

Ontario Commission
on
Proceedings Involving
Guy Paul Morin

The Honourable Fred Kaufman, C.M., Q.C.

April 1998

EXECUTIVE SUMMARY

Chapter I: The Scope and Nature of the Inquiry

The Background

Christine Jessop, a nine-year old girl, "who loved life, her family, school and sports," was murdered on or after October 3, 1984. Guy Paul Morin, her next-door neighbour, was charged with her murder. He was acquitted in 1986, but a new trial was ordered by the Court of Appeal for Ontario and this Order was affirmed by the Supreme Court of Canada. A new trial was held, and Mr. Morin was found guilty of first degree murder. He appealed, and on January 23, 1995, on the basis of fresh evidence tendered jointly by the Crown and the defence, he was acquitted of the charge. "This course of events," as the provincial cabinet later said, "has raised certain questions about the administration of justice in Ontario."

Accordingly, on June 26, 1996, the Lieutenant Governor in Council directed that a Public Inquiry be held, and a commission was issued appointing the Honourable Fred Kaufman, Q.C., a former judge of the Quebec Court of Appeal, as Commissioner under the designation "The Commission on Proceedings involving Guy Paul Morin."

The Mandate

The Order in Council directed the Commission to inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop." The Commission was also directed to "make

such recommendations as it considers advisable relating to the administration of criminal justice in Ontario." The Order in Council specified that the Commission shall "perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization." This prohibition has been observed in the Report.

The mandate of the Commission was threefold: investigative, advisory and educational. The investigative role required the Commissioner to determine, to the extent possible, why the investigation into the death of Christine Jessop and the proceedings which followed resulted in the arrest and conviction of an innocent person. The advisory role required the making of recommendations for change intended to prevent future miscarriages of justice. The educational role meant that the public inquiry should serve to educate members of the community as to the administration of justice generally and as to the criminal proceedings against Guy Paul Morin in particular.

The Hearings

Public hearings began on February 10, 1997, and continued for 146 days. One hundred and twenty witnesses were called. The Commission also considered the transcripts of evidence and exhibits from both trials, as well as documents filed with the Ontario Court of Appeal. These totalled well over 100,000 pages. Twenty-five parties were given either full 'standing,' or standing limited to particular factual issues or to systemic issues only. The media were present throughout the proceedings.

The Inquiry was divided into eight phases to address the relevant issues raised. Phase VI of the Inquiry heard systemic evidence - that is, evidence from witnesses generally unconnected to the Morin proceedings who could cast light on the issues which transcend the facts of the Morin case and extend to the administration of criminal justice in Ontario generally. This evidence came from experts and participants in the administration of criminal justice from around the world. The Commissioner heavily drew upon this systemic evidence, together with the submissions of all parties, together with the submissions of all parties, in framing his 119 recommendations for change.

The Innocence of Guy Paul Morin

Guy Paul Morin was 25 years old at the time of his arrest. He had no criminal record. He lived with his parents in Queensville, Ontario. He had a Grade 12 education. He had attended various courses in auto upholstery, spray painting, gas fitting, air conditioning and refrigeration. He worked as a finishing sander with a furniture manufacturer in October 1984, when Christine Jessop disappeared. His acquittal by the Court of Appeal on January 23, 1995, was based on fresh DNA evidence, which established that he was not the donor of semen stains found on Christine Jessop's underwear. Senior Crown counsel and then the Attorney General of Ontario conceded that Mr. Morin was innocent, and apologized to him for the 10 year ordeal he and his family had undergone. Ultimately, compensation was paid to him and his parents by the Government of Ontario.

