its members getting up on the witness stand and giving the type of evidence that you know Michalowsky gave at the first trial?
>
> A. No, they wouldn't.

Subsequently, in 1991, the fingerprint on the recorder was analyzed by the RCMP. In a letter dated January 14, 1991, Sergeant David Ashbaugh advised the Crown attorneys that the fingerprint on the recorder was actually two partial prints. He added:

> One print appears to be a whorl pattern but only half of the pattern area is visible. This fact can be misleading as [certain other patterns] would appear similar if only partially disclosed. Therefore pattern type is not a certainty.

The print was compared to the fingerprints of Betty Balsdon (Christine Jessop's teacher), Sergeant Michalowsky, and Guy Paul Morin. The RCMP was unable to identify or eliminate any of these people.

Findings

It is likely that Officer Fitzpatrick did provide the OPP report to John Scott. However, I again do not find that any failure to disclose on Mr. Scott's part was a deliberate circumvention of his obligations.

The fingerprint evidence also raises a systemic issue. The introduction of evidence that a partial fingerprint could have come from Guy Paul Morin, based upon limited similarities, raises the same issues addressed in the context of hair comparison evidence: does the probative value of such evidence, even if viewed cumulatively, truly outweigh its prejudicial effect and justify its reception in support of guilt. Although the subsequently acquired knowledge that this partial fingerprint did not originate from Guy Paul Morin cannot dictate the answer to this question (or to the hair comparison issue) the dangers associated with this partial fingerprint evidence are surely highlighted by that known fact.

I accept Constable Robinet's evidence on this issue. In my view, it is a dangerous practice to admit such evidence. Its probative value is minimal and its potential for prejudice is substantial. In my view, my recommendations respecting hair comparison evidence are equally applicable here.

Other Suspects

During the stay motion, an issue arose as to whether information regarding other suspects should be released to defence counsel. At the first trial, Mr. Scott had made no disclosure of such information. He testified:

> A. That area of suspects, I didn't have it in the brief. I didn't inquire about it, no inquiries were made about it until Mr. Pinkofsky made inquiries about it, and then material was provided.
>
> Q. So did you know anything about the other suspects prior to the conclusion of the first trial, sir?
>
> A. No.

Mr. Scott said that it was not his practice to canvass investigative files.

In the Submissions on behalf of the Morins to this Inquiry relating to the disclosure of evidence of other suspects, it is stated:

> Once again, Scott suggested in his evidence that it was the defence who was at fault because they were aware of a press release that referred to the FBI profile fitting four or five suspects. This, again, misses the point. The Crown had duties and expectations associated with its office in 1985. Scott failed to fulfil them. He also edited other suspect material out of the will says of James Cull and Kim Warner. Scott himself should have inquired about other suspects in response to written defence demands for disclosure of all matters pertaining to Morin's innocence.

Similarly, the submissions of the Morins make mention of the non-disclosure of suspicious car sightings to the defence prior to the first trial as well as certain potential witness statements, including the Horwoods (whose evidence is discussed elsewhere in this Report).

During the Inquiry Mr. Gover discussed the "fierce debate" between Inspector Shephard, Detective Fitzpatrick, Susan MacLean and himself as to whether information relating to a certain suspect should be disclosed. It was Gover's view that all the reports with respect to this suspect should be disclosed, as he was familiar with the area where Christine Jessop lived and was seen cleaning his van shortly after she disappeared. He had been in the area of Sharon and Newmarket that day. The suspect himself disappeared shortly after Christine's abduction. Ultimately, this information was provided to Mr. Pinkofsky, along with a banker's box of supplementary reports created by Detective Fitzpatrick and Inspector Shephard containing a substantial amount of material pertaining to numerous other suspects.

Mr. Gover recalled meetings at which the disclosure of information relating to other suspects was discussed. There was a concern raised by the Crown attorneys that Mr. Pinkofsky might try to turn Mr. Morin's trial into a trial of other suspects. Mr. Gover expressed his frustration in being treated by investigators on "a need to know basis." In particular, he recalled

> not knowing about other suspects in the detail that I needed to know about them in order to respond to the allegations that were being made by Mr. Pinkofsky.

Findings

The 'other suspect' evidence raises two issues — one, disclosure, two, the admissibility of evidence of other suspects in a criminal trial. There is no doubt that the police were resistant at times to the disclosure being provided by Mr. Gover to the defence. This resulted, in part, from a fundamental misunderstanding of the disclosure process.

I later recommend that a Committee, similarly constituted as the Martin Committee, address a number of outstanding disclosure issues. One of those issues should be the disclosure of other suspects and access to an 'open box' generally. In a major investigation, many tips and potential suspects are reflected in the investigative files. The wholesale disclosure of each and every name generated in the course of the investigation raises logistical and privacy issues. For example, a major investigation may yield a list of every person who has ever been convicted of a sexual offence who resides within a certain area. To what extent should these names, together with the investigation into their possible involvement, be disclosed and in what form and with what limitations? Of course, one or more of these names may, in turn, yield evidence that the crime was committed by a person other than the accused. There have been notorious miscarriages of justice where other suspects, later shown to be the perpetrator, were known to the authorities and not disclosed. Without reflecting upon the merits of an ongoing case, I am aware that this issue is alleged to arise in the *Milgaard* case. The scope and means of disclosure of other suspects, consistent with the right to make full answer and defence and the need to ensure that the innocent are not convicted, is an important issue, the resolution of which is beyond the scope of this Inquiry.

