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

causes of persons who, where Centurion's investigations so verify, are factually innocent of the serious crimes of which they have been convicted. He and his organization are to be commended for their important work on behalf of the wrongly convicted. He identified the measures available to such persons and the procedures undertaken by his organization to attempt to have their innocence recognized by the authorities.

Centurion Ministries has accepted 49 cases and has completed its work on 33 of them. Of those 33, 25 have been freed.[52] The other eight cases were unsuccessful: one died in prison before he was entitled to be freed and two whom he believed to be innocent were executed. Centurion determined that some of the persons involved in the 49 cases investigated by them were, in fact, guilty of the crimes of which they were convicted and those causes were discontinued. Mr. McCloskey, whose evidence I found to be interesting and helpful, testified that, in his view, there are nine causes of wrongful convictions; many cases involve multiples of them:

- The presumption of innocence has become the presumption of guilt.

- Perjured testimony. He testified that it was pervasive in the cases he has considered. It may involve criminals who testify in exchange for a deal (whether secret or open); real murderers who testify against the defendant charged with the crimes they themselves have committed (they may even be the star witnesses); law enforcement officers who lie about confessions allegedly made to them which are coerced or concocted by them; other witnesses to alleged confessions, such as friends of the defendant, who may be marginal persons and are coerced by the police; police informants from the street who will give perjured evidence. The victim's family may be maneuvered by the police into giving false evidence.

- Eyewitness testimony. It may be accurate, erroneous or perjured.

- Forensic testimony. This may involve laboratory workers who see themselves as arms of the law. They may exaggerate their findings, or even manufacture them and give false evidence in the area of hair and

[52] Mr. McCloskey was deeply involved in investigating the wrongful conviction of David Milgaard.

fibres and blood.

- Overzealous and shoddy police investigations. Overwhelming police case loads may lead to taking shortcuts, with the result that crucial pieces of evidence are overlooked; evidence that does not fit is dismissed or ridiculed or an attempt is made to get a confession, perhaps a jailhouse confession. The police may develop 'tunnel vision' and focus on only one individual and dismiss evidence that might point to a different suspect. A police culture that rewards case clearances may dictate police behaviour in the investigation of a case.

- Prosecutorial misconduct. An accurate jury decision depends on the integrity of the prosecutors in presenting a fair case and turning over whatever exculpatory material they have to the defence. A common feature of wrongful convictions is the withholding of important evidence by the prosecutors that can impeach their own witnesses or go to the innocence of the defendant.

- Ineffective Counsel. Mr. McCloskey testified that in the United States, most defendants are indigent and are at the mercy of the system. Many are dependant on the public defender system which is overwhelmed by the quantity of cases it is required to take on, diminishing thereby the quality of the defence. There are also court-appointed attorneys who may be 'in over their heads' in serious cases. They may not have the heart or the money to provide a vigorous defence. They may not believe their clients and may treat them in a dismissive way. They may not push the prosecutor for discovery (disclosure). Their cross-examination may be poorly researched and superficial. They may do very little investigation of the case.

- Judges' evidentiary rulings. Some judges tend to favour the prosecution in their rulings.

- Race and indigence in the United States. If one is a person of colour there may be a stronger presumption of guilt. There is also racism in the policing community. The biggest common characteristic of people who are wrongfully convicted is that they have neither money nor resources to defend themselves. The scales of justice are tilted because the state has unlimited resources.

Again, some of these factors have been found by me to have contributed to the miscarriage of justice that occurred in Mr. Morin's case.

Alistair Logan gave evidence at the instance of AIDWYC. He is a solicitor of the Supreme Court of Judicature of England and Wales. He acted for defendants in the notorious cases of the Guildford Four, the McGuire Seven and for Judith Ward, among others. His commitment to rectifying miscarriages of justice is impressive. He testified that although there have been a large number of cases in his jurisdiction where miscarriages of justice were identified, there has been no systemic analysis of the causes. He was grateful for the opportunity to discuss those issues at the Inquiry because, he said, of the apparent lack of interest in them in his own country. In the United Kingdom, in many instances each case is treated as idiosyncratic and without any history, from which no lessons may be learned.

Mr. Logan described the work in the U.K. of an organization called 'Justice.' It is comprised of lawyers, academics, members of Parliament, and former judges, who work together to uphold and strengthen the rule of law, to maintain high standards in the administration of justice, and to preserve the fundamental liberties of the individual. The organization gives help to people to whom the rule of law has been denied. However, it has limited funds; it is only able to consider in depth about 50 cases a year. Of those, they find about 15 where they are certain that there has been a miscarriage of justice. Regrettably, the organization is only able to take on five of those cases in which they feel they can achieve something.

Justice published *Miscarriages of Justice*, a document that analyzed wrongful convictions; it was filed as an exhibit at this Inquiry. According to Mr. Logan, that paper is more helpful in addressing the systemic issues that arise in cases of wrongful convictions than the Runciman Report (*The Royal Commission on Criminal Justice*), that was drafted in 1993 by a Commission appointed after the release of the 'Birmingham Six' who had been convicted of the bombing of certain public houses in Birmingham in 1973-1974, but were later cleared. The Runciman Report has been referred to by various counsel at the Inquiry, and is further addressed below. Mr. Logan does not consider this Report to be a document that would assist in lessening the risk of wrongful convictions, having regard to the terms of reference of the Commission that created it and the consequent focus of the investigation undertaken by that Commission.

Mr. Logan testified about the common causes of wrongful convictions as reflected in the report prepared by Justice. They are:

- Police Misconduct. There had been a problem with a police procedure known as 'verballing,' where a police officer asserted that a conversation took place with the accused which, however, was not recorded contemporaneously. It led to frequent contests between defendants and the police in which defendants accused the police of having invented a 'verbal.' With the advent of the requirement, contained in *The Police and Criminal Evidence Act, 1984*, that all interviews be tape recorded, and with the education of the police force, 'verballing' has now almost completely disappeared. However, false confessions produced as a result of considerable police pressure are a factor in cases of wrongful convictions. Mr. Logan detailed the nature of the police oppression that led to confessions in the case of his clients, the Guildford Four.

- Wrong Identification. Mr. Logan testified that this has not been a significant factor in producing wrongful convictions. However, he gave an example which demonstrated police pressure on an identification witness which led to an erroneous identification and a consequent miscarriage of justice. He referred to another case where information was withheld from the defence about the description of offenders given to the police by an eyewitness that was inconsistent with the description that the witness testified to at the trial.

- Perjury by co-accused or other witnesses. Mr. Logan gave evidence that there has been perjury on a grand scale leading to miscarriages of justice. He gave examples of perjury by police witnesses in certain notorious cases. He also testified to intimidation of defence witnesses by the police, so that those witnesses would not come forward with their evidence.

- Crown counsel's decision to withhold evidence about other suspects. Such evidence, he said, was sometimes suppressed by the prosecution, resulting, on occasions, in miscarriages of justice.

- Perjury by Forensic Witnesses. He testified to cases in which there was perjured forensic evidence and how those matters were dealt with by the appellate courts. He gave an example of a case where there was

contamination in the forensic laboratory which was not revealed to the trial court by the scientists. He described scientific witnesses who took an adversarial stance in presenting their evidence, and who did not want to say anything that would undermine the case for the prosecution. Some of these factors may be seen in the evidence of the forensic witnesses called for the prosecution at the second trial of Mr. Morin. Mr. Logan complained that, in his experience, such witnesses were unlikely to be called to account for their actions. However, Mr. Kyle described a case where a retired forensic scientist was prosecuted (unsuccessfully) for conspiracy to pervert the cause of justice.

- Bad trial tactics. Logan noted that the accused can pay for the tactical mistakes of their lawyers.

Nigel Hadgkiss is an Assistant Commissioner of the Australian Federal Police Force, with wide experience in the investigation of allegations of serious misconduct against public officials, including serving or past Commissioners of Police, senior officers of the National Crime Authority and the Australian Federal Police. In 1995, he was awarded the Australian Police Medal and was promoted to Assistant Commissioner. He holds an LL.B. and a Master of Commerce degree from the University of New South Wales. He has been seconded to three Royal Commissions in Australia, including the Royal Commission into the New South Wales Police Service for which he served as the Chief Investigator and Deputy Director of Investigations.

In May, 1994, the Royal Commission into the New South Wales Police Force was established, with The Honourable Mr. Justice J.R.T. Wood as Commissioner. Its terms of reference directed it to inquire into matters related to, *inter alia*, "the existence, or otherwise, of systemic or entrenched corruption" within that police force.

That Commission uncovered a mass of corruption on the part of police officers with that service. It also examined miscarriages of justice in Australia. It issued its final report in May 1997. Mr. Hadgkiss was aware of 35 claims of wrongful convictions dating back as far as 1969 currently being investigated as a result of the Commission's work. Mr. Hadgkiss outlined the following possible causes of miscarriages of justice which the Commission identified:

- An incompetent investigation, which has focused on someone other

than the offender and closed its mind to alternative avenues for inquiry.

- Corruption in its various forms.

- The use of unreliable prison informant evidence.

- Overzealous prosecution which encourages the propping up of a weak case or concealing from the defence evidence which would assist it.

- The use of evidence based on dubious forensic science or poor management of physical exhibits.

- Incompetent or under-resourced conduct of the defence case.

It should be noted that two types of corruption were analyzed by the Royal Commission: 'rotten apple' corruption and 'process' corruption. The 'rotten apple' concept, which seeks to explain police misconduct simply by the moral failings of individual officers (*i.e.* 'rotten apples'), was discredited by the Commission, which adopted the following view:

> [I]t would seem that acceptance by police managers and political elites, of a rotten apple concept of police corruption, is a defensive, face-saving exercise. The solution is simply seen as removing "bent" officers without a need to evaluate organizational procedures. It is, in essence, a means of "papering over the cracks" without admitting that there is a fundamental problem of major significance.

Mr. Hadgkiss agreed with the Royal Commission's view:

> Chiefs of police or commissioners invariably wish to think that they've only got one or two rotten apples for various reasons, probably confidence in their police service, political pressure to say all is well. And in fairness to them, they may only be briefed as to the culture that exists within their police service. They may not be intimately aware of what is happening at the operational end of the organization.

'Process' or 'noble cause' corruption was earlier defined by Ms.

Martin in her testimony.

Mr. Kyle, who had knowledge of some of the cases in the United Kingdom that were described by Mr. Logan as examples of miscarriages of justice, agreed that some of the factors listed by Mr. Hadgkiss, in different combinations, had contributed to the miscarriages in the English cases. There was no single factor; it was an accumulation of factors that contributed to the wrongful convictions in those cases.

I pause to say that some of these factors resonate with the case of Guy Paul Morin.

Mr. Hadgkiss submitted that to prevent wrongful convictions there must be greater accountability for police actions. Mr. Logan, who testified on the same panel, agreed that there must be accountability during the police investigation and for misdeeds on the part of participants. Mr. McCloskey, another member of the panel, complained that, with one exception, no one has been held accountable for their misdeeds in office in relation to wrongful convictions. Mr. Kyle recalled a number of prosecutions which were brought unsuccessfully against police officers in the United Kingdom after convictions were quashed in cases where it was determined that there were miscarriages of justice.

Michael Radelet is a Professor and Chair of the Sociology Department at the University of Florida in Gainesville. In 1979, the State of Florida executed its first inmate in 15 years, and that triggered an interest in the death penalty on the part of Professor Radelet. Since then, he has worked with death-row inmates and their families, including the last 38 inmates who have been executed in that state. He has published a number of books and articles on aspects of the death penalty. Since 1983, he and Professor Hugo Bedau have been researching erroneous convictions in homicide cases. For that work, Professor Radelet received the Criminologist of the Year award from the Society of Criminology. I found his evidence impressive. He, too, should be commended for his important work in this area. In his research, he is interested only in those cases where the accused is factually innocent. Since 1987, he and his associate documented 350 American cases that occurred in this century. Of those, 326 cases were erroneous convictions for homicide, and 24 were cases where the defendant had been convicted of rape and sentenced to death. He testified that these cases probably skim the tip of an iceberg; there are many more cases that his research has not been able to

document. In 1992, the number of such cases was expanded to 416.

Four hundred and fifteen persons have been executed in the United States since 1972. Professor Radelet gave evidence that during the same period, 72 persons were released from death row because of doubts about their guilt. No state has ever admitted to executing an innocent person. He has found that commonly, in cases in which wrongful convictions occur, the accused tend to be easy targets: they are poor, coloured, do not speak English, or are foreign nationals. That is, they are 'outsiders' in a community and may be victims of xenophobia. They may look a little 'weird' or perhaps they are 'hippies.' According to Professor Radelet, '[r]ich people do not go to death row in America.' In the cases he has researched, he concluded that one has to be incredibly lucky to have one's case reviewed and overturned. It is usually due to the dogged efforts of a person such as an attorney, prosecutor, news reporter or a police officer who has doubts about a conviction, or a television program like '60 Minutes.'

Professor Radelet testified as to the common factors which, in his opinion, result in wrongful convictions:

- Police error. The police suppress exculpatory evidence from the prosecutors. Or the police extort a confession from the accused. Or the police may engage in 'tunnel vision'. He gave some examples of this. Sometimes tunnel vision may lead to the real culprit not being apprehended. It is most often found in highly publicized cases, because there is pressure to find and charge someone. In such cases, the investigation's focus may be on a person who is relatively powerless. Evidence may be lost; it may be evidence that cannot be found or that someone conveniently hid.

- Prosecutorial error. This would include suppression of exculpatory evidence, or the prosecutors knowingly using perjured evidence or failing to question witnesses adequately.

- Witness errors. Perjury by prosecution witnesses is the number one cause of erroneous conviction in homicide cases. It is especially problematic if the witness is a jailhouse informant or someone who has pending charges and, therefore, something to gain from his or her perjured testimony. There may also be erroneous or misinterpreted evidence by expert witnesses.

- Misleading circumstantial evidence. It was a factor in 30 of the 350 cases researched by Professor Radelet. However, he found that it is not as prevalent as mistaken identity or perjury or police error in causing miscarriages of justice. He testified that in some of the cases involving circumstantial evidence, "[i]f the facts don't exactly fit, we can build a bridge that links certain known facts and jam those puzzle pieces together, even if they don't constitute a perfect fit."

- Incompetent defence counsel. Professor Radelet would recommend adequate legal aid funding for indigent accused in serious cases. But he would also recommend adequate staffing resources for prosecutors.

Again, a number of these identified causes resonant with those I have found in the Morin proceedings.

Counsel for AIDWYC also filed a schedule prepared by Professor Martin that summarized cases of wrongful convictions that have occurred in Canada, the United States and the United Kingdom and that were detailed in her study. AIDWYC has submitted that wrongful convictions are common occurrences with identifiable and redressable causes; they are not aberrations in an otherwise well-functioning criminal justice system. Counsel for AIDWYC also submitted that the conviction of Guy Paul Morin is not an isolated incident or aberration. He cited the paper prepared by Professor Martin as demonstrating that wrongful convictions occur internationally and submitted that the causes of such convictions reflected in these documents are also found in the evidence of the witnesses McCloskey, Logan, Hadgkiss and Radelet.

Counsel for the Ontario Crown Attorneys' Association questioned Ms. Martin on some aspects of the AIDWYC study, including the choice of particular cases cited and the types of inferences which could reasonably be drawn from the study. I am satisfied that the causes of wrongful convictions internationally, identified by Ms. Martin in her testimony and in the study, accord with the considerable body of systemic evidence available to me. I rely upon the study for the identification of causes of wrongful convictions generally, rather than for any inferences which may or may not be drawn from the particular cases selected.

The Wrongly Convicted

AIDWYC also organized a panel of persons who had been wrongfully convicted of serious crimes; they testified about their experiences with administrations of justice in different jurisdictions and how it came to be that they were convicted improperly. They also gave evidence as to the effect of the convictions and their imprisonment on their lives and the lives of their families. Much of the evidence given by the participants at that panel was truly heart-rending.

The panel consisted of the following individuals.

Rubin Carter was a former champion boxer who in 1967 was wrongfully convicted of murder and sentenced to death in the State of New Jersey. Two witnesses claimed that they had seen Mr. Carter at the crime scene. In 1974, both witnesses separately recanted and stated that they had been pressured by police to give false testimony. They also said they had been offered inducements of $10,000 in reward money and promises of lenient treatment on criminal charges pending against them at the time; one of the witnesses had been a suspect in the murder for which Mr. Carter was convicted. The New Jersey Supreme Court overturned Mr. Carter's conviction, but he was again convicted after a second trial. In 1985, the United States District Court overturned the second trial conviction on the basis that the prosecution had committed "grave constitutional violations": the conviction had been based on "racism rather than reason, and concealment rather than disclosure." Mr. Carter served a total of 19 years in jail.

Rolando Cruz was wrongfully convicted of the murder and sexual assault of a young child and sentenced to death in Illinois in 1985. Some of the evidence against him came from three jailhouse informants, canine sent evidence, and forensic evidence that purported to link him to footprints found on the victim's door and near her home. He successfully appealed, but was again convicted after a second trial. He was granted a third trial in 1994. In 1995, DNA testing of semen found on the deceased's clothing eliminated Mr. Cruz as the assailant. Mr. Cruz was nevertheless forced to undergo a third trial. He was acquitted of all charges, after having served over 12 years behind bars. Four of the police officers and three of the prosecutors involved in Mr. Cruz's case are currently awaiting trial on charges of, *inter alia*, perjury, conspiracy to commit obstruction of justice, and obstruction of justice.

David Milgaard spent 23 years in prison for the 1969 murder of Gail Miller in Saskatoon. A reference by the federal government to the Supreme Court of Canada resulted in the quashing of the conviction. He was not re-tried. DNA testing performed in 1997 on semen stains on Ms. Miller's clothing proved that Mr. Milgaard had not been the perpetrator. Some of the issues raised on behalf of Mr. Milgaard are similar to those arising at this Inquiry. After Mr. Milgaard was exonerated, Larry Fisher was charged with Ms. Miller's murder. He is currently awaiting trial.

Joyce Milgaard also gave evidence before the Commission. Ms. Milgaard is David Milgaard's mother. She worked tirelessly for her son's vindication, and made a valuable contribution to the evidence before me.

Joyce Ann Brown was unjustly convicted of aggravated robbery in which a murder occurred and was sentenced to imprisonment for life in Texas. The robbery was committed by two women. The police located a car believed to have been driven by the women, and in the glove compartment was a rental agreement made out to Joyce Ann Brown. Ms. Brown was later identified by the victim's wife as one of the robbers. The prosecution also relied upon the evidence of a jailhouse informant. A second woman, Renee Taylor, pled guilty to the robbery, but refused to incriminate Ms. Brown. Ms. Taylor was ultimately persuaded to provide enough information to enable her actual co-perpetrator, Lorraine Germany, to be identified. Ms. Germany looked very similar to Ms. Brown. It was also discovered that the Joyce Ann Brown named on the rental agreement was a different Joyce Ann Brown. Ms. Brown was released in 1989 after having served almost 9 ½ years in jail.

Patrick Maguire was one of the McGuire Seven, convicted of possessing explosives in 1976. He was 13 years old when he was arrested, and spent four years in prison for a crime he did not commit. The details of the case against Mr. McGuire and his co-accused are outlined in Chapter II. In brief, the prosecution relied upon scientific findings of minute traces of nitroglycerine allegedly found on the hands, under the fingernails or on the gloves of the accused. A Commission of Inquiry ultimately found that the findings could have been contaminated, and that the scientists involved failed to disclose significant information to the defence.

Rick Norris was wrongfully convicted in Fergus, Ontario, of rape and was sentenced to 23 months in jail. He was convicted largely on the basis of the evidence of the complainant, who identified him as the perpetrator.

Forensic hair and fibre evidence was also led against him. Mr. Norris never appealed his conviction, but his case was re-investigated after someone came forward alleging a Mr. Anderson had confessed to the crime. When the police re-interviewed the complainant, she advised that from the beginning she had told the initial investigators that her assailant was either Mr. Anderson or Mr. Norris, and that, to her, the two looked similar. This information was never disclosed to Mr. Norris' defence. Mr. Anderson was later convicted of the assault. At his sentencing, the Crown attorney advised the court that Mr. Anderson had initially been investigated as the assailant, but was cleared after his alibi had been confirmed. The rape occurred at midnight. Mr. Norris was arrested at 8:00 a.m. the same day. The police must, therefore, have investigated Mr. Anderson's alibi during those 8 hours. Mr. Norris' wife provided a complete alibi for Mr. Norris.

It is noteworthy that the perjured testimony of jailhouse informants contributed to the convictions in three of those cases.

I was particularly grateful for the contribution of these panel members. It was obviously painful for the panelists to re-live their experiences; unbearably painful for some. The injury done to their lives and the lives of their families was immense. Their anguish was patent and justifiable. They were all, however, obviously motivated by a desire to assist in redressing other wrongful convictions and preventing future miscarriages of justice. Patrick McGuire, for example, testified:

> [T]he judge, for eight weeks, listened, and as I thank you now for having us here, I thanked him, because he turned around at the end of the eight weeks, and he said, 'I have witnessed the worst miscarriage of justice ever inflicted on anyone in this country.' ... I just hope that yourself, Judge, and other distinguished people here who are listening, maybe you'd do the same thing. Maybe you can prevent — you can't help us so much, but there are so many other people out there.

Of course, in addition to the experiences of those panelists, there is the experience of Guy Paul Morin. He testified as to life in the Whitby jail, where he was incarcerated pending his first trial. To put it mildly, it was not a pleasant place to spend several months of one's life, particularly for a person who was innocent of any crime. After his acquittal was reversed, he spent 10 more days in custody there until he was released on bail pending his second

trial. On July 30, 1992, after he was convicted of murder and sentenced to be imprisoned for life, he was detained, first in Millhaven and then in Kingston Penitentiary, where he had to cope in a terrifying environment for over six months. His description of life in Kingston was particularly moving. The Jessop killing and the subsequent investigations, arrests, imprisonments, trials, and appeals seriously affected his life and the lives of his family for over 10 years.

Richard Wintory

I have already referred to, and drawn upon, the evidence of Richard Wintory, a senior prosecutor from the State of Oklahoma, in the context of jailhouse informants. His evidence, presented by the Ontario Crown Attorneys' Association, was also relevant to the systemic causes of miscarriages of justice generally. As I reflected earlier, Mr. Wintory was a forceful advocate of the adversarial system as the most effective way to ensure that 'right prevails', that is, that the guilty are convicted and the innocent spared. In his view, false, inaccurate or misleading evidence may frequently exist. However, these do not cause miscarriages of justice. Miscarriages of justice are, instead, caused by prosecutorial failure to provide broad disclosure, ineffective assistance of defence counsel and the failure of a judicial function. Highly skilled adversaries, with adequate resources and appropriate disclosure, best prevent a miscarriage of justice.

The submissions made by the Ontario Crown Attorneys' Association relied, in part, upon Mr. Wintory's evidence. The O.C.A.A. submitted that wrongful convictions are aberrations and are not symptomatic of systemic problems in the administration of justice in Ontario. The Association further submitted that the greatest threat to the just determination of criminal law issues is a lack of adequate resources devoted to the prosecution and defence of the accused.

In addressing the causes of wrongful convictions, the O.C.A.A. submitted they can occur when the system breaks down, whether through prosecutorial misconduct, defence misconduct, or judicial incompetence. They are the exception and not the norm. There will regrettably always be miscarriages of justice; the challenge is to create an environment in which they will be few and far between. The O.C.A.A. maintained that the prime complaint by the systemic witnesses concerned the lack of adequate disclosure from prosecuting authorities. The O.C.A.A. relies on the fact that Mr. Kyle

pointed to non-disclosure as very much a feature in what he described as the 'blockbuster' cases of wrongful convictions in the United Kingdom. The O.C.A.A. submitted that there is not currently a systemic disclosure problem in Ontario. Accordingly, many of the systemic issues identified in the studies filed with the Inquiry are no longer causes for concern.

Survey of Defence Counsel

In Chapters II and III, I discussed the survey of Crown counsel conducted under the auspices of the Ontario Crown Attorneys' Association. AIDWYC conducted a survey of defence counsel on the subject of wrongful convictions. The survey was prepared and administered in large part by Professor Anthony Doob. Professor Doob is a Professor of Criminology and a former Director of the Centre of Criminology at the University of Toronto. He has written widely on many issues, including public attitudes towards criminal justice, and had previously testified as an expert witness on survey evidence in criminal cases.

The survey was sent to over 1,000 criminal defence lawyers (most of whom were members of the Criminal Lawyers' Association). 219 responses were received. Professor Doob testified that a 22 percent return rate was fairly typical for a survey sent without advance warning to its intended recipients.

The survey defined 'wrongful conviction' as "a case where you are satisfied that a factually innocent person has been convicted at trial for any of a number of reasons." It then inquired into several different issues: First, it sought information on numbers of wrongful convictions, asking the following question:

> How many contested trials can you identify which resulted in wrongful convictions, where the accused person you represented was sentenced to one year or more in prison?

The qualification as to sentence received was inserted to restrict responses to the more serious kinds of offences.

Second, the survey sought counsel's views on the factors which contributed to the wrongful convictions. Third, it asked whether the convictions were appealed, and if so, with what result. Fourth, it asked for

counsel's opinions on various proposed reforms to address the issue of wrongful convictions (such as relaxing the rules concerning the admissibility of fresh evidence on appeal).[53]

Professor Doob candidly acknowledged that there were reasons why the survey's results should be approached with some caution. First of all, with a 22 percent return rate, one cannot know how the other 78 percent of the recipients would have responded. This means that less confidence can be placed in the precise numbers obtained in the survey than in the relative importance attributed to the factors identified as contributing to wrongful convictions. Second, the survey did not employ a methodology which allows one to ascertain how the respondents interpreted the questions asked. Third, the survey was a study of defence counsel, not a definitive study of wrongful convictions. As such, the survey only reflects the views of one interested party in the criminal justice process. Professor Doob pointed out, however, that there were reasons to believe that the responses were not simply self-serving diatribes from partisan defence counsel: the factors listed as contributing to wrongful convictions were very similar to those identified in the literature, there were no important differences between the factors listed by respondents who had also acted as Crown counsel and those who had not, and 42 percent of the respondents listed actions by the defence as one of the factors leading to a wrongful conviction.