The Facts of the Case

The Jessops and the Morins were neighbours in the small town of Queensville, about 35 miles north of Toronto. On the afternoon of October 3, 1984, the school bus returned Christine to her home at about 3:50 p.m. No one was there. Her mother, Janet, had taken Christine's older brother, Ken, to the dentist in Newmarket. The precise time of their return to the Jessop home was a major issue at the second trial. Guy Paul Morin left work at 3.32 that afternoon and could have arrived home no sooner than 4:14 pm. Accordingly, the Jessops' time of return had an impact on any 'window of opportunity' for Mr. Morin to have committed this crime. Mr. Morin gave evidence to demonstrate that he arrived home well after the Jessops and therefore had no opportunity to abduct Christine Jessop. The prosecution vigorously disputed his alibi and suggested that he changed his time of arrival in various statements to avoid responsibility for the murder.

Christine was not in the house when the Jessops returned, but there was no immediate cause for alarm. But when she failed to show up by early evening, Ms. Jessop called the police. A search of the area was organized and it continued for several days. No trace of Christine was found. As time passed, concerns heightened that she had been the subject of foul play. York Regional Police conducted the investigation into her disappearance.

Her body was found on December 31, 1984, near the town of Sunderland in Durham Region, about 56 kilometers east of Queensville. Her body was on its back with her knees spread apart in an unnatural position. An autopsy determined that she had been stabbed in the chest several times and this had been the cause of death. The presence of semen on her underpants irresistibly suggested that she had been sexually assaulted. Her body was badly decomposed, and death could have occurred three months before its discovery. Because her body was found in Durham Region, the Durham Regional Police Service took charge of the case.

John Scott prosecuted Mr. Morin at his first trial. Susan MacLean assisted Mr. Scott. Clayton Ruby and Mary Bartley defended Mr. Morin. Leo McGuigan was the lead prosecutor at the second trial, assisted by Alex Smith and Susan MacLean. Jack Pinkofsky, Elizabeth Widner and Joanne McLean defended Mr. Morin. Brian Gover was leading prosecutor during a lengthy motion by the defence to stay the proceedings at the second trial.

Chapter II: Forensic Evidence and the Centre of Forensic Sciences

Background

Phase II of the Inquiry examined the role that forensic evidence played in Guy Paul Morin's criminal proceedings and, more particularly, the role played by the Centre of Forensic Sciences.

The Centre of Forensic Sciences ("CFS") in Toronto is the principal laboratory where forensic examinations are conducted for criminal investigations in Ontario. It is publicly funded and accountable to the Ministry of the Solicitor General. Two CFS forensic analysts, Stephanie Nyznyk and Norman Erickson, gave evidence as to hair and fibre comparisons at the instance of the prosecution.

The prosecution relied on the hair and fibre findings made by these scientists to demonstrate that there was physical contact between Christine Jessop and Guy Paul Morin, and that Christine was transported in the Morin Honda to her death by Mr. Morin. The evidence was said to refute Guy Paul Morin's denial that he had any physical contact with Christine

and his specific assertion that Christine had never been in the Honda. Stephanie Nyznyk testified at both trials; Norman Erickson at the second trial only.

The Hair Findings

When Christine Jessop's body was discovered, a single dark hair was found embedded in skin tissue adhering to her necklace. This came to be known as the 'necklace hair.' This hair was not Christine's and it was presumed to have come from her killer. This hair was said to be microscopically similar to Guy Paul Morin's hair and could have originated from him. After Guy Paul Morin's first trial and before his second, an analysis of hairs belonging to Christine Jessop's classmates revealed that two classmates had hairs which were also microscopically similar.

Three hairs found in Mr. Morin's car were said to be dissimilar to Mr. Morin's hairs. It was said that these were similar to Christine Jessop's hairs and could have come from her.

The Commissioner found:

- Properly understood, the hair comparison evidence had little or no probative value in proving Mr. Morin's guilt. Generally, hair comparison evidence (absent DNA analysis) is unlikely to have sufficient probative value to justify its reception as circumstantial evidence of guilt at a criminal trial.
- Ms. Nyznyk did not adequately or accurately communicate the limitations upon her hair comparison findings to police and prosecutors prior to the second trial.
- Prior to Guy Paul Morin's arrest, Ms. Nyznyk conducted a hasty, preliminary comparison of the necklace hair and Guy Paul Morin's hairs in the investigators' presence. She communicated a preliminary opinion to the officers. That opinion was overstated and, to her
- Had the limitations on Ms. Nyznyk's early findings been adequately communicated by her, Mr. Morin may not have been arrested when he was - if, indeed, ever.

