RECOMMENDATIONS

The Report contains 119 recommendations. Most are accompanied by commentary, which often summarizes the systemic evidence and the significant caselaw bearing upon each recommendation, and which explains or refines the recommendations. The commentary is not reproduced below.

<u>Recommendation 1</u>: Policy for Funding Inquiries

A clear and comprehensive policy should be established by the Government of Ontario for the funding of public inquiries, consistent with the concerns expressed herein.

<u>Recommendation 2</u>: Admissibility of hair comparison evidence

Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

<u>Recommendation 3</u>: Admissibility of fibre comparison evidence

Evidence of forensic fibre comparisons may or may not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of the accused's guilt. However, the limitations upon the inferences to be reliably drawn from forensic fibre comparisons need be better appreciated by judges, police, Crown and defence counsel. This requires better education of all parties, improved communication of forensic evidence and its limitations in and out of court, in written reports and orally.

Recommendation 4: Admissibility of preliminary tests as evidence of guilt

Evidence of a preliminary test, such as an 'indication of blood,' does not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

Recommendation 5: Trial judge's instructions on science

Where hair and fibre comparison evidence or other scientific evidence is tendered as evidence of guilt, the trial judge would be well advised to instruct the jury not to be overwhelmed by any aura of scientific authority or infallibility associated with the evidence and to clearly articulate for the jury the limitations upon the findings made by the experts. In the context of scientific evidence, it is of particular importance that the trial judge ensure that counsel, when addressing the jury, do not misuse the evidence, but present it to the Court with no more and no less than its legitimate force and effect.

Recommendation 6: Forensic opinions to be acted upon only when in writing

(a) No police officer or Crown counsel should take action affecting an accused or a potential accused based upon representations made by a forensic scientist which are not recorded in writing, unless it is impracticable to await a written record. Where a written record is not obtained prior to such action, it should be obtained as soon thereafter as is practicable.

(b) The Crown Policy Manual and the Durham Regional Police Service operations manual should be amended to reflect this approach. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

(c) Where a written record is only obtained after such action, and it reveals that the authorities acted upon a misapprehension of the available forensic evidence, police and prosecutors should be mindful of their obligation to take corrective action, depending upon the original action taken. Corrective action would, for example, include the immediate disclosure of the written record to the defence and, if

requested, to the Court, where the forensic evidence has been misrepresented (even inadvertently) in Court. It would also include the re-assessment of any actions done in reliance upon misapprehended evidence.

<u>Recommendation 7</u>: Written policy for forensic reports

The Centre of Forensic Sciences should establish a written policy on the form and content of reports issued by its analysts. The Centre should draw upon the work done by forensic agencies elsewhere and the input of other stakeholders in the administration of criminal justice who will be receiving and acting upon these reports. In addition to other essential components, these reports must contain the conclusions drawn from the forensic testing and *the limitations to be placed upon those conclusions.*

<u>Recommendation 8</u>: The use of appropriate forensic language

The Centre of Forensic Sciences should endeavour to establish a policy for the use of certain uniform language which is not potentially misleading and which enhances understanding. This policy should draw upon the work done by forensic agencies or working groups elsewhere and the input of other stakeholders in the administration of criminal justice. This policy should be made public.

<u>Recommendation 9</u>: Specific language to be avoided by forensic scientists

More specifically, certain language is demonstrably misleading in the context of certain forensic disciplines. The terms 'match' and 'consistent with' used in the context of forensic hair and fibre comparisons are examples of potentially misleading language. CFS employees should be instructed to avoid demonstrably misleading language.

<u>Recommendation 10</u>: Specific language to be adopted

Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item 'may or may not' have originated from a particular person or object. This language is preferable to a statement that an item 'could have' originated from that person or object, not only because the

limitations are clearer, but also because the same conclusion is expressed in more neutral terms.