Professor Doob commented on how he felt the results of the survey should be used:

> I think you have to see any piece of empirical work like this in a greater context. And so that, really, these are the views of defence counsel, they are clearly that they, as I've mentioned earlier, they don't seem to me to be terribly self-serving ones. But I think that what you have to do in interpreting these is to say: Do these look relatively familiar, is this another piece of evidence pointing in the same direction as other evidence that the Commission has heard?
>
> And that, as with any single piece of evidence, if there's a single piece of social science evidence on this

[53] Other questions asked have limited relevance to my recommendations and are not summarized.

> broad issue which points in a wildly different direction, I think you would have to look at that more carefully. If, on the other hand, what this survey shows is that it's the same kinds of factors that other methodologies are showing, then it seems to me that this is one more bit of a piece of the puzzle which may help the Commission think about the kinds of remedies that it might suggest.

Professor Doob reported that 99 of the 219 respondents (45 percent) identified one or more wrongful convictions. Forty-five percent of those respondents, in turn, identified more than one wrongful conviction. Professor Doob stated that even if all the lawyers who did not respond to the survey had never experienced a wrongful conviction (the most conservative estimate), it still means that ten percent of all lawyers had. Most of the wrongful convictions occurred in cases of homicide, sexual assault or robbery.

A number of different factors were identified by the respondents as having contributed to a wrongful conviction. Professor Doob extracted the top five factors in each of two categories: 1) Dominant characteristics of cases with wrongful convictions, and 2) Mistakes or misbehaviour of criminal justice officials leading to wrongful convictions. The results are reproduced below:

Dominant characteristics of cases with wrongful convictions	All Cases (99)	All Cases except sexual assault (64)
heinous crime with public/media pressure to charge/convict	35% (35)	34% (22)
eyewitness identification	30% (30)	47% (30)
accused was portrayed as being a bad, or strange, or unattractive person	52% (51)	45% (29)
demeanour or testimony of the accused	32% (32)	25% (16)
accused's prior criminal record	26% (26)	30% (19)

Mistakes or misbehaviour of criminal justice officials leading to wrongful convictions	All Cases (99)	All Cases except sexual assault (64)
perjured testimony of a non-police witness	41% (41)	31% (20)
police did not consider other possible suspects	25% (25)	34% (22)
police pressure on witnesses inappropriately affecting their testimony	37% (37)	39% (25)
judge showed prejudice against the accused or against the defence case	51% (50)	47% (30)
error in the application of the law by the judge	44% (44)	44% (28)

A little over half of the respondents identified a factor as the most important. For those respondents that did so, the trial judge showing prejudice against the accused or the defence case was most often cited, followed by perjured testimony by a non-police witness and police pressure on witnesses inappropriately affecting their testimony.

Professor Doob cautioned that any interpretation of the relative importance of the contributing factors must take into account the fact that the responses do not reflect how often a particular factor was present. For example, in 15 cases, inadequacies in forensic science was listed as a contributing factor to a wrongful conviction. The survey does not reflect, however, how often forensic evidence was at issue in the 99 wrongful conviction cases. It could be that such evidence was at issue in only 16 cases. If so, forensic evidence might be more problematic than the raw data appears to indicate.

Information respecting the appellate proceedings which followed conviction was available for 91 of the 99 wrongful conviction cases. Fifty-five were appealed to a higher court.[54] Nineteen of these appeals were successful (in that a new trial was ordered or an acquittal entered), mostly based on traditional legal errors in process. Fresh evidence was cited in four appeals. Only one conviction was reversed based on the ground that it was an

[54] In 96 percent of the cases, counsel recommended an appeal. The respondents indicated that twenty cases were not appealed either because the accused did not wish to appeal or did not have sufficient resources to do so.

unreasonable verdict.

Six of the 36 unsuccessful appeals were then taken to the Minister of Justice for review. Only one was successful. In the result, 71 of 91 alleged wrongful convictions were left intact.

Counsel were asked for their opinions on possible reforms to address the issue of wrongful convictions. Of the respondents, 84.8 percent either moderately or strongly supported the option of relaxing the rules concerning the admissibility of fresh defence evidence on appeal; 94.9 percent moderately or strongly supported the option of broadening the powers of courts of appeal to order new trials in cases where there are doubts about the integrity of a conviction; 67 percent moderately or strongly supported the idea of establishing an independent tribunal to review cases of possible wrongful conviction.

(iii) Systemic Policing Evidence

Durham Regional Police Panel

During the systemic phase, the Durham Regional Police Services Board led important evidence as to existing and proposed police practices in Durham through a panel of senior officers. These officers were as follows:

- Sergeant Richard Sullivan. He has been a member of the Durham Regional Police Service since 1977. Since 1988, he has worked in the Forensic Identification Unit, has completed the senior identification course at the Canadian Police College and has extensively lectured on forensic identification issues.

- Sergeant Thomas Hart was introduced in Chapter III. He became a member of the Durham Regional Police Service in 1979 and has worked, since 1993, in the Intelligence Branch, where he is responsible for investigative section and technical support.

- Sergeant Myno Van Dyke was introduced in Chapter III. He has been a member of the Durham Regional Police Service since 1973. He was previously a member of the polygraph unit, and is now a trainer at the Durham Police Learning Centre.

- Inspector Charles David Mercier. He has been a member of the Durham Regional Police Service since 1977. Until his recent promotion to the rank of Inspector in 1997, he was most recently the detective sergeant in charge of the Major Crime Unit. He has had considerable involvement with the major crime management system taught by the Canadian Police College, most recently as an instructor on investigative techniques and major case management.

Their evidence was complemented by Charles Lawrence, who was tendered by Detective Bernie Fitzpatrick as a witness. Mr. Lawrence has been a team leader and instructor on Police Leadership at the Ontario Police College since 1994, and assisted in redesigning the criminal investigation training program at the College. He is a former member of the Metropolitan Toronto Police Force. I considered his evidence and some others, not only on a systemic basis, but as relevant to the level of training available to Durham Regional police officers back in the 1980s and early 1990s.

Durham Police Learning Centre

In 1993, the Durham Police Learning Centre was opened. The Learning Centre is a continuing education facility located on the campus of Durham College. It is primarily devoted to training Durham Regional police officers in the skills and elements of effective policing.

Sergeant Myno Van Dyke gave evidence before me as to the development, structure and philosophy of the Learning Centre.

The Learning Centre was largely the result of the recommendations of the 1992 Report of the Strategic Planning Committee on Police Training and Education for the Police Learning System for Ontario. This committee made a number of recommendations to the Ministry of the Solicitor General on training of police officers in the province.

Sergeant Van Dyke testified that the Durham Regional Police Service has utilized many of the principles set out in the Report. (Not all police services have effected changes based upon the recommendations.) The Durham Regional Police Service recognizes that training involves the constant review and improvement of training methods. It subscribes to the principle of

continuous learning, continually upgrading in a cycle of planning and preparation for the future of both the organization and its employees.

The Durham Regional Police Service Policy on Educational Training recognizes the need for new concepts and approaches in police learning. The policy encourages voluntary participation in ongoing learning both on and off the job. The policy seeks

> to promote and support a culture in policing that values continuous organizational and personal improvement. The service will foster the professional growth of its members by providing educational programs that will develop the skills, knowledge and expertise of its members.

Sergeant Van Dyke testified that it was not until 1993 and the opening of the Learning Centre that both a philosophical and financial commitment to learning was realized in Durham. In 1984, commitment to the Training Branch, as it was then called, was limited, consisting of one staff sergeant, assisted by a sergeant and one civilian, all of whom were also involved in recruiting. Most training officers were recruited from the field and had various levels of expertise. One week training sessions were conducted once or twice a year.

In contrast, the Learning Centre has a staff complement of 14: four staff sergeants, four sergeants, four constables, and two civilians. It is involved in the development and delivery of provincially mandated training, mandated defensive tactics training and firearms re-qualification, and the hosting or presentation of courses which previously required attendance at either the Ontario Police College in Aylmer or the Canadian Police College in Ottawa. The Learning Centre's partnership with Durham College also provides the Police Service with access to resources not otherwise available to it.

The Police Service reimburses the costs of textbooks and 75 percent of tuition costs, subject to budget limitations. Ninety-five members are currently registered in a variety of night school programs during off hours. Many officers are working toward a degree in criminology through the university centre at Durham College.

In addition to providing educational courses itself, the Learning Centre

is responsible for arranging for officers to attend at the Ontario or Canadian Police College or other educational facilities. The Police Service also enjoys a partnership with both Colleges enabling them to hold courses at the Durham facility. Sergeant Van Dyke explained that it is much more economical for Durham to bring instructors from the College to teach a large number of Durham officers than it is to send one or two officers at a time to one of the colleges. It is becoming more and more expensive to send officers on Canadian and Ontario Police College courses.

In 1997, the Police Service initiated a training program to provide mandated training prescribed by the Solicitor General in its Policing Standards Manual. Every member of the Police Service and many civilian personnel are now required to attend at the Learning Centre for two 12- hour training days, twice a year. The first day involves mandatory training in use of force and firearms. The second day includes the categories of first aid and CPR training as well as various other topics. Sergeant Van Dyke anticipated that 95 percent of sworn personnel would have completed this program by the end of 1997.

Sergeant Van Dyke stated that several areas of training pertinent to issues raised in the course of the Inquiry have also become components of the mandatory training program. These areas, identified in 1993, include report writing, standardized Crown brief preparation, modern interviewing techniques, videotaping of statements and crime scene preservation. The move toward mandatory training in these areas occurred after unsuccessful efforts in 1995 to provide training through a decentralized program whereby selected officers from each platoon or unit received monthly training with a view to passing these learned skills on to his or her platoon.

A course on ethics in policing provided by Durham to its members over the last two years has also become a part of mandatory training. The course, designed to assist officers in ethical decision-making, is taught by one of four Durham members trained to instruct the program by representatives from various police services and the Southwestern Law Enforcement Institute. In 1998, a session on crime scene protection (for officers first on the scene) will be offered.

Some of the courses at the Learning Centre are taught by members of the Durham Regional Police Service. Approximately half of the students enrolled are officers from outlying, usually smaller, services. This is not only cost-efficient, it has enabled Durham and officers from other Services to

obtain training they might otherwise have had to wait for. For example, due to space limitations in the forensic interviewing course offered at the Canadian Police College, only one Durham officer had been able to attend each year, if that. By conducting the course itself, Durham was able to train 10 of its officers at the same time. This arrangement also facilitates personnel exchanges with other police services.

Durham instructors provide training at police colleges throughout the province. Courses on various topics have also been offered by Durham Region to the policing community, Durham College students, high school students, and other interested groups at various facilities in the community, sometimes co-hosted with other police services. Judges and Crown attorneys have also assisted Durham personnel in training witnesses (for instance, nurses) how to present evidence in court. The Ministry has been very supportive of these programs.

Of course, I support wholeheartedly the existence of a well-resourced, mandated training centre for Durham officers. It is my hope, as well, that the lessons learned at this Inquiry will all be incorporated into the mandatory training of Durham officers offered through the Centre.

The Campbell Report

In 1995, The Honourable Mr. Justice Archie Campbell was appointed to conduct a review of the investigation into murders and sexual assaults committed by Paul Bernardo. Justice Campbell released his report in June, 1996.

Justice Campbell concluded that the story of the Bernardo investigation was not one of human error or lack of dedication or investigative skill, but rather of systemic failure. He wrote:

> Because of the systemic weaknesses and the inability of the different law enforcement agencies to pool their information and co-operate effectively, Bernardo fell through the cracks.
>
> The Bernardo case shows that motivation, investigative skill, and dedication are not enough. The work of the most dedicated, skillful, and highly motivated investigators and supervisors and forensic scientists

> can be defeated by the lack of effective case management systems and the lack of systems to ensure communication and co-operation among law enforcement agencies.
>
> Some of the systemic weaknesses have been identified and corrected in Ontario through changes in investigative procedures and advances in the application of forensic science. Other systemic weaknesses urgently require correction in order to guard against a tragic repetition of the problems that arose in the Bernardo investigations.
>
> Ontario has, in its existing law enforcement agencies, the essential capacity to respond effectively to another case like this, but only if certain components of those agencies are strengthened and only is systems are put in place to coordinate and manage the work of the different agencies.

Justice Campbell recognized a need for a major case management system to respond to major and inter-jurisdictional serial predator investigations. The system must be based on cooperation, rather than rivalry, among law enforcement agencies. It requires specialized training, early recognition of linked offences, coordination of inter-disciplinary and forensic resources, and mechanisms to ensure unified management, accountability and coordination when serial predators cross police borders.

Reference may be had to the Report for a complete outline of the elements of Justice Campbell's recommended system. Major elements of the system, however, were described for the Commission by Dr. James Young, whose testimony was extensively noted in Chapter II. These elements are summarized below.

The Campbell Report recommended that joint investigations be coordinated by a Board of Directors, through an executive committee. The Board would be responsible for implementing the policies and maintaining the framework for joint investigations. The executive committee would be responsible for the triggering mechanism which launches a coordinated investigation in a particular case, and for providing the general oversight of specific investigations. Dr. Young explained that the committee would be comprised of individuals from various disciplines in order to bring a broader

perspective to an investigation from start to finish.

Particular investigations would be run by a case manager. This person would be selected from a cadre of senior experienced criminal investigators. The case manager would be accountable to the executive committee, but would have control of day-to-day operations of the investigation.

The case manager would be assisted by a small inter-disciplinary advisory committee. Its members would not need to work full-time on the investigation, but they would have to be available as needed and sometimes for extended periods. The members of the committee would be selected to ensure a consistently high level of continuing technical, legal and forensic advice. Dr. Young explained that one of the committee members would be a scientific advisor who would liaise between coroners, forensic scientists and police to ensure that information is exchanged and the right tests are conducted in the right order. The role of scientific advisor was discussed in some detail in Chapter II.

The case manager would also be assisted by a small full-time support team. Depending on the investigation, the team would include a media officer, crime analysts, profilers, computer technicians, an office manager and clerical and financial staff.

Justice Campbell believed that it would generally be unproductive to merge two or more investigations. For that reason, he suggested that the different investigations proceed separately, but in coordination with each other. The case manager would be responsible for ensuring that coordination. The separate investigations would be run by the lead investigators of the different investigations. Members of each separate investigation team would perform essentially the same functions with respect to each crime, but their work would be coordinated through the management team.

One of the key concepts of the case management system is that there need be standardized investigation techniques — the same processes and procedures used in each and every major investigation — because one can never know which investigations may later be linked. Dr. Young explained that there have been problems in the past when someone commits crimes in different jurisdictions, or different areas of a large jurisdiction, or even different types of crimes which are handled by different parts of the same police force. There have been problems with linking the crimes. Even after

crimes are linked, problems arise because different investigators might be using different systems of investigation, or even just different computer systems. As such, it is important for investigators to be trained in the same method and to use standardized methods.

Justice Campbell also felt it was important for all the different police forces in the province to use the same computer software. This would ensure that all information about suspects, leads and tips can be put together in a form that is accessible by all investigators in all investigations.

Justice Campbell identified adequate training as a key element of the successful investigation of serial predators. He recommended that specialized training be provided to case managers in major case management, and local investigators in homicide, sexual assault and crime scene identification.

Dr. Young explained that the Campbell model contemplates that there will be ongoing case conferences between the various players throughout the investigation. Indeed, there is a person assigned to organize the case conferences. All this is done in order to ensure that information is exchanged, the right forensic tests are being done in the right order, and things are being delivered when they are meant to be delivered.

Dr. Young believed that the Campbell model will result in a better product for the prosecution, and a better use of resources. Critical aspects of the system are the level of cooperation between the disciplines, the involvement of forensic and other scientists from the outset, and established standards as to how the investigation will be done.

Dr. Young believed that the Campbell model should be used in all major cases, whether linked or not.

I respectfully endorse the Campbell model and urge the continued movement to its earliest implementation in this province.

Durham Major Case Management

I am told that implementation of the Campbell model is about one and a half years away. Durham Police, however, already have a major case management system in operation. The system was described by Inspector Mercier.

The Durham Regional Police Service employs the principles set out in the Major Case Management Manual prepared by the Canadian Police College. The manual was prepared with the input of major crime investigators. It was first published in 1993 and is updated annually. It describes several investigative techniques and strategies which should be considered in major cases. The concepts described are not new, but the ideas had not previously been assembled in a single document.

A major case manager (team commander), a primary investigative team, and a file coordinator form an investigative triangle responsible for the direction, speed and control of the investigation. All three roles may be performed by one person. The Crown Attorney's office is the legal resource branch of the triangle. A direct link between the team commander and a media liaison ensures that the investigation is not compromised by news reports. Inspector Mercier stated that the most important aspect of the organizational process is flexibility in investigations.

The command triangle is responsible for advising the officer in overall command (the inspector in charge of the major crimes unit) as to the progress of the investigation and for identifying investigative needs. The officer in command is to ensure those needs are met and, as well, provide his or her input into the investigation.

Where the roles of the command triangle are performed by more than one individual, daily team meetings, or round table discussions, are held in the first few days of the investigation to apprise all members of the team as to the information coming into the investigation and to ensure that all understand the investigative plan and areas of importance. All members of the team will be advised and should attend these meetings. If attendance is not practicable due, for example, to an appointment out of town, that person will understand the need to bring himself or herself up to date on what took place. All participants have input as to investigative strategy.

In a large investigation, a primary investigative team may direct several investigative groups. For example, a crime scene manager appointed by the team commander would be responsible for ensuring that all proper police procedures are conducted at the crime scene with regard to such matters as security, forensic work and investigative needs.

The case manager is appointed by the inspector in charge of major

crime on the basis of training and experience. He or she prepares an investigative plan, outlining the direction and size of the investigation, giving a brief executive summary of the investigation and a list of duties specified individuals are responsible for performing. The plan includes the resources necessary to the successful completion of tasks.

Durham has seven senior investigators trained in the case management process. The officers have completed the Major Case Management course conducted at the Canadian Police College. The three- week course is designed to train managers in the proper conduct of a criminal investigation of major incidents, and to provide a management system linking police organizations involved in the same investigation.

An individual may be identified as a "person of interest" to the investigation (for instance, persons on parole for robbery living in the area). If no link is established between that person and the offence, he or she remains a "person of interest." If a link is established, that individual becomes a suspect. The process of elimination begins with an interview to determine whether there is an alibi. If so, it is investigated. Physical evidence may be collected, including biological samples. The investigation's goal is to use every available method to clear that suspect, but in many cases elimination can only be done to varying degrees.

Policies are set out for crime scene examination. Uniformed officers accompanied by highly visible police vehicles are solely responsible for protecting the crime scene. A search plan governs any search process, with search teams supervised by a leader responsible for ensuring that officers understand what is being searched for and that a proper record is maintained. As much time is taken as necessary to do a proper job. It is becoming more common for searchers to wear decontamination suits. The process of applying for search warrants involves a warrant liaison officer trained in this area of the law and directly linked with the Crown Attorney's office.

Forensic experts from the identification section are responsible for collecting and recording evidence through photographs, videotape and diagrams. At times, scientists may attend the scene. Evidence is turned over to an exhibits officer who is responsible for the preservation, packaging, tagging, and continuity of exhibits. The exhibits officer turns all evidence over to the manager, often an identification officer. Exhibits are then listed by number according to category. Every officer at the scene must file a report

setting out what transpired, including any unusual circumstances. A liaison with the pathologist will ensure the pathologist has a direct understanding of what is important to the investigation.

Properly briefed interview teams take statements from witnesses. A polygraph examiner, reporting directly to the command triangle, acts as a guidance resource over the course of the investigation. At times, a statement may be analyzed by the examiner, linked with highly trained personnel across the country.

Document exhibits turned over to the investigative team (for example, information turned over in the course of an interview) will be recorded as an exhibit and, unless forensic work is required, stored in the documentation file of the file management system. Each piece of tangible evidence is identified, preserved, and its continuity ensured.

A support service section provides information about the criminal process to the victim or the victim's family. A counseling branch will direct victims, families or community groups to professional support for further counseling. Sometimes a community liaison will be assigned to deal with the community's needs— not to provide updates as to the investigation, but to explain the police responsibilities.

Multi-jurisdictional Case Management

Durham uses a computer program developed in 1993 by the CPIC Advisory Committee called Violent Crime Linkage Analysis System ("VICLAS"). VICLAS analysis assists in the identification of linked crimes by storing standardized pieces of information about various investigations. VICLAS analysis in Durham is facilitated by either a Durham officer seconded to the Ontario headquarters for VICLAS in Orillia or another coordinator. Upon the completion of that officer's two-year secondment, Durham will have VICLAS knowledge within its own organization. Durham also has an officer assigned to the Major Crime Section who is responsible for the liaison of Durham Regional Police with the VICLAS unit in Orillia.

In multi-jurisdictional investigations, the command structure for a Joint Force Operation provides for partnerships with other police organizations to ensure all are following the same investigative plan and strategies.

Inspector Mercier testified that the Case Management Manual promotes partnership. It advises that the home police agency should maintain primary investigative agency status and "should not be spectators in [their] own communities." Inspector Mercier explained the underlying rationale is to preserve the community's faith in its police service. While the home agency should always have an active role, primary investigation status would be subject to ability and specialized training. The home police agency is a useful resource because they understand the backgrounds of individuals and the geographic problems within the investigation.

The officer in overall command of the lead agency would identify the major case manager who may not come from either of the partnership agencies, but would be appointed on the basis of expertise, capability, and experience. His or her function would be to administer and ensure that proper investigative practices are followed, but he or she would not take the case through the court process.

Inspector Mercier explained that while, traditionally, the lead agency is identified, in a homicide, by where a body is found, this is not operationally effective where the evidence is in another geographic location. He described a recent case involving a partnership between Durham Region and Sudbury Region. While the body was found in Durham Region, the incident occurred in Sudbury. Durham Region provided resources to conduct the crime scene investigation and provide security:

> Our identification officers were sent in, specialists, scientists were brought in to assist us at that scene. We were responsible for the protection of that scene, but they were responsible for the investigation itself. The exhibits were turned over to them, all statements that were taken were turned over to them. They basically formed the command triangle, but we provided certain aspects of the investigation.

Inspector Mercier described the Campbell Report's recommendations dealing with multi-jurisdictional investigations as a welcome and clear direction on how police agencies should work together.

Peer Review

Inspector Mercier testified that peer review by independent

consultants is becoming more common in complex cases. As a result of the Campbell Report, the Province of Ontario is developing a major case management unit which would identify case managers throughout the province. These individuals could offer input on new strategies and ideas. They may comment on investigative theories which have been developed in an unsolved investigation.

Inspector Mercier also described many occasions when a meeting was held early in the investigation with the Crown Attorney's office, the coroner's office, and the pathologists or scientists involved in the case to discuss the best process or test to ensure proper results are obtained.

Tunnel Vision

Inspector Mercier testified that tunnel vision will be dealt with through the use of independent investigative consultants, and investigative meetings which provide for input from all investigators, some very experienced, who will not agree with ideas which are totally wrong.

Commentary

I am impressed with the direction taken by the Durham Regional Police Services Board, particularly respecting enhanced training for its officers and the creation of new models to structure major investigations. A number of the policies implemented or proposed by Durham address areas where failings in the Morin investigation have been identified: for example, the structure of the investigation, the isolation of investigative teams, the interplay with forensic scientists, quality assurance at the body site and the organized retrieval, documentation and preservation of original evidence.

I am also impressed with the approach taken by the Durham Regional Police Services Board throughout this Inquiry. The Board did not seek this Inquiry. It knew that the Inquiry would, in part, focus on any deficiencies in the Durham investigation — and do so in a most public way. Nonetheless, the Board has taken a very positive approach throughout. It has focused, through its counsel, on the systemic policing issues identified by this Inquiry. It has provided to Commission counsel, on an ongoing basis, the latest material from Durham bearing upon these issues. Inspector Brown was extremely forthcoming in acknowledging the shortcomings of the investigation. He was completely non-adversarial in his approach to suggested improvement. The

Durham Chief of Police provided Guy Paul Morin with as gracious and sincere an apology as any offered at this Inquiry. All of this augers well for the enhancement of policing within Durham Region.

There is one concern which I express, both for the benefit of the Board and to explain the recommendations contained in this chapter. Many of the failings identified by me in the Durham investigation go to the heart of the police culture. An investigation can be perfectly structured, but flounder due to tunnel vision or "noble cause corruption" or loss of objectivity or bad judgment. Older techniques and thought processes are, at times, deeply ingrained and difficult to change. Police culture is not easy to modify. The failings which I identified were systemic and were not confined to several officers only. The challenge for Durham will be to enhance policing through an introspective examination of the culture. I am convinced that such an examination has commenced.

The York Regional Police Association expressed another concern. Put simply, it is their position that the commitment, backed by financial resources, shown in Durham to enhanced training and quality assurance has not been shown in York Region. I have referred to these submissions in Chapter IV. The challenge for York Region, and the Government of Ontario, will be to demonstrate an equal commitment to change, again backed by adequate financial resources.

Additional Policing Witnesses

AIDWYC tendered three additional systemic witnesses, in addition to Mr. Hadgkiss, relating largely to policing issues. These were as follows:

- Jean-Paul Brodeur. He is a Professor at the School of Criminology and Director of the International Centre for Comparative Criminology at the Université de Montréal. He is an internationally recognized expert on policing and has been involved with a number of commissions of inquiry respecting policing issues. He is a member of the Discipline Committee of the Sûreté du Québec.