-- Detective Bernie Fitzpatrick testified about Ms. Nyznyk's early hair and fibre findings at Guy Paul Morin's bail hearing. His evidence was inaccurate. This was not deliberate, but can be explained, in large measure, by the inadequate way Ms. Nyznyk's findings (and their limitations) were communicated by her.

-- The hair comparison evidence was misused by the prosecution in its closing address at the second trial (though the Commissioner did not find that this was done malevolently). Particulars of this misuse are contained in the Report.

The Fibre Findings

Fibres were collected from the taping of Christine Jessop's clothing and recorder bag found at the body site, from the taping and vacuuming of the Morin Honda and from tapings of the Morin residence. Many thousands of fibres (perhaps hundreds of thousands) were examined. Several became significant. Ms. Nyznyk and Mr. Erickson testified at the Morin criminal proceedings that several of the fibres from the Morin-related locations were similar and could have come from the same source as several fibres found at the body site.

The Commissioner found that the similarities, even if they all existed, proved nothing. His findings included:

-- The fibre evidence was contaminated within the Centre of Forensic Sciences. The timing and precise origin of the contamination cannot now be determined. However, it remains possible that this contamination tainted Ms. Nyznyk's earliest findings. No inferences can safely be drawn from any alleged fibre similarities, given the existence of this in-house contamination.

-- This contamination was known to Ms. Nyznyk and Mr. Erickson prior to the first trial and withheld by them from the police, the prosecution, the defence and the Court. This may have been done to avoid embarrassment to themselves and to the CFS; it was not done out of personal malice towards Guy Paul Morin or with any desire to convict an innocent person. They believed, rightly or wrongly, that the contamination was unrelated to Ms. Nyznyk's original findings, but this afforded them no

excuse.

There was no real interest in documenting the contamination, how it had occurred, whether it had affected other cases within the Centre and how it might be prevented in the future. Indeed, Ms. Nyznyk declined to retain any documentary record of the contamination in her file.

- The existence of in-house contamination was known generally within the biology section of the CFS.
- Further examination on already contaminated fibres was ordered by Mr. Erickson for possible use at the second trial. This further examination yielded potentially exculpatory findings which were not communicated by Mr. Erickson to the prosecution or to the defence.
- Apart from internal contamination, the fibre similarities were not probative in demonstrating direct contact between Christine Jessop and Guy Paul Morin - instead, they were equally explainable by random occurrence or environmental contamination; the number and nature of the fibre similarities did not support the prosecution's position.
- Ms. Nyznyk and Mr. Erickson failed to communicate accurately or adequately the limitations on their findings to the police, the prosecutors and the Court.
- Mr. Erickson (and likely Ms. Nyznyk) provided the prosecution with a published study on fibre transference (the Jackson and Cook study) which did not support a inference that the fibre similarities in the Morin case were at all significant in proving direct contact.
- The study, properly understood, did not support the case for the prosecution. The details of the study were irrelevant to the Morin proceedings. They were elicited from both CFS scientists. Mr. Erickson and Ms. Nyznyk failed to accurately or adequately communicate the limited relevance of the study to the prosecutors or to the Court.
- The fibre findings and, more particularly, the Jackson and Cook study, were misused by the prosecution in its

closing address. Although the Crown's closing address, in some respects, took the study farther than anything that the scientists had said about it, the Commissioner did not find that the study's misuse by the prosecution was deliberate.