Recommendation 11: The scientific method

The 'scientific method' means that scientists are to work to vigorously challenge or disprove a hypothesis, rather than to prove one. Forensic scientists at the Centre should be instructed to adopt this approach, particularly in connection with a hypothesis that a suspect or accused is forensically linked to the crime.

Recommendation 12: Policy respecting correction of misinterpreted forensic evidence

A forensic scientist may leave the witness stand concerned that his or her evidence is being misinterpreted or that a misperception has been left about the conclusions which can be drawn or the limitations upon those conclusions. An obligation should be placed on the expert to ensure that these concerns are communicated as soon as possible to Crown or defence counsel. Where communicated to Crown counsel, an immediate disclosure obligation is triggered. The Crown Policy Manual and the Centre's policies should be amended to reflect these obligations. The Centre's employees should be trained to adhere to this policy.

Recommendation 13: Policy respecting documentation of contacts with third parties

(a) The Centre of Forensic Sciences should establish a written policy requiring its analysts and technicians to record the substance of their contacts with police, prosecutors, defence counsel and non-Centre experts. This policy should regulate the form, content, preservation and storage of such records. Where such records are referable to the work done on a criminal case, they must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

(b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

<u>Recommendation 14</u>: Policy respecting documentation of work performed

(a) The Centre of Forensic Sciences should establish written policies regulating the content of records kept by analysts and technicians of the work done at the Centre. In the least, these policies must ensure that the records identify the precise work done, when it was done, by whom it was done and the identity of any others who assisted, or were present as observers when the work was performed. The policy should also regulate the retention period and location of these records. All records referable to the work done on a criminal case must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

(b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

<u>Recommendation 15</u>: Documentation of Contamination

(a) Where in-house contamination is discovered or suspected by the Centre of Forensic Sciences, the contamination should be fully investigated in a timely manner. The contamination and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the contamination may relate. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements.

(b) The Centre of Forensic Sciences should also reflect, in its written policies, the protocols to be followed by its employees to *prevent* the contamination of original evidence.

(c) The Centre of Forensic Sciences should ensure that its employees are regularly trained to comply with the policies reflected in this recommendation.

<u>Recommendation 16</u>: Documentation of Lost Evidence

Where original evidence in the possession of the Centre of Forensic Sciences is lost, the loss should be fully investigated in a timely manner. The loss and its investigation should be fully documented. A copy of such

documentation should be placed in any case file to which the original evidence relates. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements. In this context, original evidence extends to work notes, communication logs or other material which is subject to disclosure.

Recommendation 17: Reciprocal disclosure

Reciprocal disclosure of expert evidence should be established. The defence should be obliged to disclose to the Crown in a timely manner the names of any expert witnesses it intends to call as witnesses, along with an outline of the witnesses' evidence.

Recommendation 18: Joint education on forensic issues

The Centre of Forensic Sciences, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Ministry of the Attorney General should establish some joint educational programming on forensic issues to enhance understanding of the forensic issues and better communication, liaison and understanding between the parties. The Government of Ontario should provide funding assistance to enable this programming.

Recommendation 19: Creation of an Advisory Board to the Centre of Forensic Sciences

An advisory board to the Centre of Forensic Sciences should be established consisting of Crown and defence counsel, police, judiciary, scientists and laypersons. It should be created by statute.

Recommendation 20: Quality Assurance Unit

(a) The recent establishment of a quality assurance unit by the Centre is to be commended. The unit's staffing and mandate should be reflected in written policies. Dedicated funds should be allocated to the quality assurance unit, adequate to implement this recommendation. The unit's budget should be insulated from erosion for operational use elsewhere.

(b) The unit should consist of at least seven full time members. The Centre should be encouraged to hire at least half of the unit's members from outside the Centre. At least one member of the unit should have training in biology.

(c) The unit should include a training officer, responsible for internal and external training.

(d) The unit should include a standards officer, responsible for writing, or overseeing the writing of policies.