- Richard Ericson. He is the Principal of Green College, and a Professor of both Law and Sociology at the University of British Columbia. He is a past Director of the Centre of Criminology and a former Professor

of Criminology and Sociology at the University of Toronto. Among his many published works are *Policing the Risk Society* (co-authored with Kevin Haggerty), and *Making Crime*, a study of detective work.

- John Briggs. He is outside counsel to the Department of Justice in Ottawa, specifically engaged to assist the Minister of Justice with respect to the applications under s.690 of the *Criminal Code*. In the past, he has worked as Special Counsel to the Assembly of First Nations and Special Advisor to the Law Reform Commission of Canada. From 1987 to 1989, he worked as Director of Research for the Royal Commission on the Donald Marshall, Jr. Prosecution.

Their evidence is referred to in the context of specific recommendations.

Panels of Senior Counsel

During the systemic phase, two panels were assembled of eminent counsel to address the issues raised at this Inquiry. Some of these witnesses have previously been introduced in this Report. Their evidence is referred to in the context of specific recommendations.

Joint Ontario Crown Attorneys' Association and Criminal Lawyers' Association Panel

The following counsel appeared as witnesses on this panel:

- Sarah Welch. She has been a Crown counsel since 1980 and is the President of the Ontario Crown Attorneys' Association. She has formidable experience as a trial counsel.

- Steven Sherriff. He has been a federal prosecutor, the Senior Discipline Counsel for the Law Society of Upper Canada and an Assistant Crown Attorney in Brampton. He has lectured on numerous subjects and is regularly consulted by law enforcement agencies.

- David Butt. He is counsel with the Crown Law Office - Criminal in Toronto. He was called to the bar in 1989 and obtained his LL.M. from Harvard in 1989. From 1991 to 1993, he was research counsel

to the Martin Committee and assisted Mr. Justice Martin in the consultation, research and drafting phases of the report.

- Lee Baig. He is a senior criminal defence counsel in Thunder Bay. He was called to the bar in New Brunswick in 1965 and in Ontario in 1968. He has been counsel in over 100 homicide cases and was a member of the Martin Committee.

- Bruce Durno. He is a senior criminal defence counsel, practicing in Toronto. He was called to the bar in 1976. He recently retired as President of the Criminal Lawyers' Association and has been a member of a variety of joint committees on issues relating to the administration of criminal justice.

The Ministry of the Attorney General Panel

The following counsel appeared as witnesses on this panel:

- Paul Culver. He is the Crown Attorney for the City of Toronto, responsible for the supervision of 77 Assistant Crown attorneys and the prosecution of all criminal cases in the downtown Toronto area. He has extensive experience as a trial counsel and as a lecturer and trainer.

- Peter Griffiths. He is the Regional Director for Crown Attorneys for Eastern Ontario. He supervises 10 offices and 50 Crown attorneys, serving a combined population of several million people. From March to June 1996, Mr. Griffiths was the Acting Assistant Deputy Attorney General, Criminal Law Division.

- Dan Mitchell. In 1989, he became the Crown Attorney for the District of Thunder Bay, and in 1991 the Acting Director of Crown Attorneys for the Northwest Region, a position that he held for five and a half years. He has been a Crown counsel since 1980 and was a member of the Martin Committee.

- Lidia Narozniak. She is Crown Attorney for the Region of Waterloo. She was called to the bar in 1983 and worked as a prosecutor with the Hamilton Crown Attorney's office for fourteen years. She has been involved with the education committee of the Ontario Crown

Attorneys' Association for nine years, and was the Associate Director for the Advocacy Course organized by the Ontario Crown Attorneys' Association every August.

- Paul Lindsay. He is Deputy Director, Appeals, of the Crown Law Office - Criminal. He was appointed to that position in 1991. He has general supervisory responsibility over appeals in the Crown Law Office, with the exception of Crown appeals. He was called to the bar in 1979 and has worked as counsel in the Crown Law Office - Criminal ever since.

- Dana Venner. She is one of five Deputy Directors of the Crown Law Office - Criminal. She was called to the bar in 1984 and has worked for the Crown Law Office ever since. As a Deputy Director, she is responsible for long-term strategic planning for the office. She has also been responsible for overseeing professional development and training of a designated number of counsel within that office. Ms. Venner was seconded to the Special Investigations Unit in 1995 and was the acting director of the S.I.U. for several months.

These panelists addressed a number of the specific recommendations which I have made in this Report. Before doing so, they provided an overview of the structure and supervision of the Crown Attorney system in Ontario, the organization and functions of the local offices and the Crown Law Office - Criminal, Crown screening of cases and evidence, the importance of prosecutorial discretion, Crown involvement in police investigations, development of Crown policy, and the educational programs available to prosecutors. This overview was reflected in the written submissions on behalf of the Ministry. Some of these submissions are reproduced here (citations omitted):

> **Managing the Crown System**
>
> In 1985, the criminal justice system in Ontario was managed by a single Director of Crown Attorneys who was responsible for the administration of 48 Crown Attorney offices in judicial districts across the province. This system provided for very little uniformity of practice in the Crown system. Policy formation for the administration of justice was largely left to local Crown Attorneys in a system that placed

emphasis on the independence of Crown decision-making at the expense of public accountability. Divergence in application of policies at the local level led to inconsistent treatment.

In 1987 the Honourable T.G. Zuber produced for the Ministry of the Attorney General the Report of the Ontario Courts Inquiry which recommended a dramatic re-structuring of the administration of justice in Ontario. Among the many changes which were implemented as a result of that Inquiry was the creation of a regional management model for the Crown Attorneys. The province was divided into 8 regions (reduced in 1996 to 6 regions) and a Director of Crown Operations was appointed for each. The principal responsibility of the new Directors was to manage the finances, human resources and legal issues in each region as well as to sit on a provincial management committee for the Criminal Law Division. Many of these issues were managed centrally prior to the change. The Directors were responsible through that committee for the formation and uniform application of criminal law policy.

The new structure was established in 1989 and continues to this day. In 1993, the first consolidated edition of the Crown Policy Manual (a copy of which has been filed with the Commission) was drafted and all policies were approved by the Attorney General. Thus a direct and substantive link between the Attorney General and his Crown Counsel agents was established, completing the transition from a highly decentralized system to a modern and accountable organization.

.....

The Nature of Crown Discretion

All Crown Attorneys are employed by the Attorney General and are administratively responsible to him or her. However, there appears to be a modern convention under which attorneys general rarely involve themselves in individual prosecutions.

.....

The decisions which fall within Crown counsel's discretion include:

- charge screening
- plea resolution
- providing disclosure
- taking over a private prosecution
- staying proceedings
- electing a mode of procedure
- determining what evidence to call at a preliminary inquiry
- determining which witnesses to call, and the order in which they will be called, at trial
- taking a position with respect to sentence
- determining whether to launch a Crown appeal

.....

Safeguarding the Exercise of Discretion - Guidance, Support and Management

i) The Crown Policy Manual

The policies contained in the Crown Policy Manual are the Attorney General's instructions as to how his or her agents are to perform their duties.

A principal purpose of the Crown policy manual is to provide assistance to Crown Attorneys in the exercise of their independent prosecutorial discretion. Although it is largely legally-based, it also provides advice to Crown Attorneys about the relevant factors to be taken into account in making different kinds of decisions.

The policy manual has another very important purpose, which is to ensure that the exercise of discretion is transparent by providing the public with the broad criteria which govern any exercise of prosecutorial discretion. They also prevent the giving of secret and arbitrary instructions to prosecutors.

Finally, the crown policy manual supports a consistent approach to policy-making and implementation across the province.

The Crown Policy Manual is intended to be a living document. A permanent committee of Crown Attorneys with representation across the province has been established to conduct a review of the manual to bring it up to date with existing law and to identify issues with respect to which policy direction is required. This committee was created to update the Crown Policy Manual and to assist in the ministry's response to the recommendations of the Commissioner. This level of responsiveness is necessary in order to ensure that the guidelines reflect contemporary issues and concerns.

ii) Hiring of Crown Attorneys

In exercising independent prosecutorial discretion, Crown Attorneys are quasi-judicial officers as well as advocates. It is important that they be able to make common sense, independent judgements, that is, that they be neither too rigid nor too liable to be swayed by advocacy groups or public pressure. In hiring new Crown Attorneys, the most sought-after characteristic is therefore the capacity to form those judgements.

iii) Crown Training

The wide range of training opportunities available to Crown Counsel is summarized in Exhibit 295. These opportunities include a week long "Crown school" for newly-hired Crown counsel specifically designed to assist them with the evidentiary and ethical issues inherent in the exercise of discretion. There is a three day spring program, a week long intensive summer program, training in specialized areas of Crown practice and training on new and emerging issues. These courses are considered to be a Crown counsel work assignment and attendance is therefore mandatory, subject to ongoing court commitments. Education panels frequently include, in addition to senior Crown counsel, defence counsel, legal academics, judges, medical personnel and forensic science experts. In addition, on-going education occurs at the regional level, supported by the Crown newsletter and by dissemination of new decisions and other material by Crown Law Office Criminal.

iv) Mentoring and Peer Review

Recognizing the complexity and competing pressures inherent in the exercise of Crown discretion, the Criminal Law Division has established a network of support for Crown counsel. In many offices, a senior Crown is appointed as a mentor to junior Crowns. As well, in each court location, Crown Attorneys are assigned a supervisory role over junior Crowns, to assist them in making decisions about, for example, sentencing range and the appropriateness of resolution discussions.

Recent changes to the law with respect to disclosure, and the implementation of charge screening, outlined above, have resulted in additional scrutiny of the exercise of discretion. Thus, as a case moves through the charge screening process, the disclosure stage, resolution discussions and ultimately a trial, the individual decisions of Crowns becomes subject to the review of others.

v) Performance management

As outlined above, the management structure of the Criminal Law Division has been significantly modernized in the past decade. There is now an enhanced capacity for accountability in the decision-making of individual Crown counsel.

In recent years, Crown Attorneys have seldom been hired on a permanent basis at the outset. They are hired on contract, and the contract period becomes in effect a period of probation. As a result of the public forum in which Crown Attorneys do their work, management often receives feedback about the performance by Crown counsel in the execution of their duties. As well, all Crown counsel are subject to an annual performance evaluation. The managing Crown is therefore in a position to assess the actual performance of the Crown Attorney, to impose corrective or disciplinary measures or to elect not to renew the contract of a probationary Crown.

vi) The decision to appeal

The process for making decisions about Crown appeals has a number of built-in safeguards to ensure the responsible and independent exercise of Crown

> discretion. The decision to appeal does not lie with the trial Crown him or herself, but with the Director of the Crown Law Office, Criminal. This office is closely related to, but institutionally separate from, the regional Crown offices. As well, a proposal for a Crown appeal will not even be made to the Crown Law Office, Criminal without the scrutiny and approval of the Crown Attorney or regional director of the region responsible for the trial of the matter. Once the request reaches the Crown Law Office, Criminal, it is reviewed by at least three Crown counsel who provide written opinions about the whether an appeal should be launched. The Crown Policy Manual sets out the factors to be considered in determining the appropriateness of an appeal, and specifically addresses the deference to be paid to jury verdicts. The proportion of jury verdicts appealed has been consistently low.

Recommendation 73: Education respecting wrongful convictions.

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

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

(c) The Criminal Lawyers' Association should develop an educational program for criminal defence counsel which specifically addresses the

known or suspected causes of wrongful convictions and how defence counsel may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry.

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

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

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

There was widespread support for such educational programming. For example, the Durham Regional Police Service submitted as follows:

> The Durham Regional Police Service would welcome a recommendation for the development of a component in all criminal investigation and identification training courses dealing with wrongful convictions of innocent people, specifically identifying the known or suspected causes of such convictions and setting out the preventative measures that can be taken by the police to avoid them. The Durham Regional Police Service recommends, however, that any such component be carefully researched and developed so as to be pedagogically sound, and not simply an *ad-on* subject to which only lip-service is paid.
>
> .....

> The Durham Regional Police Service welcomes any recommendation this Commission may make to enhance police learning in Ontario, and in particular, recommendations which ensure that adequate financial and human resources are available to allow the entrenchment of police learning as a part of modern day policing in Ontario.

Inspector Mercier believed that police training should include a component on the known causes of wrongful convictions. Sergeant Van Dyke felt that it is an area which has not received the focus it deserves, and he is currently involved in developing such a program. He believed training in this area should be done at either the Canadian Police College or the Ontario Police College where adequate research can be conducted to ensure proper training.

Recommendation 74: Education respecting tunnel vision.

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

The evidence demonstrates that 'tunnel vision' affected police and prosecutors in Mr. Morin's case. It is clear that tunnel vision is not something which is unique to the Morin case. Dr. James Robertson, a member of the systemic panel on forensic issues, testified that the wrongful conviction of Edward Splatt in Australia resulted from the police quickly focusing on Mr. Splatt and using a tunnel approach to the investigation, such that they did not look hard enough at alternative suspects. The Donald Marshall case in Nova Scotia is also a classic example of an investigation coloured by tunnel vision. Mr. Briggs testified that 48 hours after Sandy Seale was murdered, Mr. Marshall gave a statement to the police identifying the assailant and his companion. Independent witnesses had provided similar identifications. Other individuals witnessed events which did not implicate Mr. Marshall. This information was not pursued, however, because the lead investigator on the case had closed his mind to any suspects other than Mr. Marshall, and consequently discounted any evidence which did not fit that theory.

Mr. Sherriff accepted that tunnel vision is a factor in wrongful convictions and miscarriages of justice in general:

> Tunnel vision has got to be a factor. And I'm talking generically now, miscarriages at large. I don't know enough about this one [Morin] to comment; that wouldn't be right, anyway. But tunnel vision, and of course, that can come in many shapes and sizes. Tunnel vision in the investigation dooms us as prosecutors. If it hasn't been a searching investigation, we're getting fed certain data. Disclosure is the best antidote; the best remedy is disclosure.
>
> So I would say, it's mind set, and the only mind set that counts is the one that seeks the truth.

Professor Ericson suggested that the causes of tunnel vision are systemic and structural, ingrained in the police culture. Any solutions must aim to change aspects of the culture, perhaps through training specific to the danger and supervision of the substantive content and direction of the investigation.

Mr. Briggs testified that the problem of tunnel vision was indirectly addressed in the recommendations of the Marshall Inquiry with respect to training:

> I mean, indirectly there are a number of recommendations relating to training and the resources provided to police and the kind of training that they required. And certainly that's part of trying to address the tunnel vision problem, as sort of educating people to the importance and necessity of constantly questioning and re-examining, and so on.
>
> Q. Right. So training, sufficient resources, accreditation systems to make sure that smaller police forces meet central standards might all be recommendations that would indirectly get at the phenomena of tunnel vision, hopefully?
>
> A. Yeah, to some extent. I mean, that's a difficult one because it's a problem that we all face, I think, in the kind of work we do, and how you guard against it. It's an ongoing challenge. But just the study, for

> example, of cases -- be it Marshall or the current one that we're here for, by police forces, I think there's enough of these cases from our own jurisdictions and elsewhere in the world that taking a series of these and examining what happened, you know, when young police officers are exposed to this, I think ought to be very helpful in terms of their education process.

Inspector Mercier felt that tunnel vision was a training issue. Ms. Welch felt that it would be very useful for Crown attorneys to receive education on tunnel vision. She believed that joint educational programs with defence organizations like the Criminal Lawyers' Association would be particularly beneficial. Ms. Narozniak testified that avoiding tunnel vision is already an element of the Crown education program, although not identified as such.

Recommendation 75: Crown discretion respecting potentially unreliable evidence.

Various parties suggest that Crown counsel be mandated not to call evidence which they subjectively regard to be unreliable. A similar submission was put this way: Richard Wintory testified that the prevailing American view is that it is improper for prosecutors to call evidence unless, in the very least, they subjectively believe the evidence to be true. It is suggested that Ontario Crown counsel should be held to the same standard.

Other parties suggest that reliability is an assessment to be made by the trier of fact and is not to be usurped by Crown counsel. Unless the unreliability of a witness or witnesses demonstrates that there is no reasonable prospect of conviction, or unless evidence is known to be perjurious, Crown counsel should not usurp the trier of fact's role of assessing reliability by not calling relevant evidence.

In my view, the appropriate approach lies between these perspectives.

It is clear that Canadian prosecutors cannot call evidence known to be perjurious. No one suggests otherwise. The difficult issue arises where prosecutors have no confidence in the proposed testimony. They do not know it to be false, but have sufficient concerns about its reliability that they are not themselves satisfied that the evidence is true.

Canadian jurisprudence has never demanded that prosecutors be legally constrained from tendering testimony unless they believe it to true.

In Ontario, prosecutors are required to pre-screen criminal cases to determine whether there is a 'reasonable prospect of conviction.' Where there is no reasonable prospect of conviction, a case should not proceed. The evaluation of whether a reasonable prospect of conviction exists may require some preliminary assessment of the reliability or credibility of evidence, recognizing that the prosecutors generally have not heard the witnesses at that stage of the process.

This practice reflects the views expressed in the 1993 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (commonly referred to as the Martin Report, named after its Chair, the Honourable G. Arthur Martin, O.C.,O.Ont.,Q.C., LL.D.). Apart from the limited assessment of the credibility of witnesses in determining whether a reasonable prospect of conviction exists, the Committee was of the view that the credibility of witnesses is generally for the trier of fact. As well, the Committee felt that it is generally inappropriate for the prosecution to turn on the prosecutor's personal feelings or opinion as to whether or not the accused is guilty:

> A prosecution clearly cannot commence unless an informant, usually a police officer, has reasonable grounds to believe, *and does believe*, that the accused has committed the offence for which he is charged. However, after the information is laid, an important aspect of Crown counsel's prosecutorial responsibilities is to maintain an impartial independence from the police or other informant, and an objectivity with respect to the prosecution that the police may not have, due to their minds having been made up in the course of the investigation. As stated by one experienced Canadian prosecutor,
>
> > In performing his or her "quasi judicial" role, the prosecutor must not be affected by personal *animus* towards the accused. During the prosecution process, Crown counsel is called upon to make numerous decision of crucial importance to the accused and the integrity of the criminal justice system. There is a danger that personal conviction

> concerning the guilt of the accused will cloud the prosecutor's ability to act as dispassionate and impartial decision maker.
>
> If only those cases were prosecuted in which Crown counsel firmly believed in the guilt of the accused, the settled notion that "the purpose of a criminal prosecution is not to obtain a conviction" may well be compromised in practice by prosecutors who, having formed the opinion that the accused is guilty, would therefore see it as their duty to obtain a conviction. In the discussion of public interest factors that may affect the course of a prosecution which follows, *infra*, the point is made that a prosecutor's animus toward an accused person is irrelevant.
>
> The Committee recognizes that there is support in the legal literature for the proposition that a prosecution should not be instituted or proceed where the prosecutor has a genuine doubt as to the guilt of the accused. Perhaps the most famous example is Christmas Humphrey's statement: "I have never myself continued a prosecution where I was at any stage in genuine doubt as to the guilt, as distinct from my ability to prove the guilt, of the accused." Certainly, Crown counsel with a genuine doubt as to the guilt of an accused is duty bound to carefully explore the reasons for that doubt as they might be revealed in the Crown Brief or investigative file, and to recommend any further investigations as appear necessary. Such investigations may demonstrate that it is necessary to withdraw the charge, or that it is not in the public interest for the prosecution to proceed. If, however, following such review and investigation, there remains a reasonable prospect of conviction, and if the prosecution is otherwise in the public interest, the prosecution should usually proceed. On the other hand, the prosecutor's belief in the guilt of an accused counts for nothing if, on the evidence, there is no reasonable prospect of conviction. (Citations omitted.)

It is my view that a *legal* requirement that prosecutors not call 'unreliable evidence' or evidence which they do not subjectively believe to be true would be uncertain, impossible to enforce, generate endless motions (as to whether the prosecutor truly believes his or her witnesses), inhibit (if not paralyze) the ability of prosecutors to conduct their work and make

prosecutors witnesses in their own prosecutions.

However, I believe that many Crown counsel do (and should) exercise prosecutorial discretion not to call a witness whose credibility does not inspire confidence, even where there remains a reasonable prospect of conviction on the totality of the evidence. I am confident that the senior prosecutors who testified before me are very capable of exercising that kind of discretion, and have done so in the past, whether legally required to do so or not.

The exercise of that kind of discretion requires great independence and security. Complainants, victims, police officers and the media may be vocal in expressing their anger or concern if a prosecutor chooses not to call a witness due to doubts about reliability. The decision not to call a complainant for that reason may result in a complaint to the Ministry. The decision not to call a police officer for that reason is difficult, particularly in jurisdictions where prosecutors deal with the same officers on a daily basis.

The exercise of such discretion by a less senior prosecutor may be particularly difficult.

In my view, rather than impose more legal rules, the solution is to create an environment for prosecutors (particularly less senior prosecutors) that supports them in the exercise of prosecutorial discretion not to call unreliable evidence. Police officers should be told that prosecutors must have the independence to exercise this discretion. The Ministry and supervising prosecutors must provide the strongest institutional support for the exercise of this discretion.

The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole or in part, due to its inherent unreliability. The Ministry should take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

<u>Recommendation 76A</u>: Overuse and misuse of consciousness of guilt and demeanour evidence.

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

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

A significant part of the evidence advanced against Mr. Morin at the second trial consisted of 'consciousness of guilt' or 'demeanour' evidence, that is, evidence that he acted or reacted in a suspicious manner. I have found that much of this evidence was worthless.

Several courts and authors have commented on the problems with searching for indications of guilt in after-the-fact conduct of an accused person. The Court of Appeal for Ontario, for example, recently had this to say in the context of a discussion on the admissibility of 'consciousness of innocence' evidence:[55]

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[55] *R. v. B.(S.C.)* (1997), 119 C.C.C. (3d) 530.

> The admissibility of after-the-fact conduct is not without its risks. There is always the danger that the trier of fact will read too much into that behaviour. Conduct, which is no more than usual, rash or thoughtless can take on an unwarranted significance when viewed in hindsight at trial. The danger that after-the-fact conduct will be over-emphasized by a trier of fact exists whether evidence of that conduct is offered by the Crown or the defence. That risk is best avoided by a judicious use of the power to exclude prejudicial evidence even though it has some probative value.

In *R. v. Campbell*,[56] Hall J.A., speaking for the British Columbia Court of Appeal, commented as follows:

> I believe that a trial judge should consider carefully whether it is really necessary, other than in relatively rare circumstances, to instruct a jury concerning this subject.
>
> .....
>
> Where there is evidence of a deliberate effort by an accused to cover up, to mislead investigators or to influence witnesses, then it may be appropriate to instruct the jury about the subject. In general however, I venture to suggest, that it is better, is possible, to avoid reference at all to the whole subject since it can be and often is a fruitful source of potential error. There can be a host of reasons why people may do stupid things after being involved in a traumatic experience. I have the impression that trial judges are now more frequently being asked to give and are giving instructions about certain evidence in a case being possibly indicative of a consciousness of guilt. It is a trend that is not, in my view, a happy one and I believe this should rarely be invoked as a possibility probative factor of proof of guilt. If the crown case is so tenuous that this sort of evidence must be relied upon, it is in many instances not much of a case.
>
> If the trial judge is of the opinion that such

[56] Unreported, January 12, 1998.

> instructions are called for, there is something to be said for the use of the neutral language suggested by Weiler J.A. in *Peavoy*, namely, "after-the-fact conduct". It could be pointed out to the jury that certain after-the-fact conduct might lead the jury to conclude that it could be indicative of the involvement of the accused in criminal activity. If a person, subsequent to involvement in an allegedly criminal event, acts in a way that suggest culpability, then that may lead the trier of fact to infer that he or she is conscious of their involvement and of their guilt. What must be made plain to the jury is the concept that this is merely a piece of circumstantial evidence that may or may not have much probative force. Generally speaking, I should think that undue stress should not be laid upon it as a factor that could lead to proof of guilt concerning the offence charged or an included offence.

In an article entitled "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and other 'Guilty Behaviour' in the Investigation and Prosecution of Crime,"[57] Andrew Palmer wrote:

> Guilty demeanour [as opposed to tangible guilty conduct] is both more difficult to define, and identify. Perceptions of guilt based on demeanour are likely to depend on highly subjective impressions which may be difficult for the witnesses to articulate, let alone convey to a jury. The greatest obstacle to the use of guilty demeanour, therefore, will usually be the difficulty of establishing that the accused did indeed behave in a way which might be thought consistent with guilt. Even if this can be established, however, the significance of the behaviour will often be fairly equivocal. It may, therefore, be difficult for the jury to eliminate possible innocent explanations for the behaviour. Because of this, guilty demeanour will usually provide a far less secure basis for an inference of guilt than the evidence in the other four categories of guilty behaviour.
>
> .....
>
> As a general rule, one would expect someone who

[57] (1997), 21 Melbourne University Law Review 95.

has committed a crime - or at least a bloody one - to experience some sort of immediate psychological or emotional reaction to that fact. Birch, for example, has argued that '[f]ailing to show any emotion after committing murder is so unusual' that 'if the question is which of two mentally normal men committed a murder, evidence that one was upset afterwards ought to be relevant.'

.....

Another arguably relevant emotional response to an alleged crime occurs when the accused's behaviour and emotional responses depart from the behaviour and responses which would have been expected if the hypothesis consistent with innocence were true. For example, the idea that Lindy Chamberlain's failure to publicly cry over the death of her daughter Azaria meant she had probably murdered her, was based on beliefs about the ways in which bereaved others supposedly behaved.

.....

I would argue, however, that while departure from the stereotype might legitimately arouse the suspicions of investigators, an inference of guilt cannot be safely drawn from it ... The most that can be said is that the accused's emotional responses to the event appeared to be unusual. Guilt would, of course, be one explanation for the apparently unusual nature of the accused's responses; but another equally plausible one would be the accused's *general* emotional responses or levels of expressiveness differed from the norm. Without recourse to a battery of psychological testing, or the admission of a host of evidence about how the accused had responded in other, comparable, situations (if indeed any could be found), it is difficult to see how the jury could ever eliminate this possible explanation.