I have reviewed carefully the evidence bearing upon Mr. Scott's alleged violation of his disclosure obligations. I have also extensively reviewed the submissions of counsel bearing upon this issue. The evidence as to what he knew and when is less than clear to me. The extent to which officers informed Mr. Scott of information or evidence available to them is less than clear to me. In brief, I am not satisfied that Mr. Scott violated the disclosure requirements which existed at the time and, in any event, I do not find that he did so deliberately.

The admissibility of 'other suspect' evidence at the instance of the defence raises an important systemic issue, which is addressed in my later recommendations.

Conclusion

I have addressed the issues arising out of the stay motion with great brevity. As I indicated in Chapter I, the disclosure issues were of more limited relevance to my mandate, given the disclosure which was effected prior to the commencement of the second jury trial wherein Guy Paul Morin was wrongfully convicted. It is my view that errors in judgment were made by Mr. Scott in failing to disclose certain items to the defence. (I pause to note that Ms. MacLean bore no responsibility for the disclosure decisions made prior to, or at the first trial. Mr. Scott acknowledged that.) I explored several of the undisclosed items at the Inquiry because those items bore more directly on the ultimate evidence tendered at the second trial. I accept Mr. Scott's evidence that he did not deliberately breach his disclosure obligations. Mr. Scott is fully aware of the Crown's disclosure obligations at present. Though, with respect, I do not agree with everything Mr. Justice Donnelly said in his ruling referable to alleged non-disclosure and misleading disclosure (noting that he did not have the benefit of the decision in *Stinchcombe* at the time of his original ruling.)[51] I agree with him that any failings on Mr. Scott's part were not malevolent.

It would also appear that the police failed to adequately disclose information to John Scott. Mr. Justice Donnelly found no misconduct on the part of the police in this regard. For the reasons already given, the disclosure issues played a small role at this Inquiry. As a question of priority, I did not explore in any meaningful way the investigators' responsibility for not disclosing items to the Crown or to the defence and, accordingly, I do not intend to make further findings in that regard.

G. Systemic Evidence and Recommendations

(i) Introduction

This part of the Report summarizes some of the systemic evidence

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[51] After *Stinchcombe* was decided, the issue was revisited with the trial judge who declined to alter his decision.

relating to the conduct of police investigations and criminal prosecutions**,** in the context of the findings I have made and the issues I have identified. As I noted in Chapters II (Forensic Evidence) and III (Jailhouse Informants), certain issues also arise in connection with the conduct of appeals and the jurisdiction of appellate courts, which I also address. This part of the Report also summarizes the evidence heard in Phase VI of the Inquiry bearing upon the systemic causes of wrongful convictions identified, *inter alia*, in the literature, by other inquiries, by participants in the administration of criminal justice and by those who have themselves been wrongly convicted.

Much of the evidence of systemic witnesses is summarized in the context of specific recommendations. More general evidence is summarized immediately below.

(ii) Systemic Causes of Wrongful Convictions

AIDWYC Systemic Panel

AIDWYC presented a multi-jurisdictional panel on the causes of wrongful convictions, which was to complement a study done on the same topic for use at this Inquiry.

Professor Dianne Martin obtained her LL.B from Osgoode Hall Law School at York University in Toronto and an LL.M. (with merit) from the London School of Economics in 1987. She is a member of the bar of Ontario who practised criminal law for over 10 years before assuming her present position as an Associate Professor of Law at Osgoode Hall. She was instrumental in coordinating the efforts of a number of persons in Canada, the United Kingdom and the United States to gather cases of wrongful convictions in those jurisdictions and to compile them into a study entitled *Wrongful Convictions: An International Comparative Study*. That study was filed as Exhibit 235. David Kyle, a barrister who, until 1997, was Chief Crown prosecutor for the Crown Prosecution Services in London, England, was a witness called by counsel for the Ontario Crown Attorneys' Association. He is presently a member of the Criminal Cases Review Commission in England, which investigates potential miscarriages of justice for possible reference to the Court of Appeal for reconsideration. He verified that the portion of Professor Martin's study that described certain miscarriages of justice in the United Kingdom was accurate.

Professor Martin testified that the key finding of the study was that wrongful convictions occur throughout the Anglo-American world, with very similar causes in each jurisdiction. Such convictions are not aberrations; there is a pattern of systemic factors that tend to lead to unjust results. A key factor in all cases is the police investigation. This may consist of simple error or of deliberate police misconduct in influencing witnesses to alter their testimony. In the latter cases, according to the study, the police involved justify it because of their belief that the person charged is guilty of the crime and to ensure a conviction. Such conduct has been described as "noble cause corruption."

From her research, she cited the principal factors leading to wrongful convictions:

- The accused is charged with an heinous crime about which there is intense community concern.

- The accused is seen as an unpopular person, an outcast, who may be a member of a racial minority or may have a criminal record.

- The defence at trial is inadequate. Defence counsel may undertake an inadequate investigation of the facts. It is important that the defence be vigorous.

- The conviction rests primarily on suspect evidence: eyewitness testimony, confession evidence, jailhouse informant evidence, unreliable or novel science, or consciousness of guilt evidence. In cases where the crime charged is horrific, the scientists who testify may lose objectivity and fudge their results.

According to Professor Martin, these are the paradigmatic factors seen in such cases. I have concluded that some of these factors contributed to the wrongful conviction of Mr. Morin.

Mr. James McCloskey is a former officer in the United States Navy and business executive. Subsequently, he received the degree of Master of Divinity from Princeton Theological Seminary. He acted as a student chaplain at Trenton State Prison and became involved in the cause of a prisoner who, he felt, had been wrongly convicted and who was ultimately freed. He is the founder of Centurion Ministries, a non-profit organization that undertakes the