<u>Recommendation 21</u>: Protocols respecting complaints to the Centre of Forensic Sciences

(a) In consultation with the advisory board, the Centre should establish, through written protocols, a mechanism to respond to, investigate and act upon complaints or concerns expressed by the judiciary, Crown and defence counsel, or police officers. The protocols should identify the person(s) to whom a complaint or concern should be directed, how it should be investigated and by whom, to whom the results should be reported and what actions are available to the Centre at the conclusion of the process.

(b) Trial and appellate judges should be encouraged by the Centre, through correspondence directed to the Chief Justice of Ontario, the Chief Justice of the Ontario Court of Justice (General Division), and the Chief Judge of the Ontario Court of Justice (Provincial Division) to draw to the Director's attention, in writing, any concerns about testimony given by the Centre's scientists. Judges should be encouraged by the Centre to identify judgments, rulings or comments made by the Court in instructing the jury which are relevant in this regard. Transcripts should generally be obtained by the Centre of the relevant judicial comments, together with the witness' testimony.

(c) The Crown Policy Manual should be amended to provide that Crown counsel should draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre. This policy should be encouraged through correspondence directed to the Ontario Crown Attorneys' Association.

(d) The private bar should be encouraged by the Centre, through correspondence directed to relevant organizations, including the Criminal Lawyers' Association and the Canadian Bar Association — Ontario, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

(e) Police officers should be encouraged by the Centre, through correspondence directed to relevant police forces, or through the Ministry of the Solicitor General, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

Recommendation 22: Post-Trial Conferencing

The Centre of Forensic Sciences should establish a case conferencing process to assist in evaluating performance.

Recommendation 23: Audits of the Centre of Forensic Sciences

(a) The Centre of Forensic Sciences should, in consultation with its advisory board, engage an independent forensic scientist (or scientists) no later than October 1, 1998, to specifically evaluate the extent to which the failings identified by this Inquiry have been addressed and rectified by the Centre. The scientist's (or scientists') final report should be made public.

Recommendation 24: Monitoring of Courtroom Testimony

The Centre of Forensic Sciences should more regularly monitor the courtroom testimony given by its employees. Monitoring should, where practicable, be done through personal attendance by peers or supervisors. Monitoring should exceed the minimum accreditation requirements. All scientists, regardless of seniority, should be monitored. Any concerns should be promptly taken up with the testifying scientist. The monitoring scientist should be instructed that any observed overstatement or misstatement of evidence triggers an immediate obligation to advise the appropriate trial counsel.

Recommendation 25: Training of Centre of Forensic Sciences employees

The Centre of Forensic Sciences' training program should be broadened to include, in addition to mentoring components, formalized, ongoing programs to educate staff on a full range of issues: scientific methodology, continuity, note keeping, scientific developments, testimonial matters, independence and impartiality, report writing, the use of language, the scope and limitations upon findings, and ethics. This can only come with the appropriate allocation of funding dedicated to training.

Recommendation 26: Proficiency testing

The Centre of Forensic Sciences should increase proficiency testing of its scientists. Efforts should be made to increase the use of blind and external proficiency testing for analysts. Proficiency testing should evaluate not only technical skills, but interpretive skills.

Recommendation 27: Defence access to forensic work in confidence

(a) The Centre of Forensic Sciences, in consultation with other stakeholders in the administration of criminal justice, should establish a protocol to facilitate the ability of the defence to obtain forensic work in confidence.

(b) The Centre should facilitate the preparation of a registry of duly qualified, recognized, independent forensic experts. This registry should be accessible to all members of the legal profession.

Recommendation 28: The Role of the Scientific Advisor

A 'scientific advisor,' contemplated by the Campbell mode, serves an important role and addresses concerns identified at this Inquiry. The use of a 'scientific advisor' should, therefore, be encouraged. There should be no prohibition upon the designation as scientific advisor of a forensic scientist who is directly involved in the forensic examinations associated with the case. This is impracticable. However, mindful of the concerns identified at this Inquiry, the CFS should encouraged, where practicable, to designate a scientific advisor who is not also the scientist whose own work is likely to be contentious at trial.