.....

In a recent Canadian drugs case, for example, the accused's 'nervous reaction' was listed as one of the items of evidence against him:

Officer Coderre, who knew the appellant,

> reached him first, took away his weapon and informed him that they wanted to question him in the context of their ongoing investigation with respect to marijuana plants in the area. In response to this, the appellant reacted nervously and told the officers that he was in the process of hunting, that he had done nothing wrong and he asked them to let him leave. [*R. v. Couture* (1995), 93 C.C.C. (3d) 540]

It is difficult to see how the jury could possibly have eliminated the many conceivable innocent explanations for the accused's alleged nervousness; and if the jury could not eliminate those explanations, then knowing that the accused reacted nervously could not have assisted them to make a rational decision about the accused's guilt or innocence.

.....

In the Canadian case referred to above, the supposedly unconvincing denial of guilt occurred in court, so that the jury would have been able to decide whether or not the denial was that of a guilty man on the basis of their own perceptions. In most cases, however, the unconvincing denial will have occurred out of court, and the jury would have to decide whether the denial was that of a guilty person purely on the basis of a witness' account of that denial. Yet the supposed difference between the denial of the guilty and the denial of the innocent clearly turns subtle nuances of tone and timing, matters which are particularly difficult to convey accurately to a court. I would therefore argue that an accused person's out of court denial of guilt, no matter how unconvincing it might have seemed to those who heard it, should never be offered as evidence from which the accused's guilt can be inferred. As Lowe J. said - with the addition by myself of the word parentheses - 'by no torturing of the statement "I did not do that act" can you (safely) extract the evidence "I did do the act"'.

In summary, as diverse as the behaviour contained in this category is, it does tend to share the two following characteristics: difficulty in satisfactorily establishing the fact of the behaviour, and difficulty in

> eliminating any innocent explanations for it. These two characteristics mean the evidence of guilty demeanour should seldom, if ever, be admitted.

Demeanour evidence was advanced against Susan Nelles when she was wrongly charged with the murder of four infants at the Hospital for Sick Children in Toronto. In discharging Ms. Nelles at the preliminary inquiry, His Honour Judge Vanek found that no inference of guilt could be drawn from a doctor's evidence as to Ms. Nelles' demeanour:[58]

> Several ... items of evidence relate to utterances and conduct following closely after the death of baby Justin Cook on Sunday, March 22nd, at about 5:00 a.m. Dr. Fowler testified that he did not see Nelles that morning until he was about to leave the hospital; and that as he was leaving he saw Nelles sitting at one end of the desks in the nurses' station apparently writing up the final report in Cook's medical chart. He said he knew she had been involved with Pacsai and had given the digoxin before and was anxious to see what she looked like at this time. He glanced in her direction and said that she had a very strange expression on her face and no sign at all of grief. He said he thought this was very strange that this would be her appearance at a time such a terrible thing had happened. With respect, while it appears that Dr. Fowler went to school with Nelles' father many years ago and may have had some isolated transactions with him since, he barely knew Susan Nelles, if at all; he knew nothing about her emotional range, her reaction to stress, or her manner of expressing her grief. I am unable to find any evidence of guilt from what a doctor thought from a passing glance was "a very strange expression" on the face of a young woman he barely knew, who had suffered a most harrowing experience, and was engaged in the very emotionally disturbing duty she was bound to perform of writing up the final death note as part of her other difficult duties on the occasion of the death of a baby in her care.

The New Brunswick Court of Appeal also commented unfavourably

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[58] (1982), 16 C.C.C. (3d) 97 at 123-125 (Ont. Prov. Ct. (Crim. Div.)).

on determining credibility on the basis of demeanour evidence:[59]

> In determining credibility, the trial judge ... made the following comments:
>
> > ... certainly if the accused had not been near [M.] when he was alleged to have kissed her, he would have made this known to the police when questioned about the matter.
> >
> > Mr. [B.] also testified that he had never kissed a girl in his life, that he did not know what a passionate kiss was, and that if he had a girl-friend, he did not know if he would kiss her any differently from the manner in which he would kiss his mother. I find this evidence difficult to believe and rather preposterous.
> >
> > I think that even the most naive, sheltered and unworldly 17-year-old would know better than that.
> >
> > Most importantly I want to mention that in my opinion [he] lacked the sense of outrage while testifying concerning the allegations, which one would expect if he were the subject of fabricated allegations or innocently distorted memories. If the evidence in the question against him had been totally made up, one would have expected to see a young man much more upset and much stronger in his denials of the accusations.
> >
> > Again one would have expected a very strong denial from the accused had he not been kissing the young girl as alleged.
>
> .....
>
> I would refuse to determine the credibility of an accused person by relying on a stereotyped degree of reaction, outrage or denial that one subjectively might expect from someone who is falsely accused.

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[59] *R. v. B.(S.P.)* (1994), 90 C.C.C. (3d) 478.

Two of the systemic witnesses before me warned of the dangers of demeanour evidence. Professor Ericson said:

> [I]t's highly problematic to make that kind of inference [of guilt] from expressions of human emotion or particular human actions. There can be very many inferences that are made, and very many different actions that are taken as a result of those inferences.
>
> I think what you're dealing with here is of course -- I mean, this is a basis of human culture and human judgment generally that we're constantly making these inferences in order to read the character of people and to take action in relation to people. When it gets into a very serious matter, like a serious criminal trial, of course, there should be much more vigilance over whether or not that kind of information is allowed to be admissible, or those kinds of inferences are allowed to be admissible. And I'm basically agreeing with what I take to be the basis of your statement, that it's just highly problematic, and certainly should not be a grounds for concluding that somebody was actually motivated by what you're inferring from the accused.

Mr. Brodeur also pointed out that demeanour is culturally sensitive. He cited the example of aboriginals in Australia. Non-aboriginal Australians can make hasty and erroneous interpretations of aboriginal behaviour. Aboriginal body language and behaviour is markedly different than that of non-aboriginals. Looking someone in the face, for instance, is a mark of disrespect to the former and a mark of truth to the latter. Mr. Brodeur stated that aboriginals very often lose custody of their children because judges misinterpret their (apparently evasive) behaviour in court.

<u>Recommendation 76B</u>: Use of term 'consciousness of guilt.'

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

In *R. v. Peavoy*,[60] the Ontario Court of Appeal was critical of the term

[60] (1997), 117 C.C.C. (3d) 226.

'consciousness of guilt':

> In his charge, the trial judge used the term "consciousness of guilt" and that is the term which has been commonly used to describe this kind of evidence. As this court held in *R. v. White and Côté* (1996), 108 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to the Supreme Court granted June 19, 1997, [1997] S.C.C.A. No. 53, and as the trial judge stated, evidence of an accused person's acts following the crime with which he is charged should be considered together with all of the other evidence in determining whether the Crown has proven the guilt of the accused. The characterization of the conduct in question as evidence of consciousness of guilt isolates it from other circumstantial evidence. To encourage the trier of fact to consider after-the-fact conduct with other circumstantial evidence and not to isolate it, the use of more neutral terminology is desirable. The use of neutral terminology, such as the term, after-the-fact conduct, also avoids labeling the evidence with the conclusion which the jury might not wish to draw and is therefore more accurate.
>
> .....
>
> Evidence of after the fact conduct must be relevant to a fact in issue and it may be relevant to more than one fact in issue in a trial. Like other circumstantial evidence, evidence of the after-the-fact conduct must be reasonably capable of supporting an inference which tends to make the existence of a fact in issue more or less likely.

I respectfully agree with the Court's comments.

<u>Recommendation 77</u>: Admissibility of exculpatory statement upon arrest.

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

Guy Paul Morin made a lengthy exculpatory statement to the police upon his arrest. The defence unsuccessfully sought to introduce the statement at trial. There is an issue, as I have earlier noted, whether that statement was made admissible by the Crown's closing address. Apart from that, the systemic issue raised here is whether such a statement should generally be admissible at the instance of the defence.

Subject to issues of voluntariness, common law 'dirty tricks' or non-compliance with the *Charter*, such a statement made by an accused is admissible at the instance of the prosecution. However, the prevailing view is that such a statement is not admissible at the instance of the defence. In *R. v. Campbell*,[61] Martin J.A. articulated the evidentiary rules which are said to compel that result:

> The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:
>
> I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.
>
> II The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court, made to other persons out of Court, and may not call other persons to testify to those statements.
>
> Statements made by an accused which infringe Rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness. Each of the above rules is subject to well-recognized exceptions or qualifications, and there is some overlap, both in the rules and in the exceptions to them: see *Phipson on Evidence*, 12th ed. (1976), at pp. 650-3; *Cross on Evidence*, 4th ed., at pp.207-20; *Previous Consistent Statements* [1968]

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[61] (1997), 38 C.C.C. (2d) 6 (Ont. C.A.).

> Camb. L.J. 64, by R.N. Gooderson.

In *R. v. B.(S.C.)*,[62] the Ontario Court of Appeal stated that the admissibility of after-the-fact conduct by an accused to support an inference that he or she did not commit the crime should be approached on a principled basis. If the evidence is relevant, its probative value is not substantially outweighed by its prejudicial effect and it is not excluded by some policy-driven exclusionary rule, the evidence should be admitted when tendered by the defence. The Court held that certain evidence, such as the accused voluntarily providing forensic samples to the authorities, in the particular circumstances of that case, should have been admissible on that basis. The Court also reflected as follows:

> We also reject the contention that evidence that an accused voluntarily provided samples and other material to the police for forensic testing cannot be admitted on behalf of the accused because it is well known that some guilty people have provided similar samples. This submission is akin to saying that evidence of flight should always be excluded because innocent persons have been known to flee the scene. The fact that the inference favourable to the accused is not the only available inference is no bar to admissibility.

At first blush, the Court's principled approach to after-the-fact conduct by the accused might provide support for a claim that an exculpatory statement upon arrest is admissible at the instance of the accused. Further, the Court's statement that "the fact that the inference favourable to the accused is not the only available inference is no bar to admissibility" might answer the suggestion that the admission of exculpatory arrest statements at the instance of the defence would favour unscrupulous accused who provide statements for tactical reasons.

However, the Court also said this:

> Evidence from an accused that he offered to take a polygraph test is, in effect, evidence that the accused previously made a statement which is consistent with his testimony that he did not commit the crime alleged.

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[62] (1997), 119 C.C.C. (3d) 530.

> Generally speaking, evidence of a prior consistent statement is not admissible because it has very limited, if any, probative value and serves to expand unnecessarily the ambit of the trial inquiry: *R. v. Beland and Phillips* (1987), 36 C.C.C. (3d) 481 (S.C.C.) at 489-90; *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at 26-27.

The inability of an accused to tender his or her exculpatory statements (subject to delineated exceptions, such as the rebuttal of recent fabrication, etc.) is found in American jurisprudence as well. The English courts, on the other hand, have taken a different approach. They have allowed defendants to introduce such statements as evidence of their reaction to being accused of a crime. In *R. v. Storey*,[63] Widgery J. wrote:

> The Court has given careful consideration to this important point ... A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.

In *R. v. Pearce*,[64] the Court made clear that the principle was not limited to statements made immediately upon arrest:

> A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. The reference in *Storey* to the reaction of the accused "when first taxed" should not be read as circumscribing the limits of admissibility. The longer

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[63] [1968] Cr. App. R. 884.

[64] [1979] Cr. App. R. 365.

> the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements.

The only qualification on the principle was as follows:

> Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible.

The Court of Appeal reiterated the point in *R. v. McCarthy*:[65]

> One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, "That cannot be right, because I was elsewhere," and gives details of where he was, that is something which the jury can take into account.
>
> Mr. Carlile pointed out that there had been an interval of three and a half days between the burglary and the date when McCarthy was interviewed by the police. That is so, and during that time McCarthy had an opportunity of manufacturing an alibi. But the fact remains that when he was asked to account for his movements, he at once did so and invited the police to check what he had said.

The English rule is not dependent on the accused testifying in his own defence. Mr. McCarthy did not testify (or call any evidence), and yet the Court of Appeal held that the trial judge was wrong in refusing to permit the defence to introduce his statement made upon arrest. The Court suggested, however, that in such a situation a trial judge would be entitled to alert the jury to the fact that the accused has failed to support his exculpatory

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[65] [1980] Cr. App. R. 142.

statement at trial.

The Morins contend that the admission of exculpatory statements, where the accused testifies in his or her own defence, advances the administration of justice:

> 5. The proposed recommendation to admit exculpatory statements would serve the cause of the administration of justice:
>
> a. It would enable an accused to demonstrate consistency in his defence. It would avoid a jury wondering what he may have said by way of explanation on arrest.
>
> b. It would cause defence counsel to be more prepared to encourage their clients to make statements on arrest. This would be of assistance to the police. An exculpatory statement, if true, can only be helpful to the interests of justice. An exculpatory statement, if false, may be able to be shown to be demonstrably false by the time of trial. Consequently, an exculpatory statement on arrest, whether true or false, will always assist a police investigation.
>
> 6. The preclusion rule is premised on a view that self serving evidence can deceive a jury. However, if the accused testifies, he can be cross-examined on his exculpatory statement. A jury can determine its truthfulness or falsity applying the same considerations as with any other evidence. If the statement is videotaped ... this assessment will more readily be able to be made. For example, the jury in Morin's case should have been permitted to hear everything he told the police on April 22 to 23, 1985. If the jury had heard his repeated and emphatic protestations of innocence throughout a long and tiring interrogation, it may have made the difference between conviction and acquittal.
>
> 7. In this context, it is wrong to compare the issue of admissibility of a previous statement of an accused with the issue of the admissibility of a previous statement of a witness. A jury will likely assume that a witness has been previously interviewed and given a

> statement consistent with his evidence in the absence of cross-examination that shows the contrary. Jurors are unlikely to make the same assumption for an accused because of the question they are likely to pose to themselves in their ignorance of the present law, namely: Why did the defence not lead evidence of what his client said on arrest."

Some Canadian case law supports this view. In *R. v. Small*,[66] Forrestell J. held that the rule which prevents an accused from introducing his own statement into evidence violates s.11(d) of the *Charter*. In *R. v. Rozich*,[67] Hugessen A.C.J. accepted that the reasons for the rule disappear when the accused testifies in his own defence:

> [A]ll the reasons which justify the exclusion of evidence of exculpatory statements made by the accused disappear when the accused himself takes to the box. At that moment, the accused is then subject to full and searching cross-examination. It may technically be hearsay to show that on a previous occasion the accused said something similar to what he now says. I think that modern juries are intelligent enough to be able to give due weight to statements made out of court and I think that they are intelligent enough to be able to reach their assessment on the credibility to be accorded to unsworn out-of-court statements on the basis of their seeing and hearing and judging the accused when he or she is in the witness box before them.

The Crown Attorneys' Association responds to this suggestion as follows:

> The O.C.A.A. respectfully submits that the current law as it relates to the admission of statements ought to remain unchanged. There is no sound policy reason to permit an accused person to lead self-serving statements either through cross-examination of Crown witnesses or in their own case in chief. Nothing heard by this Commission would suggest that the rationale

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[66] (1991), 15 W.C.B. (2d) 51 (Ont. Ct. (Gen. Div.)).

[67] (1979), 10 C.R. (3d) 364 at 370 (Que. S.C.).

> for the rule against self-serving statements ought to be done away with. It is a rule which is time honoured and has not been identified as a cause of wrongful convictions in the evidence before this Commission. To that end, most recently, the Ontario Court of Appeal has affirmed the rule against the admission of self-serving statements [citing *R. v. B. (S.C.)*, *supra*, at paragraph 28].

Several of the Crown attorneys who appeared before me also did not support the idea of changing the law with respect to the introduction of exculpatory statements. Mr. Sherriff, on the other hand, was more receptive to the idea, acknowledging that a lot of the risk in allowing an accused to tender his or her own statement disappears when the accused testifies. However, he felt that if the accused was going to be allowed to do this, the Crown should be given the right to comment if the accused provided no statement upon arrest. Mr. Durno took exception to this latter suggestion, arguing that it would erode the right to silence.

In my view, there are policy considerations that arguably support the exclusion of the accused's exculpatory statements tendered at the instance of the defence, where the accused does not testify. However, there are compelling policy considerations, outlined above, for a reconsideration of the rule in circumstances where the accused is prepared to testify.

Recommendation 78: Admissibility of canine scent discrimination.

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

The evidence before me disclosed that Mr. Morin's wrongful conviction was not the only one in which this type of 'evidence' was introduced. Mr. Cruz explained how it was used against him.

Sergeant Van Dyke, when testifying about the polygraph during the jailhouse informant phase of the Inquiry, said that the polygraph, like the police dog, is just an investigative tool. The dog does not testify. In the Morin case, however, the dog, in effect, *did* testify. I agree with Mr. Boley that such evidence should not generally be admitted in criminal cases as affirmative evidence of guilt.

Recommendation 79: Evidence of other suspects.

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

The threshold for the admission of evidence of other suspects is, arguably, higher than the typical threshold for the admission of defence evidence (probative value not substantially outweighed by prejudicial effect). The factum of the Attorney General in Mr. Morin's appeal against conviction, summarized the state of the law:

> Traditionally the appellate courts in most jurisdictions, have demanded that there be sufficient evidence connecting the third party to the commission of the offence prior to permitting the evidence to be adduced, no doubt in recognition for the significant potential for prejudice this type of evidence brings with it, namely by confusing the issues, distracting the jury, opening up numerous collateral matters, prolonging the proceedings, leading to speculation and conjecture, etc. In fact, in virtually every appellate authority that has permitted the admissibility of such evidence there has been substantial evidence linking the third party to the offence in question.

The Morins have submitted that the rules of admissibility should be relaxed. I take it that the Morins contend that, if there is some admissible evidence linking the suspect to the crime, the evidence should be admissible.

Mr. Gover provided *some* support for that position:

> I think that we have to find some way of fashioning a rule that would permit evidence of other suspects to be led, finding some appropriate threshold in order to prevent situations like this occurring, yes.

In my view, this is a difficult issue. Courts are appropriately concerned about the prolongation of the proceedings, and distracting the jury from its tasks. On the other hand, the existence of other suspects against whom a circumstantial case could be built (that is comparable in some respects to the case against this accused) may be relevant to demonstrate that the evidence

is not consistent only with the guilt of this accused. The investigative treatment of other suspects, and the failure to clear those suspects adequately, may also be relevant to the quality of the investigation and therefore admissible, not as proof that a named suspect committed the offence, but as proof that the investigation (and therefore the evidentiary product of the investigation) is flawed.

My recommendation is not intended to resolve this issue but, rather, to reflect its importance. In my view, it is arguable (and I put it no higher than that) that the learned trial judge erred in his ruling referable to the admissibility of the evidence of other suspects.

<u>Recommendation 80</u>: Jury research.

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

An application was brought before me requesting that I summon the *Morin* jurors to testify at the Inquiry. As earlier indicated, I was of the view that this would be inappropriate. My decision was supported in the Divisional Court. I reflected, *inter alia*, that, in light of the confidentiality of their deliberations pursuant to the existing law, they should not be summoned to disgorge the content of those deliberations in a public inquiry, particularly where parties would seek to use their evidence to advance their respective positions on highly contested issues of credibility which could lead to findings of misconduct. However, I note the comments of Mr. Justice David Doherty in a speech presented at the 1996 Criminal Lawyers' Association Education Program:

> There is some empirical evidence which suggests that juries' comprehension levels are quite high. These studies support the contention that our faith in the jury system is rooted in reality.
>
> Many who operate within the criminal justice system, including judges, are convinced that the level of juror comprehension is woefully low. They argue that it is unrealistic to think that jurors understand much of what they are told about the law. Anecdotal evidence concerning the conduct of specific juries also affords some evidence that a significant number of

juries do not understand what they are told. Inconsistent verdicts, unreasonable verdicts, and bizarre questions are not uncommon features of our system of trial by jury. There are also a few reported cases in which jurors' "confessions" as to their ability to understand the trial judge's instructions appear at the appellate level.

The social science information, however, provides the most disturbing view of the level of juror comprehension. Studies over the last 25 or 30 years, most of which have been done in the United States, indicate the following:

- There are high levels of misunderstanding among the jurors on basic issues such as the burden of proof.

- Judicial instructions do not significantly improve overall juror comprehension, although they do assist in some specific areas.

- Deliberations among jurors do not appear to significantly improve juror comprehension.

- Instructions which are presented in "plain English" and which take advantage of other aids (*e.g.* providing the instructions in writing) result in significant improvement in juror understanding.

It must be concluded that we cannot know at present the extent to which jurors do not understand the law as provided to them by trial judges. The "cone of silence" which descends upon the jury immediately after it returns its verdict precludes any meaningful assessment of their comprehension level. Furthermore, the general verdict delivered by juries provides no insight into the crucial question of whether the jury understood what they were told by the trial judge.

There is strong reason to believe that we have a serious gap between what jurors are told about the law and what they understand about the law. Steps must be taken to determine the extent and cause of that gap. Three possibilities should be given serious considerations.

> - Section 649 of the *Criminal Code* should be amended to allow disclosure of information relating to proceedings of the jury in the course of their deliberations for the purposes of approved research ....[68]

I agree. One would hope that such research would enable the judiciary to respond to identified weaknesses in the jury system. Poor jury comprehension may favour the practice of providing a formula jury charge, in writing, to all jurors to assist in their deliberations. Research may demonstrate that juror comprehension would be improved if the judge's *opening* address more fully addressed the applicable law and the issues between the parties, if known. The appellate courts might revisit the division of labour between judge and jury. The uniform ability of jurors to take notes of the proceedings and a structured right to ask questions during the trial are ideas worth exploring. Our assumptions about the validity of traditional aspects of jury trials should be revisited, based on empirical research.

<u>Recommendation 81</u>: Outline of facts and personal opinions by the trial judge.

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

Trial judges currently enjoy a limited right to offer opinions on the evidence to the jury. The right is a controversial one. Professor Martin summed up the debate:

> On the one hand, the debate suggests that it's a help to a jury who might otherwise be confused. The counterbalancing argument is that the judge who herself or himself has concluded this is a guilty person

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[68] The other two possibilities referred to by Justice Doherty are that means must be put in place to lift the 'cone of silence' to permit inquiries into potential miscarriages of justice, and juries should be given more flexibility in the types of verdicts they are asked to return.

> will have a tremendous impact on a jury's view, unless you get a very independently-minded jury.

Some of the witnesses before me felt that it would be better if trial judges did not sum up the evidence in their charge to the jury. Mr. Gover, for instance, testified:

> I think that all experienced counsel will agree that the ability of a judge to sum up and to review the evidence, and indeed, in this jurisdiction the obligation of a judge to do so, is a potent device which can cause jurors to come to embrace the view taken by the judge of a particular case. And my view is that a better system, and this is despite all of the usual instructions to jurors that they not take the judge's view of the evidence as being determinative and that they're free to take their own view of the evidence, I make the point I've just made.
>
> So, in my view, the better approach would be to leave evidence entirely within the domain of the jury and permit jurors to make notes and then to rely on counsel to relate the aspects of the evidence to their respective cases.

The Runciman Report had this to say on the issue:

> The second consideration (the need to be fair to both sides) requires that judges should be wholly neutral in any comment that they make on the credibility of the evidence. It is appropriate for judges to identify for a jury questions, which are for them to decide, of a witness' credibility; it is inappropriate for judges to intrude their own views of whether or not a witness is to be believed. This is consistent with the need in some cases, for example where there is identification or confession evidence, for special guidance to be given as to its reliability. The precise balance between law and fact in a judge's summing up will be a matter for the judge to decide in the light of the facts of each case. We are well aware that summing up is an extremely difficult task, often calling for the exercise of great skill and judgment.

Probably the most compelling discussion of the issue came in *R. v.*

Lorentz-Aflalo,[69] where Proulx J.A. invited the Supreme Court of Canada to revisit the ability of a trial judge to comment on the evidence. He stated:

> *Epilogue: Is it appropriate to continue to tolerate that the judge give his opinion on the facts?*
>
> This is the question at the end of this study that I now ask myself. Is it useful or necessary for a jury to have the judge presiding over the trial inform them of his opinion as to the facts? As we previously saw, the courts consider it unacceptable that a judge give his opinion as to the guilt of the accused. In order to avoid this situation, would it be appropriate to abolish the rule which presently allows a judge to give his opinion on the facts?
>
> Turgeon J.A. in *Post and Gelfand, supra*, posed, it seems to me, the problem in all its acuity when he said:
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> > When a judge has given his opinion as to the credibility of a witness and as to the credibility of an accused, the caution which he thereafter expresses to the effect that the jurors are not obliged to follow his opinion can never wipe out the effect that it has produced in their minds. *Why then give his opinion if the jury is not bound by what he said?*
>
> Turgeon J.A. was there inspired by the reflections of O'Halloran J. in *R. v. Pavlukoff* (1953), 106 C.C.C. 249, 17 C.R. 215, 10 W.W.R. 26 (B.C.C.A.), where he wrote in this regard, at p. 266:
>
> > With great deference and I hope with proper humility, in view of the eminence of some of the jurists who have given voice to *dicta* of apparently wide scope, I think it is appropriate to express a rationalized view that since the question of guilt is solely for the jury, a Judge under Canadian jurisprudence at least, who expresses his own

[69] (1994), 69 C.C.C. (3d) 230 (Que. C.A.).

> opinions to a jury is doing nothing else than attempting to usurp the functions of the jury; the more so if strong and stubborn preconceptions are freely ventilated in the hearing of the jury prior to the conclusion of the defence case.
>
> If guilt is solely for the jury, and the Judge in law so instructs them, what occasion can there be for the Judge to express his own opinions as to factual matters of guilt.
>
> It seems an absurdity for a Judge after telling the jury the facts are for them and not for him, then to volunteer his opinions of facts followed then or later by another caution to the jury that his own opinion cannot govern them and ought not to influence them. If his opinion ought not to govern or influence the jury then why give his opinion to the jury.