The Commissioner also reflected the fact that original evidence was lost at the CFS between the first and second trials. Finally, he noted that certain terms, such as 'match' and 'consistent with' were used unevenly and were potentially misleading. The use of these terms contributed to misunderstanding of the forensic findings.

Conclusions

The contribution of the CFS to Mr. Morin's wrongful arrest, prosecution and conviction was substantial. Hair and fibre evidence elevated Guy Paul Morin to prime suspect status; formed the justification, in large measure, for his arrest and for the searches of his car and home; was cited by the Crown to support his detention pending trial; was cited by the Ontario Court of Appeal and Supreme Court of Canada as evidence relevant to their consideration of whether his acquittal should be overturned; formed a substantial part of the case against Guy Paul Morin at his first and second trials; and undoubtedly was relied upon by the jury at the second trial to convict him.

The Centre of Forensic Sciences plays a vital role in the administration of criminal justice in Ontario. It cannot perform its duties unless its scientists are objective, independent and accurate. Further, they must be perceived to be independent by the participants in the criminal justice system. A large number of CFS scientists perform their work with distinction. On the other hand, it would be a serious mistake to assume that the failings identified are confined to two scientists. A number of those failings are rooted in systemic problems, many of which transcend even the CFS and have been noted in cases worldwide where science has been misused. Dr. James Young, Assistant Deputy Solicitor General with responsibility for the CFS, apologized on behalf of the CFS for any role in Guy Paul Morin's conviction and advised the Commissioner that he had not appreciated the depth of issues which would arise at the Inquiry. He outlined corrective measures undertaken by the CFS, a number of which

were in direct response to the problems identified at the Inquiry. The Ministries of the Attorney General and Solicitor General also introduced a new policy guideline addressing the relationship between CFS scientists and prosecutors and the responsibilities of each. The Commissioner commended these initiatives. Recommendations 2 to 35 further address the systemic problems identified at the Inquiry.

'Indications' of Blood

The prosecution also tendered CFS expert evidence that there were microscopic 'indications of blood' in the Morin Honda. This was a 'presumptive' or 'preliminary' test which did not prove that there was, indeed, blood in the vehicle, let alone human blood, let alone Christine Jessop's blood. The Commissioner found that Mr. White, the CFS serologist, accurately articulated the limitations upon his findings. However, the evidence did not have sufficient probative value to justify its reception.

Chapter III: Jailhouse Informants

Background

Phase I of the Inquiry examined issues arising from a confession to the murder of Christine Jessop allegedly made by Guy Paul Morin to Robert Dean May, a fellow inmate in Whitby Jail; it was allegedly overheard by Mr. X, an inmate in the next cell. Mr. X's identity is the subject of a publication ban imposed by the trial judge and upheld by the Ontario Court of Appeal.

May has a substantial criminal record for crimes of dishonesty. He admitted that he had a problem with lying in the past and had lied to the police and correctional authorities. He wanted badly to be released from jail in 1985 and would do whatever was necessary to accomplish this. He offered to implicate other inmates. (So did Mr. X.)

May was diagnosed by mental health experts at the second trial as a pathological liar. He had a deficient social conscience and was skilled in deceiving others. After the second trial, May recanted his trial evidence. He told a number of people that he had lied about having heard Mr. Morin confess and that he had committed perjury at the trials. Then

he attempted to recant his recantations and took the position that his evidence at the trial about the purported confession was indeed true. The Commissioner found that he had spun a web of confusion and deceit about the issue of the confession."

Mr. X has a lengthy criminal record for sexual offences, particularly for offences against young children. He was diagnosed in 1988 as having a personality disorder with sociopathic tendencies. At the second trial of Mr. Morin, a expert testified that this is characterized by exaggeration, lying, suggestibility and disregard for social norms. Mr. X agreed that he has lied to the police and correctional authorities in the past. He told the Inquiry that at times he apparently lost contact with reality; he heard voices in his head which, sometimes, were so loud that he thought his head was going to explode. He explained his history of sexual misconduct by the fact that he heard the voice of his uncle telling him to commit the illegal acts. X also bargained with the police for his information about Morin's purported confession. In June 1985, he was desperate to get out of the Whitby Jail and into the Temporary Absence Program. He told the police he would give them anything they wanted if they got him into a halfway house. After the first trial, he was convicted of another sexual assault. The Commissioner found that Mr. X is a untrustworthy person whose testimony cannot be accepted on any of the issues before the Inquiry.