Recommendation 29: Post-conviction retention of original evidence

The Ministries of the Attorney General and Solicitor General, in consultation with the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for the post-conviction retention of original evidence in criminal cases.

Recommendation 30: Protocols for DNA testing

The Ministries of the Attorney General and the Solicitor General, in consultation with the forensic institutions in Ontario, the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for DNA testing of original evidence.

Recommendation 31: Revisions to Crown Policy Manual respecting testing

The Ministries of the Attorney General and Solicitor General should amend the Crown Policy Manual on physical scientific evidence to reflect that forensic material should be retained for replicate testing whenever practicable. Where forensic testing at the instance of the authorities is likely to consume or destroy the original evidence and thereby not permit replicate testing, the defence should be invited, where practicable, to observe the testing. Where defence representation is impracticable (or where no defendant is as yet identified), a full and complete record must be maintained of the testing process, to allow for as complete a review as possible.

Recommendation 32: DNA data bank

A national DNA data bank, as contemplated by Bill C-3, now before Parliament, is a commendable idea, proven in other jurisdictions, and it should be adopted in Canada.

Recommendation 33: Backlog at the Centre of Forensic Sciences

The Centre of Forensic Sciences should eliminate its backlog through increased use of overtime and an increased complement of scientists and technicians to enable it to provide timely forensic services. This can only

come with the appropriate allocation of government funding specifically earmarked for this purpose.

Recommendation 34: Forensic research and development

The Centre of Forensic Sciences should dedicate resources to research and development. The Province of Ontario should provide adequate funding to implement this recommendation.

Recommendation 35: Resource requirements

The specific recommendations referable to the Centre of Forensic Sciences involve, by necessary implication, the infusion of additional financial resources into the Centre. It is imperative that such an infusion occur, to ensure that the Centre can serve a pre-eminent role as a provider of critical forensic services, that it can do so in an impartial, accurate and timely manner, and that future miscarriages of justice can thereby be avoided. In this context, miscarriages of justice include both the arrest and prosecution of the innocent, and the delayed or failed apprehension of the guilty.

Recommendation 36: Ministry guidelines for limited use of informers

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

Recommendation 37: Crown policy clearly articulating informer dangers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;

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

10. Whether the informer made some written or other record of

the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;

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

12. The manner in which the report of the statement was taken by the police (*e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or videotape, in accordance with the guidelines set down in *R. v. K.G.B.*[1] However, in considering items 10 to 12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence;

13. Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

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

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

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

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[1] (1993), 79 C.C.C.(3d) 257 (S.C.C.).

supports the current Crown policy in Ontario.

Recommendation 43: Agreements with informers reduced to writing

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

Recommendation 44: Restrictions upon benefits promised or conferred

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

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

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

yet, undiscovered criminality when the earlier agreement was reached, and that the informer is not entitled to any credit from the court for past co-operation.

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

Recommendation 45: Conditional benefits

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

Recommendation 46: Policy on kinds of benefits conferred

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

Recommendation 47: Disclosure respecting in-custody informers

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

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

2. Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's

statement, should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.)

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

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

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

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

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

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

Recommendation 48: Post-conviction disclosure by Crown counsel

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

Recommendation 49: Post-conviction continuing disclosure by police

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

Recommendation 50: Access to confidential informer records

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

Recommendation 51: Prosecution of informer for false statements

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

Recommendation 52: Extension of Crown policy to analogous persons

The current Crown policy defines "in-custody informer" to address one

type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should, therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.

Recommendation 53: Revisions to police protocols respecting informers

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

Recommendation 54: Creation of informer registry

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

Recommendation 55: Crown contribution to informer registry

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

Recommendation 56: Police contribution to informer registry

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

Recommendation 57: Creation of national in-custody informer registry

The Government of Ontario should use its good offices to promote a national in-custody informer registry.