At p. 267:

> There is every reason why the Judge should confine himself strictly to his own responsibilities and leave the members of the jury alone to carry out their responsibility. There may be a tendency among some Judges perhaps to feel constantly nervous whether a jury will bring in the verdict they may think the jury should bring in. But the law does not give the Judge such a superior position.

At p. 268:

> It is by no means to be assumed that a Judge's view of the facts is more sound than that of a jury with whose verdict the presiding Judge may disagree. A jury is not apt to reason in the abstract as if all men were alike, and attempt to force life into a plaster cast of law.

What could have been the historical reason for authorizing a judge to give his opinion on the facts? Was it that it was feared that a jury was so stupid and ignorant that it could not discern truth from untruth? This is what Rivard J.A. noted in a decision of our

court where in conclusion to his observations on the comments of the judge in his charge, he wrote (*St-Pierre v. The Queen*, [1967] B.R. 695n):

> It is true that on several occasions in his summing up, the judge repeated to the jury that they were masters of the facts and they were entitled to have a different opinion than his own, but the whole of his charge meant the following to the jury: "You are entitled to not understand anything that I have told you, to act like complete imbeciles and to find the accused not guilty."

It has always appeared to me at the very least contradictory that on the one hand our system has confidence that a jury is capable of absorbing the most complex concepts of law in such a short time but that, on the other hand, it entertains doubts about it believing that a jury *alone* cannot decide what is a question of common sense (that is, the facts), by authorizing a judge to advance his own opinion.

Can one doubt for a single instant in our age, that a jury is not able to assess the credibility of witnesses and to decide on the facts the issue of a person's guilt or innocence?

.....

It would be appropriate to also note that in the majority of American states, a judge is not permitted to give his opinion on the facts. (William W. Schwarzer, "Communicating with juries: Problems and Remedies", Cal. L. R. (1981), p. 731; Wolchover, *ibid*, p. 784ff.)

.....

The constitutional right to a jury trial can only be given its true meaning if the verdict rendered is that of 12 jurors and not that of the judge and jury. In the continental law system, such as in France, for example, the judge deliberates with the jurors and even has a vote; our system is based on a clear division of roles; the judge is the umpire but also the professor of law or

> legal counsel and the exclusive responsibility for assessing the evidence and determining liability by the final verdict is for the jury.
>
> The reserve which is presently imposed on the judge to properly advise the jury that they are not bound by his opinion, has never appeared to me to be a sufficient guarantee. In this area, the issue is not whether the opinion of the judge influenced the jury, but rather whether, in the eyes of a reasonable person listening to the charge, it is probable that the jury was influenced.
>
> Some believe that this rule, at least in England, is linked to the very affirmation of an independent judiciary (McCardie, *The Law, The Advocate, and The Judge* (1927), pp. 25-6; P. Devlin, Trial by Jury (1956), pp. 118-20; quoted in *Due Process of Law* by Stanley Cohen, Carswell (1977), p. 339).
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> .....
>
> With all due respect, I am far from sure that the independence of the judiciary in Canada would be jeopardized if the Supreme Court of the country decided to abolish this rule which allows a judge to express his opinion on the facts. The natural respect that a jury entertains for the judiciary arises from other things than the expression of an opinion that a judge may have as to guilt or innocence.
>
> Conscience of the community, the citizen's ultimate protection against oppressive laws, role in legitimizing the criminal justice system (see report of the L.R.C., *ibid*., pp. 8-16), these are the major attributes of the jury which remains in our society a pillar of our democratic life. I consider that it would be to render it its full value not to attempt to invade what is its exclusive jurisdiction, that is, to decide on the facts in evidence. (Emphasis added.)

The jurisprudence has established limits to a trial judge's right to comment upon the evidence. Many appellate courts have also assessed whether the presentation of the facts, even in the absence of express opinions communicated by the trial judge, lacked balance and prevented a fair trial. It

was alleged on behalf of Guy Paul Morin in the Ontario Court of Appeal that Donnelly J. exceeded those limits established in the jurisprudence. The Court of Appeal never had to address that issue; without the benefit of full argument, I will not do so either. However, I can do no better than to say that I agree with Proulx J.A.'s comments in their entirety.

Recommendation 82: Cautioning the jury that evidence may be coloured by criminal charges or other external influences.

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

Recommendation 83: Treatment of the person charged in court.

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

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

These recommendations were suggested by AIDWYC. It submitted that the way in which the system treats an accused person can be very important, especially in jury trials. The environment in which accused persons are tried must reflect that he or she really is innocent until proven guilty beyond a reasonable doubt.

The Morins joined in the recommendation that persons charged with an offence should not be referred to as 'the accused' but, rather, by their name. They argued that use of the term 'the accused' is derogatory and designed to depersonalize the defendant from the rest of society; to create a 'him' and an 'us.'

Messrs. Sherriff, Durno and Ms. Welch could think of no reason why an accused person cannot be referred to by his or her name by the Crown and the Court during a trial. Ms. MacLean stated that if the term 'accused' carries a pejorative connotation, defendants should be referred to by name. Mr. Gover accepted that steps should be taken to ensure that an accused person is not depersonalized in criminal proceedings, but doubted that juries forget that the person on trial is a real live human being. Mr. Morin felt strongly that use of the term 'accused' was degrading and depersonalizing:

> I mean, when I spend hundreds and hundreds of hours listening to myself, and be - - and named, not Guy Paul Morin, not Mr. Morin, but "the accused", I mean the accused within the body of the court is present. Just reading my transcripts over the weekend from the first trial to the second trial, accused is present. I mean, without doubt, I mean, that was my role. I mean, it might be what I consider dehumanizing, it just is - - like degrading?
>
> It doesn't put you at par with your typical attenders that come to the court proceedings. You are in a class of your own. And to know that you're categorized as "the accused", it depersonalizes the - - obviously it did for me, the notion that I was really an entity of good. It's as though the accused is bad, no matter what. That's how I felt the perception was.

Professor Doob was not aware of any research which has shown that calling a defendant 'the accused' has been a factor in wrongful convictions. He was aware of a study, however, which showed that people become less punitive towards young offenders when they were referred to by their names.

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

The Morins suggest that the Crown Law Office - Criminal should always consent to the admission of fresh evidence that an in-custody informer has recanted and to an appeal from conviction being allowed, absent exceptional circumstances, even where the informer has since recanted his recantation. Though this specific recommendation was not put to Paul Lindsay, Deputy Director of the Crown Law Office - Criminal, it seems clear to me, based on his testimony at this Inquiry, that he would contend that no

such inflexible rule should restrict prosecutorial discretion. He explained that, in considering fresh evidence applications, his office applies the test set out by the Supreme Court of Canada in *Palmer and Palmer v. The Queen*.[70] It is his view that Crown counsel play an important role in putting the other side of any argument to the Court of Appeal, which can decide the appeal in its wisdom with the benefit of all possible arguments on the point. He sees much more scope for the exercise of an adversarial role (which is not to be seen pejoratively) than does counsel for the Morins.

I was impressed with Mr. Lindsay's integrity and professionalism; he was most articulate in describing the role of Crown counsel before the Court of Appeal. I believe that he, and counsel in his office, perform their duties with distinction. I also accept that Crown counsel will, on occasion, consent to defence appeals. I agree that the suggestion put forward by the Morins is overly restrictive and unnecessarily circumscribes prosecutorial discretion. However, in my view, there is some scope for the greater exercise of prosecutorial discretion to address fresh evidence in a less adversarial way.

The *Morin* appeal provides an example. The evidence accumulated post-conviction demonstrated that May was an unrehabilitated liar, whose recantations and recantations of recantations demonstrated his complete unreliability. There was no suggestion that Mr. Morin had influenced him in any way; everything May did and said after the conviction seemed to be a product of his own character flaws. Appellate Crown counsel did not challenge May's parents who described his recantations and their own son's unreliability.

Mr. Cook testified on the fresh evidence application as well. The prosecutors were advised that he was well regarded in his field, fair and objective, and indeed, the author of the study which was used to full effect by the prosecution in its closing address at trial. He unequivocally indicated that his study was misused by the Centre of Forensic Sciences and by the prosecution. He explained why. No serious challenge could be mounted to his testimony. In my view, it was obvious that his criticisms of the use of the Jackson and Cook study were well-founded. Indeed, all of the experts before me accepted his thesis that his study did not advance the prosecution case and was misused by the prosecution. While I am unable to conclude that Mr.

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[70] (1979), 50 C.C.C. (2d) 193 (S.C.C.).

Crocker told appellate counsel or Ms. MacLean that Mr. Cook was correct, he certainly did not advise them that Cook was incorrect (with the exception of Cook's conclusion that the fibre comparisons should not even have been attempted).

The case against Guy Paul Morin was far from overwhelming — we now know why. May and X constituted the only direct evidence against him. The hair and fibre evidence was regarded as the strongest evidence against him. That evidence was weakened by Mr. Cook's evidence. Mr. Morin had been acquitted by a jury once before. The appeal was of sufficient strength that a convicted first degree murderer was released on bail pending the hearing of the appeal.

Despite the honest reflections of appellate counsel that they have the discretion to do so (and have done so in other cases), I believe that consent to the admission of fresh evidence would likely only be given in the context of a murder case of this duration and profile in the most extraordinary circumstances (for instance, when DNA evidence exonerates the accused). I understand that the exercise of such discretion should not be lightly undertaken. As an appellate judge for many years, I am not insensitive to the weighty precedent for the Crown honestly and fairly articulating its opposition to the appeal and allowing the Court to decide. However, I am firmly of the view that the Ministry should rethink the scope of prosecutorial discretion on appeal so as to demonstrate less reticence in the exercise of such discretion in the future. It might well be that recognition of a broader scope for prosecutorial discretion would produce a different result on the same facts as presented in *Morin*.

No doubt, the Morins would contend that appellate Crown counsel are unlikely to exercise their discretion any differently than they presently do, absent mandatory directives. If the appellate prosecutors who appeared before me are representative of the Crown Law Office, I do not agree.

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

The Morins also suggest that the Crown, as Respondent, should

generally not argue lack of due diligence in responding to a fresh evidence application, should be obligated to consult experts independent of the institution where their trial experts were employed, should disclose the opinions of the independent experts, and generally consent to the appeal where that opinion accords with the fresh evidence, unless the Director of Crown Operations is satisfied that the evidence would likely have had no impact on the result. In my view, the better approach is to reinforce and institutionally support the exercise of prosecutorial discretion with respect to these matters.

Recommendation 85: Crown discretion where significant concerns as to the appellant's innocence.

A similar issue arises in connection with the prosecutorial discretion to consent to a conviction appeal (in the absence of proposed fresh evidence) where the trial evidence raises a significant concern in the minds of appellate Crown counsel as to the innocence of the accused. Mr. Gover thought that the Crown Law Office would be open to the notion that suspicious verdicts should be set aside on consent of the Crown. He endorsed the idea of institutionalizing the practice. I concur.

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

Recommendation 86: Fresh evidence powers of the Court of Appeal.

Apart from the exercise of prosecutorial discretion, it was suggested by some parties at this Inquiry that the powers of the Court of Appeal should be expanded to more readily admit fresh evidence tendered by the accused/appellant on appeal, and to allow conviction appeals where the Court has a significant concern as to the appellant's innocence. I now address these issues.

The approach to fresh evidence tendered on a conviction appeal was

articulated by McIntyre J. in *Palmer and Palmer v. The Queen:*[71]

> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

This analysis raises some difficulty where recantations are involved. A witness tendered by the prosecution at trial may subsequently recant. The recantation is tendered as proposed fresh evidence on appeal. The problem with its admissibility on appeal is not any lack of due diligence. The problem is that the recantation may be false and the original testimony true. Where the witness is an unsavoury one, it may also be suggested that the recantation is motivated by ulterior purposes. The witness may now favour the accused or, indeed, be influenced by him or her. The witness may no longer feel the need to assist the authorities, as any benefits have already been conferred. These and other considerations may cause the appellate court to conclude that the recantation is not reasonably capable of belief.

In *R. v. Big Eagle*,[72] the Saskatchewan Court of Appeal dealt with a recantation by an unsavoury witness. The Court stated, in part:

> The Crown has demonstrated that the circumstances leading up to his recantation do not satisfy the "credibility" test. We are in general agreement with the following submissions in the

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[71] (1979), 50 C.C.C. (2d) 193 (S.C.C.).

[72] Unreported, December 11, 1997.

Crown's written argument:

> 6. At this point the Appellant has to establish that the evidence given by Alain Germain to this Court is reasonably capable of belief. In our submission, he cannot meet this standard.
>
> Mr. Germain has told so many stories and flip flopped back and forth so often he can no longer be considered credible.
>
> .....
>
> In between, those two statements he has testified twice in courts, once at the Appellant's preliminary and once at this trial, and both times gave the same evidence implicating the Appellant. After the trial he gave an interview to Leslie Perreaux, a reporter with the Star Phoenix newspaper, in which he claimed he witnessed nothing at all and that he had lied in court. A transcribed copy of that interview was filed with the court. At the hearing of this application he testified that he had lied at trial, the preliminary hearing and to the police. During his testimony as well, he indicated he told several friends he lied. He also stated he told the Respondent's counsel on appeal, that he had told the truth at trial.
>
> 8. At this point, we submit the Appellant has very little if any credibility left and it would be impossible for this court to find his current statement to be in anyway credible. To the extent it is necessary to consider which series of statements reflect the truth, it should be noted that when Mr. Germain made his original statement, <u>he</u> called the police to make this report, they did not call on him. While he noted that he was in the area where the shooting took place and was worried about being suspected of the crime, there was no indication that the police ever considered him to be a suspect. To the extent that he had any such concerns, they arose entirely out of

> his own imagination.
>
> In this case it is only necessary to have regard for the third and fourth requirements of the "*Palmer"* test. Although we have found that the "fresh" evidence does not meet the third requirement, we also find that the fourth test has not been satisfied. When weighed against the entire evidence, this fresh evidence is not of such significance that it might reasonably have affected the verdict. Its exclusion would not result in a miscarriage of justice in the circumstances of this case.
>
> The crucial and compelling evidence linking the Appellant with this murder came from sources other than Mr. Germain — it came from his two close female associates. His friend and relative Tracy Big Eagle placed him at the scene of the robbery with his close male associate Ken Bronicki and gave detailed testimony about his subsequent confession to her. His common-law spouse Gina Big Eagle testified with respect to a "confession" on a separate occasion. It is a fair inference that the jury must have accepted this inculpatory testimony and disbelieved the appellant's denial of any inculpatory statements or participation in the attempted robbery. As well his friend, Beatrice Brittain testified as to his activities with Ken Bronicki. There was also testimony from an independent witness that the appellant and Ken Bronicki checked out the Tempo Service Station as a potential robbery site.

The Morins contend that *Eagle* illustrates the problem. Undue emphasis is placed upon the credibility of the recantation itself rather than upon the effect it inevitably must have upon any jury's ability to safely rely upon the witness' original testimony.

The Court reflects, as it was entitled to do, that there was a compelling case against *Eagle*, quite apart from the evidence of Mr. Germain. If the fact that Germain has since recanted could not reasonably be expected to have affected the result, then any appeal against conviction should have been dismissed. However, I am not sure that this is a completely accurate interpretation of the *Eagle* decision. It is well arguable that the Court accepted the Crown submission that Germain had changed his story so often, the recantation could have no credibility; having no credibility, the recantation was unlikely to have affected the verdict. The focus should not be placed only

on the believability of the recantation, but also upon the believability of Germain's original testimony, given the recantation. If the fact that Germain recanted, in the circumstances under which he recanted, could reasonably be expected to have affected the result, a new trial should be ordered whether or not the Court finds the recantation itself believable.

The *Morin* case provides an important illustration. May recanted after the trial. The recantation contained some allegations which were patently incredible. No one could find the recantations credible. Indeed, May recanted his own recantations. However, the inference which could be drawn from all of this is that May is an incorrigible liar, upon whom no reliance should be placed. In my respectful view, this evidence should have been admitted on his appeal (as it may well have been) and would have compelled a new trial. It would have been error to conclude that because the recantation itself was not credible, it should not have been received as fresh evidence.

I appreciate the judicial concern that verdicts not be too easily susceptible to attack based upon, for example, inducements offered to unsavoury witnesses to change their positions. The circumstances under which the witness recants (including any evidence of contact with the accused or inducements) may permit the Court to conclude not only that the recantation is incredible, but that the fact that the recantation occurred does not reflect back upon the reliability of the original testimony. Otherwise, a new trial may be compelled, unless the other evidence against the accused is overwhelming. Ultimately, the answer to the concern that recantations from unsavoury witnesses may too easily result in new trials is this: the Crown chose to call these kinds of witnesses and, with respect, must live with the consequences. The fact that such a witness' motivation has changed since trial may explain why he is no longer prepared to maintain the truth. However, it may also explain why, absent any self-interest, he is no longer prepared to maintain a lie. One theme, developed in this Report, is that one may never know which it is when dealing with jailhouse informants or others of similar ilk.

The application to tender Roger Cook's testimony as fresh evidence on appeal, earlier referred to, highlights a second systemic issue concerning the admission of fresh evidence on appeal: it relates to the 'lack of due diligence' requirement.

In *R. v. C. (R.)*,[73] the Court of Appeal for Ontario reflected upon the difficulty in applying this test. Carthy J.A. said this:

> The difficulty in applying the test literally is that in *McMartin, supra*, it was held that if point 4 is satisfied, lack of due diligence under point 1 should not stand in the way of the introduction of the evidence. This effectively makes point 1 redundant except perhaps as a balancing feature where there is uncertainty as to whether the evidence may be expected to have affected the trial.
>
> We would not suggest that lack of due diligence can override accomplishing a just result, but at the same time we would not like to see the requirements of due diligence watered down. The answer to the apparent conundrum may only be found in the totality of circumstances and a balancing of factors respecting the ends of justice.

The Crown, as respondent, would have had a compelling argument that Mr. Cook's evidence could have been obtained through the exercise of due diligence.[74] Notwithstanding judicial recognition that the 'due diligence' condition can be relieved against, the Morins suggest that there be a further relaxation (or even abolition) of the 'due diligence' requirement, to better prevent miscarriages of justice. The fact that inadequate representation has been shown to contribute to some miscarriages of justice (such as in the Donald Marshall case) heightens the concern that the 'due diligence' test could prevent important evidence from ever coming to light in a criminal case. The contrary position suggests that the present rule works well. Any further relaxation of the rule would cause an inordinate number of cases to be re-tried in the appellate courts. It could also be argued that the absence of any "due diligence" requirement would more easily permit counsel to reverse tactical decisions made at trial.

I favour a change to the present rule, which continues to address the

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[73] (1989), 47 C.C.C. (3d) 84.

[74] I understand that Mr. Morin would have contended, *inter alia*, that the study's real misuse only arose during the Crown's closing address. It is unnecessary for me to assess the merits of that or of the Crown's position.

concerns which motivate the 'due diligence' requirement.

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

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

Professor Martin's views were similar to this recommendation:

> [T]he very limited and strict rule for the admissibility of fresh evidence should, in my view, be reconsidered. We have a real game theory operating in the adversarial system that can be very troubling, and indeed, have not very much to do with truth or justice. So if you have a bad lawyer who gave you bad advice, and a piece of fairly relevant evidence, should have been known to that bad lawyer who is giving you bad advice. The current rule is that unless it's the smoking gun, you can't later on raise it.
>
> There's a legitimate concern that somebody is going to manipulatively get, to use the vernacular, two bites at the apple. I would like to see that legitimate concern addressed directly, so that if there is an issue of fraud or manipulation of the process, then the fresh evidence is inadmissible. That is a legitimate reason to say: Sorry, you're playing games. It is not, however, serving justice to make that determination in the absence of fraud or manipulation.

Recommendation 87: Powers of a court of appeal to entertain 'lurking doubt.'

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

The Court of Appeal's powers in addressing an appeal against conviction are set out in section 686 of the *Criminal Code*. Section 686(1)(a)(i) enables the Court to set aside a conviction where it is "unreasonable or cannot be supported by the evidence."[75]

It has been suggested, most particularly by the Morins, that appellate powers be expanded to permit the Court to set aside convictions where it has a 'lurking doubt' as to the guilt of the accused. This suggestion was resisted, most particularly by the Ontario Crown Attorneys' Association.

A consideration of this issue must start with a brief discussion of section 686(1)(a)(i), as interpreted by our courts.

In *R. v. Tat and Long*,[76] Doherty J.A. said this:

> Section 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that this court review a trial record to determine whether a conviction "is unreasonable or cannot be supported by the evidence". The section recognizes that there will be cases where despite an error-free trial and the existence of some evidence against an accused, appellate intervention is necessary to avoid an injustice. As Sopinka J. said in *R. v. Burke*, 105 C.C.C. (3d) 205 at p.216, s. 686(1)(a)(i) is:
>
> > intended as an additional and salutary safeguard against the conviction of the innocent.

[75] Section 686(1)(a)(iii) also enables the Court to set aside the conviction where it is of the opinion that, on any ground, there was a miscarriage of justice.

[76] (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

> The review directed by s. 686(1)(a)(i) is a limited one for very good reasons. The appellate process is not well suited to the assessment of the cogency of evidence led at trial. Appellate courts can claim no particular expertise in the secondhand evaluation of evidence. Appellate assessment of the factual merits of a case is not likely to be more reliable or accurate than the judgement made at first instance. Consequently, it is only in the clearest cases where the result at trial can be said to be unreasonable that appellate intervention is warranted. A verdict is unreasonable only where the appellate court is satisfied that the verdict is one that a properly instructed trier of fact acting judicially could not have reasonably have rendered: (authorities cited are omitted).
>
> While recognizing the limited review permitted under s. 686(1)(a)(i), convictions based on eyewitness identification evidence are particularly well suited to review under the section. This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review processes to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness: (authorities cited are omitted).
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> .....
>
> I have emphasized that the reasonableness review conducted under s. 686(1)(a)(i) is most effective when reviewing the reliability of eyewitness identification. Review under that provision is not, however, limited exclusively to questions of the reliability of evidence. The entire trial record must be considered and, to a limited degree, the credibility of witnesses must be assessed. In *R. v. Burke, supra* at 212, Sopinka J. said:
>
> > Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.
> >
> > I acknowledge that this is a power which an

appellate court will exercise sparingly.[77]

Appellate courts in Canada (and elsewhere) have wrestled with the distinctions between a verdict which is unreasonable and cannot be supported by the evidence, a verdict which is 'unsafe' and a verdict which leaves the appellate court with a 'lurking doubt.' The debate centres upon the appropriate scope of appellate review of guilty verdicts.

In *R. v. Malcolm,*[78] the Ontario Court of Appeal quashed a conviction registered by a trial judge on the basis that it was unreasonable and could not be supported by the evidence. Finlayson J.A. stated:

> The cases I have referred to emphasize the limitations in appellate jurisdiction, but are not that helpful in providing guidance as to when the jurisdiction should be exercised. I find some comfort in English decisions which point out that in the final analysis, the reaction of the court as to when an injustice has been done is a subjective one. While the language of the English Court of Appeal's empowering statute is different than our *Code*, the court asks itself what amounts to the same question: Is the verdict safe or unsatisfactory? I think that as appellate judges we will be expected to ask ourselves a similar question notwithstanding the absence of reversible error on the part of the trial judge.
>
> .....

Finlayson J.A. cites the English Court of Appeal in *R. v. Cooper,*[79] where Widgery J. said this:

> [W]e are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. *That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are*

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[77] See also, *R. v. Quercia* (1993), 60 C.C.C. (3d) 380 (Ont. C.A.).

[78] (1993), 81 C.C.C. (3d) 196 (Ont. C.A.).

[79] (1968), 53 Cr. App. R. 82.

> *content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.* (Emphasis added.)

After citing the English cases which track the language in *Cooper*, Finlayson J.A. states:

> I have found no reference to *R. v. Cooper* in any reported cases in Canada, but certainly the concept of an "unsafe verdict" has been accepted by this court and has been applied both in jury cases and in cases tried by a judge alone.

Finlayson J.A. ultimately concludes:

> I have considered the transcript of all the evidence and have read and reread the reasons of the trial judge. I am not satisfied that the verdict of guilty with respect to the armed robbery offences is a safe verdict. In addition to my expressed concerns about the quality of the identification evidence and the failure on the part of the Crown to make proper disclosure of Edwards' statement to the police, I am concerned that the appellant's undoubted guilt on the obstruction of justice and concealed weapon charges, coupled with his own evidence as to his life-style as a drug dealer, may have tainted him in the eyes of the trial judge to the extent, that he became a candidate for a crime he may not have committed. Giving the matter my fullest consideration, I think the verdict respecting the robbery counts should be set aside on the ground that under all the circumstances of the case it is unreasonable and cannot be supported by the evidence.