Both May and X claimed that they reported the confession and gave their evidence because they were morally outraged at the crime committed by Morin. The Commissioner rejected that motivation and found that they were both seeking to further their own ends when they reported the confession and testified. The Commissioner accepted Guy Paul Morin's evidence that he did not confess to Mr. May.

Inspector Shephard was candid in acknowledging that a number of things that the informants said and did should have been more carefully scrutinized and investigated. The Commissioner found:

Apart from their core evidence, some of the things that the informants said were patently unreliable. The prosecutors at the second trial did not objectively assess the reliability of these informants. When confronted prior to the second trial with the informants'

personal records, which showed their diagnosed propensities to lie, emphasis was placed upon denigrating or minimizing this evidence, rather than introspectively questioning whether the informants' reliability should be revisited.

Having said that, the prosecutors did regard May and X as truthful on the critical issue. There was some support for this view (most particularly, both informants passed polygraph tests though the polygraphist reflected the danger in placing undue reliance upon those results). The prosecutors views were no doubt coloured by their genuine views on Guy Paul Morin's guilt; as a result, evidence which undermined the informants was more easily discarded and largely inconsequential evidence became confirmatory. However, no existing law or ethical standards prevented the prosecutors from calling even suspect evidence, so long as they did not know that the evidence was perjured. There was no misconduct in the prosecutorial decision to call these informants. Nonetheless, the decision to call these witnesses raises important systemic issues.

Tunnel Vision

The Commissioner also found that certain parties at the inquiry continue to suffer from tunnel vision that is "staggering":

Mr. McGuigan still believes that the informants were telling the truth and that Guy Paul Morin lied about his 'confession'. Detective Fitzpatrick holds similar views. Indeed, though Mr. McGuigan believes that Mr. Morin is innocent, he also believes that he and his family deliberately concocted a false alibi. An innocent person has been known to tender a false confession - though mostly in the context of a police investigation. An innocent person has been known to tender a false, concocted alibi. I have found that Mr. Morin did not confess to May; I also have no doubt that Mr. Morin and his family (however imperfectly conveyed) did not concoct his alibi. The fact that Mr. McGuigan still accepts Mr. May's evidence, in the face of Mr. Morin's proven innocence, May's recantations, May's non-rehabilitation, and most importantly, in the face of May falsely alleging that McGuigan himself was a conspirator in framing Morin,

is 'tunnel vision' in the most staggering proportions.

The fact that Detective Fitzpatrick still accept Mr. May's evidence, in the face of this fact and May's false claims that Fitzpatrick had threatened to kill May, etc. demonstrates an equally persistent 'tunnel vision.' These findings of 'tunnel vision' also explain the need for the recommendations which later follow.

The Offer

At some point during the second trial, both informants were given the opportunity to choose not to testify at the trial. Both rejected the offer. This information was not disclosed to the defence. It only became public knowledge after Mr. May divulged it in his response to the last question asked of him in re-examination by the prosecution. Mr. X then testified and also divulged it during his cross-examination. It was later used to full effect in Mr. McGuigan's closing address to demonstrate that the witnesses were testifying voluntarily and at their own option and therefore unmotivated to lie.