Recommendation 58: Police videotaping of informers

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

Recommendation 59: Reliability *voir dires* for informer evidence

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

Recommendation 60: Crown education respecting informers

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

Recommendation 61: Police education respecting informers

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

Recommendation 62: Protocols respecting correctional records

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

Recommendation 63: Access by police officers to correctional facilities

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

Recommendation 64: Placement of inmates

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

Recommendation 65: Placement of witnesses

Where inmates have already been identified as witnesses in a criminal

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

Recommendation 66: Storage and security of defence papers

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

Recommendation 67: Timing and content of informer jury caution

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

Recommendation 68: Crown videotaping of informers

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

Recommendation 69: Informer as state agent

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

Recommendation 70: Missing persons investigations

(a) Officers conducting a missing persons investigation must remain mindful of the possibility that such an investigation may escalate into a major crime investigation. This means, in the very least, that an accurate and complete record be kept of statements taken from relevant persons. This may also mean, under some circumstances, that potential evidence be immediately preserved from removal or contamination. It is

inappropriate to direct, as a rule, when a missing persons investigation should be treated as a major crime investigation. This decision need remain within the discretion of the investigating or supervising officer.

(b) Police officers should be trained on how to respond to a missing persons investigation, where the possibility exists that such an investigation may escalate into a major crime investigation. Such training should draw upon the lessons learned at the Inquiry.

(c) The York Regional Police force's operating procedures have been amended to respond to the concerns raised by the Christine Jessop investigation. The Ministry of the Solicitor General should facilitate the creation of similar operating procedures for all Ontario police forces.

Recommendation 71: Conduct of searches

(a) Searches conducted during a missing persons investigation should be supervised, where feasible, by a trained search co-ordinator.

(b) Searches should generally be conducted in accordance with standardized search procedures, taking into consideration the particular circumstances of each case.

Recommendation 72: Skills, Training and Resources

(a) Rank and file officers need be educated and trained on a continuing basis on a wide range of investigative skills. Their educators need themselves be fully trained in these skills and in their communication to others. Financial resources need be available, secure from erosion for operational purposes, to ensure that training for all Ontario police forces is state-of-the-art.

(b) Attention should be given by the Government of Ontario, on a priority basis, to the specific concerns identified by the York Regional Police Association and the audit of the York Regional Police force. The Government of Ontario should publicly announce the measures being taken to address the concerns raised.

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.

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.

Recommendation 75: Crown discretion respecting potentially unreliable evidence

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.

Recommendation 76A: 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.

Recommendation 76B: Use of term 'consciousness of guilt'

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

Recommendation 77: 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.

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.

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.

Recommendation 80: 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.

Recommendation 81: 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.

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.'

<u>Recommendation 84</u>: Exercise of Prosecutorial Discretion respecting Fresh Evidence on Appeal

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.

<u>Recommendation 85</u>: Crown discretion where significant concerns as to the appellant's innocence

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.

<u>Recommendation 86</u>: Fresh evidence powers of the Court of Appeal

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.

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.

Recommendation 88: 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.

Recommendation 89: 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. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.

Recommendation 90: Case management system

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.

Recommendation 91: 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.

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.

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.

Recommendation 94: 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.

Recommendation 95: 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.

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.[2]

(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.

<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

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

policy (in the very least) for all major Ontario police forces.

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.

Recommendation 100: 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.

Recommendation 101: 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.

Recommendation 102: 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.

Recommendation 103: 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.

Recommendation 104: 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.

Recommendation 105: 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.

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.

Recommendation 107: Conduct of Crown interviews

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.

Recommendation 109: Review of completed investigations

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

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.

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.

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.

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.

Recommendation 114: Creation of a committee on outstanding disclosure issues

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.

Recommendation 115: 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.

Recommendation 116: Adequacy of funding for defence counsel and prosecutors

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.

Recommendation 117: 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*.

Recommendation 118: 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.

Recommendation 119: 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.