In *R. v. Guyatt*,[80] the British Columbia Court of Appeal framed the debate in this way:

> The function of this Court in considering an appeal which comes to it under s. 686(1)(a)(i) is

[80] (1997), 119 C.C.C. (3d) 304.

prescribed by the test set out by the Supreme Court of Canada in *Yebes, supra*. The concept of "unsafeness" is subsumed in the *Yebes* test. In *R. v. Irani* (27 September 1996), ... [reported 132 W.A.C. 203], this court concluded that the test in Canada as prescribed by the *Criminal Code* remains the test as set out in *Yebes*. In *Irani* Madam Justice Newbury said this in response to a similar argument (pp. 40-42) [at p. 227 W.A.C.]:

> Mr. Peck also sought to persuade us that as a result of the Supreme Court of Canada's recent decision in *R. v. Burke* (citation omitted), the discretion of appellate courts to set aside convictions under s. 686 (1)(a) has been broadened, perhaps as wide (he says) as to include a general ground of "unsafeness". (The word "unsafe" appears at p. 212 of the judgement of Sopinka, J. for the court in *Burke*). Here I infer that Mr. Peck takes the word "unsafe" to mean something more subtle or subjective than "unreasonable" — that is, to describe the situation where the appellate court is left with a "lurking doubt" as to the correctness of the conviction but cannot say no jury could reasonably have convicted. (The phrase "lurking doubt" is of course that of Widgery, L.J. in the seminal English case of *R. v. Cooper (Sean)*, (1969) 1 Q. B. 267 (Eng. C.A.))
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> Mr. Peck also notes *R. v. Malcolm* (1993), 63 O.A.C. 188; 13 O.R. (3d) 165 (C.A.), where Finlayson J.A. for the Ontario Court of Appeal said he took "some comfort in English decisions which point out that in final analysis, the reaction of the [appellate] court as to whether an injustice has been done is a subjective one" (at 174). His analysis equated the discretion to overturn a conviction under s. 686(1)(a)(i) of the *Code* with the discretion given to the English courts of criminal appeal to set aside a conviction as "unsafe", notwithstanding the differences in wording between s. 686 and the comparable English legislation. The latter permits an appellate court to overturn where

> the verdict of a jury is found "in all circumstances to be unsafe or unsatisfactory."
>
> With respect, I am also unable to accept this argument. It is now beyond doubt that the test to be applied in Canada in an appeal under s. 686(1)(a) is whether a properly instructed jury could reasonably have convicted — not whether the appellate court, without having seen any of the witnesses, would itself have convicted based on the evidence it has read. The more stringent or objective test was repeated by the court in *Burke* and is consistent with its formulation in many earlier cases, including *R. v. Yebes*, [1987] 2 S.C.R. 168, 78 N.R. 351; 36 C.C.C. (3d) 417; 59 C.R. (3d) 108; 17 B.C.L.R. (2d) 1; [1987] 6 W.W.R. 97; 43 D.L.R. (4th) 424, *R. v. Burns (R.H.)*, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 29 C.R. (4th) 113; 89 C.C.C. (3d) 193, and *R. v. Corbett*, [1975] 2 S.C.R. 275; I N.R. 258; 14 C.C.C. (2d) 385. Thus while the word "unsafe" appeared in *Burke*, the absence of any indication that the court intended to move away from these authorities must in my view mean that the court was equating the term with "unreasonable" for purposes of s. 686.

That is the test we must apply in this case. Accordingly, I would dismiss the ground of appeal based on s. 686 (1)(a)(i).

.....

But counsel urged this court to consider an Australian case. *M. v. The Queen* (1984), 181 C.L.R. 487 (H.C. of A.) and the decision of the Ontario Court of Appeal in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, which he said lent support to his submissions.

In *M. v. The Queen*, *supra*, the Australian High Court dealt with an appeal under s. 6(1) of the *New South Wales Criminal Appeal Act* (1912) which provided that the appeal of court could set aside a conviction if the court was:

> of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgement of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice.

The section further provided that the court could dismiss the appeal if it considered that no substantial miscarriage of justice had actually occurred.

Mason C.J., for the majority, said this (at pp. 492-93):

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe", or "dangerous or unsafe". In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s. 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand". *But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be "unreasonable" or incapable of being "supported having regard to the evidence". A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside* ....
>
> [A]s the Court observed in *Davies and Cody v. the King*, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there is a miscarriage of

justice covers:

> not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For *it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand* because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or *because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.* [My Emphasis.]

In other words, the appellant says, the verdict may be set aside where there exists "lurking doubt".

Brennan J., dissenting, said this (at pp. 502-4):

> A broader function for an appellate court has been suggested, namely, to determine whether "there is some feature of the evidence which raises a substantial possibility that the jury may have been mistaken or misled". In *Carr v. The Queen* I attempted to explain that that proposition, which owes it origin to a phrase in the judgement of the Court in *Davies and Cody v. The King*, cannot authorize the setting aside of a verdict as unsafe and unsatisfactory when the verdict is supported by evidence on which a jury, acting reasonably, could have convicted and when there is no blemish in the conduct of the trial.
>
> .....

The difference between the two opinions in *M. v. The Queen* seems to turn on the degree of deference that the members of the court were willing to pay to the collective, unanimous decision of the jury. The Canadian approach recognizes the very different

> positions occupied by the trier of fact and the Court of Appeal. In my view the judgement of Brennan J., which mirrors the Canadian experience, is correct.

The same debate was renewed before me. The Ontario Crown Attorneys' Association said this:

> The O.C.A.A. submits that there is no demonstrated deficiency in the jurisdiction of the Court of Appeal to review unreasonable verdicts of guilt. The suggestion that the jurisdiction of the Court of Appeal should be expanded to permit acquittals based on "lurking doubt" suffers from imprecision and a lack of recognition of the essential role of non-verbal testimonial factors. Appellate courts glean their impression of a case based solely from the printed words of a transcript, devoid of the non-verbal testimonial factors which are vital to the determination of historical truth. Indeed, the significance of non-verbal testimonial factors is universally accepted. No party to this Commission has indicated what the substantive content is to the notion of "lurking doubt". The O.C.A.A. strongly recommends that this Commission reject any recommendation to alter the jurisdiction of the Court of Appeal. This is something which is better left to Parliament, after a full and complete review through the various committees in the House of Commons and the Senate.

The contrary view was expressed on behalf of the Morins in the following terms:

> [Section 686(1)(a)(i)] has been interpreted narrowly by the Supreme Court of Canada. As a general rule, the test applied has been whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. In a rare case, an appellate court can look to issues of credibility where the assessment of credibility at trial is not supported by the evidence.
>
> The Ontario Court of Appeal has demonstrated a willingness to go beyond a strict interpretation of s. 686(1)(a)(i) in some cases, especially in identification cases such as *Quercia*. In *Malcolm*, Finlayson J.A. approved the English cases which permit the quashing

of a conviction in a case in which there is a lurking doubt. He applied the same principle and quashed Malcolm's conviction. Counsel for the Morins know of only one other case in which the lurking doubt concept has been referred to (and applied), the unreported case of *C*, a decision of Dubin C.J.O. in the Ontario Court of Appeal.

The fact remains that appellate courts are reluctant to broaden their powers to include the power to quash a conviction solely on the grounds that there is a lurking doubt as to its validity. If Morin's appeal had proceeded and if one leaves aside fresh evidence issues, the evidence of May or Mr. X would presumably have been sufficient in itself to take the Crown over the unreasonable verdict threshold. Appellate courts view themselves as courts of process, not courts to decide on issues of factual guilt or factual innocence. Radelet made the same point with respect to appellate courts in the United States:

> Right now, with some minor exceptions, the appellate courts do not deal with factual guilt/innocence claims. They only deal with procedural issues, so [it's] felt that that should be expanded so that they would have power, at least in some cases, to re-examine guilt/innocence."

There seems to be no reason to suppose that a factually guilty person is more or less likely to have received due process than a factually innocent person. Hence, the chances are not high that a factually innocent person will more likely win his appeal than a factually guilty person. The questionnaire presented by Professor Doob on Defence Counsel Views of Wrongful Convictions' adds credibility to this analysis. Only 20.9% of the cases reckoned to be wrongful convictions by the respondents were quashed in the Court of Appeal.

This limited power of appellate review is, not surprisingly, a particular concern of AIDWYC. It is a concern shared by Guy Paul Morin who has often said that one Guy Paul Morin is enough'. Alastair Logan quoted the Justice Committee Report in his testimony. Justice recommended in 1989:

> "The powers of the Court of Appeal, Criminal Division should be reformed to enable it to quash a conviction where it has doubts about its correctness."
>
> A system of justice that places so much faith in the trial process is inviting wrongful convictions. The appellate process must be broadened to increase its ability to overturn cases in which serious doubts remain despite a conviction at trial.
>
> The Crown Law Office can play an important role in remedying wrongful convictions. If the Crown Law Office, after consultation with the trial Crown and a review of the written record, were to consent to appeals in which a lurking doubt remains, the administration of justice would be well served. The response of the Attorney General of Ontario's Panel to this proposal suggested an unnecessarily adversarial approach to appeal work. Involvement in the appeal process, a far more academic environment than the trial process, should enable Crown counsel to be more impartial and less adversarial. It is appreciated that the Crown's consent to an appeal may not necessarily result in the Court of Appeal quashing the conviction. However, the Court will always give due regard to a Crown request that the Court quash a conviction. [Citations omitted.]

A similar conflict appeared in the evidence of the systemic witnesses who appeared before the Commission. Mr. Butt and Ms. Venner adopted the position articulated by the Ontario Crown Attorneys' Association. Ms. Venner added that appellate courts should be more than simply uncomfortable with a verdict before they should be able to overturn it.

Mr. Baig and Mr. Durno believed that the standard for overturning a conviction should be relaxed. Mr. Baig said this:

> I think there are cases where you look at a transcript -- and I'm not talking about getting into credibility issues, but you look at a transcript and say: How could there ever be a conviction? And it goes beyond the current standard to say that, well, a verdict is sustainable. In my guts, that's not enough. Certainly, I would like to see in these cases, and again, I'm not

> talking about the appellant and Crown in all of these cases taking the position: Well, I'm going to play judge and jury. I think there are cases where ... look at it and just say: This isn't right.

Mr. Gover's opinion was as follows:

> Q. Do you think, sir, a lurking doubt notion ... might be a good extension to the court of appeal powers of review if we are to prevent as many wrongful convictions as possible?
>
> A. [O]bviously, it would help prevent wrongful convictions. Your question is whether it would be good to have appellate courts empowered to overturn convictions on that basis, and I suppose it would be. It would be a question of how we go about doing that.
>
> .....
>
> [I]f the appellate courts of this country are to be given a broader jurisdiction in relation to factual issues, there has to be a way of enabling appellate courts to deal with the evidence that would inevitably be involved in issues of that type.

This is a difficult issue. I appreciate that appellate courts are reluctant to usurp the triers of fact, who are said to be better situated to assess a criminal case, particularly one which spins on credibility. I have expressed this reluctance myself. Of course, there is some merit to this position. However, I am also of the view that an appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of any assessment of credibility is the internal consistency of a witness' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this — sometimes indirectly — through their determination of whether there was legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly

what some judges now do indirectly. It recognizes the most important, though not the exclusive, function of a criminal appellate court: to ensure that no person is convicted of a crime he or she did not commit.

<u>Recommendation 88</u>: Crown appeal against acquittal.

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

The law with respect to Crown appeals against acquittal was set out in *Morin v. The Queen*:[81]

> The onus resting on the Crown when it appeals an acquittal was settled in *Vezeau v. the Queen* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277 (S.C.C.). It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.
>
> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.

The Supreme Court of Canada held in *Morgentaler, Smoling and Scott v. The Queen*[82] that the Crown's right to appeal acquittals on any ground of law alone was not unconstitutional.

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[81] (1988), 44 C.C.C. (3d) 193 at 221 (S.C.C.).

[82] (1988), 37 C.C.C. (3d) 449 (S.C.C.).

I accept that Crown appeals are not lightly undertaken against jury verdicts of acquittal in Ontario. Statistics provided by Mr. Lindsay show that between 1986 and 1997, only 34 appeals were taken from such verdicts.[83] I cannot speak to the situation in other jurisdictions.

In my view, there are some circumstances where it is appropriate that the Crown have available a limited right to appeal against a verdict of acquittal. An erroneous ruling as to admissibility which completely undermines the case available to the prosecution may be one example. The more difficult issue arises where an acquittal is sought to be overturned based exclusively upon alleged misdirection by the trial judge. Several arguments are advanced in this regard. First, there is little support in common law jurisdictions other than Canada for such a right. Second, cases in which a jury acquits are those where the likelihood is greater than any others that an innocent person may be wrongly charged. Third, there is a fundamental unfairness, analogous to 'double jeopardy,' in exposing an accused, acquitted after trial by judge and jury, to further jeopardy. Fourth, the retrial and conviction of a person previously acquitted by a jury undermines public confidence in the administration of criminal justice. Guy Paul Morin's case is said to provide the obvious example. Underlying these submissions is the suggestion that juries' verdicts of acquittal may often be unrelated to alleged misdirection in any event.

In my view, the matter deserves further attention and study. Despite the characterization by the courts of the Crown's onus as a "heavy one", the Crown need only demonstrate, to a reasonable degree of certainty, that the verdict of acquittal *may* have been different. It is my respectful view that the use of the term "may" substantially dilutes the onus upon the Crown, despite the words "to a reasonable degree of certainty". The formulation reflected in my recommendation addresses this issue.

<u>Recommendation 89</u>: Police culture and management style.

Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused.

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[83] A substantially greater number of appeals (391) were taken from acquittals entered by trial judges sitting without a jury during the same period.

Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.

Professor Ericson suggested that one feature of police culture is a presumption of guilt, and that this feature is instilled in the general instruction and training of officers. Mr. McCloskey believed that police culture rewards the clearance of cases, and officers are under pressure to clear cases quickly. Mr. Hadgkiss testified that police officers are under enormous pressure to solve crimes in order to please their supervisors, politicians and the media. Mr. Logan argued that changing police culture is one of the most important conditions for preventing future miscarriages of justice.

Mr. Hadgkiss suggested that if values of integrity, commitment, excellence, accountability, fairness, and trust are strictly imposed and imbued in the culture, other desirable reforms will follow. However, codes of ethics, or values, must be meaningful in the sense that everyone has ownership in the code. The values must be practiced and encouraged at every opportunity. All training courses offered by the Australian Federal Police include a segment involving integrity and multicultural awareness.

Mr. Hadgkiss believed that an appropriate culture will allow officers to admit that they have pursued the wrong suspect:

> [I]n a hypothetical scenario that you portray of an investigator, a dogged investigator six months down the track realizing that he or she has the wrong suspect. Financial implications would weight heavily, that they would feel as though they'd let their hierarchy down, that their self-esteem would be at stake, that they would have to admit that they just made the wrong decision.
>
> But obviously, if the culture is right, and notwithstanding the amount of money that's been expended on a false trail, every effort's got to be made for investigators, because the cost would be far greater when their mistake is uncovered, which invariably, it will be. Even the most experienced investigators will come unstuck if they cling to that kind of — that culture or misconduct.
>
> .....

> [I]f the culture is right, and this kind of conduct is not condoned, management cannot be in a position to turn a blind eye to investigators going horribly wrong.

In Mr. Hadgkiss' experience, management has tended to leave matters of misconduct to internal affairs. His service is trying to make management more accountable for the actions of its members.

The Durham Regional Police Service has seemingly taken some steps towards the creation of an ethical culture within its organization. A 'change team' has been assembled to develop a stated mission for the force, and a set of values by which it should be guided. In addition, early training in ethics is provided to all officers in order to guide their future conduct. Sergeant Van Dyke believed that there is no longer any code of silence within the force which protects unscrupulous officers.

Recommendation 90: Case management system.

Some of the major elements of the case management system have been outlined above. Dr. Young and Inspector Mercier highly approved of the system. It was also supported in the submissions of both the York Regional Police Services Board and the Durham Regional Police Service Board. In my view, such a system makes eminent sense and should be implemented as soon as possible. Durham also made some more specific recommendations, which I also adopt.

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

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

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

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

<u>Recommendation 91</u>: Minimum standards for police.

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

In Chapter IV, I outlined the request from the York Regional Police Association for minimum and mandatory training standards for police. The Association argued that the only way to ensure adequate and up-to-date training is to create mandatory provincial standards. It was also suggested that mandatory training standards ensure that resources, financial and otherwise, are dedicated to such training.

The call for minimum and ongoing training standards was echoed by some of the witnesses before the Commission. Dr. Young, for instance, believed that minimum training standards were both necessary and beneficial, leading to efficiencies in investigation and better evidence.

Mr. Lawrence testified that training for police officers across the province is inconsistent and not standardized except in a few discrete areas, such as use of force. In my view, this situation is unenviable. Efforts should be made to ensure a minimum level of competence for all police officers. The Minister should consider the viability of setting training standards with respect to a more comprehensive range of subject-matters. If such standards are considered viable, specific funds should be earmarked for the necessary training.

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

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

Mr. Lawrence testified that policing in Ontario is mostly governed by non-mandatory guidelines. There are very few mandatory standards, although some are being developed to deal with five "core" functions: crime prevention, law enforcement, assistance to victims of crime, public order

maintenance and emergency response. These standards will be issued under the *Police Services Act*.

The Marshall Inquiry recommended that uniform guidelines for investigative work be developed.[84] Counsel for Detective Fitzpatrick suggested that a Policing Manual should be promulgated, containing mandatory prescribed standards, practices and protocols for policing. He made a number of helpful suggestions as to the content of such a Manual, which I note here:

Schedule A

This is intended to be a list of issues that should minimally be addressed in the recommended Policing Manual for Ontario.

A) RECRUITMENT, TRAINING, EDUCATION:

1. O.P.C. and other agencies be properly funded in order to provided adequate basic, intermediate and advanced training for officers in Ontario;

2. That local services (boards) be required to fund attendance at O.P.C. or other training facilities in accordance with standards of education and training prescribed;

3. That specialized training be mandatory before participating in major investigations (e.g. homicide, child abduction, sexual assault, missing persons, major case management).

B) CONDUCT OF INVESTIGATIONS:

1. a) Availability of exceptional investigative tactics (e.g. polygraph, profiling, surveillance, intercept authorizations, search warrants, DNA and General warrants);

   b) Criteria for resort to these measures;

2. Interview Techniques/Tactics:

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[84] Recommendation 71.

a) Special Classes of Witnesses:

Victims and families of victims, children and youthful witnesses, suspects, accused persons;

b) Recording of Interviews:

i) Criteria for use of audio or video tape;

ii) Appropriateness of covert recording;

iii) Exchange of information between interviewer and interviewee;

iv) Need to have a complete and accurate record for disclosure purposes;

3. Assessment of Evidence:

a) Reliability of expert opinions;

b) Reliability of witnesses;

c) Need to ensure evidence is free of contamination to ensure accurate forensic examinations;

d) Need to confirm where possible the evidence/accounts of informers, suspects, accused persons or those who have an interest in the case;

e) Need to limit the effect of bias;

f) Criteria for determination of existence of Reasonable Grounds (charge) or Reasonable and Probable Grounds (warrants, etc.);

C) <u>OFFICERS PROFESSIONAL RESPONSIBILITIES</u>:

1. Need to ensure a professional and effective relationship with:

i) Crown Attorneys and other counsel;

ii) Other investigative agencies;

iii) Forensic specialists;

iv) Witness and victims;

v) Judiciary.

2. Need to ensure confidentiality of information obtained during an investigation;

3. Need to be informed on matters of law and procedure and local rules and regulations;

4. Need to properly document/record all investigations undertaken and results obtained.

D) MAJOR CASE MANAGEMENT:

1. Need to create an effective internal organization so that investigative and reporting responsibilities are clearly defined;

2. Need to maintain an appropriate records management system;

3. Need to ensure effective sharing of investigation product between officers;

4. Need for affective (sic) coordination of police services in multi-jurisdictional investigations;

5. Proper preparation of a Crown brief and the importance of full disclosure to the Crown;

6. Need for defined criteria for identifying and investigating suspects.

E) INFORMANTS:

1. Need to recognize the inherent risks in resorting to informants;

2. Need to have a local confidential registry of informants with access limited to assigned

personnel, and Ministry oversight of use of informants province-wide;

3. Need to fully record all contacts with informants including all dealings regarding benefits sought, offered or provided directly or indirectly;

4. Need to confirm as far as possible the accounts provided by informants and to record all efforts in that regard.

I am not sufficiently familiar with the standards of conduct which are, will be, or could be, in place for governing policing in Ontario to endorse specific content, or a specific format, for such standards. I do recommend, however, that the standards be revisited in light of the issues raised at this Inquiry, and that appropriate amendments be made.

Recommendation 92: Structure of police investigation.

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

Recommendation 93: Body site searches.

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

a) a grid search;
b) preservation of the scene against inclement weather;
c) adequate lighting;
d) coordinated search parties, with documented search areas;
e) a search plan and search coordinator;
e) full documentation of items found and retained, together with precise location and continuity;
f) adequate videotaping and photographing of scene;
g) adequate indexing of exhibits and photographs;
h) adequate facilities and methods for transportation of the remains;
i) decontamination suits in some instances;

j) resources to avoid cross-contamination of different sites. This may require that different officers collect evidence at different sites, where a forensic connection between the sites may be investigated.

I am satisfied that Durham Regional Police are now mindful of the appropriate conduct of a body site search.

<u>Recommendation 94</u>: Investigation of an alibi.

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

The Canadian Police College Manual instructs officers as follows with respect to the rebuttal of alibis:

> Identify potential alibi witnesses for all persons charged and proactively discredit their possible testimony well in advance of their court appearance. Your ability to immediately crush a misrepresentation in court will (or should) completely discredit the defense and the defense attorney while putting an end to many of the defense's shallow or illegitimate tactics.

Sergeant Van Dyke agreed that this was an unfortunate way of viewing potentially exculpatory evidence presented by the defence.

The Morins suggest that in serious cases arrangements should be made for officers who have not been involved in the investigation to investigate an alibi. Sergeant Van Dyke was asked to comment on this idea:

> SERGEANT VAN DYKE: Well, realistically, I don't think that's possible, because for most police services, and ours included, we just don't have that kind of personnel, that we can have all these teams running around. But the problem I see with that is that -- again, Chuck can verify this in the homicide unit. In order for them to interview the alibi witnesses, I think

> they have to have a pretty extensive background of the case and know the facts to be able to either substantiate or approve otherwise.
>
> Certainly, you know, the more independent you can be the better. And certainly that's a factor, but I don't think that that, in practical terms, would work.
>
> MR. LOCKYER: But most alibi pieces of evidence, when you think about it, sir, what you really need to know is a synopsis of the crime and its time. That's really all you need, isn't it, in the normal course of events?
>
> SERGEANT VAN DYKE: It depends. I think that there's a lot of variables there.
>
> MR. LOCKYER: Take that as an average circumstance.
>
> SERGEANT VAN DYKE: That was the average. I don't see any problem with doing that. I think that there's nothing wrong with having an unbiased opinion, and being more neutral than you can be, but I think my experience that any officers in homicide units or any officers investigating serious crimes are going to look objectively at it, hopefully. We've learned our lessons in the past, that if you develop tunnel vision, it's going to cause you problems. And I think that that message is fairly well articulated over the last few years, that we don't want to take those kinds of risk any more, and we're going to do our best to make sure that we have the right person.

<u>Recommendation 95</u>: Accountability for unsatisfactory police testimony.

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

Ms. Venner felt that the Crown attorneys are obliged to bring any

concerns over the reliability of police testimony to the attention of the force of which the witness officer is a member. That includes ensuring that transcripts are provided to the officer's superior.

I am confident that the senior prosecutors who testified during the systemic phase of the Inquiry would have no difficulty in fulfilling this obligation. In practice, it may be more difficult for some Crown counsel, particularly less senior counsel, to report unsatisfactory police testimony. The named Ministries and supervising prosecutors must provide the strongest institutional support for the exercise of this obligation by prosecutors.

Recommendation 96: Police videotaping of suspects.

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

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

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

it, if it is regarded as accurate.[85]

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

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

There was widespread support at the Inquiry for a policy of videotaping or audiotaping suspects (and witnesses generally). The York Regional Police Services Board suggested that "all interviews should be videotaped or audiotaped whenever possible. If recording is impracticable or timely, statements should be set out in a prescribed form signed by that person and the party taking the statement." The Durham Regional Police Service Board suggested that "whenever possible, interviews of important witnesses and suspects should be videotaped."

The judiciary has, at times, been vocal on the desirability of videotaping suspect interviews. In *R. v. Barrett*,[86] Carthy J.A. stated:

> Universal use of videotapes would obviously be of assistance to judges in weighing evidence and reaching a just conclusion, but beyond that, there is the potential to benefit the entire administration of justice.
>
> .....
>
> It is fair comment for a police officer who has secured a written confession to say, "he's as good as convicted". If the statement is admitted as voluntary the observation is probably accurate. On this determinative issue of conviction the police force has, by its own choice in his case, denied the court the opportunity of an undeniable record of what lead to the "conviction". Given the modest cost of videotape equipment, such critical evidence should not, in

[85] Of course, the recommended practice must also conform to the *Charter* s.10(b) and other legal requirements.

[86] (1993) 82 C.C.C. (3d) 266 (Ont. C.A.), rev'd on other grounds (1995) 96 C.C.C. (3d) 319

> fairness, be restricted to sworn recollection of two contesting individuals as to what occurred in stressful conditions months or years ago. The evidence is admissible under our present rules, but everyone involved in the criminal justice system should make reasonable efforts to better serve its ultimate ends.

At issue in *Barrett* was the voluntariness of an inculpatory statement. The accused alleged that he only signed the statement because, *inter alia*, he had been assaulted by the police. Arbour J.A. (Tarnopolsky J.A. concurring) said this:

> Both the sally-port and the booking area at 52 Division are equipped with a video camera which recorded the entire booking procedure. We have had the advantage of reviewing the videotape which, if not of great quality, particularly as to sound, proves immensely superior to the recollection of the witnesses, even of those who took notes, as an evidentiary tool. As should be apparent from the conflict of the evidence summarized above, a videotape of the events which occurred at the crucial time when the appellant is said to have made the incriminating statements now tendered against him, would have been dispositive of most of the issues raised in the *voir dire*. Not only was the useful practice of recording the booking procedures not extended to recording the interviews with the appellant, but the note-taking practices of the hold-up squad officers left much to be desired.
>
> .....
>
> As for the absence of a video and/or audio recording of the interview, I am not the first one to express concern in that regard. In *R. v. Lim* (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.), a case also involving the Toronto hold-up squad, Doherty J. who was then the trial judge said, at pp. 152-3:
>
> > ... I am left with a distinct impression that the statement-taking process used by the holdup squad and the members of the York Regional Police Department was designed to both minimize the active involvement of the accused and preclude resort to any independent source of information (apart

> from the accused's testimony, should he elect to testify on the *voir dire*) as to what went on in the statement-taking process. The police appear to have set the stage for a battle of credibility on the *voir dire* and excluded any independent source of information which could have supported one side or the other.
>
> The failure of the police, who were in total control of the interview process — and who, on their evidence, were dealing with a co-operative accused — to have to resort to devices which could have provided a video or audio record of the procedure suggests the reasonable inference that the police did not want an independent electronic record of that process, because that record would not have supported their oral evidence as to Mr. Lim's ability to understand and speak English. I draw that inference.