The Inquiry was told by the three prosecutors at the second trial that the offer was made for compassionate and humanitarian reasons only and was not an attempt to artificially bolster the credibility of the informants. Mr. McGuigan testified that he brought up the idea of making the offer to the informants after he learned of the abuse that Mr. X had suffered as a result of testifying at the first trial. He was mindful of his obligation to be kind and gentle to witnesses and knew that X would be dealt with harshly on cross-examination, as evidenced by the tenor of Mr. Pinkofsky's cross-examinations to that point in the trial. The idea first arose in mid-December 1991, shortly before the Christmas recess. Mr. McGuigan may have expressed his motivation by saying that he was "moved by the Christmas spirit." It was said that the offer was made to May as well so that he would not complain that he was being treated worse than Mr. X. Detective Fitzpatrick was delegated to speak to May and X. He told them that the Crown "might" give them the option not to testify. Both said they would decline such an offer. Accordingly, Fitzpatrick reported back that both elected to testify. Despite this, the offers were again made "formally" by Crown counsel to each informant.

Mr. McGuigan testified that the offer was not to come out in evidence at the trial. He suggested at one point that the witnesses would have been told not to mention the offer. Ms.

MacLean's evidence, which was inconsistent with Mr. McGuigan's, was that the prosecutors discussed that the witnesses had the right to say they were there voluntarily, and she so advised Mr. X when he raised the matter with her in trial preparation. (She correctly noted that telling Mr. X not to mention the offer would be tantamount to telling him to lie.)

During his opening address on November 12, 1991, Mr. McGuigan had told the jury that both informants would be called as witnesses to Morin's confession. He described the informants and their anticipated evidence, including the words purportedly uttered by Guy Paul Morin. Mr. McGuigan testified that he forgot about his opening statement when he authorized the offers. He conceded that if the offers had been accepted and neither of the informants testified, a mistrial might have been caused because of his mention of the confession in his opening address, but that eventuality never occurred to him.

In lengthy reasons, the Commissioner found that the offers were made "for tactical reasons with the hope or expectation that their rejection would be revealed to the jury, and in the knowledge that, if revealed, it would enhance the credibility of the informants." He found that the offers were not intended to be unconditional and genuine as Mr. McGuigan claimed they were. He noted, inter alia, that:

-- Mr. McGuigan's position that he never thought about a possible mistrial was inconsistent with his wide trial experience and his submissions to the Court on January 20, 1992, when he made reference to his earlier opening address on this very topic.

-- On Mr. McGuigan's interpretation of the offers, it was possible that only Mr. May might have accepted it, leaving the prosecution with nothing but the evidence of the person who simply overheard the confession; it is inconceivable that Mr. McGuigan would not have foreseen this possibility.

-- Had the informants accepted the offer, it would have deprived the Crown of the only direct evidence against

Guy Paul Morin and might have resulted in his acquittal; there was a real possibility that the Jessops and the public would have been outraged if a murderer of a nine-year old girl went free because the prosecutors tendered a offer out of compassion. None of the prosecutors considered any of these consequences.

-- May and X were not persons likely to evoke the degree of compassion put forward by Mr. McGuigan at the Inquiry.

Indeed, it was uncontested that neither of these witnesses had even asked the prosecutors to excuse them from testifying.

-- Mr. McGuigan contemplated that the informants would be challenged by the defence on their motivations for testifying. If it were disclosed to the jury that such witnesses declined an offer permitting them not to testify, it would seriously undermine such a line of attack. It was inconceivable that it never occurred to Mr. McGuigan until the offers were revealed in evidence that the declining of the offers would enhance the informant's credibility.

The Commissioner also found that Detective Fitzpatrick, an experienced officer, knew that the offers were not made as the result of compassion for X and a consequent need to treat May in the same manner as X. If it appeared likely that the two informants (or either of them) would accept the offers, Mr. McGuigan would have ensured that the offers were not pursued. He sent Detective Fitzpatrick to find out what their reaction would be. "Apparently, the informants gleaned the real message because both of them purported to reject the offers, although one would have thought that they would receive such news with sighs of relief at the opportunity not to be exposed to intensive cross-examination."