In *R. v. Tat and Long*,[87] Doherty J.A. had to inquire into the considerations that potentially weighed against the reliability of a prior out-of-court identification (since denied by the witness). He said this:

> I find no adequate substitute for the presence of the fact finder at the time the statement was made. Not only is there no videotape of the January 5th interview, there is virtually no record of what occurred. Q. and the police officers had very different versions of what occurred at crucial points during that meeting. Not only did they disagree as to whether Q. had maintained his identification of Long throughout the interview, but Q. also testified, at one stage in his cross-examination, that his momentary identification of Long had been the product of a very suggestive conduct by Constable Dobro. The dynamics and nuances of the interplay between Q. and the police during their conversation could not be reproduced at trial. There was no way of approximating, much less replicating, the circumstances under which the purported identification was made. Where prior statements involve alleged identification by means of a line-up, the absence of

[87] (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

> anything like a videotape which can reproduce the circumstances in which the statement was made are particularly significant in assessing the reliability of the out-of-court statement.

Mr. Durno, Mr. Baig and Ms. Welch all supported the idea of videotaping interviews with suspects. Ms. Welch, however, felt that it should not be a mandatory requirement because it may not always be possible to do (for example, the equipment may malfunction). Inspector Mercier also believed that an element of flexibility was required. Contacts with suspects may be spontaneous or involve a struggle, and it may not be possible to record the conversation.

Sergeant Van Dyke advised that pursuant to a 1987 policy directive, Durham officers are currently instructed to take videotaped statements from accused persons whenever circumstances permit. A training video was created by Durham Police to provide proper instruction on technique.

With the passage of the *Criminal Evidence Act, 1984*, it became mandatory in England for all interviews with suspects to be tape recorded. Police officers are not supposed to interview suspects other than on videotape. Police cannot stop a suspect from volunteering information away from a camera, but are required to later put to the suspect, on camera and after the suspect has had a chance to consult with a lawyer, any significant statement or silence which occurred off camera, and ask the suspect whether he or she confirms or denies it.

Mr. Logan testified that the requirement for tape recording interviews has significantly reduced the prevalence of one of the most common causes of wrongful convictions:

> Q. Mr. Logan, what did Justice [Runciman] find in this document on miscarriages of justice to be the most common causes of wrongful convictions?
>
> A. Police misconduct, usually verballing or planting incriminating evidence. Wrongful identification, false confessions, perjury by a co-accused or other witness, and bad trial tactics were the five grounds that they found.
>
> Q. Okay, well, let's start at the first in terms of

police misconduct. What do you mean by verballing? Some of us may not be familiar with the term.

A. It's an expression which has much less currency than it used to have. Verballing was the assertion by a police officer that a conversation took place between him and an accused person, which was never contemporaneously recorded, but which the officer later wrote up. And it was a frequent source of contest between defendants and police, because there was actually no way of regulating it. Judges used to say that it was the refuge of a scoundrel to accuse the police officer of having invented a verbal, but in fact, the proof of the pudding is this, because when the brought in the Police and Criminal Evidence Act of 1984, and it became operative, it became necessary for all interviews to be tape recorded.

So consequently, suspects taken into a police station would be tape recorded. The British have a wonderful way of going about the question of testing something new. What you do is, you don't test it on the English; you test it either on the Irish, the Scots, or the Welsh. The Police and Criminal Evidence Act was tested on the Scots. Until the intervention of the Police and Criminal Evidence Act, confessions formed a large part of the method of achieving convictions in Scotland, as they did in England, Wales, and Ireland.

However, with the introduction of the Police and Criminal Evidence Act, and the necessity for those confessions to take place whilst being tape recorded, we suddenly had 46 per cent of all confessions occurring either in the cell corridor leading from the interview room to the cell, or in the police car before arriving at the police station.

And that taught us that police officers were going to be very slow to change their ways, and regarded this opportunity to fix the evidence at an early stage, as one of their most jealously guarded possessions. What has happened in the aftermath of the introduction of the Act and the education of the police force is that verballing has now almost completely disappeared, whereas it was a major factor before the introduction of the Act, it has almost disappeared.

Mr. Hadgkiss testified that Australian Federal Police officers are required to videotape all formal interviews with suspects. The federal police headquarters in Melbourne has six to eight interview rooms equipped to specified standards. Mr. Hadgkiss was not aware of an instance when an interview room was not available, but in that event a police station with an available room would be found. At the very least, a tape recorder would be found.

Mr. Hadgkiss commented that it is rare that a technical malfunction would result in the unavailability of a video recording. By pressing one button the equipment simultaneously produces three videotapes: a working copy, a copy for the accused, and an original which is sealed and stored by the exhibits registrar. However, in the event of a technical problem, the interview would be repeated. Mr. Hadgkiss said that should an accused not repeat an earlier unrecorded admission, the courts would be most sceptical of the evidence and it would be "pretty unlikely that a court would admit verbal evidence of a police officer and his corroborator."

The video technology used by the Australian federal police will not permit the tape to be erased. In addition, a warning system alerts the investigator five minutes and one minute before the tape ends. When the tape is changed, or there is a break in the interview, an account of the interceding time is articulated once the tape restarts, and this is confirmed by the person interviewed. The time is continually displayed and recorded.

Videotapes are transferred to CD-Roms or DAT tapes for preservation. The original is stored in a property register at least until the conclusion of the trial and all avenues of appeal.

The Australian Federal Police have found that the practice of videotaping has increased the level of productivity. Not only is the system less cumbersome, but the admissibility of statements is no longer in issue and trials proceed without lengthy *voir dires*. Mr. Hadgkiss noted that videotaping works to protect the integrity of the officer.

Mr. Hadgkiss explained that because of the requirement that all formal interviews be videotaped, the Australian judiciary has come to expect the Federal Police, and increasingly the state police, to electronically record all conversations with accused persons, including conversations in police cars or the corridors of a police station. Defence counsel, too, challenge officers who

do not electronically record events. Juries may be instructed to consider the absence of a recording when assessing the credibility of the evidence.

In the event of an audiotape recorder malfunctioning, police officers are supposed to record any admission and the accused must sign the statement. The interview would be repeated upon arrival at the police station. In the event the admission was denied during the re-interview, the allegation that the accused had confessed would be looked upon by the courts with suspicion.

Inspector Mercier essentially supported the idea of police carrying hand-held tape recorders in order to address the issue of unrecorded verbal admissions. He believed it would probably help the police in more cases than it would not. He did foresee some logistical difficulties, however. There is a health and safety issue, with officers having to wear even more equipment on top of the twenty pounds they currently wear. The tapes may malfunction. Some officers take offence to the implied notion that their integrity is always open to question. Perhaps most importantly, resources would be required to purchase the tape recorders, control the tapes, and transcribe the recordings. Sergeant Van Dyke explained that the police do not have the necessary support staff; officers often have to transcribe recordings themselves.

Mr. Hadgkiss testified that the issue of cost has arisen in Australia as well. He acknowledged that the initial cost of equipping each police officer with a hand-held recorder is high, but believed that it is absolutely necessary to maintain the integrity of investigators. He noted that in a pilot project amongst highway patrol officers volunteering to use tape recorders, the number of complaints against them dropped dramatically.

It is clear to me that policies which mandate the videotaping of suspect interviews at police stations, subject to exigent circumstances, are long overdue. Further, the technology used by the Australian Federal Police should be evaluated for use here.

<u>Recommendation 97</u>: Exercise of trial judge's discretion.

A trial judge may wish to consider on an admissibility *voir dire* any failure to comply with any policy established pursuant to Recommendation 96 and may wish to instruct a jury (or himself or herself, as the case may be) as to the inference which may be drawn from

the failure of the police to comply with such a policy. In doing so, the trial judge (and, where applicable, the jury) should be entitled to consider the explanation, if any, for the failure to comply with the policy.

<u>Recommendation 98</u>: Police videotaping of designated witnesses.

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

As indicated above, the Durham Regional Police Service Board submitted that, whenever possible, interviews of important witnesses should be videotaped. Mr. Hadgkiss felt that all interviews with potentially contentious witnesses should be videotaped. Recent changes to the Crown policy on jailhouse informants have directed that the police be encouraged to take their statements on audiotape or videotape.

Mr. Culver believed that recording witness interviews would be beneficial, but noted that in the past there were some practical difficulties:

> I think both of us on both the defence Bar and the Crown all agree that videotaping and audio taping of witnesses is a good thing. It potentially can save time when it comes to trials to determine what exactly happened during the course of a police interview of either a witness or a suspect. The down side, both from the defence and the Crown perspective, has been that there's been a tendency with the police to basically just turn on the video or turn on the tape recorder and say: What happened?
>
> And I'm not faulting the police for that; I would say it's a human tendency. Before, if you had to take a statement and then make notes of it, you're going to sort of direct that witness along the lines of the information that you deem most relevant to what they're there for, whereas with the tape recorder, just

> turning it on and saying: What happened, we've noticed that certainly, witness statements have increased in length.
>
> And along with that, without the automatic production of transcripts which the police no longer do automatically, we often have situations where we get Crown briefs that are essentially a short synopsis, together with a package of video or audio tapes, and obviously, it's trite to say that most counsel, defence and Crowns, can review a written brief a lot quicker than you can sort of listening to and watching audio tapes that may go on for minutes, sometimes hours in length.
>
> So it has been a problem, and as yet, the resourcing of who's going to produce these transcripts, and when they are produced, and in what situations, hasn't totally been resolved in this province. So that we're still running into situations, as I indicated, where the Crown brief will be delivered, and it's a package of, in some cases, audio tapes. And obviously, that adds to the preparation time for Crowns, and it equally adds to the preparation time for defence counsel if they're faced with the same situation as part of the package of Crown disclosure.

Mr. Durno shared Mr. Culver's concern about the lack of transcripts. I consider this aspect of the issue in a later recommendation.

The Marshall Inquiry approved of the idea of videotaping police interviews with witnesses (and suspects):

> 75. We recommend that audio-visual recording of police interviews of chief suspects and witnesses in serious crimes such as murder, and of juveniles and other interviewees who may be easily influenced, be encouraged.

Mr. Briggs testified that audio-visual recording of interviews in Nova Scotia is increasingly being done by police, but it is not yet a universal practice. "I think it's done on a selective basis depending on the nature of the case and the nature of the evidence they're hoping to obtain and perhaps sensitivity around all of that."

It may be impracticable for every interview conducted with every witness to be videotaped or audiotaped. This recommendation, therefore, narrows the implementation of such a policy to significant witnesses in serious cases, where it is reasonably foreseeable that their testimony may be an issue at trial. Of course, nothing should prevent the videotaping of even uncontentious evidence, in the discretion of the investigating officers. Such a policy should also set parameters for 'significant' witnesses and for 'serious' cases.

Recommendation 99: Crown videotaping of interviews.

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

I have not adopted the suggestion made by several parties at the Inquiry that all interviews by Crown counsel should be videotaped or audiotaped. In my view, this is impracticable, unduly inhibits the conduct of criminal prosecutions, is unnecessary and cost inefficient. I have instead recommended that the feasibility of discretionary videotaping or audiotaping be examined.

The Criminal Lawyers' Association made a similar suggestion, namely, that a committee be struck to address when Crown counsel should record witness interviews and what facilities are required.

Mr. Culver testified that Crown interviews are not recorded at the present time, aside from having a police officer present to take notes. The Crown has considered video or audio recording witness interviews, but there are no plans to do so, partly because of budgetary factors. Mr. Culver believed that the volume of cases that are dealt with by the average Crown attorney does not make such taping of interviews very practical; at present witnesses are often not formally interviewed by Crown counsel prior to trial. In the more complicated cases, where witness preparation or interviews do

take place, Mr. Culver stated that "we certainly await what this Inquiry will have to say, but there are certain practical issues that will have to be looked at first."

Mr. Wintory rejected the idea of taping Crown interviews with witnesses. He thought it would pose a logistical nightmare because most Crown interviews with witnesses are rushed, over the phone, or in the hallways.

Mr. Kyle testified that Crown interviews with witnesses are not currently tape recorded in England, and he was not aware of any move to do so. Nor was he in favour of the idea: "You establish a better rapport with witnesses without a tape recorder. But, of course you have to make sure that you have an appropriate method of recording the interview that you have."

<u>Recommendation 100</u>: Creation of policies for police note taking and note keeping.

Police note taking and note keeping practices are often outdated for modern day policing. Officers may record notes in various notebooks, on loose leaf paper, on occurrence reports or supplementary occurrence reports or on a variety of other forms. The Ministry of the Solicitor General should take immediate steps to implement a province wide policy for police note taking and note keeping. Financial and other resources must be provided to ensure that officers are trained to comply with such policies. Minimum components of such a policy are articulated below:

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

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

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

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

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

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

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

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

In its written submissions, the York Regional Police Services Board urged the Ministry of the Solicitor General, in cooperation with police services, to establish province-wide guidelines and training on what should be included in a police officer's notebook. Mr. Lawrence testified that there are currently no provincially prescribed standards with respect to note-taking. There is a guideline, but it is not mandatory.

It is clear that the ways in which notes are taken and retained by police officers are diverse and problematic. Professor Ericson conducted a study in 1981 which showed notes were routinely treated haphazardly, sometimes not written up until days after an event. The note taking practices in the *Morin* investigation were, at times, appalling. Though practices may have improved since then (and since Ericson's study), the absence of mandated and enforced standards for note taking invites similar practices.

The evidence showed that the traditional police notebook is starting to fall out of use. Sergeant Van Dyke was a member of a committee which looked at police services across the country. The committee discovered that

few services in major crime investigations used the traditional notebook. Rather, they used laptop computers, steno pads and binders containing completed supplementary reports.

The Durham Criminal Investigations Unit discontinued use of the traditional notebook in 1997. It was replaced with a three ring binder in which officers keep copies of their reports, handwritten notes and other documentation. Reports are written contemporaneously and tendered at the end of the day to the records branch where they are reviewed and the dates confirmed. Corrections or additions can be made by filing a supplementary report. Once placed in the digital system, the information can be retrieved almost immediately and downloaded to a computer disk. Digital copies of supplementary reports are retained for at least 10 years. According to Van Dyke, the risk of loss is virtually nonexistent. His experience is that the system works very well. He could not comment on what steps could be taken to ensure that the computer-generated reports were not edited.

Sergeant Van Dyke testified that Durham's objective is to issue all patrol cars with a laptop computer by the year 2000:

> The days of handwriting out notes are slowly passing us by. We have to prepare for the future. Every other organization in the world uses computer technology to do their notes, and certainly policing is no different. I believe we have to use that, as well, and that it's only a matter of time before the old traditional methods are going to be behind us.

Mr. Hadgkiss described the experience and system of the Australian Federal Police:

> Q. All right. Now I want to ask you a little bit more about a couple of things. First of all, police notebooks, are they still kept in Australia, or are they being phased out? The individual police officers?
>
> A. Police notebooks are still issued to police officers, and I only talk for the federal police. But again, we have been criticised of late by the Bench about our method of keeping notes, particularly the contemporaneous nature. What police have had a tendency to do, and more so with their surveillance people, is when working as a team, they have made

individual notes. At the conclusion of their shifts, there has been what they call a scrum-down or whatever. They get together ---

Q. A scrum-down, okay.

A. It's a quaint rugby term.

Q. It's also a media term, a media scrum, around here.

A. Well, the police would return to their office, they would hand over to the next surveillance shift, or group of investigators, out they would go. They would then sit around a computerised terminal. They would then all input into what has taken place during the day, that the suspect left home at a certain time, they followed him to here, they followed him to there, and each would participate.

There would be then a running sheet compiled, the times he'd turn into Smith Street, went in the bank, and which officers saw him down the margin. But unfortunately, there has been a practice come in where police then will sign off on that, even though it's made the same day and as soon as practicable, but unfortunately, their original notes, be they on the back of candy paper or bits of paper that they've used during the day, or tape recordings, have then been destroyed, because they say that is then the composite recollection.

And we've been criticized because the original notes, the contemporaneous notes or tape recordings made at the time were destroyed. And what we've tried to change now is: No, you must keep the original notes because they're of a contemporaneous nature. And you can still produce the composite document which shows the day's activities, but you must explain how that document came into existence. And it derived from a collection of notes of maybe eight officers.

But there is a requirement that they keep them, and we have moved to, instead of the old-fashioned English system of small police notebooks which get dog-eared, and the ink runs, or have been noted to be destroyed and rewritten, and there's allegations of such, we are

> moving to where investigators will have a decent book, it is hard-covered, and that they will keep their activities on there.
>
> And we insist that senior officers check those books regularly as to their neatness, as to the factual content, and they sign a record to that effect. It's part of my duty. I have a staff officer who submits his diary quite regularly, every two weeks, and I go through, even though he had basically an administrative function. But I record that I have checked, so then that protects him if, in due course, he has to appear before a court, that's he's keeping contemporaneous notes, or he's keeping a diary.

<u>Recommendation 101</u>: Police protocols for interviewing to enhance reliability.

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

<u>Recommendation 102</u>: Training respecting interviewing protocols.

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

I have found that interviewing techniques in the *Morin* investigation could have a direct impact on the content of witnesses' testimony. Professor Martin spoke to this issue in systemic terms:

> Influence on witnesses occurs either directly in the sense of attempting to make witnesses change their testimony, or very frequently, indirectly, in the sense that the very certain and very persuasive police officer keeps questioning a witness until the witness provides the answer that the officer's been seeking. And there's a considerable amount of very good literature on how

> common that is in witnesses in police investigations. It's a very human trait; you want to please the person who's helping you, and I would venture a guess that in some instances, at least, maybe many, the police officers are not fully aware of what they're doing.

Mr. Lawrence testified that there was not much training regarding interviewing protocols in the early 1980s. In the late 1980s, however, investigative interviewing was identified by the Ontario Police College as one of six key investigative skills. As a consequence, in early 1990s, the amount of training in the area was expanded from a half-day to almost four days.

Sergeant Van Dyke explained that since 1994, the Durham police have been teaching the 'cognitive interview technique' to officers in all areas of investigative training. All uniformed supervisors in the Service were trained in the technique in 1995. The technique is used primarily for interviewing witnesses, rather than accused persons.

Sergeant Van Dyke prepared a brief explanation of this technique for the Commission:

> In the early 1985 a revolutionary interview technique was developed by Edward Geiselman and Ronald Fisher of the University of California which is referred to as the Cognitive Interview Technique. Their process represented a collection of memory-jogging techniques designed to provide investigators with an organized series of step by step procedures that help victims and witnesses retrieve and elaborate on information stored in memory. It is designed to enhance recall, is easy to learn and maximizes the quantity and quality of information while minimizing the effects of misleading or inaccurate information. Studies show that this technique can produce as much as 45% more accurate information. The process includes reconstructing the circumstances, reporting everything, recalling events in a different order and changing perspectives.

Van Dyke elaborated on this in his testimony before me:

> Basically, it takes people back to the scene, it sort of puts them in other people's footsteps so that they can view the scene from a more objective perspective. And

> basically, it gets away from the standard way we've done interviews in the past, which is interrupting people on a consistent basis, and perhaps giving them information that they shouldn't have ahead of time.

One aspect of the technique is the 'pure version statement,' whereby the witness answers open-ended questions without interruption. A verbatim statement (including 'ums' and 'ahs') is recorded. Clarification questions can be asked at the end. The purpose is to obtain the best information which can later be analyzed using statement analysis techniques.

Sergeant Van Dyke added that the cognitive interview technique has been adopted by the Ontario Police College and the Canadian Police College. Both offer interviewing courses and statement analysis courses. He indicated that the forensic interviewing course offered at the Canadian Police College is considered one of the best in the country. A number of Durham officers have been trained in that course.

It is obvious to me that Durham has moved in the right direction. The York Regional Police Association suggests that their police officers are not receiving this kind of training. They should be, as should all police services.

<u>Recommendation 103</u>: Prevention of contamination of witnesses through information conveyed.

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

Inspector Mercier was alive to the possibility that witnesses may be contaminated by the police (or others). He explained that this is why Durham's technique of asking open ended questions without interruption is important. It is also why it is important to ensure that witnesses are isolated and do not discuss their evidence with anyone prior to being interviewed. Mercier was specifically asked about confronting witnesses with inconsistent evidence:

> MR. SIMS: Is it improper to confront a witness and to point out that their statements and their evidence is inconsistent with another person's, a witness, and ask them to attempt to reconcile the differences?

> INSPECTOR MERCIER: With witnesses themselves, it's their version, and that's what's important. If they're inconsistent there may be questions to clarify, so we have an understanding of what -- how could they have misunderstood something? And they're clarification-type questions. They're never confronted with regards to: You're absolutely wrong, or: This can't be, in that method. We allow them to give their statement, it's recorded, and it's documented and disclosed.

Sergeant Van Dyke testified that the Durham Regional Police Service has developed a local practice when dealing with victims or families of victims in major crimes not to disclose information received in the course of the investigation. These persons are advised at the outset that this information will be kept within the police investigative team 'in order to protect the investigation in the court process,' but that they will be updated as to arrests and what happens in court. I support this practice.

<u>Recommendation 104</u>: Prevention of contamination of witnesses through commentary on case or accused.

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

Mr. McCloskey referred to the case of Dumosa Vega as an example of the dangers which exist when police advise witnesses of the strength of the evidence (real or imagined) against an accused:

> Now we have a case where Dumosa Vega did nine years for a murder in Momant County in New Jersey and one of the main witnesses against him was the victim's sister who came in and told the jury that Mr. Vega was having an affair with the victim, her sister, and that her sister, the victim, told her that two days before her death that she was going to break off the affair with Mr. Vega, but she was afraid of him and what his reaction might be.
>
> Well, that was very damning testimony, and it went

> unrebutted. But what the police did to obtain that testimony, is they went to the victim's family and said, look, we got this best friend confession -- Vega, the defendant's best friend's confession to him that Vega did this.
>
> Q. Right.
>
> A. We got an eyewitness, but we need motivation. And then they lie to the family ... they lie to the family. They said the semen found in your daughter's vaginal wall was Mr. Vega's. Well, that was false because the vaginal swab was lost immediately. They also lied to the victim's family to try and get them to cooperate, [to] become part of the project to convict, by saying that the belt found around the daughter's neck was Dumosa Vega's belt. It wasn't — it was her common-law husband's belt.
>
> And so now the ends justify the means. The sister comes in and gives this false testimony. And by the way, at the evidentiary hearing, we brought — the victim's sister came in and admitted that she lied.

Mr. McCloskey suggested that a victim's family is particularly vulnerable to being contaminated by the police: "[T]hey're convinced that the police have the right person and now it just becomes a matter of trying to help the police out." The connection to the Morin proceedings is obvious.

<u>Recommendation 105</u>: Interviewing youthful witnesses.

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

Several youthful witnesses gave evidence against Donald Marshall. The Marshall Inquiry found that statements from these witnesses were obtained by the police through tactics that were "reprehensible." Intimidation tactics were employed, parents were excluded from interviews, witnesses were held until late into the night, etc. The Inquiry expressed great concern over these events, and made a recommendation similar to the one set out above:

> 74. We recommend that in cases where suspects and/or witnesses are juveniles or mentally unstable investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during interviews.

Mr. Culver testified that the Toronto Crown Attorney's office has a specialized unit to deal with child abuse cases because it has found that dealing with child witnesses requires specialized training and expertise.

Recommendation 106: Crown education respecting interviewing practices.

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

Ms. Narozniak stated that education on proper interviewing techniques has been "referred to" in Crown training programs; Crown attorneys have been made aware of studies on what sort of techniques enhance or detract from reliability. Mr. Griffiths testified that interviewing techniques for vulnerable individuals is part of Crown education on sexual assault, child abuse and domestic assault cases. Mr. Culver said that his office sends Assistant Crown Attorneys to a training session, organized by several social agencies, on how to interview young children.

Recommendation 107: Conduct of Crown interviews.

Earlier in this Chapter, I have noted the dilemma facing Crown attorneys when preparing witnesses for trial. On the one hand, counsel should not be suggestive, and should not try to dovetail the evidence of a number of witnesses to make a perfect whole. On the other hand, counsel may understandably wish, in fairness to a witness and with a view to ascertaining the true facts, to advise the witness of conflicting evidence in order to invite comment and reflection.

I have previously suggested guidelines respecting the conduct of interviews. I reiterate them here.

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

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

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

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

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

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

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

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

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

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

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

<u>Recommendation 108</u>: Treatment of 'late-breaking evidence.'

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

Mr. Culver had this to say on the issue of 'late-breaking evidence':

> [A]nyone that's done a major high-profile case, you always almost deal with that. And I think you have to look at what the evidence is and assess why it's late-breaking. There may be a perfectly valid explanation. For example, someone didn't realize the significance of the evidence until the trial started, and until the reporting was in the media.
>
> But generally speaking, it depends on what the evidence is, and I think the particular test there should be to look at, why is it late breaking? Why didn't it come to light, why didn't the police obtain that evidence earlier, or why didn't the person come forward with that evidence? Was it simply something about the trial process itself that triggered it? It's not necessarily unreliable or necessarily reliable.

The York Region Police Services Board accepted the notions that 'late-breaking' evidence should be considered with caution and that all efforts should be made to independently verify its accuracy.

<u>Recommendation 109</u>: Review of completed investigations.

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

This recommendation was raised by the Durham Regional Police Service Board. The Board suggested that the review should focus on how the case management system might be improved in future investigations. It should

not focus on the substantive elements of the investigation, but rather on the process.

The Runciman Commission made this recommendation:

> 25. Reviews of certain selected major investigations should be conducted by Her Majesty's Inspectorate of Constabulary assisted by officers from another force.

It also recommended:

> 27. Following major investigations, there should be a full debriefing involving all the parties so that future investigations can benefit from the experience gained.

Mr. Logan testified that the former recommendation emanated from concerns over the investigation into the Yorkshire Ripper murders. Evidence which could have prevented the deaths of three or four young women was in the hands of the police, but was not "capable of being surfaced to enable them to focus on the correct suspect." Similar concerns have arisen at this Inquiry.

Mr. Briggs testified that a type of investigation review was, unsuccessfully, conducted in the Donald Marshall case. After Mr. Marshall was convicted, an individual named Jimmy MacNeil came forward and said that Roy Ebsary had committed the murder. A police inspector did a 'paper review' as a result of this, and ultimately concluded that MacNeil was fantasizing. MacNeil's statement was not disclosed to the defence on appeal. The Marshall Inquiry considered the investigation conducted by the inspector to be grossly negligent. Mr. Briggs testified that the lesson from this is that one must always be asking questions, re-evaluating and double checking. *One must challenge the presumption that the first investigation did it right.*

Mr. Hadgkiss also testified that a key aspect of the case management system in Australia is a quality assurance review process. This review process is premised on the concern that after a period of time, dedicated investigators may 'lose sight of the forest for the trees' and their objectivity may be impaired by a sense of determination. In major cases where large amounts of resources are being expended, independent experienced officers are brought in to assist by conducting an audit. These officers report their findings to a

management team which must address shortcomings in the investigation. A copy of the report is provided to the investigators who are asked to reply.

I cannot say whether the approach described by Mr. Hadgkiss commends itself to the case management system in Ontario or to major investigations in Ontario generally. It is an idea worthy of consideration.

Recommendation 110: Limitations upon criminal profiling.

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

Inspector Mercier testified that both the Ontario Provincial Police and the Royal Canadian Mounted Police have criminal profilers. They are trained by the FBI.

Mr. Hadgkiss was not in favour of criminal profiling. It can wrongly focus investigators: "As soon as you start stereotyping your suspect or whatever, I feel your whole investigation is very much constrained." In his opinion, the reliability of this kind of methodology is as good as clairvoyance. Inspector Mercier felt differently. He believed that each case has to be examined individually. He stated:

> [Y]ou always have the possibility that your perpetrator's not a part of that 93 per cent percentile [included within the profile], and you always have to ensure that you don't have tunnel vision on a profile, though you may use it to some degree to help you maybe eliminate a suspect, or maybe identify a suspect, or aid your investigators down certain avenues that you may wish to proceed down.

The Durham Regional Police Service suggested that the risks inherent in profiling be included in both the basic and advanced investigators' courses. I support this proposal.

Recommendation 111: The public dissemination of a purported profile.

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

In its written submissions, the Durham Region Police Service Board accepted that "profiles should not be referred to or publicly disseminated through the media in a way that could sway the public or poison the public's attitude against an accused."

Recommendation 112: The recording of facts provided to a profiler.

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

Recommendation 113: Polygraph tests.

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

I have found that undue reliance was placed upon the polygraph in the *Morin* investigation.

Inaccurate polygraph results have also had an effect on at least one other wrongful conviction. After Donald Marshall was convicted of the murder of Sandy Seale, a man named Jimmy MacNeil came forward with evidence that Roy Ebsary had actually committed the crime. Mr. Ebsary

denied his guilt. Both were given polygraph tests. The results were inconclusive for Mr. MacNeil, but indicated that Mr. Ebsary was telling the truth. After Mr. Marshall's exoneration, Mr. Ebsary was convicted of the murder.

Mr. Hadgkiss felt that the disadvantages of polygraph testing far outweigh the advantages as a result of the ability of the subject to manipulate the test. Based on the (admittedly limited) evidence before me, I certainly appreciate his concerns. Other witnesses, however, felt that polygraphs can be useful as investigatory aids. Inspector Mercier testified that the polygraph is an investigative tool which can be used to direct an investigative team. Sergeant Van Dyke testified that, although there are lots of detrimental things about polygraphs, they have withstood the test of time, and are one of the few tools available to assist in the determination of truth. He agreed, however, with the following conclusion of the Royal Commission into Metropolitan Toronto Police Practices:

> The polygraph test — which in my view is neither scientifically valid, nor accurate, and which is not a physiological test but rather a dubious psychological test, should not be used in the criminal law process for other than investigative purposes.

The Durham Police Operations Directive on polygraphs stipulates:

> The polygraph (lie detector) is an investigative aid not to be used as a bargaining tool. Its main purpose is to determine the accuracy of responses to given questions. The results may assist the investigator and lead to the discovery of admissible evidence.
>
> An examination may be conducted at any time during the course of the investigation; however, it is generally not used until the latter stages when traditional investigative methods have been exhausted and evidence obtained casts doubt on the credibility of the involved party ...
>
> In situations where polygraph tests are to be used to eliminate suspects, the investigator will initially attempt to eliminate as many individuals as possible.

The Durham Regional Police Services Board suggested that the risks

inherent in polygraphs be included in both the basic and advanced investigators' courses. I agree. Undue reliance on polygraphs can misdirect the course of an investigation, either away from the guilty party or towards an innocent one. If they are going to be used in criminal investigations, the police must be trained as to their limitations. Officers must be taught to use polygraphs as nothing more than an investigative *aid*.

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

Most of the documentation relating to the polygraph examinations of Messrs. May and X was destroyed by Sergeant Van Dyke one year after the examinations were conducted. Van Dyke testified that the documents were destroyed pursuant to a police by-law which mandated destruction after one year if no charges were laid in relation to the polygraph and the documents were of no evidentiary value. This policy was a product of the problems encountered in storing the bulky documentation produced during a polygraph examination. Sergeant Van Dyke explained that this problem no longer exists, since all polygraphs are now done on computer, and all documents are now retained by the police (unless they have no apparent relevance to anything).

Sergeant Van Dyke had no difficulty with the suggestion that polygraph documentation should be kept until all relevant court proceedings are completed:

> Q. [I]f the Commissioner, down the road, were to recommend for police forces conducting polygraph examinations that all of the documentation generated be preserved in the very least until the court case is completed, and any appellate proceedings exhausted, do you see any impediment to proceeding that way, any problems with that?
>
> A. Not today. Twelve years ago, perhaps, but not today.

Recommendation 114: Creation of a committee on outstanding disclosure issues.

The Martin Committee significantly changed the practices for pre-screening and disclosure in criminal cases in Ontario and elsewhere in Canada. The Committee's report, together with the decision of the Supreme Court of Canada in *R. v. Stinchcombe*, continue to provide a blueprint for disclosure in criminal cases in Ontario. Notwithstanding this important guidance, there continue to be many cases in Ontario where disclosure issues delay the commencement of trials, result in adjournments, in stays of proceedings, and in mistrials. Some of this is the inevitable application of rules to individual cases. But other instances would appear to result from some uneven practices, serious logistics difficulties between Crown and police and the form of the disclosure itself — untranscribed tape recordings, unreadable notes, etc. Some arise from continuing, difficult issues as to the line of demarcation between disclosure, which is required, and prosecutorial investigation for the defence, which is not. As well, other recommendations in this Report have disclosure implications which are unclear. Mandatory audiotaping or videotaping of interviews raise important and difficult issues as to the form of disclosure. Resource issues are also raised. Access to personal files of jailhouse informants raise other important issues. The right to an 'open box' was the subject of conflicting evidence at this Inquiry.

It is time for a Committee of stakeholders in the administration of criminal justice, Crown counsel, defence counsel, the judiciary, and the police, similarly constituted as the Martin Committee, to revisit outstanding issues of disclosure, with a view to greater efficiency and uniformity of practice, and with a view to resolving outstanding disclosure issues identified at this Inquiry.

AIDWYC made a number of recommendations with respect to the issue of disclosure:

> **Recommendation 11**
> That the Attorney General of Ontario, alone or in concert with the Solicitor General of Ontario and the federal government, establish policies, institutions and procedures:
>
> (a) to establish a policy of "open box" disclosure'
> (b) to educate the Crown and the police regarding the importance of providing full disclosure to the

accused;
(c) to render enforceable the right of an accused person to full disclosure; and
(d) to make those who fail to discharge the duty to disclose accountable for their actions.

Recommendation 12
That, in accordance with the recommendation of the Marshall Commission, the Attorney General of Ontario urge the federal government to implement amendments to the Criminal Code of Canada as follows:

"1. A justice shall not proceed with a criminal prosecution unless the justice is satisfied:

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against the accused in that prosecution; and
(b) that the accused has been advised of the accused's right to disclosure and understands that right.

2. The accused is entitled, before being called upon to elect the mode of trial or to plead to the charge or charges against the accused, to receive full and timely disclosure of all information in the possession of the Crown which is potentially relevant to the accused's guilt or innocence.

3. The accused person's entitlement to disclosure of all information in the possession of the Crown which is potentially relevant to the accused's guilt or innocence is a continuing one, and the prosecutor has a continuing obligation to provide disclosure to the accused person as it comes into the possession of the prosecutor, until such time as the accused person is acquitted, or a stay of proceedings is entered on the charges faced by the accused."

Recommendation 13
That, in accordance with the recommendation of the Marshall Commission, the Attorney General of Ontario establish a policy stating that no relevant information may be withheld from the accused without

the prior written approval of a Deputy Attorney General, a copy of which written approval shall be disclosed to the accused.

.....

Recommendation 15
That the Attorney General of Ontario urge the federal government to implement amendments to s. 139 of the Criminal Code of Canada (Obstructing Justice) as follows:

> "139. (4) Every one who, having the duty to disclose information to an accused person, wilfully withholds information which he or she knows to be potentially relevant to the accused person's ability to make full answer and defence is guilty of
>
> > (a) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
> > (b) an offence punishable on summary conviction."

Recommendation 16
That an amendment be implemented to the Crown Attorney's Act as follows:

> "1. Every Crown Attorney who, having the duty to disclose information to an accused person, wilfully withholds information which he or she knows to be potentially relevant to the accused person's ability to make full answer and defence is guilty of an offence punishable on summary conviction."

Recommendation 17
That, in accordance with the recommendation of the Martin Committee, s. 1(c)(viii) of the Code of Offences, a Schedule to Regulation 791 under the Police Services Act, R.S.O. 1990, c. P-15, be amended to read as follows:

> "1. Any chief of police, other police officer or constable commits an offence against discipline if he is guilty of
>
> (c) NEGLECT OF DUTY, that is to say, if he,

> ...where a charge is laid fails to disclose to the officer in charge of the prosecution or the prosecutor any information that he or any person within his knowledge can give for or against any prisoner or defendant."

Recommendation 18

That the Rules of Professional Conduct of the Law Society of Upper Canada be amended so as to make a disciplinary offence the wilful or negligent failure on the part of a lawyer to disclose relevant information to an accused person, where that lawyer has a duty to disclose such information.

Recommendation 19

That, in accordance with the recommendation of the Martin Committee, the Solicitor General of Ontario co-ordinate with federal authorities, and that both issue such directives as are necessary to require all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's directives on disclosure in their relations with Crown prosecutors. These directives should make clear that:

(a) the police and other investigators are bound to exercise reasonable skill and diligence in discovering all potentially relevant information, even though such information may be favourable to the accused;

(b) the police and other investigators are under a duty to report to the officer in charge or to Crown counsel all potentially relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel may discharge the duty to make full disclosure;

(c) the provision of full and timely disclosure to the accused operates to the benefit of all parties involved in the administration of criminal justice, including the police, by among other things decreasing the number of requests for disclosure, increasing the number of early resolutions of criminal cases, and decreasing the necessity of involving police in later stages of the process (e.g. as witnesses);

(d) a failure to disclose all potentially relevant

information as required is a disciplinary offence.

Recommendation 20
That the Attorney General of Ontario issue such directives as are necessary to require all Crown Attorneys operating within the province of Ontario to be aware of and comply with the Attorney General's directives on disclosure. These directives should make clear that a failure to disclose all potentially relevant information as required is a disciplinary offence.

Recommendation 21
That the Attorney General of Ontario establish a policy stating that where a Crown Attorney is aware of the existence, in the possession of third parties, of evidence potentially relevant to the accused person's ability to make full answer and defence, that Crown Attorney must disclose the existence and location of the information to the accused person.

I prefer that some of these issues be explored by a Committee similarly constituted as the Martin Committee.

It is clear that the decision in *Stinchcombe* and the expanded obligation on the Crown to provide full disclosure has had a tremendous impact on the criminal justice system. Mr. Culver spoke of the fact that courts often have to deal with pre-trial motions relating to alleged non-disclosure, and that a great deal of time is taken up litigating the issue. Messrs. Mitchell and Culver both noted that the expense of providing full disclosure has had a tremendous impact on the Crown's budget.

Disclosure is obviously a critical issue in the our system of justice. It is also related to the issue of miscarriages of justice. Several witnesses pointed to the fact that disclosure problems are frequently an aspect of wrongful convictions.

Mr. McCloskey believed that an 'open file' disclosure policy would help prevent such convictions. The Morins and the Criminal Lawyers' Association suggested that the Attorney General implement such a policy. Mr. Gover felt that the courts should have the discretion to order 'open box' disclosure where there is reason to believe the police or the Crown have acted

with *mala fides* with respect to their disclosure obligations, but he was concerned about protecting items which are properly privileged. Mr. Mitchell testified that his office generally applies an 'open box' disclosure policy, but that difficulties arise in large prosecutions which produce huge amounts of material, much of which is not relevant to either side:

> The difficulty is who makes that call. In our disclosure system, it should be up to the defence, and really the only way to do that is to sort of engage in a process of open-box disclosure.
>
> .....
>
> The problem that we run into with respect to disclosure is not what's in the box, but what's not in the box, and what defence counsel want the police to put in the box, and to conduct the further inquiries and to take it the one step further, and the remedies that are being sought for any intransigence by either the Crown or the police for not going that extra step, or that extra mile.

I note that there presently exists a Criminal Justice Review Committee, which is a combined initiative of the Ontario Court of Justice, the Ministry of the Attorney General for Ontario and the Criminal Lawyers' Association. I leave to others whether this Committee is an appropriate vehicle for consideration of the issues raised here.

<u>Recommendation 115</u>: Crown education on the limits of advocacy.

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

A number of appellate decisions were filed with the Inquiry where Crown counsel's inappropriate conduct was addressed — improper closing addresses, cross-examination of witnesses (including the accused), etc. As noted by Mr. Culver in his Inquiry testimony, the line between appropriate and inappropriate Crown conduct is sometimes less than certain and may shift as the case law develops. Further, much of the conduct is not reflective of malevolence or deliberateness, but over exuberance, misappreciation of the

law, carelessness or inexperience. However, Mr. Sherriff noted that the number of such reported cases has increased in recent years, causing justifiable concern.

Recommendation 116: Adequacy of funding for defence counsel and prosecutors.

This inquiry has identified systemic problems which may be addressed through the recommendations made herein. However, these recommendations do not obviate the need for the proper functioning of the adversarial system. The success of the adversarial system in preventing miscarriages of justice largely rests upon the existence of well trained, competent prosecutors and defence counsel. This necessarily involves defence counsel who are adequately compensated for their work and who have adequate resources to ensure that appropriate investigative work is done and appropriate witnesses (particularly expert witnesses) are accessible. This also necessarily involves prosecutors whose work-load, environment, training, available resources and institutional supports permit them to perform at the highest level.

The most experienced Crown and defence counsel in Ontario have expressed their concern that the Ontario Legal Aid Plan and the financial resources allocated to criminal prosecutions by the Ontario government cannot be eroded to the point where the adversarial system is less likely to prevent miscarriages of justice. In this context, miscarriages of justice include the conviction of the innocent *and* the release of the guilty, due to inadequate resources.

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

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

Mr. Durno was very critical of the current funding for the Legal Aid Plan. He pointed out that there is a constitutionally entrenched right to counsel, yet the number of hours currently provided to represent an accused

do not allow for the effective assistance of counsel. He testified:

> [I]t's important that the trend that appears to be occurring in some of the courts to almost make it factory-like, running an assembly line, has to stop. There has to be adequate funding for both prosecution and defence, because if both prosecution and defence are represented by well-educated experts in their field who can make their own decisions, the system is going to be better served.

Ms. Welch testified that the Ontario Crown Attorneys' Association is fully supportive of a properly funded legal aid system:

> No Crown attorney enjoys or is comfortable prosecuting in circumstances where a person has inadequate representation, or indeed, no representation at all. ... [W]e think it's absolutely in the interest of justice that we have well-represented accused.

Crown attorneys expressed concerns about their own funding. The survey of Crown attorneys conducted by their Association reflected that 92 percent had genuine concerns with their ability to prepare their cases.

Ms. Welch also pointed out that current developments in the law have exacerbated the problem of inadequate resourcing:

> Resourcing ... has always been a problem within the criminal justice system. Speaking from my standpoint, and I think a number of Crowns who have been in the system for a long time recognise that the practice of criminal law has changed dramatically from the early 1980's with the advent of the Charter, with the *Stinchcombe* decision, *Askov*, the Martin Report. There's tremendous duties and responsibilities that have been placed on the membership.
>
> So this is not a new problem, but it's a problem that is increasing over time because there's this ever-increasing responsibilities and duties that are being placed on Crowns, and resourcing over the years. This is not a new phenomenon, but it's one that's becoming, I think, increasingly more and more critical to the effect of practice.

Mr. Culver agreed, commenting that any new initiatives must come with adequate resources.

<u>Recommendation 117</u>: Creation of a Criminal Case Review Board.

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

During the Inquiry, counsel for Mr. Morin, who was supported by counsel for AIDWYC, requested that I hear a panel of experts, specifically constituted to testify as to the adequacy of section 690 of the *Criminal Code* to redress the legitimate injustices of persons who have been wrongly convicted of offences that they have not committed. He argued that section 690 may be unconstitutional. He submitted that, under that section, the Minister of Justice is not able to give to the applicants' cases the consideration that they warrant, nor is the Minister empowered to provide the remedy that is merited. Both the Morins and AIDWYC contend that there are serious substantive and procedural problems with the present system that compel the substitution of an independent review board, created by statute. AIDWYC's written submissions to me outline, in some detail, not only the alleged inadequacies in the present regime, but also the blueprint for an independent review board.

The issue is not a new one. In 1989, the Marshall Inquiry made this recommendation:

> 1. We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism - an individual or a body - to facilitate the reinvestigation of alleged cases of wrongful conviction.
>
> 2. We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.

With some regret, I ruled that I would not hear a panel so constituted.

Guy Paul Morin had not made application for relief under section 690 of the *Criminal Code,* given the favourable disposition of his appeal before the Ontario Court of Appeal. Put succinctly, any inadequacies in section 690 did not arise in Guy Paul Morin's own proceedings, which is the subject matter of my mandate. As well, I note that the federal Minister of Justice did not have standing at this Inquiry. However, some evidence was adduced and submissions made that bore indirectly on the adequacy of that section. For example, Mr. Sherriff felt that such a body would help restore the integrity of the criminal justice system in the face of public concern over wrongful convictions. Mr. Durno believed that the availability of a review by a body independent of the government would be of enormous benefit. Mr. Wintory said this:

> I do agree very strongly ... that we should have a systemic capacity in our criminal justice system for collateral review and attacks on convictions, so that newly discovered evidence or evidence of ineffective assistance of counsel, or prosecutor's failure to disclose evidence can be identified and presented, and if found to have merit, result in new trials.

Mr. Hadgkiss testified that there has been movement in New South Wales, Australia, towards the creation of a criminal cases review body. A Bill has recently been introduced in the legislature to establish a reviewing body which will investigate matters referred to it by the Court of Appeal, the Governor or Attorney General, and refer cases to the Court of Appeal where it considers that there may have been a miscarriage of justice. The Bill also provides for the payment of compensation by the government in cases of miscarriage of justice.

As earlier noted, David Kyle was tendered as a witness by the Ontario Crown Attorneys' Association. The United Kingdom now has an independent criminal case review board entitled the Criminal Cases Review Commission. Mr. Kyle is a member of that commission. The commission was created by the *Criminal Appeal Act, 1995,* as a result of recommendations contained in the Runciman Report. It began operations on April 1, 1997. It currently has about 1,000 applications before it.

The mandate of the Commission is to review convictions, sentences, and special verdicts of insanity and unfit to stand trial. Applications are usually made by a convicted person after all normal appeal routes are exhausted. The

Criminal Cases Review Commission determines whether the case should be referred back to the Court of Appeal. The Commission can also bypass the Court of Appeal and refer cases to the Home Secretary where it feels a Royal pardon should be considered. Mr. Kyle was not sure what factors might lead to such a referral, but stated that Royal pardons tend to be given in circumstances where the Court of Appeal would be unable to interfere with the conviction.

Prior to the establishment of the Commission, applications by convicted persons who had exhausted their rights of appeal were made to the Home Secretary, who was empowered to refer cases back to the Court of Appeal. Mr. Kyle testified that the Commission performs essentially the same functions as the Home Office used to perform, but with an expanded jurisdiction to review summary conviction cases. Mr. Logan, however, testified that the power formerly vested in the Home Secretary was not often used because the Home Office was not a pro-active department, was not staffed by legally trained people, few applicants had legal representation because legal aid was not available, and the Home Secretary kept narrowing the criteria for sending cases back to the Court of Appeal. Mr. Kyle testified that the Commission regards itself as "having a very pro-active role to play, very much more than was the view taken when the responsibility for looking into this type of case rested with the Home Office." The powers given to the Criminal Cases Review Commission under the *Criminal Appeal Act*, and the resources and staff allocated to it, reflect that more pro-active role. He believed that the Commission has expanded the mandate of the Home Secretary to review cases because, in the past, the Home Secretary would only refer cases back to the Court of Appeal where there was new evidence which did not exist at the previous proceedings.

Reviews are usually initiated by a letter from a convicted person alleging a miscarriage of justice. The Commission then sends an application form to him or her, and screens any response. Mr. Kyle testified that it is too early in the life of the Commission to say how it will distill true applications from those which do not merit its attention. Legal aid funding has been approved for the presentation of applications.

The Court of Appeal is also permitted to refer cases to the Commission. Mr. Logan testified that such referrals are useful where the Court of Appeal has a matter before it and is not happy with the extent to which it has been investigated.

After a case is referred to the Commission, an investigative is ordered. The Commission has the power to formally appoint an investigating officer. Mr. Logan testified that two problems with this aspect of the Commission's work are that it has to rely on the police to carry out its investigations, limiting its direct control over the investigation, and funding for the investigation has to come from the police force concerned.

Mr. Kyle expected that in the future the Commission's own staff will carry out investigations on its own or with assistance from police officers who are not formally appointed as investigating officers. This will allow the Commission to retain direct control of the investigations. The Commission will ask police officers to do specified tasks and, consequently, the officers will not be exercising any expertise or judgment in carrying out those tasks. The Commission will, however, appoint an investigating police officer where the scale of the inquiry is such that it would not have the resources to undertake the investigation properly.

The Commission has ultimate authority to approve the investigating officer, and Mr. Kyle stated that its practice is to only appoint officers not involved in the original investigation (sometimes from another force). A different force would likely be retained in cases where there are allegations of substantial police misconduct in the original investigation. At all times, the Commission will supervise the investigation:

> So it isn't simply a question of handing the matter over to the police and saying: Please come back to us when you've done it. We are expected to supervise, control, direct the investigation, and right from the very outset, the expectation is that we will identify the terms of reference of the investigation. And we are allowed, and intend to do so, to give directions to the investigating officer as to what should be done.

Mr. Kyle stated that the members of the Commission see themselves in a much more inquisitorial than adversarial role. Investigations are carried out impartially, and the Commission will act on the results, whatever they may be.

Under the terms of its enacting legislation, the Commission should not send a case to the Court of Appeal unless there is a real possibility that the conviction or sentence would not be upheld, *i.e.* if the Court of Appeal would

think the conviction is unsafe. There is no definition of 'real possibility.' Mr. Kyle felt that the unsafe standard is wide enough to include the concept of there being a lurking doubt, and believed that the Commission would be prepared to send cases back to the Court of Appeal where there is such a doubt.

Mr. Logan testified that the problem with the Commission's criterion for referral to the Court of Appeal is that the Commission must then take its lead from the Court of Appeal. Mr. Kyle was unsure how the Commission's views of the Court of Appeal would affect its willingness to send cases to that Court for review:

> What I do say, and certainly, the way in which we are approaching our work in the commission, is that we intend to be very broad-based in the way we assess these cases, and we do intend to press at the boundaries in the way in which we deal with cases, and we will be looking to refer cases and to test and to extend the way in which they are dealt with by the Court of Appeal.

Since its inception, the Commission has completed 25 reviews and has referred six cases to the Court of Appeal. Two of the six referrals have involved persons who were convicted when the United Kingdom still had the death penalty and who were executed.

Based upon my ruling and the limited evidence I have heard, I am not able to make recommendations as to the existing or any proposed review mechanisms for cases involving potential wrongful convictions. However, the availability of an adequate review mechanism is an issue of great importance. I am able to recommend that the Government of Canada study the adequacies of the present regime and the desirability of a criminal case review board, drawing upon the representations of all interested parties.

<u>Recommendation 118</u>: Committee to Oversee Implementation of Recommendations.

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

<u>Recommendation 119</u>: Communication of recommendations to other governments.

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