The Commissioner considered the respective involvement in the making of the offers of the three Crown attorneys. He found that the evidence did not warrant a conclusion that Mr. Smith and Ms. MacLean, having regard to their junior position in relation to Mr. McGuigan, were aware that the offers were not genuine. When Mr. McGuigan said that he was imbued with the Christmas spirit, Ms. MacLean may have accepted the truth of that statement "because of her respect for him and his stature."

Recommendations

The informants were motivated by self-interest and unconstrained by morality. It follows that they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed to May was easy to make and difficult to disprove. These facts, taken together, were a ready recipe for disaster. The systemic evidence emanating from Canada, Great Britain, Australia and the United States demonstrated that the dangers associated with jailhouse informants were not unique to the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informants.

During this Inquiry, the Crown Policy Manual was changed to reflect a new policy on in-custody informers. The Commissioner found that Crown policy to be a laudable first step in addressing difficult policy issues. Recommendations 36 to 69 address the systemic issues arising out of the use of jailhouse informants in criminal proceedings.

CONCLUSION

The Commissioner concluded his Report in these terms:

This Report ends where it started. An innocent person was convicted of a heinous crime he did not commit. Science helped convict him. Science exonerated him.

We will never know if Guy Paul Morin would ever have been exonerated had DNA result not been available. One can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable.

The case of Guy Paul Morin is not aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future. As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened in Guy Paul Morin's case and by education as to the causes of wrongful convictions.

My conclusions should not be taken as a cynical or pessimistic view of the administration of criminal justice in Ontario. On the contrary, many aspects of Ontario's system of justice compare favourably to other jurisdictions. Most of its participants, police, forensic experts, Crown and defence counsel and the judiciary perform their roles with quiet distinction. These participants are justifiably proud of their roles in the administration of justice, and the roles performed by their colleagues. It is understandable, then, that a Report which focuses on systemic inadequacies may be viewed by some of them with dismay, if not frustration.

As several Crown counsel told me during the Inquiry,

prosecuting someone who turns out to be innocent is a Crown attorney's 'worst nightmare.' I accept that. I also accept that no Crown counsel involved in this case, and no police officer involved in this case, ever intended to convict an innocent person. Although I have sometimes described the human failings that led to the conviction of Guy Paul Morin in very critical language, many of the failings which I have identified represent serious errors in judgment, often resulting from lack of objectivity, rather than outright malevolence.

The challenge for all participants in the administration of justice in Ontario will be to draw upon this experience and learn from it.

A particular challenge presents itself to the Government of Ontario. Some of the recommendations presented in this Report rely, for their efficacy, on the availability of resources. Indeed, some of the experienced counsel, Crown and defence, who testified at this Inquiry were concerned that the failure to allocate adequate resources will not only prevent the implementation of important changes, but result in more miscarriages of justice. As Mr. Wintory noted, the ability of the adversarial system to prevent miscarriages of justice relies on the existence of fully competent, fully resourced adversaries. In his context, miscarriages of justice include both the conviction of the innocent and the failure to apprehend and successfully prosecute the guilty. Adequate resourcing can only benefit the public of Ontario in the long term.

I am grateful to have had this opportunity to make recommendations for the improvement of the administration of criminal justice in Ontario. If this Report results in one less innocent person being charged, or prosecuted or convicted, it will have been worth the effort.

Ontario Commission on Proceedings Involving
Guy Paul Morin

The Honourable Fred Kaufman, C.M., Q.C.

April 1998

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.

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.

Recommendation 38: 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.

Recommendation 39: 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.

Recommendation 40: 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.

Recommendation 41: 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 the 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: exculpatory statement into details which port to prove the making of 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. By 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. Either 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, if my 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 A. v. K.G.B. [See Note 1 below] 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 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.

Note 1: (1993), 79 C.C.C. (3d) 257 (S.C.C.).

Recommendation 42: Limited role of Crown counsel conferring benefits

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

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 put 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 cooperation 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.